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THE CITIZENSHIP PARADOX IN A TRANSNATIONAL AGE

*Cristina M. Rodríguez**

AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES. By *Hiroshi Motomura*. Oxford and New York: Oxford University Press. 2006. Pp. vii, 254. Cloth, \$29.95; paper, \$19.95.

INTRODUCTION

Through *Americans in Waiting*, Hiroshi Motomura¹ tells us three different stories about how U.S. law and policy, over time, have framed the relationship between immigrants and the American body politic. He captures the complexity, historical contingency, and democratic urgency of that relationship by canvassing the immigration law canon and teasing from it the three frameworks that have structured immigrants' social status, their interactions with the state, and the processes of immigrant integration and naturalization. In so doing, he illuminates how popular mythologies about the assimilative capacity of the American melting pot obscure myriad political and social conflicts over how best to produce Americans. He also demonstrates how alternating cycles of inclusive and exclusionary politics have shaped the processes through which American citizenship has been defined. As he charts this history, Motomura reminds us of the unceasing importance of the institution of national citizenship, particularly in an era of semiporous borders and transnational forms of political and economic association. He calls on Americans to honor the very best of the three historical traditions he presents by treating lawful immigrants as American citizens in waiting, presumptively entitled to all the prerogatives of membership.

In making this bold plea, Motomura brings to light a paradox that has become increasingly apparent over the last decade. In a globalizing world marked by heightened migration and transnational forms of association, we still need robust conceptions of national, geographically anchored citizenship to promote social cooperation.² But the political institutions, such as citizenship, that support strong frameworks of belonging cannot fully absorb the influx of migrants with plural loyalties. The public opinion on which the maintenance of those frameworks depends often resists including too many new members, particularly when those new members are poor or racially and culturally distinct. In other words, the global phenomena of large-scale

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2. See *infra* Section II.B.

migration and transnational loyalties fragment national political communities and make it more difficult for the institutions that traditionally promote social cohesion—like citizenship—to effectively respond to that fragmentation.

This paradox may not be resolvable, and it may make *full-scale* revival of the Americans-in-waiting ideal impossible. But the first step in addressing the dilemma is certainly to understand its origins. In Part I of this Review, I therefore begin by discussing Motomura's account of the history of immigration to the United States. Through this retelling, Motomura provides an essential resource for those steeped in immigration law and history, as well as a revelatory read for anyone interested in how Americans can remain true to our historical willingness, as a nation of immigrants, to incorporate newcomers humanely and fairly. In Part II, I consider why Motomura's insights on the need for strong national anchors of belonging still matter in a supposed transnational age and how that need conflicts with the preferences of entrenched populations. This conflict results in what I call the admissions–status tradeoff, or the dynamic whereby the acceptance of large numbers of immigrants is accompanied by parsimonious treatment of those same immigrants. I conclude by offering some thoughts on how to broach these tensions in a way that is true to Motomura's vision of immigrants as Americans in waiting.

I. LOOKING IN ON IMMIGRATION: THREE OLD RELATIONSHIPS

In *Americans in Waiting*, Motomura identifies three conceptions of the relationship between immigrants and the body politic that have shaped our law and policy: immigration as contract, immigration as affiliation, and immigration as transition (pp. 8–12). The discussion of immigration as transition represents the normative and emotional heart of the book, as well as Motomura's primary challenge to his readers. In dialogue with the work of other scholars who have made the case for treating immigrants as full and genuine members of our society,³ Motomura calls for a reinvigoration of the idea that immigrants are in transition toward becoming American citizens and therefore should be treated as presumptively equal to citizens (p. 9).

Motomura describes immigration as transition as a lost tradition in our immigration history that predates the passage of the 1952 Immigration and Nationality Act (p. 8). According to this tradition, lawful residents who filed a declaration expressing their intention to naturalize acquired many of the rights of citizenship. “Intending citizens” possessed voting rights into the

3. See, e.g., T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10 (1990) (“[I]f membership is to be the guiding principle for constitutional analysis of the immigration power, then the circle of membership should include permanently residing aliens.”); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093–1100 (1976) (noting that many states permitted aliens to vote through much of the nineteenth and early twentieth century). For an excellent discussion of the complex interaction of immigration and alienage law and the ways in which the border reaches inside the United States to justify drawing distinctions between citizens and noncitizens, see LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006).

early twentieth century, as well as the right to sponsor the immigration of their relatives without limitation. They were eligible for grants of land under the 1862 Homestead Act, and many states and localities permitted them to participate in public-works projects and other public programs intended for citizens (pp. 116–19).

Not all immigrants were eligible to be treated as Americans in waiting, of course. As Motomura points out, naturalization was open only to whites from 1790 to 1870, to whites and blacks from 1870 to the 1940s, and to all immigrants regardless of race only after 1952 (p. 123). But the equal treatment of intending citizens reflected a belief that certain “we/they” dichotomies are inappropriate in a democratic society (p. 14). Motomura calls for a universally applicable revival of this conception to honor our country’s immigrant traditions and advance the integration of current immigrants, who are arriving in the United States in unprecedented numbers.⁴

To understand what such presumptive equality would entail and to appreciate why Motomura’s Americans-in-waiting idea is simultaneously compelling and challenging, it is first critical to understand the frameworks with which immigration as transition has competed throughout American history. Under immigration as contract, immigrants are entitled to remain in the United States as long as they abide by the terms of their admission (p. 36). The government need only provide them with fair notice of those terms. Should the terms be violated, the government can revoke its permission to stay at any time and deport the immigrant—an option not available to the government in its relations with its citizens. The animating principles behind immigration as contract are fairness and the protection of expectations, not equal treatment (p. 10). Equality presumes belonging. But under the immigration-as-contract framework, noncitizens, by definition, do not belong to the body politic, and equal treatment therefore has no place in defining their status (pp. 88–89).

Immigration as affiliation, by contrast, assumes that immigrants can earn their inclusion in the body politic (p. 89). The ties and roots immigrants establish inside the United States—to employers, to spouses and children who are citizens, and to social networks—gradually transform immigrants from outsiders to quasi citizens. As immigrants become increasingly integrated into American life, they accrue entitlements that the government must recognize—entitlements that also, indirectly, protect the interests of the U.S. citizens to whom they have become attached (p. 90). In other words, immigrants derive their status from the role they play in making our society function. The terms of their membership can change over time as that role

4. See, e.g., RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 8–9 (2003); Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOC. 105, 107 (2005) (“[W]e believe that there will be a . . . replenishment of immigrants that is likely to be a defining characteristic of American immigration for years to come.”); cf. Mary C. Waters and Reed Ueda, *Introduction*, in *THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965* 1, 2 (Mary C. Waters et al. eds., 2007). (“The foreign-born of the 21st century are more numerous than ever before, but at 12.1 percent of the population, they constitute a smaller proportion of the total population than they did a century ago, when they were 14.7 percent.”).

evolves, in contrast to the contract model that determines an immigrant's rights upon his arrival (p. 90). Though the transition and affiliation models can both be characterized as inclusive, under the latter in particular, "America's welcome is uncertain and deferred," and immigrants are not treated as presumptively equal (pp. 154–55).

Both immigration as contract and immigration as affiliation have shaped our laws and policies, and together largely have subsumed the transition model. Motomura canvasses the Supreme Court's major immigration cases and shows how these models have competed with one another in court opinions and legislative debates. Immigration as contract, for example, emerged in the foundational cases of immigration law through which the Supreme Court upheld the Chinese Exclusion Acts and developed the so-called plenary power doctrine.⁵ Though the ideology of Anglo-Saxon superiority expressed by the Court marks the opinions as products of the late nineteenth century, the idea that controlling borders, or setting the terms of immigrant admissions, is a core function of the national sovereign remains vital today. Immigration as contract therefore shapes much of contemporary immigration law. For instance, Congress has dramatically expanded the grounds for removal under the aggravated felony category—a category that originally included murder and the trafficking of firearms or drugs but that has been broadened to include fraud or deceit crimes and crimes classified as misdemeanors under state law (p. 55). This expansion of the list of terms according to which immigrants forfeit their right to remain in the United States reflects a continuation of the contract mentality.⁶ Proposals circulated in the last year for guest worker programs⁷ that would admit workers on a strictly temporary basis with no path to permanent residence and bar those workers who violate the terms of their visa from ever legally returning to the United States also reflect the contract mentality.⁸

As Motomura points out, because the contract framework consists of the fairness principles of notice and the protection of expectations, it can some-

5. See, e.g., *United States v. Chae Chan Ping (Chinese Exclusion Case)*, 130 U.S. 581 (1889). This doctrine is the constitutional justification for Congress's complete authority to set the terms of immigrant admissions and provide for removal of noncitizens who fail to comply with those terms. P. 29. Though the doctrine originated in a contract framework, it permits Congress to adjust the model according to the prevailing sentiment of the day.

6. At the same time that the grounds for removal have expanded, relief from removal—an expression of the affiliation model—has become more difficult to win. P. 55.

7. See, e.g., Editorial, *Talking Nonsense: The Bush administration's plan on immigration is divorced from reality*, WASH. POST, April 2, 2007, at A14 (discussing President Bush's latest proposal to limit guest worker visas to six years total and require visa holders to leave the country every two years for six months at a time); see also Side-by-Side Chart for Major Immigration Legislation Pending in 109th Congress, Migration Policy Inst., available at http://www.migrationpolicy.org/ITFIAF/legislation_jan06.pdf (listing the visa terms for various bills).

8. I have critiqued reliance on the contract model in existing proposals for a large-scale guest worker program elsewhere. See Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (noting that because migrants' intents change, temporary guest worker programs force migrants into an untenable choice and impose externalities by creating a temporary laboring class without full participation rights).

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times work in the immigrant's favor, as when the Supreme Court declined, in *INS v. St. Cyr*,⁹ to apply new eligibility rules for cancellation of removal to a noncitizen whose conviction had been entered before the new rules were put into place (pp. 56–57). But the Court also made clear that it would not strike down a clear statement from Congress that it intended the rules to be applied retroactively, suggesting that Congress retains the power to change the terms of the contract between the noncitizen and the state. Indeed, the constantly expanding definition of aggravated felony applies retroactively to render removable noncitizens who were convicted of crimes that were not considered aggravated felonies at the time they were committed, arguably defying the notice the immigrant had been given and thus thwarting the immigrant's original expectations.

According to Motomura, immigration as affiliation emerged in the second half of the twentieth century “to compete with immigration as contract,” in response to the imperatives of the developing welfare state (p. 80). As welfarism evolved, policymakers came to understand government obligations as arising out of “more elusive notions of justice” that did not depend on voluntary consent or express agreements (p. 88). Under the affiliation framework, the longer an immigrant has lived in the United States and the more significant his ties have become, the more likely he is to be recognized by a court or by the state as a member entitled to protection of his interests.

This conception of immigration animates the law's provision for relief from removal, providing a kind of equitable remedy by which a noncitizen otherwise deemed removable might remain in the United States. This relief from removal often turns on the strength of the immigrant's ties to the United States (pp. 97–100). Immigration as affiliation also framed legislative debates in 1996 over whether to deny lawful immigrants welfare benefits (p. 85). In the original legislation, eligibility for benefits depended in part on immigrants' ties to the United States. The framework subsequently enabled courts that heard challenges to the final legislation to uphold distinctions Congress had drawn between types of noncitizens on the ground that Congress could have employed the distinctions to “reward . . . service or to encourage other aliens to make similar contributions in the future.”¹⁰ Immigration as affiliation continues to influence immigration-policy debates today. It helps explain proposals to legalize large portions of the twelve million unauthorized immigrants in the United States on the ground that they have become structurally embedded within the U.S. economy and the lives of U.S. citizens in communities across the country. Calls to add a path to permanent residency to guest worker proposals similarly reflect immigration as affiliation because they reward temporary workers who remain in the United States long enough to develop meaningful ties, along with the desire to remain.

Given the immigration-fueled demographic changes occurring in the United States today, Motomura's extended reflection on immigration and

9. 533 U.S. 289 (2001).

10. P. 87 (quoting *City of Chicago v. Shalala*, 189 F.3d 598, 609 (7th Cir. 1999)).

citizenship in American history could not be timelier or more necessary. Through deft presentation of historical narratives and individual case studies, Motomura demonstrates how each conception of immigration has played a role in the development of our immigration laws, and he highlights the best and worst of each approach. In calling for a revival of the Americans-in-waiting ideal, Motomura challenges readers to be true to some of our most honorable historical practices at a time when public debate is beset by ideological divisions and intergroup competition.

II. LOOKING OUT ON MIGRATION: NEW FORMS OF ASSOCIATION

Motomura's efforts to promote the formation of bidirectional loyalties between immigrants and American society assume that naturalization is or should be the end goal of immigration. But a profusion of social science literature focused on the movement of people around the world is increasingly demonstrating that migrants have varied intentions and that much migration is best understood as cyclical or temporary. Whereas Motomura writes about immigrants, or persons who leave one society to work and become part of another, the social science literature refers to migrants, or persons who move, without reference to a final destination.¹¹ Seen in this light, the concept of Americans in waiting shows its pre-1952 pedigree and represents an old tradition out of step with the dynamics of global migration. We may well need new forms of association to structure the relationship between today's migrants and our body politic, but the idea of Americans in waiting offers a square peg for a round hole.

Despite originating in a different time and place, however, a framework for belonging that does not depend on having formal citizenship status but that nonetheless possesses many of the attributes of strong national citizenship remains viable—indeed, it is an essential concept. Motomura reminds us of our continued need for a simultaneously robust and inclusive conception of citizenship. In a globalized world, we still need expansive conceptions of national citizenship to promote social cooperation and create incentives for civic engagement, even among migrants whose intent is not to resettle permanently.

But recognizing the continuing need for strong national-citizenship frameworks in our contemporary context exposes the potentially irresolvable paradox posed by *Americans in Waiting*: a dilemma I call the admissions–status dynamic. International migration produces fragmentation, which creates a need for strong institutional anchors that promote unity within a society in the face of immigrants' external loyalties. But the institutions that serve as those anchors, such as national citizenship, are not always able to absorb the consequences of globalization, particularly when they

11. Motomura himself recognizes that the trend in U.S. law is decidedly away from the citizens-in-waiting conception, noting that immigration to the United States has become increasingly temporary (or channeled through temporary visas) and unlawful; only thirty-eight percent of noncitizens who came to the United States in 2004 came as lawful permanent residents, down from sixty-six percent in the period between 1998 and 1999. P. 141.

come in the form of immigrants. The profusion of unauthorized immigration¹² and the trend toward temporary legal immigration statuses underscore this problem because they reflect our lack of will or ability to extend full membership to the many people with whom we have become interdependent. The growing need for immigrants at both the high end and low end of the labor market has corresponded with increasingly circumscribed immigration statuses (including unlawful status), which in turn is undermining the promotion of integration—an essential component of maintaining social cohesion in an increasingly diverse environment. To understand whether it is possible to resolve this puzzle, it is first critical to assess each of its pieces.

A. *Transnationalism and Fluidity*

At first glance, Motomura's focus on permanent immigration may seem out of step with migration patterns in an age of transnationalism. By invoking transnationalism, I mean to refer to two different but interrelated dynamics: the process by which migration creates networks and ties across borders,¹³ and the cyclical as opposed to straight-line nature of migration. On the first score, as one scholar defines it, "transnationalism refers to some combination of plural civic and political memberships, economic involvements, social networks, and cultural identities that reach across and link people and institutions in two or more nation-states in diverse, multilayered patterns."¹⁴ Scholars who study these patterns stress that migrants create "new transnational spaces" that "de-territorialize . . . the nation-states they link."¹⁵ Within this literature, some scholars suggest that social life is no longer organized primarily around the nation state.¹⁶ This emerging transnational trope is organized around the idea that we have entered a postnational era in which immigrants travel back and forth between two different societies, carrying with them multiple national (and local) allegiances.¹⁷ This sort

12. For data comprehensively describing the unauthorized population, see JEFFREY S. PASEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.* (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

13. See Peggy Levitt & Mary C. Waters, *Introduction*, in *THE CHANGING FACE OF HOME: THE TRANSNATIONAL LIVES OF THE SECOND GENERATION* 1, 5 (Peggy Levitt & Mary C. Waters eds., 2002).

14. Ewa Morawska, *Transnationalism*, in *THE NEW AMERICANS*, *supra* note 4, at 149, 149.

15. *Id.* at 149–50; see also SASKIA SASSEN, *GUESTS AND ALIENS* 133 (1999) ("National governments still have sovereignty over many matters, but they are increasingly part of a web of rights and regulations that are embedded in other entities—from EC institutions to courts defending the human rights of refugees.").

16. See, e.g., Levitt & Waters, *supra* note 13, at 8 (citing YASEMIN NUHOĞLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994)).

17. See Alejandro Portes et al., *The Study of Transnationalism*, 22 *ETHNIC & RACIAL STUD.* 217 (1999) (discussing surveys documenting the small but significant number of migrants "living across borders").

of movement exposes the limitations and constraints of national citizenship and gives rise to new frameworks of belonging.¹⁸

To be sure, the difference between today's transnationalism and the migration of previous periods of American history may be one of degree rather than kind.¹⁹ But, as scholars of transnationalism emphasize, whereas immigrants in earlier phases of migration were "closet transnationalists,"²⁰ today the phenomenon is "out into the open,"²¹ studied and understood by scholars and policymakers. Ease of travel and communication also has made transnationalism more persistent across generations. Some scholars contend, in response to these changes, that we should reformulate our conception of citizenship to make it more plural, creative, and fluid than the sort of transitional model Motomura champions. We should think in terms of immigrants' "options" for participation²² across borders instead of aggressively constructing American citizens.

The second important transnational dynamic that puts pressure on the Americans-in-waiting idea is the reality that much migration is cyclical. Some migration will result in permanent resettlement, but a great deal of migration is motivated not by a desire to start a new life in a new country but by the desire to support a family or finance home construction or business development in one's country of origin.²³ This pattern appears to be particularly true for Mexican migrants and therefore should be particularly relevant to American discourse on citizenship and belonging. As Doug Massey and Jorge Durand have put it, "[l]eft to their own devices, most Mexican immigrants would work in the United States only sporadically and

18. See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 277–78 (discussing "Today's Changed Relation to the National State" and analyzing how the "transformations in the condition of the national . . . show [citizenship's] national spatial character as but one of several possible framings"). For a discussion of types of transnational practices, see Levitt & Waters, *supra* note 13, at 9 (noting that nearly ten percent of Colombians, Dominicans, and Salvadorans "were involved in some form of regular transnational political engagement"—including membership in a home-country political party, civic hometown associations, and home-country electoral-campaign participation—and nearly twenty percent "reported occasional participation").

19. See NANCY FONER, *IN A NEW LAND* 63 (2005) ("[B]y now, there is general agreement that transnationalism is not a new phenomenon At the same time, much is distinctive about transnationalism today not only because earlier patterns have been intensified but also because new processes and dynamics are involved."); Nancy Foner, *Second-Generation Transnationalism, Then and Now*, in *THE CHANGING FACE OF HOME*, *supra* note 13, at 242, 245; see also Morawska, *supra* note 14, at 150.

20. Ewa Morawska, *Immigrants, Transnationalism, and Ethnicization: A Comparison of This Great Wave and the Last*, in *E PLURIBUS UNUM? CONTEMPORARY AND HISTORICAL PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION* 175, 193 (Gary Gerstle & John Mollenkopf eds., 2001).

21. FONER, *supra* note 19, at 77.

22. See *id.* at 239 n.86.

23. E.g., Jorge Durand & Douglas S. Massey, *What We Learned from The Mexican Migration Project*, in *CROSSING THE BORDER: RESEARCH FROM THE MEXICAN MIGRATION PROJECT* 1, 6–7 (Jorge Durand & Douglas S. Massey eds., 2004); see also Douglas S. Massey, *Borderline Madness: America's Counterproductive Immigration Policy*, in *DEBATING IMMIGRATION* 129, 135 (Carol M. Swain ed., 2007) (demonstrating how increased border enforcement has had the effect of thwarting what would otherwise be cyclical or return migration by Mexican migrants).

for limited periods.”²⁴ Over time, some of these migrants surely will develop the desire to resettle. But if large numbers of migrants do not seek belonging, does it make sense to design a legal and social framework for accommodating migration that aggressively facilitates belonging? My claim is that it does, and I turn now to explaining why immigration as transition remains a relevant—even essential—paradigm.

B. *Nation-statism and Stability*

Even in the face of a transnational zeitgeist, it is crucial that we maintain frameworks for immigrant belonging that approximate the status of national citizenship, not only for the sake of migrants themselves, but also for the sake of our own civil society. As Linda Bosniak puts it, “[p]ostnational’ or ‘transnational’ forms of citizenship remain a real but limited part of the citizenship landscape.”²⁵ Many migrants will either intend to resettle from the outset or develop the intent to resettle over time. For this reason, it is essential that scholars attend to the complex practices and institutions that we call citizenship within the national society. Given these dynamics, encouraging immigrants’ deep social and political integration from the early stages of their presence is in everyone’s long-term interests.

The Americans-in-waiting approach structures the relationship between new arrivals and the society into which they have entered in the way most likely to produce successful coexistence between immigrants and existing citizens. First and foremost, immigration as transition provides the strongest incentives for immigrants themselves to integrate. As Motomura explains, the way people are invited into the country influences their joining behavior (p. 188). Giving immigrants the option of becoming Americans in waiting creates an incentive to invest in society, as well as the institutionally supported freedom to make the most of their precitizenship transition period. Recent evidence suggests that migrants respond to such incentives, at least when they take the form of threats. When political trends undermine the security that lawful permanent resident status provides, rates of naturalization rise.²⁶ Incentives that come in the form of promises rather than threats might work as well, and Motomura is right to suggest that immigrants and

24. Durand & Massey, *supra* note 23, at 6.

25. BOSNIAK, *supra* note 3, at 6.

26. The number of naturalized citizens has grown steadily in this decade, increasing from 463,204 in 2003 to 702,589 in 2006. Julia Preston, *Sharp Rise Seen in Applications for Citizenship*, N.Y. TIMES, July 5, 2007, at A1. This growth may be attributable to a number of factors, including the 1996 welfare reforms that barred many legal immigrants from federal benefits; a corresponding climate of hostility toward immigration that compounds noncitizens’ status as outside the political community; and vigorous naturalization drives promoted by states with high immigrant populations, such as Illinois, Spanish-language media, and other constituencies interested in integrating and enfranchising immigrants. For a discussion of Illinois’ new citizens initiatives, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008). Though these factors would not be reflected in the statistics cited above, an imminent increase in the naturalization fee and worry that the government is in the process of making the civics and language tests more difficult are also spurring naturalization. See Preston, *supra*.

Americans alike stand to gain from opening up spaces for quicker integration and loyalty formation. For those who intend to resettle in the United States, incentives toward naturalization encourage economic, social, and cultural investment from early on in the immigrant experience.²⁷

By creating these incentives, laws and policies that embody immigration as transition also help the host society cope with the impacts of immigration. One of the primary challenges presented by large-scale immigration is the possibility of cultural change. Anxiety over this change contributes to the perception by members of the host society that immigrants are reluctant to assimilate into their new surroundings. But an immigration framework that includes self-conscious declarations by immigrants of their intent to become citizens and gives immigrants incentives to integrate could help dampen these anxieties. Of course, the idea of immigration as transition was forged in an era when the concept of assimilation had strong overtones of Anglo-Saxon superiority, and it would be unacceptable today to structure assimilation frameworks with this old hierarchy in mind. But policies reflecting immigration as transition need not include the expectation that immigrants abandon their cultures²⁸ or even citizenships of origin, as the expansion of dual citizenship around the world and the greater tolerance for diversity in the United States suggest. In the end, the integration incentives offered by the Americans-in-waiting idea, coupled with these new forms of tolerance, may well be our best bet for balancing the competing social and cultural interests of immigrants and host society members.

These insights about loyalty formation and integration are also relevant to understanding the citizenship implications of cyclical migration, even though immigration as transition as a model assumes permanent resettlement. Even a temporary intent does not obviate the need for strong institutional anchors for belonging.²⁹ Migrants who set out with the intent to stay only temporarily can and do remain for prolonged periods of time in the society they initially joined for short-term reasons.³⁰ Whether the extended stay is the result of not wanting to give up economic gains they have made or of new attachments to spouses and children who are citizens, history shows that the rise of temporary migration does not mean the end of long-term immigrant presence, even among those with self-consciously temporary intent.

Relatedly, the social security of the second generation is also at stake, and our conceptions of immigration must take those interests into account. Migrants, whether they intend to return to their countries of origin or not,

27. I have discussed this idea of investment elsewhere. See Rodríguez, *supra* note 8; see also Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 827–29 (2007) (noting that policies, such as guest worker programs, that treat immigrants as if they were on probation delay their investment in society).

28. FONER, *supra* note 19, at 77 (“Now, when there is an official commitment to cultural pluralism and cultural diversity, transnational ties are more visible and acceptable—and sometimes even celebrated in public settings. . . . Indeed, transnationalism is good for American businesses.”).

29. See Rodríguez, *supra* note 8.

30. *Id.*

often produce either citizen children or children who can imagine no other home than the United States. A child's integration and social success depend in part on the framework for belonging available to the child's parents. The effects of the transnational lifestyle on the second generation are only now being studied,³¹ but it is safe to say that having parents whose presence in the United States is based on immigration as contract can be destabilizing; removal orders, for example, have civil society implications because they destabilize the lives of families and communities left behind. The point is not that immigrants who commit deportable acts should not be removed but that defining the terms of an immigrant's right to be in the United States has second-generation and therefore civil society implications that should be taken into account³²—a factor that supports invigoration of immigration as transition.³³ The right to remain that citizenship provides is crucial for the migrant and those with whom he associates, even when migration is cyclical or allegiances are multiple.

Finally, there are serious civil society implications to permitting temporary migrants to remain disconnected from the world in which they physically reside. The presence of a temporary laboring class without deep interests in becoming part of the communities around them may well diminish support and regard for immigrants generally and exacerbate the distrust that Robert Putnam's research has shown arises in ethnically diverse settings.³⁴ This distrust is certainly evident in efforts by local communities to use zoning ordinances to prevent large groups of immigrant men from living in single-family homes—a quality-of-life move designed to prevent communities from becoming worksites and way stations. The point here is not to cast blame on temporary migrants.³⁵ Instead, the point is to underscore the relevance of loyalty formation and integration, even in the context of tempo-

31. For a compilation of essays discussing these effects, see *THE CHANGING FACE OF HOME*, *supra* note 13.

32. As Motomura points out, and as I note above, these effects are taken into account in certain relief-from-removal provisions, but it is also important that they be considered in managing the front-end of migration: the terms of admission and the *ex ante* definition of grounds for removal.

33. This factor also supports a strengthening of immigration as affiliation. The advantage of the transition framework, however, is that it does not require the migrant to prove the strength of his or her affiliation and therefore does not give an immigration judge or other decision maker the power to determine whether an affiliation is sufficiently strong in an individual case. Immigration as transition provides a form of across-the-board, *ex ante* protection that immigration as affiliation does not.

34. In his latest research, Robert Putnam documents the diminished trust and absence of feelings of solidarity that characterize ethnically diverse settings. He argues that though increased immigration and diversity are "inevitable" and "over the long run . . . desirable," in the short term they "challenge social solidarity and inhibit social capital." Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 *SCANDINAVIAN POL. STUD.* 137, 138 (2007).

35. Indeed, temporary migration may be to the long-term benefit of the hemisphere as a whole given its connection to development in Mexico. See *MULTILATERAL INV. FUND, INTER-AMERICAN DEV. BANK, SENDING MONEY HOME: LEVERAGING THE DEVELOPMENT IMPACT OF REMITTANCES 1* (2006), available at http://www.iadb.org/news/docs/remittances_EN.pdf.

rary migration, and to demonstrate that efforts to channel this migration legally should be designed to facilitate investment.³⁶

In a world in which borders have diminishing power to stop migration, it is all the more important to ground social and political identities in a conception of belonging that carries with it not only privileges but also obligations. As Motomura's work suggests, conceptions of belonging must have content that grounds migrants in the geographic space in which they actually, physically live—even if they intend only to live there for a short period of time. This grounding secures social stability by requiring people to invest in the community around them.

Countries like Mexico are playing an important part in promoting this stability by permitting dual citizenship. But the stakes are different in a receiving country like the United States, and therein rests the problem. Dual citizenship is clearly in Mexico's national self-interest in light of the number of its citizens who leave, many for good. For the United States, however, accepting dual citizenship and other forms of dual belonging primarily means integrating large numbers of newcomers, rather than simply permitting citizens who have established lives elsewhere to retain their legal ties to the United States. In other words, the United States faces unique challenges when it comes to development of cross-border forms of belonging. As preferable as the Americans-in-waiting construct may be for integrating new immigrants, it may require too much of the United States, politically and socially, under current conditions. I turn now to considering this possibility.

C. Impossible Trade-offs

Though the Americans-in-waiting ideal may be theoretically compatible with—and crucial to—the effective management of contemporary forms of migration, it is not clear that the model is achievable given the admissions–status dynamic. According to the dynamic, more immigration translates into diminished support for immigrants' rights, and more robust immigrants' rights translate into less support for immigrant admission.³⁷ To put it crudely, if cheap labor is suddenly transformed into expensive citizens in waiting, the doors to immigrants may well close altogether. If we commit to treating immigrants as citizens, we may well erode what support exists for large-scale immigration, giving rise to policies that more strictly limit the number of people permitted to enter. Such restrictions would be justified on the ground that we must be highly selective about those we admit given that

36. See Rodríguez, *supra* note 8 (arguing that even temporary migrants maintain a presence for significant periods of time and that offering the possibility of permanent membership would facilitate the development of ties and be preferable to creation of an isolated laboring class).

37. Some scholars have made this point conceptually. See, e.g., Aleinikoff, *supra* note 3, at 20 (noting that the “generosity” embodied in the extension of federal benefits to legal permanent residents “may be based in large part on Congress’s ability to limit entry and therefore limit the costs of benevolence”). Evidence from citizenship developments in Europe similarly underscores this dynamic. Marc Morjé Howard, *Comparative Citizenship: An Agenda for Cross-National Research*, 4 PERSP. ON POL. 443, 451 (2006) (noting that elite reform has led to liberalization of citizenship laws but that when public opinion “gets activated,” liberalization is usually thwarted).

they will be presumptively entitled to join our political community. In short, a society may be willing to absorb large-scale immigration only if it can maintain tight control over the benefits that accrue to immigrants, reserving for citizens alone the most expensive or most valued goods of citizenship.

Trends in immigration law and policy in the United States reflect this trade-off. In the midst of record rates of immigration, our framework for accommodating migration has become increasingly contractual in nature.³⁸ The admissions–status dynamic, which Motomura does not confront directly in his book,³⁹ was apparent during the 1996 immigration reforms, which excluded lawful immigrants from many public-benefits programs but did not restrict immigrant admissions. The reforms also made it easier to remove noncitizens by expanding the definition of aggravated felony to include even quite minor offenses, suggesting an increasingly parsimonious contract mentality and a heightened desire to expand control over the immigrant population in exchange for permitting immigration levels to remain at already high levels. During the immigration debates of 2006 and 2007, guest worker programs came back into vogue. The “Grand Bargain” that emerged from the Senate in May 2007 would have adopted a temporary worker program without a path to citizenship in order to fill the needs of our labor market. The legalization plan crafted by President Bush and a bipartisan coalition in the Senate reflected elements of the affiliation model through its recognition of the integration of the unauthorized population into American society. But even so, it would not have extended the possibility of citizenship status to immigrants for approximately thirteen years.⁴⁰ The compromise would have accepted the presence of the high numbers of immigrants needed to fill our labor market needs, but it would have done so without a generous extension of the indicia of belonging, including the presumptive right to remain.

Perhaps most telling is the brute fact of unauthorized immigration. The twelve million unauthorized immigrants inside the United States arguably demonstrate that immigration as transition has limited viability under current conditions. For at least the last decade, lawmakers, law enforcement, and U.S. citizens themselves have tolerated an arrangement that is economically beneficial both to immigrants and to the United States, but we have made no real effort as a nation to treat the immigrants on whom we clearly

38. It also has become more temporary, as I point out elsewhere. Rodríguez, *supra* note 8 (noting that more of our labor needs are filled today using temporary visas). In 2004, only thirty-eight percent of lawful permanent residents in the United States arrived initially on permanent visas, a figure down from sixty-six percent between 1998 and 1999. *Id.* at 33–34. Motomura himself cites this statistic. P. 141.

39. Motomura does observe, in addressing the historical demise of the transition model, that “[a]s immigration became more open to all, being an immigrant meant less,” p. 136, but he does not confront the implications of this trade-off for his theory of how immigration law should be reoriented.

40. See Nat’l Immigration Law Ctr., S. 1639—Why the Current Senate Bill Would Preclude Real Reform (June 25, 2007), <http://www.nilc.org/immlawpolicy/CIR/cir027.htm> (last visited Nov. 3, 2007).

depend as potential American citizens⁴¹: we have regarded them instead as expendable. We accept the immigrants we need, look away (while simultaneously beefing up border enforcement) when those immigrants are unauthorized, and make no commitment to their long-term interests.⁴² *Americans in Waiting* does not reckon with these implications of the unauthorized phenomenon—a significant omission, as the size and persistence of the unauthorized population suggests that immigration as transition is not feasible as a political platform.

Forms of status equal to or resembling citizenship are, in fact, notoriously difficult for immigrants to win in the political process, not least because immigrants are not formal participants. Existing political communities also tend to be reluctant to change their composition by accepting too many outsiders. When the public believes immigrants are causing a fiscal drain, it agitates for scaling back the attributes of full belonging.⁴³

A variety of explanations can be ventured for this dynamic, including the proposition that it is legitimate to favor members of one's family over strangers, particularly when resources seem tight.⁴⁴ It is a defensible and widely held belief that we owe a duty first and foremost to our compatriots, or our preexisting fellow citizens.⁴⁵ Treating immigrants presumptively as citizens, particularly during a time of large-scale migration, can be seen as compromising redistributive objectives or commitments already entered into by the preexisting members of the nation state.

Events in Europe illustrate an extreme version of this dynamic. Europe's robust welfare state depends on a kind of thick social contract—a commitment to a national community formed through a sense of belonging to one

41. For a brief discussion of this dependence, see *infra* notes 52–53 and accompanying text.

42. The collapse of immigration reform in June 2007 underscores this dynamic. There are, to be sure, many Americans and lawmakers who object to illegal immigration, but few if any voices called for mass deportations—a spectacle that could neither be accomplished nor stomach. Instead, a lot of *sturm und drang* concerning the demise of the rule of law marked the reform debate, but, in the end, the only comprehensive solution on the table that combined tough enforcement with legalization was defeated. This left in place a status quo of high levels of unauthorized immigration, sporadic and destabilizing raids, and no means of bringing the millions of unauthorized immigrants inside the United States out of the proverbial shadows.

43. Americans consistently do not support the expansion of immigration even when they support legalization. See, e.g., Peter H. Schuck, *The Disconnect between Public Attitudes and Policy Outcomes in Immigration*, in *DEBATING IMMIGRATION*, *supra* note 23, at 17, 20 (“81 percent of Americans oppose higher immigration—a level of opposition that contradicts the thrust of immigration’s political economy, which is decidedly expansionist. . . .” (footnote omitted)).

44. See KWAME ANTHONY APPIAH, *COSMOPOLITANISM* 158 (2006) (“[A]s Adam Smith saw, to say that we have obligations to strangers isn’t to demand that they have the same grip on our sympathies as our nearest and dearest. We’d better start with the recognition that they don’t.”). We can cabin the question of whether a community of citizens, or a nation state, is appropriately analogized to a family and nonetheless appreciate that a familial dynamic is at work in the processes of national self-definition.

45. For an articulation of the justifications for this widely accepted assumption, see Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy*, in *DEBATING IMMIGRATION*, *supra* note 23, at 63, 64 (“Citizens have special obligations to one another: we have special reasons to be concerned with the distribution of wealth and opportunities among citizens. . . . I argue that it is as members or co-participants in self-governing political communities that we have special obligations to our fellow members.”).

and the same people. A commitment to a common project of social support depends on participants sharing strong affinities, which are largely absent in the relationship between an entrenched society and newcomers. As Robert Putnam explains, though societies in the long run develop mechanisms for creating “new forms of social solidarity” to “dampen the negative effects of diversity” and create “new, more encompassing identities,” the social solidarity on which welfare-state policies depend is clearly challenged by the arrival of new, ethnically diverse immigrants in the short term.⁴⁶ This challenge, combined with Europe’s lack of experience with large-scale immigration until relatively recently, has given rise to an admissions–status tradeoff that has resulted in social unrest and emboldened nationalist, anti-immigrant political parties and movements.⁴⁷

The United States has had more experience with large-scale immigration, but, for the most part, it has traded status away in favor of admission, both legal and illegal. Philosophers such as Michael Walzer would have us make different choices. Walzer argues that a democratic society cannot justify treating immigrants differently from citizens: “[M]embers must be prepared to accept, as their own equals in a world of shared obligations, the men and women they admit”⁴⁸ In return, “immigrants must be prepared to share the obligations.”⁴⁹ The relationship between citizens and noncitizens, or noncitizens and the state, is one of “perfect reciprocity” under this point of view⁵⁰—a perspective that shares some basic assumptions with Motomura’s conception of immigration as transition. But the consequence of this view is an admissions–status tradeoff different from the one we have been making: a society must be very careful about whom it admits if it is going to treat them as citizens. The demand that immigrants be treated as citizens justifies keeping the border relatively closed and tightly controlled. Indeed, Walzer, along with most liberal political theorists, assumes the democratic legitimacy of border closure.⁵¹

46. Putnam, *supra* note 34, at 138–39.

47. See, e.g., Howard, *supra* note 37, at 450 (discussing right-wing parties). For discussions of immigration-related social tensions in Europe see, for example, David Bell, *The Shorn Identity*, NEW REPUBLIC, Dec. 5, 2005, at 20 (noting in the wake of the Paris riots that while France has a long and successful multiethnic history, the model of French republican citizenship no longer works well as a model for integrating immigrants); Oliver Burkeman, *Going to Pot*, NEW REPUBLIC, Feb. 21, 2005, at 10 (discussing the erosion of the Dutch concept of “gedogen,” or “live and let live”); Christopher Caldwell, *Islam on the Outskirts of the Welfare State*, N.Y. TIMES MAG., Feb. 5, 2006, at 54 (discussing Muslim immigrants in Sweden); and Peter Schneider, *The New Berlin Wall*, N.Y. TIMES MAG., Dec. 4, 2005, at 66 (discussing the rise of increasingly insulated Turkish neighborhoods in Berlin).

48. MICHAEL WALZER, SPHERES OF JUSTICE 52 (1983).

49. *Id.*

50. Rodríguez, *supra* note 8.

51. For an excellent discussion of this literature, see BOSNIAK, *supra* note 3, at 125–29 (describing the liberal approach to these questions as soft on the inside and hard on the outside and noting that liberal theorists generally “criticize[] internal subordination of noncitizens” but “presuppose, and sometimes affirm, the action of exclusionary borders”).

The difficulty with this vision of perfect internal reciprocity is underscored by today's crisis of unauthorized immigration: borders cannot be fully closed, at least not given current conditions in the hemisphere. The dramatic wage differential, the extensive land border between the United States and Mexico, and the needs of the U.S. labor market make a certain amount of migration from South to North inevitable. Trying to stop illegal immigration without opening more channels for workers to enter legally is likely to fail because market forces push labor from low-wage to high-wage countries and from low-productivity use to high-productivity use.⁵² And even if there *were* some American workers willing and able to fill, at higher wages, the jobs currently performed by illegal immigrants, there are simply not enough such workers, and for good reason. As our citizens become more and more educated, the labor force has shifted toward high-skilled, high-wage jobs.⁵³

The model of strong citizenship-like rights for all immigrants coupled with tightly controlled admissions is thus untenable as a practical matter. The United States desperately needs an immigration policy that recognizes the reality of hemispheric interdependence and of the modern form of transnational migration. But it is not clear that this need is compatible with immigration as transition, compelling as it is. The virtual inevitability of immigration to the United States from Latin America, at least for the foreseeable future, demands large-scale admissions,⁵⁴ which is likely to mean immigration as transition will remain a compelling ideal honored in the breach.

CONCLUSION

Our dilemma is as follows. Motomura is quite right that immigration as transition offers us the best means of ensuring immigrant integration, fostering immigrant loyalty to the United States, and encouraging social investment by immigrants. But we also need an immigration policy that can

52. GORDON HANSON, COUNCIL ON FOREIGN RELATIONS, THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION 32 (2007), available at <http://www.cfr.org/content/publications/attachments/ImmigrationCSR26.pdf>.

53. See DOWELL MYERS, IMMIGRANTS AND BOOMERS: FORGING A NEW SOCIAL CONTRACT FOR THE FUTURE OF AMERICA 37–38 (2007); see also *Immigration: Economic Impacts: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 66 (2006) (written testimony of Dan Siciliano, Executive Director, Program in Law, Economics, and Business, Stanford Law School). The testimony notes:

As the number of less-skilled jobs continues to grow, it will become increasingly difficult for employers to find native-born workers, especially younger workers, with the education levels that best correspond to those jobs. In this sense, immigrant workers are a vital complement to a native-born labor force that is growing older and better educated.

Id.

54. The current political climate extends this generosity only in the form of de facto acquiescence in high levels of unauthorized immigration. But it is not insignificant that those who obstructed the 2007 attempt at comprehensive immigration reform neither proposed reducing the number of legal admits nor provided a workable alternative for dealing with the current unauthorized problem short of more enforcement, which is likely to have only limited effect.

handle cross-border traffic—the impacts of development, trade, and hemispheric integration—while mustering public support. One strategy might be to take Motomura’s immigration as transition as aspirational and set about trying to persuade the public to embrace the idea over the long haul. But the admissions–status dynamic will be difficult to dislodge and will only become more entrenched in times of economic downturn or moments of national insecurity. We thus are left with a set of conditions that demands immigration as transition in order to promote integration and long-term social peace but that simultaneously renders immigration as transition unachievable as a political matter.⁵⁵

Part of the answer to the paradox Motomura’s work reveals will involve self-consciously integrating the immigration-as-transition idea into more of our laws through hybrid devices or structures. We might adopt a guest worker program with a path to permanent residency or citizenship. A legalization plan could include a relatively short path to citizenship and a de minimis number of purely punitive provisions. We could also do a better job of facilitating the incorporation of the immigrants we already admit for permanent residence, easing the naturalization process and investing meaningful resources in adult language education and other integration-related programs.⁵⁶ Our national citizenship constructs thus could continue to balance immigration as contract and immigration as affiliation humanely and rationally while including aspects of immigration as transition to the extent possible. Arguably, all Motomura is calling for is a reinvigoration of the concept of immigration as transition, and there are ways of incorporating that insight into our structures of belonging, even if the return to filing declarations of intent to naturalize in order to acquire the rights of citizenship immediately is not achievable systemwide.

We may also need to rely more heavily on subfederal territorial alternatives to national citizenship—to ensure that belonging is geographically grounded in at least some way.⁵⁷ This strategy would include turning to state and local forms of citizenship to capture the more demanding aspects of the

55. By political, I refer not only to today’s fights between Republicans and Democrats but to the political dynamics of a complex modern society accustomed to robust citizenship prerogatives.

56. See, e.g., MARGIE McHUGH ET AL., MIGRATION POLICY INST., ADULT ENGLISH LANGUAGE INSTRUCTION IN THE UNITED STATES: DETERMINING NEED AND INVESTING WISELY 3 (2007), available at http://www.migrationpolicy.org/pubs/NCIIP_English_Instruction073107.pdf (noting that English language classes are woefully underfunded and insufficient to meet current demand); see also IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA 1–5 (2006) (arguing that the way immigrants are received is crucial to their incorporation and that Canada, with its multiculturalism policies, performs better on this score than the United States).

57. Cf. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 409 (2007). Bosniak notes that “territoriality . . . honor[s] the real attachments people develop in their daily lives.” *Id.* However, territoriality “promises more than it delivers. . . . [W]hen read through the lenses of globalization, we see that territoriality is beginning to fray . . . largely because territory itself no longer organizes social and political life in the determinative way it once did.” *Id.* For additional discussions of citizenship and territoriality, see RUTH RUBIO-MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE: CITIZENSHIP AND INCLUSION IN GERMANY AND THE UNITED STATES (2000).

Americans-in-waiting idea. This approach would use the tools of decentralization to provide immigrants with strong forms of belonging in ways calibrated to different states and localities' willingness to accept and integrate immigrants.⁵⁸ We might allow states and cities to compete for immigrants, or the federal government might give states incentives to attract immigrants and treat them as quasi citizens. This cooperative federal-state-local process might ultimately produce the sorts of institutional grounding that social stability requires. Such an approach is not a perfect substitute for national citizenship because only national citizenship can confer on immigrants the right to remain. But it might be a mechanism for negotiating the different migration dynamics currently working at cross-purposes. What is more, the benefits attached to these more localized forms of citizenship can be equally great, if not greater than, what the federal government is prepared to give, as the tradition of noncitizen voting in local and state elections underscores.⁵⁹

In the end, it may well be that national citizenship qua national citizenship cannot absorb the contemporary realities of migration. But Motomura reminds us that we cannot lose sight of our need for a geographically grounded conception of membership. Such a conception is necessary to promote the political and social cooperation required among inhabitants of the same space in a transnational world.

58. I discuss at length how states and localities have shown themselves capable of performing this function in Rodríguez, *supra* note 26.

59. For a discussion of this history, see RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRATION VOTING RIGHTS IN THE UNITED STATES* 15–40 (2006).