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## A House Still Divided

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## RESPONSE

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### A HOUSE STILL DIVIDED

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CLARE HUNTINGTON<sup>†</sup>

In response to Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008).

Adam Cox's *Immigration Law's Organizing Principles*<sup>1</sup> contests the traditional view that immigration law and alienage law—in his terms, “selection rules” and “regulation rules”—are distinct categories with legal and moral salience. Building upon prior scholarship that also called the distinction into question,<sup>2</sup> Cox offers important insights

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<sup>1</sup> Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008).

<sup>2</sup> See, e.g., HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 113 (2006) (arguing “that the line between alienage law and immigration law is elusive” in part because the categories can be substitutes for one another and in part because they “overlap functionally and conceptually”); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798-99, 826 (2008) (describing the blurring of the categories and arguing that “it makes more sense to think about immigration law and alienage law as part of a continuum of immigration regulation”); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202-03 (1994) (arguing that the distinction is “more formal than real” because of the overlap in practice between alienage and immigration law, and further contending that “[v]iewed in more basic terms, the reason for the functional overlap between immigration and alienage rules is that both types of government decisions belong to the broader enterprise of determining who belongs to American society as full members or as something less”). Linda Bosniak also has joined in the call for breaking down the categories. Professor Bosniak has contended that the distinction (which she often phrases as an inside/outside distinction, or a question of where to locate the border) is highly problematic. Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1058 (1994); accord *id.* at 1063 (“[H]owever useful it may be for critiquing the current state of immigration law, the ‘inside’/‘outside’ model can easily

into why this dividing line does not have the sharp conceptual edges that the jurisprudence would suggest exist. Despite the analytical persuasiveness of Cox's argument, I am not convinced that it will destabilize the entrenched understanding of the dichotomy, at least in the political realm. The relevant and continuing question—for Cox and the rest of us who contest this line drawing—is to discern why the line continues to have such appeal. I want to explore two possible explanations for the tenacity of the categories: (1) the conceptual distinction between the categories that does exist, and (2) the political utility of hewing to the line.

## I.

Cox describes the ways that courts and commentators draw a distinction between selection and regulation rules, contending that the distinction is analytically bereft.<sup>3</sup> He argues that the classification is misleading because every rule can be understood either as a selection rule or a regulation rule given that all rules concern both.<sup>4</sup> His central claim is that because each rule has consequences for both selection and regulation, we should not distinguish between or seek to categorize such rules. Instead, Cox contends, we should discard the twin categories and more productively focus on one category of “immigrant-affecting rules.”<sup>5</sup>

This is a provocative claim and one with which I generally agree. I am not persuaded, however, that the distinction is quite as incoherent as Cox argues. There is *some* difference between selection and regulation, at least with respect to a subset of selection rules—admission rules.

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lead to misunderstanding because it suggests a greater degree of uniformity in the law on both sides of the line than is warranted.”). Although her work could be read to contest the location of the line between selection and regulation, rather than the line itself, she has argued that “[t]he nation’s inside and its outside are always interpenetrated, always marbled through with one another.” Linda Bosniak, *Between the Domestic and the Foreign: Centering the Nation’s Edges*, 24 CONST. COMMENT. 271, 273-74 (2007) (reviewing LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF LEGAL BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006)); see also Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2451 (2007) (“[E]ven if we concede the legitimacy of borders, there is another problem with the [distinction]: Its empirical premises about jurisdictional separation are untenable. The fact is that citizenship’s exclusionary commitments are not always confined to the community’s territorial edges; rather, citizenship’s ‘border’ operates on the territorial inside as well.”).

<sup>3</sup> Cox, *supra* note 1, at 342-44.

<sup>4</sup> *Id.* at 343.

<sup>5</sup> *Id.*

Selection rules can be broken down into two subsets: rules that govern admission and rules that govern removal. These two types of selection rules operate somewhat differently. Absent a waiver of inadmissibility, the federal government cannot admit an otherwise inadmissible alien. In this way, admission rules are mandatory, both for the federal government and for the noncitizen. By contrast, the federal government has greater discretion over removal. For example, by setting enforcement priorities and exercising prosecutorial discretion, the federal government does not bring removal proceedings against all noncitizens who could be removed. Selection rules governing admission thus operate as a complete bar, whereas selection rules governing removal are more akin to regulation rules in that their effect is more diffuse and less predictable.

Like removal rules, regulation rules affect selection but do not control it completely. Instead, regulation rules provide incentives or disincentives that indirectly affect selection. Even the most anti-immigrant regulation rules—such as those preventing noncitizens from obtaining jobs, housing, and public benefits—would not bar the admission of a noncitizen who has a home to go to with relatives who can care for her.<sup>6</sup> Similarly, even the most pro-immigrant set of regulation rules—say, voting rights, generous public benefits, and so on—likely would not be the only consideration influencing a noncitizen's decision about where to live. In short, regulation rules influence decisions but do not control them. This operational difference between admission rules and regulation rules gives at least some salience to the dividing line.

This difference is reflected in the current split between the national and subnational levels of government. Historical accounts aside,<sup>7</sup> the only entity in the contemporary setting that can control the admission side of selection in an absolute manner is the federal government.<sup>8</sup>

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<sup>6</sup> In the case of an unauthorized migrant, the relevant selection rule is the bar on entry without inspection. For such individuals, regulation rules may carry more weight because the calculus is likely a mix of economic and social reasons for entering unlawfully or overstaying a visa. But again, the regulation rules are merely incentivizing—changing the calculus, but not the actual rule, about admissibility or inadmissibility.

<sup>7</sup> See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–84 (1993) (describing in general terms the kinds of state laws during the titular period—including the regulation of the movement of criminals, public health, the movement of the poor, and the regulation of slavery—and noting that some state laws applied to international as well as interstate migration).

<sup>8</sup> On the removal side, there is also a distinction between levels of government. State and local governments enact and enforce laws that influence the removal aspect

Cox claims that the distinction is incoherent because all rules create both selection and regulatory pressure.<sup>9</sup> I agree, but assert that it still matters operationally that the pressure in the admission context is absolute, while in the regulatory context it is merely incentivizing. The distinction matters because the political calculus may differ when enacting an absolute rule as opposed to an incentivizing rule. For starters, absolute rules may be more transparently anti-immigrant or pro-immigrant and therefore provoke a more pointed political debate about the effects of the rule. And it matters because government entities may establish different institutions to reflect the different types of rules, with absolute rules arguably requiring greater enforcement and concomitant penalties. These operational differences may account for at least some of the adherence to the line.

Rather than conflate selection and regulation rules completely, then, it may be more useful to distinguish mandatory rules (the subset of admission rules) from incentivizing and discretionary rules (regulation rules and the subset of removal rules).

I do not mean to overstate this difference. My point is simply that the operational difference between mandatory and incentivizing rules may help to explain why the distinction persists between selection rules (more generally) and regulation rules, even if it does not perfectly map onto the distinction that I articulate.

## II.

A second reason for the tenacity of the two categories is the political utility of distinguishing among types of rules. Cox contends that the distinction “flows from the intuition that rules governing who gets to live in a state are, and should be, legally and morally distinct from

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of selection rules, such as an aggressive effort by local law enforcement to deliver unauthorized migrants to federal officials. But these actions still fall short of absolute selection because the decision to initiate removal proceedings rests solely with the federal government. Further, federal law contemplates a role for state laws in determining deportability—for example, by defining an “aggravated felony,” a conviction for which is grounds for removal, to incorporate various state laws. *See, e.g.*, 8 U.S.C. § 1101(43)(G) (“The term ‘aggravated felony’ means . . . a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year” (footnote omitted)). But even this central role for states falls short of control over selection because, again, the decision to remove an alien remains with the federal government, which may choose not to pursue immigration proceedings despite a state conviction for an aggravated felony.

<sup>9</sup> Cox, *supra* note 1, at 360.

other sorts of legal rules.”<sup>10</sup> Cox then demonstrates that there is no legal or moral distinction between the categories. His argument is persuasive, but those of us who, like Cox, care about immigration reform and problematic conceptual categories should acknowledge the political reality of the lingering force of these categories. This force makes advocacy for dismantling them all the more urgent, but we also cannot ignore the strength of the intuition that there is a difference. Although the distinction makes limited analytical sense, the intuited difference will continue to inform public debate.

To demonstrate the impact of a unitary category, Cox offers three concrete examples.<sup>11</sup> In examining the example of immigration federalism, he contends that because “every immigrant-affecting rule that a state enacts can alter both where and how noncitizens live, the constitutional claim that immigrant selection should, or even can, be the exclusive province of the federal government is misguided.”<sup>12</sup> He argues that, although it is analytically impossible to allow states to enact regulation rules and not selection rules, there are some differences between federal and state rules—notably the jurisdictional boundaries at issue because state rules may create sorting across state boundaries but not across national boundaries.<sup>13</sup> Cox posits that *this* distinction between federal and state rules should be the central concern of the federalism debate, rather than “ineffectual efforts to classify state and local rules as either concerning or not concerning immigrant selection.”<sup>14</sup>

I agree with Cox that conceiving of one category of immigration-affecting rules advances our understanding of the constitutionality of immigration federalism<sup>15</sup> and that the issue is not whether the rule at issue falls into one category or another, but rather other considerations, such as the jurisdictional reach of the rule. I have contended elsewhere that, because the Constitution is silent on the proper allocation of immigration authority between levels of government and does not express a preference for the federal government to the exclusion of state and local governments, we should turn to federalism values to determine the proper allocation of authority.<sup>16</sup> Depending on the

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<sup>10</sup> See *id.* at 342.

<sup>11</sup> *Id.* at 387-93.

<sup>12</sup> *Id.* at 389.

<sup>13</sup> *Id.* at 390.

<sup>14</sup> *Id.* at 391.

<sup>15</sup> See Huntington, *supra* note 2, at 826 (“[I]t makes more sense to think about immigration law and alienage law as part of a continuum of immigration regulation.”).

<sup>16</sup> See *id.* at 827-37.

context, balancing the values of uniformity and experimentalism, efficiency and effectiveness, protection of individual rights, increased political participation and accountability, and a check on federal power will play out in favor of or against different allocations of authority.<sup>17</sup> Thus, Cox and I begin from a common starting point—that there are good reasons to conceive of one category of rules and that the authority to enact these rules is shared among levels of government.

The question, however, is who determines this allocation of authority. Although federal appellate courts may soon give some guidance on the constitutionality of state and local involvement,<sup>18</sup> it is unlikely that all immigration federalism, in its many forms,<sup>19</sup> will go away, even if the courts find some particular measures unconstitutional. We are left, then, with a quintessentially political judgment about which level of government should exercise what kind of authority. In this political context, there may be good reason to continue using the distinction between selection and regulation rules, if only on realpolitik grounds.

Take, for example, the Legal Arizona Workers Act, which imposes sanctions on an employer who knowingly or intentionally hires an unauthorized migrant.<sup>20</sup> Under Cox's analysis, this rule could be understood both as a regulation rule and as a selection rule. It operates as a regulation rule by making it more difficult for unauthorized migrants in Arizona to find employment. But it also operates as a selection rule because it likely influences the decision whether to come to the United States, or at least to Arizona.

This conceptual incoherence aside, I am not as quick as Cox to dismiss the intuition that the distinction between selection and regulation is meaningful.<sup>21</sup> There may be something to be said for maintaining the questionable fictional distinction and the related understand-

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<sup>17</sup> See *id.*

<sup>18</sup> See, e.g., *Lozano v. Hazleton*, No. 07-3531 (3d Cir. argued Oct. 30, 2008); *Chamber of Commerce of the USA v. Edmondson*, No. 08-6127 (10th Cir. appeal docketed June 19, 2008); *Gray v. Valley Park*, No. 08-1681 (8th Cir. appeal docketed Mar. 27, 2008). The Ninth Circuit recently upheld a relevant Arizona law, discussed *infra* note 20, but only on a facial challenge and without addressing the constitutionality of immigration federalism more generally. See *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

<sup>19</sup> See Huntington, *supra* note 2, at 799-804 (describing the three dominant forms of immigration federalism—federal delegation, inherent enforcement authority, and immigration-related lawmaking).

<sup>20</sup> See ARIZ. REV. STAT. ANN. §§ 23-211 to -216 (2008).

<sup>21</sup> Cox, *supra* note 1, at 368-69.

ing that subnational governments may play a more meaningful role in regulation but not selection. This understanding exists in the collective imagination and may affect the political question. I am not suggesting that the distinction makes sense, but rather that it is familiar, and therefore that the distinctly political conversation about the proper allocation of authority may be advanced by thinking about selection versus regulation rules. In other words, if there is a common understanding of the operation of the law, even if it is a misunderstanding, the political debate may better proceed premised on the false understanding.

For this reason, the argument of conceptual incoherence may carry more weight with law professors than political representatives and their constituents. For the average Arizonan, or even the average Arizonan legislator, there is likely a sense that Arizona should be able to decide the terms upon which its employers hire individuals. That same person, however, likely would not claim that Arizona should decide who enters the United States as a whole or even who crosses Arizona's borders. That decision, collectively imagined, seems to belong to the federal government. Similarly, when Congress is trying to determine which state and local activities to preempt, it is easier to say that subnational governments cannot choose which noncitizens can come into the state, but a state can choose the conditions under which noncitizens live. This balance preserves the idea that the federal government chooses its members and state and local governments make decisions about their resources. Indeed, it is important not to lose sight of the perception that the cost of unauthorized migration is spread unevenly across levels of government.<sup>22</sup>

Again, I am not arguing that the distinction makes sense analytically, but rather that academics need to respect the weight of these political judgments and perceptions. Intuitions matter, especially for political debates, and the intuited difference will continue to inform the political conversation. If, as I have argued, the allocation of authority is really a political question to be resolved through political processes, then intuitions will influence that debate, like it or not. The intuition that Arizona can dictate the terms of a noncitizen's stay in that state has political, if not legal, salience.

A final caveat: even if the political debate continues to hew to the distinction, courts and academic commentators should not. I agree with Cox that legal scholars and judges should avoid the incoherence and distraction of misleadingly dichotomous categories. In the politi-

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<sup>22</sup> See Huntington, *supra* note 2, at 805 n.70, 817 n.126.



cal process, however, common (mis)understandings may advance the debate.

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To explore the stickiness of these categories is not to take away from Cox's manifest contribution to the literature. His sustained exploration of the issue will advance both academic debate and, hopefully, legal doctrine. Moreover, I largely agree with him. My point is that, in proving the analytic flaws in the dichotomy, we should not lose sight of the real, albeit conceptually unstable, differences that exist and, more importantly, the intuitive appeal the categories summon. Those who care about breaking down these categories, as I, Cox, and others do, need to be forthright about the power the distinction retains.

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