From Australia to California: Solving California’s Water Crisis by Applying Lessons Learned Down Under

By James A. Folger*

Drought succeeds like nothing else in reminding Californians of their enormous dependence upon water.¹
—Governor’s Commission to Review California Water Rights Law, 1978

Introduction

Drought is nothing new for California.² However, recent developments such as climate change and a growing population have forced the State to reexamine its water laws. California recently enacted a comprehensive water package to address the environmental and economic effects of the recent three-year drought.³ Although this package makes large changes to water policy in the state, California will be forced to take even more sweeping measures to address the state’s water shortage in the near future. The growing effect of climate change will exacerbate the deeply entrenched water wars among urban users, agricultural users, and environmentalists. In order to properly address the worsening lack of water resources and these competing interests, California needs to act now to create a well thought out, proactive, structured approach to water scarcity, where all stakeholder interests are properly represented.

In an effort to continue the dialogue about California’s water issues, this Note looks toward Australia for inspiration on how to ad-

* J.D./M.B.A. University of San Francisco Class of 2011; B.A., Connecticut College.
2. See id. (discussing past droughts; for example water shortages during the 1966–1967 drought forced California to impose fifty percent reductions on agricultural deliveries and the U.S. Bureau of Reclamation to reduce agricultural deliveries by seventy-five percent and municipal and industrial deliveries by fifty percent).

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dress water resource scarcity. Australia is often viewed as a model for creating comprehensive water policy while simultaneously combining environmental protection with water efficiency. In the 1980s, Australia started to scrutinize its water laws. As water became scarcer and access was contested, the country was forced to pursue improved rules for coordinating water use and settling conflicts. At the time, the Australian economy and its communities were not receiving a strong value for their water resources because the water was locked up in poorly used and inefficient water licenses. As a result, Australia was forced to pass sweeping legislation that clarified and rearranged its water systems.

This Note compares the similar histories of California and Australia’s water laws and argues that California should largely adopt the Australian approach. However, there are serious obstacles that the California legislature must address before the State can adopt Australia’s approach. Before California can adopt Australian innovations like water rights trading, the California legislature needs to address water allocations, an issue that can be solved if California also adopts the Australian water licensing system. Under the Australian licensing system, no one has a guaranteed right to water. Instead, people only have a right to access water. But in order for such a licensing system to work in California, the State must in turn implement further groundwater extraction reforms. Even more importantly, the State needs to create the necessary political will to implement such reforms. Once California adopts these reforms, the State can start building a robust water transfer system that will promote the efficient use of water throughout the state. Community support is also imperative. Without widespread community support and involvement, California will not be able to properly address the water needs of its residents and natural environment.

Part I of this Note briefly explores California water law, especially regarding the San Francisco Bay-Delta and the recently enacted water

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6. Id.
7. *See, e.g.*, Godden, supra note 4, at 181.
conservation package. Part II surveys Australian federal water law and New South Wales’s water law, with particular emphasis on the Murray-Darling Basin and the recently enacted water laws. Part III analyzes which parts of the Australian water reforms California could adopt as it addresses its own competing needs. Finally, it is shown that in order to adopt these changes, California will need to transform certain aspects of its current water laws. This Note concludes that Californians need to create the political will to revolutionize the state’s water laws now when there is time for a thoughtful discussion among all stakeholders. Otherwise, California will be stuck with an inefficient system that will cause further economic and environmental damage.

I. California Water

A. Background on California Water Issues

California’s massive irrigation projects often hide the fact that the state has a semi-arid landscape that does not receive much rainfall. However, before storms drenched the state earlier this year, California Governor Arnold Schwarzenegger declared a state of emergency in California due to three consecutive years of drought. This drought left most of the state’s major reservoirs at their lowest levels in almost twenty years and forced local water agencies to impose mandatory water restrictions on residents. Lake Shasta, the largest reservoir in California, held only thirty-one percent of its capacity in January 2009. This severe drought negatively impacted the state’s economy, especially in the agricultural areas of the Central Valley. The fact that several fish species in the San Francisco Bay-Delta are in decline, with some on the brink of extinction, added even more pressure to the system. Plus, since groundwater demand increases in dry years, the drought exacerbated aquifer overdraft and land subsidence.

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14. Id.
15. Id. (defining subsistence as when users pump an unsustainable amount of water from an aquifer, causing the land directly above the aquifer to sink).
Even with the 2010 winter storms, California will be forced to take further water saving measures. The state’s population is projected to grow from almost forty million residents this year (2010) to almost sixty million by 2050.\footnote{16} Additionally, because California by itself is one of the largest economies in the world, its addiction to water will only grow.\footnote{17} California’s farmers grow approximately half of all United States vegetables, fruits, and nuts.\footnote{18} Climate change has also added stress to the system because rising temperatures have been shrinking the Sierra Nevada snowpack, which acts as California’s largest storage facility of surface water.\footnote{19} The snowpack holds the snow during the winter, and as the snow melts during the spring and summer, it gradually releases water down the rivers to be used throughout the state.

\section*{B. California Water Projects}

Although there are many reasons why California needs to take immediate steps to address its water needs, the main reason is that the state’s complex plumbing system is now dangerously strained.\footnote{20} California’s Secretary of Natural Resources recently said that “[t]he way the system works now is a disaster.”\footnote{21} Because about seventy percent of California’s available groundwater falls as rain or snow in the less populated north, and eighty percent of the demand lies in the southern two-thirds of the state, which only receives a few inches of rain per year, California relies heavily on major water transportation systems built along the Sacramento and San Joaquin Rivers and their tributaries.\footnote{22} The Central Valley Project (CVP), operated by the United States Bureau of Reclamation, has a storage capacity of eleven million acre-feet of water in twenty-two reservoirs, making it one of the largest water storage and transportation systems in the world.\footnote{23} The CVP de-
livers seven million acre-feet of water per year.\textsuperscript{24} Its water not only irrigates more than three million acres of farmland but also delivers drinking water to nearly two million consumers.\textsuperscript{25} The State Water Project (SWP), operated by the California Department of Water Resources, provides water to about twenty million California residents and 660,000 acres of farmland through thirty-four storage facilities, reservoirs, and lakes; twenty pumping plants; four pumping-generating plants; five hydroelectric power plants; and about 700 miles of open canals and pipelines.\textsuperscript{26}

However, even these two enormous water storage and delivery systems are not enough to meet California’s current needs. In Carlsbad last year, construction started on the largest desalination project in the country.\textsuperscript{27} Once completed, this operation will produce fifty million gallons of potable water per day.\textsuperscript{28} Although the desalination plants are expensive to build and use substantial amounts of energy, nineteen more plants are being planned for construction in California.\textsuperscript{29} Some water districts are taking even more proactive steps to ensure their access to water. For instance, the Orange County Water District recently constructed the second largest water-reclamation facility in the world.\textsuperscript{30} This facility recycles seventy million gallons of sewage every day into clean, potable water.\textsuperscript{31}

C. The San Francisco Bay-Delta

Unfortunately, the CVP and SWP have also had a devastating effect on the San Francisco Bay-Delta ecosystem.\textsuperscript{32} This 1153-square mile estuary at the confluence of the San Francisco Bay and the Sacramento and San Joaquin Rivers also happens to be the hub of the CVP and SWP.\textsuperscript{33} Approximately twenty-five million California residents receive some, if not all, of their drinking and agricultural water from the Delta.\textsuperscript{34} The Bay-Delta “is in a state of full environmental collapse and

\begin{itemize}
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} California State Water Project, CAL. DEP’T WATER RESOURCES, http://www.water.ca.gov/swp/ (last visited May 11, 2010).
  \item \textsuperscript{27} Bourne, supra note 11, at 145.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Id. at 141.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} CODY ET AL., supra note 13, at 12.
  \item \textsuperscript{33} Pervaze A. Sheikh & Betsy A. Cody, CALFED BAY-DELTA PROGRAM: OVERVIEW OF INSTITUTIONAL AND WATER USE ISSUES I (2005).
  \item \textsuperscript{34} Cody et al., supra note 13, at 11.
\end{itemize}
the state’s water infrastructure, built fifty years ago for a population half as large, can’t handle the stress of the current crisis.”

In response, California and the federal government passed numerous laws to try to protect the Bay-Delta ecosystem, while still providing water to agricultural and urban users. One of these responses to the Bay-Delta crisis was the CALFED Bay-Delta Program, which brought together state, federal, and other stakeholders to develop a comprehensive response to restoration and water supply issues in the Bay-Delta. Additionally, the Endangered Species Act and other state and federal laws, which were passed to protect the Bay-Delta, have limited how much, and when, water may be pumped from the Bay-Delta by the SWP and CVP. These restrictions on water deliveries are estimated to range from approximately twenty percent to twenty-five percent of total water delivery reductions in 2009.

D. Overview of California Water Law

California is distinctive when it comes to water rights because riparian rights coexist with prior appropriative water rights. A riparian water right, which has been recognized in California since the mid-1800s, is the right to use water as a result of owning land that is appurtenant to a natural watercourse. An appropriative water right, on the other hand, is the right to divert and use a specific quantity of water for a reasonable and beneficial use in a specific location. The California water rights doctrine emerged as a result of the 1849 gold rush. Priority is based on seniority such that senior rights-holders are those who first established a pattern of water use that was recognized by an administrative permit or judicial decree—hence the saying, “first-in-time, first-in-right.” When it comes to groundwater, Cali-

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37. SHEIKH & CODY, supra note 33, at 7.
38. CODY ET AL., supra note 13, at 12.
39. Id. at 24.
41. Lux v. Haggin, 10 P. 674, 753–74 (Cal. 1886).
44. Id.
nia employs the correlative rights doctrine, which is similar to riparian rights.\textsuperscript{45} However, groundwater is not regulated under a statewide permit system, and most property owners overlying groundwater can simply drill wells and extract water, limited only by the correlative rights of their neighbors. As with other states, there is a long and involved relationship with the federal government regarding water rights, but there is also “the consistent thread of purposeful and continued deference to state water law by Congress.”\textsuperscript{46} For example, the California Constitution requires that all water resources of the state be put to beneficial and reasonable use.\textsuperscript{47}

This system of water rights only exacerbates the problem of water deliveries in drought years.\textsuperscript{48} This type of water resource management is “based on laws and policies poorly suited to modern demands.”\textsuperscript{49} In response to these concerns, the California Legislature has started to expand the voluntary transfer of water and water rights.\textsuperscript{50}

\section*{E. Recent Legislative Efforts to Address Water Issues in California}

The California Legislature recently enacted the most far-reaching legislative response in recent times to address California’s water issues.\textsuperscript{51} This comprehensive water package was comprised of four policy bills and an $11.14 billion bond proposal.\textsuperscript{52} Senate Bill 1 addressed Delta governance and the long term Delta Plan by (1) establishing the Delta Stewardship Council, which must implement a comprehensive management plan for the Delta, and (2) restructuring the Delta Protection Commission.\textsuperscript{53} Senate Bill 6 addressed groundwater monitoring and, for the first time, required local agencies to implement a groundwater-monitoring program.\textsuperscript{54} A region that fails to implement a plan will be ineligible for state grant funds.\textsuperscript{55} Senate Bill 7 addressed water conservation by requiring the development of agricultural water management plans and by requiring urban water agencies to reduce

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\item 45. Katz v. Walkinshaw, 74 P. 766, 771–72 (Cal. 1903).
\item 47. CAL. CONST. art. X, § 2.
\item 48. CODY ET AL., supra note 13, at 19–20.
\item 49. Kenney, supra note 43, at 167.
\item 50. CAL. WATER CODE §109 (West 2010).
\item 51. 2009 Comprehensive Water Package Special Session Policy Bills and Bond Summary, supra note 3.
\item 52. Id.
\item 55. Id.
Because some urban areas have already started to reduce consumption, this bill establishes multiple ways for urban water suppliers to reach the twenty percent reduction goal. Additionally, this bill makes any urban or agricultural water supplier who is not in compliance ineligible for state grant funds. Finally, Senate Bill 8 addressed diversion, use, and funding issues by improving the accounting of water being diverted. Additionally, it appropriated funds to benefit the Delta to improve the reliability of the state’s water supply.

II. Australia Water

A. Background on Australian Water Issues

Australia and California share a similar history in both their climates and their water resources. Australia is the driest inhabited continent on Earth. As such, Australia has been forced recently to take more aggressive steps to control and conserve its water, especially since it has endured a prolonged drought. As a result, the Australian government has invested fifty billion dollars in water infrastructure and not only cut farmers’ water allocations by seventy percent but also cut household water use to a quarter of California’s household use. Like California, Australia’s agricultural management practices were developed to suit a much different climate that is wet and naturally fertile. Also like California, Australia’s water is mostly used for agricultural irrigation.

57. 2009 Comprehensive Water Package Special Session Policy Bills and Bond Summary, supra note 3.
58. Id.
60. Id.
63. Blueprint for a Living Continent, supra note 61, at 5.
64. See Godden, supra note 4, at 183; see also McKay, supra note 8 (agriculture accounts for seventy-five percent of water use while urban use accounts for only twelve percent in Australia).
To make matters worse, as a result of climate change, temperatures in Australia have risen about 0.9°C since 1910.\textsuperscript{65} The rising temperatures have been exacerbated by the lower moisture content of the soil associated with the recent drought, which results in even higher temperatures.\textsuperscript{66}

The common law favored an individualist approach, which worked fine in a well-watered and highly developed England.\textsuperscript{67} But water laws developed in the wet European climate failed in Australia; in fact, many of Australia’s 246 river basins do not permanently flow.\textsuperscript{68} As a result, it became readily apparent that the common law rules regarding water were poorly suited to Australia’s climate.\textsuperscript{69}

These problems and their associated projected costs forced the Australian government to address its water laws and forced Australians to consume less water.\textsuperscript{70} Although agriculture was hit hard by the drought,\textsuperscript{71} city residents started to take notice as well when fruit and vegetable prices started to rise and the public parks changed from green to brown.\textsuperscript{72} The Australian government started a social marketing campaign to reduce urban water use. Just two weeks into the campaign, average daily per capita use dropped from eighty gallons to thirty-two gallons, which saved an amount of water equivalent to what a desalination plant could produce.\textsuperscript{73} Australians have favorable attitudes toward water conservation (ninety-seven percent of Australians believe water conservation is important and ninety-two percent said that they conserve water when they can); however, Australians do not always take appropriate action.\textsuperscript{74} For instance, even these voluntary reductions and additional government restrictions do not ultimately

\begin{thebibliography}{99}
\bibitem{66} Id.
\bibitem{67} Godden, \textit{supra} note 4, at 186.
\bibitem{68} Godden, \textit{supra} note 4, at 182–83.
\bibitem{70} Godden, \textit{supra} note 4, at 184.
\bibitem{71} McKay, \textit{supra} note 8 (explaining that recent crop and pasture reports have confirmed the significant effect of drought with the yield estimates around twenty percent below the ten year average).
\bibitem{73} Id.
\end{thebibliography}
save enough water when compared to potential savings from agriculture, because urban use only accounts for twelve percent of Australian water consumption.\textsuperscript{75}

\section*{B. The Murray-Darling Basin}

Australia even has its own version of the San Francisco Bay-Delta: the Murray-Darling Basin. This basin includes a total of twenty-three river valleys and covers fourteen percent of the total area of Australia.\textsuperscript{76} As Australia’s most important agricultural area, the basin generates thirty-nine percent of the national income derived from agricultural production.\textsuperscript{77} The basin is the catchment of the Murray and Darling Rivers and their tributaries and includes extensive wetlands.\textsuperscript{78} However, unlike the Sacramento and San Joaquin Rivers, the Murray-Darling Basin spans five states.\textsuperscript{79} As a result, the Australian federal government created the Murray-Darling Basin Authority, a single agency responsible for planning an integrated management system for the basin water resources.\textsuperscript{80} One of the largest challenges dominating the public and political agenda is the environmental consequence of over-extracting water from the country’s river systems.\textsuperscript{81} Australia is currently focused on supply-side measures while ignoring the huge potential of conservation measures.\textsuperscript{82} For instance, a majority of Australians neither reuse water nor use rainwater tanks.\textsuperscript{83} Additionally, fewer than two thirds of the citizens have water efficient dishwashers, hose timers, or water collection systems for washing machines, sinks, or showers.\textsuperscript{84}

\section*{C. Overview of Australian Water Law}

Similar to California, Australia has quite a few defining characteristics regarding its history of water rights: (1) a constitutionally-based federal governance system that leaves water rights to the states; (2) the

\begin{itemize}
\item \textsuperscript{75} See supra text accompanying note 64.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} See id. (explaining that the basin spans parts of Queensland, New South Wales, Victoria, South Australia, and the Australian Capital Territory).
\item \textsuperscript{81} Haisman, supra note 5, at 113.
\item \textsuperscript{82} Id.
\item \textsuperscript{83} Water Conservation—Why Australians Are Not Really Taking Action, supra note 74.
\item \textsuperscript{84} Id.
\end{itemize}
adoption of antiquated systems of administratively granted water rights; (3) a semiarid climate; and (4) a pioneer culture that led to the competitive and extreme development of water resources. As miners immigrated to the country in the second half of the nineteenth century, Australians started to adopt large-scale irrigation. The government helped this water development boom by building and operating major dams and irrigation areas in an effort to turn the desert green or “of turning water into gold.”

Unlike California, however, the British monarchy specifically retained water rights so water was never a right; water access was always a license. Regardless, Australian water law resembles California’s prior appropriation doctrine because the licensed water rights were also on a first come, first served basis. This view of water rights changed, however, in the 1970s when water became scarcer, and the main rivers were closed to further license applications. Australia is unique because before major water systems were developed there were no riparian water rights, except in limited situations involving livestock and domestic uses; as a result, riparian rights are basically nonexistent. Furthermore, in order to develop public infrastructure for water, including irrigation, water resources were mainly vested in governments through legislation. As a result, state governments today continue to hold vested water resources.

There have been five major water epochs in Australian water law history. From 1788–1901, there were only state colonial laws, which were highly introspective to the particular colony. During this time, the focus was on developing water, and there was little concern for sustainable management or environmental protection. The years between 1901 and 1983 were marked by a time of federation. Nevertheless, the central national power did not have much power because the

85. Haisman, supra note 5, at 114.
86. Id. at 117.
87. Id.
88. Id. at 120 (“The Water Act of 1912 specifically vested in the Crown . . . the right to the ‘use, control, and flow’ of all surface and groundwater.”).
89. See McKay, supra note 8 (describing the historic use of water licensing).
90. Haisman, supra note 5, at 121.
91. Id.
92. Id. at 123.
93. Godden, supra note 4, at 187.
94. Id.
95. McKay, supra note 8.
96. Id.
97. Id.
states refused to relinquish control of their water laws.\textsuperscript{98} Furthermore, legislation did not coherently address the growing environmental repercussions of water project development.\textsuperscript{99}

Federal powers were enhanced from 1983 to 1994, but the federal government still did not have full control. However, pressure on the government to clarify water property rights increased during this period.\textsuperscript{100} The Water Act of 1989 was the first overhaul of existing water laws.\textsuperscript{101} The Act included environmental protections and harmonized the regulation of surface water and groundwater.\textsuperscript{102}

From 1994 to 2007, the states still retained power, but federal power increased through the use of funding incentives to create national water law.\textsuperscript{103} However, there were still fourteen distinctly different types of legal water systems among water supply businesses in the country.\textsuperscript{104} In 1994, the Council of Australian Governments agreed to a strategic framework for the reform of the country’s water industry.\textsuperscript{105} Although the Crown always retained all water rights, this framework created clearly defined water property rights that were separate from land title.\textsuperscript{106}

Australia’s adoption of the “precautionary principle” from the 1992 United Nations Conference on Environment and Development was another important step during this period.\textsuperscript{107} This principle states that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”\textsuperscript{108} As a

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Godden, supra note 4, at 188.
\item \textsuperscript{100} Pagan & Crase, supra note 9, at 79.
\item \textsuperscript{101} Godden, supra note 4, at 189.
\item \textsuperscript{102} Id.
\item \textsuperscript{103} McKay, supra note 8.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} McKenzie, supra note 69, at 443.
\item \textsuperscript{106} Id. at 443–44.
\end{itemize}
result, several Australian courts have applied the precautionary principle in environmental disputes.109

In 2004, the International Agreement on a National Water Initiative (NWI) was signed at the Council of Australian Governments meeting, with the Tasmanian Government joining the agreement in 2005 and the Western Australia Government joining in 2006.110 The NWI built on the 1994 strategic framework’s guiding principles111 for the continued reform of the Australian water industry.112 Under this agreement, the state governments committed to: (1) prepare water plans with provisions for environmental protection; (2) address issues of over-allocated or stressed water systems; (3) introduce registers of water rights and water accounting; (4) expand water transfers; (5) improve water storage and delivery pricing; and (6) meet and administer urban water demands.113 Additionally, each state was required to prepare and implement an NWI plan, which must be approved by the National Water Commission.114 Under the plan, all parties agree to implement the NWI “in recognition of the continuing national imperative to increase the productivity and efficiency of Australia’s water use, the need to service rural and urban communities, and to ensure the health of river and groundwater systems by establishing clear pathways to return all systems to environmentally sustainable levels of extraction.”115

Furthermore, the agreement included state commitments to action across eight aspects of water management.116 The first commitment called for improved water access entitlements and planning.117

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111. Godden, supra note 4, at 189 (guiding principles include: (1) water pricing should be consumption-based and focus on full cost-recovery; (2) environmental allocations should be based on the best scientific information; (3) water allocations should be separate from land title and easily tradable; (4) there should be wide public participation and consultation).
114. Id.
The second commitment called for improved water markets and trading, because they allow for scarce water resources to be transferred to their most productive uses. The third commitment called for improved water pricing and institutional arrangements, which would advance economically efficient and sustainable uses of water. The fourth commitment called for the integrated management of water for environmental and other public benefits. The fifth commitment called for improving water resource accounting and called for proper measurement, monitoring, and reporting systems. The sixth commitment called for reforming urban water systems to ensure healthy, safe, and reliable water supplies and to increase the use and efficiency of water in domestic and commercial areas. The seventh commitment called for increasing knowledge and capacity in order to ensure future support and execution of the agreement by identifying and implementing proposals. Finally, the agreement called for the government to involve water users and other stakeholders in reaching the NWI objectives by improving transparency and public-private partnerships. The Commission makes continuous findings and recommendations about the implementation of the NWI. In the 2009 report, the Commission found that the quality of metering and monitoring


groundwater extractions varies, and the quality of the data is generally poor.125

The NWI avoided providing complete perpetual rights to water access and, instead, established perpetual rights to a share of available water resources.126 The shared system attempts to reduce uncertainty by spreading the risk of potential future reduced water allocations across all stakeholders.127 By strengthening water rights, the government could enhance the optimal management capacity and further reduce uncertainty.128

The last epoch started with the 2007 Water Act, a national law that created a de facto centralized water system.129 Under this law, the national government must certify that each natural resource region is complying with the law.130 Similar to what was included in California’s recently enacted legislation, if the government determines that the water plan is inadequate, then the government can not only step in and produce a new plan but can also refuse to grant money to the area for water development.131 Since the Crown retains all water rights, no compensation is given to farmers even if the government determines that farmers are to receive an amount of water each year that is less than was previously allocated.132 This law passed because communities were involved in the drafting process and will continue to have a say in water allocations.133

In April 2008, the national government announced the Water for the Future Initiative, which is designed to help address water scarcity as it relates to climate change.134 This initiative focuses on four key priorities: “taking action on climate change; using water wisely; securing water supplies; and supporting healthy rivers.”135 In order to implement this initiative, the national government has promised to

126. Pagan & Crase, supra note 9, at 87.
127. Id.
128. Id. at 86.
129. McKay, supra note 8.
130. Id.
131. Id.
132. Id.
133. Id.
135. Id.
provide more than $1.5 billion to help urban users improve their water security.\textsuperscript{136}

The national government also passed the Water Amendment Act of 2008, which created the single body Murray-Darling Basin Authority.\textsuperscript{137} Negotiating a memorandum of understanding on the Murray-Darling Basin reform and the Intergovernmental Agreement on Murray-Darling Basin Reform were critical to passage of this act.\textsuperscript{138} It is unlikely that such strong reform would have been possible without this coordinated effort.

D. New South Wales Reforms

The state of New South Wales took even further steps to reform its water laws than required by federal laws.\textsuperscript{139} To address its own water issues, the state of New South Wales implemented the Water Management Act of 2000,\textsuperscript{140} which separated the right to extract or divert water (“access licenses”) from the right to use water for a specific purpose at a precise location (“water use approvals”).\textsuperscript{141} Each license lasts for up to fifteen years and each Water Management Plan lasts ten years.\textsuperscript{142} Should license holders receive a water allocation less than what is specified in the plan, they can claim compensation for that loss.\textsuperscript{143} As a result, there is greater certainty of water allocations, which facilitates investment, yet the government still is able to retain the right to amend a license during the renewal period should there be new considerations, such as emerging environmental issues.\textsuperscript{144} In an effort to create even greater certainty, the government allows for continuous accounting of water, which allows water users to carry over some or all of their unused water entitlements to the next year.\textsuperscript{145} The water user may consume the water, sell it on the transfer market, or

\textsuperscript{136} Id. at 4.
\textsuperscript{139} McKenzie, supra note 69, at 447.
\textsuperscript{141} Haisman, supra note 5, at 134.
\textsuperscript{142} Id. at 135.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 136.
\textsuperscript{145} Id. at 134.
leave up to one year’s allocation in storage indefinitely.\footnote{146} A key reason why this approach has worked was the strong community involvement during preparation of the water management plans that determine where, when, and to whom the water is allocated.\footnote{147}

Water trading, prompted after the severe drought in the early 1980s,\footnote{148} is an integral part of irrigation planning in New South Wales.\footnote{149} In 1994, the Council of Australian Governments endorsed water trading to promote efficiency and address the uncertainties of the availability of water in Australia.\footnote{150} Because there is a variety of water trading mechanisms,\footnote{151} there is also a vigorous water transfer market.\footnote{152}

### III. Australian Reforms Proposed for California Adoption

#### A. Problems of Adoption

Economic and climate limitations suggest “an increased federal role in water law is appropriate, and probably inevitable.”\footnote{153} In the meantime, however, states will have to take the lead. No matter who leads this charge, water law and policy will have to adapt to the effects of climate change. The current system is inadequate to deal with the coming change in water supplies.\footnote{154} The recently enacted California water bills are a step in the right direction. However, even the controversial elements of these bills do not adequately address California’s true water supply issues. Reducing urban supply is clearly important, but agricultural consumption, accounting for approximately fifty-two percent of California’s water consumption, must be reduced.\footnote{155} Therefore, a holistic approach is necessary. By applying the lessons

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\footnote{146}{Id.}
\footnote{147}{Id. at 138.}
\footnote{148}{Id. at 130.}
\footnote{149}{Id.}
\footnote{150}{Godden, supra note 4, at 203.}
\footnote{151}{Haisman, supra note 5, at 145–46 (trading mechanisms include: deals between neighbors, private advertisements, the use of water brokers, and even Internet-based exchanges; for an example of an Internet-based exchange, see http://www.waterexchange.com.au).}
\footnote{152}{Haisman, supra note 5, at 145.}
\footnote{153}{Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENVTL. L.J. 1, 7 (2010).}
\footnote{154}{Id.}
\footnote{155}{Water Supply Availability, CAL. FARM WATER COALITION (Nov. 12, 2008), http://www.farmwater.org/Content/Water-Supply-Availability.html (comparing agricultural use with thirteen percent for urban use and thirty-five percent for environmental use).}
learned in Australia, California could better manage its water resources for all of its residents and the natural environment.

B. Water Transfers

In 1973, the National Water Commission recommended reducing barriers to water transfers, and it is time to accelerate removal of these barriers in California.\textsuperscript{156} The prior appropriation doctrine is inefficient because it is based on seniority and prevents the development of water markets.\textsuperscript{157}

However, opponents to water transfers cite three main reasons for their position.\textsuperscript{158} First, since property rights are ill defined in institutional water supplies, there can be fierce battles over a transfer’s profits.\textsuperscript{159} Second, there can be adverse effects on third parties, such as local community members who rely on various agricultural needs. Third, pure politics and prestige may affect whether administrators grant transfers.\textsuperscript{160} Therefore, if water transfers are going to reach their potential, the decision-making process must bring all stakeholders, including third parties, into the conversation.\textsuperscript{161} This inclusion is necessary because markets alone do not reflect all of the important values of water,\textsuperscript{162} especially since community claims have historically been neglected in water transfers.\textsuperscript{163} In order to avoid this neglect in the future, water policy must favor sales that minimize disadvantages to the whole community.\textsuperscript{164} A simple way to achieve this goal would be through a transfer tax, which would vary depending on the nature of the sale.\textsuperscript{165} For example, a higher tax could be imposed for out-of-basin transfers than for in-basin transfers.\textsuperscript{166} Transfer taxes could also be used to mitigate environmental concerns, such as the loss of waterfowl habitat.\textsuperscript{167} Water transfer systems must be flexible enough to

\textsuperscript{156} Barton H. Thompson, Jr., Institutional Perspectives on Water Policy and Markets, 81 Calif. L. Rev. 671, 675 (1993).
\textsuperscript{157} Id. at 682.
\textsuperscript{158} Id. at 730.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 731.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 37.
\textsuperscript{164} Id. at 38.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
adapt to the changing situation of water flows and the reallocation mechanisms must include transaction costs to promote efficiency.\textsuperscript{168}

\section*{C. Water Licensing}

The biggest water reform that California could adopt would be to retire the “California Doctrine” and adopt Australia’s water license system. Although California has had administratively controlled water rights since the early part of the twentieth century,\textsuperscript{169} this change would be significant. However, there may come a time when the state could finally determine that the current system works so poorly that adopting Australia’s approach would be necessary to ensure certainty. In 1978, the Governor’s Commission to Review Water Rights Law found that uncertainty in water rights is a major problem\textsuperscript{170} because it unnecessarily impedes local management and supervision of water systems.\textsuperscript{171} Since 1978, however, the legislature and the courts have started to provide greater water rights certainty and security.\textsuperscript{172} Although legislative changes cannot eliminate all uncertainty, legislation could allocate uncertainty across society to lessen the burden and to promote methods of user-based mitigation.\textsuperscript{173}

Australia’s approach may seem anathema to California, but a legislative overhaul may not even be necessary. The California Constitution’s water provision allows for changing notions of waste and unreasonable water use.\textsuperscript{174} Furthermore, some have suggested that the public trust doctrine could be extended “as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”\textsuperscript{175} The California Supreme Court has determined that the public trust evolves “with the changing public perception of the values and uses of waterways.”\textsuperscript{176} California can surrender “that right of protection only in rare cases when the

\begin{thebibliography}{99}
\item \textsuperscript{168} Kenney, \textit{supra} note 43, at 174–75.
\item \textsuperscript{169} \textit{Final Report}, \textit{supra} note 1, at 9 (explaining that the State established the Conservation Commission in 1911).
\item \textsuperscript{170} \textit{Id.} at 2; see also Nirav K. Desai, \textit{Up a Creek: An Introduction to the Commission’s Final Report Discussion of Uncertainty in California Water Rights Law}, 36 McGovern L. Rev. 29, 30 (2005) (explaining that uncertainty has been a problem since well before 1978).
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} Scott S. Slater, \textit{A Prescription for Fulfilling the Promise of a Robust Water Market}, 36 McGovern L. Rev. 253, 293 (2005).
\item \textsuperscript{173} Thompson, \textit{supra} note 156, at 679.
\item \textsuperscript{174} \textit{Final Report}, \textit{supra} note 1, at 9.
\end{thebibliography}
abandonment of that right is consistent with the purpose of the trust. 177 Once the public trust doctrine is properly invoked, compensation would not be required. 178 Previously granted rights could be revoked, 179 and “lands long thought free of the trust” could be put under the protection of the trust. 180 At the same time, the Fifth Amendment of the United States Constitution prohibits the government from taking private property for public use, without just compensation. 181 However, the United States Supreme Court has held that the public trust can trump private riparian rights, stating that the private right to appropriate “may not substantially diminish one of the great foundations of public welfare and health.” 182

Historically, because water rights have fewer protections than other property rights, 183 the Constitution has not barred legislation that applied retroactively to water. 184 From a policy perspective, characterizing a change to a licensing system as a taking would remove one of the most effective ways to mandate more efficient use of existing water supplies. 185 Hence, the public trust doctrine could be extended to all water supplies, both above and below ground. The sooner California recognizes the necessity to change its water policies, the sooner planning can begin, which means that the eventual changes will be less painful than if the state waits to reform its laws. 186 Ideally, after the necessary community input, the California legislature would amend the constitution so that access to water is specifically a license. However, should the legislature fail to act, the courts likely have the discretion to make this adjustment if Californians’ notions of the public trust and water use change enough.

177. Id. at 441.
178. Id. at 440; see also James Burling, The Latest Take on Background Principles and the States’ Law of Property After Lucas and Palazzolo, 24 U. Haw. L. Rev. 497, 511 (2002) (“Any regulation that restricts the ability of an individual to utilize what was assumed to be a private property interest that is found subject to the public trust would not give rise to a cause of action for a taking because, in reality, the private property interest never really existed in the first place.”).
180. Id.
181. U.S. CONST. amend. V.
184. Id. at 264.
185. Id. at 260.
186. Id. at 282.
D. Groundwater Reforms

California needs to integrate its groundwater and surface water policies. Keeping these two policies separate is largely historical and outdated, because it ignores the scientifically proven hydrological link between these systems.\footnote{Thompson, supra note 156, at 685.} Currently, groundwater extraction is effectively unregulated.\footnote{Joseph L. Sax, We Don’t Do Groundwater: A Morsel of California Legal History, 6 U. DENV. WATER L. REV. 269, 270 (2003).} Groundwater users, fearing they would lose control of their pumping practices, generally have opposed any state regulation of groundwater extractions.\footnote{Thompson, supra note 156, at 684–85.} Even with the passage of the recent water bills, California will only have started to monitor extraction on a statewide scale.\footnote{See S.B. 6, 2009–2010 Leg., 7th Ex. Sess. (Cal. 2009).} Until California recognizes the hydrological reality and institutes a statewide approach to groundwater extraction, it will be impossible to transform the water system and create water policies that properly deal with allocation.

E. Necessary Community Involvement

In order for California to properly implement these changes, there must be great community involvement. For this reason, a legislative approach would be much preferred over a judicial approach. Community-based governance “performs better than government-centered approaches because locals possess superior time and place information about the resources and how their actions affect the resource.”\footnote{Edella Schlager, Getting the Relationships Right in Water Property Rights, in WATER RIGHTS REFORM: LESSONS FOR INSTITUTIONAL DESIGN, supra note 5, at 27, 38.} These communities are able to better address the trade-offs of certain water allocation and use systems.\footnote{Id. at 49.} Although this public involvement takes time and resources, the benefits in developing and implementing a workable approach are overwhelming.\footnote{Bryan Randolph Bruns et al., Reforming Water Rights: Governance, Tenure, and Transfers, in WATER RIGHTS REFORM: LESSONS FOR INSTITUTIONAL DESIGN, supra note 5, at 283, 296.} It is necessary to allow enough time for stakeholders to properly participate in the process and for institutional change.\footnote{Id. at 306.} Additionally, the government needs to constantly conduct performance-based assessments during the transition in order to properly monitor and evaluate
the performance of the legislative changes. However, these changes should not be pushed too soon or without appropriate communication and synchronization between the involved institutions. These institutional changes can help make "water use more efficient, equitable, and environmentally sound." At the same time, legislators should be aware that there are also serious risks.

Conclusion

California needs to start planning for necessary legislative reforms to its water laws and policies. The State must start this process now in order to develop the appropriate framework for the future and to create the necessary political will. Australia has shown that when there is the necessary political climate, a government can substantially change its water policies. California should use Australia as a guide because of its similar history and climate. First, California should adopt a water licensing system. Second, the State should recognize hydrological reality and institute better groundwater management. Once these two changes have been made, it will be easier to adopt better water transfer policies. However, in order to make any of these changes occur, the whole community and all stakeholders need to be actively involved. Because of all of the competing interests involved in California water and because of the extensive time it will take to come to a consensus, this dialogue needs to start immediately.

In the meantime, as Professor Jennifer McKay suggests, California can start by adopting the United Nations' precautionary principle so that the lack of full scientific certainty will not be used for postponing cost-effective measures to prevent environmental degradation where there is a threat of serious or irreversible damage. While this small step is controversial, it is an important first step to start the conversation about the inevitable major California water rights reform process.

196. Bruns et al., supra note 193, at 294.
198. Id. (explaining that risks include: “disrupting existing institutions, worsening inequalities, or creating incentives that compound problems”).
199. McKay, supra note 8.
Free Movement of Labor in North America: Using the European Union as a Model for the Creation of North American Citizenship

By Emily Gibbs*

Introduction

In 2009, APPROXIMATELY 10.8 million undocumented immigrants lived in the United States.¹ Of these 10.8 million, sixty-two percent or almost 6.7 million were born in Mexico.² The majority of the U.S. undocumented population is between the ages of twenty-five and forty-four,³ prime working years. Thus, it comes as no surprise that many of these undocumented immigrants came to and remain in the United States to work. The presence of this large undocumented population has led to a serious debate over how to cope with undocumented immigrants attempting to enter the United States seeking work as well as how to manage the undocumented population already living within the United States.

On one side of the resulting immigration debate, states like Arizona have taken it upon themselves to create and enforce strict state immigration laws.⁴ On the other side, immigrants’ rights groups advo-

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² Id. at 4.
³ Id. at 5.

* I received my B.A. from the University of California San Diego and my J.D. from the University of San Francisco School of Law. I would like to thank Annick Persinger, Professor Maria Ontiveros, Alison Britton-Armes, and the rest of the 2010 USF Law Review team for all their help during the writing and editing process. I would also like to thank my amazing family, Vicki, Jake, and Loren Gibbs, for all their love and support.
cate for amnesty for those undocumented immigrants currently living in the United States.\textsuperscript{5}

This comment discusses the European Union (EU) as a model for international free movement of labor by examining the strategies employed via EU treaties to encourage free movement of labor, the justifications for and the benefits of the EU model, and the potential application of EU policies in North America. Part I of this comment describes the three key aspects of the European Union model for free movement of labor: (A) the legal basis and justifications for European Union citizenship; (B) the economic theory justifying free movement of labor; and (C) the incorporation of basic human rights as a requirement for EU membership. Part II applies the EU justifications for supranational citizenship, economic theory, and the justifications for a human rights requirement to the United States and the North American Free Trade Agreement (NAFTA). Finally, after exploring three ways in which North American labor migration restrictions could be liberalized, Part III recommends creating a supranational North American citizenship and suggests strategies for implementing the EU model.

This comment concludes that the European Union citizenship model should inform the U.S. approach to immigrant workers. The policies and methods of the EU, if applied in the United States, would reduce the number of undocumented workers in the United States and create an incentive for employers to respect immigrants’ rights. Based on the success of the EU and the applicability of its tenets in the context of North America, signatories to NAFTA should incorporate free movement of labor by creating North American citizenship in the treaty and requiring the implementation or expansion of human rights protections in participating signatory countries.

I. The European Union and Free Movement of Labor

In 1950, the EU began as the European Economic Community, with six founding members and a treaty based on economic integration.\textsuperscript{6} That original community has evolved and grown into the Euro-

\textsuperscript{5} See Federation for American Immigration Reform at http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecentersa5ad for a list of groups supporting some form of amnesty for undocumented immigrants in the U.S.

European Union, which now includes twenty-seven Member States, a democratically elected government body, a supranational court, a common currency, a single market, and a treaty that creates binding law governing a myriad of national interests.

Since its inception, the EU has broken down barriers between Member States’ national markets in order to create “a single market where goods, people, money and services can move around freely.” Not only has the creation of a single market facilitated and improved trade between Member States, but it has also made the EU a major player in global export and import. Partly as a result of the EU’s economic success, other European countries have begun to apply for membership. If a country’s application is accepted, it becomes a “candidate country” and begins negotiations with the European Commission to determine the specific membership terms for that country—a process which can take several years to complete.

This section analyzes the legal basis and the justifications for three elements of the European Union model of multinational economic and social agreements: (A) the creation of a European Union citizenship; (B) the economic theory supporting incorporation of a free movement of labor requirement; and (C) the incorporation of a human rights requirement for all Member States and candidate countries.

A. European Union Citizenship

1. The Legal Basis for European Union Citizenship

Article 8 of the Treaty on European Union established European Union citizenship, declaring that “[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.” This unprecedented creation of a supranational citizenship established EU citizenship rights for nationals of Member States within the European Union. These provisions of the Treaty on European Union opened internal borders between Member States, creating a EU citi-
zens a freedom of movement between countries akin to the freedom of movement between states enjoyed by U.S. citizens. After this treaty was implemented, movement of Member State nationals between France and Germany, for instance, became almost as simple as a U.S. citizen’s movement between California and Nevada.

Beyond simply allowing EU citizens to move freely between Member States without a passport, the Treaty on European Union also grants EU citizens:

[T]he freedom to live and work anywhere in the European Union, the right to nondiscrimination on the basis of nationality, the right to vote and stand in municipal and European Parliament elections, the right to be protected by European diplomatic services, and the right to petition the European Parliament and contact the European Ombudsman in any of the 23 official EU languages.\footnote{Oana Dan, United in Diversity: The Determinants of European Citizenship (unpublished qualifying paper draft, Harvard University) (citing Article 8 of the Treaty on European Union) (presented at the annual meeting of the American Sociological Association Annual Meeting, July 31, 2008).}

The freedom to live and work anywhere provides a right of free movement, meaning an EU citizen has a right to “movement and residence within the territory of the Member States,”\footnote{Council Directive 2004/38, art. 1, 2004 O.J. (L 158) 77, 87 (EC).} as long as the national has a passport or other valid form of identification.\footnote{Id. art. 4.} A “Union citizen” is defined as “any person having the nationality of a Member State.”\footnote{Id. art. 2.} As an EU citizen, a national of one Member State has “the right of residence on the territory of another Member State for a period of up to three months without any conditions.”\footnote{Id. art. 6.} However, if the aforementioned EU citizen is a worker or is self-employed in the host Member State, then he or she may reside in the host Member State for more than three months.\footnote{Id. art. 7.} As new countries have become Member States, the area of free movement has expanded to incorporate these new citizens and states. Article 8 of the Treaty on European Union creates a supranational citizenship, which guarantees EU citizens the right not only to travel freely between Member States,\footnote{Treaty on European Union, tit. II, art. G(C), Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 (Union Treaty or Maastricht Treaty).} but also the right to live and work in any Member State with the same protections granted to citizens of that State.\footnote{Council Directive 2004/38, art. 6–7, 2004 O.J. (L 158) 77, 92–95 (EC).} These supranational rights do not limit or replace national citizenship rights but, in fact, provide addi-
tional guarantees and expand EU citizens’ rights beyond the borders of their country of birth.

2. **Justifications for Creating a European Union Citizenship**

   Promotion of regional welfare, improvement of cultural legitimacy, and the reduction of antagonism via increased trust between Member States justified the creation of a supranational citizenship by the European Union. The motto of the EU is “united in diversity.”

   According to the EU’s website, this motto exemplifies the fact that through EU membership, “Europeans are united in working together for peace and prosperity, and that the many different cultures, traditions and languages in Europe are a positive asset for the continent.”

   The EU touts itself as a “friendly neighbourhood,” where neighboring European countries work together to promote political stability and economic prosperity. By embracing this neighborhood feeling, the EU attempts to promote regional welfare and cultivate community.

   In order to cultivate a sense of community, the EU first needed to create a community structure, which was accomplished through the creation of EU citizenship. From an anthropological perspective, EU citizenship serves as a “‘blank banner’ or ‘mobilizing metaphor’” designed “to invent the category of a ‘European public’” rather than to simply mobilize support for the Union within Member States. By creating this unifying category based upon a supranational identity, the EU increased its “cultural legitimacy.” Political systems obtain cultural legitimacy by gaining and maintaining consensual governance, which creates a sense of belonging in the citizens they govern. Fostering this sense of belonging via creation of an EU citizenship promoted increased respect for the EU’s institutions and policies both inside and outside of the Union, because it allowed the EU to interact with other countries as a single, unified entity representing one people—EU citizens.

22. *Id.*
26. *Id.*
In addition to improving cultural legitimacy, EU citizenship enhances trust between the nationals of all Member States. This trust further legitimizes the EU as a participant in the global economy, providing an economic justification for the creation of EU citizenship.

One commentator explains that trust proves essential “under circumstances of mutual dependence,” where each participant relies on the “regular co-operation” of other participants. Member States within the European Union rely on each other for economic, political, and security needs. Trust between Member States ensures compliance with existing rules, assists in creation of new regulations, and promotes respect for co-Member State court adjudication. Without trust, Member States could not function as an economic unit in the global economy. The rest of the world would likely hesitate before conducting trade with the EU or relying upon EU laws if Member States themselves did not comply with EU law. Another commentator claims that the Treaty on European Union included the citizenship provision “largely to make that treaty more palatable to voters and to head off a brewing legitimacy crisis.” Any sign of instability within the Union could prove devastating not only to the EU’s international trade but also to its international reputation.

Cultural legitimacy mainly promotes respect for the EU outside of the Union, while increased trust between Member States improves economic and political relations within the Union. In order to participate as a political and economic unit in the global arena, the EU needs international recognition and legitimization. Therefore, improving cultural legitimacy and reducing antagonism between Member States through the cultivation of community justified the creation of supranational citizenship by the European Union.

B. Economic Theory and the EU: Free Movement of Labor

1. The Legal Basis for Free Movement of Labor

When the European Union created Union citizenship under Article 8 of the Treaty on European Union, it declared that, once the treaty entered into force, the Council of the European Communities would be required to “issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of

29. Id. at 318–21.
movement for workers.” Under this authority, the Council issued Regulation (EEC) No. 1612/68, which states:

Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

Thus, as a result of citizenship in the European Union, nationals of any Member State may not only move freely between all Member States but may also work in any Member State. The laws of each Member State protect EU citizens that choose to work in that state to the same extent that they protect nationals of that State. These legal protections include anti-discrimination laws as well as administrative and regulatory laws.

In addition, a national of one Member State who takes up employment in the territory of another Member State may bring certain family members to live within the territory of the Member State where they work. These family members include spouses and registered partners—if the host Member State recognizes registered partnerships as equivalent to marriages—as well as direct descendants under twenty-one years of age and dependents of the worker or of the partner or spouse. These reciprocal employment protections benefit EU workers by providing more employment opportunities and benefit EU employers by enlarging the labor pool with no added cost to the Union as a whole or to individual Member Countries.

2. Justifications for the Free Movement of Labor

Many economists argue that economic theory supports a liberalization of international immigration policy. One commentator explains that “economic theory raises a presumption in favor of the free movement of labor.” The reasoning behind this presumption is that

32. Commission Regulation 1612/68, Freedom of Movement for Workers Within the Community, art. 1, 1968 O.J. (L 257) 2 (EC).
33. Id.
34. Id. art. 1.
35. Id. tit. II.
36. Id. tit. III.
“[l]abor migration generally leads to net gains in wealth for the world as a whole because labor flows to the country where it has the higher value use.” In other words, both skilled and unskilled workers tend to migrate towards the areas of the world where the pay for the same work is higher than in other areas. Thus, economic theory indicates that their labor has higher value in the destination country than it does in their country of origin.

At first glance, the higher-value concept may appear merely a boon to the immigrant worker, however, allowing labor to move freely between countries also leads to an increase in global wealth and a decrease in global wealth disparity. By opening the gates to allow labor supply to meet employer demand internationally, the cost of labor will decrease, the employers’ return on their investment in employees will increase, and the savings will be passed on to consumers. Furthermore, allowing workers to migrate towards higher wages will potentially lead to higher remittances, which in turn will lead to improved living conditions in the immigrant’s country of origin, thus potentially removing or decreasing much of the economic impetus to migrate. Economists estimate that with free movement of labor the potential increase in “the world’s real income” could range from a 5.6% to 12.3% gain per year.

This increase in the world’s real income is not due solely to economic improvement in immigrants’ countries of origin. In fact, a 2006 study conducted by World Bank economists estimated that under a limited liberalized immigration policy “high-income countries receiving immigrants [from economically developing countries] . . . would enjoy an increase of 0.4% in their real income, that is, a gain of $139 billion.” The economic success and continued popularity of the European Union—as evidenced by the large number of European countries applying for membership—show how a liberalized immigration policy combined with international economic agreements can lead to economic growth in Member countries.

One argument frequently made against liberalizing worker-immigration restrictions rests upon the fear that immigrants will take “native” workers’ jobs or cause a drop in wages for native workers.

39. Id.
40. Id. at 4.
41. Id. at 5.
43. I use “native” in quotes because this is a relative term, especially when used in the context of this argument.
However, economic theory demonstrates that free movement of labor is actually in the economic interest of the natives, taken as a whole, in a destination country. Even though allowing a freer flow of labor may lead to a drop in wages for some native workers, this loss of wages “is a pure transfer among natives: it is offset by an equal gain for those who employ labor and ultimately for consumers, who obtain goods and services at lower cost.” Employers gain the benefit of a larger labor pool from which to choose and in turn a reduction in the wages they must pay. They then pass these savings on to consumers via a reduction in the cost of products or services. According to one study on the fiscal effects of immigration, “new immigrants help produce new goods and services, but they are paid less than the total value of these new goods and services. The rest goes to domestic residents, who collectively are better off than before.”

Thus, considering both the losses and gains for natives, when natives are taken as a whole, the net benefits of free movement of labor to the receiving country outweigh the costs.

C. European Union Human Rights Requirement

1. The Legal Basis for the European Union Human Rights Requirement

One of the principles upon which the European Union is founded includes “respect for human rights and fundamental freedoms.” If a complainant accuses a Member State of breaching this principle, the European Council may, based upon a qualified majority vote, suspend some of the violating country’s rights granted under the Treaty on European Union. A candidate country wishing to become a Member of the European Union must also respect human rights and fundamental freedoms in order to qualify for membership in the Union.

With the recent entrance into force of the Treaty of Lisbon in December 2009, EU Member States are now legally bound by the Charter

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45. Chang, Economics of International Labor Migration, supra note 38, at 5.
46. Id.
49. Id. art. 7.
50. Id. art. 49.
of Fundamental Rights.\textsuperscript{51} Prior to the Treaty of Lisbon much of the EU human rights protections were based on Article 6 of the Treaty on European Union and case law from the Court of Justice and the European Court of Human Rights.\textsuperscript{52} The now-binding charter ensures government protection of a myriad of human rights, including: the right to dignity, freedoms, equality, solidarity/workers’ rights, citizens’ rights, and the right to justice.\textsuperscript{53} The right to dignity includes the right to life and integrity of the person and the prohibition of slavery, torture, “inhuman or degrading treatment or punishment.”\textsuperscript{54} Some of the freedoms protected by the charter include freedom of thought, conscience, religion, expression, assembly, and association, as well as the right to liberty, to marry, to education, to property, and to asylum.\textsuperscript{55} The charter also provides for equality before the law and prohibits discrimination based on culture, religion, language, sex, age, or disability.\textsuperscript{56} Under the solidarity and workers’ rights section, the charter protects the right to collective bargaining and action and the right to fair working conditions, provides for social security and environmental and consumer protection, and prohibits child labor.\textsuperscript{57} The charter also protects EU citizens’ right to freedom of movement and residence and their right to vote and stand for European Parliament and municipal elections.\textsuperscript{58} Finally, the right to justice means that everyone is presumed innocent until proven guilty, has the right to a fair trial, just remedy, and proportionality between punishment and criminal offense and may not be tried twice for the same crime.\textsuperscript{59}

2. Justifications for the Inclusion of Human Rights Requirements Within the Treaty on European Union

The inclusion of human rights requirements within the Treaty on European Union is justified by the universal and inalienable nature of


\textsuperscript{52} For a background on the Charter of Fundamental Rights, see http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l33501_en.htm.


\textsuperscript{54} Id. tit. I.

\textsuperscript{55} Id. tit. II.

\textsuperscript{56} Id. tit. III.

\textsuperscript{57} Id. tit. IV.

\textsuperscript{58} Id. tit. V.

\textsuperscript{59} Id. tit. VI.
human rights, the need to create a record of government commitment to enforcing human rights protections, and the benefit of creating a mechanism for accountability if a country allows human rights violations.

A human right need not be codified in order to exist. Human rights are “defined by concepts of universality, inalienability, and the essential need for freedom.”\textsuperscript{60} “[H]uman rights (1) do not depend on legislation for their existence, (2) are not subject to the whims of politics for their survival, and (3) should be promoted and upheld by all governments.”\textsuperscript{61} This means that even if a government chooses not to acknowledge or codify a human right, the human right exists—it exists irrespective of any government or institution. However, by writing human rights protections into their legislation, governments create a record of their commitment to protecting these inalienable rights and provide a mechanism for accountability when those rights are violated. Furthermore, the many human rights violations occurring worldwide daily demonstrate that relying on governments to protect these rights without binding law that carries real consequences for violations is insufficient. With globalization creating a world where countries—particularly neighboring countries—become more and more economically intertwined, human rights violations occur across borders and affect multiple countries. Accordingly, the developing global economy creates a need for more global human rights protection, as exemplified by European Union Law.

The European Union continually emphasizes their commitment to the protection of human rights by explicitly incorporating these protections into the primary law that governs all Member States and by requiring applicant States to respect these rights as well. This baseline human rights protection requirement means that any country interested in joining the Union or staying in the Union must create and maintain the human rights protections laid out in the \textit{Charter of Fundamental Rights of the European Union}.\textsuperscript{62} By including this requirement, the European Union creates an incentive, beyond purely “moral” justifications, for candidate countries to respect human rights.

The universal nature of human rights, combined with the lack of accountability for human rights violators when there exists no legisla-
tion creating consequences for these violations, justifies the EU’s human rights requirement for applicant and Member States.

II. Application of the Justifications Supporting Free Movement of Labor, EU Citizenship, and a Basic Human Rights Requirement in the Context of the United States and NAFTA

Although North America does not have a similar continent-based treaty providing for open internal borders, a single currency, a well-developed supranational court system, or a democratically elected North American government, the United States, Mexico, and Canada have all signed an economic treaty: the North American Free Trade Agreement (NAFTA). The implementation of NAFTA decreased restrictions on trade between the signatory countries, which facilitated “freer trade in goods and services” and “increased opportunities for foreign direct investment.” However, NAFTA and North America have not evolved in the same way that the precursor to the EU (the European Economic Community) did when it transformed into the European Union. NAFTA represents a liberalization of trade similar to that which took place in Europe during the 1950s with the creation of the European Economic Community, suggesting that NAFTA—and North America as a unit—could follow a similar trajectory toward free movement of labor.

NAFTA already includes a few articles dealing with free movement of labor. Under NAFTA, some classes of workers can move freely between the signatory countries on a temporary, non-immigrant basis. For instance, Chapter 16 of NAFTA delineates procedures for temporarily allowing four categories of temporary non-immigrants entry into the United States. These four categories include “business visitors, traders and investors, intra-company transferees, and professionals.” Chapter 16 permits these immigrants to stay in the United States temporarily while they “conduct business, engage in trade and transnational investment ventures, work as employees of multinational corporations, [or] practice in any of sixty-three specified profes-

64. Id.
65. Id.
66. Id.
This very limited NAFTA provision allowing temporary non-immigrants to work in the United States on a short-term basis under specific conditions nowhere near approximates the provision allowing free movement of labor in the Treaty on European Union.

NAFTA also includes a labor side agreement, the North American Agreement on Labor Cooperation (NAALC), through which drafters attempted to advance workers’ rights, improve workers’ living standards, “improve Mexican labor practices and allay domestic fears that American jobs would disappear to southern locales.” The NAALC constitutes “the first international agreement on labor to be linked to an international trade agreement.” The signatories intended the NAALC to protect workers’ rights through “a set of Objectives, Obligations and Labor Principles that all Parties are committed to promote” and “a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards . . . .” This agreement demonstrates an effort to achieve some of the same goals as the EU Human Rights Requirement and could provide the basis for more comprehensive worker protection, such as that enjoyed by EU citizens under the Charter of Fundamental Rights of the European Union.

Since NAFTA’s underpinnings could evolve into a treaty similar to the Treaty on European Union, the following sections apply the justifications supporting the creation and maintenance of the European Union to North America. Specifically, the next three subsections discuss (A) EU-style supranational citizenship, (B) economic theory, and (C) the inclusion of a human rights requirement in the context of NAFTA.

A. North American Citizenship

The same grounds that justify EU citizenship in the European Union justify “continental citizenship” in North America. The European Union’s creation of a supranational citizenship promoted regional welfare, improved the Union’s cultural legitimacy, and decreased antagonism between neighboring countries by enhancing the trust between Member States.

67. Id. at 60–61.
68. Bull, supra note 60, at 6.
70. Id.
71. See Treaty of Lisbon, supra note 51, at 1.
Currently, great tension exists between the United States and Mexico over issues related to undocumented individuals crossing the border from Mexico into the United States. Decreasing this antagonism and enhancing trust between the United States and Mexico would greatly improve their relationship as neighboring countries. By providing a legal mechanism for Mexicans wishing to work in the United States to safely cross the border and relocate to jobs within the United States, the creation of a North American citizenship would encourage the U.S. and Mexican governments to work together to ensure that only “North American citizens” are allowed to move freely between the two countries. Working together in this capacity would in turn increase trust between the two countries and diminish the antagonism created by the “us versus them” dynamic currently perpetuated by U.S. immigration policy and border control.

One positive aspect of creating a North American citizenship based on the European Union model is that it would counteract the anti-immigrant argument that the influx of immigrants into the United States taxes the U.S. welfare system. In fact, under the EU model, nationals from other Member States without employment may only move into other Member States for a maximum of three months. Therefore, EU-type citizenship status would only allow Mexican or Canadian immigrants with jobs to move into the United States for an indefinite period of time. A North American model could adopt or even shorten this time requirement and could specifically restrict extension of social benefits to only those individuals or families with employment in the host country. Thus, creating a North American citizenship would not lead to an open door policy where any national of Mexico or Canada could relocate to the United States permanently without continued employment.

Rather than improving the cultural legitimacy of North America as an economic unit, implementing continental citizenship could instead legitimize liberalization of U.S. immigration policy based upon the economic arguments laid out in Section I.B above in the EU context. By limiting immigration liberalization to Mexican and Canadian citizens via the introduction of a North American citizenship, the idea of allowing immigrant labor into the United States could become more acceptable to the general public. Garnering support from U.S.

citizens for a completely open-border labor migration policy would likely prove incredibly difficult for the U.S. government. However, limiting the liberalization to Mexican and Canadian citizens would decrease the number of undocumented workers attempting to enter the United States for employment purposes, because Mexican and Canadian immigrants would have documents. Thus, this limited immigration liberalization could prove an easier idea to sell to U.S. citizens.

Much like in the European context, decreasing antagonism and increasing trust between the United States and Mexico serve as strong justifications for the creation of a North American citizenship. Furthermore, adopting the EU citizenship model would still allow restrictions on free movement of labor based on time and employment status, which could ease some concerns of U.S. citizens opposed to the liberalization of labor migration restrictions.

B. Economic Theory: The Free Movement of Labor in the Context of NAFTA

As discussed above, economic theory provides many justifications for promoting the free movement of labor. These justifications include: net gains in global wealth and in individual high-income countries’ wealth, a decrease in global wealth disparity, a decrease in the cost of labor in receiving countries, increased global productivity, decreased impetus to migrate, and savings on labor for employers that can be passed on to consumers.74

The fact that the United States, as a high-income country, could reap the benefit of a 0.4% increase in its real income (based upon the World Bank study discussed above) constitutes one of the strongest economic arguments in favor of instituting a free movement of labor element into U.S. foreign policy. Particularly in times of economic recession, the United States should give careful consideration to any measure that could improve the national economy.

Another circumstance specific to the United States that supports allowing free movement of labor is the possibility of a decrease in U.S. expenditures on the regulation of its borders. As mentioned at the beginning of this comment, sixty-two percent of the undocumented population living in the United States in 2009 was born in Mexico. 75

If the United States and Mexico embraced a policy allowing for the free movement of labor between the United States and Mexico, the

74. Chang, Economics of International Labor Migration, supra note 38, at 1.
75. Hoefer et al., supra note 1, at 2–4.
U.S. government would no longer need to spend money detaining and deporting over half of its undocumented population.

A potential decrease in the cost of labor, where employers pass the resulting savings on to consumers, serves as another persuasive economic justification for loosening labor restrictions in the United States. As early as 1986, the Reagan Administration acknowledged the potential benefits of a more liberalized labor migration policy when the Council of Economic Advisors recognized “[t]he free flow of resources in response to market signals promotes efficiency and produces economic gains for both producers and consumers. The migration of labor, both domestically and internationally, represents such a flow of productive resources.”

The fact that the Reagan Administration did not act on this information demonstrates the difficulty presented in trying to sell labor immigration policy modifications to the U.S. public and legislature even with government recognition of their beneficial potential. In fact, less than ten years after the Reagan Administration reached this conclusion, when the Clinton Administration negotiated NAFTA “the United States refused to discuss the liberalization of labor movement as an element of free trade.”

Another justification which has special applicability in the context of the United States is the cost imposed on natives as a result of increased prices for goods and services. Maintaining restrictions on immigration imposes costs on natives “by driving up the cost of labor, which in turn drives up the cost of goods and services to consumers.” Thus, while “[n]ative workers may gain from higher wages . . . this gain comes only at the expense of employers in the host country and ultimately consumers.” This means, even though native workers may reap the benefits of higher wages as a result of immigration restrictions, as consumers, they lose much of this benefit, because they must pay higher prices for goods and services that would otherwise be cheaper under a liberalized immigration system.

Finally, in addition to U.S. Natives potentially benefiting from the decreased costs of goods and services and from an improved econ-

78. Id. at 1158.
79. Id.
omy, research shows that immigrant labor does not cause native job-loss. For example, one political theorist notes that, “studies of the effects of immigration in U.S. labor markets have shown little evidence of any significant effects on native wages or employment, even for the least skilled native workers.”

The inconsequential effect on native wages and employment results from the segregated nature of the labor market—i.e., that many of the jobs immigrants “take,” when entering the United States, are in an area of the labor market already predominately occupied by immigrant workers, not native workers.

The fact that free movement of labor would have an inconsequential effect on native wages and employment—combined with the potential net gains in U.S. wealth and savings on labor for U.S. employers that could be passed on to consumers—justifies including free movement of labor in the NAFTA context.

C. The Inclusion of a Basic Human Rights Requirement in NAFTA

The reasons justifying the inclusion of a basic human rights protection requirement discussed above in the EU context include the universal and inalienable nature of such rights, creating a record of government commitment to enforcing human rights protections, and creating a mechanism for accountability if a country allows human rights violations.

By incorporating a human rights requirement into a supranational agreement, the signatories could prevent employer abuse of migrant workers. One concern regarding the economic justifications for creating free movement of labor is that, even if cheaper labor becomes available to employers, the savings will not be passed on to the consumer. However, creating a legal, documented workforce would prevent employers from underpaying and abusing undocumented workers.

Incorporating a human rights requirement would force employers in all signatory countries to treat workers with dignity and respect human rights. If a country does not live up to the requirement, then, as in Europe, the treaty could provide for some penalty in the form of sanctions or the revocation of certain privileges granted under the treaty.

The justifications for Union citizenship apply equally well to the creation of a North American citizenship. Regional welfare would in-

80. Chang, Economics of International Labor Migration, supra note 38, at 8.
81. Id. at 8–9.
crease, and antagonism between the United States and Mexico would decrease. Furthermore, as explained above, economic theory supports liberalization of U.S. labor migration restrictions. Thus, creation of a North American citizenship based on the European Union model constitutes a viable method of liberalizing labor migration restrictions. Inclusion of basic human rights protections within the treaty creating North American citizenship would protect the citizens of all signatory countries and provide an incentive for those countries to respect the rights of all North American citizens.

III. Implementing Liberalized Labor Migration Policies in the United States

The above analysis shows that creation of a North American citizenship could serve the interests of the United States, Mexico, and Canada. However, whether the United States, Mexico, and Canada should adopt North American citizenship depends on the feasibility and logistics of shifting international policies to allow for free movement of labor. Part III explores how the United States, Mexico, and Canada could design and implement liberalized labor migration policies, advocates for the creation of a North American citizenship, and discusses potential options for incorporating a new continental citizenship.

A. Options for Liberalizing U.S. Labor Migration Restrictions

The liberalization of North American labor migration restrictions would constitute a huge shift in political, social, and even economic relations among all three countries. Liberalization could take a variety of forms which can each be taken to varying extremes. This section discusses three potential forms of labor migration liberalization in North America: (1) a liberalization of U.S. immigration law that discriminates in favor of Mexican and Canadian citizens; (2) the imposition of an immigrant tariff; or (3) the creation of a North American citizenship.

1. Liberalization of U.S. Immigration Law—Discriminating in Favor of Mexican and Canadian Citizens

U.S. immigration law currently has five categories of employment-based visas available to immigrants. These categories separate immigrants by education and skill level, with the most educated and skilled immigrants receiving priority admittance over less educated
and less skilled applicants. Uneducated and unskilled foreign workers must jump a further hurdle in order to apply. Even if some employment visas are available, these “less desirable” workers must provide the U.S. government with labor certification before the United States will grant them an employment visa. Labor certification requires a showing that there are insufficient workers “able, willing, qualified . . . and available at the time” and place where the immigrant applies.

The first option listed above—liberalization of U.S. immigration law via discrimination in favor of Mexican and Canadian citizens—would involve expanding the availability of immigrant employment visas for Mexican and Canadian citizens. The United States could achieve this objective by simply eliminating the labor certification requirement for Mexican and Canadian citizens. By removing this huge impediment for many immigrants seeking entry to the United States for employment, the United States could potentially reap some of the benefits predicted by economic theory to be a consequence of labor migration liberalization. However, this option would potentially require extensive rewriting of U.S. immigration law. Furthermore, if the United States expands the availability of employment-based visas for Mexican and Canadian citizens, it might decrease the availability of other forms of immigrant visas for Mexican and Canadian citizens in order to compensate for the possible influx of immigrants from these two countries via employment-based visas. This would require adjustments beyond just the sections of U.S. immigration law that deal with employment-based visas and labor certification.

2. Imposition of an Immigration Tariff

The United States could achieve the second potential option—liberalization of labor immigration restrictions combined with an “immigrant tariff”—through the elimination of the labor certification requirement for Mexicans and Canadians and the imposition of an immigrant tariff. One commentator, Howard F. Chang, suggests imposing a tariff on immigrants through the use of a “discriminatory income tax,” which the immigrant would pay from income earned after immigration. At this point, neither the Supreme Court nor Congress has deemed discrimination based on citizenship or alienage

82. 8 U.S.C. § 1153(b) (2006).
83. Id. § 1153(b)(3)(C).
84. Id. § 1182(a)(5).
85. Chang, Liberalized Immigration, supra note 77, at 1163.
unconstitutional, thus the tariff system he proposes would likely survive a constitutional challenge.\footnote{Id. at 1186.} However, if the NAFTA signatories also adopt the supranational citizenship discussed below, a discriminatory income tax levied against non-U.S. North American citizens might not survive a constitutional challenge.

Although Chang argues for liberalization on a global level, the tariff he suggests could also be used in the North American liberalization context. In this context, the United States could ease labor migration restrictions for Mexican and Canadian citizens but not for other immigrants. Then, having liberalized entrance restrictions for Mexican and Canadian citizens, the United States could impose an immigrant tariff on only the Mexican and Canadian beneficiaries of these liberalized policies and not charge such a tariff on other immigrants who are still subject to the immigrant quota system. Already, Chang argues, “[i]mmigrants increase tax revenues by expanding the tax base.”\footnote{Id. at 1164.} They pay “income taxes, social security taxes, [and] sales taxes” directly, pay property tax directly or through their landlords via higher rent, and pay corporate income tax as employees, shareholders and consumers.\footnote{Id.} Expansion of the tax base in this manner is better than simply expanding it through population growth because immigrants generally enter the United States as adult workers who can immediately begin contributing taxes, whereas native-born children generally cannot directly contribute income taxes for at least fourteen years.\footnote{What is the Youngest Age at Which Someone Can be Employed?, Fair Labor Standards Act Advisor, U.S. Department Labor, http://www.dol.gov/eflaws/faq/esa/026.htm (last visited Apr. 24, 2010).} Therefore, since an immigrant tariff and an expansion of the tax base would benefit the U.S. economy, it makes more sense to ease immigration restrictions and incorporate an immigrant tariff than to use the current quota system for Mexican and Canadian immigrants.

However, imposing increased taxes on people who have uprooted their lives to move to a new country seems unjust and punitive, especially when one considers that these immigrants will already be expanding the U.S. tax base as consumers, workers, and property owners or renters. Creating a North American citizenship constitutes a far more just and feasible method for liberalizing U.S. labor migration.
3. Creating a North American Citizenship

If the United States, Mexico and Canada implemented the third option—creating a North American citizenship—all three countries would need to adjust their immigration laws to accommodate the expansion of the concept of “citizen.” However, in this situation U.S. immigration law would potentially require far less, if any, tweaking than it would in the two scenarios listed above. Part of the purpose of creating a North American citizenship would be to establish the privilege to move between North American countries for the purpose of employment without having to either go through extensive immigration procedures or enter and work in a country without documents. Creating a North American citizenship would require the United States, Mexico, and Canada to enter into a binding treaty. By creating and defining North American citizenship in a treaty, the United States would avoid the hassle of drastically changing U.S. immigration law. While expanding the definitions section of U.S. immigration law to include and define the scope of “North American citizenship” may be necessary, if the treaty is specific enough, little else would need to be changed within the text of current U.S. immigration law.

It is important to note that the above listed options are mutually exclusive. For example, if the United States decides to use a discriminatory tax against citizens of Mexico and Canada, this might preclude the creation of a North American citizenship. At the very least, if the United States adopts a tariff now but later attempts to adopt a treaty providing for North American citizenship, the treaty would raise constitutional concerns, such as whether the United States can discriminate against a North American citizen via an immigrant tariff that is not similarly imposed on U.S. citizens. Even if the courts were to decide that discrimination against North American citizens—but not U.S. citizens—in the form of increased taxes is constitutional, they may be called upon to determine the extent to which the federal and state governments may discriminate against this new category of citizens.

Of the three potential forms labor migration liberalization could take in the United States, creation of a North American citizenship that includes a human rights requirement proves the best option. Liberalization of U.S. immigration law by eliminating the labor certification requirement for Mexican and Canadian citizens proves less promising because it would require extensive adjustment to current immigration policy and might fail a constitutional challenge. Imposition of an immigrant tariff, while superior to the current quota system
because it secures the benefits predicted by economic theory, still constitutes an inferior form of free movement of labor when compared to a North American citizenship, because it treats new immigrants like second class citizens and imposes increased taxes on those recently arriving in the United States—and thus less likely to have a family or social network to rely on in times of financial hardship. Creation of a North American citizenship by treaty would save the United States the time and effort required to drastically change its immigration law, and the inclusion of a human rights requirement would provide improved citizen protections in all signatory countries, as well as a mechanism for enforcing them. Thus, the best route toward labor migration liberalization for the United States is the creation of a North American citizenship.

B. Creating a North American Citizenship: How Should the United States, Mexico, and Canada Proceed?

As creation of a supranational citizenship requires some form of supranational law, the creation of a North American citizenship should be accomplished by treaty. The United States, Mexico, and Canada could either create a new treaty defining and developing a North American citizenship or incorporate North American citizenship into NAFTA.

Drafting a completely new treaty might require additional negotiating and haggling over definitions and other preliminary matters that previous NAFTA negotiations have already addressed. By incorporating the new provisions into NAFTA, the United States, Mexico, and Canada may save time, because this will allow them the freedom to focus their energy on the specific section laying out the scope of citizenship instead of wrestling with an entirely new treaty. Creation of a new treaty might make the concept of citizenship clearer and more accessible as it would be a separate document, but because the free movement of goods and free movement of people concepts are so intertwined, it makes more sense to add these elements to NAFTA.

If the United States, Mexico, and Canada collectively choose to include the citizenship provision within NAFTA, then they will need to decide where in NAFTA to place such a provision. As NAALC comprises the labor side agreement to NAFTA—and thus already deals with labor issues—one potential placement for the new provision would be within this agreement. However, NAALC mainly addresses protection of workers’ rights and does not address issues involving
movement of workers.90 Furthermore, NAFTA already contains provisions for the free movement of goods across international borders,91 so it would likely prove easiest to simply add provisions for the free movement of people to that treaty. A final potential option is the creation of a new side-agreement dealing specifically with the movement of people, which could be incorporated into NAFTA by reference. However, this option may have some of the same problems that the creation of a new treaty would, such as an unnecessary consumption of time. North America might do well to follow the EU’s example and incorporate the creation of a supranational citizenship within a preexisting, broad treaty covering economic issues including the free movement of goods.

Conclusion

The EU citizenship model for free movement of labor has survived and evolved since the Union’s inception as the European Economic Community in the 1950s. Many of the same justifications for creation of a supranational citizenship—including decreasing antagonism between neighboring countries by enhancing trust and promoting regional welfare—apply in both the European and North American context. Furthermore, adoption of the EU model by North America would allow the United States, Mexico, and Canada to specify restrictions on the free movement of labor akin to the time limits currently in force in the EU.

As with supranational citizenship, the justifications for allowing free movement of labor provided by economic theory—such as an increase in national real wealth and savings for employers from a decreased cost of labor that can be passed on to consumers—likewise support the liberalization of U.S. immigration policy. The negligible effect on native wages and employment from allowing free movement of labor further supports a liberalization of U.S. immigration restrictions.

Finally, the justifications for promoting the protection of human rights—including providing a record of government commitment to enforcing human rights protections and creating a mechanism for enforcing this governmental commitment—also apply in both Europe and North America. Based upon the continued success of the EU and

the applicability of these justifications in the context of North America, the signatories to NAFTA should expand NAFTA to incorporate free movement of labor. They should do this by creating a North American citizenship within NAFTA and including a prerequisite requiring the implementation of human rights protections in participating signatory countries. As there is already such a large undocumented population from other North American countries living and working in the United States, creative ideas—like the creation of a North American citizenship—are necessary to promote the economic, social, and political interests of all North American countries.