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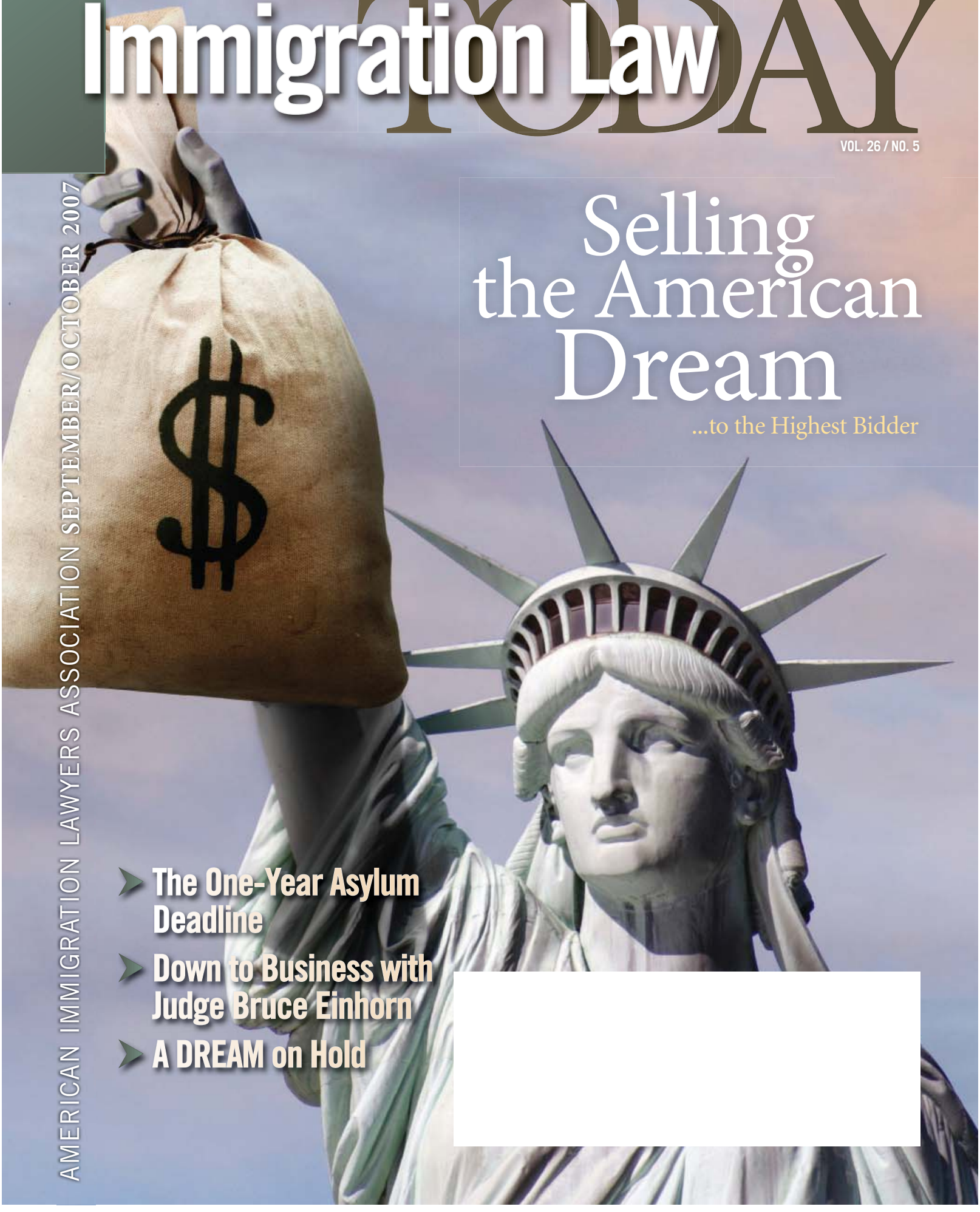
Selling the American Dream

...to the Highest Bidder

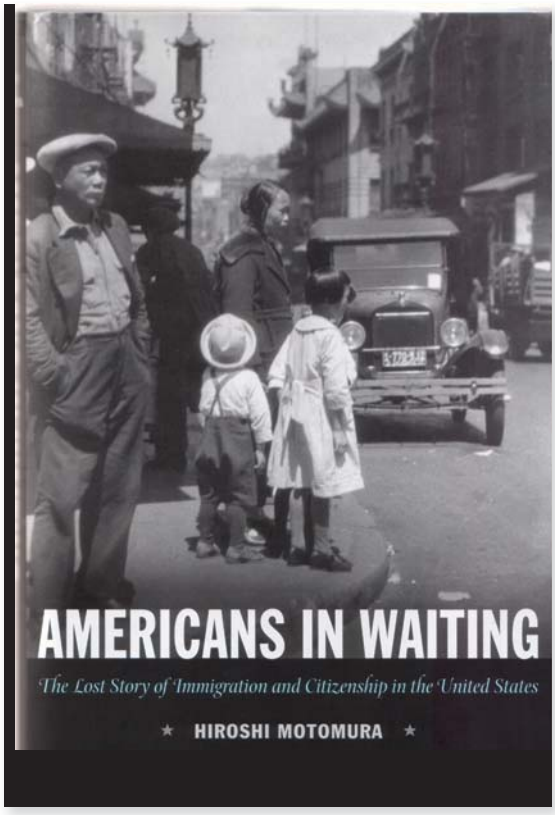


- The One-Year Asylum Deadline
- Down to Business with Judge Bruce Einhorn
- A DREAM on Hold

Americans in Waiting—Crossing the Threshold to Citizenship

ARE IMMIGRANTS TO THIS COUNTRY EXPECTED TO BECOME U.S. CITIZENS and integrate into mainstream society, or should they return to their home country if they do not choose the path to citizenship? These questions become even more complicated as the right to deport is relatively broad while the right to deny admission into this country is even broader. *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford University Press; $29.95, paperback) tackles the task of dissecting the U.S. Supreme Court's interpretation of immigration laws for more than two centuries, and compares how noncitizens have been treated from one era to the next. The book stresses the fact that in order to gain an understanding of this country's present and future handling of immigration issues, one must understand the evolution of U.S. immigration law.

In *Americans in Waiting*, Professor Hiroshi Motomura combines his great knowledge of immigration law and history with individual stories to bring the book's major themes to life. His own life story gives the book a personal touch from the very first page. Even though Motomura grew up in the United States and felt more "American" than his traditionally Japanese father, he did not gain legal status here until he was 15 years old. In contrast, Motomura's father was a U.S. citizen by birth, but moved back to Japan shortly after. Growing up, the noncitizen Motomura was linguistically and culturally American, while his U.S. citizen father was not. He surmises, "My family history shows that the law makes distinctions of various kinds, most prominently by drawing a line between citizens and noncitizens, but that this line between 'us' and 'them' often does not match up with the ways in which families come to this country."



Three Models of Treating Noncitizens

The author describes three models for becoming an American: immigration as transition; immigration as contract; and immigration as affiliation.

Immigration as Transition

In colonial times, the first model of "immigration as transition" was used, as new immigrants were presumed to be "Americans-in-waiting" because they eventually would become U.S. citizens. In fact, until the early 1900s, most jurisdictions treated noncitizens very much like citizens, even allowing noncitizens to vote. There were penalties for not applying for citizenship within a certain period of time. This still has vestiges in current law, as permanent residents or asylees may lose some anti-discrimination protection under the Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603, 100 Stat. 3359) if they do not apply to naturalize when they are eligible.

An interesting twist on this model came with the 1848 Treaty of Guadeloupe-Hidalgo under which the United States paid $15 million to buy what is now California, Utah, Nevada, and Texas (plus parts of six other states) from Mexico. According to the treaty, the 60,000 Mexican nationals who did not leave by 1849 automatically became U.S. citizens. The Mexicans were the first large group of non-European settlers who were treated as Americans-in-waiting. Later immigrants from Asia, Latin America, and Africa would not benefit from the same presumption.

Immigration as Contract

A second model that evolved later is "immigration as contract," under which people were allowed to remain in the United States as long as they stayed out of trouble, but their stay was not expected to be →

permanent. This predominated in the late 1880s, with much of the regulation passed by individual states.

President Bill Clinton once exclaimed that "when immigrants come to America… they have to promise that they won't try to get on welfare and they won't take any public money." This is a classical statement of immigration as contract—newcomers are not considered Americans-in-waiting, or in transition, on their way to being accorded the same status as native-born citizens. Rather, new immigrants enter the United States as part of a contract to benefit the United States but not take from it.

Immigration as Affiliation

The final model is "immigration as affiliation"—the treatment of noncitizens should depend on the level of ties they have developed in this country. For example, in this year's immigration debate in Congress, many legislators argued that undocumented aliens must learn English before legalization. In the 1960s, the Supreme Court rejected some state laws limiting benefits to noncitizens and keeping them from being attorneys. The states had argued a special "public interest" in protecting its citizens. However, the Court found that noncitizens contribute to the economic well-being of the state, pay taxes, can be called to military service, and therefore, deserve the benefits of citizenship.

From State to Federal Immigration Enforcement

Immigration lawyers often surmise that they can represent clients in other states because immigration is federal law. However, the U.S. Constitution did not grant specific power to regulate immigration—it only states that Congress should "establish a uniform Rule of Naturalization." Why did the framers not mention immigration specifically? Motomura speculates that "immigration was a part of daily life … the national government's power to allow or limit the arrival of newcomers may have seemed so basic … that the founding document did not need to mention it."

Until the mid-1800s, most immigration regulations were at the state level, and then the Supreme Court in 1849 started to strike down state laws based on the Commerce Clause. The shift reflected the federal government's new role during the Civil War. National citizenship started to be as meaningful as state citizenship, and the Supreme Court began to develop the federal plenary power doctrine. Also, immigration policy became considerably less complicated with the end of slavery (before the Chinese Exclusion Act), as uniform rules could be used for all newcomers.

The growth of federal bureaucracy soon followed the increasing number of federal laws. In 1890, the federal government began to revoke its contracts with various states to inspect incoming aliens, and created a federal superintendent of immigration in the U.S. Treasury Department. This led to the implementation of formal federal processing stations at leading ports, such as Ellis Island. The courts provided great deference to the decisions of these new officials. In one case involving a young Japanese woman seeking entry, the Supreme Court wrote that "the decisions of

executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Regulating Borders

From the beginning of immigration rules, there were the challenges of regulating entry and identifying people while still keeping ports of entry moving. For example, the Chinese Exclusion Act required immigration officers at the ports to identify people based on information on certificates they carried, including "physical marks or peculiarities," and detailed measurements of "numerous body parts." Yet, despite specific efforts to keep out Chinese and Japanese citizens, the United States did little to control the borders until the mid-20th century.

The most important part of identifying people is figuring out who are the really bad apples. Over time, the focus has shifted from anarchists to subversives, then to communists, and most recently to terrorists. Exclusion and deportation began in earnest in the late 1800s as American business interests feared eastern European and Mediterranean political agitators. Motomura describes the 1918 case of Russian-Jewish anarchist Jacob Abrams. The Supreme Court upheld his arrest and deportation for distributing anti-war and pro-labor leaflets in English and Yiddish.

The Immigration and Nationality Act of 1952 (Pub. L. No. 82-414, 66 Stat. 163) retained much of the federal government's plenary power for ideological exclusion and deportation (although the goal then was to fight communism rather than anarchists). In one provision, refusal to testify about subversive activity within 10 years of naturalization was ground for revocation of U.S. citizenship. Today, the same issues are played out in the war against terrorism.

The Next Wave of Americans-in-Waiting

Motomura concludes Americans in Waiting by stressing that immigration as contract and immigration as affiliation are important paradigms to understand current law, but do not lead to a solution to the broken immigration system. Only going back to the first model of immigration as transition—the lost story of Americans-in-waiting—leads to a workable strategy.

It remains to be seen whether immigration as transition can make a comeback. At the "Jim Lehrer News Hour" on PBS earlier this year, an anti-immigration spokeswoman was asked whether it was practical to consider deporting 12 million people. She explained that to the restrictionists, this is a war of attrition. By gradually making it less pleasant for noncitizens to be here and incrementally tightening the border, the undocumented will leave and fewer will come. In this author's opinion, only time will tell if the next major immigration reform can adopt an idea of Americans-in-waiting, granting a future to those who are here and those yet to come. ILT

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