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US IMMIGRATION & NATIONALITY LAW

HOW MANY AMERICANS IN WAITING?

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by
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While the debate on whether to legalize millions of undocumented immigrants and create a pathway for their citizenship continues to rage, a gem of a book advocates for a paradigm shift on how we ought to be viewing immigrants. It essentially states that immigrants ought to be treated like citizens.

Americans in Waiting – The Lost Story of Immigration and Citizenship in the United States by Hiroshi Motomura (Oxford University Press) is brilliant and insightful. It takes the reader through a fascinating tour of the landmark Supreme Court decisions on immigration and analyzes them through three viewpoints – immigration as contract, immigration as affiliation and immigration as transition. It is the last viewpoint that Professor Motomura focuses on in his book. Since the late 1700s, people who landed on America's shores were put on a track to citizenship and were treated on an equal footing as citizens. These immigrants, which he terms "Americans in Waiting," could vote and were also given diplomatic protection. The concept faded away after it became irrelevant to declare one's intention to become a citizen. He advocates for its revival today.

Motomura, who is Kenan Distinguished Professor of Law at the University of North Carolina School of Law, first analyzes the Supreme Court's infamous Chinese Exclusion cases and their progeny under a contract-based reasoning. This approach does not require equality, but rather, depends entirely on the terms of the immigration contract. The contract can be altered or revoked at the will of the sovereign. The Chinese Exclusion cases served as a precursor to limit immigration to the US by race, ethnicity or objectionable political views. Yet, not all cases under the contract-based approach have been decided

against the immigrant. In 2000, the Supreme Court in *St. Cyr* employed contract analysis to hold that Congress did not provide adequate notice when it eliminated waiver eligibility for those who had been convicted of crimes.

Professor Motomura then takes the reader through the decisions of the Supreme Court that have held that deportation procedures must meet minimum constitutional standards. These decisions have involved non-citizens who have developed ties to the United States. This he terms "immigration by affiliation" and the decisions include *Chew*, *Bridges, Woodby* and *Plasencia,* which bucked the plenary power trend. Finally, Professor Motomura re-visits some of the plenary power decisions, *Harisiades and Carlson*, which rejected the immigrants' due process claims and observed that they had failed to naturalize. Looking at these decisions with a new lens, the Supreme Court might have analyzed them from the transition point of view. If these immigrants had naturalized, they would not have been subject to deportation.

It is the transition viewpoint that Professor Motomura forcefully advocates for its revival. If this approach is revived, non-citizens who become legal residents should be viewed, within the first few years, as citizens in waiting and be accorded the same benefits as citizens in the areas of voting, public employment, benefits, family reunification and also be given some measure of protection against deportation. Also, a transition-based model to immigration would allow greater integration of immigrants into America, and through their participation, could also influence it. Thus, it is hoped that although immigrants in transition may have to buy into a culture shaped largely by a white, protestant Anglo-Saxon majority, their early participation in the political process would also enable the country to benefit by embracing new ideas and cultures. Once immigrants in transition are on the same level playing field as citizens, it would be harder to deport them by changing the rules midstream, as we saw in the Immigration Act of 1996 or through discriminatory post 9/11 immigration policies. One would think that immigrants in transition would be able to argue that they are immune from deportation like citizens, but Professor Motomura believes that they should be deported for serious crimes, although it would be harder to deport them than non-citizens.

The greater protection given to immigrants in transition will cease if they choose not to naturalize. Yet, Professor Motomura argues that even if such immigrants lose the protection accorded to immigrants in transition, the other views, contract and affiliation, should be able to continue to protect them. Thus,

immigration by contract and affiliation continue to remain viable alongside immigration by transition.

One would hope that Professor Motomura could have extended the transition model to non-citizens who are waiting to become permanent residents. Indeed, the broadest group of aspiring citizens are those who are on the cusp of permanent residence. They may be in the US lawfully on temporary work visas, like the H-1B, which allows "dual intent," and are unable to immigrate because of backlogs in the employment-based preferences. Then, there are people who have filed applications for permanent residence but are unable to be granted the coveted status because of inordinate delays under the FBI name check security procedures. Finally, many non-citizens are present in the US in an undocumented capacity, but are on the pathway to permanent residence as a result of ameliorative measures such as Section 245(i).

These intending immigrants have been subject to retroactive deportation laws, profiling after September 11 and an inability to pursue appeals over denials in the federal courts. Should this group of intending immigrants, who also aspire to become citizens, not be covered under the transition model?

Also, it is worth questioning whether the transition approach adopted from America's past, and without re-examination, tends to force immigrants to naturalize and integrate into a society different from theirs in a short period of time? Immigrants no longer come to the shores of America in sailboats or steamships, forever leaving behind their homelands. Unlike the past, intending immigrants can no longer set foot on American soil and be considered legal residents from the get go. Immigrants may choose not to become citizens because certain countries prohibit dual citizenship, and they still maintain dual allegiance. Others may lose valuable property or inheritance rights in their countries of origin if they become US citizens. As a result of traveling for business reasons between the US and other countries, they may not yet readily meet the residency requirements for naturalization. Yet, others would be happy to continue to remain "guest workers" all their life by working in the US on extended temporary visas and then periodically returning to their home country. And an unfortunate few may never be able to become permanent residents as they lack the qualifying relative to obtain waivers, particularly the waiver to overcome the HIV ground of inadmissibility. Some immigrants are afraid to become citizens as they are afraid that the broad and opaque "good moral character" requirement will be used against them at a naturalization

proceeding.

This writer would like to believe that a human rights model could also provide justice to immigrants regardless of ties, affiliation and independent of whether the individual qualifies for citizenship or not. The rights approach has been applied to people fleeing persecution who seek protection in the US and to battered spouses whose sponsors have withdrawn support. These protections have been extended to victims of crimes and trafficking through the U and T visas. The rights model, if allowed to proliferate, would allow the immigrant with HIV to overcome the ground of inadmissibility without the qualifying relative and for the same sex immigrant partner to also obtain immigration benefits through the US partner. Such a model would also preserve family reunification by preventing parents from being torn from their US citizen children and for the close family of permanent residents to quickly come to this country.

Regardless of whether the reader agrees or disagrees with the immigration in transition approach, Professor Motomura's model is powerful and can resonate rather poignantly to both policy makers and the American people. If immigrants, and those on the cusp of becoming permanent residents, are viewed as Americans in Waiting, it would result in an attitudinal shift from the way we look at immigration today. It will be more difficult to see them as dispensable, and thus easily deportable and capable of being torn away or kept separated from their loved ones. The book is a must for anyone interested in this nation's immigration history and contemporary immigration issues.

The book can be purchased by clicking on this link - http://www.us.oup.com/us/catalog/general/subject/Law/ImmigrationLaw/~~/dmlldz11c2EmY2k9OTc4MDE5NTE2MzQ1Mg==

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This article is based on Mr. Mehta's commentary at a program with Hiroshi Motomura, "Are Immigrants Really Americans in Waiting?" New York Law School, NY, March 26, 2007.