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BROWN V. BOARD OF EDUCATION, IMMIGRANTS,
AND THE MEANING OF EQUALITY[†]

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Being asked to speak at a symposium on *Brown v. Board of Education*¹ about the impact of *Brown* on immigration law is very much like being asked to teach immigration law at the University of North Carolina in Chapel Hill. Much of my personal challenge at UNC is to think about issues of race and equality, but in the specific ways that the study of immigration and citizenship provoke. North Carolina is a state and UNC is a law school that obviously have long histories in matters of race in the context of what is often called the black-white paradigm. But census figures show that North Carolina, like the entire southern part of the United States, is changing, largely as a result of immigration. In 1990, North Carolina had a Mexican-born population of less than 9,000. In 2000, ten years later, the Mexican-born population of North Carolina was almost 180,000, a twenty-fold increase. The state has also seen significant growth in Asian immigration populations, and these demographic trends are evident throughout the South in the past ten years.² In places that have changed as dramatically as North Carolina has, the principal question can be phrased this way: how do we think about immigrant rights in the context of civil rights? To the extent that *Brown* symbolizes much of the promise, the hope, and the history of civil rights as it has traditionally been understood, how are civil rights issues affected by the new immigrant demographics throughout the country?

[†] This essay is based on a presentation given at *Brown is Dead? Long Live Brown!: A Commemorative Symposium* at New York Law School, New York, April 26, 2004.

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1. 347 U.S. 483 (1954).

2. STEVEN A. CAMAROTA & NORA McARDLE, *WHERE IMMIGRANTS LIVE: AN EXAMINATION OF STATE RESIDENCY OF THE FOREIGN BORN BY COUNTRY OF ORIGIN IN 1990 AND 2000* (2003).

I've been working on a book project for the past several years. Its working title is *Americans-in-Waiting*,³ but one of the things that I realized as I was preparing for this symposium was that its subtitle could easily be "What Does *Brown* Mean for Immigration?"

There are many different stories or angles I could take on this topic. I will mention one that is important by way of introduction. The historical path from *Brown* in 1954 to the important amendments to the Immigration and Nationality Act in 1965⁴ is a very direct one. The 1965 immigration amendments ended a system, called the national origins system, that started provisionally in 1921⁵ and was enacted more concretely into law in 1924.⁶ The national origins systems brought into immigration law a strong preference for the lawful admission of northern and western European immigrants.⁷ This was the law of the land from 1921 until 1965.⁸ It's no coincidence that in the same year as the 1965 immigration amendments ended that very blatant form of white privilege in the immigration system, the Voting Rights Act of 1965 also became law.⁹

But today I'm going to talk about something else that's much less obvious in recent immigration history, yet something that may ultimately be more important. I'll start with a sentence in the *Brown* decision itself. It's a sentence that you might not think is about immigration at all. The sentence is the one in which Chief Justice Warren says that education "is the very foundation of good citizenship."¹⁰

Warren used "citizenship" not as a designation of status, but in the sense of what it means to "be a good citizen." Without education, by which Warren meant education in a school that isn't ra-

3. HIROSHI MOTOMURA, *AMERICANS-IN-WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (forthcoming 2005).

4. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12.

5. Act of May 19, 1921, ch. 8, § 2(a)(6), 42 Stat. 5, 5.

6. Act of May 26, 1924, ch. 190, § 11(a), 43 Stat. 153, 159-60.

7. See Act of May 19, 1921, ch. 8, § 2(a)(6), 42 Stat. 5, 5; Act of May 26, 1924, ch. 190, § 11(a), 43 Stat. 153, 159-60.

8. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 2, 79 Stat. 911, 911-12.

9. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971, 1973 to 1973p (2005)).

10. *Brown*, 347 U.S. at 493.

cially segregated, Americans can't be good citizens. But as someone working on immigration issues, I couldn't help asking myself, what if you were to think about "citizenship" in Earl Warren's phrase in a different sense, the sense of "immigration and citizenship," and particularly in the sense of a person who comes to America as an immigrant, and then over time becomes an American citizen?

What, then, is the very foundation of good citizenship in this sense? To take this thought experiment one step further, what word would you substitute for "education" if you were to fill in the blank in "_____ is the very foundation of good citizenship" as the endpoint of the immigration process?

Brown is celebrated today as a landmark of national commitment to the equality that is central to any democracy. But there's a special problem in immigration law with regard to equality. The source of this problem is the premise — though not entirely uncontested — in immigration and citizenship that it is permissible to draw some distinctions between people who are citizens and people who are not.

In any country some persons are citizens, while others are not. Some noncitizens will be admitted, while others won't be. Citizens may object if they aren't treated equally, but noncitizens sometimes can't persuasively raise these sort of objections. The reason for this is the general acceptance of the proposition that a democracy, in order to shape and preserve itself as a community of interests and shared values, must have some power to grant or refuse membership to newcomers.

But there must be some limits on discrimination against noncitizens, and the power to grant or refuse membership to newcomers isn't an absolute and unrestrained power. So the hard question is this: what distinctions between citizens and noncitizens are impermissible? In other words, what are the limits of inequality in an area of law and policy where some inequality is accepted?

More particularly, getting back to *Brown*, how does the apparently absolute command of equality in *Brown* help us understand what equality means in immigration and citizenship if inequality between citizens and noncitizens is part of the very fabric of this field?

What deeper understandings of equality emerge from *Brown* that help us define equality for noncitizens?

As background, I should first explain that there's a traditional view of immigration that permeates U.S. immigration history, something that I call *immigration as contract*.¹¹ Immigration as contract is the idea that coming to America can be explained — and in turn, that immigration law decisions can be justified — as involving some sort of agreement that newcomers enter into when they come here. Migrating to any country represents a set of expectations and understandings between the migrant and his new country. This contract isn't a matter of a formal, legally binding document, nor an agreement after back-and-forth bargaining in the marketplace. Still, the key elements of contract are there: notice of the terms of an offer to prospective immigrants, with implied promises by both sides.

Immigration as contract continues to exert a strong influence on immigration law, just as it did when Chinese immigrants were deported in the 1890s.¹² The actual terms used by the Supreme Court at that time in upholding deportation laws targeting Chinese were that the government was simply revoking a license that it had issued to the immigrants to allow them into the United States.¹³ Similarly, talk now appears frequently in congressional and public debates about how the government may revoke welfare benefit eligibility for immigrants because immigrants "promise" to be financially self-sufficient.¹⁴

More fundamentally, the idea behind immigration as contract is that justice for immigrants is possible without equality for immigrants. Looking at U.S. immigration law from early on until the present day reveals many strands in debate and dialogue about immigration that say essentially that the receiving country can decide to admit immigrants under any conditions prescribed in advance.

11. MOTOMURA, *supra* note 3.

12. *See, e.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

13. *Id.* at 609.

14. *See* 8 U.S.C. § 1601(1) (2005) (preamble); President William Jefferson Clinton, Address to the Joint Session of the Michigan Legislature (Mar. 10, 1997) (text available at 1997 WL 8030646); S. REP. NO. 104-249, at 5-7 (1996) (welfare bars), *excerpted in* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 447 (5th ed. 2003).

The “justice” in this is the requirement that the government give notice in advance. We protect the expectations of immigrants, but whatever we tell immigrants will be the immigration contract.

So, for example, if a permanent resident of the United States (who under U.S. law is normally allowed to stay lawfully in the United States for an indefinite period) commits a crime, even a relatively minor one, he can be deported.¹⁵ The thinking is that he has violated a condition of his admission, so he can’t appeal to protections based on the U.S. Constitution, or international human rights, or anything else that might allow him to stay. This is immigration as contract.

There’s a certain attraction to thinking of immigration as a matter of contract. It protects expectations, especially by giving notice, but allows otherwise unconstrained discretion by the host country. This is one approach to equality in a context where equality can’t be assumed.

But immigration as contract has a lot of problems, many of which are fairly obvious. One is the fact the contract is not really a bargained-for exchange. Consent can be sufficient to legitimate market transactions, but insufficient for democratic politics. And agreements of this nature can’t always be enforced without doing violence to other values of justice. In some cases, the “contract” is entirely fictional, while in other cases it might be legally enforceable but the passage of time has diminished its moral and persuasive force as the basis for immigration decisionmaking.

Especially in the twentieth century, two other strands in immigration law have arisen to compete with immigration as contract and have even become dominant at various times. Something that I call *immigration as affiliation* has emerged as the prevailing vision of justice and equality for people who see themselves as relatively friendly to immigrants and noncitizens.¹⁶ Immigrants arrive and form ties in this country. They become parents, join churches, work, and pay taxes. The longer they are here, and the more they become enmeshed in the fabric of American life, the more they and citizens should be treated equally. This is earned equality.

15. See Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2005).

16. MOTOMURA, *supra* note 3.

People gradually acquire rights, and as they do so, they gradually become more like U.S. citizens.

For example, immigration law has so-called safe harbor periods that provide that immigrants who have been in the United States lawfully for five years are protected from the normal rule that makes a noncitizen deportable if he commits a single crime involving moral turpitude.¹⁷ Moreover, discretionary relief from deportation can be affiliation-based. Even if a noncitizen is deportable, she can ask an immigration judge for discretionary relief based on the fact that she has citizen children or on other hardships that would be a consequence of deportation. Also, a whole body of procedural due process law recognizes the ties that noncitizens have in this country. They become eligible for Medicare and welfare if they have been here for a certain period of time.¹⁸ Again, this is a notion of earned equality.

For example, the argument has been heard with some frequency in the past few years that noncitizens should be allowed to vote.¹⁹ Why? Because they have lived in the United States for some period of time and have become members of their communities in social and economic terms. Therefore, it is argued, they should be allowed to participate politically by voting. This is immigration as affiliation.

The affiliation-based version of equality is more generous than immigration as contract, where governmental action is constrained only by notice. At the same time, the earned equality of immigration as affiliation is still a precarious equality. I question whether it fully fills the blank that I hypothesized in Chief Justice Warren's sentence "_____ is the very foundation of good citizenship" as the endpoint of the immigration process. Put differently, a noncitizen who has acquired this earned equality over a period of time hasn't

17. 8 U.S.C. § 1227(a)(2)(A).

18. See 8 U.S.C. § 1612(a)(2)(L) (2005) (food stamp eligibility after five years in United States); 42 U.S.C. § 1395o (2005) (Medicare eligibility is limited to permanent residents who have resided continuously in the United States for five years).

19. See GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-1100 (1977).

necessary acquired good “citizenship,” if this earned equality is hard won from a begrudging host.

There is a third way of thinking about immigration and immigrants. It is an approach that is largely a lost story in U.S. immigration and citizenship history. The key here is one simple but powerful idea that was once central to American thinking about immigration. This is a presumed equality. This is seeing the status of an immigrant in America not as a permanent noncitizen, but rather on the way to becoming a citizen. It’s a very different understanding of equality, of equality that is not earned, but instead is conferred as part of the immigration experience, at least until an immigrant decides not to become a citizen. Immigrants are Americans in waiting. This is what I call *immigration as transition*.

Immigration as transition is similar to immigration as affiliation, but differs in key respects. Taking immigration as transition seriously, and taking presumed rather than earned equality seriously, would mean eliminating waiting lists for family reunification of new immigrants that are currently quite long.²⁰ It would mean granting more generous welfare benefit access for immigrants who fall on hard times.

Taking transition seriously would also mean making naturalization easier than it is now. It would mean allowing permanent residents to vote. It would require greater vigilance against the racial and ethnic profiling of permanent residents in the enforcement of the immigration laws.

Immigration as transition was quite dominant, and even *the* dominant way of thinking about immigration, at least for some immigrants, from the founding of this country until about the 1920s. For much of its history, America treated lawful immigrants as future citizens, and immigration was viewed a transition to citizenship. Lawful immigrants could become “intending citizens.” For a century and a half — from 1795 to 1952 — every applicant for naturalization had to file a declaration of intent several years in advance.²¹

20. See, for example, the March 2005 figures given by the Bureau of Consular Affairs, VISA BULLETIN, Feb. 8, 2005, *available at* http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

21. See Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

This declaration gave any noncitizen who was eligible to naturalize a pre-citizenship status that elevated him, even from his first day in America, well above those who hadn't filed declarations and therefore weren't on the citizenship track. Many statutes throughout this period treated intending citizens just like citizens.²² The Homestead Act of 1862,²³ the key to settling the western frontier, made noncitizens eligible for land once they filed declarations. Until the early twentieth century, it was a typical practice for states and territories to allow intending citizens to vote.²⁴

For over one hundred years ending in the 1920s, the line that really mattered in immigration and citizenship law was not the line between citizens and noncitizens. It was the line between citizens and intending citizens, who were given citizen-like rights, on the one hand, and everyone else on the other.

Today, the declaration of intent is optional, and few are filed. In 1926, Arkansas repealed the last state law allowing noncitizen voting.²⁵ The significance of this shift goes well beyond the demise of the declaration of intent as a formal document. The United States has lost not only the legal category of intending citizen, but also the idea of the intending citizen as a basis for our treatment of noncitizens. Americans no longer view immigration as transition in the ways that we once did, nor do we treat immigrants as Americans-in-waiting.

So immigration as transition is the lost story of immigration and citizenship in the United States. Why did it go away? This is an interesting and complicated inquiry. In the United States, the diminished role for immigration as transition in the second half of the twentieth century reflected a loss of commitment to the idea of a nation of immigrants.

Explaining this loss of commitment to the idea of a nation of immigrants requires that I come back to *Brown v. Board of Education* in at least two ways. First, if we take *Brown's* equality mandate seriously and think about this as trying to fill in the blank in the sen-

22. See Raskin, *supra* note 19, at 1399-1417.

23. 12 Stat. 392 (1862).

24. See NEUMAN, *supra* note 19, at 63-71; Raskin, *supra* note 19, at 1401-17; Rosenberg, *supra* note 19, at 1093-1100.

25. See Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 115-16 (1931).

tence, “_____ is the very foundation of good citizenship,” it suggests that it is at least curious, and even troubling, that the dominant concept of immigrants’ rights in the twentieth century became earned equality. Whatever happened to presumed equality, which at least intuitively suggests a more robust form of eventual citizenship for immigrants, because they are seen and treated as Americans-in-waiting?²

Digging deeper, *Brown* sheds light on the loss of commitment to the idea of a nation of immigrants in another way. The period in which immigrants were seen as Americans-in-waiting was also the period when immigration was most restricted by race. Then, during the later period in which immigration opened up by race, it became less meaningful to be an immigrant. It’s the vantage point *Brown* gives us that makes us look at the treatment of noncitizens in ways that may be more cynical than is often done.

At the same time, to bring this discussion back in a different way to *Brown* and its connection to the 1965 immigration amendments, it’s undeniable that *Brown* is very much the catalyst in immigration law that led eleven years later to the end of the blatant racial discrimination of the national origins system.

Looking at immigration law through the lens of *Brown* thus yields two insights. One is that *Brown* makes us question the supposedly progressive view of earned equality by showing that affiliation-based recognition of noncitizens isn’t really as generous to noncitizens as it is often believed to be. At the same time, looking at *Brown* should prompt us to see that it also sparked the changes to immigration law that paralleled civil rights developments through the Voting Rights Act of 1965 and the Civil Rights Act of 1964. In short, *Brown* has very much the same kind of lesson in immigration and citizenship that it has in other areas of law, in particular in the educational context in which it arose. It shows us how far we’ve come but it also reminds us of how far we have to go.

