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IMMIGRATION LAW'S ORGANIZING PRINCIPLES

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Immigration law and scholarship are pervasively organized around the principle that rules for selecting immigrants are (and should be) fundamentally different from rules that regulate the lives of immigrants outside the selection context. Both courts and commentators generally conclude that the government should have considerably more leeway to adopt whatever selection rules it sees fit. Consequently, the selection/regulation dichotomy shapes the central debates in immigration law—including debates about the legality and legitimacy of guest worker programs, America's criminal deportation system, and restrictions on immigrant access to public benefits. This Article argues that this central organizing principle is misguided: legal rules cannot be classified as concerning

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either selection or regulation because every rule concerns both. Every rule that imposes duties on noncitizens imposes both selection pressure, potentially influencing noncitizens' decisions about whether to enter or depart the United States, and regulatory pressure, potentially influencing the way in which noncitizens who choose to stay live their lives. Moreover, even if it were possible to overcome a century of radical disagreement about which rules are "really" about selection rather than regulation, there would still be little reason to ascribe constitutional or moral significance to the distinction between the two. As the Article shows, selection and regulation are simply two alternative mechanisms that a state may use to achieve a particular end. There is no a priori reason to prefer one mechanism over the other. These central conclusions have a number of important implications for immigration law and institutional design.

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INTRODUCTION

American immigration law is organized around a seductive idea: that rules for selecting immigrants are fundamentally different from rules regulating immigrants outside the selection context. At bottom, the idea flows from the intuition that rules governing who gets to live in a state are, and should be, legally and morally distinct from other sorts of legal rules. This intuition has long led courts to conclude that the

government has considerable leeway to adopt whatever selection rules it sees fit. For example, rules that restrict the admission of immigrants on the basis of their speech are given great deference, but attempts to restrict the First Amendment rights of resident noncitizens would be subject to strict scrutiny.¹ Outside the constitutional context, the distinction between selection rules and other rules frames debates about the legality and legitimacy of myriad laws that affect immigrants, including guest worker programs, the criminal deportation system, and recent proposals for comprehensive immigration reform.²

This central distinction is misguided. For over a century, every effort by courts and scholars to draw a conceptual distinction between immigrant-selecting rules and rules that affect immigrants' behavior outside the selection context (immigrant-regulating rules) has been an utter failure. These efforts have inevitably led to radical disagreement about how to classify any given rule. The reason is not surprising: legal rules cannot be classified as concerning *either* selection *or* regulation because every rule concerns both. Every rule that imposes duties on noncitizens imposes both selection pressure, potentially influencing noncitizens' decisions about whether to enter or depart the United States, and regulatory pressure, potentially influencing the way in which resident noncitizens live. At a very basic level, these are the twin consequences of *any* territorially bounded rule that imposes a duty on a person. Despite the fact that the distinction between selecting and regulating rules is part of the conceptual bedrock of immigration law, it is a foundation without substance.

Recognizing that all immigrant-affecting rules have consequences for both selection and regulation has a number of important implications for immigration law and theory. Fundamentally, it makes clear that we must reorganize debates about the legitimacy and constitutionality of various immigration rules. Legal rules cannot be meaningfully defended simply by contending that they are part of the process of selecting immigrants. Nor can legal rules be criticized simply by casting them as surreptitious attempts to use putative immigrant-selecting rules in order to regulate immigrants' daily lives.

Furthermore, even if we were able to get greater agreement by reformulating the dichotomy between selection rules and regulatory rules, there would still be little reason to treat the distinction as important. To be sure, sorting people across borders *is* meaningfully differ-

¹ See *infra* text accompanying notes 23-24.

² See *infra* text accompanying notes 26-44.

ent from shaping peoples' lives wherever they do choose to live. These are two very different forms of behavior. But even were we to ignore the fact that every legal rule produces incentives for both sorts of behavior, it is hard to see why we would treat the distinction between selection and regulation as legally or morally significant. Selection and regulation are simply alternative strategies for achieving whatever a state's normative goals or constitutional commitments happen to be. A state concerned about the cultural consequences of migration, for example, can shape those consequences in two ways: by altering the spatial sorting of peoples across borders (perhaps to increase the cultural homogeneity of people who reside in the state), or by inculcating particular cultural views in those who do reside in the state.

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. Rather, which mechanism is more effective or desirable in any particular context is an important (and overlooked) question of institutional design.³ Exploring this question will allow us to develop ways of evaluating immigrant-affecting rules that are analytically sharper and normatively more significant. But these new analytic frameworks will not track the misleading distinction between selection rules and regulation rules that dominates immigration law today.

In addition to this insight into the design of immigration regimes, the Article's clearer conception of the relationship between selection and regulation has other important implications for the structure of immigration law.⁴ First, it demonstrates the central role that information can play in immigration policy. Second, it reorients modern debates about immigration federalism by pointing to the fundamentally different types of sorting pressure created by state and federal rules. Third, it reveals the extent to which courts and commentators have overlooked a variety of options for structuring American deportation policy.

This Article proceeds in four parts. Part I surveys several central debates in immigration law to show the prominent role played by the distinction between selection rules and regulatory rules. Parts II and

³ Of course, as this Article makes clear, it is never possible for a state to pursue a pure strategy of selection or a pure strategy of regulation because all legal rules will produce a mix of both consequences.

⁴ See generally Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 811-12 (2007) (discussing the need for immigration scholarship to focus more on questions of institutional design).

III set out the Article's core arguments: first, that it may not be possible even to draw this distinction because efforts to employ it produce radical disagreement about how to categorize a wide swath of rules; and second, that even if it were possible to overcome this obstacle, there is no reason to treat the selection/regulation distinction as legally or morally significant. Part IV discusses a few implications for institutional design that follow from these conclusions.

I. THE CONCEPTUAL STRUCTURE OF IMMIGRATION LAW

To set the stage, this Part highlights the way in which immigration law and scholarship draw sharp conceptual, constitutional, and moral distinctions between rules that "select" immigrants and rules that regulate immigrants outside the "selection" context. This dichotomy dominates most of the central controversies concerning immigration law and theory. Part I focuses on three of the most prominent: debates about the scope of the federal government's "plenary power" over immigration, disagreements over the boundaries and legal status of so-called "alienage law," and conflicts concerning the power of state and local governments to regulate noncitizens.

Before laying out these examples, it is useful to say a bit more about what I mean by the terms "selection" and "regulation." Part of the difficulty in defining these terms stems from the fact that they are never clearly defined by courts or commentators. Instead, in existing discourse, the ideas of selection and regulation often seem to operate more as metaphors than as clear concepts. But as I will show, there is an underlying account of selection and regulation that is central to all of the following examples. Behind all of them is a rough sense that selection has to do with the process of sorting, while regulation has to do with the process of determining how immigrants residing in the United States live their lives. For that reason, I will use the concept of "selection" to refer to spatial sorting for residency in a state.⁵ In contrast, I will use the concept of "regulation" to refer to the behavioral regulation of those who live within a state.⁶ It is, of course, possible to

⁵ This use is intuitive and unsurprising given the fact that immigration law is centrally concerned with the movement of persons across borders.

⁶ This definition is necessarily a bit artificial. "Regulation" is commonly used to capture all forms of behavioral regulation and thus could comfortably be understood to include even the regulation of sorting behavior. For ease of exposition, however, I will use "regulation" as the obverse of "selection," as this makes the two concepts analytically precise.

define these concepts slightly differently, but the above definitions best capture the dichotomy that organizes much of the case law and scholarship. Moreover, Part II will return to the possibility that “selection” can be understood differently—as centrally concerned with ideas of membership rather than spatial sorting.

A. *Constitutional Foundations and the Immigration “Plenary Power”*

The doctrine of “plenary power” is the most famous jurisprudential piece of American constitutional immigration law. The doctrine has been at the center of some of the most controversial immigration cases decided over the last century, and it has prompted more legal scholarship than perhaps any other aspect of immigration law.⁷ For present purposes, the plenary power doctrine is important because it is widely understood to draw a sharp constitutional distinction between rules that select immigrants and rules that otherwise regulate them.

The Supreme Court first established the federal government’s plenary power over immigration matters in the late nineteenth century. To be sure, the history of the plenary power’s rise as a legal doctrine and an intellectual framework is complicated and contested. Nonetheless, two cases, decided just a few years apart, capture the plenary power’s foundational distinction between selection and regulation that today shapes nearly all discussions about the structure of immigration law. The first case concerned the legality of the Chinese Exclusion Act of 1882.⁸ In the years before the Act’s passage, Congress faced increasing pressure to prevent Chinese immigration to the United States. That pressure initially led Congress to enact the Page Act—the nation’s first restrictive immigrant admission law.⁹ The Page Act formally made prostitutes and some criminals inadmissible as immigrants; as a practical matter, the Act was applied selectively to ex-

⁷ For a small sample of this work, see sources cited *infra* note 13.

⁸ Ch. 26, 22 Stat. 58 (repealed 1943).

⁹ See Ch. 141, § 1, 18 Stat. 477, 477 (1875) (repealed 1974) (restricting entry “of any subject of China, Japan, or any Oriental country” if the subject entered a contract for “lewd and immoral purposes”). Prior to the passage of the Page Act, the federal government had never formally limited the admission of certain classes of potential immigrants. This is not to say that there was no regulation of migration prior to this date. See, e.g., Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–43 (1993) (examining state laws that had the effect of regulating some migration during the nation’s first century). But it was only in response to the growing backlash against Chinese immigrants that formal federal immigration controls were finally introduced.

clude Chinese women.¹⁰ But just a few short years later, the Chinese Exclusion Act went much further: it flatly prohibited the admission of all Chinese laborers.¹¹

The Chinese Exclusion Act was quickly challenged as a violation of U.S. treaty obligations and the Constitution. The Supreme Court upheld the Act in *Chae Chan Ping v. United States*, concluding that the federal government has broad authority to regulate immigration free from federal courts' interference.¹² While the precise scope of the Court's holding is more than a bit ambiguous, many courts and commentators over the last century have concluded that it affirms the power of the federal government to select immigrants for admission on any basis—even on a basis, like race, that ordinarily would be subject to serious constitutional scrutiny.¹³ On this account, immigrant-selecting rules are not constrained by ordinary constitutional law.

*Yick Wo v. Hopkins*¹⁴ stands in stark contrast to *Chae Chan Ping*. Decided just three years earlier, *Yick Wo* concerned the constitutionality of a San Francisco ordinance that prohibited laundries from operating in wooden buildings without a permit. While the ordinance was facially neutral, it was applied in a discriminatory fashion: permits were approved for laundries operated by white residents but uniformly refused for laundries operated by Chinese residents.¹⁵ The Su-

¹⁰ See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 698-702 (2005).

¹¹ Chinese Exclusion Act § 1, 22 Stat. at 59 (suspending entry of Chinese laborers for ten years).

¹² 130 U.S. 581, 604-10 (1889) (stating that the power to regulate immigration cannot be "restrained on behalf of any one" when exercised by the federal government in the interests of the country).

¹³ For discussions of this constitutional exceptionalism, see GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255. For a more recent example from the Supreme Court, consider *Fiallo ex rel. Rodriguez v. Bell*, 430 U.S. 787 (1977). In that case, the Court considered the constitutionality of an admission rule that facially discriminated on the basis of sex. While the Supreme Court was beginning around that time to invalidate sex-discriminatory statutes in a variety of contexts, it declined to apply serious scrutiny to the admission policy. Suggesting the exceptionalism of immigrant-selecting rules, Justice Powell, writing for the majority, noted that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as . . . largely immune from judicial control." *Id.* at 792 (citations and internal quotation marks omitted).

¹⁴ 118 U.S. 356 (1886).

¹⁵ *Id.* at 373-74.

preme Court invalidated the ordinance as a violation of the Equal Protection Clause. Rather than following the path it was to take in *Chae Chan Ping*, the Court emphasized that the Equal Protection Clause covered “all persons” within the jurisdiction of the state.¹⁶ On that ground, the Court held that the government could not limit the employment opportunities of resident noncitizens on the basis of their race.¹⁷

Both *Chae Chan Ping* and *Yick Wo* involved laws that were racially discriminatory, but the Court treated those laws very differently. There are a number of ways in which one might distinguish the cases. One could rely on the territorial status of the petitioners: *Yick Wo* was within U.S. territory, whereas *Chae Chan Ping* was excluded while attempting to enter.¹⁸ Or one could interpret the cases as turning on the identity of the regulator: *Chae Chan Ping* concerned a federal statute, while *Yick Wo* concerned a local ordinance.¹⁹ These explanations have played some role in the history of immigration law. But both courts and commentators have often read the cases as turning on the *type of rule* at issue: the question becomes whether the rule is an immigrant-selecting rule.²⁰ On this account, the Constitution accords the government greater flexibility when it selects immigrants than when it regulates the way that they live outside the selection context.

The idea that the plenary power doctrine gives the federal government free rein in immigrant selection raises an immediate question: does selection extend beyond the decision to admit or exclude a noncitizen at the border? The Court confronted this question not long after it decided *Chae Chan Ping*. In *Fong Yue Ting v. United States*, it extended the idea of selection to encompass de-selection through deportation.²¹ The Court thus concluded that the government’s power to deport resident noncitizens was coextensive with its power to exclude

¹⁶ See *id.* at 369.

¹⁷ See *id.* at 369-74.

¹⁸ For a discussion of the potential relevance of the status (territorial or otherwise) of the rights-claimant in immigration jurisprudence, see Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 388-92 (2004).

¹⁹ See *infra* text accompanying notes 45-52.

²⁰ See, e.g., THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 212 (6th ed. 2008) (asserting that “constitutional law relating to *immigration* may differ from [that] relating to noncitizen *immigrants*”); see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007).

²¹ 149 U.S. 698 (1893).

them at the border.²² Later cases suggested that, as a result, deportation policies would be subject to less scrutiny than other policies relating to noncitizens. For example, a long line of cases makes clear that the government may not criminally punish noncitizens for engaging in disfavored speech.²³ In contrast, other Supreme Court decisions have been read to suggest that the government may be able to select immigrants for deportation on the basis of whether they have engaged in disfavored speech.²⁴ While there are many ways one might try to reconcile the holdings of these lines of cases, courts commonly reconcile them by concluding that rules relating to immigrant selection (through deportation) are subject to significantly less scrutiny than rules relating to immigrant regulation (through criminal sanction).

To be sure, the question of the plenary power's scope over immigrant selection is not always answered in the same way. Many legal scholars and judges have criticized the Supreme Court for classifying all deportation laws as immigrant-selecting rules.²⁵ Consider, for ex-

²² See *id.* at 707 (“The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps toward becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

²³ See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (“Freedom of speech and of press is accorded aliens residing in this country.” (citing *Bridges v. California*, 314 U.S. 252, 263 (1941))).

²⁴ See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491-92 (1999) (“When an alien’s continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.”); *Dennis v. United States*, 341 U.S. 494, 551 n.15 (1951) (Frankfurter, J., concurring) (noting that immigration laws require deportation of aliens who advocate overthrowing the government by force). Relatedly, modern immigration law appears to make persons deportable for mere membership in disfavored organizations—though mere membership by a resident noncitizen in a disfavored organization, such as the Communist Party, cannot, as a constitutional matter, be criminally sanctioned. See 8 U.S.C. § 1227(a)(4)(B) (2006) (making deportable any non-citizen who is a member of a terrorist organization described in 8 U.S.C. § 1182(a)(3)(B)).

²⁵ Justice Murphy’s famous concurrence in *Bridges v. Wixon*, 326 U.S. 135, 157-66 (1945) (Murphy, J., concurring) is but one example. That case concerned deportation for membership in the Communist Party. In the course of concluding that the deportation statute violated the First Amendment, Murphy argued that such a deportation rule should not be insulated by the plenary power for two reasons. First, he argued that the Constitution protected all persons within the territory of the United States. *Id.* at 161-62. Second, and more important for present purposes, he argued that the distinction between selection and regulatory rules was illusory:

Any other conclusion [than that the First Amendment applied] would make our constitutional safeguards transitory and discriminatory in nature. Thus

ample, Daniel Kanstroom's recent critique of the structure of the modern deportation system.²⁶ He contrasts modern deportation rules with the rules that existed at the turn of the twentieth century. On his account, deportation was historically used only to remove people who had sneaked through the border-exclusion system.²⁷ In contrast, the government today uses the deportation system to remove people for a variety of post-entry conduct—most notably, a wide range of criminal conduct.²⁸ Kanstroom suggests that the original deportation system was less worrisome because it was an inevitable part of the process of selecting immigrants: we selected immigrants at the border, and deportation was a mechanism for ensuring that those who slipped through the cracks of the selection system were not permitted to remain in the country.²⁹ Kanstroom argues that the deportation system has become increasingly illegitimate in the modern era because it is no longer used solely as part of this selection system. Instead, it has morphed into a system of “social control”—that is, a system that regulates the daily lives of those noncitizens who live in the United States by sanctioning (with deportation) certain post-entry conduct they might undertake.³⁰

While both Kanstroom and the courts rely crucially on the distinction between immigrant-selecting rules and immigrant-regulating rules, they wield the distinction in crucially different ways. The Supreme Court suggests that it considers a rule criminally sanctioning an immigrant for engaging in particular conduct to be a regulatory rule,

the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom.

Id. at 162.

²⁶ See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007).

²⁷ See *id.* at 4-6, 91-130.

²⁸ See 8 U.S.C. § 1227(a) (listing grounds of deportability).

²⁹ See KANSTROOM, *supra* note 26, at 5-6 (suggesting that “extended border control” laws, in contrast with “post-entry social control” laws, are legitimately derived from sovereignty).

³⁰ See *id.* at 5-6, 10-12, 107-30, 243 (cataloging various forms of post-entry social-control deportation implemented by the federal government). To be sure, Kanstroom is displeased with the use of deportation in all its forms, including as “extended border control.” But he sees that type of deportation rule as conceptually distinct from, and less egregious than, the use of deportation as “social control.” See *id.* at 243 (“As a 100-plus years social experiment, the U.S. deportation system has caused considerable harm and done little demonstrable good. . . . The dramatic recent increase in post-entry social control deportation warrants special concern.”).

but that it considers a rule deporting an immigrant for engaging in the very same conduct to be a selection rule.³¹ Kanstroom, on the other hand, argues that many deportation rules should be classified as regulatory rules, not selection rules.³² In other words, the Court and Kanstroom rely on the same organizing principle to reach opposite conclusions: the Court to justify considerable deference to deportation rules, Kanstroom to argue for much more scrutiny of (at least some) deportation rules. Clearly they have different ideas about what distinguishes the two types of rules and where precisely the boundary falls between the two types. But they share a common conceptual framework for resolving questions about the legality or legitimacy of immigrant-affecting rules.

B. Immigration Law and "Alienage" Law

The legal debate about which rules concern immigrant selection ranges well beyond the ambit of admission and deportation rules. What are commonly referred to as "alienage" rules are often analyzed in the same terms. Alienage laws are rules that treat a person differently because of her citizenship status.³³ These include laws that prohibit noncitizens from receiving public assistance,³⁴ working in particular occupations,³⁵ participating in politics,³⁶ and so on. Alienage rules may apply to all noncitizens, or they may target only a subclass of noncitizens, such as noncitizens who are in the country unlawfully. Recent state laws denying undocumented immigrants access to a variety of public services are an example of the latter sort of restriction.³⁷

³¹ See *supra* text accompanying notes 21-23 (discussing this reading of *Fong Yue Ting* and contrasting criminal cases).

³² See KANSTROOM, *supra* note 26 at 18 ("We therefore shall not view deportation law solely as an adjunct to sovereignty or as merely part of the immigration border control system.").

³³ See, e.g., ALEINIKOFF ET AL., *supra* note 20, at 1191.

³⁴ See, e.g., 8 U.S.C. §§ 1611-1613, 1621-1622, 1631-1632 (2006) (limiting lawful permanent residents' access to public assistance).

³⁵ See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 444-47 (1982) (discussing permissible employment restrictions on lawful permanent residents); ALEINIKOFF ET AL., *supra* note 20, at 360-96 (discussing employment restrictions on temporary migrants).

³⁶ See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 65-67, 82-87 (2000) (describing the development of restrictions on voting by noncitizens); NEUMAN, *supra* note 13, at 70-71 (same).

³⁷ See, e.g., ARIZ. REV. STAT. ANN. § 46-140.01 (2005) (requiring verification of immigration status for public benefits and classifying nondisclosure of violations of federal immigration law by a state employee as a misdemeanor); COLO. REV. STAT. § 24-

Courts have struggled for decades to develop a coherent approach to evaluating alienage rules. For the most part they have failed: in some cases courts have suggested that alienage classifications are suspect and trigger heightened scrutiny,³⁸ but in other cases courts have suggested that some alienage restrictions are due great judicial deference.³⁹ For all the doctrinal confusion, however, a consistent thread is that courts often frame their reasoning in terms of the dichotomy between immigrant selection and regulation: they often suggest that the appropriate level of judicial scrutiny turns on whether particular alienage rules do or do not relate to the process of immigrant selection.⁴⁰

Scholars also often use this intellectual framework for evaluating restrictions on resident noncitizens. For example, Hiroshi Motomura has recently argued that the United States needs to reconceive the basic structure of immigration law. (Like Kanstroom, he believes such a reformulation is needed to recapture the earlier promise of the system, which he worries has been lost in the modern era.) His central thesis is built on a conceptual framework that distinguishes sharply between the selection and regulation of immigrants.⁴¹ Motomura argues that the United States may be free to choose immigrants on a variety of bases, but that we have a moral obligation to treat as equals the immigrants we choose as “citizens-in-waiting”—that is, we have an ob-

76.5-103 (2007) (mandating verification of lawful presence for adults applying for local, state, or federal benefits); GA. CODE ANN. § 50-36-1 (2006) (same as Colorado).

³⁸ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”).

³⁹ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.” (footnote omitted)).

⁴⁰ See, e.g., *id.* at 81 (noting the increased judicial deference to the federal government for regulating immigration and naturalization); *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (noting that state law cannot interfere with the federal power to regulate immigration); *Richardson*, 403 U.S. at 377 (noting the national government’s “broad constitutional power” to regulate the terms and conditions of naturalization); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (holding that several provisions of California Proposition 187 were unconstitutional because “the authority to regulate immigration belongs exclusively to the federal government”).

⁴¹ HIROSHI MOTOMURA, *AMERICANS IN WAITING* 13, 189-200 (2006) [hereinafter MOTOMURA, *AMERICANS IN WAITING*]; cf. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202-03 (1994) (recognizing some tension between the categories of immigration rules and alienage rules, but still relying on this organizing distinction).

ligation to regulate their lives as residents no differently than we regulate the lives of citizens. He gives numerous examples of what this might mean in practice. Under his model of immigration law, the government should be free to choose not to admit immigrants who might be at risk of becoming public charges; for example, the government might choose to permit immigration only by highly skilled immigrants who have substantial savings.⁴² But the government should not be free to make immigrants ineligible for public assistance that is available to citizens.⁴³ The reason for this distinction, he suggests, is that the former context involves immigrant selection, but the latter involves a decision about how to treat already-selected immigrants.⁴⁴

C. Immigration Federalism

Immigration federalism is a third area in which the distinction between immigrant-selecting rules and other rules has long framed legal debates. The relationship between state and federal power over non-citizens has been an issue for nearly two centuries. Power struggles between the national government and immigrant-receiving states like New York and California are part of what gave rise to the plenary power doctrine in the nineteenth century.⁴⁵ More recently, the explosion of state and local efforts to regulate noncitizens has been front-page news. Several states and dozens of local governments have enacted laws relating to noncitizens in the past few years.⁴⁶ These laws run the gamut from restrictions on access to public benefits, to provisions penalizing employers who hire immigrants without work authorization, to statutes permitting local law enforcement officials to arrest and detain individuals for immigration violations.⁴⁷

⁴² Cf. MOTOMURA, AMERICANS IN WAITING, *supra* note 41, at 191 (suggesting that groups can demand that new members meet higher standards than some current members).

⁴³ See *id.* at 190-91.

⁴⁴ See *id.* at 191.

⁴⁵ See *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875) (striking down a California statute requiring ship masters to pay bonds for certain categories of immigrants arriving on their vessels); *Henderson v. Mayor of New York*, 92 U.S. 259, 269-71 (1875) (striking down a similar New York statute); *The Passenger Cases*, 48 U.S. (7 How.) 283, 410 (1849) (holding that a state tax imposed on arriving noncitizens was unconstitutional).

⁴⁶ See Migration Policy Inst., State and Local Immigration Regulation, <http://www.migrationinformation.org/integration/regulation/regulation.cfm> (last visited Nov. 15, 2008) (cataloging recent state and local regulatory efforts).

⁴⁷ See *id.*

Courts have been deeply divided over which sorts of rules states have the power to pass. Despite these disagreements, however, courts share a common approach to the cases: they widely agree that the Constitution reserves to the federal government the exclusive power to select immigrants.⁴⁸ Thus, courts generally concur that states can regulate immigrants only outside of the selection context.⁴⁹

The recent high-profile judgment striking down Hazleton, Pennsylvania's attempt to regulate immigrants exemplifies this common approach.⁵⁰ Hazleton had adopted an ordinance similar to those enacted by many other local governments: the ordinance empowered local officials to penalize business owners who hired unauthorized workers as well as landlords who rented to unauthorized immigrants.⁵¹ In striking down the ordinance, the district court emphasized that Hazleton was attempting to set selection priorities different from those of the federal government.⁵² Thus, the court concluded, the

⁴⁸ See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from . . . the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization'" (alterations in original) (quoting U.S. CONST. art. I, § 8, cl. 4)); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) ("[T]he supremacy of the national power . . . over immigration, naturalization, and deportation, is made clear by the Constitution"); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (stating that the power to prohibit immigration is reserved to the federal government); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("[T]he regulation of immigration is unquestionably an exclusive federal power"), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); cf. *Ariz. Contractors Ass'n v. Candelaria*, 634 F. Supp. 2d 1036, 1048 (D. Ariz. 2008) (noting that immigration has historically been an exclusive federal concern). See generally Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 807-26 (2008) (summarizing the claim of federal exclusivity over immigration regulation); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575-76 (2008) (surveying Supreme Court treatment of federal exclusivity); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 501-04 (2001) (arguing in favor of federal exclusivity).

⁴⁹ See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 764-65 (N.D. Tex. 2007) ("The Supreme Court has held that state immigration laws can be preempted by federal law in several ways. . . . Under the first test, the Court must determine whether a state statute *is a regulation of immigration*. Since the power to regulate immigration is unquestionably exclusively a federal power, any statute statute which regulates immigration is constitutionally prescribed." (emphasis added)).

⁵⁰ See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007) (holding that the Hazleton ordinance was preempted by federal law and thus unconstitutional).

⁵¹ See *id.* at 515-17 (describing the tenant-registration ordinance and amendments).

⁵² See *id.* at 530-32 (concluding that the Hazleton ordinance attempted to make de facto de-selection decisions about many immigrants whom the federal government had allowed to remain in the United States).

ordinance was preempted by various provisions of the federal immigration code and by Congress's exclusive authority over immigration.

The *Hazelton* court's approach is far from unusual. Constitutional questions concerning immigration federalism have long been organized around the selection/regulation dichotomy. Consider *Truax v. Raich*, an early-twentieth century case in which the Supreme Court invalidated an Arizona law prohibiting most businesses from employing more than a certain percentage of noncitizens.⁵³ The Court treated the rule as beyond the state's power on the ground that it amounted to a de facto selection rule:

The authority to control immigration—to admit or to exclude aliens—is vested solely in the federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.⁵⁴

Many other cases take a similar approach, casting rules burdening noncitizens as implicit limitations on entrance.⁵⁵ But this does not mean that there is agreement about how to treat such rules; far from it. Court and commentators disagree pervasively about whether such rules should or should not be considered selection rules. Recently, for example, lower courts considering local ordinances almost identical to *Hazelton*'s have reached opposite conclusions about whether those ordinances should be considered selection rules.⁵⁶

⁵³ 239 U.S. 33 (1915).

⁵⁴ *Id.* at 42 (citation omitted).

⁵⁵ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 378-79 (1971) (“The state statutes at issue in the instant cases impose auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependence on public assistance. Alien residency requirements for welfare benefits necessarily operate . . . to discourage entry into or continued residency in the State.” (emphasis added)); *id.* at 379-80 (“[I]n the ordinary case an alien, becoming indigent and unable to work, will be unable to live where, because of discriminatory denial of public assistance, he cannot ‘secure the necessities of life, including food, clothing, and shelter.’ State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode.”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (redescribing a state rule that precluded some noncitizens from obtaining commercial fishing licenses as a “discriminatory burden[] upon the entrance or residence of aliens,” a rule beyond the power of a state because a state “can neither add to or take from the conditions lawfully imposed by Congress upon admission”).

⁵⁶ Compare *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 768-69 (N.D. Tex. 2007) (concluding, like the *Hazelton* court, that a local ordinance prohibiting landlords from leasing to those without “eligible immigration status”

In short, immigration federalism questions have the same analytic structure as plenary power doctrine and alienage-law jurisprudence. To be sure, the consequences of concluding that a rule is a selection rule are different here from in the first two doctrinal areas. There the conclusions insulated government action from judicial review; here the conclusion strips states of the power to enact a particular rule. The common intellectual framework, however, remains.

* * *

The three central areas of immigration jurisprudence laid out above all follow the same basic analytic structure: in each, important legal or moral principles are thought to follow from the distinction between rules that select immigrants and rules that regulate immigrants' lives outside the selection context. In the plenary power examples, the Court refuses to scrutinize rules that it identifies as selection rules—even where those rules appear to single people out for unfavorable treatment on the basis of their race or speech, grounds which would ordinarily raise constitutional suspicion. But the Court appears much more willing to intervene where it concludes that the rule is not a selection rule.

Similarly, Motomura and Kanstroom both rely on a strong distinction between selection rules and regulatory rules to frame their critiques of contemporary immigration law and policy. Kanstroom criticizes the modern deportation system on the ground that it has strayed from its selection-focused roots and taken on the ambition of regulating immigrants' lives outside the selection context. Motomura's argument is broader, but it is framed by the same idea. He argues that while the United States should have considerable leeway to select immigrants on a wide variety of bases, it should consider those immigrants it selects citizens-in-waiting, and accordingly treat them basically as existing citizens. On that basis, he concludes that most of our existing immigrant employment restrictions, immigrant voting rules, deportation rules, rules restricting immigrant access to public assistance, and so on are misguided. For Motomura, these rules are not

does amount to "a regulation of immigration"—in other words, that it is an immigrant-selecting rule), *with* *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1055-56 (S.D. Cal. 2006) (concluding that a local ordinance prohibiting any person from harboring an illegal immigrant in a dwelling unit "does not attempt to impermissibly regulate immigration" because it does not amount "essentially [to] a determination of who should or should not be admitted to the country").

selection rules; they are rules that regulate immigrants outside the selection context. Yet the rules do not treat immigrants as citizens are treated, and for that reason are unjustified.

While the examples all make use of a similar conceptual framework, this similarity masks deep disagreements. Courts are often conflicted about which legal rules concern immigrant selection—with the end result being a relatively incoherent doctrine concerning the scope of the immigration plenary power, the boundaries of alienage law, and the shape of immigration federalism. Moreover, even where there is relative judicial agreement about which rules concern selection, scholars often sharply disagree. Of course, the existence of these disagreements is well known. A good chunk of modern immigration law scholarship focuses, either directly or indirectly, on differences of opinion about the appropriate location of the line between immigrant-selecting and immigrant-regulating rules.⁵⁷ These disagreements have led scholars like Kanstroom to criticize the Court for locating the line in the wrong place.⁵⁸ More generally, they have led many to expend considerable effort trying to figure out which rules are appropriately put in which conceptual box.

II. THE MISLEADING DISTINCTION BETWEEN SELECTION RULES AND REGULATORY RULES

To defend immigration law and scholarship's central focus on the distinction between rules that select immigrants and rules that regulate immigrants outside the selection context, we would need first, to give an account of what courts and commentators mean by selection; second, to explain how one should distinguish between rules that are selection rules and other rules; and third, to explain why dividing up legal rules in this fashion serves some useful purpose—in other words, why it is a useful way of protecting particular constitutional values, promoting certain normative commitments, thinking about the institutional design of immigration systems, and so on.

This Part explains why efforts to determine whether a particular legal rule does or does not constitute an immigrant-selecting rule have been such a failure. The difficulty is not that there is no clear concep-

⁵⁷ See, e.g., MOTOMURA, *AMERICANS IN WAITING*, *supra* note 41, at 113-14; Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 452 (1997).

⁵⁸ See KANSTROOM, *supra* note 26, at 243-46.

tion of selection. Underlying all of the examples in Part I is a rough sense that selection has to do with spatial sorting for residence in a state, while regulation covers all other nonsorting forms of behavior. The problem crops up in the effort to determine whether a particular legal rule does or does not constitute an immigrant-selecting rule. Legal rules can be classified in a variety of ways, but, as the examples in Part I show, courts and commentators focus centrally (and unsurprisingly) on the material consequences of legal rules relating to immigrants. They try to divide immigrant-affecting rules into two mutually exclusive categories in the following fashion: immigrant-selecting rules are those that affect spatial sorting, and immigrant-regulating rules are those that affect the way that noncitizens live outside the sorting context.⁵⁹ Part II.A demonstrates that this effort is doomed to fail because *every* territorially bounded rule produces both selection pressure and regulatory pressure. As a result, even sophisticated commentators will often disagree, radically, about whether a given rule constitutes a selecting rule or instead a regulating rule. Part II.B shows that attempts to decrease disagreement by conceptualizing the distinction in some other way—by focusing on the facial features of the legal rules, or on their underlying purpose or public meaning—are unlikely to be successful. Nor, as Part II.C explains, can radical disagreement be avoided by reconceptualizing selection as concerned with the idea of membership rather than spatial sorting.

Before proceeding, I should note one important caveat: I do not mean to suggest that there are no analytically straightforward distinctions that we might draw between rules that regulate noncitizens. My point is only that such distinctions do not track any of the existing attempts to separate selection rules from regulatory rules. Consider, for example, a simple territorial distinction. We might evaluate immigration rules differently depending on whether they legally coerce immigrants who are inside or outside the physical territory of the state.⁶⁰ It

⁵⁹ It is on this basis, for example, that Kanstroom argues that many deportation rules should be treated as immigrant-regulating rules: these deportation rules are really regulatory rules, he says, because they affect the way in which noncitizens live in the United States. *See supra* text accompanying notes 26-30.

⁶⁰ Territoriality is not, of course, the only analytically straightforward alternative. Another possibility is the distinction between *ex ante* and *ex post* screening—on making decisions about an immigrant's right to reside on the basis of information that the state has at the time the immigrant arrives, or instead on the basis of information that arises some time after the immigrant enters. Here too it is not hard to see how rules could be uncontroversially classified as embodying *ex ante* or *ex post* screening. Moreover, in other work, Eric Posner and I have explained why the distinction be-

is possible that there would be relatively widespread agreement about how to apply this conceptual distinction.⁶¹ Moreover, there are a number of theories in American constitutional law about why territoriality might be normatively significant. But the idea of territoriality does not track anything like the distinction between selection and regulation that exists in immigration law today. At a basic analytic level, the territorial distinction focuses on the status of the noncitizen subject to a particular legal rule; in contrast, the selection/regulation dichotomy focuses on the status of the legal rule itself. This fundamental difference has long led courts and commentators to treat the territorial distinction as entirely separate from the distinction between selection and regulation rules. This is why there are huge disagreements over whether a rule that makes someone deportable for criticizing the government, or a local law that forbids landlords from renting to undocumented noncitizens, should be considered a selection or a regulation rule.⁶² Despite the fact that these are clearly rules operating against noncitizens who are within the territory, the question remains whether they are selection rules precisely because immigration law does not treat the task of classifying a rule as selecting or regulating as turning on the status of the noncitizen.⁶³

tween ex ante and ex post rules is extremely significant for any effort to evaluate the structure of immigration law. See Cox & Posner, *supra* note 4. Again, however, this distinction does not track anything like the distinction between selection and regulation.

⁶¹ That said, even this distinction presents two thorny conceptual issues. First, it requires a conception of what it means to be within the territory of a state. The development of the entry fiction in immigration law and recent disagreements about the territorial status of places like Guantanamo Bay should remind us that the concept of territorial presence can still produce its share of disagreement. Compare *Rasul v. Bush*, 542 U.S. 466, 480 (2004) (“By the express terms of its agreement with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” (internal quotation marks omitted)), with *id.* at 497 (Scalia, J., dissenting) (“[T]oday’s opinion . . . extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts.”). Second, the territorial distinction requires a conception of what it means for a legal rule to “apply to” or “legally coerce” a person. Rules that exclude noncitizens at the border clearly apply to them, but those same rules also often have profound effects for those already living within the territory. See Cox, *supra* note 18 (discussing the consequences of admission rules for those who are territorially present); see also *infra* text accompanying note 123. This complicates the question whether such rules should be thought of as applying to persons within or to persons outside the territory.

⁶² See *supra* Part I (discussing the widespread disagreement about how to classify such legal rules).

⁶³ Note that this point is true for *any* conceptual distinction that turns on the status of the noncitizen—even if the relevant marker of status is not territoriality. Thus, my point applies *mutatis mutandis* if we deem a person’s legal admission into

In short, my argument is that the dominant distinction between immigrant-selecting rules and other rules is unhelpful and misleading in two respects. First, as this Part explains, attempts to apply such a distinction produce widespread disagreement, even by those quite knowledgeable about immigration law—suggesting that the distinction is in fact incoherent.⁶⁴ Second, as Part III shows, even if we might be able to reach greater agreement under certain formulations of the distinction, it is difficult to see why the fact that a rule is or is not considered a selection rule should be given much normative or legal significance. For these reasons, the central reliance on the distinction often leads courts and scholars astray in arguments about the legal or moral structure of immigration law.

A. *Choosing Where to Live and How to Live*

Efforts to classify a particular legal rule as either an immigrant-selecting rule or an immigrant-regulating rule will inevitably fail. Every putative selection rule creates regulatory pressure (that is, pressure to live one's life in a particular way), and every putative regulatory rule creates selection pressure (that is, pressure to live in a particular place). In fact, any legal rule that one might apply to noncitizens will create both selection and regulatory pressure. These twin pressures simply describe the two different ways in which potential or actual immigrants might respond to a legal rule imposed by a state. From the immigrant's perspective, therefore, every legal rule imposing an obligation, duty, or burden imposes both types of pressures. And from the state's perspective, the distinction between so-called selection rules and regulatory rules quickly breaks down as the rules emerge as (at least partial) functional substitutes. Thus, immigration law and scholarship is wrong to place such emphasis on our ability to divide legal rules into these two categories.

To see this basic conceptual point about the twin consequences of immigrant-affecting rules, consider what might initially appear to be archetypical selection rules: admission and deportation rules. These

the United States as the relevant determinant of status, rather than their entrance into the physical territory (which could be with or without legal permission). All such status-based arguments about the structure of immigration law share the fundamental similarity of focusing on some aspect or characteristic of the noncitizen. But the central point of Part I was to show that, as a descriptive matter, such status-based theories cannot explain wide swaths of immigration law.

⁶⁴ Thus, I am not simply making a claim about the imprecision of legal categories generally, about the difference between rules and standards, or about the distinction between hard and easy cases.

rules provide that an immigrant can reside in a state if certain conditions do obtain and other conditions do not obtain. In U.S. immigration law, such rules are commonplace, and the conditions that determine an immigrant's right to reside are varied: immigrants gain the right to reside on the basis of conditions like family connections (such as marriage) and employment prospects, and admission on many of these grounds is numerically limited by quotas.⁶⁵ Immigrants lose their right to reside in the United States if they commit certain crimes, if they provide material support to a designated terrorist organization, and so on.⁶⁶

Perhaps unsurprisingly, admission and deportation rules are those rules that both courts and scholars have most commonly identified as selection rules. In reality, however, admission and deportation rules also operate as immigrant-regulating rules by generating powerful incentives for immigrants to live their lives in particular ways. The criminal deportation rules in the United States illustrate this effect. Noncitizens in the United States become deportable if, among other things, they are convicted of an "aggravated felony."⁶⁷ Ex post, such a conviction can lead to a noncitizen's deselection from residence in the United States. Ex ante, however, the possibility of deportation for such a conviction creates pressure for a resident noncitizen to avoid committing crimes classified as aggravated felonies.⁶⁸ Questions remain, of course, about how large this incentive is and how responsive each immigrant is to the incentive. But at a basic behavioral level, it is impossible to disentangle the selection and regulatory effects of the rule. The rule cannot be recast to have only selection features without corresponding consequences for the daily lives of immigrants.

Moreover, this conclusion is not an artifact of my choosing, as an example, a rule that makes a person deportable for post-entry conduct. Kanstroom's book suggests that this choice is significant and that deportation rules triggered by post-entry conduct amount to dis-

⁶⁵ See 8 U.S.C. §§ 1151–1160 (2006) (describing grounds of admission and numerical limitations). See generally ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* (2006) (surveying the historical development of America's admission system).

⁶⁶ See 8 U.S.C. § 1227 (describing grounds of deportability).

⁶⁷ *Id.* § 1227(a)(2)(A)(iii).

⁶⁸ Note that, ex ante, such a rule also creates selection pressure. The existence of criminal deportation provisions can affect the decisions that potential immigrants make about whether to come to the United States. For example, the risk of erroneous deportation on the basis of the criminal provision could discourage risk-averse noncitizens from immigrating.

guised forms of social control.⁶⁹ Kanstroom is correct that such rules create incentives that might shape immigrant behavior. But he is wrong to suggest that other sorts of deportation rules would not have a similar effect.

Deportation rules—that is, rules that result in a person’s removal at some point after they initially enter the United States—can be divided into two categories: rules that rely on information available at the time the immigrant enters (ex ante information rules) and rules that rely on information that arises after the immigrant enters (ex post information rules).⁷⁰ The criminal deportation rules are the latter sort. The immigrant’s post-entry conduct provides new information on which the deportation is based.⁷¹ The former sort would include rules that make an immigrant deportable on the ground that she entered the country without being admitted or that she lied on her admissions application.⁷² Kanstroom suggests that these ex ante deportation rules do not operate as mechanisms of social control in the way that ex post deportation rules do because they do not turn formally on post-entry conduct. But this is incorrect. Ex ante deportation rules can also produce powerful immigrant-regulating effects. For example, many immigrants in the United States today are here without authorization because they entered the country surreptitiously. But the immigration provision that makes them deportable on the basis of this ex ante information still changes how these immigrants live their lives. The threat of discovery and deportation shapes the choices they make about where to live, whether to travel outside the country, when to interact with governmental officials, and so on.⁷³

⁶⁹ See KANSTROOM, *supra* note 26, at 4-6.

⁷⁰ For a discussion of the choice between ex ante and ex post screening rules, see Cox & Posner, *supra* note 4.

⁷¹ See 8 U.S.C. § 1227(a)(2) (describing the classes of crimes resulting in deportability).

⁷² See *id.* § 1182(a)(6)(A)(i) (making inadmissible—and hence subject to removal—any “alien present in the United States without being admitted or paroled”); *id.* at § 1182(a)(6)(C)(i) (making inadmissible—and hence subject to removal—any non-citizen who procured admission “by fraud or willfully misrepresenting a material fact”).

⁷³ It is tempting to think that there is an exception to this logic: one might argue that deportation can affect the daily lives and behavior of immigrants only to the extent that the noncitizens can affect the risk of deportation by changing their behavior. Thus, one might argue, pure status-based reasons for removal cannot produce the same pressure for an immigrant to change her behavior. The explanation of deportation based on unlawful status belies this argument. And the same is true for other status-based removals. So, for example, even deportation based solely on an immigrant’s race can create incentives for the immigrant to act in particular ways, even

Even if we limit our focus exclusively to admission and exclusion at the border and put aside all deportation rules, it is still impossible to untangle cleanly the selection and regulation effects of immigration rules.⁷⁴ The rules that determine whether a noncitizen should be admitted or excluded at the border still regulate immigrants by shaping how they live, not just where they live. A noncitizen facing an American admission rule that privileges migrants who will work in a particular industry might choose to pursue a career in the United States in that industry in order to secure the immigration benefit, even if the immigrant otherwise would have preferred a different profession. And even before the point of entry, potential migrants' decisions about education,⁷⁵ marriage,⁷⁶ and a variety of other matters are shaped by the admission rules of other states.

So much for archetypical selection rules. What about rules that are more likely to be thought of as immigrant-regulating rules, rather than

though she cannot change her race (in any conventional sense). *See generally* KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (discussing societal pressure to conform even immutable characteristics such as sexuality and race).

⁷⁴ Rather than restricting the set of putative selection rules on the basis of the *information* used for the selection decision, this restriction is based on the *timing* of the selection decision. For a discussion of these twin dimensions of rules that regulate immigrants' rights to reside in a state, see Cox & Posner, *supra* note 4.

⁷⁵ *See* ROBERT E.B. LUCAS, SWED. MINISTRY FOR FOREIGN AFFAIRS, INTERNATIONAL MIGRATION AND ECONOMIC DEVELOPMENT: LESSONS FROM LOW-INCOME COUNTRIES (2005) (discussing educational choices of Filipino students as a means of gaining admission to the United States); Michel Beine et al., *Skilled Migration and Human Capital Formation* 13-15 (Nov. 2006) (unpublished manuscript), *available at* <http://web.econ.uic.edu/espe2007/paper/D13.pdf> (providing some empirical evidence that the admission rules in receiving states influence the education decisions of potential migrants in sending states). *Cf.* Mari Kangasniemi et al., *Is the Medical Brain Drain Beneficial? Evidence from Overseas Doctors in the UK* (Feb. 2004) (unpublished manuscript), *available at* <http://cep.lse.ac.uk/pubs/download/dp0618.pdf> (surveying Indian doctors working in the United Kingdom and determining that only a minority of doctors from developing countries considered the possibility of migration when they chose to obtain medical degrees).

⁷⁶ One interesting recent example comes from Denmark. In 2002, Denmark changed its family-reunification grounds for immigration. Prior to that point, a noncitizen living in another country could obtain an immigrant visa if she married an immigrant living in Denmark. After July 1, 2002, a family-reunification visa was not available if one of the marriage partners was below twenty-four years of age. The change was designed to reduce the number of arranged marriages and to reduce the number of nonwestern immigrants entering Denmark. A recent study finds, perhaps unsurprisingly, that the change in admission rules altered the marriage behavior of immigrants and their potential spouses. *See* Helena Skyt Nielsen et al., *The Effect of Marriage on Education of Immigrants: Evidence from a Policy Reform Restricting Spouse Import* (Inst. for the Study of Labor Discussion Paper Series No. 2899, 2007), *available at* <http://ssrn.com/abstract=1000373>.

immigrant-selecting rules? Consider a hypothetical legal rule that imposes a burden on all noncitizens who reside in a state because of their status as noncitizens. Such rules are common in the United States. Immigrants who come to the United States face a variety of restrictions on their employment opportunities, on their access to public assistance, on their ability to participate in politics, and so on.⁷⁷ These are the rules sometimes thought of as immigrant-regulating rules.

In operation, these putative immigrant-regulating rules create substantial selection pressure: they can affect decisions about whether to migrate in the first place or whether to stay if one has already migrated.⁷⁸ This result follows because immigrants can respond in two ways to a rule that imposes a burden or a duty on them. First, they can accept the burden or comply with the duty. Second, they can leave the jurisdiction in order to escape the application of the burden or the duty. Take employment restrictions, for example. If the United States limits the employment opportunities for highly skilled migrants (by, for example, making it difficult for these immigrants to change jobs⁷⁹), a noncitizen working in Silicon Valley has two choices: put up with the job restriction despite the fact that it limits her opportunities or leave the United States in order to avoid the job restriction. A noncitizen thinking about immigrating to the United States faces a similar choice. She can come and accept the burden, or she can choose not to come—either by not migrating at all, or (and this is an

⁷⁷ See *supra* text accompanying notes 33-36.

⁷⁸ This does not mean, of course, that all migrants will respond to the selection pressure imposed by such a rule by altering their migration decisions. There are many reasons why such a rule might not affect a particular noncitizen. First, and most straightforwardly, the benefits from migration might be so great that the burden does not dissuade the immigrant from migrating (in other words, the immigrant might be inframarginal rather than marginal). Second, the immigrant might not have complete information about the existence of the rule or its consequences at the time she makes her migration decision. (I return to this point in Part IV.A.) Third, the immigrant might, for a variety of cognitive reasons, be overly optimistic about the benefits of migration or the significance of the rule's burden. These possibilities suggest a number of reasons why, as a matter of institutional design, such rules could have consequences far different from those that a state might intend or for which it might hope. For example, they suggest that some regulatory efforts might well not be effective or might not be worth their cost given the actual decision-making process of potential migrants. This is an important point, as the small economics literature on the institutional design of immigration systems generally overlooks many of these possibilities by assuming an overly simplistic model of immigrant decision making.

⁷⁹ See 8 U.S.C. § 1184(n) (2006) (placing some limits on the job flexibility of highly skilled workers in the country on temporary employment visas).

increasingly important possibility) by migrating to another country that does not impose a similar burden.⁸⁰

* * *

In short, therefore, every legal rule relating to noncitizens can affect both *where* they live and *how* they live in that place. This connection between so-called immigrant-selecting and immigrant-regulating rules is occasionally noted by courts and scholars, but it is recognized only sporadically and usually in the service of arguing for the need to keep the two categories of immigrant regulation separate. In other words, various legal actors often view any slippage between the conceptual categories as an undesirable anomaly.⁸¹ But this is a mistake, as the interrelationship is an inevitable feature of *any* rule that imposes a burden on an immigrant.⁸²

⁸⁰ See, e.g., Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 149-61 (2006) (discussing how the demand for highly skilled migrants can shape the immigration policies of countries competing for those migrants). Note that even legal rules that do not target noncitizens, such as tax policies or redistribution policies, can produce selection effects by altering potential migrants' decisions about where to live in the world. See, e.g., Jeffrey Grogger & Gordon H. Hanson, *Income Maximization and the Sorting of Emigrants Across Destinations* 21-25 (Feb. 2007) (unpublished manuscript), available at <http://www.princeton.edu/~ies/Spring07/HansonPaper.pdf> (presenting some empirical evidence that more progressive social policies tend to reduce the average skill level of immigrants).

⁸¹ See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 37-76 (2006) [hereinafter BOSNIAK, *THE CITIZEN AND THE ALIEN*]; KANSTROOM, *supra* note 26, at 5-6, 10-12, 124-30 (describing the difference between deportation as a tool for "extended border control" and "social control"); MOTOMURA, *AMERICANS IN WAITING*, *supra* note 41, at 189-91, 194-200, 203-04; Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1053-57 (1994) [hereinafter Bosniak, *Membership*] (highlighting the relationship between immigration and alienage law).

⁸² In this way, legal scholarship concerning immigration is somewhat disconnected from the way that social scientists talk about rules that regulate immigrants. For example, the sparse economics literature on the institutional design of immigration systems treats the deep behavioral connection between selection effects and regulatory effects as a foundational premise, and for that reason, draws essentially no distinction between so-called selection rules and regulatory rules. See, e.g., Mohammad Amin & Aaditya Mattoo, *Can Guest Worker Schemes Reduce Illegal Immigration?* 3-4 (World Bank Policy Research, Working Paper No. 3828, 2006), available at <http://econ.worldbank.org> (search "Data & Research" for "3828") (finding that guest-worker schemes are an inefficient way to combat illegal migration); Grogger & Hanson, *supra* note 80, at 21-25, 28-34; Karen Heimbüchel & Oliver Lorz, *Temporary Immigration Visas* 2-3 (Feb. 23, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=964858> (examining the economic effects of issuing tempo-

Moreover, it is important to recognize that my argument is simply an application of a more foundational point about the consequences of all legal rules that have limited jurisdictional scope. Such rules always operate both as sorting mechanisms and as behavior-regulating mechanisms. This point is well understood in many other areas of law. Within local-government scholarship, for example, a large literature focuses on the ways in which local-government policies might affect people's decisions about where to live (and reciprocally, how the mobility of people might affect the policies that local governments adopt).⁸³ The same is true with respect to corporate law: the idea that the structure of corporate law is in part the product of interjurisdictional competition for incorporations is common.⁸⁴ Strangely, however, this basic point is too often overlooked in immigration jurisprudence and scholarship, even though immigration law is centrally concerned with the spatial sorting of peoples across state boundaries.

B. *Rescuing the Dichotomy?*

That every jurisdictionally bounded legal rule produces both selection and regulatory effects does not mean that it is logically impossible to draw a distinction between immigrant-selecting and immigrant-regulating rules. But as the examples in Part I suggest, attempts to draw this distinction over the last century have led to radical disagreement about which rules are properly classified as immigrant selecting and which are properly classified as immigrant regulating. This confusion and incoherence is driven in large part by the fact that

rary visas to foreign nationals). Similarly, the sociological literature on the ways in which legal structures affect migration patterns also treats both types of rules as substitute mechanisms that each have effects on migration patterns. See, e.g., DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENIUM* 270-74, 288-89 (1998).

⁸³ This literature was spawned in part by Charles Tiebout's seminal article on the provision of local public goods. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

⁸⁴ See, e.g., Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 600-07 (2003) (proposing that Delaware competes not only with other states, but also with the federal government, for corporate tax revenue); Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 FORDHAM L. REV. 843, 844-46 (1993) (discussing how state takeover regulation affects competition among states). There are many other analogs that do not involve spatial sorting. In democratic theory, for example, scholars often focus on two intertwined consequences of electoral rules: (1) the rules' selection effects (i.e., the effects on the types of representatives selected), and (2) the rules' behavioral effects (i.e., the effects on the behavior of office-holders). Cf. Adrian Vermeule, Essay, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 995-98 (2005) (discussing the structure of constitutional law from these twin perspectives).

the legal categories have been thought of as mutually exclusive even though the sorting and regulatory consequences of immigrant-affecting rules are deeply intertwined. But whatever the precise cause, my modest point is that it is a mistake to attach great legal or moral significance to a legal dichotomy that has been largely incoherent in practice.

Note two features of this claim: First, it is not just a claim about the inevitable fuzziness of all legal categories, or about the distinction between hard and easy cases. As the examples in Part I illustrate, even the core, archetypical cases in the field produce deep disagreement and doctrinal incoherence. Recall the discussion of deportation rules. Some conclude that these rules are in the heartland of what must be considered selection rules if anything is to be given that moniker. But others argue vigorously that, to the contrary, most deportation rules are “really” immigrant-regulating rules that amount to the social control of resident noncitizens. Second, the descriptive claim laid out above is not an unusual one in law. There are other areas in which legal categories have, in practice, turned out to be impossible to apply in any coherent way. Standing law’s injury-in-fact requirement is just one among many famous examples.

Still, one might argue that it is possible to rescue the conceptual distinction from incoherence. First, we might do so by becoming relentlessly empirical. Not all putative selection and regulation rules are perfect substitutes. The extent to which they are substitutes depends on a variety of factors, including how much information immigrants have about the legal rules, how much those immigrants value living in the United States, and how effectively the government enforces a particular rule.⁸⁵ To the extent that they are not perfect substitutes, some rules will produce greater selection effects while others will produce greater regulatory effects. Perhaps rules can be classified on the basis of their predominant effect. This might allow us to reach greater agreement about the distinction. But the resulting distinction would not come anywhere close to tracking the existing structure of immigration law.⁸⁶ And as I will show in Part III, determining the causal ef-

⁸⁵ See *supra* note 74.

⁸⁶ This causal focus would radically reshape immigration law because the predominant consequences of an immigrant-affecting rule will often not track any of the existing intuitions in doctrine or scholarship about which rules are selection rules and which are regulatory rules. This is the central thrust of Part II.A. And it is easy to imagine myriad examples not included in that discussion. For example, the immigration code excludes those who lack certain vaccinations, and many would describe this

fects of any particular rule will still not justify drawing a sharp normative distinction between selection rules and regulatory rules.

Relatedly, one might argue that we can avoid incoherence if we stop focusing on the material consequences of legal rules relating to noncitizens. Perhaps the legal and moral status of those rules should depend on something else. This is not an unfamiliar idea. In American constitutional law, for example, the legal status of a particular rule often appears to turn on the facial content of the rule or the reasons underlying the rule, rather than on the rule's material consequences.⁸⁷ But it is not clear that such a focus would make it easier to reach agreement about how to categorize a particular rule. More importantly, it is not clear why a facial or purpose-based distinction should carry legal or normative significance.

Consider the idea of facial targeting first. On this understanding, we might conclude that rules stating "no noncitizen without a college education shall be admitted" or "any noncitizen convicted of a crime shall be deported" are selection rules, while rules stating "noncitizens are ineligible for public assistance" or "noncitizens are barred from government employment" are regulatory rules. But is this intuition meaningful? After all, every putative regulatory rule can be reformulated to have identical content but to look like a putative selection rule. For example, we can redescribe the rule "noncitizens are ineligible for public assistance" as "noncitizens can enter (or remain) only

as an archetypical selection rule. See 8 U.S.C. § 1182(a)(1)(A)(ii) (2006). Contrary to that intuition, however, it is quite possible that this rule has only a tiny effect on who actually comes to the United States but a substantial behavioral effect, causing large numbers of people to be vaccinated who otherwise would not be. In contrast, consider a rule that many might classify as regulatory: the post-9/11 regulations that required many noncitizens from predominantly Muslim countries to specially register with the FBI. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 8046 (Feb. 19, 2003); 68 Fed. Reg. 2363 (Jan. 16, 2003); 67 Fed. Reg. 77,642 (Dec. 18, 2002); 67 Fed. Reg. 77,136 (Dec. 16, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002); 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 57,032 (Sept. 6, 2002); see also 8 U.S.C. § 1303(a) (authorizing the Attorney General to prescribe special registration for certain classes of aliens). It is quite possible that this rule had a much greater effect on where noncitizens chose to live than on how they lived, as the rule may have prompted many noncitizens either to leave or not to enter the United States out of disgust for the program's singling out of noncitizens from predominantly Muslim countries.

⁸⁷ See generally Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

on the condition that they agree not to receive public assistance.”⁸⁸ Thus, even on this approach, which might seem to be the easiest (if most limited) way to distinguish between rules that select and rules that regulate, there will often be considerable disagreement about how to classify a particular rule.⁸⁹

Beyond this conceptual point, there is the question why this sort of facial distinction should be accorded great normative or legal significance (a point about which I will say more in Part III). The same is true for a purpose-based distinction between immigrant-selecting and immigrant-regulating rules. Law often focuses on reasons for action rather than just material consequences. Purpose-based tests of constitutionality are perhaps the most obvious example of this sort of focus.⁹⁰ It is important not to overlook such theories. Still, however

⁸⁸ The functional identity of these two rules makes all the more startling the fact that much immigration law and scholarship suggest that they should be subject to different sorts of scrutiny. See *supra* Part I.B (discussing the different scrutiny accorded to admission rules and so-called alienage rules).

⁸⁹ The difficulty with this approach to distinguishing between selection and regulation rules is illustrated by the near-identical attempt of one of the leading immigration-law casebooks to distinguish “immigration law” from “alienage law.” The casebook begins a chapter on alienage law with definitions of the two terms. It first explains that “immigration law . . . as traditionally defined, concerns the admission of noncitizens to the United States and the *terms under which they may remain*.” ALEINIKOFF ET AL., *supra* note 20, at 1191 (emphasis added). But by including in the formulation of immigration law the terms under which noncitizens are permitted to remain, the definition sweeps up essentially every type of immigrant-affecting rule. This is because, as explained above, any rule restricting the rights of noncitizens can be formally recast as a condition of entry or continuing residence. As an analytic matter, therefore, this definition leaves nothing in the category of alienage law. This fact is highlighted by the casebook’s effort a few sentences later to define alienage law in a way that distinguishes it from immigration law: “*Other differences* between citizens and permanent residents are part of alienage law, which as traditionally defined is distinguished from immigration law and addresses other matters relating to the legal status of noncitizens.” *Id.* at 1191. A careful reading reveals that this definition has no analytic content. Alienage law is defined simply as that which is not immigration law—as any “other differences.” But since the definition of immigration law given is capacious enough to encompass nearly every conceivable legal rule—including the restrictions on employment and access to public assistance that are at issue in the cases in this chapter, a chapter ostensibly dealing with “alienage law”—the definition of alienage law is either incoherent or simply a null set.

⁹⁰ See, e.g., *Washington v. Davis*, 426 U.S. 229, 240-41 (1976) (formalizing the requirement that plaintiffs prove discriminatory purpose to make out a claim under the Equal Protection Clause); see also Strauss, *supra* note 87, at 950-51 (describing and criticizing the focus on discriminatory intent in modern Equal Protection Clause jurisprudence). Closely related are the various theories of constitutional law that focus on the “expressive significance” or “social meaning” of a particular legal rule. See Anderson & Pildes, *supra* note 87.

useful these theories might be for evaluating particular rules relating to noncitizens, it is difficult to see how a focus on reasons for action can help make the distinction between selection and regulation rules more meaningful. It seems implausible to conclude that it is legitimate for the government to impose a burden on noncitizens for the reason of selecting immigrants but illegitimate to impose such a burden for a reason other than selecting immigrants.

Ultimately, whatever one thinks about these alternative approaches, doing any of the above—becoming relentlessly empirical, focusing on facial features, or turning to a purpose-based inquiry—would radically change immigration law and theory. Thus, arguing that the dichotomy between so-called selection and regulation rules can be saved by adopting one of these alternatives largely proves Part II's central claim—that the existing practices in the field have led to deep confusion and incoherence.

C. *Selection and the Role of Membership in Immigration Law and Theory*

Rather than focus on different ways in which we might categorize legal rules, perhaps we can rehabilitate immigration law's focus on the uniqueness of immigrant-selecting rules by reconceptualizing what is meant by selection. Linguistically, the difference between selection and regulation is generally described as the difference between the question of how we choose immigrants and the question of how we treat those immigrants whom we have chosen. This verbal distinction often tracks an implicit or explicit distinction between, on one hand, the spatial sorting of people across borders, and, on the other hand, the treatment of people within a particular border.

But immigration law is not concerned only with the spatial sorting of people across state boundaries. It is also intimately concerned with access to membership in the state's political community.⁹¹ Thus, we might try to rehabilitate the distinction between rules that select and rules that regulate immigrants by focusing on selection for "membership," rather than residency.⁹²

A prominent strand of scholarship takes this path, identifying the distinction between membership-selecting rules and other rules as

⁹¹ See, e.g., MOTOMURA, *AMERICANS IN WAITING*, *supra* note 41; T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990).

⁹² See Aleinikoff, *supra* note 91.

having foundational legal and moral significance.⁹³ These writers either explicitly or implicitly tie the distinction to a moral theory under which (1) a state should have considerable leeway to decide whom to admit to membership in the political community, and (2) a state should be obligated to accord equal treatment to all members of the political community.⁹⁴ The focus on this conceptual distinction stems, in large part, from the longstanding influence of a particular strand of communitarian political theory on American immigration scholars. This work—exemplified by Michael Walzer's writing in *Spheres of Justice*—argues for a sharp distinction between rules that regulate admission to membership in a political community and rules that affect a member's treatment after admission.⁹⁵ Walzer argues that few principles of justice constrain a state's decision about whom to admit to membership; this choice is left largely to the existing political community.⁹⁶ In contrast, a state is obligated to accord equal treatment to all members of the political community.⁹⁷

Immigration scholars often suggest that Walzer's sharp distinction between membership-selecting rules and other legal rules provides a moral foundation for evaluating a wide variety of immigration policies. For example, some immigration scholars suggest that it follows from Walzer's principles that particular deportation policies (sometimes all deportation policies other than those that target unlawful entrants) are unjust because they represent unequal treatment of those whom we have already admitted to membership. Similarly, some scholars suggest that it is just for the government to decline to admit immigrants whom the government deems likely to become public charges, but unjust for the government to deny admitted immigrants the same access to public assistance as citizens have, on the ground that such a restriction falls outside the domain of membership regulation.⁹⁸

⁹³ See, e.g., BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 81, at 74 (distinguishing the legal rules to which noncitizens are subject between those governing "admission to community membership" and those governing "general status of territorially present persons").

⁹⁴ See, e.g., *id.* at 75.

⁹⁵ MICHAEL WALZER, SPHERES OF JUSTICE 61-63 (1983).

⁹⁶ *Id.* at 62.

⁹⁷ *Id.* at 41-42, 48.

⁹⁸ See, e.g., MOTOMURA, AMERICANS IN WAITING, *supra* note 41, at 50-53, 190-91. Bosniak makes a similar point:

The dispute concerns the question whether discriminatory treatment of aliens is to be understood as a legitimate exercise of the government's power to regulate membership or as an illegitimate violation of their rights as persons. . . .

But shifting our focus from spatial sorting to membership selection does not rescue the distinction between selection and regulation rules. This is because nothing internal to the theory provides a way to decide which legal rules regulate membership. Thus, without more, Walzer's moral theory does not speak to the legitimacy of the deportation, admission, or public assistance rules discussed above. In the examples above, what determines whether a particular legal rule regulates access to membership? The case law and scholarship that trades on this distinction never provide a coherent explanation.⁹⁹

Immigration theorists who think that Walzer's moral principles help explain this distinction often conflate the idea of entry or admission into the physical territory of a nation with admission to membership in the political community that is covered by the community-centered obligations of equality that Walzer emphasizes. Consider the claim above regarding access to welfare benefits. What distinguishes the two legal rules is that the first operates against a noncitizen outside the territory of the state while the second operates against a noncitizen inside the territory. But Walzer's communitarian political theory differentiates strongly between rules that select members and rules that regulate members.¹⁰⁰ We would need to say more to claim that the rule regarding the admission of potential public charges operates as a rule that selects immigrants for membership in the political community, while the rule regarding access to public assistance for immigrants operates as a rule that accords differential treatment to members of the community. Specifically, we would have to make an additional claim that one should equate admission to the territory with immediate admission to membership.

Walzer does come close to making this claim, though, as I will show, he cannot bring himself to commit fully to the conclusions that would follow from this position. He grounds the claim in an idea about the relationship between membership and self-governance. The idea, which has considerable intuitive appeal at a high level of abstraction, is the old democratic ideal that the legitimacy of government requires an identity of the governed and the governors. Under

[I]n our legal system, noncitizens are subject, broadly speaking, to two distinct regimes of regulation and relationship: the first governs admission to community membership, and the second governs the general status of territorially present persons. The question in the cases is always which regime controls . . .

BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 81, at 74.

⁹⁹ See, e.g., Bosniak, *Membership*, *supra* note 81, at 53-56 (discussing the alienage case law that perpetuates this incoherence).

¹⁰⁰ See, e.g., WALZER, *supra* note 95.

this theory, all those subject to the power of the state must have a say in decisions about how the state exercises its power.¹⁰¹ At a high level of abstraction, Walzer suggests that we can ensure this by (1) imagining states as territorially bounded entities that exercise power only over those within that territory and nowhere else and (2) declaring that every person within that territory must be a member of the political community that determines how the state exercises power.¹⁰² In this fashion, all those subject to the coercive force of the state play a part in determining how that coercive force is exercised.

Equating admission to the state's territory with both admission to membership and the application of state power suggests a rather quaint world, in which states are completely insular and have perfect control over their borders, and in which people for the most part do not move or even travel—except in those rare situations where they pull up their roots and move permanently to a new nation. But as this description suggests, there are several serious problems with any theory that conceptualizes the world in this way.

First, the exercise and effect of state power is not, and cannot be, contained strictly within the territorial boundaries of the state. The actions of one state pervasively affect the interests of those who live in other states. Perhaps this was less true at some time distant in the past, though the history of colonialism would suggest that we would have to look back very far to find such a time. But today the extraterritorial consequences of state action present a potentially fatal problem for any theory of political legitimacy or morality that requires perfect identity of the governed and the governors.

Second, Walzer's theory imagines only one type of human movement across borders—permanent relocation. But not all the comings and goings of people across borders fit this model. Many people travel to other countries as tourists, diplomats, and so on. Some intend to come only temporarily, and even some who intend to remain permanently do not want to become citizens.¹⁰³ What rules of justice constrain the treatment of entrants who have no desire to reside permanently in the state or become full members? Walzer's theory has no answers for this question.

¹⁰¹ *See id.* at 62 (“[T]he rule of citizens over non-citizens, of members over strangers, is probably the most common form of tyranny in human history.”).

¹⁰² *See id.* at 64-65, 304-05.

¹⁰³ *See, e.g.,* DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 20-21 (2002) (discussing cyclical and temporary migration from Mexico to the United States).

Third, and perhaps most important given the significant influence that *Spheres of Justice* has had on American immigration-law scholarship, Walzer's world of perfect territorial sovereignty omits any of the actual legal institutions responsible for regulating the movement of people across borders. Legal institutions designed to choose new members must confront a number of difficulties, including the problem of imperfect enforcement and the difficulty of identifying desirable future members from a large pool of potential migrants.¹⁰⁴ The first problem, imperfect enforcement, raises the question of what treatment should be required of those who enter the territory by evading the admission system. Given Walzer's desire to accord the state broad control over membership selection, it is hard to imagine that he would believe that those who sneaked across the border could force the state to treat them as members.¹⁰⁵

But even putting aside the problem of imperfect enforcement, the screening problem raises questions for which Walzer's theory has no answers. While I explained above that Walzer comes close to equating admission to the territory with admission to membership, not even he would declare every person admitted to the territory an automatic member of the political community. He specifically allows for a probationary period during which noncitizens who have been admitted to the territory can be denied full membership and treated differently from how existing members are treated.¹⁰⁶ In part, Walzer appears to acknowledge that this probationary period is a necessary component of any realistic screening process. The alternative would be to argue that all states are morally required to rely only on *ex ante* screening at the point of physical entry to select new members of the political community. And given the tremendous significance of community membership for his theory of justice, it is unsurprising that he is unwilling to commit to this position.

The problem is that Walzer's theory provides no explanation of what limits should constrain the probationary period. This does not mean that he makes no claims about that period. Walzer argues, for example, that it is acceptable during this probationary period to deny

¹⁰⁴ See Cox & Posner, *supra* note 4, at 813, 821-22 (discussing the institutional design issues raised by these problems).

¹⁰⁵ See BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 81, at 63-64 (noting that Walzer does not consider the possibility of unauthorized entry).

¹⁰⁶ See WALZER, *supra* note 95, at 61 ("No democratic state can tolerate the establishment of a fixed status between citizen and foreigner (though there can be stages in the transition from one of these political identities to the other).").

the new entrants political participation rights, but not acceptable to deny them any social or economic rights accorded to citizens.¹⁰⁷ Because his theory of obligation does not explain these requirements or the distinction between social and political rights, his defense of this view is vague and unsatisfying. Walzer's restrictions on the probationary period—making it extremely brief and easy to pass—seem designed to assuage his unease with the idea of deviating from the strict view that admission to the territory equals admission to membership. Legal scholars do much the same thing. They also often recognize that it is acceptable to have some probationary period. And, like Walzer, they argue that the probationary period should be brief and not particularly demanding.¹⁰⁸

Both Walzer and legal scholars may be right about the probationary period. But one needs a theory about how principles of justice constrain the structure of the probationary period and the treatment of immigrants during that period. The distinction between membership-selecting rules and other rules cannot provide such a theory, because such a theory itself would be what defines the distinction. (This is what makes the membership theory basically question-begging.)

The upshot is this: the membership view of the distinction between selection rules and regulation rules is, like the spatial-sorting view, somewhat seductive when stated at a very high level of abstraction. The problem is that redefining "selection" does not help us determine which legal rules should count as membership-selecting rules. Neither courts nor immigration scholars have provided such a theory. Walzer's work purports to provide such a theory by equating physical admission with membership acquisition. But whatever the intuitive appeal of this idea, the theory's excessively thin conception of the varieties of human movement in the world, combined with its lack of any conception of the actual legal institutions necessary to regulate human movement in its various forms, renders it theoretically inadequate to help answer the questions of central importance to American immigration law today.

Again, this does not mean that there are no reasons why the government might be obligated to treat, for example, long-term residents

¹⁰⁷ *See id.* at 60 ("[T]hey must be possessed of those basic civil liberties whose exercise is so much preparation for voting and office holding.").

¹⁰⁸ *See, e.g.,* MOTOMURA, AMERICANS IN WAITING, *supra* note 41, at 120-21, 155-57 (discussing the Supreme Court's recognition of a probationary period in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and explaining that a waiting period is consistent with immigration as transition).

differently from short-term residents, or differently from those who have never entered the United States. My only point is that any obligation the government has to do so does not depend on whether a particular legal rule is classified as a membership-selecting rule or as some other type of rule. The focus on membership is therefore at best unhelpful and at worst misleading.

III. SECOND-ORDER STRATEGIES IN IMMIGRATION LAW

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 of immigration law above depends crucially on the idea that these are two analytically distinct types of human behavior. The central difficulty is that every territorially bounded rule creates both sorting and regulatory pressure.

As Part II.B explained, this might suggest that we can rehabilitate immigration law's organizing framework. Perhaps courts and commentators have been wrong to think that immigrant-affecting rules can concern either selection or regulation, with the resulting analytic confusion leading to pervasive disagreement and unproductive debate. But once we get past this confusion we could still try to separate legal rules on the basis of something like their predominant empirical consequences.

This Part argues that such an effort would be misguided. The reason is that selection and regulation are simply alternative strategies for achieving whatever one's normative goals or constitutional commitments happen to be. Thus, even if we could overcome a century of radical disagreement about which rules produce greater selection effects and which produce greater regulatory effects—perhaps by developing a much richer empirical account of each rule's actual consequences—it would be a mistake to hold an a priori preference for either selection mechanisms or regulatory mechanisms. Neither mechanism has an inherently positive or negative valence.

To see this point, consider the example of immigration and public assistance. If Congress is worried about the fiscal effects of immigration, it might allay that concern in at least two ways. First, it could decide not to admit immigrants who might later fall into poverty. Second, it could make admitted immigrants ineligible for public

assistance. Each of these rules will create both selection pressure and regulatory pressure, affecting whether immigrants choose to live in the United States and how they live their lives in the United States. But even if we assumed that the first rule produced exclusively selection effects and the second produced exclusively regulatory effects, that would not lead to the conclusion that the first rule—the selection mechanism—is superior. To the contrary, the question of which strategy is more efficacious or morally attractive in this particular context would remain.

Immigration law and scholarship should focus more directly on this question of mechanism design, rather than simply assuming the superiority of one mechanism over the other. An analogy to recent property-theory literature may be helpful here. Over the last several years, Henry Smith has written an important set of papers about mechanism design in property law. His central insight is that the design of property law often entails a choice between the strategy of exclusion and the strategy of governance.¹⁰⁹ These twin strategies—which are similar to the mechanisms of selection and regulation in immigration law—represent alternative ways in which a property owner may control the use of a particular resource. Smith develops an information theory about when exclusion is preferable to governance and vice versa.¹¹⁰ While Smith's theory of mechanism choice does not translate directly to immigration law, the general idea of developing a theory about the comparative desirability of alternative regulatory mechanisms is directly applicable.

As Smith has done for property theory, it is possible to develop theories about the situations in which it is desirable for the government to emphasize one strategy or the other (while remaining attentive to the fact that all legal rules will produce both selection and regulation effects). These efforts should allow us to develop new ways of categorizing immigration rules that are analytically sharper and normatively more significant.¹¹¹ But whatever these new analytic frameworks turn out to be, they will not track the misleading distinction between selection rules and regulation rules.

¹⁰⁹ See Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S464-71, S486-87 (2002) (recognizing a spectrum of property rights with exclusion and governance as endpoints).

¹¹⁰ See *id.*

¹¹¹ Consider, for example, the distinction between *ex ante* and *ex post* screening rules that Eric Posner and I have developed elsewhere. See Cox & Posner, *supra* note 4, at 824-27.

To demonstrate this in more detail, this Part considers three central normative commitments underpinning immigration law. Asking how best to advance these commitments demonstrates that selection and regulation are simply alternative strategies without an inherent normative or constitutional valence. For as I will show, these commitments turn out to be generally unconnected to the distinction between selection and regulation.

Before proceeding with the examples, I should note one caveat: the normative commitments discussed below are what we might think of as midlevel theories. My aim here is not to explore what particular high-level moral theories—such as a welfarist approach (in its global or national flavors), a Rawlsian approach, or some other theory of justice—might have to say about the desirability of various immigration rules.¹¹² Instead, this Article's more modest goal is to show that while the midlevel theories prominent in immigration law and scholarship do have significant implications for the legitimacy or desirability of particular immigration rules, those implications do not track the distinction between the mechanisms of selection and regulation.

A. *Immigrant Integration*

The importance of integrating immigrants into a receiving state is a central value that motivates much immigration law and scholar-

¹¹² One reason for not taking that approach here is that much of the existing work that considers the relevance of these high-level theories for immigration policy concerns a very abstract question: whether any significant restrictions on the free movement of people across borders are defensible. See, e.g., Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987) (drawing on several contemporary approaches to political theory to argue for open borders); Timothy King, *Immigration from Developing Countries: Some Philosophical Issues*, 93 ETHICS 525, 536-31 (1983) (summarizing various philosophical arguments for and against relatively open borders); Michael Blake & Matthias Risse, *Is There a Human Right to Free Movement? Immigration and Original Ownership of the Earth* 3-5 (John F. Kennedy Sch. of Gov't Faculty Research Working Paper Series, Paper No. RWP06-012, 2006), available at <http://ssrn.com/abstract=902383> (examining the relationship of persons to land as a source of moral constraints on immigration controls). This debate is important, but it is somewhat disconnected from the actual institutional details that legal scholars of immigration should be interested in evaluating. The most important questions confronting American immigration law today do not include the question whether we should have open borders. Instead, the questions concern issues like the desirability of particular temporary worker programs, the appropriateness of America's emphasis on family migration rather than migration on some other basis, and the usefulness of our large-scale criminal deportation system.

ship.¹¹³ Exactly what is meant by integration and why it might be valuable are complex questions that are not important to rehash here.¹¹⁴ Understood in a limited (and oversimplified) fashion, integration can be thought of as the process by which an immigrant adjusts to life in a new society—which might include acquiring some language skills, securing relatively stable work, developing social networks, and so on.¹¹⁵ Defined in this way, integration can be valuable for both the receiving state and the immigrant herself.

The integration-related consequences of a legal rule bearing on immigrants are certainly of considerable normative significance. Moreover, there are a variety of ways in which legal rules might affect the process of immigrant integration. Some rules will affect mechanisms of integration that operate at the level of individual immigrants. These rules might change (1) the immigrant's desires, (2) the immigrant's integration-related opportunities, or (3) the immigrant's information about her opportunities.¹¹⁶ Other rules will affect mechanisms of integration that operate at the level of groups. Integration is in many ways a collective process, and immigration rules can affect the group-related mechanisms of integration by influencing things like

¹¹³ See, e.g., MOTOMURA, *AMERICANS IN WAITING*, *supra* note 41, at 189 (“The essence of immigration as transition is giving lawful immigrants the best chance to belong in America, in a broad sense that goes beyond formal citizenship to include integration into American society.”); Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 869-70 (2007) [hereinafter Motomura, *Choosing*] (emphasizing that a primary concern of legal immigrants is the transition to permanent residence and citizenship); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 222-23 (arguing that guest worker programs should be avoided because they inhibit integration).

¹¹⁴ For background on this issue, see, for example, RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2003).

¹¹⁵ See *id.* at 215-70 (reviewing the historical record of “key areas” of contemporary assimilation, including language, socioeconomic status, residential change, and intermarriage). In practice, of course, integration also involves the receiving state's changing in response to the presence of new residents. See Susan K. Brown & Frank D. Bean, *Assimilation Models, Old and New: Explaining a Long-Term Process*, MIGRATION INFORMATION SOURCE (Migration Pol'y Inst., Wash., D.C.), Oct. 2006, <http://www.migrationinformation.org/Feature/display.cfm?id=442> (discussing the reciprocal nature of the process of integration).

¹¹⁶ See JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 13-21 (1989) (“[A]ctions are explained by opportunities and desires—by what people can do and by what they want to do.”).

immigrants' housing patterns or their concentration in certain employment sectors.¹¹⁷

While immigrant-affecting rules will often have important consequences for integration, their effect on integration does not turn on whether they operate principally through the mechanism of selection or regulation. The conventional wisdom suggests that we should be skeptical of rules that regulate immigrants outside the selection context because such rules are likely to interfere with integration.¹¹⁸ It is on this ground that commentators often criticize rules that limit immigrants' employment opportunities or access to government benefits.¹¹⁹ These commentators might well be right that the particular policies that they criticize interfere with integration. But if so, it is not simply because those rules operate as regulatory mechanisms to shape integration-related opportunities or desires. The mechanism of selection can have similarly powerful effects on integration.

To see this, consider the archetypical immigrant-selection rules: the admissions criteria that determine which potential immigrants (and how many) will be permitted to enter a state. Even were we to assume that those rules affected only spatial sorting, it is clear that admissions criteria have significant consequences for immigrant integration. For example, if language skills are crucial to successful immigrant integration (a point about which there is some disagreement), then admissions criteria that reward potential migrants who speak the primary language of the receiving state can improve the process of integration.¹²⁰ Similarly, if family networks facilitate integration, then admission rules can promote integration by privileging the admission of migrants with family already living in the receiving state.¹²¹

Thus, to the extent that one believes that we should evaluate immigration rules on the basis of their consequences for immigrant integration, focusing on the distinction between selection and regula-

¹¹⁷ Cf. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 96-126 (2004) (discussing these sorts of mechanisms in the context of Filipino migration during the early part of the twentieth century).

¹¹⁸ See, e.g., MOTOMURA, AMERICANS IN WAITING, *supra* note 41, at 151-67.

¹¹⁹ See generally *Plyler v. Doe*, 457 U.S. 202, 221-23 (1982) (concluding that restricting noncitizen children's access to public education would interfere with their integration into the United States).

¹²⁰ See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE? 158-70 (2004) (arguing that linguistic enclaves threaten the process of integration).

¹²¹ See THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER 105-215 (Marcelo M. Suárez-Orozco et al. eds., 2005) (discussing the role that family structures can play in integration); see also Cox & Posner, *supra* note 4, at 854-55 (same).

tion does little to improve our understanding of how best to promote that goal. Hiroshi Motomura's book *Americans in Waiting*, which does a wonderful job of explaining why we should be centrally concerned with the process of incorporating noncitizens, chooses to say almost nothing about the structure of the United States' admissions system.¹²² But my conclusions suggest that the admissions system—and the possibility that the government can use that system as a substitute for the postadmission rules on which Motomura focuses—should be central to any inquiry focusing on immigrant integration.

Moreover, it is important to emphasize that this conclusion does not depend upon any controversial assumption about the moral status of those who live outside the state. Sometimes it seems as though commentators decouple their discussion of admission rules from rules that they classify as immigrant regulating because they think that admission rules can be evaluated only by making difficult judgments about the obligations owed to outsiders: Are we cosmopolitans? Communitarians? Something else? But this conclusion is a mistake produced by an excessively individualistic and *ex ante* focus—a focus on the consequences of the admission rule for the potential immigrant herself, and a focus on the potential immigrant only prior to the application of the admission criteria. Focusing directly on principles like the promotion of integration shows how this way of thinking can be misleading. When a state selects an immigration policy to promote integration, it need not be embracing a cosmopolitan commitment to the life of a prospective immigrant who will benefit from the policy. Instead, the state could be advancing a purely self-interested commitment: the state might believe, for example, that integration is critical to the maintenance of its own democratic institutions.¹²³

B. *Second-Class Status*

Concerns about second-class status are pervasive in immigration scholarship and crop up from time to time in immigration jurisprudence. For example, such concern motivates the central thesis of Daniel Kanstroom's book *Deportation Nation*.¹²⁴ His principal critique is that deportation is used as a tool of "social control," with some de-

¹²² See *supra* text accompanying notes 41-44.

¹²³ This is a common theme in the literature on assimilation and integration. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 88-95 (1980); HUNTINGTON, *supra* note 120, at 178-220.

¹²⁴ See *supra* text accompanying notes 26-32.

portation rules subjecting resident noncitizens to more rigorous standards of acceptable conduct than apply to the rest of the population. By subjecting a particular group to special forms of social control, he suggests, these deportation rules relegate resident noncitizens to a subordinated, second-class status.¹²⁵

The United States has a long history of legal regimes that have been criticized for creating second-class groups—Jim Crow laws that persisted for nearly a century being but one example. To be sure, some claims about second-class status in law are tied specifically to the idea of second-class treatment for those who are citizens. But the idea need not focus only on the treatment of those who possess formal legal citizenship. Concern about legal rules that promote second-class status can be understood in a more catholic sense. Kanstroom, for example, relies on a more capacious understanding that is amenable to claims of second-class status even by those who lack formal citizenship status.

Kanstroom's concern about the promotion of second-class status is a very real one. But like the commitment to integration, concerns about second-class status do not track the distinction between the mechanisms of selection and regulation. As Part I explained, Kanstroom draws a relatively sharp distinction between deportation on the basis of post-entry conduct—in particular, the criminal deportation rules—and deportation to enforce the prohibition on unlawful entry.¹²⁶ On his account, the latter rules may be an inevitable part of the immigrant-selection process, while the former rules represent illegitimate forms of social control that relegate immigrants to second-class status. Kanstroom is right that the criminal deportation rules operate in part as a regulatory mechanism, leading immigrants to live in ways different from citizens. But he is wrong to suggest that this fact is what makes criminal deportation rules threatening to those concerned about second-class status.¹²⁷

¹²⁵ See KANSTROOM, *supra* note 26, at 10-12.

¹²⁶ See *supra* text accompanying notes 26-30.

¹²⁷ Remember that *Deportation Nation* is also wrong to suggest that only deportation rules that are triggered by post-entry behavior operate in part as regulatory mechanisms. As I explained in Part II, even putative selection rules, such as the rule that makes deportable a person who is in the country unlawfully, operate in part as regulatory mechanisms. This rule creates pressure for those in the country unlawfully to live in ways minimizing their contact with government officials. See *supra* text accompanying notes 72-73. As a result, undocumented immigrants often have less access to many of the institutions of civil society (such as law enforcement) than the rest of the popu-

Selection mechanisms can similarly affect the creation of second-class groups. Admissions criteria, which are often thought of as the paradigmatic selection rules (and which clearly produce selection effects), can promote or diffuse the possibility of creating second-class groups within a society. Second-class status in the United States has sometimes been associated with dramatic income inequality. As George Borjas and others have noted, admission rules can affect the level of income inequality in a state. Admission rules like those in the United States, which focus on family-based immigration, tend to alter the composition of the immigrant pool in ways that increase the levels of poverty and income inequality in society.¹²⁸ Systems that focus on highly skilled employment immigration tend to have the opposite effect of reducing income inequality. In short, both sorting and regulatory mechanisms have important consequences for group subordination or the creation of second-class status. The distinction between so-called selection rules and regulation rules obscures this point. Getting past the distinction promotes more comprehensive and coherent evaluation of the implications of immigration law for concerns about second-class status.¹²⁹

Importantly, this argument does not depend on admission rules producing regulatory effects, though they certainly do. Rather, my point is that both the mechanism of selection and the mechanism of regulation can have powerful effects on the creation of second-class groups. For that reason, valuing that normative commitment itself provides no reason to prefer one mechanism over the other.

lation—something of potentially serious concern for those concerned about second-class status.

¹²⁸ See, e.g., GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 62-64 (1999) (arguing that an immigration policy that encourages less-skilled workers to enter the United States will harm the economic well-being of native low-wage workers).

¹²⁹ The argument would apply largely unchanged if one were concerned more about preserving certain kinds of opportunities than about preventing the creation of second-class groups. Concern for opportunity-limiting rules might lead us to be skeptical of rules that restrict immigrant access to things like employment or voting. But as I explained in Part II, even archetypical selection rules like admission requirements can restrict those opportunities. So if our normative concern is discouraging legal rules that interfere with an individual's opportunity to pick a particular profession or spouse, for example, there will be little reason to distinguish between so-called selection rules and other rules.

C. Impermissible Choices

We might think that there are certain choices that states simply should not offer to potential immigrants. The idea that some choices and bargains are impermissible is commonplace in law. The law voids certain contractual arrangements as unconscionable, proscribes the sale of babies and body parts, and prohibits individuals from bargaining away certain constitutional protections.¹³⁰ The reasons for these limitations on the choices that people make and the bargains into which they enter are varied and occasionally a bit mysterious. Sometimes the restrictions seem to stem from concern about deficiencies in the individual's process of choosing that are the result of informational asymmetries, bargaining-power disparities, externalities, and so forth. Often, however, the law forbids certain bargains regardless of whether any decision-making defects are present.¹³¹ We have extremely strong intuitions that a person may not sell herself into slavery in any situation, even if we are hard pressed to pinpoint the source of that intuition.

The idea of impermissible choices (or unconstitutional conditions) is nascent in immigration law and scholarship. At times constitutional immigration jurisprudence has suggested that immigrants are not permitted to trade away certain constitutional protections in exchange for the right to reside in the United States.¹³² Commentators sometimes go further, proposing that a receiving state should not force potential immigrants to choose between residing in the state and, say, occupational freedom.¹³³ Given the pervasiveness of the idea of impermissible bargains throughout law, the fact that these ideas appear in immigration jurisprudence and scholarship is unsurprising.

¹³⁰ See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993) (exploring the desirability of limiting the power of the state to bargain with its citizens); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

¹³¹ See Saul Levmore, Lecture, *Unconditional Relationships*, 76 B.U. L. REV. 807, 808-13 (1996).

¹³² See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("[A] continuously present permanent resident alien has a right to due process [when threatened with deportation]."); *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (requiring that an immigrant be given "all opportunity to be heard upon the questions involving his right to be and remain in the United States" before deportation).

¹³³ See, e.g., WALZER, *supra* note 95, at 56-61 (objecting to all guest worker programs on these grounds).

While this concern for impermissible bargains has an important place in immigration law and theory, the commitment does not track the distinction between the mechanisms of selection and regulation. Both putative immigrant-selecting and immigrant-regulating rules can violate a constraint on permissible bargains. Consider, for example, a rule that grants an immigrant the right to reside in the United States on a three-year employment visa.¹³⁴ Or consider a rule that makes resident noncitizens ineligible for Medicaid for five years after admission.¹³⁵ The first rule might be more likely thought of as an immigrant-selecting rule, while the second might be more likely described as an immigrant-regulating rule. But each of these rules might raise questions about permissible choices. One might believe, for example, that it is impermissible for a state to offer potential immigrants a choice under conditions in which the immigrants are likely to have little information about the consequences of that choice, or where immigrants' estimates of those consequences are for cognitive reasons terribly biased. On this theory, the permissibility of an immigrant-affecting rule would depend directly on the presence of information deficiencies or cognitive biases. If potential immigrants tend to be excessively optimistic about their future health but realistic about the likelihood that they will want to remain in the United States after working here for three years, we might be more comfortable with temporary employment visas than with restrictions on Medicaid access. On different assumptions, however, the healthcare rule could look much better and the temporary admission rule much worse.

Relatedly, consider an approach that focuses on bargaining power. On this conception of impermissible choices, the legitimacy of a rule like the Medicaid restriction would turn in part on the other options available to potential migrants. It might be much more permissible to impose the rule on well-educated, highly skilled migrants with many destination country options than on, say, potential political asylees.

These are, of course, stylized examples. Explaining exactly why the Constitution or some moral theory prescribes particular choices (or conditions on choice) is extremely difficult, as attested to by the vast and largely unsatisfying literature on unconstitutional conditions.

¹³⁴ See 8 U.S.C. § 1184(g)(4) (2006) (limiting the period of authorized admission for temporary-worker visas to six years); 8 C.F.R. §§ 214.2(h)(9)(iii), (h)(15)(ii)(B) (2008) (outlining the various time-period restrictions on approvals for temporary workers, depending on their occupations).

¹³⁵ See 8 U.S.C. § 1613.

Nonetheless, the important point is that this difficult but quite relevant question is obscured by the pervasive focus on the distinction between immigrant selection and regulation.

* * *

Each of the normative theories I have sampled here may or may not be particularly compelling. But my point is not to defend them on their merits. My aim instead is to show that concern for those commitments should not lead us systematically to prefer the mechanism of selection over regulation, or vice versa. One could obviously choose different examples and alternative normative theories to make this point. For example, there is a legal consensus that tourists should not vote but that a tourist charged with a crime should receive the same procedural protections available to citizens.¹³⁶ There are a variety of theories that might reconcile these twin intuitions. One possibility turns on something about the nature of the right itself; voting is sometimes considered less fundamental or universal than other types of rights.¹³⁷ Another possibility is tied to a particular conception of democracy: that voting rights need only be available to those whose interests are affected in a sufficiently substantial or permanent way by government action, which might not be the case for tourists. A third possibility is tied to exit opportunities: there may be instances in which exit may serve as a legitimate substitute for access to political voice, and tourists may have more obvious exit opportunities than many others. Regardless of the precise theory, however, the point is that most puzzles about the legitimacy or desirability of particular immigration rules are best understood by reference to the same prob-

¹³⁶ With a few potential exceptions, states and local governments have never permitted noncitizens who were temporary residents to vote. See generally RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 87-107 (2006) (analyzing examples of immigrants voting in local elections); KEYSAR, *supra* note 36 (surveying the history of the franchise in the United States, including restrictions on voting by noncitizens). In contrast, for over a century clear Supreme Court precedent has accorded noncitizens charged with crimes the same due process protections available to citizens. See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

¹³⁷ See, e.g., SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 1-64 (3d ed. 2007) (surveying cases that highlight the complicated constitutional status of voting rights in the United States). Of course, some process-perfecting theories of constitutional law flip this presumption and treat full access to the political process as perhaps the most important right. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 116-25 (1980) (“[U]nblocking stoppages in the democratic process is what judicial review preeminently ought to be about, and denial of the vote seems the quintessential stoppage.”).

lems and theories prominent in other areas of law. Treating the problems as unique to the immigration arena is generally unproductive and frequently counterproductive.

IV. THE IMPLICATIONS FOR INSTITUTIONAL DESIGN

Lifting the haze created by the misleading distinction between selection rules and regulatory rules has important implications for the institutional design of immigration systems. Part III highlighted perhaps the most important one: there is no a priori reason to prefer the mechanism of selection over regulation—or vice versa—when evaluating the structure of immigration law. But other concrete insights also follow from understanding more fully the consequences of legal rules for spatial sorting and other sorts of behavioral regulation. This Part briefly highlights three such implications, each of which allows us to begin thinking more creatively about the structure of immigration law.

A. *Immigration Law and Information Policy*

My focus on the material consequences of immigrant-affecting rules highlights the importance that information can play in immigration policy. Consider the decisions immigrants make about whether to enter the United States. Sometimes these decisions are directly constrained by the coercive force of the state. An immigrant might present herself for admission at the border and be turned away because she falls within one of the grounds of inadmissibility under the Immigration and Nationality Act.¹³⁸ More often, however, immigrants' spatial-sorting decisions will be constrained by the way in which legal rules shape their incentives. An immigrant might choose to enter in part because she knows that her children will be able to go to public school, or she might choose not to enter because she knows that she will face restrictions on job mobility.¹³⁹ This is, of course, no more than a standard account of how law works. Law pervasively regulates behavior by generating incentives, not solely through the direct exertion of coercive force.

¹³⁸ See 8 U.S.C. § 1182 (2006) (setting out the grounds of inadmissibility, including, for example, insanity, drug addiction, and criminality).

¹³⁹ See, e.g., Shachar, *supra* note 80, at 164-65 (proposing that skilled migrants seek not only improved employment but also a home country that will provide valuable benefits).

Of course, a legal rule can affect immigrants' decisions about where to live only if those immigrants have information about the existence and content of the rule. As a matter of institutional design, this means that some immigrant-affecting rules might be less effective by virtue of the fact that they are less well known. For example, state rules relating to immigrants may be less effective sorting mechanisms if immigrants are likely to have less information about state rules than federal rules. To know whether this is true, we would need to know considerably more about the way in which information is transmitted to communities of potential immigrants.¹⁴⁰ But it seems possible that these communities are less likely to have information about state and local policies, either because of the greater number and diversity of such policies, or because of the lack of formal institutions like consular offices to transmit information. If so, state policies may not be particularly effective substitutes for federal policies because they may send weaker signals to noncitizens contemplating migration.

More generally, recognizing the role of information suggests that information policy may be an important component of a state's immigration policy. To 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. Moreover, receiving states might use information policy directly as a strategy for signaling potential migrants. Lior Strahilevitz has advanced a similar argument with respect to property law.¹⁴¹ He has argued that exclusion in property regimes is often accomplished not through coercion but through the use of what he terms "exclusionary vibes," which "involve[] the landowner's communication to potential entrants about the character of the community's inhabitants. Such communication tells potential entrants that certain people may not feel welcome if they enter the community in question"¹⁴² What role this sort of signaling can or should play in immigration policy has gone largely unexplored. Its

¹⁴⁰ There is a substantial literature by sociologists studying these information networks and their role in facilitating migration. See, e.g., STEPHEN CASTLES & MARK J. MILLER, *THE AGE OF MIGRATION* 21-32 (3d ed. 2003) (surveying literature on the different theories of migration, including informal information networks). But for the most part this work does not focus specifically on the transmission of information about legal conditions in the receiving state.

¹⁴¹ See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

¹⁴² *Id.* at 1851.

significance has been obscured by conventional accounts of the structure of immigration law.

B. *Immigration Federalism Redux*

Immigration federalism is another arena in which my central analytic claims have interesting implications for institutional design. As Part I explained, courts often hold that the constitutional authority of a state or local government to enact a rule that affects immigrants depends on whether or not the rule is considered a selection rule.¹⁴³ States are often thought to be barred from enacting immigrant-selecting rules. But given that 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.

Although it is analytically impossible to prohibit states from enacting rules that affect the spatial sorting of noncitizens, this does not mean that there are no differences between state and federal regulation of noncitizens. Indeed, my focus on the consequences of immigrant-affecting rules points to an important analytic distinction between state and federal rules: their different jurisdictional boundaries create different types of spatial sorting pressure. In other words, state laws disaggregate the spatial sorting pressure imposed by a federal rule. A state rule typically imposes costs (or benefits) only on the decision to live within the boundaries of the state. In contrast, a federal rule imposes costs (or benefits) on the decision to live anywhere within the nation's borders.

Debates about the legality and legitimacy of state efforts to regulate noncitizens generally overlook this way in which the sorting pressure imposed by state and federal rules differs. It is possible that courts and commentators ignore this analytic difference because they believe that it is of little practical significance, and in some instances this may be true. Some migrants may have only one plausible destination in the United States, perhaps because of their family and social connections, or perhaps because of the structure of the U.S. labor market. For this group of migrants, a state rule that creates pressure to leave the state will, in practice, create pressure to leave the coun-

¹⁴³ See *supra* text accompanying notes 48-64.

try.¹⁴⁴ In such situations, state policies will be close substitutes for similar federal policies.

But many immigrants today are not so constrained. The rise of new migration destinations in North Carolina, Iowa, and other states is suggestive evidence of this increased mobility.¹⁴⁵ And as settlement options for migrants expand, the sorting consequences of state and local rules will diverge from the consequences of immigrant-affecting federal rules. State rules will more and more frequently create pressure for interstate sorting but not for sorting across national boundaries.

Whether such interstate sorting of immigrants should be cause for celebration or concern is well beyond the scope of this Article. But this difficult question is not unique to immigration policy; rather, it is a central question of the large literatures on federal systems, jurisdictional competition, and democratic theory. This work reveals that there are both virtues and vices to such interstate sorting—which might explain why American constitutional traditions reflect considerable tension about its desirability.¹⁴⁶ Those traditions are sometimes read to endorse such sorting as a way to alleviate conflict among diverse groups living within a shared republic.¹⁴⁷ At the same time, American constitutional law has long frowned on rules that impair the right of internal mobility.¹⁴⁸ Whatever the status of this debate, immi-

¹⁴⁴ Cf. Randal C. Archibold, *Arizona Is Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13 (reporting that some immigrants in Arizona are returning to their home countries in part because of restrictive state laws that penalize employers for hiring immigrants who lack work authorization); *Illegal Immigrants Leaving Arizona*, Associated Press, USA TODAY, Dec. 22, 2007, http://usatoday.com/news/nation/2007-12-22-immigration-leaving_N.htm (same).

¹⁴⁵ See AUDREY SINGER, THE BROOKINGS INST., THE RISE OF NEW IMMIGRANT GATEWAYS, available at http://www.brookings.edu/~media/Files/rc/reports/2004/02demographics_singer/20040301_gateways.pdf (analyzing past, present, and projected future gateways for immigrants to the United States); Rodríguez, *supra* note 48, at 588-89 (describing the rise of Iowa as a new settlement area for immigrants).

¹⁴⁶ For example, Michael Walzer takes the position that political morality requires every nation state to guarantee freedom of internal movement. See, e.g., WALZER, *supra* note 95, at 36-42. He famously invoked this principle to bolster his defense of national restrictions on immigration. See *id.* at 39 (arguing that the absence of national border controls would lead to the creation of a “thousand petty fortresses” as local governments worked to exclude those they deemed undesirable).

¹⁴⁷ See, e.g., Roderick M. Hills, Jr., *Federalism and Fear: Sorting and Democratizing Politics in Federal Regimes* (Jan. 8, 2008) (unpublished manuscript), available at <http://www.law.uchicago.edu/files/law-and-politics-workshop-hills.pdf> (analyzing the history of sorting policies in Western societies and their various degrees of success at limiting internal conflict).

¹⁴⁸ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 504-07 (1999) (holding that a state’s one-year residency requirement to receive benefits under the federal Temporary Assistance

gration scholarship would do far better to focus on this question than on ineffectual efforts to classify state and local rules as either concerning or not concerning immigrant selection.

C. *Temporary Deportation*

America's deportation policy is one of the most widely criticized aspects of modern immigration law. Over the past several decades, the scope of conduct that renders an immigrant deportable has expanded at a breathtaking rate. Today a wide variety of minor criminal conduct renders even long-term permanent residents deportable. This trend is part of what has led Kanstroom and others to argue that deportation has morphed into a form of "social control."¹⁴⁹

The current deportation rules may well deserve widespread condemnation.¹⁵⁰ But if they do, it is not for the reason Kanstroom argues. His critique misses the mark because all deportation rules create both sorting pressure and pressure to live in a particular way.¹⁵¹

But the effort to conceptualize deportation as concerned purely with selection (and to criticize deportation rules that deviate from the selection model) causes an additional problem: it obscures legal-design options by flattening the concept of deportation. Viewing deportation as exclusively about selection—either for residence or for membership—leads us to think about deportation as a binary concept. On this understanding, deportation becomes an on-off switch that controls whether a particular noncitizen will be deselected.

Once we abandon this exclusive focus on selection, it becomes clear that deportation need not be seen as a binary concept. In the same way that there are varieties of admission—with some immigrants admitted as permanent residents, others as temporary workers, and so on—there can be varieties of deportation. The concept of deportation can be disaggregated into (1) the physical removal of a noncitizen from the territorial United States, accompanied by (2) an additional set of legal conditions relating to the noncitizen's right to reside in the United States. Describing the concept of deportation in this fashion draws attention to the fact that some such variation al-

to Needy Families program unconstitutionally infringed upon the right to travel); *cf.* U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

¹⁴⁹ See *supra* text accompanying notes 26-30.

¹⁵⁰ See, e.g., Cox & Posner, *supra* note 4, at 835-44 (suggesting some reasons why the current deportation rules may make little sense).

¹⁵¹ See *supra* text accompanying notes 72-76.

ready exists in U.S. immigration law. The Immigration Code typically makes a deportee ineligible to apply for readmission for a fixed period of time—sometimes five or ten years, though a lifetime bar on readmission is becoming increasingly common.¹⁵² Even in existing law, therefore, deportation is not quite binary.

But disaggregating the concept of deportation highlights a much broader suite of available legal rules. One possibility is the idea of temporary deportation, which has never been considered by immigration scholars. A temporary deportation rule would be one that required the physical removal of a person from the country but accorded this person the right to reenter after a fixed period of time.¹⁵³ Relatedly, conditions other than temporal restrictions could be placed on the noncitizen's right of reentry. Deportation provisions could, for example, make those currently subject to deportation for minor drug crimes eligible for readmission upon the completion of qualified drug treatment outside the country.

Like the other options discussed in this Part, disaggregating deportation, and thereby expanding the suite of regulatory options available to a state, could have both advantages and disadvantages. It could lead to excessive reliance by the government on temporary deportation as a substitute for other regulatory measures, such as criminal prosecution. On the other hand, it could alleviate some costly and potentially counterproductive features of the existing immigrant regu-

¹⁵² See 8 U.S.C. § 1182(a)(9)(A) (2006) (setting five- and ten-year bans on readmission for immigrants previously deported). Some deportable noncitizens are eligible for a statutory alternative to deportation called “voluntary departure.” See 8 U.S.C. § 1229(c). Noncitizens who depart the country pursuant to a voluntary departure agreement avoid the collateral legal consequences of deportation and may immediately reapply for admission. See 8 U.S.C. §§ 1182, 1229(c). Often, however, these noncitizens cannot qualify for any of the employment-, family-, or refugee-related grounds of admission. And recent changes in the law have made voluntary departure a less attractive option for noncitizens. See ALEINIKOFF ET AL., *supra* note 20, at 820-21.

¹⁵³ What I term “temporary deportation” is quite different from any existing rule in American immigration law. It is true that, under the current system, some noncitizens have the right to reapply for admission after a period of time. Nonetheless, the right to reapply still requires the noncitizen (1) to come within one of the grounds of admissibility (such as the family- or employment-related grounds); (2) to fit within whatever applicable quotas might limit their eligibility for admission; and (3) to not be deemed inadmissible. As a formal matter, therefore, they have no legal right to reenter. And as a practical matter, reapplying for admission will often be futile because the basis of a noncitizen's prior deportation often constitutes a ground of inadmissibility. Temporary deportation would flip the legal entitlement at the end of the temporary period and accord the noncitizen the right to reenter. In many cases this would lead to dramatically different consequences.

latory system—such as the fact that there is little bargaining in modern deportation proceedings, relative to the bargaining that occurs in the criminal justice system, because deportation is a largely binary rather than graduated sanction.¹⁵⁴ Regardless of the ultimate evaluation of these options, it is difficult to begin to imagine these possibilities until we discard the close association of the concept of deportation with the concept of selection.

CONCLUSION

For over a century, immigration law has resisted the norms that apply to most of our domestic legal system. Immigration scholarship has similarly been segregated from much of the contemporary public-law discourse. Both of these trends have been driven in part by the idea that the process of selecting immigrants is exceptional. This Article has argued against immigration exceptionalism. The process of selecting immigrants is deeply and irrevocably intertwined with the process of regulating their daily lives. Recognizing that fact reorganizes a variety of prominent modern debates about the structure of immigration law both in and out of the courts. While this Article cannot hope to resolve those debates, it does aim to provide a new path for future conversation about these difficult constitutional and moral questions.

¹⁵⁴ This is an important problem in immigration law today. The existing immigration adjudication system has been widely criticized by scholars, jurists, and advocates. *See, e.g.*, Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671 (2007) (suggesting that the skepticism of Judge Posner and others towards immigration courts may reflect either a nondelegation norm or dissatisfaction with the quality of agency decision making). Most of these critics have advocated internal reforms to improve the system. They have argued for things like more-qualified immigration judges or appointed counsel for immigrants in removal proceedings. These suggestions are valuable, but they overlook another avenue of improvement: external changes to the structure of immigration law that reduce the burden on the system of immigration adjudication. Making changes that promote the bargained resolution of a much higher fraction of immigration cases is one way to reduce this burden.