
RESPONSE

IMMIGRATION LAW'S ORGANIZING PRINCIPLES: A RESPONSE

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

Adam Cox's recent article, *Immigration Law's Organizing Principles*,¹ extends his earlier article's emphasis on information economics.² Like the earlier article, *Organizing Principles* is a fine paper, although it is flawed in some respects. The basic claim is that the distinction between the government's selection of new immigrants, which under the plenary power doctrine is largely unconstrained by constitutional rules, and its regulation of immigrants once they are admitted, which is far more legally constrained, shapes the central debates in immigration law.³ This is a very bold claim, all the more so because Professor Cox is correct that the distinction has indeed been influential in the analysis of many immigration law issues and does collapse to some degree.⁴ Nevertheless, the distinction between "immigration" and "im-

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

² See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 812-14, 813 nn.11-12 (2007) (explaining the "information problem" presented by immigration screening and the potential of economic models to evaluate the "comparative effectiveness" of different models of screening).

³ See Cox, *supra* note 1, at 342-45.

⁴ See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 826 (2008) (claiming that questions of immigration and alienage "bleed together" and that the two should be viewed "as part of a continuum" rather

migrant” law is, in fact and in principle, misleading, and perhaps even incoherent, because these two activities actually engender overlapping incentives and effects. Despite this problem, however, his analysis leads to some interesting prescriptions.

The analytical problem at the core of the article, I think, is captured in Professor Cox’s statement that “[s]election and regulation are *simply* alternative strategies for achieving whatever a state’s normative goals or constitutional commitments happen to be. . . . It would be a mistake to hold an a priori preference for either selection mechanisms or regulatory mechanisms. Neither has an inherently positive or negative valence.”⁵ By calling attention to the overlap between the two kinds of activities and the rules that govern them, Professor Cox makes a potentially significant point but then takes a step too far by going beyond overlap to claim essential equivalence of the two. The word “simply” implies that there is not merely overlap between selecting who may come and regulating those who are already here but that the two are basically the same.

In my view, the two strategies, while overlapping, are not the same. Therefore, the real question becomes whether, despite the overlap, enough difference between the two remains to justify maintaining some distinction in the legal rules that apply to them—albeit not necessarily the legal rules that we now have. I think that there probably is enough difference—for example, in terms of the length of time that the individual is likely to have been in the United States accumulating ties to Americans and legal residents;⁶ the distinct criteria that may be properly relevant to a decision to admit versus a decision to, say, grant or deny public benefits or private employment;⁷ or the different stakes to the government and to an individual immigrant associated with admission decisions and other postadmission decisions (such as peti-

than distinct categories); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202-03 (1994) (recognizing that a “functional overlap” exists and that accordingly “[t]he line between ‘immigration’ and ‘alienage’ [law] is elusive”).

⁵ See Cox, *supra* note 1, at 344 (emphasis added).

⁶ Compare *United States v. Copeland*, 369 F. Supp. 2d 275, 334 (E.D.N.Y. 2005) (including “residence of long duration in this country” and family and business ties as factors favoring the immigrant in deportation proceedings), *aff’d*, 232 F. App’x 72 (2d Cir. 2007), with *Graham v. Richardson*, 403 U.S. 365, 380 (1971) (“State alien residency requirements that . . . condition [benefits] on longtime residency . . . are constitutionally impermissible.”).

⁷ Compare 8 U.S.C. § 1153(c) (2006) (allocating visas by national origin), with 42 U.S.C. § 2000e-2(a) (2006) (forbidding private employers from making hiring decisions based on national origin).

tions to adjust status or naturalize, possible removal proceedings, and so forth). My point here, however, is that Professor Cox does not really address that question, much less answer it, in his article. His claim in the last part of the quoted passage—that there is no a priori reason to prefer one strategy to another—is correct but irrelevant to the question that I have just raised.

In the remainder of the article, Professor Cox runs his essential-equivalence point through a number of areas of immigration law and makes many interesting observations and arguments along the way, particularly about the importance of the economics of sorting and information.⁸ Again, however, the persuasiveness of his basic claim rests in large part on whether the essential-equivalence point is correct. One of his ideas is that deportation should not be thought of as a binary concept, and that temporary deportation, with a right to reenter after a period of time, might be a more flexible and information-generating enforcement tool.⁹

This is an intriguing notion, but Professor Cox fails to observe that a form of it already exists in certain cases under existing immigration law. The Immigration Marriage Fraud Act of 1986, for example, provides that an immigrant who obtains a green card based on marriage to a United States citizen or permanent resident,¹⁰ or based on the immigrant's entrepreneurial investment and job-creating commitments,¹¹ is subject to a two-year conditional period before the condi-

⁸ See Cox, *supra* note 1, at 387-93. Professor Cox highlights the importance of informational economics to immigration rules by exploring the role of information in "sorting." See *id.* at 387. By sorting, Professor Cox means the "spatial sorting for residency in a state" that is central to the selection process. *Id.* at 345. Information is important to sorting because, although immigrants' decisions to enter the United States can be "directly constrained" by the state, "[m]ore often . . . immigrants' spatial-sorting decisions will be constrained by the way in which legal rules shape their incentives." *Id.* at 387. These decisions will depend upon the information available to prospective immigrants about a legal rule in the prospective state. See *id.* at 388. Professor Cox concludes that "[t]o the extent that a state wants immigrants to assess accurately the costs and benefits of migration decisions, it has an interest in facilitating information transmission." *Id.*

⁹ See Cox, *supra* note 1, at 391-93. Specifically, Professor Cox proposes disaggregating deportation into two components: (1) the physical removal from the United States, accompanied by (2) legal requirements regarding the noncitizen's ability to return. See *id.* at 391. The imposition of conditions for reentry could vary, including expulsion for a specified amount of time or the requirement, for minor drug-crime offenders, of successfully completing a drug-treatment program outside of the United States. See *id.* at 392.

¹⁰ See 8 U.S.C. § 1186a(a)(1) (2006) ("[A]n alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis . . .").

¹¹ See *id.* § 1186b(a)(1) ("[A]n alien entrepreneur . . . shall be considered, at the

tion can be removed.¹² In some cases, that may mean that the newcomer must leave the United States until the conditional period expires and the condition can be removed.¹³ (The citizen or permanent-resident spouse may feel obliged to leave the country as well in order to keep the family intact during this period.) In line with Professor Cox's idea, what the government learns about the marriage and the individuals during the conditional period may improve its information and subsequent decision making.

Another example of this is where the immigration statute authorizes certain would-be immigrants who were previously deported (now "removed"), or who were unlawfully present in the United States for certain periods of time, to apply for readmission after certain periods of time have elapsed since the earlier removal under certain conditions.¹⁴ Again, Professor Cox might have used these provisions to reinforce his excellent point about the government's ability to use postremoval information in order to decide whether the immigrant deserves another chance through readmission.

In sum, Professor Cox's article is a valuable contribution to our understanding of the "deeper structure" of immigration law—here, its exploitation of improved knowledge about particular immigrants' suitability for admission and permanent residence. Immigration scholars should search for many more insights of this kind from scholars of a law and economics bent who can mobilize theory—here, the economics of information—in the service of greater understanding and better policy guidance.

time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis . . .").

¹² See *id.* § 1186a(d)(2)(A); 8 U.S.C. § 1186b(d)(2)(A).

¹³ If an alien seeks to adjust her visa status on the basis of marriage to a citizen but was subject to admissibility or deportation proceedings at the time of the marriage, the applicant will be subject to a two-year foreign-residency requirement. See 8 U.S.C. §§ 1154(g), 1255(e). An exemption for bona fide marriage is available if the alien demonstrates by clear and convincing evidence that the marriage is in good faith. See *id.* § 1255(e)(3). Additionally, exchange visitors who are present in the United States on J-1 visas, which include those coming to the United States for graduate medical school or training, are subject to a two-year foreign-residence requirement before they are able to seek permanent residence status. See *id.* § 1182(e); *Friedberger v. Schultz*, 616 F. Supp. 1315, 1319 (E.D. Pa. 1985) (requiring an alien fiancé of a previous "J" visa holder applying for permanent residency who did not meet the two-year foreign residency requirement to leave the United States).

¹⁴ See 8 U.S.C. § 1182(a)(9) (2006).

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