

THE BIRTHRIGHT  
LOTTERY

*Citizenship and Global Inequality*

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## Introduction:

# The Puzzle of Birthright Citizenship

Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!

EMMA LAZARUS, *The New Colossus* (1883)

IN 2003, five men from the Dominican Republic hid themselves on a ship headed for Houston, Texas, in search of the “golden door.” When the ship was about half-way to Houston, one of the stowaways became ill. The five men decided to call upon the human compassion of the crew, and made their presence known. The vessel’s crew knew they were bound by the rules of the International Maritime Organization “to protect, feed, and repatriate stowaways.” But they also knew that they would receive special bonuses from the vessel’s owner if they reached the shores of the United States stowaway-free. America’s current immigration policy imposes significant monetary fines on vessels arriving with unwanted and undocumented migrants, like the five men in our story, who were from “the wrong side of the tracks” of prosperity and security. So the crew members acted swiftly. Showing no compassion at all, they threw two of the stowaways overboard and left the other three on a raft in the sea. After four hours of dangerous navigation, the three men were picked up by another vessel. The two others were less fortunate. Their shark-eaten bodies were found some time later.<sup>1</sup>

The stowaways apparently believed that boarding a vessel bound for the United States, without any proper documentation or permission to enter, represented their only hope to fulfill the American dream. As the Texas court that heard the survivors’ legal claim against the vessel’s owner (the person responsible for issuing the bonus reward for stowaway-free arrival) sympathetically noted, the five men’s belief was in fact shared by “countless

immigrants who have—legally and illegally—entered our great country almost since it gained independence.”<sup>2</sup> The problem nowadays, for those who hold this belief, is that the golden door is not often left ajar. In fact, it is increasingly shut tight. This is true in the United States, as well as in most other prosperous nations.<sup>3</sup>

When we place the sad story of the stowaways in this broader context, we soon realize that despite jubilant predictions by post-nationalists of the imminent demise of citizenship, the legal distinction between member and stranger is, if anything, back with a vengeance.<sup>4</sup> This distinction has gained a renewed, and at times draconian, significance in the post 9/11 years. It is this realization that informs my assertion in this book that we must step back and account for the *persistent* importance of citizenship, *especially* in our current era of globalization. This last point requires further elaboration. There is no doubt that growing transnational flows of people across borders have created a wealth of new levels of membership and affiliation, operating within and across territorial borders, as well as above and below the traditional organizational framework of the nation-state.<sup>5</sup> Such multilayered and potentially overlapping sources of identity and authority provide meaningful rights and obligations that operate on a variety of levels, but they hardly correspond to, nor do they erase, the significance of citizenship as full membership in a political community of equals. As one author eloquently observes, we might use “the term *citizen* in other contexts, but only as a metaphor . . . Cities, provinces, and territories have residents; . . . corporations and communes have stakeholders; the global village has its cosmopolitans and its humanists who dream of a day beyond territorial divisions. But only nation-[states] have citizens.”<sup>6</sup>

This situation may, of course, change in the future. But in today’s world, as I will explain in the following pages, there are strong forces that explain not only the persistence of regulated membership (at the national or supranational level) but also the preservation of its archaic mechanism of conferring citizenship by virtue of birthright. Indeed, we cannot understand the resilience of bounded membership—which defies the vogue predictions of its demise—unless we revisit the legal and political institution of *birthright* citizenship. This institution provides a state-sponsored apparatus for handing down from generation to generation the invaluable security and opportunity that attach to membership in a stable, affluent, and rule-of-law society. It also allows members of well-off polities an enclave in which to preserve their accumulated wealth and power through time. If we focus on these *transfer* mechanisms, we soon realize with some surprise that today’s birthright citizenship laws resemble ancient property regimes that shaped rigid and tightly regulated estate-transmission rules. Birthright cit-

izenship operates not merely *as if* it were any other kind of inherited property; rather, it moves down the generations like an entail form of untaxed inherited property.<sup>7</sup> Today, such “entailed” transfer of property is deeply discredited: it is banned in most jurisdictions and, indeed, is largely associated with a bygone feudal system. At the same time, we still find strict reliance on birthright transmission of entitlement in the assignment of the valuable good of *political membership*.

It was none other than Alexis de Tocqueville who, in *Democracy in America*, famously warned about the social and political dangers of inherited property becoming the basis of enduring privilege. A similar cautionary tale is worth telling about birthright citizenship in an unequal world like our own. This book does just that: in confronting the complexity of the current system of citizenship transfer, I aim to offer a new way of thinking about political membership by drawing a conceptual analogy between birthright citizenship and inherited property. This perspective creates a space in which to explore membership entitlement in the broader context of today’s urgent debates about global justice and the distribution of opportunity.

For those granted a head start simply because they were born into a flourishing political community, it may be difficult to appreciate the extent to which others are disadvantaged due to the lottery of birthright. But the global statistics are revealing. Children born in the poorest nations are five times more likely to die before the age of five. Those who survive their early years will, in all likelihood, lack access to basic subsistence services such as clean water and shelter, and are ten times more likely to be malnourished than children in wealthier countries. Many will not enjoy access to even basic education, and those out of school are more likely to be girls than boys.<sup>8</sup> The odds that they will either witness, or themselves suffer, human rights abuses are also significantly increased. What is more, these disparities that attach to birthright citizenship are not a matter of individual desert or fault; rather, they represent systemic and structural patterns. In such a world, citizenship laws assigning political membership by birthright play a crucial role in the distribution of basic social conditions and life opportunities on a global scale.<sup>9</sup>

My intention is not to belabor the familiar argument that such extreme inequality of actual life chances is morally and ethically troubling. Rather, the point here is more subtle: by focusing on the often neglected angle of membership transfer, I wish to call attention to the crucial role played by existing legal regimes for allocating entitlement to political membership (according to birthright) in restricting access to well off polities and sustaining the privilege of inherited entitlement. I further wish to destabilize the notion that such reliance is “natural” and, in this sense, apolitical. This

latter notion serves to legitimize (and make invisible) the significant intergenerational transfers of wealth and power, as well as security and opportunity, which are currently maintained under the seal of the birthright regime of membership allocation. By highlighting the analogy to inherited property regimes, it becomes possible to call attention to the manifold ways in which reliance on birth in the assignment of citizenship regularizes, naturalizes, and legitimates distinctions not only between jurisdictions, but also between vastly unequal bequests. Framed in this way, we can begin to acknowledge the massive estate-preserving implications of inherited citizenship regimes as they exist today. Drawing upon the rich body of democratic theory and property jurisprudence, this book sets out to expose—and challenge—the moral problem of unburdened intergenerational transmission of citizenship.

It seems unlikely that circumstances of birth would serve today as the core determinants of entitlement to full and equal membership in the citizenry body, given the extent to which it has been rejected in so many other domains of public life.<sup>10</sup> And yet, reliance upon the accident of birth is inscribed in the laws of all modern states and applied everywhere. In fact, the vast majority of the global population has no way to acquire membership *except* by circumstances of birth.<sup>11</sup> To the extent that citizenship is a valuable resource, it is currently secured on the basis of a morally arbitrary set of criteria. Birthright membership principles that sanction such distribution deserve the same critical analysis appropriate to any other social institution that stands in the way of the equal realization of opportunities. Such analysis is, however, conspicuous for its absence. The almost casual acceptance of ascription as a basis for assigning political membership is so prevalent that we tend to simply take it for granted.<sup>12</sup> Even those who propose to tighten the circle of membership do not contest the basic principle of hereditary entitlement; instead, they quibble about the scope of its application. What remains unchallenged, and remarkably so, is the entrenched assumption that reliance on birth is somehow an unquestionable component of assigning political membership. This (misguided) assumption is, in part, to blame for the scant attention that has been paid to the puzzle of birthright citizenship even by progressive scholars interested in “rethinking” the political community.<sup>13</sup>

This is a serious omission: the bulk of the world’s population acquires citizenship on the basis of transmission at birth based on parentage or territorial location at time of birth. The harsh facts on the ground are such that most people alive today, especially the huddled masses yearning to breathe free, remain largely “trapped” by the lottery of their birth.<sup>14</sup> This acknowledgment motivates (in the book’s latter chapters) the uneasy task

of envisioning viable and realistic possibilities for reforming the existent birthright-allocation system. These possibilities involve enlarging our scope of analysis beyond the standard accounts of political membership as a repository of legal status, rights, and collective identity.<sup>15</sup> Although each of these aspects remains a vital part of citizenship's domain, together they do not capture the full range of its purpose. Instead of dwelling on these familiar categories, my interest lies in *expanding* our understanding of citizenship by adding a thus-far missing aspect: thinking about birthright access to citizenship as a distributor, or denier, of security and opportunity on a global scale. To unearth the more complex and multidimensional functions of birthright citizenship, we need to take a hard look at the entrenched legal connection between birth and political membership.

A hypothetical illustration sets the stage for our inquiry. Imagine a world in which there are no significant political and wealth variations among bounded membership units. There are no resource scarcities of any kind, and there are also no conflicts based on social factors such as class, ethnicity, or nationality. In such a world, nothing is to be gained by tampering with the existing membership structures. In this imaginary and fully stable world system, there is no motivation for change or migration. Each political entity offers a safe and welcoming space in which people live, love, work, and eventually pass away. Assuming there are no natural or human-made disasters, children and grandchildren may well pursue the same membership path as their progenitors. More important still, the specific collective in which a child belongs does not matter; roughly equal opportunities attach to citizenship entitlement in whatever political community she happens to have been born.

When we relax these assumptions in order to fit them more closely to the reality of our own world, with its omnipresent struggles and conflicts—a world where political instability, human mobility, and material inequality continue to persist—things begin to look quite different. In our world, membership in a particular state (with its specific level of wealth, degree of stability, and human rights record) has a significant impact on our identity, security, well-being, and on the range of opportunities realistically available to us. When analyzed in this broader context, full membership in an affluent society emerges as a complex form of property inheritance: a valuable entitlement that is transmitted, by law, to a restricted group of recipients under conditions that perpetuate the transfer of this precious entitlement to “their body,” specifically, their heirs. This inheritance carries with it an immensely valuable bundle of rights, benefits, and opportunities.

Although they have a pernicious effect on distributing life prospects and human security, birthright entitlements still dominate our laws when it

comes to the allocation of political membership to a given state. In fact, material wealth and political membership (which are for many the two most important distributable goods) are the only meaningful resources whose intergenerational transfer is still largely governed by principles of heredity.<sup>16</sup> Whereas the normative foundations of these principles have been thoroughly discussed in terms of the intergenerational transmission of property, they have seldom been considered in terms of citizenship. This omission is as surprising as it is disturbing: academics and policymakers pay a great deal of attention to questions of citizenship, immigration, the claims of minority groups, concerns about civic integration, and how to make political membership meaningful in a world of overlapping and competing affiliations. These vibrant debates engage primarily with the trilogy of status, rights, and identity. What remains conspicuously absent from these discussions, however, is a serious analysis of the global-distributive implications of the entrenched norm and legal practice of designating membership on account of pedigree or birthplace, and its accompanying protections and benefits.<sup>17</sup> When it comes to any other legal entitlement generated and distributed by the state, reliance on birth status has been deeply discredited. To date, however, birthright citizenship laws have largely escaped similar scrutiny. It is my conviction that it is time to redress this imbalance: we must start to critically examine the connection between birth, the *demos* definition, and the unequal distribution of voice and opportunity on a global scale.

Although there have been many significant efforts to problematize citizenship and to counteract problems of global inequality and deficits of democratic legitimacy, the typical strategy has been to focus almost exclusively on the situation of nonmembers, pressing hard to expand their rights and to open up the regimes that make it possible for newcomers to join the circle of members.<sup>18</sup> Undoubtedly, these are important objectives, which have become ever more urgent in recent times. The years following 9/11 have seen governments throughout the world expand and deepen their regulatory control over territorial access and membership admission as part of a larger strategy to regain control over borders.<sup>19</sup> Yet, as an analytical matter, to frame the question of political membership in this way is to omit something important. It is not enough to focus only on the situation of those who do not belong; the basis for entitlement of those who “naturally” belong must also be examined. How is full membership acquired in the absence of migration? On what basis is the coveted entitlement to citizenship conferred upon some, while denied to others? Who benefits and who loses out when birthright principles are entrenched in citizenship laws? These are the fundamental questions that will concern me in the discussion

that follows. To address them, we must shift our gaze from the immigrant to the citizen, and expand the discussion of membership beyond the familiar lens of identity and belonging to account for the transfer mechanism of citizenship by birthright with its pernicious effects on the distribution of voice and opportunity on a global scale.

### Birthright Attribution: The Legal Frameworks of Citizenship and Property

When we talk about birth as a source of citizenship, we must distinguish between two principles that define membership in a state in the modern era: *jus soli* (“the law of the soil”) and *jus sanguinis* (“the law of blood”). While *jus soli* and *jus sanguinis* are typically presented as antipodes, it is important to note that both rely upon, and sustain, a conception of bounded membership. They share the basic assumption of scarcity: only a limited pool of individuals can automatically acquire citizenship in a given polity. Once the idea of scarcity is introduced, we are faced with the dilemma of allocation, or boundary making: put another way, how do we determine whether a person is to be included within the circle of members or left outside its parameters? Both principles resolve this dilemma in a similar fashion: by reliance on *birthright transfer of entitlement*. The distinction between them lies in the connecting factor used to demarcate a respective polity’s membership boundaries: *jus soli* relies on birthplace; *jus sanguinis* on parentage. It is tempting to think that a rule that makes citizenship “contingent upon the place of a child’s birth is somehow more egalitarian than a rule that would make birthright citizenship contingent upon the legal status of the child’s parents.”<sup>20</sup> But this distinction can easily lead us astray. Both criteria for attributing membership at birth are arbitrary: one is based on the accident of birth within particular geographical borders while the other is based on the sheer luck of descent.

By focusing selectively on the event of birth as the sole criterion for allocating automatic membership, existing citizenship laws contribute to the conceit that this assignment is no more than an apolitical act of membership demarcation. It is in this way that the potential distributive implications are obscured from view.<sup>21</sup> In practice, however, birthright-attribution rules do far more than demarcate who may be included in the polity. Like other property regimes, they also define access to certain resources, benefits, protections, decision-making processes, and opportunity-enhancing institutions which are reserved primarily to those defined as right-holders. In this respect, birthright citizenship exhibits the definitive features of prop-

erty regimes, which can broadly be characterized as a system of rules that govern access to, and control over, resources that are scarce relative to the human demands made upon them.<sup>22</sup>

As William Blackstone already observed more than two hundred years ago, “there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.”<sup>23</sup> Invoking a conceptual analogy to property and inheritance thus requires vigilance and clarification of the intended use of these charged concepts, a task that I undertake in the following chapter; at this point, suffice it to say that citizenship clearly differs from the narrow and atomistic (indeed, “Blackstonian”) conception of property that has become synonymous with the values of tradability, alienability, or “sole and despotic” ownership.<sup>24</sup> Rather, it is a competing vision of property, one which emphasizes stewardship and mutual responsibility, that I wish to bring to the fore in the context of citizenship. As a collectively generated good that creates a complex set of legal entitlements and obligations among various social actors, citizenship offers an excellent example of more contemporary interpretations of property as a web of social and political relations imbued with obligations to promote the public good and not just to satisfy individual preferences.<sup>25</sup> This broader perspective permits us to see citizenship regimes not only as generating intricate rules that define the allocation of membership, but also as bearing considerable effects on the distribution of power, wealth, and opportunity. These latter implications are particularly disturbing given that access to the said social good is determined almost exclusively by circumstances beyond our control. To draw the analogy to inherited property and to acknowledge birthright entitlement to citizenship as a human construct not impervious to change is to open up the existing system of distribution to critical assessment. Once we categorize certain relationships under the rubric of property and inheritance, the classic questions of distributive justice—that is, of *who* owns what, and on *what* basis—cannot but follow.

### Birthright Citizenship and Global Inequality

Birthright citizenship does more than define the formal boundaries of membership. It also closely corresponds to strikingly different prospects for the well-being, security, and freedom of individuals. For most legal scholars (as well as most political philosophers), however, the question of which state would guarantee membership to a particular individual has been seen as largely irrelevant. In this respect, notes Benedict Kingsbury, “the system of state sovereignty has hitherto had the effect of fragmenting and divert-

ing demands that international law better address inequality.”<sup>26</sup> This may explain why theories of law and morality have too long been blind to the dramatically unequal voice and opportunity consequences of birthright citizenship; but it does little to justify it.

Even thinkers who defend a moral or basic human right to membership typically do so at a general, abstract level, while relegating “the specific content of the right to citizenship in a specific polity . . . [to the] specific citizenship legislation of this or that country.”<sup>27</sup> This division of labor may well be motivated by the idea of sovereign autonomy or democratic self-determination. Alas, it unwittingly strengthens the notion that all that matters is that one gain a right to access citizenship “in this or that country” rather than exploring the dramatically unequal life prospects that attach to membership in this or that country. It is this slippage between an abstract right to membership and its concrete materialization that demonstrates how the focus on *formal equality of status* makes invisible the *inequality of actual life chances* attached to citizenship in specific political communities.

The typical response of liberal and democratic theory to the inequality of opportunity caused by ascriptive factors is to work hard to ensure that “no child is left behind.” While this slogan has never fully materialized in any country, it reflects an aspiration to overcome social hierarchies and economic barriers that are caused by morally arbitrary circumstances or structural patterns of disadvantage. It is therefore surprising that the global-distributive dimension of birthright membership has largely escaped critical assessment. This paucity of analysis is explained at least in part by the fact that the study of citizenship laws has traditionally been the province of domestic and often parochial scholarship, which tends to concern itself with the particular features of its own country’s norms and procedures for defining membership and admission.<sup>28</sup> International law, for its part, has focused primarily on attempts to resolve the problem of statelessness. This account calls our attention to the fact that it is better for the individual to enjoy a special attachment to a given polity than to remain with no state protection at all.<sup>29</sup> This is clearly a potent argument. However, this formulation focuses only on formal equality of status. It says nothing about rectifying inequalities that correlate with the birthright assignment of membership in “this or that” particular country.

Moreover, the familiar focus on formal equality of status (requiring that all individuals belong to one state or another) itself relies on a schematic picture of an orderly world comprised of clearly delineated political communities. This conception of the world is described by Rainer Bauböck as having, “a quality of simplicity and clarity that almost resembles a Mondrian

painting. States are marked by different colors and separated from each other by black lines . . . [This] modern political map marks all places inhabited by people as belonging to mutually exclusive state territories.”<sup>30</sup> In such a world, with its clear and exhaustive division of the global political landscape into mutually exclusive jurisdictions, it appears “axiomatic that every person ought to have citizenship, that everyone ought to belong to one state.”<sup>31</sup> By focusing on the Mondrianesque picture of citizenship, it becomes possible to emphasize the artificial symmetry between states (represented as different color-coded areas on the world map) while ignoring inequalities in the actual life prospects of citizens who belong to radically different (yet formally equal) membership units.<sup>32</sup>

On this score, the stowaways knew better. It must have required an acute awareness of the actual inequalities in life prospects to embark on their fatal trip, risking everything, including their very survival, for the goal of attaining a better future in a more affluent and stable country to which they did not legally belong.<sup>33</sup> It is in this context that the relationship between birthright citizenship and inequality of opportunity comes to the fore. Although existing citizenship laws do not create these disparities, they perpetuate and reify dramatically differentiated life prospects by reliance on the morally arbitrary circumstance of birth. At the same time, they camouflage these crucial distributive consequences by appealing to the presumed “naturalness” of birth-based membership. There is, however, nothing apolitical or neutral about these birthright regimes.<sup>34</sup> They are constructed and enforced by law, advantaging those who have access to the inherited privilege of membership, while disadvantaging those who do not—just like hereditary regimes of property transmission in the past preserved wealth and power in the hands of the few.

### The Importance of Citizenship’s Global Distributive Dimension

We can now see membership boundaries in a more complex light: not only are these boundaries sustained for symbolic identity and belonging purposes (as the conventional argument holds), they also serve a crucial role in preserving restricted access to the community’s accumulated wealth and power. The latter is jealously guarded at the juncture of transfer of “ownership” from the present generation of citizens to its progeny. In other words, birthright citizenship mechanisms provide cover through their presumed naturalness for what is essentially a major (and currently untaxed) property/estate transmission from one generation to another. Ours is a world of

scarcity; when an affluent community systemically restricts access to membership and its derivative benefits on the basis of a strict heredity system—akin to an entail structure of transmission—those who are excluded have reason to complain.<sup>35</sup>

If we wish to revisit these automatic transmission principles and to consider how to better allocate across borders the social benefits that presently attach to citizenship in a bounded community (as I believe we should), the first order of business is to draw attention to the entrenched connection between birth and political membership. Despite its pervasive effects, this connection has largely escaped attention in both academic and public policy circles. Once subjected to scrutiny, this system of allocation can no longer be taken for granted, nor can it be ignored.<sup>36</sup> This is so for at least three reasons.

First, the scope and scale of citizenship distribution is truly grand: it affects every single human being on this earth. Although the topic of immigration nowadays attracts considerable attention, it is still by means of ascriptive birthright that individuals attain their initial political membership in “this or that” particular country. And despite the public attention paid to those who go on to reside outside the polity in which they were born, they represent less than three percent of the global population. Everyone else—namely, ninety-seven percent of the global population, or more than six billion people—is assigned the life-long good of membership by the lottery of birth and either chooses, or is forced, to keep it that way.<sup>37</sup>

Second, the consequences of this membership-transfer system are profound, going far beyond the familiar emphasis in citizenship studies on questions of identity, diversity, and civic virtue. In an unequal world like our own, birthright citizenship does more than demarcate a form of belonging. It also distributes voice and opportunity in a vastly unequal manner. By legally identifying birth, either in a certain territory, or to certain parents, as the decisive factor in the distribution of the precious property of membership, current citizenship principles render membership in well-off polities beyond the reach of the vast majority of the world’s population. It is in this way that citizenship may be thought of as the quintessential inherited entitlement of our time.

And what a significant inherited entitlement it is: in our world, the global disparities are so great that under the present regimes of birthright citizenship, “some are born to sweet delight” as William Blake memorably put it in the *Auguries of Innocence*, while others (through no fault or responsibility of their own) are “born to endless night.”<sup>38</sup> The reality of our world is that the endless night is more prevalent than the sweet delight. More than a billion people live on less than a dollar a day; about 2.7 billion live with-

out access to adequate sanitation and more than 800 million are seriously malnourished.<sup>39</sup> Add to this the almost incomprehensible fact that eight million will die each year, as one author piercingly remarks, “because they are simply too poor to live.”<sup>40</sup> Or think of the shocking atrocity that we casually permit to continue every day: more than ten million children under five years of age perish each year in the world’s poorest nations—most from entirely preventable causes of death.<sup>41</sup> To this we must add the stinging realization that—contrary to the conventional optimistic story of breaking down ascriptive barriers and replacing them with mechanisms of choice and fair distribution—under the current system of birthright, gaining access to citizenship’s goods is clearly not open to anyone who voluntarily consents to membership or is in dire need of its associated benefits.<sup>42</sup>

Once this more critical perspective is taken into account, with its profound emphasis on global disparities coupled with a sharp recognition of how tightly our membership boundaries are regulated, the existing correlation between inherited citizenship and general well-being is impossible to ignore. The quality of services, safety, and scope of freedoms and opportunities enjoyed by those born in affluent polities are far greater, *ceteris paribus*, than the opportunities of those born in poorer or less stable countries.<sup>43</sup>

When our citizenship laws effectively become intertwined with distributing shares in human survival on a global scale—designating some to a life of relative comfort while condemning others to a constant struggle to overcome the basic threats of insecurity, hunger, and destitution—we can no longer silently accept this situation. These dramatically differentiated life prospects should disturb not only the expectant crowd of moral universalists but also free-marketers who believe in rewarding effort and distributing opportunity according to merit, rather than on the basis of station of birth. The problem of unequal allocation and transfer, which has gained plenty of attention in the realm of property, is, in fact, far more extreme in the realm of birthright entitlement to citizenship.

The third reason why we must pay careful attention to the puzzle of birthright citizenship is that, astonishingly, we continue to have no coherent theoretical explanation for the continued reliance on circumstances of birth in the assignment of political membership. This is despite the fact that the vast majority of the global population is assigned political membership by ascription (the scope of the studied phenomenon), and the dramatic global distributive implications that result from this entrenched system of allocation of unequal opportunity (birthright’s consequences). If anything, the persistence of ascription in this most unlikely of social arenas—namely, the definition of who is included and who is excluded from the *demos* (the

citizenry body), flies in the face of our standard liberal and democratic accounts of citizenship as reflecting the choice and consent of the governed.<sup>44</sup> It also reveals serious cracks in the conventional argument that we can divide the world neatly into countries that fall into the “civic” or “ethnic” ends of the spectrum of conceptualization of membership. Similarly, the prevalence of birthright membership stands in tension with the conventional characterization of citizenship as reflecting a social contract between the individual and the political community, or what various French authors refer to as “*le lien politique et juridique*.”<sup>45</sup> This post-Enlightenment vision is often contrasted with the older, Roman law conception of citizenship as an assigned status, with rights and obligations following automatically as a consequence of birth, not choice. Many of the giants of social and political thought recount and reify this (largely fictitious) distinction, according to which the modern state’s allocation of citizenship operates as a matter of choice and consent, marking an important improvement on the prior, status-based definition of one’s standing in the community. These triumphant themes are perhaps most famously captured in John Locke’s *Second Treatise of Government* and in Henry Maine’s catch-phrase thesis in *Ancient Law*, which describes the transition from the ancient world to the modern one as law and society’s development “from status to contract.”<sup>46</sup>

To recognize the surprising similarities in form and function between birthright citizenship and inherited property highlights a striking exception to the modern trend away from ascribed statuses in all other areas. The ascribed birthright-transmission mechanism, which is still exercised today, cannot be dismissed as a mere historical accident, given that the question of legitimizing political authority and property is central to the liberal, democratic, and civic-republican intellectual traditions. Such a startling observation only makes the persistent link between *political membership* and *station of birth*—a connection that has been both ignored and taken for granted—ever more puzzling and in urgent need of a coherent explanation. Addressing this lacuna is the challenge I take on in this book.

### Placing the New Framework of Analysis in Context

My discussion is informed by, and in turn seeks to enrich, three different bodies of literature: citizenship studies in contemporary political and legal scholarship, global inequality debates, and sociological accounts of the demise of borders in the context of post-national theorizing. This literature is set against the actual, restrictive policy changes undertaken by most advanced industrial nations in recent years in reformulating their citizenship

and immigration regimes in response to perceived threats of increased cross-border mobility and global insecurity. In juxtaposing these different lines of inquiry, I highlight the paucity of attention paid to *birthright* membership. I further contend that we need to take into account these partly intersecting discourses if we wish to find a justifiable balance that permits the preservation of the enabling properties of citizenship in a self-governing polity while at the same time aggressively responding to the global injustices perpetuated by the current system of entail-like transmission of membership by birthright. This mode of enquiry also illustrates the gaps and inconsistencies in each body of literature.

Consider the following: most of the writings on citizenship in recent years engages in a nuanced account of the rights of minorities in diverse societies, the civic virtues of citizenship, the ideals of deliberative democracy, and the prospects of creating a world without borders, or at least with more porous ones. This welcome renaissance-of-sorts in citizenship studies has dramatically enriched the field, highlighting the manifold ways in which political membership means much more than “the narrow passport-holding sense of having a formal legal connection to a particular [state].”<sup>47</sup> Remarkably, however, sparse attention has been paid to analyzing the *transfer* mechanism of membership by birthright and its pernicious effects on the distribution of voice and opportunity on a global scale.

The literature on global inequality, in contrast, suffers from an opposite shortcoming. Although encompassing tremendously rich debates about the effects of globalization on both inter-country and intra-country inequalities, the units of analysis themselves, that is, bounded membership communities (in their present incarnation as sovereign political entities in the interstate system), are often taken for granted. Therefore, no attention is paid to the type of questions that concern me here: how the boundaries of inclusion and exclusion are defined in the first place, what sustains them, and why polities in the real world continue to rely upon morally arbitrary circumstances of birth in deciding who falls on what side of the border of prosperity and security. In spite of the academic fanfare of post- and transnationalists, who happily predicted the demise of regulated borders and the eventual devaluation of bounded membership, citizenship is enjoying an unmistakable resurgence of authority at present.<sup>48</sup> This makes the study of citizenship’s birthright transfer mechanisms—the lost dimension of law’s construction of formidable walls that establish (and then protect) the membership boundaries they helped create—ever more pressing.

Highlighting this tremendous gap between theory and practice is part of my endeavor here, but it takes place as part of a larger project of merging the critical account of existing citizenship laws with a constructive explo-

## Reconceptualizing Membership: Citizenship as Inherited Property

I am astonished that ancient and modern writers on public matters have not ascribed greater influence over human affairs to the laws governing inheritance. Such laws belong, of course, to the civil order, but they should be placed first among political institutions because of their incredible influence on a people's social state; . . . in a sense, they lay hold of each generation before it is born. Through them, man is armed with an almost divine power over the future of his fellow men. Once the legislator has regulated inheritance among citizens, he can rest for centuries. Once his work has been set in motion, he can remove his hands from his creation. The machine acts under its power and seems almost to steer itself toward a goal designated in advance. If construed in a certain way, it collects, concentrates, and aggregates property, and before long, power as well.

ALEXIS DE TOCQUEVILLE, *Democracy in America* (1835)

THE VAST MAJORITY of today's global population (97 out of every 100 people) have acquired their political membership solely by virtue of birthplace or "pedigree."<sup>1</sup> Even in the current age of increased globalization and privatization, there is little doubt that securing membership status in a given state or region (with its specific level of wealth, degree of stability, and human rights record) is a crucial factor in the determination of life chances. However, birthright entitlements still dominate both our imagination and our laws in the allocation of political membership to a given state. In fact, material wealth and political membership (which are for many the two most important distributable goods) are the only meaningful resources whose intergenerational transfer is still largely governed by principles of heredity entitlement. Whereas the normative foundations of these principles have been thoroughly discussed in terms of the intergenerational transfer of property, they have seldom been considered in terms of citizenship.

This omission is especially disturbing in light of recent heated debates in political and legal theory concerning the claims of minority groups, the narratives of collective-identity formation, and the ethics of political boundaries.<sup>2</sup> These debates involve what can be referred to as the "identity-bonding" dimension of citizenship. However, what remains conspicuously

absent from these discussions is a serious analysis of what we might call the global-distributive implications of the entrenched norm and legal practice associated with automatically allocating political membership according to parentage (*jus sanguinis*) or territoriality (*jus soli*) principles. This chapter begins to address this considerable gap: it conceptualizes birthright citizenship laws, which construct and govern the *transfer* of membership entitlement, as analogous to a complex form of inherited property. This analysis in turn opens the door to fresh ideas for mitigating the profound distributive consequences that follow from reliance on circumstance of birth in allocating political membership.

Unlike advocates of world citizenship who seek to abolish bounded membership altogether, I believe that greater promise lies in diminishing the extreme inequities in life prospects that are presently attached to ascribed membership status under the existing birthright regime. This approach strikes a new balance between political membership and global justice without substantively detracting from the participatory and enabling qualities of membership in a self-governing polity. Although there are a number of responses that might get us closer to accomplishing this vision, I will focus here on the *obligation* to impose certain property-like and justice-based restrictions on the presently uncurtailed citizenship inheritance. Whether to interpret this obligation as a strong egalitarian commitment or a weaker international baseline welfarism is, of course, open to debate and will eventually have to be worked out through various democratic deliberations and reiterations across and between membership communities.<sup>3</sup> But the crux of my argument is this: once the analogy to inherited property is placed at center stage, it becomes far harder to justify the wealth-preserving aspect of citizenship that has long been cloaked under the cover of birthright's "naturalness." Once we see this complex system for what it is, the justice of requiring well-off hereditary title holders to provide at least a minimal threshold of well being (or subsistence) to those excluded from membership in an affluent and stable polity by accident of birth becomes more manifest.<sup>4</sup>

Theorists and policymakers shall undoubtedly have a heyday debating where precisely to draw this threshold. The more important point for our discussion is, however, to establish and defend the global redistributive obligation as a binding *corollary* to the right of birthright recipients to maintain their own entitlement to citizenship in a well-off polity. (In the course of this book I will be exploring some institutional options to facilitate that obligation.) In Hohfeldsian terms, the duty toward those who are excluded from citizenship by circumstances that are absolutely beyond their control is seen as correlated to the recipients' right to uphold their windfall membership. The analogy to inherited property further provides a foundation for avoiding "malfare" worldwide, yet without jumping to the quasi-tyrannical

conclusion that we must abolish *tout court* the space in which semibounded, self-governing political communities can flourish.<sup>5</sup> This permits the preservation of the social relations aspect of citizenship, while counterbalancing the inequities sustained under the seal of natural transmission of entitlement by virtue of birth. It is here that the analogy to inherited property proves most useful. After distinguishing between a narrow and broad conception of property, I turn to a description of the main insights that can be applied from the realm of intergenerational transfer of property to the study of intergenerational transfer of citizenship.

My analysis in this chapter proceeds in four parts. (1) I begin my discussion of birthright-citizenship transfers as resembling property and wealth transfers by highlighting the disparities in the living conditions and opportunities offered to citizens born into unequal political communities across the world. (2) I survey a few key concepts in property theory that serve as a basis for my conceptual analogy between property and citizenship regimes. (3) I show that a broad conception of property corresponds with two core functions of bounded membership in the world today: “gate-keeping” and “opportunity-enhancing.” (4) I venture into an exploration of the early common-law mechanisms of *fee tail* or *entailed* estates. This discussion shows the surprising commonalities in both form and function between these antiquated approaches to property transmission and present-day birthright principles that regulate access to bounded membership. Both these mechanisms serve to preserve and disguise as natural the immensely advantageous starting points in life to those who benefit from the birthright transfer. The analogy between inherited citizenship and the intergenerational transfer of property also helps reveal the pacifying role that legal norms and institutions play in legitimizing these transmission patterns. No less significantly, it permits us to deploy existing qualifications found in the realm of inheritance as a model for imposing restrictions on the presently *uncurtailed* transmission of membership—with the aim of ameliorating its most glaring inequalities of opportunity.

Although I criticize the *transfer* mechanism of citizenship (by way of automatic birthright), my conclusion is not that we must abolish the collective good of membership. Rather, a new balance can and must be found between protecting the valuable features of political membership and improving the well-being of those who currently remain outside the legal walls surrounding well-off polities. I am not suggesting or implying that wealth-preserving is the sole or even core function of birthright citizenship. There are other plausible functions or explanations, such as identity-bonding, democratic self-governance, administrative convenience, respecting cultural differences or constitutive relations. I address these in Chapter 5, but bracket them for now in order to highlight the global distributive dimension that

often goes unnoticed in our familiar discussions about citizenship. Ultimately, once the analogy between property and citizenship is drawn, the rich body of literature on inheritance becomes relevant to our discussion of the intergenerational transmission of citizenship. This enables me to defend the protections that citizenship guarantees to those included within a given membership circle, while at the same time targeting the unequal effects of this transmission system on those who remain excluded by its rigid, birth-based entitlement structure. Viewed through this prism, a redistributive *birthright privilege levy* (described in Chapter 3) might provide a model solution for addressing the severe inequalities of starting points that currently attach to inherited membership. Given that “*all* reasonable moral theories give us a sound basis for condemning the status quo,” placing this kind of burden on the presently uncurtailed inheritance of citizenship permits establishing a binding legal obligation on the fortuitous birthright recipients.<sup>6</sup>

### What Is Citizenship Worth?

Much has been written about global inequality. Everybody knows that the living conditions of a child born in Swaziland are, other things being equal, far worse than those of a child born in Switzerland. Publications such as the UNDP’s *Human Development Report* or the World Bank’s *World Development Report* reveal just how tremendous global disparities in life opportunities, chances, and choices actually are.<sup>7</sup> Consider, for example, measurements reflecting absolute deprivation: that is, the number of people falling below a threshold that enables them to function in a decent manner, such that the possibility of autonomous human action is severely restricted if not removed outright.<sup>8</sup> According to recent World Bank statistics, approximately 1.1 billion people live in extreme poverty with an income of less than \$1 per day per person, measured at purchasing power parity.<sup>9</sup> Another 1.6 billion live in moderate poverty, defined as living on between \$1 and \$2 per day. In other words, over 2.7 billion people—approximately 45 percent of the world’s population—survive on less than \$2 a day. Virtually all of the world’s extreme and moderate poor live in Asia, Africa, and Latin America. The overwhelming share of the extremely poor live in Southeast Asia and sub-Saharan Africa. At least 25 percent of the households in almost all sub-Saharan Africa or East Asian countries subsist on less than \$1 per day per person at real purchasing power levels. As of the early 2000s, the average annual per capita income in the United States exceeded \$30,000, with an average annual growth of 1.7 percent over the last two centuries. In contrast, the per capita annual income in Africa is

just over \$1,300 (far lower in sub-Saharan Africa), with an average annual growth rate of 0.7 percent over the last 200 years. Global inequalities in terms of income are even more striking when gender is factored in. Whereas in most industrialized polities, significant strides have been made toward the elimination of at least formal gender inequality, in other parts of the world women continue to lag far behind their fellow countrymen in terms of income and meaningful life choices.

But global inequalities in opportunity go far beyond income and expenditure. The mean years of educational attainment for the world have almost doubled from 3.4 in 1960 to 6.3 in 2000. However, disparities in educational attainment and achievement between students in developing countries and those in Organization for Economic Co-operation and Development (OECD) countries remain strikingly large. In many developing countries, literacy rates are still unacceptably low. According to the 2006 *World Development Report*, developing countries constitute the lower tail of the learning distribution. Students in these countries fare, on average, far worse than students in even the poorest-performing OECD countries. A recent study found that for children in Argentina and Chile average performance is two standard deviation points below that of children in Greece, one of the poorest performing countries in the OECD. Another recent study found that the reading ability of an average Indonesian student is equivalent to that of a French student at the seventh percentile.

Global inequalities also exist in health expenditures and health care. Whereas in 2002 the health expenditure per capita in Switzerland and Norway was roughly \$3,500 (PPP US\$), the equivalent health expenditure in Sri Lanka in the same year was \$131, and a meager \$15 in the Congo. Alternatively, take the crucial indicator of access to clean water. In 2002, 100 percent of Australia's population had permanent access to safe water sources. But only 70 percent of Australia's neighboring Solomon Islands' population, and approximately 39 percent of neighboring Papua New Guinea's population had sustainable access to safe water sources. Another revealing disparity is found in health care provision. Even health outcomes of the rich citizens in poor countries remain well below the OECD average. For all countries with average per capita GDP below \$2 a day, the infant mortality rate of the richest quintile of the population is more than 10 times higher than the OECD average. Basic sanitation standards seem to be a long way off throughout the developing world. The availability of appropriate medical services and drugs is sporadic. And we have not yet taken into account the HIV/AIDS pandemic, with its clear regional concentration and impact on infant mortality.

A baby born in 2001 in Mali (one of the world's poorest countries) had

a 13 percent chance of dying before reaching the age of one year, with his or her chances improving a mere 4 percent, to 9 percent, if the baby was born to a family in the top quintile of Mali's asset distribution. It is further estimated that approximately one in four children (24 percent) born in Mali will not reach age five. By contrast, a baby born in the United States the same year had less than 1 percent chance of dying in its first year or first five years. The probability at birth of not surviving to age 40 (for the 2000–2005 cohort) in Mali was 37.3 percent. In other words, at least one in every three people born in Mali between 2000 and 2005 will die before reaching the age of 40. As of 2003, only 48 percent of Mali's population had sustainable access to an improved water source (100 percent had such access in the United States). That year, over 70 percent of Mali's population lived on less than \$1 a day, and over 90 percent of Mali's population lived on less than \$2 a day. Although the average American born between 1975 and 1979 has completed more than 14 years of schooling (roughly the same for men and women, in both urban and rural areas), the average attainment of the same cohort in Mali is less than two years, with women's attainment less than half that of men, and virtually zero in rural areas. Not surprisingly, the illiteracy rate in Mali (percentage of those aged 15 and above as of 2003) was 81 percent. Taking into account the actual quality of education in the two countries is likely to yield far greater differences.

In short, the general well-being, quality of services, safety, and scope of freedoms and opportunities enjoyed by those born in affluent polities are all far greater, other things being equal, than the opportunities of those born in poor countries. Ours is a world in which disparities of opportunity between citizens of different countries are so great that about half of the population of the world, according to the World Bank, lives "without freedom of action and choice that the better-off take for granted."<sup>10</sup> Although extant citizenship laws do not create these disparities, they perpetuate and reify dramatically differentiated life prospects by reliance on morally arbitrary circumstances of birth, while at the same time camouflaging these crucial distributive consequences by appealing to the presumed naturalness of birth-based membership.

These dramatically differentiated life prospects should disturb not only moral egalitarians, but also free-marketers who believe in rewarding effort and distributing opportunity according to merit, rather than station of birth.<sup>11</sup> As the data provided here documents, the problem of unequal allocation, which has gained plenty of attention in the realm of property, is far more extreme in the realm of hereditary or territorially attributed citizenship. Remarkably, in spite of the conceptual affinity between the intergenerational transfer of property and birthright citizenship, and irrespective of the thousands of pages devoted to debating the justifications for inheri-

tance in property law, there have been few, if any, scholarly attempts to scrutinize the justifications for automatic inheritance of citizenship by birth. The muteness of political and legal theory with respect to the intergenerational transfer of citizenship by the fortuitous location or station of birth becomes all the more astonishing when we consider the incredible gaps in life opportunities perpetuated by birthright citizenship regimes. Such disparity runs far deeper and is infinitely more multifaceted than the material inequalities perpetuated through the intergenerational transfer of fungible wealth. By drawing the analogy from inherited citizenship to intergenerational transfer of property and privilege, we open up a new avenue for the development of just such debate.

### Property Theory: Some Key Distinctions

#### *Property as State-Enforced Relations of Entitlement and Duties*

Property is notorious for escaping any simple or one-dimensional definition. It is commonly recognized that “although property has to do with tangible and certain intangible ‘things’ property is not the thing itself.”<sup>12</sup> Rather, it is a human-made and multifaceted institution, which creates and maintains certain *relations* among individuals in reference to things.<sup>13</sup> These relations have a special validity in law; a property owner has rights that are valid against the world (rights *in rem*), as distinct from rights *in personam* which are only valid against a specific set of individuals such as those with whom one has contracted. The *in rem* quality provides strong protection to entitlements that get defined as property. This protection, in turn, relies upon collective recognition and enforcement. The collective dimension is important: property rights gain meaning only when they are connected to a system of law and governance that can enforce them.<sup>14</sup> In the modern era, the enforcing body has typically been the state.<sup>15</sup> As Thomas Gray aptly observes, “property must be seen as a web of state-enforced relations of entitlement and duty between persons, some assumed voluntarily and some not.”<sup>16</sup> Given its currency in the contemporary moral and legal landscape, the specific content and protection given to a property entitlement has always been (and still is) subject to political contestation. Property relations are thus never immune to reconstructive inquiry whether in law or in philosophy.

Property relations establish a range of enforceable claims. As stated in Wesley Hohfeld’s seminal work, these enforceable claims are often described as a “bundle” of rights.<sup>17</sup> Some of the most notable sticks in the bundle include the right to use, to transfer, to delimit access, and so on.<sup>18</sup> As Guido

Calabresi and Douglas Melamed observe in their classic “view from the cathedral,” each society or legal system must define who has an enforceable claim in a given entitlement and must further determine which protections, opportunities, and decision-making processes become available to the right-holder.<sup>19</sup>

Modern theories of property extend the concept beyond concrete and tangible objects (my car, your house) to refer to a host of more abstract entitlements (shares in a company, intellectual property in the form of patents and copyrights, professional licenses, genetic information, even folklore practices). Changes in human relations and social values constantly modify our understanding of what counts as protected property.<sup>20</sup> Important questions of allocation come up when we begin to categorize certain relationships as legal property: who owns it, and on what basis? Ownership and possession of property affects people’s livelihood, opportunities, and freedoms.<sup>21</sup> Conflicting interests concerning access, use, and control of goods are therefore likely to arise, particularly with respect to items that are scarce relative to the number of claimants or demands that human desires place upon them.<sup>22</sup> In this context, it is useful to draw on Jeremy Waldron’s formulation of property relations as offering a “system of rules governing access to and control of [scarce] resources.”<sup>23</sup>

When applying these understandings of property to citizenship, perhaps the most obvious parallel is that birthright and naturalization laws create precisely such a system of rules governing access to, and control over, scarce resources (in this case, membership rights and their accompanying benefits). I call this access-defining feature of citizenship its *gate-keeping function*. This function is well-recognized in the literature on political membership: “Every modern state formally defines its citizenry, publicly identifying a set of persons as its members and residually designating all others as non-citizens . . . Every state attaches certain rights and obligations to the status of citizenship.”<sup>24</sup> Even in today’s world of increased globalization and privatization, determining who shall be granted full membership in the polity still remains an important prerogative of the state.<sup>25</sup> As we shall see in latter chapters, gate-keeping is never absolute or unrestrained. But at present, it does not generate (legally or ethically) an obligation to make the global minimum a correlating duty to the existence of bounded membership. Establishing such a duty as a restraint on the right to exclude is part of what this book aims to achieve.

Although there is a lively discussion among citizenship theorists about the expansion of rights accorded to noncitizens (postnational citizenship), the embryonic development of regional citizenship (the European Union is the prime case study in the literature), and the normative vision of global

(or cosmopolitan) citizenship, it is all too easy to ignore the facts on the ground: gaining access to membership status remains crucially important for defining our scope of opportunity, security, and sense of belonging. This observation, which highlights the continued significance of regulated citizenship in today's world, is fully compatible with acknowledging that at some point in the future we might have a different system of dividing political and juridical authority over people and territory, a system that will not be so closely tied to secure membership in this or that country.<sup>26</sup>

Even enthusiastic advocates of post-Westphalian citizenship, such as Richard Falk, concede that at present “[d]espite globalization in its various impacts, the individual overwhelmingly continues to be caught in a statist web of rights, duties, and identities.”<sup>27</sup> For instance, international travel still depends on passports issued by sovereign states, “borders are exclusively managed by governmental authority, and an abuse of rights in a foreign country is almost always dealt with by seeking help from one’s country of citizenship.” Even migration, “to the extent that it is ‘legal,’ rests on [bounded] notions of territorial sovereignty.”<sup>28</sup> In short, although recent years have witnessed a surge in competing and overlapping sources of political authority (both above and below the national level), when it comes to citizenship, states have retained a relatively strong hold over the regulation of their membership boundaries.<sup>29</sup> This observation holds true even in the case that seems to contradict our focus on bounded membership, namely, European citizenship. Here, too, a close look reveals a surprising fact: access to membership at the regional or supranational (European Union) level is still entirely derivative. It is exclusively defined at the member-state level.<sup>30</sup> This reflects in part the existence of an institutional and international structure that privileges the power of interdependent states (even those bound to establish an “ever closer union”) to define membership boundaries, which I take as a background condition for my analysis.

Returning to our property analogy, when we explore the realm of citizenship, we soon recognize that what each citizen holds is not a private entitlement to a tangible thing, but a relationship to other members and to a particular (usually a national) government that creates enforceable rights and duties. From the perspective of each member of the polity, reconceptualizing his or her entitlement to citizenship as a complex type of property fits well within the definition of *new property*, a phrase famously coined by Charles Reich referring to public law entitlements as serving the traditional private law purposes of ensuring a baseline of security and dignity to citizens under market-based economies.<sup>31</sup> Unlike traditional forms of wealth, which were held as private property, valuables associated with the public title of citizenship derive specifically from holding a legal status

that is dispensed by the state alone. Such entitlement to the status of membership in turn bestows a host of privileges and benefits (as well as certain civic obligations) upon its holders.<sup>32</sup>

Although the value of citizenship is communally generated, the entitlement conferred upon each member is individually held.<sup>33</sup> This intricate combination of individual and collective aspects makes citizenship a particularly complex type of property-like entitlement, with “priceless benefits” as the U.S. Supreme Court memorably put it, adding that “it would be difficult to exaggerate its value and importance.”<sup>34</sup> In this legal structure, the state operates as generator and trustee of membership titles, with their critical enabling implications on the life opportunities of its individual members.<sup>35</sup> Each insider differs from the outsiders by virtue of his or her share in the protection conferred only on those counted as citizens and by their right not to be deprived of the valuable good of membership itself.<sup>36</sup> For each member, citizenship further entails a share of ownership and governance of that polity’s communal and pooled resources. As such, citizens stand in a special relation to each other and to the collective that they govern. When citizenship is conceived in this way, the distinction between “narrow” and “broad” conceptions of property becomes highly relevant.<sup>37</sup>

### *The Narrow and Broad Conceptions of Property*

The narrow (or “rivalrous”) conception treats property as a market commodity that can be sold, traded, or alienated, through voluntary transactions.<sup>38</sup> According to this notion of property, each owner has a near absolute dominion over his or her assets, and is free to dispose of these as he or she sees fits.<sup>39</sup> This vision of property rests on a particular conception of social life, according to which all interpersonal interactions are characterized as “trades,” and thus everything may in principle be subject to market transaction.<sup>40</sup> This in turn relies on a possessive individualism worldview, whereby social atomism and unrestricted commodification rule, and where self-interest is the core motivation for human action.<sup>41</sup> In this view, maximum freedom ought to be granted to the right-bearer, whose preferences may only be limited by compelling state interests (in the form, for example, of compensated “takings”), or certain *ex ante* (rather than *ex post*) legal constraints.<sup>42</sup>

In contrast, the broad (or “trusteeship”) conception of property views property as part of a web of social and political relations, wherein people depend upon others “not only to thrive but even just to survive.”<sup>43</sup> This view of human flourishing dates back to Aristotle and treats property not as an end in itself but as a means toward advancing the commonweal and

building relations of trust.<sup>44</sup> Closely related to the distinction between the narrow and broad conception is a disagreement over how best to characterize property's core. For those who emphasize self-interest (the narrow conception), property is understood primarily as entailing the right to exclude others from the use and benefit of what one owns.<sup>45</sup>

This right to exclude privileges the possessive individual who presumably stands solely in market relations to other traders in a *laissez-faire* society. It allows each person to erect high and enforceable legal boundaries of exclusion around her property, boundaries which operate as *in rem* rights, rights "against the world." In this conception, as Hanoch Dagan and Michael Heller sarcastically observe, each individual is seen as "cloaked in the Blackstonian armor of 'sole and despotic dominion.'"<sup>46</sup> Given its fend-for-yourself ideological bent, the narrow account of property fails to explain situations in which individuals form relations of co-ownership or interdependence. This is a remarkable shortcoming given the current social and economic reality in which co-ownerships, partnerships, shareholding structures and the like, constitute a growing proportion of property relations.

The literature on property, which is mostly dominated by the proponents of the narrow conception, holds in stock plenty of arguments in favor of protecting exclusive and sole ownership. It is argued that this arrangement fosters the owner's independence, dignity, and freedom by creating a zone of privacy within which he or she is protected against the power of the state or a majority of fellow citizens.<sup>47</sup> Even the harshest critics of the narrow version of property, such as Jennifer Nedelsky, concede that it has valuable qualities: "we mean by property that which is recognized as ours and cannot be easily taken away from us."<sup>48</sup> In practice, however, the narrow vision has limited traction in explaining the rise of new property regimes that blend individualized and communal ownership in the co-governance of valuable resources.<sup>49</sup> For instance, there has been a dramatic surge in the number of common property institutions that emphasize cooperation and trust-building among diverse rights-holders by using the law of property to enhance mutually beneficial relationships rather than erecting zones of absolute privacy.<sup>50</sup>

A concrete illustration of this trend is found in the rise of common-interest communities in the United States. It is now estimated that approximately one-fifth of owners of residential housing have chosen to purchase property in housing communities with quasi-democratic governance structures, which typically involve exclusive rights to a dwelling unit and co-ownership of common areas.<sup>51</sup> The rise of organizations such as public corporations and shareholding provide further support for this idea. Such co-ownership calls for the development of institutions and procedures for