
RESPONSE

MAKING SENSE OF IMMIGRATION LAW

ADAM B. COX[†]

In response to Clare Huntington, *A House Still Divided*, 157 U. PA. L. REV. PENNUMBRA 227 (2009); Peter H. Schuck, *Immigration Law's Organizing Principles: A Response*, 157 U. PA. L. REV. PENNUMBRA 235 (2009).

I want to thank both Clare Huntington and Peter Schuck for writing such thoughtful replies to my article, *Immigration Law's Organizing Principles (Organizing Principles)*.¹ The article's central argument is that immigration law draws a sharp moral and constitutional distinction between rules that select migrants and rules that regulate migrants out of the selection context, but that in practice this distinction has been incoherent and misleading.² Both Schuck and Huntington agree that the conceptual distinction between immigrant-selecting and immigrant-regulating rules is problematic.³ Yet they both resist my claim that the distinction is used by immigration scholars and the courts in a way that is incoherent.⁴ This claim is too strong, both argue, because there is some meaningful distinction between the two types of rules—

[†] Assistant Professor of Law, the University of Chicago Law School.

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

² See *id.* at 343-44.

³ See Clare Huntington, *A House Still Divided*, 157 U. PA. L. REV. PENNUMBRA 227, 228 (2009), <http://www.pennumbra.com/responses/04-2009/Huntington.pdf> (agreeing that “we should not distinguish between [selection and regulation] rules”); Peter H. Schuck, *Immigration Law's Organizing Principles: A Response*, 157 U. PA. L. REV. PENNUMBRA 235, 235-36 (2009), <http://www.pennumbra.com/responses/04-2009/Schuck.pdf> (calling the distinction “misleading, and perhaps even incoherent”).

⁴ See Huntington, *supra* note 3, at 228 (“I am not persuaded, however, that the distinction is quite as incoherent as Cox argues.”); Schuck, *supra* note 3, at 236-37.

even if the distinction does “collapse to some degree.”⁵ To put it simply, they believe that the distinction is *imprecise*, while I believe that it is *incoherent* in practice.

Huntington’s and Schuck’s critiques are extremely productive in the context of a colloquy because I believe their positions reflect widely held sentiments at which my article takes aim. In that sense, their replies confirm my claim that the conceptual distinction has been—and continues to be—a central organizing principle of the field. In this short response, there is not sufficient space for me to rehash *Organizing Principles*’ full explanation of why the stronger claim is correct and why the difference between the stronger claim and the weaker claim of fuzziness is extremely important for the future of immigration law. Instead, I will try to use this short response to show the ways in which Schuck’s and Huntington’s essays embody some of the same conceptual mistakes that I believe infect the field as a whole. My hope is that, by unpacking the analytic structure of their arguments, I can bring into even clearer focus the precise claim I am making in *Organizing Principles*.

While Schuck’s and Huntington’s claims are close cousins rhetorically, they are actually quite distinct analytically. Because I believe that Schuck’s claim misapprehends the argument my article makes, I address it first in order to clarify the structure of my argument. Schuck contends that I wrongly conflate the concepts of “selection” and “regulation”—that is, that I argue for an “essential equivalence of the two.”⁶ I agree with him that equating these two forms of human behavior would be a mistake. Selection refers “to spatial sorting for residency in a state.”⁷ Regulation refers “to the behavioral regulation of those who live within a state.”⁸ Obviously, where one lives is quite different than how one lives in that place. But, in *Organizing Principles*, I never suggest that these forms of behavior are the same. Indeed, my entire argument is built on the idea that they are different. As I wrote,

To say that efforts to divide legal rules into two boxes based on whether they select or regulate immigrants will inevitably fail is not to say that there is no meaningful distinction between the concepts of selection and regulation themselves. As I emphasized at the outset, spatial sorting and behavioral regulation are two very different things. In fact, my critique

⁵ Schuck, *supra* note 3, at 235.

⁶ *Id.* at 236.

⁷ Cox, *supra* note 1, at 345.

⁸ *Id.*

of immigration law above depends crucially on the idea that these are two analytically distinct types of human behavior.⁹

Contrary to Schuck's contention, therefore, my claim is only that every effort to draw a sharp legal distinction between "selection rules" and "regulatory rules" has been a failure—in large part because every legal rule puts pressure on both the decision where to live and the decision how to live.¹⁰

Huntington criticizes this claim directly by arguing that there is "some" conceptual distinction between the two types of rules.¹¹ Her argument in favor of the distinction has two important features. First, Huntington makes clear in her essay that she believes the conceptual distinction maps onto the difference between (a) admission and deportation rules and (b) other rules that regulate noncitizens, such as rules "preventing noncitizens from obtaining jobs, housing, and public benefits."¹² Admission and deportation rules are selection rules, while other rules are regulatory rules. Second, she argues that the conceptual divide reflects a real "operational difference" between the two types of rules: on her account, "regulation rules *affect* selection but do not *control* it completely."¹³

Consider the first feature of her argument. Huntington's argument assumes that there is a common understanding in the field that admission and deportation rules are properly put into a different conceptual box than other rules relating to noncitizens. Early on she makes clear that she thinks of both admission and deportation rules as selection rules, writing that "[s]election rules can be broken down into two subsets: rules that govern admission and rules that govern removal."¹⁴ Later she emphasizes that she believes her view is widely shared. While discussing the politics of immigration law, she states,

⁹ *Id.* at 376.

¹⁰ *Id.* at 365.

¹¹ Huntington, *supra* note 3, at 228. To be clear, Huntington herself appears a bit unsure whether she wants to defend the conceptual distinction. While the first part of her response argues that the distinction has real analytic traction, the second part of her response appears to retreat from this claim. In the latter half she refers to the "conceptual incoherence" of the "questionable fictional distinction," states that she is "not arguing that the distinction makes sense analytically," and concludes that she agrees with me "that legal scholars and judges should avoid the incoherence and distraction of misleadingly dichotomous categories." *Id.* at 232-33.

¹² *Id.* at 229.

¹³ *Id.* (emphasis added) ("[R]egulation rules influence decisions but do not control them."); see also *id.* at 229 n.6 ("[T]he regulation rules are merely incentivizing—changing the calculus, but not the actual rule, about admissibility or inadmissibility.")

¹⁴ *Id.* at 229.

“[I]f 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.”¹⁵ The difficulty with her claim is that there is no such consensus among courts or scholars. As I explain in *Organizing Principles*, there is deep doctrinal and theoretical disagreement about the status of all of these immigrant-affecting rules: the Supreme Court has sometimes suggested that rules denying immigrants public benefits are selection rules;¹⁶ scholars, such as Dan Kanstroom, have argued that many deportation rules should be treated as regulatory rules.¹⁷ These positions are precisely opposite of what Huntington claims is a widely shared view.

Moreover, the Arizona example that Huntington offers in support of this widely shared view belies any notion of a “common understanding.” She argues that average Arizonans and state legislators would not see an Arizona law sanctioning employers who hire undocumented workers as an immigrant-selecting rule.¹⁸ But, in fact, many advocates have attacked Arizona’s law on the ground that it *is* an immigrant-selecting rule.¹⁹ And there has been a hard-fought legal battle over precisely the question of what category the rule fits into.²⁰ In other words, Huntington’s core example has engendered litigation and public commentary that highlights confusion over the distinction that she claims it elucidates.

But what about the second feature of her argument? Even if there is widespread disagreement today, perhaps Huntington is suggesting that we could achieve agreement if we applied her proposed criteria

¹⁵ *Id.* at 233.

¹⁶ See Cox, *supra* note 1, at 353-57 (citing, as an example, *Graham v. Richardson*, 403 U.S. 365, 378-79 (1971)).

¹⁷ See *id.* at 351 (citing DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007)).

¹⁸ Huntington, *supra* note 3, at 233 (suggesting the rule would be seen as a regulation of “the terms upon which its employers hire individuals,” rather than as a regulation of “who enters the United States as a whole or even who crosses Arizona’s borders”).

¹⁹ Randal C. Archibold, *Arizona Is Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13 and *Illegal Immigrants Leaving Arizona*, ASSOCIATED PRESS, USA TODAY, Dec. 22, 2007, http://usatoday.com/news/nation/2007-12-22-immigration-leaving_N.htm both describe the exodus of immigrants being attributed to the law.

²⁰ See *Ariz. Contractors Assoc. v. Candelaria*, 534 F. Supp. 2d 1036, 1051-52 (D. Ariz. 2008) (acknowledging that “[p]laintiffs argue that the Act intrudes into the federal government’s plenary power over the field of immigration,” but concluding that it is “a regulation of employment, not immigration”).

for sorting rules. On this reading we should use, as a criterion for identifying the difference between selection rules and regulatory rules, the distinction between (a) a rule that “indirectly affect[s] selection” by “provid[ing] incentives or disincentives,” and (b) a rule that “control[s] [selection] completely” by operating as a “complete bar.”²¹ Thus, she argues, the fact that “regulation rules *influence* decisions but do not *control* them . . . gives at least some salience to the dividing line.”²²

Huntington’s attempt to describe a dividing criterion has a few problems. First, by her own admission, the criterion does not track her own description of what rules should be considered selection rules and what rules should be considered regulatory rules. As I noted above, she believes that both admissions rules and deportation rules should be considered selection rules. But she then goes on to say that deportation rules are really more like regulation rules: “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.”²³ This is confusing. If the distinction we should be drawing is between rules that “control” selection and rules that merely “influence” it, as Huntington argues, then on her own account we should consider deportation rules to *be* regulatory rules, not just to be more akin to them. But Huntington is not willing to say this. Thus, while she proposes a criterion for rehabilitating the distinction between selection and regulation rules, she is not willing to apply it consistently.

Putting this problem aside, it is not clear that the criterion Huntington suggests can do the conceptual work she wants it to do. Her argument actually contains a few different conceptual distinctions, but the primary one she relies on is the idea of a difference between mandatory rules and incentivizing rules. To make the idea concrete, consider two rules: one that makes illiterate noncitizens inadmissible and one that bars noncitizens from receiving public assistance. Huntington’s intuition is that the admission rule *controls* selection in the sense that no one who fails to meet the rule’s criteria is admitted, while a rule denying access to public assistance just becomes one consideration *influencing* an immigrant’s decision about whether to immigrate.²⁴

²¹ Huntington, *supra* note 3, at 229.

²² *Id.* (emphasis added).

²³ *Id.*

²⁴ *See id.* (arguing that, unlike admission rules, regulation rules are not “the only consideration influencing a noncitizen’s decision about where to live”).

This intuition is understandable but misleading. First, what does it mean to say that the welfare restriction does not control selection? As I argue in *Organizing Principles*, it is not clear even at a formal level why a rule that says “an immigrant may be admitted only on the condition that she is literate” is different than a rule that says “an admitted immigrant is ineligible for public assistance.”²⁵ The second rule can be easily reformulated as “an immigrant may be admitted only on the condition that she agrees to forgo public assistance.” The reformulated rule has identical content but now looks just like the literacy admission rule. That makes it difficult to understand why we would treat the literacy and welfare rules as importantly different.

Second, what does it mean to say that the literacy admission rule “controls” selection rather than “influences” the migration decision? Just like the public assistance restriction, the literacy test influences migration by raising or lowering its cost. For migrants who want to enter, the literacy requirement creates an incentive to become literate. In fact, this is just what happened when the United States adopted a literacy requirement for admission in 1917: many migrants invested in learning to read, and Italy and other sending states even set up programs to teach basic literacy skills to potential emigrants.²⁶

The conceptual slip in Huntington’s intuition is that she implicitly adopts a different perspective when describing the literacy admission rule than when describing the public-assistance restriction. When describing the admission rule, she imagines that people are *fixed types*—that is, that they are unable to change the thing that makes them inadmissible. In contrast, when describing the welfare rule, she imagines that people *can adapt*—that is, that at some cost they can choose to comply with the rule.²⁷ But this is a mistake. For some people the difficulty of learning to read will be far outweighed by the value of mi-

²⁵ See Cox, *supra* note 1, at 368-69.

²⁶ See Elizabeth Cometti, *Trends in Italian Emigration*, 11 W. POL. Q. 820, 827-28 (1958) (explaining that the Italian Commissariat of Emigration set up evening and holiday schools for illiterate adults following the adoption of the literacy test in the United States).

²⁷ It is this conceptual slip that leads Huntington to suggest that admission rules have uniform effect while job restrictions have differential effect. See Huntington, *supra* note 3, at 229. This suggestion is also misleading. Both the literacy rule and the job rule have a uniform effect in the sense that they apply to all prospective immigrants. And both rules have a differential effect in the sense that the rules will only “bite” with respect to a subset of all people: the first rule bites with respect to people who cannot read and for whom it is too costly or difficult to learn to read; the second rule bites with respect to people for whom it is too costly to immigrate without access to government employment.

grating. Conversely, for other people—say, a person with significant disabilities—it will not be worth migrating if there is no access to public assistance. Of course, whether and under what circumstances people can adapt to legal rules, and at what cost, is a difficult empirical question.²⁸ Equally challenging is the question when people *should* be asked to adapt in this way.²⁹ But as I explain in *Organizing Principles*, these important questions do not track the distinction between admission rules and other rules, as Huntington argues.³⁰

For these reasons, I believe that the structure of Huntington's and Schuck's arguments actually bolsters the central thesis of my article. Huntington is right: "the intuitive appeal [that] the categories summon" is extremely powerful.³¹ But those intuitions have for some time distracted us from important questions and led to unproductive debate. To be clear, this does not mean that I believe that all immigrant-affecting rules should have the same moral and legal status, or that there are no useful conceptual distinctions to be drawn among these rules. On the contrary, there are important distinctions we can and should draw among immigrant-affecting rules. However, as I describe in the full article, we must draw those distinctions by reference to our underlying normative commitments, not by reference to a hollow distinction between rules that select and rules that regulate immigrants.³² That distinction serves to obfuscate rather than illuminate the important normative principles at stake when we choose amongst competing immigration laws and policies. Thus, my goal is to encourage those who care deeply about the field's central normative and legal questions to abandon that hollow distinction and to adopt a new set of organizing principles for immigration law.

²⁸ Cox, *supra* note 1, at 367-68.

²⁹ *Id.* at 384-86.

³⁰ Note that all of this is true even if we ignore enforcement issues and imagine that all legal rules relating to immigrants are perfectly enforced. But of course enforcement is always imperfect. This makes Huntington's distinction, and her choice of examples, even more puzzling. She says that deportation rules "indirectly affect" because the government has discretion not to enforce them. Huntington, *supra* note 3, at 229. Yet she simultaneously asserts that the legal rule against entering without inspection is the sort of core admission rule that "controls," rather than merely influences, selection. *See id.* at 229 n.6. If this were really true, we would not have 11 million unauthorized migrants living in the United States. The legal rule against unauthorized entry has obviously not operated as a complete bar to many migrants' residence in the United States.

³¹ *Id.* at 234.

³² Cox, *supra* note 1, at 376-87.

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