Are We the People? A Contextualized Theory of Voting for Non-Resident Citizens

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Abstract

This thesis presents a contextualized account of non-resident citizen enfranchisement that, I argue, is both constitutionally and democratically defensible. While the practice of non-resident citizen voting has expanded exponentially over the last half century, it remains undertheorized. Within democratic theory, the practice tends to be normatively rejected on the basis that citizenship-based voting is a relic of outdated nationalisms, and that non-resident citizens are not sufficiently subject to the laws that will be created. In constitutional courtrooms, however, despite significant democratic, logistical and institutional barriers, the right of non-resident citizens to vote in national elections has been overwhelmingly affirmed. By comparing the analyses in five constitutional apex courts, I argue that that this overwhelming support is driven by (1) the constitutional framing of the citizen as the source of all state authority, and (2) a vigorously protective judiciary. In other words, laws which exclude citizens from the *demos* are constitutionally impermissible, and legislated dividing lines that separate voting from non-voting citizens are too blunt and arbitrary. I argue that judges rightfully adopt a skeptical posture towards legislated disenfranchisement. However, their statements about the absolute nature of the citizen's right to vote are not only wrong as a matter of fact, they open the door to political manipulation of the electorate in ways that undermine the rights they are seeking to protect. Democratic theories have compelling accounts of membership that can help rectify this failing. However, given their skepticism of citizenship-based voting, these accounts have not penetrated the constitutional courtroom. By probing these accounts, I argue that Rainer Bauböck's stakeholder citizen model is able to impose meaningful democratic guardrails onto the practice of non-resident citizen voting in a way that is constitutionally acceptable. In order to survive vigorous scrutiny, however, Bauböck's account must be modified. The output of this

investigation is my Constitutional Stakeholder model. It argues that restrictions on non-resident citizen voting can be constitutionally acceptable so long as they are justified by reference to a citizen stakeholding understanding of democratic membership. However, in order to withstand vigorous constitutional analysis, lines separating voting from non-voting citizens cannot be blunt or arbitrary. In practice, this means that in order to be constitutionally upheld, non-resident citizens on the wrong side of a legislated dividing line must have a path by which they can demonstrate their rightful inclusion in the *demos*. To assuage critiques that such individuation is unworkable, my solution is derived from models that are already in place in other countries.

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Introduction

A. The Puzzle of the People

In 2019, a majority of the Supreme Court of Canada struck down a law preventing non-resident citizens from voting in federal elections.[1] According to the majority, the impugned law wrongfully disenfranchised Canada's "best and brightest…ambassadors of Canadian values."[2] A few years prior, approximately 128,000 non-resident Hungarian citizens voted overwhelmingly in favour of the ruling party.[3] Their inclusion was maligned as an instance of democratic decline, and a strategic manipulation deployed to secure the ruling party's increasingly autocratic grip on power.[4]

These events, while geographically, politically, and contextually distinct, share a puzzle at the heart of this thesis. In a world where states are territorially conscribed, but citizens live outside these borders, how should we allocate the right to vote? Is it a constitutional imperative for non-resident citizens to be included in the electorate, or is it a democratic breakdown when people are given a voice in creating laws that may not bind them? Boiled down to its simplest terms, is non-resident citizen voting a good thing or a bad thing?

There are no universally accepted answers to these questions. On the one hand, the core of democracy is self-rule: people make decisions and then have to live with them. On this reasoning, if you want to find who should have a say in collectively binding decisions, you

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[1] *Frank v Canada* (Attorney General), 2019 SCC 1 [*Frank*].
[2] I*bid* at para 80.
[3] Szabolcs Pogonyi, "Report on Political Participation of Mobile EU Citizens: Hungary (Italy, European University Institute: 2021) online: <https://cadmus.eui.eu/bitstream/handle/1814/71907/RSCAS_GLOBALCIT_PP_2021_3.pdf?sequence=1> at 16; For more, see: Lili Bayer, "Viktor Orbán courts voters beyond 'fortress Hungary'" Politico (22 August 2017) online: https://www.politico.eu/article/viktor-orban-courts-voters-in-transylvania-romania-hungarian-election-2018/.
[4] Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018) at 69-70; Kim Lane Scheppele, "Hungary, An Election in Question, Part 4: The New Electorate (in Which Some Are More Equal than Others)" (NY Times, Feb 28, 2014), archived at http://perma.cc/69HC-4XJ5; For more, see: Kim Lane Scheppele, "How Victor Orbán Wins" (2022) 33:3 Journal of Democracy 45 at 55.

should look for the people who will either be affected by, or subject to them. Scholars have aptly pointed out that citizenship status does not guarantee this relationship. In a world where the coercive power of the state is largely confined to territory, subjection to that power is largely a function of physical presence. Under this view, non-resident citizens should not be able to vote.[5]

On the other hand, in courtrooms around the world, it is increasingly clear that the right to vote is grounded in "citizenship, and citizenship alone".[6] Under this view, state authority is ultimately derived from citizens, who set forth the terms of their subjection in a constitution. Institutions created by that authority – including lawmaking bodies - cannot use the powers they have been given to dismantle their maker. In practice, this means that elected lawmakers lack the authority to disenfranchise citizens on the basis that they don't belong to the *demos*.[7] The citizen's physical absence from the state territory, as well as the reasons behind it, are irrelevant when allocating the right to vote.

The constitutional fortress that judges have built around the citizen's right to vote is well-grounded. Allowing elected lawmakers to determine rightful voters is akin to letting foxes guard the henhouse.[8] If political actors can disenfranchise the people who elect them, the concern is

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[5] Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393; Patti Tamara Lenard; "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119; Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27.

[6] *Frank,* supra note 1 at para 29.

[7] My use of the label *demos* refers to the voting population of a given state (country). In this definition, I rely on articulations of the *demos* made by Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989): "The *demos* must include all adult members of the association except transients and persons proved to be mentally defective", and Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 218: "In a democracy, those who enjoy full political rights compose the *demos*…" For more detailed discussion on the terminology used in this thesis, see Section D: A Note On Terminology, below.

[8] Samuel Issacharoff and Richard H Pildes "Politics As Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643. See also: Richard L Hasen, "The 'Political Market' Metaphor and Election Law: A Comment on Issacharoff and Pildes" (1998) 50 Stan L Rev 719; Daniel Hays Lowenstein; Nathaniel Persily, "In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders" (2002) 116:2 Harv L Rev 649.

that they will wield it for personal benefit rather than public good. To avoid this, constitutions construct a *demos* that lies outside the reach of political hands.[9]

But while this stance is understandable, it ignores three important realities. First, citizenship laws have no fixed core. Most governments around the world can change their citizenship laws by ordinary legislative processes, and many bestow citizenship status on people who have never even been to their country of citizenship. There is something democratically amiss when laws are determined by people who are unlikely to ever encounter them. Second, citizens move away. Within that practice, it is at least arguable that citizenship status – without more - should not automatically entitle them to vote. And third, no country in the world enfranchises all of its citizens. Whether for reasons of age, residence, incarceration or incapacity, there is no liberal democracy on earth that gives the right to vote to every one of its citizens. Judicial statements to the effect that all citizens must always have the right to vote may be inspiring, but they are wrong. Instead, what we are left with is constitutional adjudication that is fiercely and understandably protective, yet ill-suited to the changing face of a globalized world, and the nebulous content of citizenship laws.

All this to say that existing approaches to non-resident citizen voting fail to capture its normatively ambivalent potential. Non-resident citizen voting tends to be painted as being either good or bad, when in reality, it is both. The constitutional protection of non-resident citizen voting is good in that it takes the question of enfranchisement out of political hands, and recognizes that membership in the *demos* can transcend borders. On the other hand, it is bad when it fails to recognize that some citizens lack a genuine link to the country where they hold citizenship, and when it opens a backdoor to political manipulation.

[9]Issacharoff and Pildes, *supra* note 8.

The following chapters attempt to navigate this ambivalence with the goal of developing an account of non-resident citizen enfranchisement that is both democratically and constitutionally acceptable. Accomplishing this task is complicated because it requires revisiting foundational but divergent stories of membership. As the following chapters will demonstrate, in democratic theory membership in the *demos* is grounded in a relationship of reciprocity: one rightfully has a voice in collectively binding decisions if they will be affected by, or subject to them. In constitutional law, this question is answered by reference to a pre-defined citizenry from whom all state institutions trace their authority.

While these accounts point to the same population in many cases, this is not so with non-resident citizens. Non-resident citizens voting is a point at which these divergent accounts of membership must be addressed directly, and much of the legwork involved in this thesis involves probing these stories to find a space in which they can co-exist.

To this end, I seek practical solutions. Broadly speaking, I work with the liberal democratic constitutional framework as it is. In my view, it is not necessary to sever voting from citizenship in order to make it democratically acceptable. Even if I wanted to, however, I do not believe this is a realistic short-term goal. But while I accept the existing framework, I do not necessarily accept the interpretations that judges have ascribed to it. There are problems with the way judges are approaching non-resident citizen voting, and theory can help solve them. The issue, however, is that democratic accounts of membership struggle to find footing in a constitutional setting. The following chapters work with these different lines of thinking in order to locate a common ground that does not undermine the role of citizenship within the modern constitutional framework, but tames its anti-democratic excesses.

After exploring and defending theoretical accounts and constitutional caselaw on non-resident citizen enfranchisement, this thesis presents its own contextualized theory of voting, citizenship, and territory. My solution is tiered in terms of its ambition. Its more aspirational account targets citizenship laws themselves. If all citizens must vote, but citizenship laws lack democratic credentials, then we can fix that problem by embedding democratic credentials into citizenship status. This approach diffuses the tension between democracy and constitutional accounts by assigning each institution its own lane: legislatures get to determine who are citizens, while courts interpret the rights to which those citizens are entitled. As explored in later chapters, under this ideal citizens both legally and normatively have the right to vote.

While tidy, this approach is limited, both in its understanding of the issue and in its political feasibility. As such, a more practical solution is also needed. The output of this analysis is my Constitutional Stakeholder Model. This name is a nod to Rainer Bauböck's influential stakeholder citizen theory, from which my account takes inspiration.[10] That theory – developed in more detail in Chapter 2 - argues that citizenship is properly understood by reference to one having a stake in a larger community.[11] In order to meet the realities of the constitutional courtroom, however, Bauböck's account must be modified. The 'Constitutional' qualifier to my account speaks to the modifications needed for Bauböck's theory to survive vigorous constitutional scrutiny. Thus, my Constitutional Stakeholder model can be understood as a contextualized variation of Bauböck's account.

As more fully defended in Chapter 4, the practical output of my analysis is the conclusion that some restrictions on non-resident citizen voting can be constitutionally acceptable so long as

[10] Bauböck, *supra* note 5.
[11] Under it, citizens should rightfully have the ability to vote insofar as their individual well-being is tied to collective democratic flourishing of the polity, *ibid.*

they are justified by reference to Bauböck's "stakeholding" account of membership. However, I modify Bauböck's account by insisting that any legislated dividing line between voters and non-voters must be sufficiently tailored to allow individual citizens to demonstrate their rightful inclusion in the *demos*. This, I argue, strengthens his theory and allows it to withstand a vigorous constitutional analysis. To assuage critiques that such individuation is unworkable, my solution draws on models that are already in use in other countries.

As explored in the chapters ahead, developing an account of non-resident citizen enfranchisement that meets democratic and constitutional demands requires compromises on both sides of the ledger. The democratic side must accept citizenship's relationship to voting in the liberal democratic state, and must narrow the discretionary space within which decisions on allocating the vote can be made. On the other side, constitutional courts must acknowledge that legislatures may validly tailor voting laws in order to meet the core edicts of democracy. While territorial presence isn't the entire story of membership in the *demos*, it is a relevant part of it. This acknowledgment does not, however, require courts defer to government choices on who has the right to vote. On the contrary, it requires a vigorously protective stance in order to ensure this authority is not abused or exploited.

B. A Contextualized Theory of Non-Resident Voting

My method of analysis falls under the umbrella of a contextualized political theory.[12] Political theory can suffer from a level of abstraction that does not concern itself with real world implications. A contextual approach to political theory pushes back against this tendency by

[12] For more on contextual political theory, including its limits, see: Patti Lenard "Deliberative and contextual approaches to multiculturalism" in Geoffrey Brahm Levey, ed., *Research Handbook on Multiculturalism* (Cheltenham, UK: Edward Elgar Publishing, 2025) at 137; Jeffrey Howard, "The Public Role of Ethics and Public Policy" in Annabelle Lever and Andrei Poama, eds, *The Routledge Handbook of Ethics and Public Policy* (New York, NY: Routledge, 2019) at 25.

giving real-world practice "standing" in both the development and critique of theory.[13] Contextual political theory embraces the idea that "established institutions and practices may contain forms of wisdom that theories fail to capture."[14] The exercise is iterative: theory is used to normatively evaluate practice, and practice is held up to theory.

This thesis is contextual in two senses. First, I use constitutional court cases to develop my democratic theory of inclusion. By giving case law standing in the development of theory, I can distill the hurdles to implementation that theory faces in the real world. This, in turn, allows me to investigate whether it is possible to meet these constitutional concerns in a way that is democratically acceptable. Secondly, this approach yields an outcome – the Constitutional Stakeholder model – that is itself context-enabling. As explored in later chapters, the Constitutional Stakeholder model it is a vehicle by which facts on the ground are rendered relevant in the courtroom.

While this approach endorses the idea that case law can be used to develop theory; the reverse is also true. This thesis draws on normative political theory and prescribes it as a tool for judges to resolve the notoriously "hard case" of membership in the *demos*.[15] In this light, my output bears the markings of Ronald Dworkin's constructivism.[16] This thesis does not focus on the relationship between law and morality. However, I do believe that there is persistent disagreement about who counts as part of 'the people' and that this disagreement raises moral stakes. To the extent I rely on normative theory to navigate this disagreement, my work is aligned with a Dworkinian vision of law.[17]

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[13] Joseph H Carens, "A Contextual Approach to Political Theory" (2004) 7 Ethical Theory and Moral Practice 114 at 122.
[14] *Ibid.*
[15] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1986).
[16] *Ibid.*
[17] *Ibid* at 266.

Some may question the relevance of a contextualized theory of non-resident citizen enfranchisement.[18] Theories and practices of non-resident citizen voting already exist. For the most part, they proceed on separate tracks. Practice has not been hampered by a lack of theory, and existing theories have already aptly pointed out the weaknesses of practice. In this light, a contextualized theory is likely to please no one. For the democratic theorist, an account of voting informed by constitutional law is likely to be taken as watered-down or ideologically compromised. Constitutional courts and commenters in turn have little use for democratic accounts of inclusion. While theorists can imagine the world as it might be, judges must work with the world as it is - including its institutional and constitutional constraints.

I have three arguments in support of this approach. First, non-resident citizen enfranchisement is rapidly expanding, both in terms of legal recognition and of the number of people are subject to it.[19] While it may have been acceptable to develop *ad hoc* practices of non-resident enfranchisement when dealing with small or largely inconsequential populations, the problems with this approach are becoming more apparent as it is deployed in different contexts and impacts larger swaths of the population. Theory is needed to understand the foundations, goals and perils of non-resident citizen voting, and to identify its weaponization.

In this regard, my contextualized theory is uniquely useful in that it is grounded in real-world legal constraints and decision-making structures. Theories developed without regard to these factors can be rich in theoretical insight, but they can run into problems on the level of

[18] See Will Kymlicka's framing of the issue in response to his own goals, from which my explanation took inspiration: Will Kymlicka, *Politics in the Vernacular: Nationalism Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001) at 4.

[19] Elizabeth Iams Wellman, Nathan W Allen, and Benjamin Nyblad, "The Extraterritorial Voting Rights and Restrictions Dataset (1950–2020)" 2022 Comparative Political Studies 909 at 910, 924: While the trend is clearly towards expansion, there are examples of retreats over the past 40 years. Some states, including Korea, Morocco, Afghanistan, South Africa and Cambodia have reversed (and occasionally re-reversed) their stance on whether non-resident citizens should be included in the *demos*. For more on this, see Chapter 1, Section C.

implementation (at least in the short-term). For example, theories of democratic inclusion that take the stance that citizenship should no longer be the touchstone for voting will be difficult to implement within constitutional regimes that expressly grant the right to vote to citizens, as most do.

In making this observation, I emphasize that existing theories remain enormously valuable – they push thinking about the normative foundations of a *demos*, critically engage with problematic elements of citizenship, and expose weaknesses in our current practices. My goals are simply different from theirs – I am seeking a theory that is informed by the constitutional structures that exist now, with the idea of offering off-the-shelf solutions and guidance on implementation.

By contrast, constitutional courts seem ill-suited to grapple with the role of residence in voting. This ambiguity, I argue, opens the practice to exploitation. Political actors and publics sense that there is something critical about residence and voting, but they have nowhere to hang their hat within a constitutional system. A theory that is constitutionally workable and informed by democratic theory can better accommodate this reality. By better explaining the relationship of voting, citizenship and residence, a contextualized theory can better understand the role of residence within a constitutional and democratic system that is responsive to the needs of each pillar.

In short, even though they may not realize it, constitutional courts need theory to successfully navigate this conversation. Without it, they are making statements about the relationship of voting to citizenship that have the potential to cause as many problems as they solve. If we absolutely defend the right of citizens to vote without grappling with its democratic meaning and content, we don't prevent the political manipulation of voting; we just shift the

locus of those efforts. Rather than just handing control of voting and citizenship to either courts or legislatures, we need an account that understands how both institutions operate in this area of overlap.

Lastly, the rapid increase in cross-border movement of people and their expectation of a right to vote at home can be expected to place pressure on international bodies for the development of standards of practice or "codification".[20] International standards of practice cannot be developed without understanding whether or why non-resident citizens should (or should not) be enfranchised in the first place. A more comprehensive understanding of non-resident voting that is informed by legal structures assists in the development of international standards and illuminate the foundations of the potential and limits of non-resident citizen voting.

C. Major Themes Explored

Questions about non-resident citizen enfranchisement engage a number of overarching themes. Below, I set out four such themes, in the hopes that they will serve as useful touchstones to ground the analysis to come.

a. The Nebulous Nature of Citizenship

Within this thesis, my discussion of 'citizens' and 'citizenship' refers to persons who hold the legal status of citizenship from an internationally recognized state. An inexact, but nonetheless helpful way to conceptualize this subject matter is to think of passport holders.[21] This is a decidedly state-centric, top-down understanding of citizenship.

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[20] Kymlicka, *supra* note 18 at 7.

[21] Several scholars would, on good grounds, criticize conflating citizenship status with holding a passport. Elizabeth Cohen, for example, has aptly described how holding a passport is mistakenly conflated for the whole of citizenship. See: Elizabeth Cohen, *Semi Citizenship in Democratic Polites* (Cambridge: Cambridge University Press, 2009) at 41. Here, I am using passports simply as a shorthand conceptual device.

Citizenship is a notoriously difficult term to define. It, like other "essentially contested concepts", possesses the paradoxical quality of having widespread usage and understanding, yet lacking an authoritative singular definition.[22] The definitional imprecision is ancient and endemic to the term. Citizenship's etymological lineage points in different directions. Its Aristotelian conception speaks to a participatory, civic republican, normative ideal (citizenship as virtue), while its Roman origins embody a passive, proto-liberal status or entitlement (citizenship as status).[23] In modern times, citizenship has also assumed an administrative role as the "international filing system" which assigns individuals to states.[24]

Modern understanding and discourses on citizenship draw, knowingly or not, from some or all of these understandings. Citizenship can refer to something a person *has*, something they *do,* or a state to whom they are assigned. Scholars debates the "core" of citizenship,[25] its embedded normativity,[26] its relationship to the state,[27] and its legacy.[28] Scholars speak about the

[22] Walter Bryce Gallie, "Essentially Contested Concepts" (1956) *Proceedings of the Aristotoleian Society* 167 at 168, cited in Elizabeth F Cohen and Cyril Ghosh, *Citizenship* (Cambridge: Polity Press, 2019) at 4, 11. Citizenship has been described by equally authoritative sources as a "legal status, a standing, an institution, an instrument of political categorization, a set of actions related to virtue, civicness, a form of identification, a process, an affect, and various other things." Cohen and Goshen, *ibid* at 10. See also: Linda Bosniak, "Citizenship Denationalized" (2000) 7 Ind J Global legal Stud 447 at 450, 455 (in which she recognizes that "the meaning of citizenship has been, and remains, highly contested among scholars").

[23] The Greek usage of citizenship is associated with participatory, civic republican ideals. Roman strands of citizenship are more closely associated with a more rights-based liberal understanding. In other words, is citizenship something that you *do*, or something that you *have*? (Cohen, *supra* note 21 at 100-108). See also: Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006) at 18-19.

[24] Cohen, *supra* note 21 at 100-108; Barry, *supra* note 38 at 19; Bosniak, *ibid* at 18-19; Nottebohm Case (*Liechtenstein v Guatemala*) [1955] ICJ 1 [Nottebohm]; Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (London, Cambridge: Harvard University Press, 1992) at 31.

[25] Ruth Rubio-Marin, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81:1 NYUL Rev 117 at 124; Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119 at 120 [Lenard: Residence]; Bauböck, *supra* note 5 at 2393; Bosniak, *supra* note 23 at 35.

[26] Bosniak, *supra* note 23 at 12.

[27] Bosniak, *supra* note 23 at 20-8; Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) at 1, 114-127; 219.

[28] Bosniak, *supra* note 23 at 29-34.

citizenship of aliens,[29] semi-citizenships,[30] multicultural citizenship,[31] global, cosmopolitan, or universal citizenship,[32] and other loci and manifestations of citizenship as a status (transnational or supranational citizenship)[33] or virtue (netizenship, ecological, economic or cultural citizenship etc.).[34] At their heart, all of these debates draw on and emphasize certain strands of citizenship's history while downplaying others. Collectively, they demonstrate that citizenship is a shell into which many different ideas and beliefs can be poured.

Without disagreeing with any of these conceptions, I am focused on the rights to political inclusion that flow from holding the legally recognized status of citizenship issued by a particular country. In other words, my definition of "non-resident citizens" does not include the normative, functional or non-state definitions that appear in citizenship literature.[35] I have made this choice because my research focuses on the allocation of constitutional voting rights in a country. Those rights flow from the legal status: a person cannot "earn" the right to vote simply by acting like a citizen,[36] nor do status citizens typically lose the right to vote by failing to adhere to civic republican ideals of citizenship (i.e. attend public debates, volunteer in community groups, or vote in prior elections).[37]

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[29] *Ibid*.
[30] Cohen, *supra* note 21.
[31] Bosniak, *supra* note 23 at 23; Will Kymlicka *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Oxford University Press, 1995).
[32] Bosniak, *supra* note 24 at 25-31.
[33] Jo Shaw, *the People in Question* (Britsol: Bristol University Press, 2021) at Ch 6.
[34] See discussion of these topics in, for example: Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton, Princeton University Press, 2021) at 215-218, Bosniak, *supra* note 23 at 21-23.
[35] For discussion of the different meanings and content of citizenship, see Bosniak, *supra* note 23 at Chapter 2; Cohen, *supra* note 21 at Chapter 2.
[36] Cohen*, supra* note 21 at 15-22.
[37] Cohen, *supra* note 21 at 15-22. It may be argued that some states remove the right to vote for prisoners based on their failure to act like citizens. I am referring to losing the right to vote based on failing to live up to a republican ideal of citizenship; not removing the right to vote as a form of punishment for criminal behaviour, regardless of its relationship to civic engagement and public life.

I note, however, that while my starting point of citizenship is a state-issued legal status, I will inevitably engage these wider debates. In this respect, the rights that flow from citizenship status are often justified based on normative underpinnings. For example, it can be argued that non-resident citizens should lose the right to vote because their physical absence from the territory precludes their ability to *act* like a citizen.[38] Separately, in discussing the relationship of voting to citizenship, I will inevitably touch on debates about the "core"[39] of citizenship and the presence of "semi citizenships".[40] In other words, while I rely on a legalistic definition of citizenship, it cannot be entirely segregated from its other formulations. A legal definition of citizenship cannot ignore the significant normative underpinnings of the term, nor it's understanding as "a source of communal 'identification and solidarity'".[41]

The inability to nail down the meaning of citizenship is a theme to which I will return throughout this thesis. Much of the difficulty that I must navigate flows from this imprecision. How, for example, can a theory justify the allocation of political rights based on such a malleable and nebulous concept? This is a topic more fully developed in Chapters 3 and 4. At this point, it is simply relevant to flag the existence of these different strands of thought within citizenship, and to anchor my definition of non-resident citizens to persons holding the legal status from a country.

Even with a workable definition in place, I must also confront the complicated legacy of state-issued citizenship status. On the one hand, citizenship status is constructed as the guarantor of equality. While imperfectly in practice (and supplemented by human rights regimes) state-

[38] Kim Barry, "Home and Away: The Construction of Citizenship in an Emigration Context", (2006) 81:1 NYU Law Rev 11 at 24.
[39] Cohen, *supra* note 21 at 23-29, in which she criticizes contingent justifications of citizenship.
[40] Cohen, *supra* note 21.
[41] Home and Away, *supra* note 38 at 21, citing to Bosniak, *supra* note 23.

issued citizenship status remains a foundational starting point for individual rights protection within national and international legal orders.[42] Citizenship status is, in many ways, aptly understood as "the right to have rights".[43]

On the other hand, citizenship status discriminates.[44] Its promise of universal equality is only for those who hold it.[45] Citizenship status divides the world into 'us' and 'them' based on factors largely out of our control, and on this basis, has been accused of being "morally arbitrary".[46] When rights (like voting) are bestowed based on these factors, citizenship status does not look like equality. Instead, it looks like a system of embedded inequality and privilege.

Given its nebulous and paradoxical qualities, some have called for either the abolition of birthright citizenship,[47] or at least the decoupling of certain rights (like voting) from it.[48] This thesis – particularly in Chapters 2 and 4 - will touch on some of these views. However, as the following chapters will demonstrate, I am largely pragmatic about citizenship status. While there are problems with citizenship, I do not view its abandonment as being either practical or wise. Instead, I largely look for a solution within the confines of citizenship status as it exists today.

b. Democracy versus Liberal Constitutionalism

This thesis explores the well-trodden tension between democracy and liberal constitutionalism.[49] This tension can be briefly summarized as follows: democracy is a political

[42] Bosniak, *supra* note 23 at 29-30.
[43] Hannah Arendt, *The Origins of Totalitarianism* (New York, Meridon Books Inc, 1958) at 296.
[44] Bosniak, *supra* note 23 at 1. Ayelet Shacher, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press: 2009) at 24-7.
[45] Bosniak, *supra* note 23 at 1, 32-33, Ch 6 generally for a discussion of bridging this divide; See generally: Benhabib, *supra* note 27.
[46] Shacher, *ibid.* Benhabib, *supra* note 27 at 18.
[47] Shacher, *supra* note 44.
[48] See eg: Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119; Ruth Rubio-Marin, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81:1 NYUL Rev 117 at 130.
[49] Benhabib, *supra* note 27 at 19, 43-45, Cohen, *supra* note 23 at 110-115.

system grounded in the promise of self-rule; under it, the people choose the laws to which they will be governed. Liberal constitutionalism constrains that choice by reference to a series of values to which an earlier iteration of the people have bound them.[50]

Normally, this tension rears its head when a constitutional court prevents an elected government from doing something that is popular with voters. For example, Chapter 3 explores several cases in which a constitutional court prevents an elected government from disenfranchising non-resident citizens. This issue is not unique to my subject area; it manifests any time constitutional courts are empowered to strike down laws passed by a democratically elected body.

This thesis also, however, strikes a deeper chord within this narrative. I am not just looking at when a constitution can limit the will of the democratic majority, but *who* gets to be part of 'the people' from whom these democratic majorities are formed. Democratic accounts define who should vote ('the people') by reference to a relationship of subjection or affectedness. By contrast, liberal constitutional accounts define who should vote ('the people') by reference to the citizenry. When we ask whether non-resident citizens should have the right to vote, we are really asking which definition we should be using. On the question of voting, as between the democratic and liberal constitutional accounts – whose definition of 'the people' holds sway?

In more formal terms, this deeper tension can be understood as a disagreement about the appropriate locus of popular sovereignty, and the limits they impose on state institutions. It is widely accepted that modern liberal democracies are, at least in theory, grounded in popular sovereignty (by which I mean 'the people' are the ultimate source of state authority, and that

[50] Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565 at 557-562.

exercises of political authority are legitimized by reference to their consent).[51] The problem, however, is that democratic theory and constitutional law disagree on who 'the people' are. In constitutional law, 'the people' are the citizenry who set out the terms of their consensual subjection in a constitution. Pursuant to this arrangement, institutions created by a constitution lack the authority to dismantle their maker. Pursuant to democratic theory, however, 'the people' refers to the governed. When voting laws fail to reflect that relationship, it negatively impacts the legitimacy of those who purport to act in the peoples' collective name.

It is tempting for a lawyer or other legally trained person (such as I am) to adopt the constitutional side on this debate. Constitutions bring the force of legal backing. Democratic theory, while interesting in the abstract, arguably has no role to play when the constitution has stepped in and filled the conceptual gap. I intentionally push back against this stance. As explored in later chapters, there are problems with the constitutional account as it relates to non-resident enfranchisement, and they will only grow with time. Liberal democracy faces increasing pressure around the world, and the relationship between citizenship and voting is one site at which this pressure is being exerted. The issues that emanate from these practices and other cannot be successfully navigated by reference solely to constitutional accounts. Whether judges acknowledge it or not, they need theory to traverse this complexity. My goal is to provide a workable path for them to do so.

c. Adjudication of Election Laws

This thesis also can be understood as part of a larger debate about how judges should approach disputes about the electoral process. Topics within this subject area, often referred to as

[51] Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford: Oxford University Press, 2016). See also: Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004) at Chs 5, 9 generally and for discussion of the distinction between public power and state authority.

the law of democracy, are varied.[52] However, all of this scholarship grapples with the best way to respond to the uncomfortable fact that politicians get to make election laws.[53]

Competing theoretical frameworks have emerged as to how best to respond to this reality. On the one hand, the 'structural' view argues that, if left unguarded, politicians will use their lawmaking authority to advance their own interests rather than the public good.[54] Gerrymandering laws are a paradigmatic example of this concern in action.[55] In response, this view advocates for judges to take a "hard look" at electoral disputes with a view to safeguarding democracy.[56] This necessitates adopting a wider, more "structural" lens, to consider the far-reaching institutional impacts of seemingly innocuous electoral changes.[57]

On the other hand, some theorists advocate for judicial restraint. Pursuant to this view, judges should avoid wading into the "political thicket".[58] Most electoral disputes boil down to philosophical or political judgments about how a people ought to govern themselves. Courts lack the institutional mandate to answer these questions, which appropriately lies with the elected branch of power.[59] The further an electoral dispute strays from individual rights adjudication, the more hesitant judges should be to get involved.

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[52] Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299 at 303.
[53] Issacharoff and Pildes, *supra* note 8; Pal, *ibid* at 302-3.
[54] Pal, *ibid.*
[55] Pal, *ibid.*
[56] Issacharoff and Pildes, *supra* note 8*;* Pal, *supra* note 53.
[57] *Ibid.*
[58] Pal, *ibid* at 310, citing "political thicket" *Colegrove v Green* 328 US 549 at 556, 66 S Ct 1198 (1946).
[59] For examples of the rights view, see: Christopher P Manfredi, "The Day the Dialogue Died: A Comment on Sauve v. Canada" (2007) 45:1 Osgoode Hall LJ 105 at 123 [Manfredi: Dialogue]; Richard L Hasen, "The 'Political Market' Metaphor and Election Law: A comment on Issacharoff and Pildes" 50 Stanford Law Rev 719; Richard L Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003) at 153 (arguing that the structural approach is illegitimate has no foundation in constitutional text); Nathanial Persily, "In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders" (December 2002) 116:2 Harvard Law Rev 649 at 652 (making essentially the same argument as Hasen: Judging Equality)

In the courtroom, these competing frameworks come to a head in discussions about deference, i.e. the level of restraint or scrutiny judges should adopt when analyzing non-resident voting laws. As Chapter 3 will demonstrate, deferential judges advocate for restraint; they are more likely to uphold non-resident voting laws on the basis that questions of membership in the *demos* are politically charged. So long as a law strikes a balance between competing policy concerns, these judges are not inclined to intervene to police the boundaries of the *demos*. By contrast, non-deferential judges are more likely to hold the government's proverbial feet to the fire and closely scrutinize voting laws. These views express a skepticism that borders on hostility to the notion that politicians can disenfranchise citizens.

My own view aligns more closely with the 'structural' framework, which is evident throughout this thesis and particularly in Chapter 4. In my view, there is something inherently wrong about political actors using their elected authority to disenfranchise the very people who gave them that authority, and judges are wise to be skeptical of this context. However, as explored in later chapters, the competing view is still present, and there are elements of it which are compelling. All this to say that the conversation on deference and scrutiny in the law of democracy continues to be contested, and is a continuing theme in later chapters.

d. Democratic Decline

The prospect of political manipulation of the electoral process brings me to the last theme underpinning this thesis – that of democratic decline. Democratic decline is an umbrella term used to describe state-led retrenchment from liberal democratic forms of governance.[60] In lay

[60] It goes by several names, including "democratic backsliding" (Nancy Bermeo, "On Democratic Backsliding" (2016) 27:1 Journal of Democracy 5); "democratic decline" Richard Albert and Michael Pal, "The Democratic Resilience of the Canadian Constitution" in Mark Graber, Sanford Levinson & Mark Tushnet. *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018), "constitutional retrogression" (Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy" (2018) 65 UCLA L Rev 78; "democratic erosion" Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018); "constitutional rot" Jack Balkin, "Constitutional

terms – it looks at politicians undermining the competitive playing field needed for a healthy democracy. If the last section was concerned with the political manipulation of discrete election laws, democratic decline can be understood as its more comprehensive output.

Over the last decade, a wide body of scholarship has developed which tracks observable trends towards decline in a number of once-consolidated democracies.[61] These trends have, for the most part, focused on the use of seemingly innocuous laws to undermine the liberal and constitutional predicates to a healthy democracy.[62] Laws which target judicial independence or free speech are common examples of this practice.

For my purposes, this issue is relevant insofar as non-resident voting laws have the potential to become unwitting tools of democratic decline. In benevolent hands, non-resident voting laws can recognize that the civic and territorial boundary of a state do not perfectly match, and that there are some citizens who are proper members of the *demos* despite their physical absence. In different hands, however, these laws can (and have been) manipulated to undermine the competitive electoral playing field.[63] For example, in a constitutional system in which all citizens must vote, but elected governments make the rules for citizenship, a ruling party can simply offer citizenship to a new class of sympathetic citizens (and thus voters). What transpires is constitutionally sound – in that citizens are given the right to vote - but at the same time, something clearly anti-democratic has just happened. Such are the nefarious workings of democratic decline.

Crises and Constitutional Rot" Mark Graber, Sanford Levinson & Mark Tushnet, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018);

[61] See eg: *Ibid.*

[62] Huq and Ginsburg, *How to Save a Constitutional Democracy, ibid* at 76; Kim Lane Scheppele, Worst Practices and the Transnational Legal Order (or how to build a constitutional "democratorship" in plain sight" (working paper 2016), archived at http://perma.cc/Q266- MJEK at 10 [Scheppele: Worst Practices].

[63] *Supra* note 3.

While non-resident voting laws have received passing references in existing literature, there hasn't been a detailed study of non-resident voting laws as a tool of democratic decline.[64] My thesis is not focused on unravelling the relationship, but the fact that non-resident citizen voting laws are even a small part of this larger story bears emphasis. The potential weaponization of non-resident voting laws to achieve anti-democratic ends, and judicial grappling (or lack thereof) with this possibility underpins my view that we need a more comprehensive, practical, and grounded understanding of non-resident voting laws in a liberal constitutional democracy. In this regard, my contextualized theory is cognizant of the relationship of voting and citizenship to democratic decline, and is responsive to it.

D. A Note on Terminology

This thesis examines points of convergence and distinction between voters and citizens. In casual discussion, it is not uncommon for these terms to be conflated. The label of citizen is deployed as a shorthand to refer to members of the voting community, and vice versa. Other terms, such as political community, democratic community, and polity are also used interchangeably to refer to one or both of these groups (or to something else entirely). Despite this usage, the citizenry is not synonymous with the voting community; a person can be one and not the other. A child is an example of a citizen who is not a voter; and in countries that extend voting rights to permanent residents, there are voters who are not citizens.

In order for me to clearly communicate the arguments in this thesis, I need to be precise and clearly distinguish between the citizenry and the rightful voting community. As such, my references to citizenship, citizenship laws, and/or the citizenry refers to persons who hold citizenship status. Under my usage, citizenship is a legal status that is is allocated based on a

[64] See eg: Huq and Ginsburg, *How to Save a Constitutional Democracy, supra* note 60 at 88.

country's citizenship laws. Separately, when speaking of the rightful voting community, I I refer to the *demos*[65] and the political community. Under this definition, a person is a member of the *demos* if they can vote based on a country's election laws.

E. Chapter Summary

After this introduction, Chapter 1 sets the stage for the discussion to come by situating the reader in the topic of non-resident enfranchisement from an empirical, legal, and scholarly perspective. It provides a brief history of the development of non-resident citizen enfranchisement, as well as current trends, data, and empirical insights. This is followed by an overview of the legal frameworks which structure the practice, and other scholarly perspectives. I then explain and defend my methodological approach, which is ground in contextual political theory and - in discussing constitutional law - comparison. Lastly, Chapter 1 sets out how I employ this methodology to discern case studies for comparison.

Chapter 2 digs into the democratic perspectives on non-resident citizen enfranchisement. While the link between voting and citizenship is so widespread that it may seem innate to democracy itself, the practice is controversial within democratic theory. This chapter digs into this disconnect. It explains the framework by which democratic theorists approach the question of enfranchisement, discerns what this approach means for non-resident citizens, and clarifies the conceptual space upon which democratic support for non-resident enfranchisement may exist. As explored there, while many theorists reject citizenship as an adequate proxy for the franchise, some theorists attempt to justify voting for citizens under this framework. Of those accounts, I

[65] I rely on articulations of the *demos* made by Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989): "The *demos* must include all adult members of the association except transients and persons proved to be mentally defective", and Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 218: "In a democracy, those who enjoy full political rights compose the demos…".

find Rainer Bauböck's stakeholder citizen model to best respond to the democratic critiques of citizenship-based voting.

With the theoretical playing field clarified, Chapter 3 distills and explains the constitutional response to non-resident citizen voting. At least fifteen national or supranational constitutional courts have been asked whether citizens abroad should have the right to vote in national elections.[66] Of these, only one national level court has ruled that non-resident citizens do not have the right to vote.[67] Chapter 3 explores this tendency by selecting five case studies for detailed exploration. This analysis demonstrates that, despite possessing a number of contextual factors which would speak against their inclusion, national courts overwhelmingly find that non-resident citizens have the constitutional right to vote.

Having reached this conclusion, Chapter 3 offers an explanation for it. I argue that this overwhelming tendency is rooted in the two factors introduced above: institutional authority and deference. Pursuant to the dominant constitutional understanding, all state authority is ultimately traceable to the citizenry. There is no space for institutions created by that power – including

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[66] *Frank v Canada (Attorney General),* 2019 SCC 1 (Canada); *Shindler v the United Kingdom*, [2013] ECHR 423 (ECHR); *Kalali Steven v Attorney General and the Electoral Commission* 2013 UGHCCD 35 (Uganda), *Kalali v Attorney General & Anor* (Miscellaneous Cause No. 35 of 2018) [2020] UGHCCD 172 (17 June 2020) (ULii), [Ugandan Decision]; *Lekka v Kiluwe* SCT Civil 19-46 (9 Oct 2019) (Marshall Islands) and *Konou and Lehman v Kiluwe and Kawakami (as AAG) (consolidated)* SCT Civ 19-69 (9 Oct 2019) (Marshall Islands) [Marshall Islands Decision]; Constitutional Court (VfGH), 16 Mar 1989 G218/88 No 12023 (Austria) [Austrian Decision]; *Iqbal et al v Federation of Pakistan* (2011) (In Const.P.39/2011) (SC Pakistan) *and Imram Khan et all v Federation of Pakistan* (2011) (In Const.P.90/2011) (SC Pakistan) (consolidated) [Pakistan Decision]; *Chindam & Ors v UOI and ANR* (2013) 80/2013 (SC India) (Record of Proceedings) (India) [Indian Decision]; 19-1 KCCR 859, 2004 Hun-Ma 644 et al., June 28, 2007 (Korea) [Korean 2007 Decision] see also: 26-2(A) KCCR 173, 2009 Hun-Ma 256, 2010 Hun-Ma 394 (SC Korea) (consolidated); July 24, 2014; 2001 (Gyo-Tsu) 82 Minshu Vol 59, No 7 (14 Sept 2005) (SC Japan) [Japanese Decision]; *ATM Ali Reza Khan v Bangladesh Election Commission and others,* 1997, 26 CLC (HCD) [8111] (Bangladesh) [Bangladeshi Decision], Ram Kumar Kamat "No voting rights for Nepalis abroad" The Himalayan Times, 21 March 2022 (online: https://thehimalayantimes.com/nepal/no-voting-rights-for-nepalis-abroad); *Richter v The Minister for Home Affairs and Others* [2009] ZACC 3 (South Africa) [South African Decision]; BVerfG, Beschluss des Zweiten Senats vom (4 Juli 2012) 2 BvC 1/11 at paras 1-70, https://www.bverfg.de/e/cs20120704_2bvc000111.htm; Supreme Court of Justice (Uruguay), Montevideo, 3 April 2020, *Sentencia Definitiva* 57/2020 [Uruguay Decision]; Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvC 1/11, 2 BvC 2/11 4 July 2012 [BVerfG 2 BvC 1/11].

[67] Uruguay Decision, *ibid.*

legislatures or courts – to challenge it. In addition, restrictions on the citizen's right to vote are often subjected to vigorous constitutional scrutiny. Blanket bans which divide citizens based on crossing crude thresholds cannot withstand this scrutiny. Collectively, these dual features render legislative attempts to exclude non-resident citizens constitutionally invalid. Amidst this overwhelming tendency, there are, however, dissenting voices which challenge both elements of this analysis.

Chapter 4 takes these insights and uses them develop my proposal to solve the puzzle of non-resident citizen enfranchisement. Through mapping out different paths of action, I distill my own contextualized theory of non-resident citizen voting. My Constitutional Stakeholder model argues that non-resident citizens should have the constitutional right to vote only if their citizenship status represents a "stakeholding" relationship between the individual and the state. This goal can be accomplished by embedding this reciprocity into the bestowal of citizenship status, or by asking the question at the time of voting. Under that latter approach, there is a subsidiary question as to whether a genuine stakeholding citizens can lose that link over time (i.e. by moving away). While this is a more difficult argument to make in constitutional terms, I argue that it can. However, this query must be a two-way conversation between citizen and state if it is going to survive vigorous constitutional scrutiny.

Lastly, my conclusion responds to anticipated criticisms of my account, and sets out areas of future research. Given that my approach is a compromise between democratic and constitutional schools of thought, I expect to face critiques both sides of the ledger. While these critiques are valid, I maintain that the Constitutional Stakeholder model is the most effective practical way to respond to the challenges of non-resident voting within the existing frameworks we use today.

F. Conclusion

Unravelling the puzzle of non-resident citizen enfranchisement requires us to engage with conflicting demands and walk a fine line between a number of undesirable outcomes. As the following chapters will demonstrate, the story of non-resident citizen voting is itself a bundle of contradictions: it highlights both the irrelevance of borders, and their centrality in forming one's identity. A non-resident voter must simultaneously be unmoored from their home state and deeply identify with it. Within this ambiguity, there exists potential for non-resident voting to embrace the non-territorial aspects of membership, but also for political manipulation and democratic retrenchment. In the Chapters to follow, I find that the normatively ambivalent potential of non-resident voting can be tamed by an open and practical engagement with the divergent accounts of membership in the *demos*. Doing so provides a clearer framework by which we can navigate and understand an increasingly globalized - but still territorially grounded – political and legal landscape.

Chapter 1: Conceptualizing Non-Resident Citizen Enfranchisement

A. Introduction

In order to develop a theory to account for the enfranchisement of non-resident citizens, we must first come to terms with the subject matter. While non-resident citizen voting is increasingly widespread, the average person may be unfamiliar with its existence, much less the scope, manifestations, or the frameworks within which it is practiced or studied. Knowledge about the theory and practice of non-resident citizen voting is scattered across a range of scholarly, government, and non-governmental sources – each of which examine it from different perspectives to advance different agendas. My task in this chapter is to fill in some of the blanks and situate my research within the wider topic. As such, this chapter has three goals: first, to define the scope of my inquiry; second, to familiarize readers with existing research and legal frameworks of non-resident citizen enfranchisement; and third, to describe my methodological approach.

The following section develops a working definition of non-resident citizen enfranchisement. Next, I provide a brief history of the development of non-resident citizen enfranchisement, as well as current trends, data, and empirical insights. This is followed by an overview of the legal frameworks that structure the practice, and other scholarly perspectives. Lastly, I set out and defend my choice to explore non-resident enfranchisement from the perspective of comparative constitutional law and contextual political theory.

B. Defining Non-Resident Citizen Enfranchisement

a. Who are Non-Resident Citizens?

As outlined in the Introduction, throughout this thesis, the term "non-resident citizens" refers to persons who hold the legal status of citizenship from an internationally recognized state, but who live outside of that state.[1] An inexact, but nonetheless helpful way to conceptualize this subject matter is to think of passport holders.[2]

The label "non-resident citizens" itself encompasses a wide variety of people who, for one reason or another, live outside the country where they hold the status of citizenship. It includes, for example, migrant workers, permanent expatriates, international students, refugees and asylum seekers, members of the armed forces, second (or third) generation citizens, linguistic, historical or cultural citizens, and others.[3] Some of these citizens have left their country of citizenship temporarily, others permanently, while some may have never lived on the territory of the state. The thread that binds these groups is the possession the legal status of citizenship issued by a country.

b. What is Non-Resident Citizen Enfranchisement?

Non-resident citizen voting can be understood by reference to a number of different measures. My understanding refers to the presence of democratically enacted laws which permit non-

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[1] For other definitions and discussion of choices, see: Dieter Nohlen & Florian Grotz, "External Voting: Legal Framework and Overview of Electoral Legislation" (2000) 33:99 Boletín Mexicano de Derecho Comparado 1115 at 1140-1144; Elizabeth Iams Wellman, Nathan W Allen, and Benjamin Nyblad, "The Extraterritorial Voting Rights and Restrictions Dataset (1950–2020)" 2022 Comparative Political Studies 909 at 910-911; Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393 at 2398-99.

[2] Several scholars would, on good grounds, criticize conflating citizenship status with holding a passport. Elizabeth Cohen, for example, has aptly described how holding a passport is mistakenly conflated for the whole of citizenship. See: Elizabeth Cohen, *Semi Citizenship in Democratic Polites* (Cambridge: Cambridge University Press, 2009) at 41. Here, I am using passports simply as a shorthand conceptual device.

[3] Pasquale Lupoli, "Foreword" in *Voting from Abroad: The International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2007) III at III; Jeremy Grace, "External and Absentee Voting" in *Challenging the Norms and Standards of Election Administration* (2007) at 35, online (pdf): *International Foundation for Electoral Systems* <www.ifes.org > [perma.cc/FAZ4-7X6R].

residents citizens to cast a ballot in national elections while outside the country's physical borders. There are four issues to unpack from this description. First, I explain my focus on national (i.e. state-level) elections; second; the measure by which I measure inclusion (laws versus practices); third, the locus of voting that makes it a non-resident vote (voting from outside the country); and fourth, my understanding of democracy (liberal constitutional democracy).

1. National Elections

This thesis examines the ability of non-resident citizens to vote in national (state-wide) elections. It does not consider the inclusion of non-resident citizens in substate (territorial, provincial), regional, and/or municipal elections. I made this decision for two reasons.

First, I am relying on the constitutional adjudication of non-resident citizen voting to develop my theory. The vast majority of constitutional adjudication is focused on inclusion in national elections, and judicial reasoning is tied expressly thereto.[4] It would not be appropriate for me to extrapolate the reasoning developed specifically in relation to national voting rights and apply them to sub-national elections.[5]

Second, some scholars have argued that the practice of voting for citizens is most closely linked to national elections, and that this link weakens in substate elections.[6] This suggests that the level of election is relevant in determining the relationship between citizenship to voting.[7] For my analysis, these insights indicate that national elections provide the most fruitful

[4] *Infra,* note 92.
[5] Jean Thomas Arrighi and Rainer Bauböck "A multilevel puzzle: Migrants' voting rights in national and local elections" (2017) 56:3 European Journal of Political Research 619; Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018).
[6] Arrighi and Bauböck, *ibid.*
[7] David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State (London: Palgrave Macmillan, 2009) at 63. These scholars have theorized that this emphasis is tied to the fact that national elections are more likely to engage one's status as a citizen (*qua* citizen)

conceptual space to evaluate non-resident citizen voting. While it may provide a launchpad for further discussion in substate elections, at this stage my research is focused solely on national elections.

Finally, I note that, by choosing to focus on national level elections, I have not focused on referenda. However, many of the issues raised and arguments I advance may be equally applicable to national referenda, and other scholars have made this link.[8] While I welcome this discussion, I have not focused my research on issues relating to voting in national referenda.

2. Legal Recognition

This thesis treats inclusion as a function of *legal* recognition. In other words, where a constitutional court says that non-residents have the right to vote, I take that to mean they are, in fact, able to vote. There are weaknesses in this approach. Scholars in political science have aptly highlighted the gap between *de jure* and *de facto* non-resident citizen voting regimes.[9] Many countries permit non-resident voting "on the books" but, for logistical, political or other reasons, non-residents cannot actually cast a ballot.[10] This thesis stops short of examining this implementation gap. In searching for the best theory to account for the inclusion of non-resident citizens in the electorate, I take for granted that implementation follows recognition.

Political scientists who have explored the implementation of non-resident voting regimes have demonstrated that, even where rights are recognized, significant hurdles to implementation exist.[11] By focusing on a theory of non-resident inclusion in the electorate, my thesis arguably

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[8] Owen, *ibid.*
[9] Wellman, *supra* note 1 at 900, 904. See also: Jean Michel LaFleur, "The enfranchisement of citizens abroad: variations and Explanations" (2015) 22:5 Democratication 840.
[10] Wellman, *supra* note 1 at 900, 904. See also: Benjamin Nyblade, Elizabeth Wellman, and Nathan Allen, "Transnational voting rights and policies in violent democracies: a global comparison" (2022) 10:17 Comparative Migration Studies 1 at 2, 12.
[11] Wellman, *supra* note 1.

ignores the significant political and logistical challenges that play a critical role in the actual exercise of the vote.

In my view, however, there remains value in a clearly articulated theory to account for non-resident citizen inclusion. A theory of democratic inclusion that accounts for non-resident citizens may not solve the entire puzzle, but it is one necessary piece. A clearly articulated understanding of when and why non-resident citizens ought to be included in the electorate provides footing upon which deficiencies in implementation can be challenged.

3. A Non-Resident Citizen's Vote

My definition of non-resident enfranchisement is focused on the legal ability of non-residents to cast a ballot while physically outside the voting country. This limitation is focused on the modalities of the vote (how non-resident ballots are actually cast). While this is discussed in more detail below, here it is relevant to note that some countries permit non-resident citizens to vote while physically outside the country, and others permit non-residents to vote only so long as they return to the country to cast a ballot in person.[12] There is debate in the literature as to whether the latter constitutes non-resident voting.[13]

The modalities of the non-resident citizen's vote are not central to this thesis. I am focused on locating a theory that accounts for non-resident citizen inclusion in the electorate, not on guaranteeing them specific modes of voting. With that said, the debate over where a vote is cast is relevant to my research in two respects. First, insofar as my theory supports non-resident inclusion in the electorate, it would also support creating an infrastructure by which that right could reasonably be exercised. Second, this distinction is also relevant insofar as some constitutional courts have discussed the whether the constitutional right for non-resident citizens

[12] Wellman, *supra* note 1 at 900; Nohlen and Grotz, *supra* note 1 at 1119, 1120.
[13] Wellman, *supra* note 1 at 900; Nohlen and Grotz, *supra* note 1 at 1119, 1120.

to vote can be satisfied by letting them cast ballots if they return to their territory of citizenship on voting day.[14]

4. What is a Democracy?

My account of voting for non-resident citizens is informed by constitutional adjudication that has emerged out of liberal constitutional democracies. As such, the scope of my theory is tied to that ideological form of governance. My usage of the label 'liberal constitutional democracy' refers to a system of governance in which (1) political leaders are elected in free and fair elections by a *demos* with broad eligibility for the franchise, (2) majority power is constrained by a constitution that divides power among various institutions, and (3) that constitution protects liberal values necessary for meaningful political expression and competition including, but not limited to, individual autonomy and equality.[15] Throughout this thesis, my usage of the word democracy is shorthand for this ideological framework.[16]

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[14] Marshall Islands Decision, *infra* note 92.

[15] Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565 at 557-559. See also Scheppele's descriptor of these terms, which captures my understanding:

> Democracy is a political system in which leaders are accountable to the people; constitutionalism is a political system in which leaders and the people together are additionally accountable within a system of constitutional constraint to uphold basic values that transcend the moment.
> …
> Liberalism as a governing political philosophy … can be identified by its core commitments to the dignity and liberty of individuals and their democratic governance by self-limiting and accountable political power.

See also: Huq and Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018) at 9; Samuel Issacharoff, "Populism versus Democratic Governance" in Mark Graber, Sanford Levinson & Mark Tushnet, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018) at 445-6; Fareed Zakaria, "The Rise of Illiberal Democracy" (1997) 76:6 Foreign Affairs 22 at 22; Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge: Harvard University Press, 2019) at 3.

[16] Kim Lane Scheppele, Worst Practices and the Transnational Legal Order (or how to build a constitutional "democratorship" in plain sight" (working paper 2016), archived at http://perma.cc/Q266- MJEK at 9-10; Scheppele: Autocratic Legalism, *ibid.*

Much like citizenship, democracy lacks a singular authoritative definition.[17] "Thin" accounts of democracy focus on the minimum procedural and institutional conditions that must be present for competitive elections to exist.[18] Here, democracy is largely understood as a process in which leaders are periodically chosen by aggregating individual preferences.[19] It is identified by reference to its focus on certain procedures and institutions (namely, voting and competitive elections) and the rights and freedoms needed to protect them (for example, freedom of speech and freedom of association).

By contrast, "thick" accounts believe that procedural accounts do not go far enough in prescribing what democracy requires.[20] In addition to procedural guarantees,[21] democracy demands certain conditions be met that enable participants to understand, participate and solve common problems together.[22] Deliberative democracy – which emphasizes the dialogue and processes of deliberation that takes place between elections - is a dominant theory among these "thicker" accounts.[23] While descriptions of deliberative democracy vary, they all focus on creating a space in which meaningful democratic dialogue may occur.[24] Under this view,

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[17] Walter Bryce Gallie, "Essentially Contested Concepts" (1956) *Proceedings of the Aristotoleian Society* 167 at 168, cited in Elizabeth F Cohen and Cyril Ghosh, *Citizenship* (Cambridge: Polity Press, 2019) at 4, 11. See also: Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 286-289.

[18] Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 286-289. While framed in different terms, see also Hélène Landemore's discussion of "talkers" versus "counters" in Hélène Landemore, *Democratic Reason: Politics, collective Intelligence and the Rule of the Many* (Princeton: Princeton University Press, 2013) at Chapter 3.

[19] Pal: Unwritten, *supra* note 18; Tereza Křepelová, "Aggregative and Deliberative Models of Democracy: Reciprocity as a Consolidating Concept?" (2019) working paper. Available online:< https://www.scribd.com/document/519102640/Aggregative-and-Deliberative-Models-of-Democracy-Reciprocity-as-a-Consolidating-Concept>; Robert Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford: Oxford University Press, 2008) at 1 (discussing "minimalist" accounts of democracy).

[20] Pal: Unwritten, *supra* note 18. See also, Goodin, *ibid* at 2-5.

[21] Pal: Unwritten, *supra* note 18 at 287.

[22] See eg: Nadia Urbinati's views on democracy as a diarchy: Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge: Harvard University Presss 2014) at Ch 1 and Nadia Urbinati, *Me the People,* (Cambridge: Harvard University Press, 2019) at 7, 166; See also: Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) working with Jürgen Habermas discourse theory.

[23] See eg: Seyla Benhabib, *ibid* Pal: Unwritten, *supra* note 18 at 288.

[24] Given their focus on the need to create a space of open and equal deliberation, deliberative democrats would be more likely to, for example, argue that economic, social and cultural rights are necessary for democracy. See, eg: Urbinati,

democracy does not just happen on election day, but is an ongoing process of collective opinion formation.

My definition falls on the thinner side of this range. The aspects of democracy I am focused on (voting and competitive elections) sit at the heart of the thinner accounts and, for the most part, represents the extent of my inquiry into a country's democratic credentials. This choice allows me to focus squarely on the issue of enfranchisement. There is no single understanding of what a thick account of democracy requires, and there is uneven acceptance about whether many 'democracies' in the real world satisfy these accounts.[25]

It could be argued that this choice stacks the deck in favour a particular outcome. For example, it is likely more difficult for a non-resident citizen to satisfy a deliberative account of democracy because their physical absence negatively impacts their ability engage in the ongoing deliberation necessary for this iteration of democracy.[26] However, given changing conditions of globalization and technology, this outcome is not a foregone conclusion.[27]

For the most part, I do not dig into the debate between thin and thick democracy, nor the credentials needed for a non-resident citizen to satisfy a deliberative conception of democracy. Wading into these issues risks getting sidetracked in a way that depletes the value of my research

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supra note 22 at Ch 1, in which she discusses a right to education as a necessary element of freedom of speech under a positive conception of liberty.

[25] Pal: Unwritten, *supra* note 18 at 289 "The thicker the principle, the more likely there is to be serious disagreement on its content."

[26] This is discussed more detail at Chapter 2. While not framed in the language of deliberative democracy, see for example, general arguments against non-resident enfranchisement based on this limitation by Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119; Ruth Rubio-Marin, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81:1 NYUL Rev 117 at 122.

[27] Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton, Princeton University Press, 2021) at 161-162, 215-218; Bauböck, *supra* note 1 at 2417. While a non-resident citizen may not be engaging in debates the local grocery store or Tim Hortons, residents aren't necessarily doing that either. Many daily markers of community that were once tied to residence are now conducted from a computer. While public debates about the public good are still held in town halls, they are also held on Facebook groups, social media platforms and message boards.

as a tool for understanding non-resident enfranchisement practices in the real world. It would also entail answering a different question: what does a deliberative democracy require, rather than what does a liberal constitutional democracy require? With that said, much like the citizenship debate, discussions about what democracy is, and what is requires cannot be entirely severed from the debate about its meaning. Chapters 3 and 4 engage with constitutional understandings of non-resident voting that are expressly tied to deliberative accounts of democracy.[28] As a general matter, however, my references to democracy should not be taken to vouch for the 'thicker' credentials demanded by the deliberative accounts.

My focus on liberal constitutional democracy also raises an issue in relation to countries that are retrenching from this framework.[29] As explained in the Introduction, democratic decline refers to the state-led retrenchment from liberal democratic constitutionalism.[30] In later chapters, I argue that non-resident voting can be defended under a liberal democratic framework, but the dominant constitutional approach for doing so creates an opening for democratic decline. My model, I argue, provides a better explanation of non-resident enfranchisement that is both constitutionally acceptable and avoids this failing. As such, while this thesis is not focused on democratic decline, my model can be understood as an effort to protect liberal constitutional democracy from it.

[28] Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvC 1/11, 2 BvC 2/11 4 July 2012 [BVerfG 2 BvC 1/11].
[29] See eg: Nancy Bermeo, "On Democratic Backsliding" (2016) 27:1 Journal of Democracy 5.
[30] See eg: Bermeo, *ibid.* Richard Albert and Michael Pal, "The Democratic Resilience of the Canadian Constitution" in Mark Graber, Sanford Levinson & Mark Tushnet. *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018).

C. Historical and Empirical Snapshot

a. Historical Overview of Non-Resident Voting

As a practice, non-resident citizen voting has existed in various forms throughout history.[31] For much of this time, however, it was treated as a privileged reserved for discrete classes of citizens who found themselves overseas in service to their state, such as soldiers or foreign diplomats.[32] This has now changed. Over the past 40 or so years, non-resident citizen voting for general classes of non-resident citizens has gone from the exception to the norm. This section provides a brief historical overview of the development of non-resident citizen enfranchisement, a snapshot of current practices, and a brief discussion of the theories surrounding it.

Non-resident voting laws for citizens[33] were first documented in Roman times.[34] In modern history, the American civil war tends to be referenced as a starting point for the practice.[35] For several European and Commonwealth countries, the modern practice is rooted in wartimes.[36] Many of these countries first introduced non-resident citizen voting in World War I as a way to enfranchise overseas soldiers, and some maintained and extended systems for

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[31] Lupoli, *supra* note 3 at III.
[32] Jean-Michel Lafleur, *Transnational Politics and the State: The External Voting Rights of Diasporas* (New York: Routledge, 2012) at 17–18.
[33] While citizenship is the prevailing standard upon which voting is based in liberal democracies today, this was not always the case. Throughout history, voting has been tied to different criteria, such as property ownership or legal subjecthood. Non-resident voting for persons otherwise qualified to vote (non-resident property owners for example) has existed under these streams as well. For a Canadian example of this, see: Elections Canada, *History of the Vote in Canada*, 3rd Ed (Gatineau: Chief Electoral Officer of Canada, 2021) at 26, 51 (see Ch 1 generally for the evolution of the franchise. The vote was also was also restricted by age, gender and religion).
[34] Andrew Ellis, "The History and Politics of External Voting" in Institute for Democracy and Electoral Assistance & Instituto Federal Electoral. Voting from Abroad: The International IDEA Handbook (Stockholm and Mexico: IDEA and IFE, 2007) 41.
[35] *Ibid.*
[36] Bauböck, *supra* note 1 at 2400; Wellman, *supra* note 1 at 910-11; 923-4; LaFleur, *supra* note 32 at 49. Ellis, *supra* note 35 at 43. Note that Nohlen and Grotz, *supra* note 1 at 1121-1123, dispute this characterization. They argue that non-resident voting laws are passed based on national peculiarities and do not correspond to historical waves.

administrators in occupied territories.[37] World War II provided further momentum for the practice, after which enfranchisement was expanded to non-soldiers overseas in service to the state, including military spouses, and foreign diplomats, or others.[38] Non-resident voting laws also spread via colonization, in which formerly colonized countries carried forward the practices after independence.[39] These practices were also implemented for symbolic or strategic reasons, such as recognizing the exodus of citizens during times of civil war, or in attempting to foster a relationship.[40]

The global south has been cited as leading the way on non-resident voting for general classes of citizens as early as the 1950s.[41] Despite limited exceptions, however, prior to 1990 the prevailing view was that non-resident voting was a discrete privilege extended to citizens overseas in service to the state.[42] Over the past 40 or so years, however, this has drastically changed. Between 1990-2020, over 100 countries legally recognized extraterritorial voting rights for the first time.[43] Most recent estimates count 141 (roughly 75%) of the world's countries as legally enfranchising their non-resident citizens.[44] This roughly equates to 200 million

[37] Ellis, *supra* note 35 at 42, referencing the United Kingdom, New Zealand and Canada, France. For examples of Canadian legislation, see: *Military Voters Act*, SC 1917 (7 & 8 Geo V), c 34; *History of the Vote in Canada*, *supra* note 33 at 79-81.
[38] For a summary of this expansion in Canada, see *Frank et al v AG Canada*, 2014 ONSC 907 at paras 38-45. See discussion in: Bauböck, *supra* note 1 at 2934, 2400. Of course, other countries followed different paths. See: Ellis, *supra* note 35 at 43.
[39] Ellis, *supra* note 35 at 43.
[40] In Spain, for example, the inclusion of non-resident citizens in the electorate served as a symbolic recognition of the republican emigration during the Civil War; and in Argentina, it was driven by the desire to foster are relationship with emigrants. Ellis, *supra* note 35 at 43. See also: Bauböck, *supra* note 1 at 2400.
[41] Wellman, *supra* note 1 at 906, 910; Ellis, *supra* note 35 at 43 citing Indonesia as the original source in 1953. There is disagreement on this source: The International Idea for Electoral Assistance (IDEA) cites Norway in 1921 as the first country to have non-resident voting (*Voting from Abroad: The International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2007) at 242), and Nohlen and Grotz, *supra* note 1 refer to Australia in 1901.
[42] Wellman, *supra* note 1 at 910 discussing that only 9 countries had non-resident voting for general classes of citizens in 1970.
[43] Wellman, *supra* note 1 at 910, 924. While the trend is clearly towards expansion, there are examples of retreats over the past 40 years. Some states, including Korea, Morocco, Afghanistan, South Africa and Cambodia have reversed (and occasionally re-reversed) their stance on whether non-resident citizens should be included in the *demos*.
[44] *Ibid* at 910.

enfranchised expatriates.[45] In short, there has been an exponential growth in the eligible individuals and methods of non-resident citizen voting across political and electoral systems.[46]

b. Explanations for Current Trends

There is broad acceptance that the expansion of non-resident citizen voting has been driven by the dual forces of globalization and technology.[47] As more people move across state borders while staying connected to their home state, the practice of non-resident enfranchisement has grown alongside. However, more targeted explanations have also been advanced. Political scientists have measured how the extension of non-resident citizen voting regimes tend to follow major political events including processes of independence, wars, democratic transitions, or major constitutional or electoral reforms.[48] Thus, by way of example, the post-1989 third wave of democratization corresponds with the extension of external voting rights.[49] Between 1990 and 2000, emigrant voting rights became widespread across Eastern and Western Europe, states in the former Soviet Union, and North and South America.[50]

A variety of political and socio-demographic factors have also been advanced, such as norm-diffusion, political competition, and transnational negotiation.[51] Theories of migrant transnationalism tend to focus on either "top-down" or "bottom-up" drivers of

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[45] *Ibid* at 910.
[46] Bauböck, *supra* note 1 at 2400.
[47] For statistics on global migration trends over the past twenty years, see Nadja Braun & Maria Gratschew, "Introduction" in *Voting from Abroad: The International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2007) 1 at 2; Grace, *supra* note 3 at 38. See also: Kim Barry, "Home and Away: The Construction of Citizenship in an Emigration Context", (2006) 81:1 NYU Law Rev 11 at 15-16. See also: United Nations, Department of Economic and Social Affairs, Population Division (2019). *International Migration 2019: Highlights* (ST/ESA/SER.A/439) at 5.
[48] Bauböck, *supra* note 1 at 2400; Wellman, *supra* note 1 at 910-11; 923-4; Ellis, *supra* note 35 at 44; LaFleur, *supra* note 32 at 49. Note, however, that Nohlen and Grotz, *supra* note 1 at 1121 dispute this characterization. They argue that non-resident voting laws are passed based on national peculiarities and do not correspond to historical waves.
[49] Wellman, *supra* note 1 at 923-4.
[50] *Ibid.*
[51] A Turçu and R Urbatsch, "Diffusion of Diaspora Enfranchisement Norms: A Multinational Study" (2015) 48:4 Comparative Political Studies 407, but see Wellman, *supra* note 1 at 918, 922-3, which narrows Turcu and Urbatsch's claims; LaFleur: The enfranchisement of citizens abroad, *supra* note 9.

enfranchisement.[52] Top-down theories emphasize how, for financial, political and/or other reasons, emigrants are increasingly seen as assets to their state of citizenship. As a result, home states extend voting as a way to foster that relationship.[53] For example, data suggests that, as national governments become increasingly dependent on remittances from migrant workers, their efforts to enfranchise non-residents also increases.[54]

By contrast, "bottom-up" theories focus on emigrant lobbying and advocacy in driving the push for enfranchisement. As migrant workers recognise their impact on their home state, they simultaneously increase their lobbying efforts and demands for enfranchisement from their national governments.[55] Related views emphasize the role of emigrant citizenship "as a tool of nation-building and identity construction in emigration states,"[56] and the symbolic value of voting as "practiced identity" for emigrants.[57]

Political scientists emphasize the political motivations that influence the enactment and implementation of non-resident voting laws.[58] Research has also identified demographic, institutional and logistical barriers to non-resident citizen enfranchisement. Demographic barriers are focused on the non-resident population. Pushback to enfranchisement can develop where the emigrant population is large (in number or as a proportion of the overall voting population), and

[52] LaFleur, *supra* note 32 generally, with specific discussion of transnationalism as a methodology at 45-49.
[53] Elizabeth Iams Wellman, "Emigrant inclusion in home country elections: Theory and evidence from sub-saharan Africa", (2021) 115:1 American Political Science Review 82; LaFleur, *supra* note 32 generally, and for an example, the Chapter 3 on explaining the introduction of external voting in Mexico. Barry, *supra* note 47 at 14-15 who flags the role of discourse in changing the conception of non-resident voters as traitors or ambassadors.
[54] LaFleur, *supra* note 32 at 46-47; D Leblang, "Harnessing the diaspora: Dual citizenship, migrant return remittances" (2017) 50:1 Comparative Political Studies 75, see also Wellman, *supra* note 1at 898, 920-1. See also, Barry, *supra* note 47 at 12-13.
[55] Barry, *supra* note 47 at 14-15.
[56] Barry, *supra* note 47 at 19. See also: Bauböck, *supra* note 1 at 2400.
[57] Barry, *supra* note 47 at 23.
[58] Lafleur: Enfranchisement of Citizens Abroad *supra* note 9.

where it is perceived to have asymmetric policy leanings from the domestic population.[59] The fear in this case is (1) that political actors will resist non-resident voting where it is not favourable to their re-election,[60] and (2) that the domestic electorate will question the legitimacy of elections which are determined, in whole or in part, by non-residents.[61]

Institutional barriers focus on issues of electoral design, and the need for countries grapple with how to allocate non-resident votes within existing electoral systems. Votes can be dispersed across the existing system, or can be given discrete representation.[62] Both options have impacts in terms of political calculus and public perceptions of legitimacy.

Lastly, there are a number of logistical barriers to non-resident votes. Implementing a non-resident voting regime can be expensive and complicated. In terms of cost, it has been argued that non-resident voting is too onerous and expensive for (resident) taxpayers, especially in democracies with large expatriate populations.[63] Complexity concerns focus on the difficulties of ensuring electoral integrity outside the country's borders. The concern here is that non-resident enfranchisement requires unacceptable trade-offs in voter equality or transparency;[64] or that it is vulnerable to fraud, bias, and manipulation.[65]

c. Impacts of Non-Resident Voters

[59] Lafleur: Enfranchisement of Citizens Abroad *supra* note 9; Graham Hassall, "Case Study: The Cook Islands: Seat for overseas voters abolished" in Challenging the Norms and Standards of Election Administration (2007) at 50, online (pdf): International Foundation for Electoral Systems <www.ifes.org > [perma.cc/FAZ4-7X6R];
[60] Lafleur, *supra* note 32.
[61] These concerns are essentially a real-world manifestation of the theoretical debates of democratic inclusion which are outlined at subsection D, below: why should non-residents have a say in the choice of a government where they won't have to live with the consequences. While this concern is always present, in countries where there is a large diaspora, this concern becomes heightened; Bauböck, *supra* note 1 at 2401.
[62] Peter J Spiro, "Perfecting Political Diaspora" (2006) NYU Law Rev 210.
[63] Nohlen & Grotz, *supra* note 1at 1139; Braun & Gratschew, *supra* note 47 at 8, 34; Lafleur, *supra* note 32 at 42-44.
[64] Nohlen & Grotz, *supra* note 1 at 1139-1140; LaFleur, *supra* note 32 at 42-44.
[65] Nohlen & Grotz, *supra* note 1 at 1138; Bauböck, *supra* note 1 at 2406-9.

Scholars have explored various impacts of including non-resident citizens in elections. For example, non-resident voting can impact feelings of belonging and experiences of human agency, autonomy, and intrinsic worth among its holders.[66] On a national level, within the country of citizenship, non-resident voting can impact the country of citizenship's political platforms and agenda (as parties compete for these voters),[67] its economic outlook (for example, insofar as fostering a close relationships with expatriates increases remittances),[68] and its global relationships (insofar as expatriates are viewed as ambassadors of the sending state).[69] Within host states, the practice has been cited as a tool for fostering[70] or destabilizing[71] inter-state relations.

Including non-resident voters in elections can also, of course, impact electoral outcomes. Despite widespread expansion of voting laws, the evidence so far is that this impact is muted. Voter turnout among non-resident citizens tends to be much lower than resident citizens.[72] This has been attributed to numerous factors, some of which are focused on the voters themselves (for example: disinterest, decreased connection to the state of citizenship, fear of exposure in host state),[73] and others on the state (for example: failures to implement mechanisms for non-resident voting, and the existence of express and implicit barriers to voting off-territory).[74] For whatever

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[66] For examples, see LaFleur, *supra* note 32 at 14 (and Chapter 1 more generally) See also: Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27 at 27.
[67] LaFleur, *supra* note 32 at 14 at 158.
[68] For examples, see LaFleur, *supra* note 32 at 7-8. In this regard, there are a variety of beneficial impacts that sending states can expect by fostering a sense of belonging among their diaspora: See LaFleur, *supra* note 33 at Chapter 1; Rubio-Marin, *supra* note 26 at 121.
[69] LaFleur, *supra* note 32 at 14 at 151. See Ch 6 Generally for more discussion.
[70] Eg: Rubio-Marin, *supra* note 26 at 121-3.
[71] For example, campaigning in a host state can be viewed as something which prevents integration of immigrants, a complication to foreign policy, a direct challenge to state sovereignty, or an entry point for importing foreign conflict. See eg: LaFleur, *supra* note 32 at 14 at 158 in discussing the Canadian government's response to foreign campaigning on its soil.
[72] For examples: see Graham Hassall, *supra* note 59 at 50; Bauböck, *supra* note 1 at 2401; *Frank v Canada (Attorney General)* 1 SCC 2019 at para 106; LaFleur: The enfranchisement of citizens abroad, *supra* note 9 at 850.
[73] Grace, *supra* note 3 at 35-6; LaFleur, *supra* note 32 at Chapter 5; Hassall, *ibid.*
[74] LaFleur, *supra* note 32 at Chapter 5; Wellman, *supra* note 1.

reason, the participation rates of non-resident citizens in national elections tends to be much lower than their residential counterparts. This low participation has arguably fed the expansion of non-resident voting rights, in the sense that their inclusion is not perceived as having a meaningful impact on electoral outcomes.

There are signs that this is changing, however. As trends in globalization and technology lead more people to live outside their state of citizenship while remaining connected to it, so too grows their participation in elections.[75] Indeed, while outside the norm, there are existing examples of non-resident voters either swaying or outnumbering domestic electoral voters.[76] This is most noticeable in small-island nations with large emigrant populations. In these countries, the proportion of non-resident votes is more pronounced, the impact of their votes on electoral otucomes is correspondingly significant.[77] However, over the past 25 years non-resident citizens have also been determinative in national elections in larger countries.[78]

For my purposes, the impacts (or lack thereof) of non-resident voters on electoral outcomes are particularly notable. As explored in Chapter 3, judicial reasoning has rendered the issue of participation levels irrelevant: if non-resident citizens must have the vote because they are rightful members of the *demos*, it shouldn't matter how many of them choose to exercise that right, or what impact this may have. This judicial analysis has, however, largely occurred against

[75] Elections Canada, "Estimation of Voter Turnout by Age Group and Gender at the 2019 General Election" (Chief Electoral Officer of Canada, 2020) at 22: At the 43rd general election, for the first time in history, Canadians living abroad could vote regardless of how long they have been living abroad as a result of a Supreme Court of Canada decision and of legislative changes. Consequently, the number of registered international voters more than tripled from 15,603 to 55,512. The number of actual voters was 34,144, that is, an official turnout rate of 61.5%. Given the influx of special ballots requested for the 2021 election as a result of the Covid-19 pandemic, the figures that came from overseas Canadians is not available. It is not clear if this data will be provided in the future.
[76] Hassall, *supra* note 72.
[77] Hassall, *supra* note 72.
[78] For a notable example, see: David Barstow & Don Van Natta Jr., "How Bush Took Florida: Mining the Overseas Absentee Vote", *NY Times* (15 July 15, 2001) and discussion of *Bush v Gore* 531 U.S. 98 (2000) in Spiro, *supra* note 62 at 211.

a backdrop in which non-resident voters are perceived to be a small and/or inconsequential block of voters. As their participation changes, so too will their impact on outcomes. There is reason to believe that this can negatively impact feelings of legitimacy among the domestic electorate,[79] and can even change judicial perspectives on the topic.[80]

d. Conclusion

The empirical snapshot reveals three factors that are especially pertinent to this thesis: first, the extension of voting rights has increased exponentially over recent decades. While there can be (and often is) a disconnect between rights and access, most states accept that non-resident citizens should be able to vote in state-level national elections.[81] Second, despite this expansion, there remain demographic, institutional, and logistical barriers to inclusion. When present, these barriers raise legitimacy and fairness concerns for the domestic public that can feed or create further political barriers to implementation. Third, most enfranchised non-resident citizens have not voted in past elections. In any given election, there are often hundreds of thousands of non-residents citizens who could vote, but only a small fraction of them do so. This means that, in most countries, the full impact of their inclusion has not yet been felt.

D. Legal Frameworks for Non-Resident Citizen Enfranchisement

a. International Law

The practice of non-resident citizen enfranchisement is relatively unconstrained by international law.[82] International and regional instruments tend to mandate voting rights and

[79] LaFleur, *supra* note 33 at 41.
[80] For example, the Supreme Court of Canada's concurring judgment draws on the low participation rates to support non-resident enfranchisement claims, and indicated that higher participation rates would change the constitutional calculus. Frank, *supra* note 72 at para 106.
[81] Wellman, *supra* note 1.
[82] LaFleur, *supra* note 32 at 49.

equal suffrage for citizens, without reference to residence.[83] No widely ratified international or regional treaties mandate voting rights for non-resident citizens.[84] Other instruments expressly acknowledge the permissibility of residency restrictions.[85] All of this to say that international law leaves "tremendous latitude" to states in approaching the question of non-resident citizen enfranchisement.[86] Informally, while there may be a growing expectation that non-resident citizens are enfranchised, there are no generally accepted global standards for how non-residents should be permitted to vote.[87]

b. Election Legislation

Non-resident voting practices are typically located in electoral legislation at the national level, where a diverse pool of practices have emerged. Legislative choices generally fall into one of three categories. The first category, eligibility, refers to *which* non-resident citizens can vote. For example, the vote may be open to: a discrete class of non-resident citizens (soldiers, foreign diplomats and their families, etc.); temporary absentees (international students, or people whose

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[83] For example: *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 25 (entered into force 23 March 1976, accession by Canada 19 May 1976): "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:… (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors…" [ICCPR]; *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 Oct 1986), art 13; *American Convention on Human Rights* (22 Nov 1969) 1144 UNTS 123 (entered into force 18 July 1978) art 23; Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* 20 March 1952, ETS 9, 213 UNTS 262 (entered into force 18 May 1954).

[84] *Ibid,* the primary exception to this absence is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, (entered into force 1 July 2003), art 41: "migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State". This convention has been ratified by 58 countries. See more discussion by LaFleur, *supra* note 52 at 35-36.

[85] UN Human Rights Committee, CCPR General Comment No. 25: Article 25 *Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7 at 11: "… If residence requirements apply to registration, they must be reasonable..."; Council of Europe, Venice Commission, *Code of Good Practice in Electoral Matters* (July 2002) I./1/1.1: "Universal suffrage…may…be subject to certain conditions: …c. Residence: i. a residence requirement may be imposed; ii. residence in this case means habitual residence; … v. the right to vote and to be elected may be accorded to citizens residing abroad."

[86] LaFleur, *supra* note 32 at 35, see also Grace, *supra* note 3 at 33 "wide latitude".

[87] Grace, *supra* note 3 at 38; LaFleur, *supra* note 32 at 33-38.

absence does not exceed a specified duration); permanent absentees (persons who have left with no intention of returning); those who have never lived on the territory, but their parents or grandparents have (second or third generation citizens); or people who have never lived, or whose ancestors have never lived, on the current state territory (ethnic, kin, or linguistic citizens).

The second category refers to modalities of the vote, which sets out *how* external votes are cast. Options include: proxy voting (having a designated person cast your ballot on the territory); consular voting (voting in person at overseas consulates); overseas polling stations (voting in person at designated voting booths); mail-in ballots; or electronic voting that could include fax or online voting portals. These choices expose trade-offs between cost, integrity and transparency that are not, in and of themselves, exclusive to non-resident voters. For example, both resident and non-resident voters can use mail-in ballots. However, because non-resident voters disproportionately rely on these modes of voting, and because assumptions about the reliability and integrity of state services (such as a postal service) would vary for non-resident voters, additional consideration and scrutiny of these methods seems necessary.

The last category considers *where* non-resident votes are counted, in terms of how non-resident votes translate into political representation. Topics in relation to this category fall within one of two branches: non-resident votes can be counted in "assimilated" regimes, meaning that votes are counted in a pre-determined constituency, such as the person's last territorial residence, or they can be counted in a pre-assigned district.[88] They can also be represented in "discrete" regimes where they are given dedicated political representation via assigned electoral seats, constituencies or districts.[89]

[88] Grace, *supra* note 3 at 47, 48.
[89] *Ibid.*

c. Constitutional Law

The regulation of non-resident voting largely occurs within state-level (i.e. country-level) constitutions.[90] Most constitutions allocate the right to vote in state-wide (country-wide) elections to *citizens* (those holding the legal status of citizenship), or less commonly to "the people", without reference to residency.[91] Judges holding powers of constitutional review have been asked to determine whether residency restrictions are nonetheless permissible within their constitutional framework. At least 15 constitutional courts – in Canada, the European Court of Human Rights, Austria, Germany, India, Bangladesh, Nepal, Pakistan, Japan, Korea, Uganda, South Africa, the Marshall Islands, Uruguay and Guyana - have been asked this question.[92] All

[90] While constitutions can and do come in different forms and espouse different values, my references to 'constitutions' is short hand for liberal democratic constitutions, which have emerged as the emerged as the hegemonic normative form of governance form since World War II (See discussion in Lorraine Weinreb, "The Postwar Paradigm and American Exceptionalism" in Sujit Choudhry, ed *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 84 at 89 explaining the post-war constitutional paradigm. See also: Scheppele: Autocratic Legalism, *supra* note 15 at 557-560) In this thesis, the label "liberal democracy" or "liberal democratic constitution" refers to a system of government in which political leaders are elected in periodic elections by way of universal suffrage, and are constrained in the exercise of their power against individuals by reference to legally enshrined documents that are built upon (among other things) liberal commitments to individual equality, dignity, and "democratic governance by self-limiting and accountable political power." For more on liberal democratic constitutionalism, see Scheppele: Autocratic Legalism, *supra* note 15 at 557-560."Democracy is a political system in which leaders are accountable to the people; constitutionalism is a political system in which leaders and the people together are additionally accountable within a system of constitutional constraint to uphold basic values that transcend the moment. … Liberalism as a governing political philosophy … can be identified by its core commitments to the dignity and liberty of individuals and their democratic governance by self-limiting and accountable political power." See Also: Alan Ryan, The Making of Modern Liberalism (Princeton, Princeton University Press, 2012) at 23-38.

[91] For some exceptions, see: Greece, *Constitution of Greece*, 11 June 1975, as amended, art 51; Italy, *Constitution of the Republic of Italy*, 22 December 1947, entered into force 1 January 1948 (rev 2012) art 48; Portugal, *Constitution of the Portuguese Republic*, 2 April 1976, as amended) (rev 2005) art 14; Spain, *Constitution of Spain*, 6 December 1978, as amended, art 68(5). Of note, all of these constitutions specifically include non-resident citizens in the electorate.

[92] Frank *supra* note 72; *Shindler v the United Kingdom*, [2013] ECHR 423 (ECtHR); *Kalali v Attorney General & Anor* (Miscellaneous Cause No. 35 of 2018) [2020] UGHCCD 172 (17 June 2020) (ULii) (Uganda) [Ugandan Decision]; *Lekka v Kiluwe* and *Konou and Lehman v Kiluwe and Kawakami (as AAG)* SCT Civ 19-69 (9 Oct 2019) (consolidated) (Marshall Islands) [Marshall Islands Decision]; Constitutional Court (VfGH), 16 Mar 1989 G218/88 No 12023 (Austria); *Iqbal et al v Federation of Pakistan and Imram Khan et all v Federation of Pakistan* (2011), Const P 39/2011 and 90/2011 (SC Pakistan) (consolidated) (decision of 29 April 2013) (Pakistan) [Pakistan Decision]; *Chindam & Ors v UOI and ANR* (2013) 80/2013 (SC India) (Record of Proceedings) (India); Constitutional Court, 28 June 2007, 19-1 KCCR 859, 2004 Hun-Ma 644 (Korea) [Korean 2007 Decision] see also: 2 Constitutional Court, 24 July 2014, 26-2(A) KCCR 173, 2009 Hun-Ma 256, 2010 Hun-Ma 394 (consolidated) (Korea); Saikō-Saibansho [Supreme Court], 14 Sept 2005, 2001 (Gyo-Tsu) 82 Minshu Vol 59, No 7 (Japan); *ATM Ali Reza Khan v Bangladesh Election Commission and others,* 1997, 26 CLC (HCD) [8111] (Bangladesh) [Bangladeshi Decision], *Richter v The Minister for Home Affairs and Others* [2009] ZACC 3 (South Africa) [South African Decision]; Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 4 July 2012, 2 Beschluss des Zweiten Senats vom, 2 BvC 1/11, 2 BvC 2/11 4 (Germany), online:

but two of these decisions (the European Court of Human Rights and Uruguay) support non-resident citizen's bid to vote in national elections.[93]

The remaining decisions can be sub-divided according to their ultimate finding on constitutionality,[94] the nature of non-residency at issue,[95] te electoral systems of representation,[96] and the expansiveness of their conclusions.[97] They share, however, an understanding that, when it comes to national-level elections,[98] non-resident citizens have the right to vote.

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https://www.bverfg.de/e/cs20120704_2bvc000111.htm; Supreme Court of Justice, Montevideo, 3 April 2020, *Sentencia Definitiva* 57/2020 (Uruguay) [Uruguay Decision]; Ram Kumar Kamat "No voting rights for Nepalis abroad" The Himalayan Times, 21 March 2022, <online: https://thehimalayantimes.com/nepal/no-voting-rights-for-nepalis-abroad)>; Staff Reporter "'Residency not required for voting'" *Guyana Chronical* (11 Feb 2020) online: <https://guyanachronicle.com/2020/02/11/residency-not-required-for-voting/.>

[93] As explored in detail in Chapter 3, cases largely hinged on peculiarities about the nature of the court and/or unusual constitutional language. Council of Europe, *Protocol 3 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention*, ETS 45, 6 May 1963, Art 3: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." *Shindler, ibid.* Uruguay, *Constitution of the Oriental Republic of Uruguay*, 27 November 1966, as amended, Art 81: Nationality is not lost even by naturalization in another country, it being sufficient for the purpose of retaining the rights of citizenship merely to take up residence in the Republic and register in the Civil Register. [translated]

[94] Decisions which found a breach of the state Constitution's voting and/or equality provisions: South African Decision, *supra* note 92; Frank, *supra* note 72; Ugandan Decision *supra* note 92, Marshall Islands Decision *supra* note 92, Austrian Decision *supra* note 92, Korean 2007 Decision *supra* note 92; and Japanese Decision *supra* note 92. Decisions which did not find a breach: Indian Decision, *supra* note 92 (the Court accepted that the Government was going to implement voting rights and so adjourned the matter); Pakistani Decision, *supra* note 92 (the Court accepted that the Government had agreed to implement non-resident voting rights and so adjourned the matter); and the Bangladeshi Decision *supra* note 92 (the Court held that the rules on voting for non-residents had to be read subject to the Constitution).

[95] For example: In the Bangladeshi Decision, *supra* note 92, the non-resident was purportedly a temporary non-resident because they maintain a permanent address in Bangladesh, although they had moved from Bangladesh several decades prior. Other decisions, such as the Marshall Islands Decision, *supra* note 92, dealt with expatriates who were not overseas temporarily. The German decision, *supra* note 92, dealt with citizens who had never been resident in Germany. Still others, such as the South African Decision, *supra* note 92, the Korean 2007 Decision, *supra* note 92, the Japanese Decision, *supra* note 92; the Austrian Decision, *supra* note 92, and *Frank*, *supra* note 72, dealt with non-residents who had lived overseas for some time, although it was not clear if their absence was permanent.

[96] For example, Korea elects the president directly in a single plurality vote, while the national assembly is a mix of local constituencies and proportional representation. Other countries, including Canada, use a single-member plurality vote for constituency-based Members of Parliament, who then elect the Prime Minister.

[97] For example, the Korean 2007 Decision, *supra* note 92 which granted non-resident citizens the right to vote in national and presidential elections was modified by the Korean 2014 Decision, *supra* note 92 which indicated that non-resident citizens could vote for the proportional representation national assembly, but not the local constituency assembly members. The Bangladeshi Decision, *supra* note 92 ruled that temporary non-residents could vote in domestic state level elections, although in that case the "temporary" non-resident had left the country over 30 years prior.

[98] My project is focused on state-level elections. Different considerations come into play at sub-state (provincial, municipal) or supra-national (EU, for example) elections. For more on this distinction, see eg: Bauböck, *Democratic Inclusion, supra* note 5; Owen, *supra* note 7; *Frank*, *supra* note 72 at para 61.

This conclusion is generally or invariably driven by the words of the constitution,[99] a citizenship-based conception of popular sovereignty and "the people",[100] and a vigorous defence of their enfranchisement.[101]As explored in more depth in Chapter 3, liberal democratic constitutions are structured around the view that all state institutions ultimately derive their authority from citizens.[102] There is no space for institutions created by that power – including legislatures or courts – to challenge that story. As such, the prevailing constitutional view is that, while governments may restrict a citizen's voting rights to protect the system from external harms (such as election integrity or electoral fraud) they cannot do so on the basis that some citizens are not rightful members of the *demos*.[103] For a casual reader of these decisions, despite the elaborate discussion and analysis, the judicial reasoning is quite straightforward: constitutions give citizens the right to vote; non-residents are still citizens; therefore they maintain the right to vote.

d. Conclusion

To sum up this legal snapshot, there is very little international guidance on non-resident citizen enfranchisement. Most countries implement their own non-resident voting regimes within state (country-wide) election law, where a diverse pool of practices have emerged. These practices serve a variety of needs, some of which are contextual and logistical (for example: the

[99] Breach of voting rights: *Frank*, *supra* note 72, Ugandan Decision *supra* note 92, Japanese Decision *supra* note 92, South African Decision, *supra* note 92. Breach of Equality guarantee: Marshall Islands Decision, *supra* note 92; Ugandan Decision, *supra* note 92.
[100] Korean Decision, *supra* note 92; Ugandan Decision, *supra* note 92 at para 23; Japanese Decision, *supra* note 92; Austrian Decision, *supra* note 92.
[101] See eg: Ugandan Decision, *supra* note 92 at paras 9 -12; Frank, *supra* note 92 at paras 2, 62; Marshall Islands Decision *supra* note 92 at p 8.
[102] See eg: Ugandan Decision, *supra* note 92 at paras 9 -12; Frank, *supra* note 92 at paras 2, 62; Marshall Islands Decision *supra* note 92 at p 8; South African Decision, *supra* note 92 at para 52.
[103] See: Chapter 3, Sections D-F.

location of consulates or the realities of postal service), while others are political (for example: creating barriers where non-resident voters are perceived to be antagonistic to the ruling party).

The policing of non-resident voting practice largely occurs within state-level (country-level) constitutions. To date, the practice of non-resident voting has been considered by at least 15 constitutional courts around the globe. While there are variations, constitutional courts have tended to support the constitutionality of non-resident enfranchisement and have adopted similar logic in arguing that their respective constitutions guarantee citizens the right to vote, wherever they live.

E. Theoretical Perspectives

The support for non-resident voting under constitutional law stands in stark contrast to most normative democratic theory. Chapter 2 explores democratic accounts of non-resident enfranchisement in detail. Here, I will simply set out the broad contours of the stances within democratic theory, and highlight the gaps to which my account is directed.

While the link between voting and citizenship is so widespread practically speaking that it may seem innate to democracy itself, the practice is actually quite controversial within democratic theory. Most democratic theorists believe that the question of democratic inclusion (who is rightfully given a vote when making collective decisions) should be answered by reference to the reciprocal, closed loop-relationship of self-rule.[104] In other words, if you want to

[104] See also Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989): Dahl's principle of full democratic inclusion holds that: "The *demos* must include all adult members of the association except transients and persons proved to be mentally defective", where 'adult members of the association' refers to "all adults subject to the binding collective decisions of the association.". See discussion in: Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 218, 219; Goodin, *supra* note 19 at 130; Bauböck, *supra* note 1 at 2412.

find who should have a vote, find the people who will either be affected by,[105] subject to,[106] or governed by[107] its outcome.[108]

For many theorists, citizenship status doesn't necessarily speak to this relationship. Citizenship status a marker of national belonging - it does not guarantee that its holders will be subject to the laws they help create.[109] Given that we live in a world where state power is largely exercised over a defined physical territory, territorial touchstones (like residence or domicile) do a better job of locating this relationship. Thus, residence and domicile are often put forward as providing a more democratically legitimate foundation for allocating the franchise.[110] In other words, people who live on the territory clearly have to live under its laws. As such, they (not citizens) rightfully have a say in what those laws are.

While there are exceptions to the rule,[111] most of the normative literature opposed to non-resident voting is focused on securing the voting rights of *non-citizen residents* including refugees, temporary foreign workers, permanent residents and/or irregular migrants who are physically present on a territory on the date of an election.[112] These scholars emphasize the role

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[105] Goodin, *supra* note 19 at 5-6; Iris M Young, *Inclusion and democracy* (Oxford: Oxford University Press, 2000); Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003) Ch 1.; Rubio-Marin, *supra* note 26 ("directly and comprehensively affected", in which non-residents are not affected enough to claim a right to vote);
[106] Owen, *supra* note 7 at 53; Lenard, *supra* note 26 at 120; Valeria Ottonelli, and Tiziana Torresi "Temporary Migration Projects and Voting Rights" (2014) 17:5 Critical Review of International Social and Political Philosophy 580 (note the Ottonelli and Torresi do not advocate for a subject to law standard, but use it as shorthand for discussing the issue).
[107] López-Guerra, *supra* note 104.
[108] For other terminology, see: Beckman, *supra* note 106 at 47-52 (all those "bound by" law or "subject to the government and its laws"); Nohlen & Grotz, *supra* note 1 at 1136 (only those who bear the consequences of electoral decisions should have the right to vote); Rubio-Marin, *supra* note 26 ("directly and comprehensively affected", in which non-residents are not affected enough to claim a right to vote); Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27 at 36 ("responsive to" law).
[109] López-Guerra, *supra* note 104 at 226; Lenard, *supra* note 26 at 122. Similar stances have echoed the view that voting may be severed from status because it lies outside citizenship's "core". Rubio Marin, *supra* note 26 at 124.
[110] Lenard, *supra* note 26 at 120; Rubio-Marin, *supra* note 26 at 129, Duarte, *supra* note 108.
[111] Lopez-Guerra, *supra* note 104; Rubio-Marin, *supra* note 26.
[112] Lenard, *supra* n *supra* note 26 (proposes severing the right to vote from citizenship and tying to residence); Beckman, *supra* note 106 at 76-80 (supports state level voting rights based on domicile, which does not technically preclude non-residents, but would disenfranchise many if not most non-resident voters). Nohlen & Grotz, *supra* note 1 at 1142 (the authors are primarily focused on critiquing non-resident voting, but endorse residency-based voting).

that territorial presence plays in making a person a legal subject. The illegitimacy of non-resident citizen voting is usually a logical extension, rather than the primary preoccupation, of these views.

There are fewer scholars writing in favour of non-resident citizen enfranchisement. Under this grouping, non-resident voting has been defended as an expression of universal suffrage;[113] a human right;[114] a form of justice for emigrants of authoritarian regimes;[115] and as a response to globalization.[116] There are, however, some scholars who attempt to justify voting for non-resident citizens under the terms set by democratic theory.

Some scholars in this space argue that the act of bestowing citizenship status creates a relationship of subjection needed to satisfy democratic theory.[117] Pursuant to this view, all citizens should have the right to vote because all citizens are legal subjects. Any undesirable outcomes that could flow from this system are rightfully policed at the level of bestowing citizenship (i.e. don't offer citizenship to people who are not social members of the community). Others argue that some, but not all, non-resident citizens have the rightful franchise based on whether their citizenship status speaks to a genuine membership interest between its holder and

[113] Universal suffrage arguments often note that expatriates generally lack voting rights in their country of residence. See, for example: Rubio-Marin's description of Kim Barry's argument - *supra* note 26 at 130, she also offers a critique of this approach at 130-131. For further descriptions see Nohlen & Grotz, *supra* note 1 at 1135; Bauböck, *supra* note 1 at 2409-11 (Bauböck himself does not advocate for this position but presents it).
[114] Braun & Gratschew, *supra* note 47 at 1; Grace, *supra* note 3 at 42, 46 (Grace's suggestion of non-resident voting as a right is specific to forced migrants). For a critique, see Rubio-Marin, *supra* note 26; Lopez-Guerra, *supra* note 104 at 228.
[115] Bauböck, *supra* note 1 at 2400; Grace, *supra* note 3 at 42. For the contrary view, see Lopez-Guerra, *supra* note 104 at 230-231.
[116] Grace, *supra* note 3 at 38-42; LaFleur, *supra* note 32 at 45-49 (Lafleur's account is sociopolitical, not normative but finds this to be the most plausible explanation for the spread of non-resident voting; Rubio-Marin, *supra* note 26 at 121 makes a similar claim). The economic reality argument often centres on contribution-based claims in states whose economies depend largely on emigrant remittances. For a summary and critique of contribution-base claims, see Bauböck, *supra* note 1 at 2413; López-Guerra, *supra* note 104 at 229; Rubio-Marin, *supra* note 26 at 131-135.
[117] Owen, *supra* note 7.

the country of issuance.[118] Under this view, citizens who have a genuine membership stake in the community should have a voice in these decisions, because their wellbeing is inextricably tied to (affected by) the country's well-being.

As explored in later chapters, I work most closely with the latter approach. However, it and the other democratic accounts of inclusion do not engage in detail with the constitutional frameworks under which decisions about voting are made in practice. The choice not to engage with this perspective is consequential. As explored in Chapter 3, constitutional adjudication is actively screening out voting laws which seek to implement these accounts. If the goal is to have these various accounts of democratic inclusion implemented, we need to engage with the decision-making framework within which these laws are assessed. By adding a constitutional perspective to these theory, we can figure out if and how they can actually work in practice.

F. Methodological Choices

The historical, empirical and theoretical snapshot above demonstrates that non-resident voting can be explored from a variety of perspectives. It also reveals what we know about non-resident voting, and what questions remain. While there are a variety of explanations about current practices (the how, when, and why as a matter of law and politics), there remains a significant gap in understanding how we should approach the practice in a constitutional democracy.

Democratic theory can paint the practice as an unfortunate or anti-democratic anomaly.[119] And yet, the now-widespread practice has significant constitutional wind in its sails. Courts around the world are vigorously protecting their right of these citizens to vote. I do not accept

[118] Bauböck, *supra* note 1 at 2447 ("stakeholders" - a tamed version of all affected interests principles, which includes temporary non-residents, excludes second generation non-resident citizens, and leaves all other citizens up to the discretion of the state).
[119] For example, see: López-Guerra, *supra* note 104.

that either vision provides an accurate account of non-resident citizen enfranchisement, or that they adequately capture its normatively ambivalent potential. I do, however, believe that each of constitutional law and democratic theory has something crucial to add to the story. This belief is rooted in the view that justifications for the right to vote in "hard cases" necessarily engages questions of morality.[120] In my view there is an unavoidable moral element undergirding disagreement about who can call themselves on of 'the people', and this posture has influenced my methodological choices.

a. Comparative Constitutional Law and Contextual Political Theory

To build a contextualized theory of non-resident enfranchisement that satisfies democratic and constitutional frameworks, I must complete two tasks: first, I must determine the constitutional understanding (or understandings) of non-resident citizen enfranchisement. Second, I must use this understanding to develop my own theory. To complete these tasks, I rely on comparative constitutional law and contextual political theory. These approaches, while employed at distinct stages, share the view that case studies are a valuable tool to explain, develop, and test theory, such they that they can work together to build a theory of non-resident voting.

My starting point for developing a theory of non-resident citizen enfranchisement is the adjudication of this issue in constitutional courtrooms around the world. This evaluation is comparative. At least fifteen constitutional courts - spanning five continents and a range of institutional and legal structures, national identities, emigrant demographics, and logistical considerations - have been asked about non-resident citizen enfranchisement as a matter of

[120] Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1986) at 266.

right.[121] My approach starts with selecting and analyzing case studies within this dataset to uncover insights as to the constitutional understandings of non-resident voting.

To this end, my approach to case selection is informed by Ran Hirschl's treatise on comparative constitutional law.[122] Hirschl has argued that comparative legal scholars who adopt social science case selection principles can strengthen their conclusions and engage in theory testing through causal inference.[123] Using this approach, it is my goal to demonstrate that – individual variances notwithstanding - at its foundation liberal democratic constitutions construct the citizen as the individual constituent unit of the self-governing nation-state. This foundation makes it extraordinarily difficult to constitutionally disenfranchise citizens based on residence.

My approach to case selection specifically draws on Hirschl's "most difficult" and "outlier" principles.[124] The logic behind the "most difficult" approach is trial by fire.[125] By testing a hypothesis against the toughest case available, we can infer it will remain true in easier cases. In my case, this means analyzing the constitutional adjudication of non-resident voting rights in contexts where the barriers to their inclusion are greatest. Drawing on the empirical and

[121] *Supra* note 92.
[122] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2015) at Chapter 6. Under the umbrella of small-N studies, Hirschl sets out the explanatory power of five sub-approaches to case selection. This includes (i) selecting cases that are similar except for the proposed causal variable (the "most similar cases"); (ii) selecting cases that are different except for the proposed causal variable ("most different cases"); (iii) selecting cases that have as many key characteristics as possible found in a large number of cases ("prototypical cases"); (iv) selecting a case where the variable is present even though one would think it should not be ("most difficult case"); and, (v) cases where an outcome exists even though no existing theories explain it ("outlier cases").
[123] Hirschl, *ibid* at 260.
[124] This is also supported by Joseph H Carens, "A Contextual Approach to Political Theory" (2004) 7 Ethical Theory and Moral Practice 114 at 122 at 125 who encourages contextual political theorists to search out cases that are challenging to their position.
[125] Hirschl, *ibid* at 260: The "most difficult case" principle is based on an idea known in formal logic as ad absurdum. It works on the logic that our confidence in the validity of a given claim, or in the explanatory power of a given hypothesis, is enhanced once it has been proven to hold true in a case that is, prima facie, the most challenging or least favorable to it."

theoretical research above, I have organized my barriers to inclusion within three buckets: (1) Demographic Barriers; (2) Institutional Barriers; and (3) Logistical Barriers.

Demographic barriers focus on the argument that non-resident citizens are outside the closed-loop reciprocal relationship of self-rule, and are therefore appropriately outside the *demos*. As explored above, this view is common within democratic theory. There, the inclusion of descent-based citizens serves as an exemplar for the illegitimacy of including non-resident citizens in the electorate.[126] Scholars have identified similar arguments that arise in practice – demographic barriers to inclusion become particularly strong in cases where the non-resident citizen population is perceived as having the ability to impact electorate outcomes based on their size (either in total numbers, or as a percentage of the voting population).[127]

I have selected the Marshall Islands and Germany as case studies exemplifying these demographic barriers. At first blush, given its small size and international profile, the Marshall Islands may seem to be a peculiar case study. However, given their proportionately large emigrant populations, small island nations are often on the front lines of the non-resident voting debate.[128] The Marshall Islands and similarly situated countries have to grapple more directly with the reality that non-resident citizens can decide electoral outcomes – which makes it a useful case study to analyze how this reality influences constitutional adjudication.

Germany is selected to exemplify a different demographic barrier. Despite recent reforms, Germany remains the modern standard bearer of *jus sanguines* (descent based) citizenship. For my purposes, this is noteworthy because Germany's constitutional adjudication of non-resident

[126] Eg: Lopez-Guerra, *supra* note 104 at 216; Bauböck, *supra* note 1 at 2426.
[127] LaFleur, *supra* note 33 at 41.
[128] See eg: Hassall, *supra* note 72.

voting had to confront claims to inclusion from those with the weakest claim to inclusion in the electorate – descent-based citizens who have never lived in Germany.

The institutional variable speaks to issues of electoral systems design, and the difficulties that can flow from including non-resident voters within electoral systems that are themselves residency-based. In this regard, data has shown that countries with a British colonial heritage are late (or non) adopters of non-resident voting laws.[129] The British and now (for the most part) Commonwealth countries' geographically-defined constituency-based electoral systems have been hypothesized to be a reason. I have selected Canada as speaking to this institutional variable. Canada is a democracy with a British colonial past, and still utilizes a Westminster-styled system.[130] Canada also offers the benefit of focusing on state-level (country-level) constitutional adjudication. While I could have selected the decision of the European Court of Human Rights (which dealt with non-resident voting laws in the United Kingdom) that choice would have introduced distinct supranational considerations[131] that make it more difficult to focus exclusively on the right of non-resident citizens to vote.

Lastly, logistical barriers refer to the cost and complexity variables that make non-resident voting difficult to implement in practice. Social scientists have theorized that these

[129] Turçu and Urbasht, *supra* note 51 at 421. See also Wellman, *supra* note 1 at 916 which found the negative linkage between expatriate voting and countries with a British Colonial history, but they did not hypothesize a reason for this relationship.

[130] *Shindler, supra* note 92.

[131] *Shindler, supra* note 92 at paras 102,110-115 discussing the wide margin of appreciation a supranational body owes to member states in creating electoral systems: "[102] When reviewing the proportionality of the measure, it must be borne in mind that numerous ways of organising and running electoral systems exist. There is a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into its own democratic .... In this regard, one of the relevant factors in determining the scope of the authorities' margin of appreciation may be the existence or non-existence of common ground between, or even trends in, the laws of the Contracting States… [115] It…cannot be said that the laws and practices of member States have reached the stage where a common approach or consensus in favour of recognising an unlimited right to vote for non-residents can be identified. ..., the margin of appreciation enjoyed by the State in this area still remains a wide one."

factors may be more pressing in poorer countries with large emigrant populations, or where emigrant populations are located in countries to which integrity concerns may be raised.

I have selected Pakistan as the case study that best speaks best to these barriers.[132] Pakistan has one of the largest emigrant populations in the world, poverty rates are high, and its GDP ranks in the bottom 25% of the world's countries.[133] The Pakistani diaspora is very organized and politically engaged, and the issue of enfranchisement has been hotly politicized. Given these factors, the inclusion of non-resident citizens is likely to be expensive (given resources), complex and logistically and politically difficult, making it a useful case study for my analysis.

After studying these "most difficult" cases, I supplement the analysis with the "outlier" case of Uruguay. The outlier case selection principle is useful in presenting a novel theory when other theories have proven to be insufficient to explain given phenomena. It "lends credence to a novel explanation for a given phenomenon through the negation of alternative explanations for that phenomenon."[134] Uruguay qualifies as an "outlier" in that it is the only state-level (country-level) constitutional court I have identified that ruled that the inclusion of non-resident citizens in the electorate is unconstitutional. It merits detailed study given its unique judicial stance, and it provides a useful case study upon which my hypothesis can be tested.

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[132] Some may object to Pakistan's liberal democratic credentials. I have nonetheless included Pakistan as a case study because, despite its challenges, it does have competitive elections and a liberal democratic constitution whose broad divisions of power and rights are generally adhered to, if imperfectly. I discuss this issue in more detail in Chapter 3, subsection C.

[133] International Organization for Migration, *Pakistan: Migration Snapshot* (IOM, August 2019) online: https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/Pakistan%20Migration%20Snapshot%20Final.pdf at 5: "With around 6 million emigrants, representing 3 per cent of the total Pakistani population, Pakistan is one of the top ten emigration countries in the world"; World Bank, Poverty and Equity Brief, Pakistan 2023 online: https://databankfiles.worldbank.org/public/ddpext_download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/current/Global_POVEQ_PAK.pdf.

[134] Hirschl, *supra* note 122 at 262-263.

This analysis will demonstrate that, despite this extraordinary variance and presence of significant barriers, judicial outcomes are heavily weighted towards inclusion.[135] I hypothesize that this is due to a particular conception of citizenship – and its relationship to state legitimacy - that is embedded in liberal democratic constitutions. The result is that, absent clear constitutional language, the bar to disenfranchising non-resident citizens will be exceptionally high within a liberal democratic constitutional framework.

My case selections may be subject to criticism. Country studies are nuanced and multi-variable. It is an oversimplification to suggest that some countries possess favourable variables, while others unfavourable. In reality, all countries possess variables and interests that point in both directions.[136] Germany, for example, is a country with a national identity that may, contra my reasoning, lend itself uniquely *in favour* of non-resident inclusion in the electorate, thus undercutting the conclusions I draw therefrom.[137]

These and other critiques, while potentially worth exploring further, are difficult to mitigate entirely: alternative accounts, pending further investigation, persists no matter which cases are selected. All countries are multivariable and complex. Within them, there will be variables pointing in different directions. Notwithstanding this reality, I submit that the countries selected remain uniquely valuable, because they allow us to hone in on the weak points of non-resident citizen voting. By evaluating cases where courts must grapple with large or absent non-resident populations, electoral systems that are intimately tied to residency, and situations where

[135] *Shindler, supra* note 92. Note that Pakistan and India remitted the case to be determined by other governmentt entities. In Pakistan's case, this was based on the express acknowledgment by their Electoral Management Body that non-resident citizens do have the right to vote.
[136] Lafleur, *supra* note 32.
[137] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (London, Cambridge: Harvard University Press, 1992) at Ch 3.

non-resident voting is inordinately costly and complex to implement, we can test the constitutional inclusion of non-resident citizens against its strongest attacks.

After I have evaluated the constitutional understanding of non-resident voting, my next task is to develop my own theory of voting, citizenship and residence. Doing so requires that I work with political theory. In completing this tasks, I consider the wisdom garnered from the case studies alongside democratic theory, and I use both sources to craft my own theory of non-resident citizen voting. This exercise is iterative: theory is tested against practice, practice held up to theory, and so on.[138] Areas of conflict "impose an obligation to reflect upon the way we do things and what that may teach us".[139] I locate cleavages, areas of potential compromise, and make choices that I argue creates a more comprehensive and workable theory of non-resident enfranchisement. Through this conversation with theory and practice I will seek to locate a space in which the most important features of both can co-exist.[140]

b. Avoiding Methodological Pitfalls: Universalism versus Cultural Relativism

Critics of normative political theory and comparative constitutional law have cautioned against the impossibility[141] and/or irresponsibility[142] of espousing universal truths about experiences which are socially and culturally embedded. There are various formulations to this critique. In political theory, it is argued that universal statements can be used to propagate and embed inequality.[143] In my case, the danger is that by espousing a theory of non-resident

[138] Carens, *supra* note 124 at 122.
[139] Carens, *supra* note 124 at 122.
[140] Will Kymlicka, *Politics in the Vernacular: Nationalism Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001) at 4.
[141] Pierre Legrand, *"*The Impossibility of "Legal Transplants*"* (1997) 4 Maastricht Journal of European and Comparative Law 111.
[142] Carens, *supra* note 124 at 128-132.
[143] *Ibid.*

enfranchisement for citizens, I will provide cover for political actors who seek to use these laws to manipulate the democratic process.

I am cognizant of this concern, and of the possible deployment of non-resident voting as a tool of democratic manipulation.[144] In my view, however, it is the lack of an adequate theory for non-resident voting that has fostered its manipulation. A theory grounded in constitutional law and democratic theory adds guardrails to an otherwise unregulated process that, I submit, provides a clearer foundation upon which manipulative practices can be identified and called out.

Within comparative constitutional law, critics argue that constitutions are culturally embedded documents, and that attempts to simply compare constitutional laws without fully understanding the culture from which they come are either "impossible", "outdated", or "amateurish".[145] Comparative constitutional scholars have defended their efforts against this critique largely through paying special attention to context, demonstrating a strong awareness of bias, and through adopting an interdisciplinary lens.[146] The overarching lesson within this methodological evolution is one of caution. Constitutional law is socially embedded; it cannot be understood, lifted, transplanted, or studied without an intimate appreciation of its context.

I am sensitive to this concern, especially given that the focus of my study is citizenship, which is itself steeped in national understandings of identity, community, and belonging. In my case, the individualized and socially embedded understandings of constitutions, citizenship, and voting is central to the puzzle I am seeking to solve. Much of my inquiry is focused on determining why constitutional outputs are the same despite these widely differentiated

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[144] See eg: Hirschl, *supra* note 122.
[145] Legrand, *supra* note 141; Annelise Riles, "Comparative Law and Socio-Legal Studies" in Mathias Riemann and Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 776 at 784.
[146] Hirschl, *supra* note 122.

variables. In other words, I am not blind to difference, I am trying to understand why these differences are not impacting outcomes. Comparative constitutional law is about difference, and difference sits at the centre of my inquiry.

I also aim to mitigate the universalizing tendency of comparative constitutional law by adopting an interdisciplinary lens. While grounded in law, my research engages significantly with democratic theory, political science, and citizenship studies. Within this, the social sciences are best able to provide sensitivity to context. Political scientists have done much of the leg work in documenting and measuring the spread of non-resident voting, as well as its drivers and barriers, and I have embedded insights from political science into my case selection. Citizenship scholars have provided invaluable insight into the cultural or social constructions of "the nation" that inform citizenship laws.[147] In this regard, work from Rogers Brubaker, has been particularly insightful to my research, and I rely on his insights when discussing citizenship in more detail in Chapter 3.

c. Avoiding Methodological Pitfalls: Bias

There are also biases embedded in my approach that can attract criticism. Most of these critiques find their footing based on my decision to rely heavily on constitutional court decisions. By basing the constitutional view on doctrinal sources (judicial decisions), I am arguably presenting a global stance based on a small snippet of self-selected jurisdictions. There are many reasons other courts have not adjudicated this issue, and it would be a mistake to equate the decisions that do exist with a global stance. Despite this limitation, there is value in analyzing every constitutional court decision on the topic. Doing so reveals important points of convergence, which I argue, is sufficient to evaluate developing trends, if not conclusive global

[147] Jo Shaw, *the People in Question* (Britsol: Bristol University Press, 2021); Benhabib, *supra* note 22.

consensus. This doctrinally focussed start may serve for more empirically based and context-focussed studies, for example.

In addition, it can also be argued that by developing a theory based on documents produced within a specific institutional context, I am privileging the values protected by that institution, and disadvantaging others. Essentially this argument posits that, because I am using decisions emanating from liberal democracies, I am prioritizes those values while diminishing those that are not institutionally promoted.

While it is difficult to entirely escape this critique,[148] I accept that my view does foreground and center liberal democratic constitutional rights and values. By its own terms, the value of my theory is tied to its responsiveness to existing decision-making structures, in this case including constitutional courts and constitutional rights. In response, I simply note that my theory does not espouse liberal democratic constitutional values as being inherently more worthy or valuable than others. Instead, my reliance on these decisions and the values they promote flows from their *de facto* status as apex decision-making institutions in most democracies.

Lastly, it is arguably naïve for me to suggest that written decisions accurately reflect the motivations driving judicial outcomes. While judges may be "hanging their hat" on certain factors, the real reasons may lie elsewhere.[149] I have two responses to this critique: first, the fact that outcomes are so heavily weighted towards inclusion mitigates the concern that the real reason for judicial outcomes are entirely context dependant - if the 'real' reasons were driven by unique contextual concerns, we would expect to see more variance in outcomes.

[148] Even if constitutional court decisions were not part of my work, I rely on are products of institutional systems and ways of thinking that are exclusive, and which amplify some voices and disadvantage others.
[149] For example, others have suggested the Uruguayan case can be explained diaspora size and political elites. See: Sebastián A Umpierrez de Reguero, et al, "Political Regimes and External Voting Rights: A Cross-National Comparison" (2021) 3 Frontiers in Political Science 1 at 8.

Second, even if one accepts the 'real' reasons remain hidden, the fact that judges are compelled to hang their hat on similar constitutional concepts is itself a valuable insight. Law creates the world it is attempting to merely regulate.[150] Judicial outcomes, and reasons used to get there, help create a new reality regardless of 'real' yet unarticulated reasons. By sticking to constitutional language, judges reinforce the conclusion that these decisions have to be framed in these terms, and this choice impacts the ongoing understanding of the relationship between citizenship, residence and voting.

G. Conclusion

This chapter has sought to define the parameters of my inquiry, familiarize readers with existing perspectives on non-resident citizen enfranchisement, and to situate my research within the literature. The ability for civilians holding the legal status of citizenship to vote in that country, despite living elsewhere, is a relatively recent phenomena. Over the span of 40 or so years, however, it has rapidly moved from the exception to the norm. This rapid expansion has outpaced any theoretical and normative consensus, and a wide gulf has emerged between theoretical and constitutional understandings of the practice.

My goal is to try and narrow this gulf by developing a theory of non-resident enfranchisement that constitutionally and democratically palatable. Doing so, in my view, will help develop more defensible practices of enfranchisement that are responsive to the world we live in and the people who inhabit it.

With this background completed, my next task is to provide a more thorough understanding of the normative theoretical stance to non-resident citizen enfranchisement. Chapter 2 takes on this task. It sets out the framework employed in democratic theory to

[150] Riles, *supra* note 145 at 812.

determine who has a rightful claim to democratic inclusion, discerns what this approach means for non-resident citizens, and clarifies the conceptual space upon which democratic support for non-resident enfranchisement may exist.

Chapter 2: Perspectives from Democratic Theory

A. Introduction

The last chapter positioned my research within the wider topic of non-resident citizen enfranchisement. It defined the parameters of my inquiry, familiarized readers with existing perspectives on non-resident citizen enfranchisement, and positioned my approach within the literature. As outlined there, my goal is to locate an account of non-resident citizen enfranchisement that is both constitutionally and democratically acceptable.

To accomplish this, I must first identify an acceptable democratic account of non-resident citizen enfranchisement to work with. That is the goal of this Chapter. The following discussion undertakes this task in three stages. First, I explain and defend the framework by which democratic theorists approach the question of enfranchisement. After summarizing historical accounts, I focus on Robert Dahl's principle of democratic inclusion, which argues that democratic states are justified by their commitment to the equality of all those who are subject to their rule. In other words, all those who will be subject to decisions should have a voice in their creation. This reciprocal relationship (the act of being author and subject) rightfully grounds the franchise.

Second, I critically engage with different strands of thought to explore the case for and against non-resident citizen voting. Democratic theorists provide several accounts of Dahl's principle – of which I engage with four. Two influential accounts - the residency view and domicile view – are critical of non-resident citizen enfranchisement. By engaging with these accounts, I tease out the democratic case against non-resident citizen voting – which rests on the nationalist underpinnings of citizenship laws and a predominantly territorial understanding of Dahl's principle.

I then use these critiques to weigh the relative strength of two accounts which defend non-resident citizen voting – which I refer to as the pluralist account and the stakeholder citizen accounts. The pluralist account argues that certain forms of subjection exist simply by virtue of holding citizenship status, and this is adequate to ground the franchise. The Citizen Stakeholder account argues that citizens rightfully have the franchise irrespective of residence only insofar as their citizenship status speaks to a 'stakeholding' relationship (their individual circumstance of life depend on the continued democratic flourishing of the polity).

This leads to my last task, which is to clarify the conceptual space in which democratic support of non-resident citizen enfranchisement can be based. While both the pluralist and stakeholding views challenge the territorial understanding of Dahl's principle in interesting ways, I argue that only the stakeholder view adequately responds to the critiques of citizenship-based voting. By tethering citizenship status to a democratic standard, the stakeholder citizen approach better responds to the democratic critiques of citizenship-based voting, and narrows the gap between the substance of citizenship laws and the democratic grounds for rightful enfranchisement. The pluralist account, by contrast, struggles to meet these critiques, and creates space to bring out the worst in non-resident voting laws. As such, I conclude by arguing that the Citizen Stakeholder model provides the most persuasive and democratically defensible account of non-resident citizen voting.

This chapter concludes by emphasizing the democratic understanding of non-resident citizen enfranchisement. It summarizes the core principles of theory that are essential to its understanding, and highlights the space within which a bridge to constitutional understanding can be built, which will be the focus of the next chapter.

B. The Boundary Problem

a. A Brief History

Who should be included in collectively binding decisions? The question of democratic inclusion, also known as the boundary problem, highlights a conceptual hole at the centre of democratic theory: there is no democratic process to form a *demos*.[1] The heart of democratic decision-making is self-rule.[2] This framework would, at least initially, suggest that existing voters should be able to determine the scope of the *demos*. But therein lies the problem: on what basis does that existing group of voters have the authority make that determination for others? What, for example, gave the existing voter-base during South African apartheid the authority to decide whether Black South Africans should be able to vote? If we leave the question of democratic inclusion to those who are already included, this raises the question of how they got to be included in the first place. The circularity of the paradox has been aptly explained as follows: "the people cannot decide until somebody decides who are the people."[3]

While central to democratic theory, the boundary problem is often ignored, in that scholarly inquiry often takes the existence of a pre-defined *demos* for granted.[4] For much of history, there was surprisingly little said about it.[5] Historical titans of political philosophy largely

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[1] See references to the "boundary problem" in, for example: Sarah Song, "The boundary problem in democratic theory: why the demos should be bounded by the state" (2012) 4:1 International Theory 39.
[2] Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton, Princeton University Press, 2021) at 1. Cristina M. Rodríguez, *"Noncitizen voting and the extraconstitutional construction of the polity"* 8:1 (2010) I-Con 30 at 30. See also: Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) at 10: "The primary purpose of democracy is to provide legitimacy to coercive political rule through popular self-government" [Bauböck: Democratic Inclusion].
[3] Ivor Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1953) at 56.
[4] See eg: Benhabib's critique of John Rawls' account: Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) at 74 – 94.
[5] For a summary, see Robert Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989) at 119-131 in which Dahl reviews statements from democratic philosophers including Locke, Rousseau, and Mill, noting how they side-step the boundary problem [Dahl 1989]. See also: Robert A Dahl, *After the Revolution?: Authority in a Good Society* (New Haven: Yale University Press, 1970) at 60-61; Robert Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford: Oxford University Press, 2008) at 128.

ignored the question of democratic *demos* formation. Instead, they simply assumed that democratic states would consist of some people who were qualified to govern (i.e. "citizens") and a large number of people who lived on the territory but who lacked the competence or other qualities to govern. Thus, Aristotle defended the exclusion of large swaths of the population from the *demos*;[6] Locke excluded classes of people from enfranchisement based on their perceived qualifications for governance;[7] and Rousseau's endorsed the narrowed boundaries of enfranchisement for "citizens" to the exclusion of the other "orders of men."[8] *Demos* formation happened on its own (non-democratic) terms, and then democracy happens after the fact. The hole this left in their respective theories was left unexplored. As explored in later chapters, much of this thesis can be understood as an attempt to retroactively cure this failing. For now, however, it is simply worth emphasizing that thinkers who greatly influenced modern democracy either ignored or rejected the premise of democratic *demos* formation.

Well into the 20th century, Joseph Schumpeter defended the arbitrariness of *demos* formation sitting at the heart of democracy. He made explicit what had thus far been implicit in theory - i.e. we must accept the "inescapable conclusion" that "we must leave it to every populus to define himself [sic]."[9] Schumpeter believed that there was no democratic way to constitute a democratic people.[10] So long as an association was managed democratically amongst

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[6] Aristotle, *Politics*, Book III, translated by Benjamin Jowett (Kitchener: Batoche Books, 1999) at 52-53.
[7] John Locke, *Second Treatise of Government* (1690) (Toronto: Ryerson University and Brock University Public Domain Core Collection Team, 2021) At Ch 6 para 60, Ch 7 para 85.
[8] Jean-Jacques Rousseau, *The Social Contract*, translated by Jonathan Bennett (2017) Book 1 at 7, fn 2: "[M]ost people mistake a town for a city, and a townsman for a citizen. They don't know that houses make a town, but citizens a city… When Bodin was trying to talk about our citizens and our townsmen, he blundered badly by confusing these two classes with one another. M. d'Alembert avoided that error in his article on Geneva, clearly distinguishing the four orders of men (or even five, counting mere foreigners) who dwell in our town, of which only two make up the republic. I don't know of any other French writer who has understood the real meaning of the word 'citizen'". See also: Rousseau's discussion of Venice at Book 4 at 57.
[9] Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Abingdon: Routledge, 2010) at 220. See also: Goodin, *supra* note 5 at 133.
[10] *Ibid.*

its' own members, it did not matter whether the rules for membership were themselves democratic.[11] Thus, a wide range of historical regimes which excluded people from the *demos* on the basis of sex, race, property ownership, or other grounds may have been reprehensible, but were nonetheless democratic.

Into the present, the view that democracy is something that comes after a pre-defined group is formed still persists among many nationalist and liberal nationalist thinkers. David Miller, for example, defends the (pre-political) nation[12] as the proper boundary of a self-determining political community,[13] while Will Kymlicka believes that the nation provides the stability and solidarity needed to get democracy "off the ground".[14]

b. Dahl's Principle of Democratic Inclusion

It wasn't until the second half of the 20th century that Robert Dahl meaningfully challenged this conversation. Dahl argued that, just because there may be no democratic *procedure* to form the *demos*, there are still democratic principles which shape this determination.[15] For Dahl, these core principles were equality and autonomy: all people are equal, and as such, no person is naturally entitled to subject another to their will without their

[11] *Ibid.* Goodin, *supra* note 5 at 133.
[12] A term which he defines as a legitimate form of collective identity and an ethical community with a good claim to self-determination. David Miller, *On Nationality* (Oxford: Oxford University Press, 1997) at 10-11.
[13] Miller, *ibid* and see Chapter 4: National Self-Determination.
[14] Will Kymlicka, "Solidarity in Diverse Societies: Beyond Neoliberal Multiculturalism and Welfare Chauvinism" (2015) 3:17 CMS 1 at 3 "In order to get democracy off the ground, we need to somehow combine diverging preferences about policy with converging preferences about units….This peculiar combination of diverging policy preferences and converging unit preferences is the structural presupposition of democracy, but to repeat, nothing in democratic theory entitles us to expect such a combination. So what does explain it? To date, the answer is typically nationhood. Nationhood provides a sense of belonging together and a desire to act collectively. Ideas of belonging together, collective agency and attachment to territory are part of the very meaning of shared nationhood. Where a sense of nationhood is widely diffused, people think it is right and proper that they form a single unit, and that they should act collectively, despite their diverging interests and ideologies. Nationhood, in short, generates converging preferences on units." Note that as between the two Kymlicka and Miller would differ, on what this means in terms of immigration policies, with Kymlicka defending a more liberal and open immigration policy.
[15] Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 218, 219; Goodin, *supra* note 5 at 130; Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393 at 2412.

consent.[16] If a government is going to make a decision that will subject another person to their will, they must treat that person equal to all others in that position. Thus, democratic states are justified by their commitment to the equality of all those who are subject to their rule.[17]

Using this foundation, Dahl's principle of full democratic inclusion holds that: "The *demos* must include all adult members of the association except transients and persons proved to be mentally defective", where 'adult members of the association' refers to "all adults subject to the binding collective decisions of the association."[18] In other words, democracy is a closed-loop reciprocal relationship where authors must also be subjects. Persons within the closed loop rightfully have a vote, while those outside that closed loop are properly excluded. The notion that all those subject to rule must have a voice in its creation has been called core substantive principle of democracy.[19]

Dahl's argument is especially persuasive because it relies on fairly uncontroversial principles of liberalism (equality and autonomy) and democracy (self-rule) to reach its outcome. If nothing else, democracy is a system of self-rule. So long as we can agree that people are equal and autonomous, it makes sense that voters should include all the 'selves' who will be subject to the 'rule'. This is a is fairly intuitive take that does not require we change our conception of democracy, but does require we apply it to the moment of *demos* formation. Accounts of democratic inclusion that ignore this principle (for example: membership in the nation denotes

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[16] Dahl 1989, *supra* note 5 at 84-88.
[17] See López-Guerra's summary of Dahl's democratic criterion for inclusion, *supra* note 15 at 219: "[Dahl's] case for democracy can be summarized as follows: (1) governments must give equal consideration to the good and interests of every person bound by their laws (principle of intrinsic equality); (2) unless there is compelling evidence to the contrary, every person should be considered to be the best judge of his or her own good and interests (presumption of personal autonomy); therefore (3) all adults should be assumed to be sufficiently well qualified to participate in the collective decision-making processes of the polity (strong principle of equality).Thus: "The citizen body in a democratically governed state must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves. This is Dahl's "principle of full inclusion."'
[18] Dahl 1989, *supra* note 5 at 129 and 130.
[19] Rodriguez, *supra* note 2 at 30.

the proper boundary of the political community) have an air of hypocrisy to them insofar as they assume that one group is entitled to make decisions that others must follow. That is not self-rule, that is tyranny.[20]

But while Dahl's principle has become the bedrock for discussions about democratic inclusion, it has not 'solved' the boundary problem in the sense of settling the debate. Instead, Dahl's principle has spawned a variety of interpretations as scholars have embarked on a prolonged debate as to what exactly it means to be (in Dahl's terminology) 'subject to' collectively binding decisions. Within this, two broad umbrellas of understanding have emerged: the 'all affected interests' and 'all subject to law' standards. These views are set out in more detail below.

i. All Affected Interests

One cohort of scholars in this space argue that, properly interpreted, Dahl's account requires that all persons whose interests are "affected by" collectively binding decisions ought to have a say in them.[21] There are a variety of thresholds within this heading, but its defenders share the view that, if democracy requires reciprocity, all those whose lives will be *affected by* a decision ought to have a voice in its creation. As such, the 'all affected interests' standard is primarily deployed to enfranchise individuals based on the impact they will experience as a result of government decisions.

Because many decisions (for example, foreign or environmental policies) affect individuals without regard to traditional markers of enfranchisement, this standard often serves as a precursor to challenge these markers. I am not governed by China's environmental policies,

[20] Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Basil Blackwell, 1983) at 53-62.
[21] Goodin, *supra* note 5 at 5-6; Iris M Young, *Inclusion and democracy* (Oxford: Oxford University Press, 2000); Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003) Ch 1.

and yet my interests are arguably affected by them. Per the all affected standard, I ought to have a say in that decision.

While this standard is perhaps the most democratically pure (in that it takes the most literal understanding of self-rule) the all affected interests standard encounters several practical and conceptual critiques. Some interpretations of this threshold require the creation of an ever-shifting issue-by-issue *demos*,[22] which critics argue is a practical impossibility.[23] In addition, given the impossibility of determining who is affected by a decision *ex ante* (and of determining those impacted by decisions not taken among alternatives) some critics argue this standard is either incoherent,[24] or quickly devolves into a global *demos*.[25] While defenders have responded to these criticisms, it remains the case that this standard tends to be characterized as radical, in that it possesses the most disruptive potential to the current structures of governance.[26] However, this is not necessarily the case. A novel interpretation of this standard has been presented in defence of citizenship-based voting, based on having one's "membership interests" affected by decisions.[27] This view, and its impact for non-resident citizens, is explored later in this chapter.

[22] Ian Shapiro, *The Moral Foundations of Politics* (London: Yale University Press, 2003) at 222. See also the implications of Sarah Fine's view in: Sarah Fine, "Democracy, Citizenship and the Bits In Between" (2011) 14:5 Critical Review of International Social and Political Philosophy 623 at 627.
[23] Bauböck, *supra* note 15 at 2420.
[24] See eg: Ludvig Beckman, *The Boundaries of Democracy: A Theory of Inclusion* (New York: Routledge, 2023) at 41-47.
[25] See eg: David Owen, "Transnational citizenship and the democratic state: modes of membership and voting rights" (2011) 14:5 Critical Review of International Social and Political Philosophy 641at 643-5 Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) at 22-28 [Bauböck: Democratic Inclusion]; Lopez-Guerra, *supra* note 15 at 222 (does not advocate for this view but explains it); Bauböck, *supra* note 15 at 2420 (does not advocate for this view but explains a way to account for it); Fine, *supra* note 22 at 624.
[26] Owen, *ibid* at 643-5; Bauböck: Democratic Inclusion*, ibid* at 22-28. Goodin, *supra* note 5 at 6; Lopez-Guerra, *supra* note 15 at 222 (does not advocate for this view but explains it); Bauböck: *supra* note 15 at 2420 (does not advocate for this view but explains a way to account for it); Fine, *supra* note 22 at 624.
[27] Bauböck, *supra* note 15.

ii. All Subject to Law

The second cohort of scholars in this space ground rightful democratic inclusion to all persons "subject to",[28] "responsive to",[29] "governed by"[30] or "subject to the coercive force of"[31] a government's decisions. There are a variety of cleavages under this umbrella tied to the precise language employed. All these views, however, attempt to craft a narrowed and more stable *demos* than that prescribed by the all affected standard. Under this umbrella, it is not enough to simply to have one's interests affected by a decision: the person must be subjected to, governed by, or be subject to the coercive force of the law to have a say in them.[32] A dominant theme under this grouping is to understand the *demos* by reference to law, in that you are "subject to" collectively binding decisions when you fall under the state's legal jurisdiction.[33]

The subject to law standard is more dominant within democratic theory. This can likely be attributed to the fact that it avoids several of the most glaring weaknesses associated with the all affected principle, and is more reflective of the existing Westphalian model of states and modes of governance. We live in world in which state jurisdiction is limited. To take the example from above, while I am arguably affected by China's environmental policies, I do not have to

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[28] David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State (London: Palgrave Macmillan, 2009) at 53; Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119 at 120; Beckman, *supra* note 24; Valeria Ottonelli, and Tiziana Torresi "Temporary Migration Projects and Voting Rights" (2014) 17:5 Critical Review of International Social and Political Philosophy 580 (note the Ottonelli and Torresi do not advocate for a subject to law standard, but use it as shorthand for discussing the issue).

[29] Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27 at 36.

[30] Lopez-Guerra, *supra* note 15 at 220.

[31] See eg: Abizadeh, Arash. "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders." (2008) 36:1 *Political Theory* 37; Bauböck: Democratic Inclusion, *supra* note 25 at 28-37 (Bauböck but does not advocate for this standard but explains it).

[32] While these efforts are often accepted, some scholars argue that, when pressed, distinctions between the differing thresholds tend to collapse. See eg: *supra* note 22 at 624; Lopez Guerra, *supra* note 15 at 224; Ludwig Beckman, *The Frontiers of Democracy: The Right to Vote and its Limits* (London: Palgrave MacMillan, 2009) at 77 (in which he argues that to be affected is to be bound) [Beckman: Frontiers].

[33] Beckman: Frontiers, *ibid* at 47.

follow their environmental laws, nor can the Chinese government penalize me for failing to do so. Only those who fall under China's jurisdiction can be said to be subject to its rule, in the sense that only they have to follow those rules (or face consequences for failing to do so). Those legal subjects – the people who fall under China's jurisdiction - form rightful *demos* because they are the governed.[34]

It is worth noting, however, that the subject to law standard is not immune to criticism. Among other things, it has been accused of failing to meaningfully respond to the boundary problem (who created the original law to which these people are subject?),[35] and for crafting a distinction without a difference (in that any purported difference between it and the all affected counterpart devolves in practice).[36] For example, while some scholars argue that the subjection standard crafts a demos that is coterminous with a state's physical boundaries, others have aptly noted that people are subject to a state's laws when they are seeking entry to it.[37] Indeed, the policing of state borders is a forceful exercise of state jurisdiction.

In this vein, Arash Abizadeh has argued that border control subjects foreign nationals to the coercive power of the state.[38] Thus, he argues that "border restrictions must be addressed in democratic forums in which foreigners…also have standing to participate."[39] In other words, per the subject to law standard, states do not have the right to unilaterally control their own borders.

[34] This is not necessarily to say that being affected by the decision should disentitle me from having a voice in those decisions. Bauböck, *supra* note 2 at 2420-1 for example, discusses the case for these impacts justifying a duty of consultation or referenda with affected parties when taking on such actions. The idea that being affected entitles someone to inclusion in the *demos* is challenged here.
[35] Bauböck: Democratic Inclusion, *supra* note 25 at 29-30.
[36] See eg: Fine, *supra* note 22 at 624. Lopez Guerra, *supra* note 15 at 224. Beckman: Frontiers, *supra* note 32 at 77 (in which he argues that to be affected is to be bound).
[37] Fine, *supra* note 22.
[38] Abizadeh, *supra* note 31.
[39] *Ibid* at 54.

Sara Fine has similarly argued that either existing immigrants, or that all people who may be immigrants, be given a democratic voice in that country's laws (or at least their immigration laws).[40] Related arguments can be made in relation to a country's foreign policy decisions. A person living in Iran can be said to be subject to a decision by the American government to bomb (or not) Iran. As such, per the subject to law standard they should arguably be given a democratic say in that decisions. All this to say that, while the subject to law standard is presented as providing a more stable and delineated *demos*, at the margins its boundaries can become difficult to manage.

c. Dahl's Principle and Non-Resident Citizens

The contours of Dahl's principle has spawned debate across a number of democratic frontiers.[41] For our purposes, the key question is what Dahl's principle (democratic states are justified by their commitment to the equality of all those who are subject to their rule) in either permutation means for non-resident citizens. As explored below, the dominant view is that Dahl's principle requires abandoning citizenship status as the marker for determining membership in the *demos*. Citizenship status denotes national membership - it does not determine if a person is affected by, subject to, or governed by a law. Instead, other touchstones are presented as doing a better job of approximating this relationship. There are, however, some scholars who argue that Dahl's perspective can accommodate citizenship-based voting.

To more fully understand these stances, four accounts of democratic inclusion are explored below. The first two accounts – the residency and domicile views – reject voting for non-resident citizens. While their focus lies elsewhere, by exploring their rationales it is possible

[40] *Ibid.*
[41] For an overview, see: Beckman: Frontiers*, supra* note 32. While not the focus of this thesis, Dahl's limitations related to age or being "mentally defective" are also the subject of debate. See eg: Elizabeth F Cohen, "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" (2009) 9:2 Citizenship Studies 221.

to tease out the democratic case against non-resident citizen voting. The second grouping, the citizen-stakeholder and pluralist views – support non-resident citizen voting. By exploring these accounts, we can understand the democratic perspective on enfranchisement, and how and where non-resident citizens fit within it.

C. Democratic Opposition to Non-Resident Citizen Enfranchisement

The residency and domicile views are dominant strands of thought in democratic theory. These views believe that, because state jurisdiction is primarily exercised territorially, physical presence on the territory is a key ingredient to be a legal subject. While this presence can be softened by considerations of community membership (people who are gone from the territory temporarily, for example), physical presence remains an essential component. Here, the exclusion of non-resident citizens is not the focus of the inquiry, but it is a practical offshoot. If presence on the physical territory is a key ingredient to be a legal subject, people who lack this ingredient are rightfully excluded.

While this would be enough to exclude non-resident citizens in their own right, these views also advance a second argument which is focused on delegitimizing citizenship-based voting more generally. This argument is often focused on the nationalist underpinnings of citizenship laws. Nationalist thinking can be identified by the belief that humans are collective beings whose meaningful existence is tied to bonds of affinity or membership, which often precede, but can overlap with, formal state status.[42] Membership in the nation is primarily articulated in one of two formulations: a pre-political group sharing a common (ethnic, linguistic,

[42] Walzer, *supra* note 20 at 44 ("Nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity").

cultural, historical) identity, or a group of people who become a nation by living and making decisions together.[43]

Present-day birthright citizenship laws are a modern artifact of these nationalist understandings. Around the world, citizenship status tends to be automatically allocated at birth to persons who satisfy one or a mix of descent-based (common identity) and/or territorial (living together) criteria. Per most democratic theorists, this status does not determine whether you are subject to law. In other words, you may be entitled to citizenship on the basis of possessing these nationalistic criteria, but they should not also ground your entitlement to vote. Descent-based citizenship laws are, in particular, viewed as being out-of-step with liberal democratic ideals of pluralism and tolerance.[44] Thus, the case against democratic inclusion of non-resident citizens has two parts: first, non-residents are not legal subjects; second, citizenship-based voting endorses 'old world' discriminatory forms of nationalism. The following section fleshes out this understanding.[45]

a. The Residency View

The residency view arguably offers the most intuitive take on Dahl's principle. In a world where states are territorially circumscribed and the coercive force of state jurisdiction is largely confined to territory, the people who live on that territory are clearly subject to its laws. Residents live with the benefits and burdens of governance choices on a daily basis. They pay taxes, obey traffic laws, attend schools, and drive on the roads. If they want to combat climate change with a tax on emissions, residents are the ones who pay that tax (or the increased price of

[43] See Benhabib, *supra* note 4 at 60, in which she summarizes this division in relation to Hannah Arendt's theory of nation.
[44] Duarte, *supra* note 29 at 30, see also 36-37.
[45] While some theorists conclude this is an issue-specific determination: Sarah Song, "Democracy and non-citizen Voting Rights" (2009) 13:6 Citizenship Studies 607; Fine, *supra* note 22 at 623.

goods as the cost by emitters is passed off on consumers). Non-residents can largely avoid these consequences. Even if a law purports to carry non-territorial penalties, the practical ability to carry out those penalties is very limited. For the most part, the coercive force of the state is territorially bounded. As such, residence is the more appropriate touchstone by which voting rights ought to flow.[46]

Patti Lenard provides an example of the residency view. Lenard argues that given what long-term residence entails, it ought to be the relevant factor in determining entitlement to vote.[47] While conventional theory grounding entitlement to the franchise focuses on the duties and obligations owed by *citizens* to the state, on closer inspection these factors apply equally to residents.[48] Residents are governed by the law on equal terms to (resident) citizens; they pay taxes and contribute to the economic and social fabric of the state; and the state exercises coercive authority over them.[49] All of these factors collectively demonstrate that long-term residents should be included in the *demos*.[50]

Most takes on the residency view are cushioned by a time threshold, in which only people who have spent enough time on the territory to make them members of the community are appropriately included. While one could argue that tourists are subject to the law in which they are visiting (for example, if they commit a crime while on vacation they can be criminally charged and sent to jail in that country), they are usually viewed as lacking the community

[46] Lenard, *supra* note 28 at 120; Ruth Rubio-Marin, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81:1 NYUL Rev 117 at 129.
[47] Lenard's class of long-term residents is broader than those who hold permanent resident status: Lenard, *supra* note 28 122-123.
[48] Lenard, *supra* note 28 at 120.
[49] Lenard, *supra* note 28 at 125.
[50] Lenard, *supra* note 28 at 125.

membership credentials to be included in the *demos*.[51] Lenard's approach, for example, is constrained to *long-term* residents.[52]

For the most part, advocates for the residency view are focused on solving the mirror issue to that which this thesis is focused – that is, the disenfranchisement of *non-citizen residents* (i.e. all the people who live in a country but cannot vote because they lack citizenship status).[53] This can include permanent residents, refugee claimants, asylum seekers, international students, temporary foreign workers, or irregular migrants who are living and often working in a country. The primary evil to which these theorists are focused is the wrongful exclusion of these people from the electorate.

Thus, while non-resident citizens are not their primary concern, they tend to view their democratic exclusion as the necessary corollary to their goal. For example, in pursuit of enfranchising non-citizen residents, Lenard also advocates for severing the link between voting and citizenship.[54] In support, she notes that citizenship-based voting is based on an outdated understanding of nation-states,[55] that people who are absent from the territory do not contribute "on the ground" to the "public culture,"[56] and that citizenship can be severed from voting because "more fundamental" distinctions between it and residence (the right against deportation and the right to consular services) remain intact.[57]

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[51] For an exception, see Beckman: Frontiers*, supra* note 32 at 81.
[52] See discussion of Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013) in Lenard, *supra* note 46 at 125-126. Note, however, that on Lenard's view, long-term residents would be entitled to the vote even if they don't mean the criteria of 'social membership'.
[53] See eg: Lenard, *supra* note 28.
[54] Lenard, *supra* note 28 at 125.
[55] Lenard, *supra* note 28 at 122.
[56] Lenard, *supra* note 28 at 122, FN 14.
[57] Lenard, *supra* note 28 at 129. Similar stances have echoed the view that voting may be severed from status because it lies outside citizenship's "core" – see eg: Rubio Marin, *supra* note 46 at 124.

Other residency scholars launch more direct attacks on non-resident citizen voting.[58] Claudio López-Guerra, for example, argues that Dahl's principle necessitates the exclusion of the non-resident citizens from the electorate because they are not governed.[59] In defence of his claim, Lopez-Guerra confronts several claims made in favour of expatriate enfranchisement. Taking each in turn, he argues that these claims are mistaken, irrelevant and/or inadequate to satisfy Dahl's principle.

First, insofar as constitutional and international legal documents guarantee voting for citizens, he argues this has no bearing on Dahl's principle. The right to vote is not a freestanding entitlement – it only entitles a person to participate in decision-making processes where they will be governed.[60] Constitutional provisions which link voting and citizenship are simply wrong, in that they represent a flawed understanding of what properly grounds the vote (being governed).[61] While international human rights documents guarantee everyone the right to vote in "their country,"[62] this guarantee has wrongfully been interpreted as enfranchising persons in 'their' country of citizenship, when it should denote enfranchisement in 'their' country of residence.

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[58] López-Guerra, *supra* note 15 at 220.
[59] López -Guerra, *supra* note 15 at 225. This exclusion is mandated on the basis of self-determination. Essentially, by including 'non-governed' folks in the *demos*, the governed will be forced to obey laws they would not have chosen for themselves. See Bauböck explain this: *supra* note 15 at 2418. Rubio-Marin makes similar arguments, but she does not take López-Guerra's stance that expatriates must be excluded from the electorate. Rather she takes the view that they can be enfranchised but cannot demand it as a matter of right. See: Rubio Marin, *supra* note 46 at 129.
[60] López-Guerra uses the standard of democratic inclusion as being "governed by" law, which takes to mean: "all individuals who live permanently under the laws and binding decisions of the polity" (*supra* note 15 at 222). Within the literature on democratic inclusion, there are different opinions on what it means to be "governed by law". Sometimes, however, it is used to craft a narrowed subject to law standard to, for example, deal with the democratic inclusion of immigrants at the border. While they are "subject to" the law of the state, they are arguably not "governed by". I take this as what López-Guerra means. However, others adopt a different view and see it as similar to the "all affected" standard. For more on this, see: Fine, *supra* note 22 at 626, 628-630.
[61] López-Guerra, *supra* note 15 at 227-8.
[62] López-Guerra, *supra* note 15 at 228-9.

The fact that most countries do not extend voting to residents,[63] that many non-resident citizens financially contribute to their country of citizenship,[64] that many of them left the country against their will,[65] and that they often retain the significant emotional, familial, and/or financial ties to their country of citizenship are simply irrelevant to the question of democratic inclusion.[66] None of these features demonstrate that a person is governed.

Lastly, insofar as legal rights or obligations purport extend to citizens on the basis of citizenship, such as taxation, conscription, or criminal laws with extraterritorial application, they are inadequate because they are not subject to the entire legal system.[67] Most laws cannot be enforced extraterritorially, rendering them meaningless.[68] Even if they could be enforced against non-resident citizens, this subjection is too limited to ground inclusion in the electorate. Only people who are subjected to the entire legal system are governed, and only they should have the right to elect representatives.[69]

The critiques launched against non-resident citizen enfranchisement are analyzed in detail later in this chapter. As a general matter, however, the residency view's influential status is likely tied to its intuitive appeal. People who live on a territory are clearly subject to its laws. Thus, this view lays bare the unfairness of excluding long-term residents from the *demos*. While a strict reading of the residency view has the potential to lead to absurd results (enfranchising tourists,

[63] A person's wrongful disenfranchisement in their country of residence is not made right by enfranchising them somewhere where they are not governed. López-Guerra, *supra* note 15 at 228-9. For a similar argument, see Rubio-Marin, *supra* note 46 at 130; Bauböck, *supra* note 15 at 2409-2410.
[64] Voluntary contributions do not make a person governed and the right to vote is not for sale López-Guerra, *supra* note 15 at 229-30. For a similar argument, see Rubio-Marin, *supra* note 46 at 131; Bauböck, *supra* note 15 at 2413-4.
[65] This does not impact whether someone is (presently) governed by a law López-Guerra, *supra* note 15 at 230. For a similar argument, see: Beckman: Frontiers *supra* note 32 at 76-80.
[66] Emotional attachment, family connections and property ownership are not proper foundations of the vote: López-Guerra, *supra* note 15 at 231-232.
[67] López-Guerra, *supra* note 15 at 233 such as taxation or military conscription, Bauböck, *supra* note 15 at 2418-2419; Rubio-Marin, *supra* note 46 at 133.
[68] López-Guerra, *supra* note 15 at 232-233.
[69] López-Guerra, *supra* note 15 at 222, 229-30. For a similar argument see Rubio Marin, *supra* note 46 at 131-133.

for example) the residency view also incorporates an element of non-territorial community membership into the franchise.[70] The role that community membership plays in allocating the franchise is a theme to which other accounts draw upon more heavily, but it is present here.

Despite accommodating non-territorial community membership, however, residency-based accounts may be accused of being too blunt in their understanding of legal subjection. On this account, once a country is defined territorially, it is also defined in civic terms.[71] The idea that state borders dictate the boundaries of legal subjection, while democratically tidy, may miss some important pieces of the puzzle. There are elements of community membership that are not reducible to presence on an existing territory. When residence is simply equated with community membership, the theory is subject to exploitation.

For example, Avigail Eisenberg has raised alarms over the residency view's preference for territorially-based community membership over other membership identities, in arguing that voting for residents can be weaponized to dilute national minority efforts for self-determination.[72] In essence, Eisenberg argues that resident non-citizen voters are unlikely to be aligned with national minority self-determination projects. In this light, state-level governments can encourage immigration into a sub-state territory dominated by a national minority as a way to dilute the political force of these efforts. These concerns have proven to be both well-founded and prescient, as contemporary examples document this practice.[73]

The residency view can also be accused of taking an unjustified leap in treating territorial presence as the only acceptable way a person can become or remain a community membership.

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[70] See, eg: López-Guerra, *supra* note 15 at 226; Lenard, *supra* note 46 at 122-3.
[71] Benhabib, *supra* note 4 at 45.
[72] Avigail Eisenberg, "Voting Rights for Non-citizens: Treasure or Fool's Gold?" (2015) 16 Int Migration & Integration 133.
[73] See, eg: Reuters, "Why is there unrest in New Caledonia? Everything you need to know" *The Guardian* (21 May 2024) online: < https://www.theguardian.com/world/article/2024/may/15/why-riots-new-caledonia-france-voting>.

Pursuant to it, the franchise is assumed to be a zero-sum game wherein proof that residence is a *sufficient* condition of legal subjection is also taken as proof that it is a *necessary* condition of legal subjection.[74] In other words, this view assumes that by showing long-term territorial presence leads to legal subjection, it simultaneously proves it is the only path to get there. As explored below, other accounts challenge this assumption.

Lastly, some understandings of the residency view, while conceptually rich, arguably give short shrift to real world practical constraints. For example, Lopez-Guerra's claim that constitutions have no bearing on the legitimate boundaries of a *demos* is democratically defensible. However, it is difficult to see how this stance will help a lawmaker operating within a framework in which constitutions are very relevant to this question. Lopez-Guerra and other are not attempting to create constitutional theories of *demos* formation, and so their respective choices not to engage with constitutional frameworks is not a failing. This summary dismissal can, however, render their messages unworkable for lawmakers who are operating within a much more restrictive and non-ideal framework.

b. The Domicile View

The domicile view ties the franchise to a person's true 'home'. While it bears similarity to residency, domicile leans more heavily into the idea that ongoing community membership is an essential ingredient for rightful enfranchisement. Domicile is the location where a person legally registers their home, and thus, links their future to that of the community.[75]

Melina Duarte provides a persuasive description and defence of this view. Duarte rejects allocating the vote on the basis of either citizenship or residency in favour of domicile. While domicile and residence are similar concepts, they differ in at least two respects. First, understood

[74] Owen, *supra* note 28 at 62.
[75] Duarte, *supra* note 29 at 40.

as a legal status, residency is issued by a state (for example: permanent resident status, temporary resident status),[76] whereas domicile flows from an individual's community connections and their choice to register in that jurisdiction.[77]

Second, residency is objective and reducible to physical presence. It includes people who live in a physical location, regardless of their commitment to that place or its future. Domicile is only be available to people who have a link to the physical territory and have linked their future to the community. Thus, domicile can be a exacting standard than residence in the sense that physical presence on the territory is not enough. On the other hand, domicile can also be more flexible than residence in that it supports the continued enfranchisement of people who temporarily live off the territory, but remain community members. This is based on the view that the person will ultimately return to live in their domicile and be subject to those laws in the future.[78]

Like the residency view, the domicile view is not focused on non-resident citizens. As a general matter, however, Duarte is very skeptical of citizenship-based voting. For her, citizenship status a marker of belonging to a national community (defined as expressing common history, values, culture or language).[79] This renders it incompatible, from a liberal democratic (i.e. respecting of pluralism and diversity) standpoint, as being the exclusive basis for allocating membership in the political community.[80] While the domicile account declines to comment on non-resident citizen voting specifically,[81] we can extrapolate that Duarte would not approve of citizens voting in a country where they are not domiciled.

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[76] *Ibid.*
[77] *Ibid.*
[78] Duarte, *supra* note 29 at 40.
[79] Duarte, *supra* note 29 at 29-30, 33.
[80] Duarte, *supra* note 29 at 33-8.
[81] Duarte, *supra* note 29 at 35.

The allure of the domicile account lies in incorporation of a temporal element into the discussion (i.e. linking one's future to the community), and for leaning into the idea of community membership. You may not be living on a country now, but if it is your home, you will be subject to those laws in the future. At its core, the domicile view tries to grapple with the fact that territorial presence and community membership have to work together to ground the vote, and that rightful grounding of the franchise can't be tied down to objective criteria alone.

While there is much to commend in the domicile account, the ill-defined contours of domicile make it difficult to implement in practice. For all their faults, citizenship and (to a somewhat lesser extent) residency are clear cut and easily determined. Domicile lacks that clarity. In this respect, while Duarte asserts that domicile is one's legally registered permanent home,[82] at present there is no legal register of one's domicile in many countries (much less internationally). If one were to exist, it is not clear on what basis or parameters it would be understood as between individuals and states (and as between states).[83] In essence, implementing this view would require abandoning two markers of membership (citizenship and residence) that have considerable administrative clarity in favor of one that does not. As such, while this view is

[82] Duarte, *supra* note 29 at 40, 41, 42.

[83] For example, on what basis may a person be entitled to register their domicile in country X versus country Y? What is preventing a person from registering their domicile in several countries? At least within common law jurisdictions - the jurisprudence on domicile does not provide any clear answers to these questions. Within common law jurisdictions, domicile is an expressly subjective (and notoriously vague) individualized assessment based on objective and subjective criteria that is saddled with much of the baggage lobbed against citizenship (see, eg: at least within common law traditions, a "legitimate" child is assigned their father's domicile at their date of birth, and an "illegitimate" child takes their mother's domicile at their date of birth.) A person's domicile is based on evaluating a non-exhaustive mix of objective (where do you own property, pay taxes, work, receive mail?) and subjective (where do believe your home is?) factors. The subjective element here bears emphasizing, because it is what distinguishes domicile from the related concepts of habitual or ordinary residence. *Udny v Udny* (1869), LR 1 Sc. 441 (Scotland HL): "Domicil [sic] of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place [objective criteria], with an intention of continuing to reside there for an unlimited time [subjective criteria]." See also: *Olney v Rainville* 2009 BCCA 380 at para 33; *Montano v Sanchez* [1964] SCR 317. While it may be that domicile possesses a more concrete understanding or infrastructure in civil law (or other) jurisdictions, this underscores the fact that, as between states, identifying a person's domicile is neither self-evident nor objectively determinable.

onto something in grappling with the messy relationship between territory and community membership, it suffers from practical limitations.[84]

c. The Democratic Case Against Non-Resident Citizen Voting

The residence and domicile views present influential conceptions of membership in the *demos* based on Dahl's account. Under both, legal subjection is grounded in a territorial understanding of legal subjection – in which being subject to law is equated with being subject to the state's coercive jurisdiction. However, both views temper this foundation by reference to community membership. For the residency view, the community membership feature emerges in enfranchising temporary absentees, while disenfranchising those who are (very) temporarily on the territory. The domicile view takes a more open-ended approach to community membership. In this respect, domicile provides a more forgiving stance to territorial absence for persons who have legally registered their home in a jurisdiction but are not living inside of it.

Their respective stances towards Dahl's account provides a solid understanding the headwinds that non-resident citizen voting faces in democratic theory. On these theories, the franchise is grounded in two ingredients: community membership and physical presence on the territory. Possessing one ingredient does not make up for lacking the other. An expatriate may be a member of the community, as expressed by indices such as contribution-based claims, property ownership, family connections, and feelings of personal connection. None of these features makes up for their lack of territorial presence. They may also be granted the constitutional right to vote. Within the confines of democratic theory, however, this fact is irrelevant. Non-resident citizens simply lack the necessary ingredient to meet the threshold for inclusion.

[84] For discussion of the role of "administrative rationality" as an element citizenship as an international filing system, see: See: Elizabeth Cohen, *Semi Citizenship in Democratic Polites* (Cambridge: Cambridge University Press, 2009) at 116-123.

Separately, both accounts discredit citizenship-based voting more broadly. Citizenship laws reflect nationalist (pre-political historical, cultural, linguistic or ethnic) claims to belonging.[85] Allocating membership in the *demos* based on one's membership in the nation not only amounts to endorsing those ideals,[86] it is antithetical to Dahl's account because it allows the populous to decide itself. Contra any suggestion that voting for non-resident citizens signals a move towards a globalized cosmopolitan reality, according to these views, citizenship-based voting harkens to a time better left in the past.[87] The more modern approach to globalization requires decoupling citizenship from voting. While this may constitute a shock to the political system, because this decoupling leaves the "core" (right of return and diplomatic protection) of citizenship intact, this change is not a threat to citizenship status as such.[88]

Thus the democratic case against non-resident citizens has two components, one positive and one negative. The negative case is grounded in the view that, as a group, they lack the essential ingredient for inclusion. If territorial presence is a necessary feature to inclusion, non-residents simply don't have it. The positive case asserts that citizenship-based voting is itself something bad. Given the content of citizenship laws, voting for citizens endorses outdated ideas that equate national membership with democratic membership.

Collectively, these dual considerations call for the disenfranchisement of non-resident citizens. But while these democratic stances are defensible, they can hit a wall in the constitutional courtroom. A judge, politician, or other lawmaker looking for help in solving constitutional questions about non-resident citizen voting will have a difficult time working with stances that do not prioritize citizenship-based voting. By rejecting citizenship-based voting,

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[85] Bauböck, *supra* note 15 at 2393.
[86] Duarte, *supra* note 29 at 29-30; Rubio-Marin, *supra* note 46 at 129; Lenard, *supra* note 46 at 122.
[87] Bauböck, *supra* note 15 at 2393.
[88] Rubio-Marin, *supra* note 46 at 124; Lenard *supra* note 46 at 129.

these theories offer solutions that are not an option for them. To help bridge this gap, the next section looks at democratic theories that try to develop democratic framework that is accepting of citizenship as a grounds for allocating the franchise.

D. Democratic Support For Non-Resident Citizen Enfranchisement

The last section demonstrated that the case against non-resident voting for citizens is grounded in a territorial understanding of Dahl's principle, and the desire to leave old-world (especially descent-based) nationalism in the past. The next section sets out two democratic accounts of inclusion that accept non-resident citizen voting. As explored below, both accounts attempt to work citizenship status into Dahl's principle. The outputs are democratic accounts of voting which enfranchise (some or all) non-resident citizens. By exploring these accounts, we can set out the conceptual playing field upon which the democratic case for non-resident citizen inclusion may be based.

a. The Citizen-Stakeholder View

The stakeholder citizen approach ties the franchise to the "stakeholding" members of a self-governing polity. Rainer Bauböck is the champion of the stakeholder citizen thesis.[89] He offers a novel take on the "all affected interests" standard,[90] in which rightful enfranchisement

[89] Bauböck, *supra* note 15 at 2422.

[90] It is debatable as to whether the stakeholder citizen view appropriately falls under Dahl's principle of democratic inclusion, or whether it is better considered to be a separate theory altogether. I understand his view as being a novel interpretation of the "all affected interests" standard based on statements made Bauböck and those who engage with his work. See egg, Bauböck *supra* note 15 at 2420-1: "There are two answers to the question of who should have a right to participate in a collectively binding decision: all those who will be bound by the decision or all those whose interests will be affected by it…." and later "[I]f [expatriates] claim to be specifically affected by certain decisions taken in their home country, then this is not a sufficient reason for including them permanently in the demos. … We must therefore define the expatriates' interests in a specific way - not as interests in particular decisions but as an interest in citizenship itself. In other words, instead of regarding them as individuals outside the jurisdiction whose interests are affected, their interests must be seen to place them inside the demos that is represented in all political decisions taken in their country of origin"; and . For a similar characterization, see: Owen, *supra* note 28 at 53. But see: Bauböck: Democratic Inclusion, *supra* note 25 at 20. Here, I choose the "all affected" interpretation because the article in which those statements were made were focused specifically on non-resident citizen enfranchisement, whereas the other statements in Bauböck, Democratic Inclusion, *supra* note 25 were directed at locating rules for citizenship.

flows by virtue of having one's *membership interest* affected by collectively binding decisions - not, as usually asserted, on having varying (financial, personal, security or other) interests affected by a specific government decision.[91] Properly conceived, citizenship status should reflect this membership interest. However, because current citizenship laws do not reflect this relationship, only citizens who satisfy the stakeholder threshold at the time of voting are rightfully included in the *demos*. The short-term practical output of this theory is that some, but not all, non-resident citizens are rightfully enfranchised.

As a starting point, Bauböck criticizes the mainstream approaches to Dahl's principle.[92] Traditional takes on the 'all affected interest' fail to explain why having an interest in particular decisions translates to a right to full-time membership within a political community.[93] Just because you will be impacted by a particular decision does not mean that you should be permanently included in a *demos*. Likewise, and contrary to mainstream 'subject to law' approaches, membership in a *demos* cannot be measured by looking at whether you will be subjected to particular laws. There is always a wide disparity in this subjection both across and within territories. *Demos* inclusion does not simply flow from the fact or possibility of being subject to a law.[94] It speaks to a relationship among people that will last across their lifetime and through time, not based on the degree to which they are subject to particular decisions.

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[91] Bauböck, *supra* note 15 at 2417.
[92] Bauböck: Democratic Inclusion, *supra* note 25 at 29-38.
[93] Bauböck, *supra* note 15 at 2419-20.
[94] Bauböck would not necessarily disagree with Abizadeh that people are subject to the coercive power of the state when seeking entry to it. He would, however, disagree with the conclusion that this entitles foreigners to vote. For Bauböck, subjection to coercive force does not ground the vote. This is not to say that Bauböck believes that foreigners have no democratic rights. He argues that all those whose rights are actually affected by a decision have a democratic claim to representation of their interests in the decision making process (i.e. consultation or negotiation); and that all those who are subject to the jurisdiction of a government have a claim to equal protection of their rights and freedoms by that government and a right to contest its decisions (i.e. an ability to legally challenge the decision to exclude them from the territory). The democratic rights that flow from having an interest affected or subjection to a decision do not, however, include voting. For Bauböck, the vote is specifically tied to being a stakeholder in the community - a threshold which foreigners would not be able to satisfy. For more on Bauböck's approach and engagement with Abizadeh, see: Bauböck: Democratic Inclusion, *supra* note 25 at 35, 49.

More fundamentally, he notes that models which base rightful democratic inclusion on perceived outcomes of a decision (will you be subject to this decision?) presuppose a decision maker already in place. Therefore, these stances never actually settle the boundary problem, because they never locate the initial decision-maker.[95] In other words, Bauböck flags a chicken and egg problem. When asking "What came first, the state or the people?" most interpretations of Dahl's principle point to the state, but doing so both undermines the claim of solving the boundary problem, and causes a host of other problems.[96] Per Bauböck, the people must come first - they cannot be derived from a decision of the state. The problem, however, is that liberal democracy doesn't have an adequate conception of this original people. Thus nationhood – the idea of a people sharing an identity, language, culture and/or community - has filled this space. This means that we must accept one of two uncomfortable options: we either accept that the state comes first and a people are derivative of it, or that the original people are a nation who define their own terms of exclusion and inclusion. Per Bauböck, neither of these options are acceptable.

To solve this problem, Bauböck argues that rightful claims to democratic inclusion lie with a people whose individual autonomy and wellbeing are tied to a collective interest in the continued democratic flourishing of the community.[97] In other words, he overlays a liberal

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for example, that this subjection necessitates a process of negotiation or consultation, or even (in some cases) referenda in neighboring states. For more: see Bauböck, *supra* note 15 at 2420; Bauböck: Democratic Inclusion, *supra* note 25 at

[95] Bauböck: Democratic Inclusion, *supra* note 25 at 29-30 in which he explains how this focus creates a bias in favour of the *status quo* and unjust borders. Under these approaches, for example, a colonized people may have a claim to inclusion in their colonizer's *demos*, but not a claim to self-determination. Once the boundary has been set, the most that can be hoped for is inclusion. presence of a pre-existing government ("Will I be subject to this decision"? presupposes there is already a decision maker in place).

[96] *Ibid.*

[97] Bauböck: Democratic Inclusion, *supra* note 25 at 41. Bauböck, *supra* note 15 at 2422: "Living under a government that respects the rule of law and provides citizens with a range of liberties, rights, and benefits is instrumentally valuable for everybody. Democracy is the form of government that is most likely to produce these results. Yet democracy is not merely government for the people, but also government by the people. Self-government is what makes membership in a democracy intrinsically valuable and provides democratic government with a legitimacy that is superior to even the most benevolent form of nondemocratic government. In this view, the rights of political participation form the core of

democratic framework on top of a pre-existing people. Whatever other ethnic, civic, linguistic, cultural or territorial characteristic 'the people' may (or may not) have had common, they also share a stake in the democratic flourishing of the polity.[98] That shared stake emanates from the fact that their "individual circumstances of life link their future well-being to the flourishing of a particular polity".[99]

That shared stake forges a group of individuals as a democratic people, and it is the pertinent characteristic to determine the rightful boundary of democratic inclusion.[100] Citizenship status - properly conceived as a status of full and equal membership in a self-governing political community – should reflect this claim.[101] Political participation rightfully forms the core of this conception of citizenship.[102]

The distinction between 'citizens' and 'stakeholding citizens' needs unpacking here. Within his broader theories, Bauböck advocates for citizenship laws to reflect his stakeholding threshold.[103] He would like to see citizenship status bestowed only on people whose individual autonomy and well-being depends on the continued flourishing of the country that bestows it.[104] This wouldn't result in abolishing the traditional mechanisms for allocating citizenship (territory and parentage), but it would impose democratic guardrails on the practice.[105] For example, a

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democratic citizenship. The notion of stakeholding expresses, first, the idea that citizens have not merely fundamental interests in the outcomes of the political process, but a claim to be represented as participants in that process. Second, stakeholding serves as a criterion for assessing claims to membership and voting rights. Individuals whose circumstances of life link their future well-being to the flourishing of a particular polity should be recognized as stakeholders in that polity with a claim to participate in collective decision- making processes that shape the shared future of this political community."

[98] Bauböck: Democratic Inclusion, *supra* note 25 at 43.

[99] Bauböck, *supra* note 15 at 2422.

[100] Bauböck: Democratic Inclusion, *supra* note 25 at 42-43. Bauböck, *supra* note 15 at 2422.

[101] Rainer Bauböck, "The Rights and Duties of External Citizenship" (2009) 13:5 *Citizenship Studies* 475 at 478-80 [Bauböck: External Citizenship].

[102] Bauböck: Democratic Inclusion, *supra* note 25 at 41; Bauböck, *supra* note 15 at 2422.

[103] Bauböck: External Citizenship, *supra* note 101.

[104] Bauböck: Democratic Inclusion, *supra* note 25 at 42.

[105] Bauböck: Democratic Inclusion, *supra* note 25 at 64-75.

multi-generational descent-based citizen's life and wellbeing would not, on its own, meet the stakeholder threshold. Therefore, they should not receive citizenship under his account.[106] In other words, the stakeholding threshold is a "normative yardstick" Bauböck uses to democratize the nationalist foundations of citizenship laws.[107] The output of his analysis is to temper the excesses of descent and territorial birthright citizenship laws, and to expand access to naturalization.[108]

In this perfect world, by using the stakeholding threshold at the point of bestowing citizenship, the normative gap between citizenship and voting is significantly narrowed. For the most part, all citizens (resident or not) should be eligible to vote because citizenship status is only allocated to genuine stakeholders. However, two realities muddy this water. First, current citizenship laws do not use this standard. Many people hold citizenship in countries for which they are not stakeholders. As such, we can't rely on citizenship status alone to determine access to the franchise (at least in the short term).[109] Second, a person's status as a stakeholder can change over time. While citizenship status can be issued to stakeholders, this status may change over the course of their life.

To meet these dual concerns, Bauböck proposes that his stakeholder threshold also be deployed at the time of voting. While resident citizens are automatically stakeholders because the act of living together ("circumstances of life") render them a "community of fate", the same cannot be said of non-residents.[110] A non-resident citizen who was studying abroad would likely satisfy the stakeholding threshold. Notwithstanding their physical absence from the territory,

[106] Bauböck, *supra* note 15 at 2426.
[107] Bauböck, *supra* note 15 at 2422.
[108] Bauböck: Democratic Inclusion, *supra* note 25 at 64-75. Bauböck, *supra* note 15 at 2421 (fn 81), 2426.
[109] Bauböck, *supra* note 15 at 2421-2422.
[110] Bauböck, *supra* note 15 at 2417-2419, 2422.

their life is meaningfully tied to their state of citizenship and they should be able to vote. On the other hand, a second or third generation descent-based citizen would not meet this threshold.[111] This person's life is likely not meaningfully tied to their state of citizenship, and they should not vote. First-generation expatriates straddle this dividing line. At this point, Bauböck argues their enfranchisement is "permissive but not required".[112] He allocates a "broad freedom" to democratic governments to impose conditions (such as previous residence on territory, maximum time living abroad, stated intention to return etc) to delineate stakeholding from non-stakeholding citizens in this group.[113]

There are several merits of the citizen stakeholder approach. Here, I focus on three. First, it provides a thicker account of the relationship between voting and popular sovereignty as an expression of a self-determining people. The stakeholder view ties the franchise to the 'time zero' of *demos* formation, rather than relying on prospective impacts to measure inclusion. In so doing, it addresses many vexing challenges to the boundary problem, such as historical contingency of political boundaries, minority claims to secession, and foreign occupation.[114]

Second, the language of stakeholding inserts a measure of objectivity to the largely unbounded territory of citizenship laws. Countries are largely unbridled in terms of their citizenship laws – this choice goes to the heart of state sovereignty.[115] In order to attach democratic rights to this bestowal, however, the stakeholder theory demands that citizenship laws must reflect a genuine relationship between the citizen and the state. As such, the stakeholder threshold offers a path to police efforts to manipulate the electorate. Citizens

[111] Bauböck, *supra* note 15 at 2426.
[112] Bauböck, *supra* note 15 at 2426.
[113] Bauböck, *supra* note 15 at 2427.
[114] Bauböck: Democratic Inclusion, *supra* note 25 at 30, 37-45.
[115] League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality*, 20 AJIL 21, 23 (Special Supp. 1926). For history and a discussion on possible inroads, see Peter J Spiro, "A New International Law of Citizenship" (2011) 105:4 American J of International Law 694. See also: Benhabib, *supra* note 4 at 2.

rightfully hold the vote, but only insofar as citizenship laws reflect a real relationship between citizen and state. In some ways, the stakeholding language bears similarity to the domicile threshold outlined above (insofar as both try to locate the place to which a person is most meaningfully connected).[116] Unlike domicile, however, by tying this determination to citizenship status, it overcomes many of the workability weaknesses which tie up that account.

Third, it offers a path to maintain the link between citizenship and voting while fixing its democratic shortcomings. In essence, the stakeholding account argues that we should not throw the proverbial baby out with the bathwater. If the problem with citizenship-based voting lies in the nationalist content of citizenship laws, we can course correct that content rather than rejecting the system entirely. By measuring the content of citizenship laws against the stakeholding threshold, this theory simultaneously separates citizenship from nationalist foundations, and replaces it with a Dahlian reciprocal relationship. Claims to political inclusion do not flow from ethnic or cultural membership, but from a citizen's ongoing shared interest in the democratic flourishing of the association to which they are members.[117]

There are, however, at least two critiques that can be launched against this view. First, it does not directly address the claims to inclusion by resident non-citizens. Under this view, voting remains the exclusive purvey of citizenship. While many resident non-citizens are arguably "stakeholders", because they are not citizens, they have no claim to inclusion here. To maintain the exclusive link between voting and the self-governing people (citizens), the plight of residents is handled tangentially – i.e. by changing the rules for citizenship to extend to all stakeholders.

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[116] Bauböck: Democratic Inclusion, *supra* note 25 at 37-41, referring to *Liechtenstein v Guatemala (Nottebohm),* [1955] ICJ Rep 4, 6 April 1955 (*Nottebohm*).

[117] In other words: "[W]e derive the collective identity and cohesion of a demos from its members' shared fundamental interest in citizenship. These interests are genuinely political ones and emerge because individuals happen to be permanently dependent on, and jointly subjected to, established institutions of government that they can accept as legitimate if they are adequately represented in these institutions": Bauböck: External Citizenship, *supra* note 101 at 480.

This would presumably include some residents who choose to obtain citizenship under these stakeholding rules.

The issues that flow from mandating naturalized citizenship to vote have been explored by other theorists and are not central to my argument.[118] For my purposes, the broader concern is that it is difficult to reconcile Dahl's principle with a theory that does not directly address the claims of residents who are clearly directly affected by (or subject to) the laws, and yet they cannot vote. While Bauböck's response is that the vote only belongs to those whose "membership interests" are engaged, this begs the question of why only citizens get to claim this title.

Secondly, with regards to the grey zone of first-generation descendants, it proposes a blunt and unfettered policy response. In essence, it says that stakeholder citizens should be able to vote because they have tied their individual fate to the fate of the community, but that governments can decide what that means. There is a significant conceptual disconnect in letting governments deploy blunt objective criteria (a maximum time abroad, for example) to answer what is essentially a personal and subjective status (is your fate connected to that of the community?). This undermines the normative punch of the stakeholder thesis, and the instrumental force of the stakeholding tool.[119] Governments can impose whatever test they want to shape and reshape the *demos* in accordance with their own interests. In short, the stakeholder view provides a compelling framework for exploring the relationship between citizenship and voting per the terms of Dahl's principle. Arguably, however, it ignores other rightful claimants, and undermines its own force by letting current governments define stakeholding.

[118] See eg: Duarte, *supra* note 29 at 33-36.
[119] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 658-659.

b. Pluralist View

Lastly, the pluralist view argues that citizens and residents are both subject to the authority of the state, and as such, both are proper members of the *demos*. I have dubbed this the 'pluralist' account, because it argues that there are multiple coexisting ways to experience legal subjection. David Owen has pioneered this account.

As a starting point, Owen accepts that people who live on a territory are subject to its laws, and on that basis, they ought to be entitled to full political inclusion.[120] In other words, he accepts the core of the residency view. From there, however, these accounts diverge. Unlike the residency view, Owen argues that while residency is one basis of subjection, it not the only one.[121]

Specifically, Owen argues that governments also subject citizens to their authority based on their status *qua* citizens. Decisions specifying the rights and obligations of citizens (such as nationality laws and voting rights) and those which address the fundamental character of the civil association (such as those the rights and duties associated with citizenship) directly bind citizens and engages their status as a citizen.[122] When, for example, a government holds a referendum on whether non-resident citizens should vote, or whether the country should join the European Union, all citizens are clearly subject to these decision.[123] All citizens, irrespective of their residence, rightfully have a voice in those decisions.[124] Note that in both of these examples, Owen ties these decisions to referenda.[125]

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[120] Owen, *supra* note 28 at 58-59, 69.
[121] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 646.
[122] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 659.
[123] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 646.
[124] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 659.
[125] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 646; Owen, *supra* note 28 at 62-63, 70; David Owen, "Populous, Demos and Self Rule" in Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) 183 at 192, 201-2 in discussing the 'constitutional demos' on being reserved for citizens. [Owen: Democratic Inclusion].

At other points, however, he focuses on non-resident citizen inclusion in all national elections. This argument draws on the fact that a government is engaging a citizen's interest as a citizen any time it decides whether non-resident citizens will receive a benefit or owe a duty associated with citizenship (one example he gives is the United Kingdom's decision on whether to extend a government pension that is designated for citizens to non-residents).[126] Non-resident citizens are also subject to the authority of the state when the state harnesses the international legal framework, relationships or agencies, to reach their citizens wherever they live.[127] Indeed, because citizens are members of a political association, any time the fundamental nature of that association is at issue, citizens are subject to the outcome.[128]

Admittedly, the legal subjection that citizens experience *qua* citizen occurs less frequently than territorial subjection. These types of decisions may only come up a handful of times over a government mandate, or a citizen's lifetime. However, Dahl's principle does not distinguish between *how much* you are subject to collectively binding decisions at any given moment, but rather, the fact of being subject.[129] Here, citizenship status is likened to being signatory to a contract – all the clauses of the contract apply to you as a signatory, but some may only be activated or triggered when certain events occur.[130] Regardless of which clauses apply to you at any given moment, citizens remain subject to the contract.

But while Owen argues that all non-resident citizens are subject to the law of state, he also advocates for placing boundaries upon the conferral of citizenship status. For Owen, citizenship status should be bestowed or retained by reference to one of a social membership

[126] Owen: Democratic Inclusion, *supra* note 125 at 646; Owen, *supra* note 28 at 62.
[127] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 642-3.
[128] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 649, 659; Owen, *supra* note 28 at 62-64.
[129] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 656; Owen, *supra* note 28 at 64.
[130] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 647.

principle,[131] or Bauböck's stakeholding threshold.[132] This boundary justifies an expatriate's rightful retention of citizenship (and the voting that flows from that) only insofar as this threshold exists. Owen ties this boundary to first-generation non-resident citizens.[133] With this first-generation qualifier in place, he also advocates for all non-resident citizens to have the right to vote in all national elections.[134]

The pluralist account offers an interesting perspective on what subjection means, and highlights the fact that not all experiences of subjection that are territorial. Laws on consular services, the right of return, citizenship status, taxation, repatriation, and external voting all apply to citizens because they are citizens – wherever their reside or are domiciled. These laws are non-territorial exercises of state authority over its subjects. In other words, it shows how the act of bestowing status creates a Dahlian relationship of subjection.

Relatedly, this account also challenges us to explore broader understandings of legal subjection and political authority. Most of the views explored in this chapter equate legal subjection with the coercive power of the state, and draw a direct link between this and territorial borders. While the pluralist account accepts this understanding, it also invites a wider

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[131] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 647-8: [In discussing how each of the social membership principle and stakeholder principles navigate problems with legal subjection] In the case of the stakeholder principle, this is done directly by specifying the idea of stakeholding in terms of a relationship between the autonomy and/or well-being of an individual and the future of the polity. In the case of the social membership principle, with which I begin, it is done indirectly through an appeal to the salience of social membership."

And later, in explaining the social membership principle: "[P]eople have a moral right to be citizens of any society of which they are members, in which this membership is measured by social connections and attachments, as well as being subject to the political authority of the state: The basis of this claim is twofold. First, the general social fact that living in a society makes one a member of a society since as one forges connections and attachments, one's interests become interlinked with those of other members of the … Second, in living in given society, one is subject to the political authority of the state and, consequently, on democratic grounds, should have access to full political rights within the political com- munity of that state..." [citations omitted]

[132] Owen: Democratic Inclusion, *supra* note 125 at 183: "I accept Bauböck's argument that the all-citizenship stakeholders (ACS) principle is the best available principle for determining the composition of the citizenry but, in a particular and specific sense, reject the claim that it thereby also demarcates the demos."

[133] Owen, *supra* note 28 at 64-5, 70.

[134] Owen, *supra* note 28 at 69, 70.

conversation about law and power in two respects. First, it argues the state's coercive power can extend beyond territory via leveraging the political authority of the state on the international plane.[135] While a state cannot exercise coercive jurisdiction directly over its non-resident citizens, it can harness the international sphere to accomplish this task indirectly.

Second, it challenges the assumption that subjection is simply equated with the coercive power of law. Being subject to the 'political authority of the state' casts a much wider net of subjection (as one example, Owen cites the United Kingdom's decision to exclude non-resident citizens from pension benefits).[136] Cast in this light, the state exercises its political authority over non-resident citizens every time it makes a decision as to the scope of its laws and policies. If the government could have extended a right or privilege to non-resident citizens but chose not to, that is an exercise of subjection.

Lastly it highlights a conceptual problem in Bauböck's stakeholder thesis. Recall that Bauböck advocates for all 'stakeholding' citizens to vote, in which the line dividing stakeholding from non-stakeholding citizens can be drawn by elected lawmakers (a 5-year maximum time abroad, for example). Owen challenges the defensibility of this dividing line. If any existing voter-base, however contingently created, can determine who gets to vote, we are left with an arbitrary *demos*.[137] To avoid this arbitrariness, Owen argues that whenever decisions about the nature of the association or the status of citizenship is at stake, all citizens must be included.[138]

There are, however, at least three vulnerabilities of the pluralist account. First, it may be accused of stretching the idea of legal subjection beyond any reasonable interpretation. To accept

[135] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 642.
[136] Owen, *supra* note 28 at 62; Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 646.
[137] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 658-9; Owen: Democratic Inclusion, *supra* note 125 at 193.
[138] *Ibid.*

this view is to accept that a person is subject to laws that they may never encounter or have to follow (indeed, it can extend to policies that were never adopted). On this point, the argument that non-resident citizens are subjected to the political authority of the state when policy decisions are made that exclude them arguably casts a net much wider than citizens. Governments choose to include (or exclude) people from benefits, policies and other exercises of authority on grounds other than citizenship. They can choose to send foreign aid to country A versus country B, for example. If rightful enfranchisement is tied to anyone who is included or excluded by a government policy decision, there is no reason why this has to be limited to citizenship.

Second, while it attempts to craft some distinctions about which non-resident citizens should be able to vote in referenda (all of them) and national elections (first generation) this distinction doesn't translate in practice. For example, he says that all non-resident citizens should be able to vote on referenda about nationality and expatriate voting rights because they engage their status as citizens.[139] At other points, he makes a narrowed claim that first-generation non-resident citizens should be able to vote in national elections, because they are the only ones who rightfully retain citizenship.[140] The problem with this reasoning is that decisions about expatriate voting and nationality are not usually put to a referenda.[141] As Chapter 3 amply demonstrates, decisions about citizenship and voting are usually passed in ordinary legislation. In other words, decisions that engage one's status *qua* citizen are made all the time in the regular course of everyday lawmaking. We can't neatly divide the *demos* based on whether the decision engages one's status as a citizen.

[139] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 646; Owen, *supra* note 28 at 62, 70.
[140] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 647.
[141] Owen: Democratic Inclusion, *supra* note 125 at 190-193.

This leads us to the last problem, which focuses on the interaction of his views on (1) *why* non-resident citizens should be able to vote; and (2) *who* should hold citizenship status. On the first point, Owen grounds the rightful enfranchisement of non-resident citizens in a legal subjection argument. He argues that non-resident citizens should have the right to vote because they become subject to the political authority of the state simply by virtue of holding citizenship status (the subjection argument). The second point constrains the excesses of this argument. There, he argues that only people with social membership to the community should be entitled to hold citizenship status (the citizenship argument).[142]

Notice, however, how the subjection argument does not depend on the citizenship argument. If non-resident citizens demand the right to vote in a country because they subject are to the political authority of the state *qua* citizens, it is no answer to say they shouldn't have citizenship in the first place. Regardless of the grounds upon which their citizenship was issued, that person holds citizenship status. By virtue of that fact, Owen's theory would say that they are subject to the political authority of the state, and with that, entitled to vote.

This discrepancy is easiest to conceptualize in thinking about a country that does not follow Owen's citizenship argument. Imagine, for example, Country A has citizenship laws which bestow descent-based citizenship status on multiple generations of persons who have never lived on the territory. These people do not meet Owen's citizenship argument. Despite this, the subjection argument (citizenship status creates a relationship of subjection) still stands. The logic that a citizen is a subject because they are signatory to the constitutional contract doesn't depend on the on content of citizenship laws, only on the fact that they hold citizenship status.

[142] Owen: Democratic Inclusion, *supra* note 125 at 183; Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 647-8. See excerpts from relevant quotations at footnotes 131 and 132.

To be clear, Owen would likely not support severing his citizenship argument from the subjection argument. However, the fact remains that his subjection argument stands on its own feet. Indeed, as explored in Chapter 3, this type of argument is advanced by courts choose to justify the inclusion of non-resident citizens in the electorate, without regard to the content of their citizenship laws. As I will argue in Chapters 3 and 4, this subjection argument is problematic because it creates significant space to politically manipulate the electorate via citizenship laws.

c. The Democratic Case For Non-Resident Citizen Enfranchisement

This section has explained two foundations upon which we can democratically defend the inclusion of non-resident citizens in the *demos*. The stakeholder view argues that citizens are rightfully enfranchised so long as citizenship status reflects a genuine link between individual wellbeing and the democratic flourishing of a self-governing polity. This standard ought to be embedded into citizenship laws, but in the meantime, can also be used as a standard to determine a citizen's rightful enfranchisement at the time of voting. This theory would enfranchise some but not all, non-resident citizens.

Separately, the pluralist view argues that legal subjection can extend beyond a country's borders to reach citizens based on their status as members of the association. To accept this line of reasoning is to accept that all non-resident citizens should be included *demos*, and that rightful enfranchisement should be policed when issuing citizenship status.

There are areas of agreement between these accounts. For example, both accounts premise their defence of citizenship-based voting on some constraint about the content, bestowal and/or retention of citizenship status. In other words, in order to democratically defend citizenship-based enfranchisement, both accounts agree that there should be guardrails on

citizenship laws. In terms of content, both accounts are closely aligned: Bauböck advocates for his stakeholder principle, while Owen has defended that principle as well as one based on social membership in the community.[143] This is important because, at present, the bestowal of citizenship status by countries is largely unconstrained. By advocating for constraints on citizenship status, both accounts acknowledge that a defence of citizenship-based voting requires some mechanism to correct for the unwieldiness of citizenship laws themselves.

These accounts differ, however, in important respects.[144] For my purposes, the most important difference relates to what comes after people hold citizenship status. The stakeholder account says that it is possible to subdivide the citizenry into voters and non-voters by imposing a stakeholder threshold at the time of voting. This does two things: first, it reflects the view that a person's stakeholding status can change over time (if, for example, they move away). Second, it gives us path forward to handle non-resident voting in the event that citizenship laws are bestowed without regard to the stakeholding threshold. In other words, Bauböck's account gives us a mechanism for controlling non-resident citizen voting even if citizenship laws do not reflect his stakeholding content.

The pluralist approach takes a different view. Pursuant to it, membership in the *demos* is rightfully policed at the point of citizenship laws – in which citizenship status should only be given or retained by people who are either stakeholders or social members of the community. Once bestowed, however, there is no meaningful backstop to control access to the vote. This means that, in the event states do not follow his prescription for citizenship laws, there isn't a

[143] It is also interesting that each of these standards (stakeholding and social membership) bears some similarity to the domicile standard outlined above. In all cases, the grounding of the franchise is linked to some form of community membership.

[144] For example, Bauböck draws on an all-affected argument, to argue that voting comes from having one's membership interest in the flourishing of the polity engaged, while Owen's is linked to the subjection which arises by virtue of being a citizen.

clear path to restrict their inclusion because they are still, per his contractual theory, subject to the political authority of the state.

Earlier in this chapter, we were confronted with two formidable challenges to non-resident citizen enfranchisement. First, there is the claim that citizen-based enfranchisement endorses pre-political nationalist 'old-world' (ethnic, cultural, linguistic, historical) claims to membership. Second, there is the claim that non-resident citizens cannot satisfy Dahl's principle because, without some touchstone to the territory, citizenship laws do not determine if a person is subject to or affected by law.

Of the two accounts explored above, the stakeholding view better responds to the nationalism critique. Bauböck takes great pains to sever his stakeholding rationale from nationalist claims to membership. Under it, the claim to democratic inclusion flows having a membership interest in the collective claims to self-government.[145] If citizenship laws are themselves are based on old world nationalisms, the stakeholding approach presents two choices: change the content of citizenship laws so they are no longer based on nationalism, or confine voting to only those citizens whose claim can be separated from that foundation. In either case, citizenship-based voting is explicitly severed from the nationalist content of current citizenship laws.[146]

The pluralist stance is less effective at responding to the nationalism critique. While it does not support nationalist citizenship laws,[147] the legal subjection argument can be deployed to justify their ongoing inclusion in the electorate. The essence of this problem lies in the fact that

[145] Bauböck: Democratic Inclusion, *supra* note 25 at 41: "Political legitimacy in a democratic polity is not derived from nationhood or voluntary association but from popular self-government, that is, citizens' participation and representation in democratic institutions that track their collective will and common good."
[146] Bauböck: Democratic Inclusion, *supra* note 25 at 37-41.
[147] Owen: Transnational Citizenship and the Democratic State, *supra* note 28 at 647-8.

Owen's argument about why citizens should vote (they become subjects by virtue of holding citizenship status) does not necessarily depend on his argument about who should get citizenship (social members/stakeholders). Thus, while the pluralist view is not itself rooted nor accepting of nationalist claims of membership, its rationale is vulnerable to being deployed in ways that perpetuate their inclusion.

There are shades of this problem in practice. In recent years, Hungary has become a case study in democratic decline.[148] Part of this story revolves around the ruling government's decision to offer citizenship (and with that, voting rights) to populations living in neighboring states who possess ethnic Hungarian ancestry.[149] Both the stakeholder and pluralist accounts would argue that citizenship status should not be offered to these groups. However, what prescription does each theory offer in light of this imperfect reality? The stakeholder account would say these ancestral non-resident citizens should still not be able to vote because, even though they are citizens, they are not stakeholders in the community of fate. Under the pluralist account, however, the answer is less clear. As citizens, they are now subject to the political authority of the state. There is no clear way to restrict the voting rights of citizens aside from revoking citizenship.

This shortcoming bleeds into the second critique – i.e. the pluralist view's framing of Dahl's principle. On the question of legal subjection, the pluralist account argues that citizens are legal subjects because they are signatories to the constitutional 'contract'. Any time that contract is being interpreted or negotiated, citizens are subject to the outcome of that decision. In practice,

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[148] Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018) at 69; Kim Lane Scheppele, "Hungary, An Election in Question, Part 4: The New Electorate (in Which Some Are More Equal than Others)" (NY Times, Feb 28, 2014), archived at http://perma.cc/69HC-4XJ5; For more, see: Kim Lane Scheppele, "How Victor Orbán Wins" (2022) 33:3 Journal of Democracy 45 at 55; Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565.
[149] *Ibid.*

this means that citizens have the right to vote based on their being subjected to laws that they may never encounter or even be aware of. Arguably, this stretches the idea of legal subjection beyond any reasonable interpretation. Owen defends this stance on the basis that the subjection standard is non-scalar: Dahl's principle does not matter how much you are subjected, so long as you are subjected. While this argument is defensible, it doesn't fully shake the criticism that the definition of 'subjection' is being stretched beyond recognition.

In fairness, Bauböck's construction of Dahl's principle also requires stretching the imagination. The stakeholder view is premised on the view that *membership interests* ground the right to vote. Membership interests are affected any time a government decision is made because one's life and wellbeing is linked to wellbeing of the organization (country) to which you are a member. In this respect, Bauböck's account suffers from at least two weaknesses: first, it arguably fails to adequately account for resident non-citizens. This account leaves us wondering why only membership interests matter, when there are many 'non-members' whose life is meaningfully tied to the flourishing of the community. While the enfranchisement of non-citizen residents is not central to my thesis, it is difficult to ignore this democratic disparity. As set out in my concluding chapter, there is a need for further research on the ability of the stakeholder thesis to meaningfully respond to resident non-citizens.

Second, by allowing the government to draw the dividing line separating stakeholders from non-stakeholders, this account allows the populace to decide itself. This is a real weakness, and it is one which Bauböck has yet to adequately respond. But while Owen argues that this problem requires enfranchising all non-resident citizens, as explored in Chapters 3 and 4, I believe there is a more nuanced yet constitutionally workable way to handle this problem.

This brings us to the last reason I favour the stakeholder principle, which is its relationship to constitutional understandings as to the origins of state authority. Constitutional constructions of voting and citizenship, and their relationship to state authority, are explored in detail in the next chapter. Here, I simply note that while most of the theories explored above derive membership in the *demos* from subjection to a an already existing form of government, Bauböck begins with a pre-existing people. This staring point provides a crucial opening for the stakeholder theory to work within a constitutional setting.

All this to say that, while the stakeholder citizen account may not be accepted by all democratic theorists, it offers the best chance of bridging a divide between democratic and constitutional understandings of enfranchisement. While no account is perfect, it holds its own against democratic critiques of citizenship-based voting. It severs membership claims from nationalist critiques, and offers a defensible account of Dahl's principle by tying the vote to a membership interest in a country's well-being. It also offers responses to real world iterations of the boundary problem,[150] and, as explored in the next chapter, its starting premise is can be accommodated within modern constitutional frameworks. As such, despite its weaknesses, the stakeholding account provides the most solid footing upon which a democratic understanding of citizenship-based voting can be justified.

E. Conclusion: Lessons To Draw From Democratic Theory

This chapter has sought to unpack the democratic perspective on non-resident citizen enfranchisement. First, I briefly explained the boundary problem and the dominant framework by which it is addressed – Dahl's principle of democratic inclusion. Dahl's principle holds that

[150] Bauböck: Democratic Inclusion, *supra* note 25 at 29-30 in which he explains how this focus creates a bias in favour of the *status quo* and unjust borders. Under these approaches, for example, a colonized people may have a claim to inclusion in their colonizer's *demos*, but not a claim to self-determination. Only his approach ties the right to democratic inclusion to a claim of self-determination.

democracy is premised in equality and autonomy, and as such, individuals cannot be democratically subjected to law unless they have a say in its creation. This notion of reciprocity is expressed in various terminology, but the core premise is constant.

Next, I outlined four interpretations of Dahl's principle and their respective implications for non-resident citizens. Democratic theory has various answers to the question of democratic inclusion, and several of them do not favour citizenship as the appropriate marker for allocating the franchise. These stances are theoretically well-grounded, but encounter difficulties working with constitutional frameworks that expressly grant the right to vote to citizens. Despite this limitation, theories which oppose citizenship as the rightful grounding of the franchise help clarify the two democratic problems with non-resident citizen voting: the territorial boundaries of Dahl's principle; and the nationalist foundations of citizenship laws.

Next, this Chapter critically evaluated two attempts to democratically justify voting for non-resident citizens. The stakeholding account holds that, in order to enfranchise all non-resident citizens, the content of citizenship laws must be changed reflect a reciprocal relationship between the citizen and state. In addition, the stakeholding test must be applied to citizens at the stage of enfranchisement. The pluralist account, by contrast, holds that non-resident citizens can vote because the bestowal of citizenship status itself makes citizens signatories subject to the constitutional contract.

Of these two accounts, I argued that the stakeholding claim better withstood the democratic critiques of non-resident enfranchisement. It decouples citizenship from membership in the nation, embeds the reciprocity needed provides to ground Dahl's principle into the definition of citizenship itself, and justifies asking a stakeholding question at the time of voting.

In my view, the pluralist account has a weaker response to the critiques of citizenship-based voting.

The challenge for the next chapters lies in demonstrating that the stakeholder principle is also capable of working within a liberal democratic constitutional system. The next chapter embarks on this task by exploring constitutional accounts of non-resident enfranchisement. As explored there, constitutional law has a different perspective on the question of non-resident citizen voting. Adjudication of this issue provides valuable context by which the promise and pitfalls of these democratic theories may be tested.

Chapter 3: Constitutional Adjudication of Non-Resident Voting*

A. Introduction

The last chapter explored the democratic perspective on non-resident citizen voting. It focused on the framework employed in democratic theory to determine who has a rightful claim to democratic inclusion. While the dominant democratic stance is that citizenship status does not satisfy this framework, there are at least two strands of thought – the stakeholder and pluralist views - which defend their inclusion per the terms of Dahl's principle. Of the two, I argued that the stakeholding view provided a more defensible account of voting for non-resident citizens.

This chapter explores the constitutional response to non-resident citizen voting. While the inclusion of these citizens was the exception in the last chapter, here it is the rule. After demonstrating that constitutional courts overwhelmingly find that non-resident citizens have the right to vote, this chapter attempts to explain why this stance is so pervasive, and what impacts flow from it.

As explored below, I argue that the dominant constitutional stance is rooted in the constitutional story about the ultimate source of state authority, and the limits this imposes on governments. While democratic and constitutional accounts of state authority share the view that ultimate authority lies with 'the people' (popular sovereignty) they disagree on which people to

* This Chapter relies on translated texts of judicial decisions emanating from Germany and Uruguay. Translations were conducted using DeepL.com AI-powered translation services. There are drawbacks to this approach. AI software may lack the contextual awareness and nuance needed to translate legal reasoning. This weakness is particularly poignant for me, given that my analysis relies on parsing the specific language used by these foreign legal decisions. One may criticize my analysis on the basis that, if AI-software incorrectly translates a term, I lack the familiarity with either the Uruguayan or German legal systems to identify and correct that failing. In the interests of transparency, when discussing portions of either judgment, I include an excerpt of the translated text (and surrounding paragraph) upon which I am relying. This does not eliminate the problems of machine-based translation, but it does encourage critical engagement with my analysis and the translations upon which it is based. For more on the offerings and drawbacks of AI-translation software in law, see: Ann Marie Boulanger, "The Pros and Cons of Machine Translation and AI in Legal Translation" (19 Sept 2024) McGill School of Continuing Studies, permalink: https://perma.cc/2PAK-GNCF.; G Spulak, "Machine Translation: Considerations and Cautions for Courts" (Williamsburg, VA: National Center for State Courts, 2025).

whom they are referring. Under a constitutional view, 'the people' refer to a citizenry who collectively consent to be ruled on terms set out in a constitution. Under this arrangement, the institutions created by that constitution – including legislatures or courts – cannot use the power they have been given to dismantle their maker. But while powerful and pervasive, this story misses important nuance. Indeed, judicial interpretations of the citizen's right to vote have the potential to weaken the pillars of constitutional democracy that they are seeking to safeguard.

Making my way through this analysis will take several steps. The Chapter below is divided into seven parts. After this Introduction, Part B presents an abbreviated history of the constitutional citizen. This history is meant to explain why citizenship-based voting is so prevalent in the world today, and sets the stage for further exploration of the disconnect between democratic theory and constitutional law on the question of voting.

Part C introduces the dataset from which I will analyze the constitutionals approach to non-resident enfranchisement. At least fifteen courts have considered the right of non-resident citizens to vote. Overwhelmingly (13 of 15) these courts have ruled that these citizens have the right to vote in national elections. Relying on Ran Hirschl's case selection principles, I select five case studies – from Germany, Pakistan, the Marshall Islands, Canada and Uruguay - for more detailed exploration.

Part D sets out each of the five case studies, and Part E analyzes them. While each case engages distinct fact-patterns, legal systems and constitutional language, I argue that outcomes are determined by (1) their views on the source state authority, and (2) the level of deference they ought to apply. Most courts obey the constitutional story of state authority, in which popular sovereignty is vested in the citizenry. This means that, while lawmakers can disenfranchise citizens in order to protect the electoral system from external harms (such as electoral integrity or

transparency), they lack the authority to do so on the basis that citizens are not part of the people. This view is tied closely to a vigorous standard of scrutiny, in which any attempt to disenfranchise citizens is approached with skepticism. A minority stance, expressed by dissenting judgments out of Canada and Germany, prefer democratic accounts of popular sovereignty (at least to some degree) over constitutional ones. These accounts adopt a deferential standard of review, according to which judges ought to defer to elected lawmakers on questions of democratic inclusion.

In the vast majority of these cases, the respective approaches to the source of state authority and deference are bound (i.e. constitutional accounts are protected with vigorous scrutiny, while democratic accounts are associated with deference). Only the German majority decision bucks this trend. By accommodating a more democratic understanding of state authority with a vigorous approach to deference, the German majority opens the door for elected lawmakers to shape the electorate – albeit in narrow ways. In my view, this is the preferrable path forward because it allows democratic accounts of inclusion in the constitutional door. In so doing, it recognizes the relevance of democratic accounts in creating the *demos*, but prevents the contested nature of this space from being exploited by elected lawmakers.

Part F concludes by considering the areas of alignment between the constitutional and democratic perspectives. Despite the fact that voting regimes aligned with Bauböck's stakeholder citizen thesis have been repeatedly struck down, I argue this incompatibility largely exists on the margins, rather than the core, of each account. The German case gives us fruitful space to consider how to constitutionally navigate this discrepancy, the mechanisms of which will be addressed in more detail in Chapter 4.

B. A Brief Overview the Constitutional Citizen

The last chapter unpacked the faults - from a democratic perspective - of citizenship-based voting. As set out there, the democratic case against citizenship voting is compelling. If democracy requires self-rule, there is nothing inherent about citizenship status that guarantees a person will be subjected to the laws they help create. Attempts to make this case (as seen in the pluralist and stakeholding accounts) require clever footwork. Given the prevalence of voting for citizens in the world today, this democratic skepticism may come as surprising. For the general public, the fusion of citizenship and the vote is so normalized that it may seem absurd or even offensive to challenge it.

The answer to this disconnect lies in the specific construction of citizenship that emerged during the Enlightenment and has since become embedded within the liberal democratic constitutional form.[1] According to it, citizens are the politicized embodiment of the nation from which all state authority is ultimately derived.[2]

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[1] William Rogers Brubaker, "The French Revolution and the Invention of Citizenship" (1989) 7:3 French Politics and Society" 30; Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard: Harvard University Press, 1998); See also: Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol: Bristol University Press, 2021) at 44-5; See generally: Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016); Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565 at 557-559; Martin Loughlin, "The Concept of Constituent Power" (2014) 13:2 European journal of Political Theory 218 at 219-221.

[2] Loughlin, *ibid*; Jean Jacques Rousseau, *The Social Contract* (in Susan Dunn, ed, *The Social Contract and the First and Second Discourses* (New Haven: Yale University Press, 2002) Book 1 at 7 FN2 (page 163 of cited text) (note that Rousseau's idea of what made a citizen differentiated between townsfolk and "orders of men", but his ideas were part of an evolution towards this understanding of citizenship-nation-governance. See, for example: Emmanuel Joseph Sieyès, "What is the Third Estates?" in Oliver W Lemcke and Florian Weber, eds, *Emmanuel Joseph Sieyès: The Essential Political Writings* (Leiden: Koninklijke Brill, 2014) 43 at 61. "Like civil rights, political rights derive from a person's capacity as a citizen. These legal rights are identical, whether his property happens to be great or small. Any person who satisfies all the formal requirements for an elector has the right to be represented, and the extent of his representation cannot be a fraction of the extent of some other citizen's representation. The right to be represented is single and indivisible. All citizens enjoy it equally…".

The link between citizenship and national membership is evident in the fact that the two horns of national belonging (coming together and living together under a common law or possessing a common pre-political culture, language or history) mirrors modern territorial (*jus soli*) and descent-based (*jus sanguines*) birthright citizenship laws. Brubaker, *Citizenship and Nationhood in France and Germany, supra* note 1; Sieyès, *supra* note 2. See Generally: Omar Dahbour & Micheline Ishay, eds, *The Nationalism Reader* (Atlantic Highlands, NJ: Humanities Press, 1995). See discussion of the link between nationalism and birth right citizenship laws in Ayelet Shacher, *The Birthright Lottery:*

Popular sovereignty – the notion that governments derive their legitimacy from the consent of the governed – was often articulated in the language of citizenship.[3] Within this story, political participation became "if not constitutive of [state] citizenship, at least essential to citizenship."[4] In other words, during this impactful period citizenship was deployed to perfectly overlay membership in the nation and rightful membership in the *demos*.[5] Colossal ideas of nation, equality, and popular sovereignty coalesced under the banner of citizenship and this was codified in the constitutional form.

Of course, this perfect nesting has never been entirely true.[6] For our purposes, however, the relevant takeaway is that this overlay of citizen-nation-governance, while subject to ongoing debate and critique, sits embedded in national constitutions and international law. Particularly since World War II, constitutional statements of "We the People" have been commonly understood to mean the citizenry as both members in the nation and the ultimate source from

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Citizenship and Global Inequality (Cambridge: Harvard University Press: 2009) at 113-128. See also: Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27 at 30.

[3] Rousseau's famous articulation of the social contract an example of this. For him, when a group of associates come together and each of them surrenders themselves to the community, they form a separate moral and collective body known as the general will. The general will, comprised of the collective unity of its members, is the sovereign. Within this articulation, citizenship represents a kind of transubstantiation, in which by virtue of coming together and agreeing to govern themselves, a people become citizens. Per Rousseau: T]he social compact comes down to this: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole. …Those who are associated in it are collectively called 'a people', and are separately called 'citizens' (as sharing in the sovereign power) and 'subjects' (as being under the state's laws)…

For general statements on popular sovereignty, see Martin Loughlin "Rights Democracy and Law" in Tom Campbell, ed, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) at 42.

[4] Brubaker: Citizenship and Nationhood, *ibid* at 43.

[5] Brubaker, *Citizenship and Nationhood in France and Germany, supra* note 1, Brubaker, "Invention of Citizenship", *supra* note 1. For general statements on popular sovereignty, see Martin Loughlin "Rights Democracy and Law" in Tom Campbell, ed, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) at 42.

[6] We know, for example, that universal citizen enfranchisement was not perfected during the French Revolution and that scholars of the time grappled with this issue. For an example of this discussion, see: Lucia Rubinelli *Constituent Power: A History* (Cambridge: Cambridge University Press; 2020) Chapter 1: Sieyès and the French Revolution.

which the state derives its authority to govern. While not immune from challenge, this construction remains the dominant script for governance in the world today.[7]

This constitutional construction creates limits on state authority (meaning the powers that state institutions possess) and political authority (the powers that elected lawmakers possess). Namely, institutions created by the citizen's *constituent* power cannot use their *constituted* powers to dismantle their maker.[8] Herein lies the problem for elected lawmakers, legislatures and courts. Per this view, democratic theory has it backwards when it argues that state authority is legitimate when its actions are authorized by those subject to its rule. Instead, the state's powers must be constrained by the citizenry, because their authority only exists by virtue of the citizenry's bestowal.

The history and development of constitutional citizenship is a complicated and contested space full of convergences and contradictions.[9] For the purposes of this thesis, the relevant takeaway is the divergence that has developed between constitutional and democratic accounts as to the ultimate holders of state authority. In democratic theory, popular sovereignty rests with the governed in its strict sense. A state's authority is only legitimate by virtue of the consent it

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[7] Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565 at 557-559. Lorraine Weinreb, "The postwar paradigm and American exceptionalism" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Harvard: Harvard University Press, 2006) at 84 at 87-88: "Consensus developed [after WWII] that an integrated set of international and domestic safeguards could militate against such crisis in the future. This thinking ultimately produced a particular conception of constitutional ordering, to stabilize democracy and safeguard equal citizenship and respect for inherent human dignity as supreme or higher law. This conception now stands as the foundation of the postwar constitutional state.… The postwar constitutional paradigm has extensive reach and deep transformative power. One can discern its basic structure within seemingly unrelated and unconnected legal systems… Its strongest transformative effect has been to establish fundamental principles at the core of the modern constitutional state…". See also Seyla Benhabib, *The Rights of Others* (Cambridge, Cambridge University Press, 2004) at 43; Alexander Hamilton, James Madison, and John Jay, Edited by Clinten Rossiter et al, *The Federalist Papers* (New York, NY: Penguin Group, 2003) at 310: "[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived…"

[8] Loughlin, *supra* note 1 at 219-221.

[9] Many scholars have interpreted and critically engaged with Enlightenment-era concepts of citizenship and constituent power. An overview of some discussion is contained in Shaw, *supra* note 1 and Loughlin, *supra* note 1. Other influential scholars who critically engage in this space include Jürgen Habermas, Hélène Landemore, Carl Schmidt, Hannah Arendt, and Antonio Negri, Bruce Ackerman, and many others.

derives from those over whom it will exercise that authority. Under constitutional theory, popular sovereignty rests with citizens. Citizens embody the original bestowal of authority to create the institutions to which the people have agreed to be governed.[10] This sheds light on the positioning of voting and citizenship at the heart of the liberal democratic constitution. Put succinctly:[11]

> The citizen is the constituent unit of the constitutional subject in all its multiple identities, chief among them, the *who* that makes the constitution, the *for whom* it is made, and the *to whom* it is addressed. The citizen is at the heart of modern constitutionalism and is the principal actor in its birth, deployment and continuing life.

It also and foreshadows what we will see in constitutional adjudication of non-resident voting rights. As explored in more detail below, despite the presence of significant contextual barriers, constitutional courts have vigorously protected the right of non-resident citizens to be included in the electorate. This tendency, I argue, is a legacy of this constitutional construction. According to it, while courts and legislatures can restrict voting in order to protect the electoral systems from external harms (such as integrity) they lack the authority to exclude citizens from the electorate on the basis that they are not rightful members.

Of course, the natural question that flows from this insight is why, give these different ideas, constitutional courts should care about the democratic take on this issue. This question will be explored in later in this chapter and into Chapter 4. Before getting to that point, however, I must first explore what the cases about non-resident citizen enfranchisement have to say. This is where I turn next.

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[10] Loughlin, *supra* note 1.
[11] Michel Rosenfield, *The Identity of the Constitutional Subject Selfhood, Citizenship, Culture, and Community* (Abingdon: Routledge, 2009) at 211.

C. The Dataset of Non-Resident Citizen Enfranchisement

How do judges respond when non-resident citizens seek the right to vote? Given the specific legal, factual, social, cultural and institutional contexts at play, it is arguably impossible to provide a blanket response to this question. Despite this contextual challenge, I believe the answer to this question is heavily influenced by the constitutional account of state authority outlined above. This view severely restricts lawmakers' ability to disenfranchise citizens. While they can restrict the vote in order to protect the electoral system from some external harm, they lack the authority to disenfranchise citizens on the basis that they are not rightfully part of the *demos*. This foundation renders some contextual factors (for example, those related to integrity or transparency) important, but neutralizes many of the others – such as diaspora size, the reasons for territorial absence, or ability to influence outcomes – that one might expect to have bearing on this outcome.

Before getting to this substance, however, I must clarify the playing field. This involves two stages. First, I set out the dataset of constitutional adjudication from which I will be working. Second, I reintroduce the principles that I used to draw out five case studies for more detailed exploration in developing this view. Together, these foundations set the stage upon which I can conduct a comparison of the constitutional adjudication of non-resident voting rights.

With the help of the Extraterritorial Voting Rights and Restrictions dataset, I have located fifteen apex constitutional courts that have addressed the right of non-resident citizens to vote in the national elections of their state of citizenship.[12] These fifteen courts – in Canada, Germany,

[12] Elizabeth Iams Wellman, Nathan W Allen, and Benjamin Nyblad, "The Extraterritorial Voting Rights and Restrictions Dataset (1950–2020)" 2022 Comparative Political Studies 909. Special thanks to Nathan Allen for his assistance in working with this dataset.

Austria, the European Court of Human Rights, the Marshall Islands, Pakistan, India, Bangladesh, Nepal, South Africa, Uganda, Korea, Japan, Uruguay and Guyana - span five continents and a wide range of fact patterns, institutional and legal structures, electoral systems, national identities, emigrant demographics, and logistical considerations.[13]

Despite the presence of significant contextual variances, their constitutional outputs are heavily one-sided. Thirteen of these decisions supported the constitutional right of non-resident citizens to vote in national elections. Of the two outliers, one emanated from a supranational court (the European Court of Human Rights), and its outcomes turned heavily on considerations specific to that context (the wide margin of appreciation that individual states are owed when there is no consensus within member states on a practice).[14]

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[13] *Frank v Canada (Attorney General),* 2019 SCC 1; *Shindler v the United Kingdom*, [2013] ECHR 423 (ECtHR); *Kalali v Attorney General & Anor* (Miscellaneous Cause No. 35 of 2018) [2020] UGHCCD 172 (17 June 2020) (ULii) (Uganda) [Ugandan Decision]; *Lekka v Kiluwe* and *Konou and Lehman v Kiluwe and Kawakami (as AAG)* SCT Civ 19-69 (9 Oct 2019) (consolidated) (Marshall Islands) [*Lekka*]; Constitutional Court (VfGH), 16 Mar 1989 G218/88 No 12023 (Austria); *Iqbal et al v Federation of Pakistan and Imram Khan et all v Federation of Pakistan* (2011), Const P 39/2011 and 90/2011 (SC Pakistan) (consolidated) (decision of 29 April 2013) (Pakistan) and *Ch. Nasir Iqbal and others v Federation of Pakistan and others*, PLD 2014 SC 72 (Pak SC) [collectively, *Iqbal*]; *Chindam & Ors v UOI and ANR* (2013) 80/2013 (SC India) (Record of Proceedings) (India); Constitutional Court, 28 June 2007, 19-1 KCCR 859, 2004 Hun-Ma 644 (Korea) [Korean 2007 Decision] see also: 2 Constitutional Court, 24 July 2014, 26-2(A) KCCR 173, 2009 Hun-Ma 256, 2010 Hun-Ma 394 (consolidated) (Korea); Saikō-Saibansho [Supreme Court], 14 Sept 2005, 2001 (Gyo-Tsu) 82 Minshu Vol 59, No 7 (Japan); *ATM Ali Reza Khan v Bangladesh Election Commission and others,* 1997, 26 CLC (HCD) [8111] (Bangladesh), *Richter v The Minister for Home Affairs and Others* [2009] ZACC 3 (South Africa), Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 4 July 2012, 2 Beschluss des Zweiten Senats vom, 2 BvC 1/11, 2 BvC 2/11 4 (Germany), online: https://www.bverfg.de/e/cs20120704_2bvc000111.htm; Supreme Court of Justice, Montevideo, 3 April 2020, *Sentencia Definitiva* 57/2020 (Uruguay) [Uruguay Decision]; Ram Kumar Kamat "No voting rights for Nepalis abroad" The Himalayan Times, 21 March 2022, <online: https://thehimalayantimes.com/nepal/no-voting-rights-for-nepalis-abroad)>; Staff Reporter "'Residency not required for voting'" *Guyana Chronical* (11 Feb 2020) online: <https://guyanachronicle.com/2020/02/11/residency-not-required-for-voting/.>

[14] *Shindler, ibid.* The unique supranational element here flows from the inquiry into what level of deference a supranational court has over national election laws, which has no direct comparison in the other decisions. In this regard, it may be pointed out that multi-nation federations in my dataset (such as Canada) could also be classified as supranational. While the Canadian Supreme Court can and does account for different national identities within Canada, the distinguishing element I am drawing upon here relates to a legal doctrine requiring the European Court of Human Rights to adopt a certain posture when evaluating the election laws adopted by independent member states. There is no direct comparison to this in the other case studies (a direct comparison would require me to look, for example, at what posture the Supreme Court of Canada should take over Quebec's provincial voting laws, and whether the fact that many other provinces or nations in Canada have different voting laws is relevant to that determination.) A further complication arises from the fact that the European Convention on Human Rights, not being a national bill of rights, does not contain a right to vote. Instead, it has the following guarantee: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people

All said, only one national level court within this dataset rejected the claim that non-resident citizens have a constitutional right to vote. While this lopsided outcome may be partially explained by individual contextual or other socio-legal phenomena,[15] I believe it is also driven by the constitutional view as to the origins of state authority which underpins the liberal democratic constitutional form.

In order to test my hypothesis, I selected five cases out of this larger dataset for detailed exploration. As explained in more detail in Chapter 1, my approach to case selection has been informed by Ran Hirschl's "most difficult" and "outlier" principles of case selection.[16] Using these principles, I analyze the constitutional approach to non-resident citizen voting against the four most difficult logistical, institutional and democratic variables located within the dataset; and against the lone outlying national court which denied non-resident citizens the right to vote.

The cases out of the Marshall Islands, Canada, Germany, and Pakistan feature these most difficult contexts. To briefly reiterate what was outlined in more detail in Chapter 1: the Marshall Islands and Germany speak to democratic variables. The Marshall Islands is a small island nation in which the non-resident citizen population is disproportionately large. Political scientists have identified a disproportionately large non-resident citizenry as a factor mitigating against non-resident citizen enfranchisement.[17] The German case asks about the rights of descent-based

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in the choice of the legislature." Council of Europe, *Protocol 3 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention*, ETS 45, 6 May 1963, Art 3.

[15] See eg: The "global constitutional dialogue" occurring between judges; the increasing reliance on foreign law (express or implied) in reaching judicial decisions; the product of an international band-wagoning effect as norms diffuse across borders as discussed in Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2015) at 21; See also: A Turçu and R Urbatsch, "Diffusion of Diaspora Enfranchisement Norms: A Multinational Study" (2015) 48:4 Comparative Political Studies 407. See generally: Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

[16] This is also supported by Joseph H Carens, "A Contextual Approach to Political Theory" (2004) 7 Ethical Theory and Moral Practice 114 at 125 who encourages contextual political theorists to search out cases that are challenging to their position.

[17] Graham Hassall, "Case Study: The Cook Islands: Seat for overseas voters abolished" in Challenging the Norms and Standards of Election Administration (2007) at 50, online (pdf): International Foundation for Electoral Systems <www.ifes.org > [perma.cc/FAZ4-7X6R]; *Lekka*, *supra* note 13.

citizens. Given their grounding in pre-political strands of national membership, democratic theorists have targeted descent-based citizens as exemplars for the democratic case against citizenship-based voting.[18] The Canadian case speaks to an institutional variable. Canada's electoral system is rooted in its British colonial history, which is closely tied to the ideal of representing local interests at the national level. Political scientists have noted that countries sharing a British colonial history are less likely to extend voting to non-resident citizens.[19] And lastly, Pakistan speaks to a variety of logistical variables. Given the size of its diaspora, financial limitations and politically-charged nature, non-resident enfranchisement in Pakistan possesses a number of challenging logistical factors which mitigate against their inclusion.

Thus, each of these cases highlights a demographic, logistical and/or institutional contextual pain point that speak against the inclusion of non-resident citizens. Using Hirschl's rationale, if the right of non-resident citizens to the vote is affirmed in these hard cases, we can infer they will be similarly protected in comparatively easier cases.

Uruguay is the outlier in that it is the only national level constitutional court in the dataset which determined that non-resident citizens to not have the right to vote. As such, it merits detailed study given this unique judicial stance. Per Hirschl's rationale, if we can isolate something special, novel or unique about an outlier case, we can explain why it reaches the opposite conclusion from the rest of the cases in the dataset.

While the contextual variances in the cases below are considerable, there are two baseline commonalities grounding the analysis in each case. First, each of the case studies below examine

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[18] See Discussion in Chapter 2. For more see: Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27; Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393 at 2426; Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119 at 121-122.
[19] *Frank, supra* note 13; Turçu and Urbasht, *supra* note 15 at 421. See also Wellman et al, *supra* note 12 at 916 which found the negative linkage between expatriate voting and countries with a British Colonial history, but they did not hypothesize a reason for this relationship.

whether 'long-term' non-resident citizens (i.e. citizens who had lived out of the country for a lengthy period with no concrete plans for return) had the right to vote in national elections. None of the cases involved citizens who had left for a defined period (students, temporarily working abroad etc.).

Second, per the terms of my research parameters, each of the cases below adhere to the liberal democratic frame of governance. By this I simply mean that, in each of these cases, political leaders are elected by a *demos* with broad eligibility for the franchise; majority power is constrained by a constitution which divides power among executive, legislative and judicial branches; and that the constitution protects liberal values via bills of rights that are enforceable by way of judicial review.[20]

Pakistan's democracy sits somewhat uncomfortably under this umbrella. As explored in the case study below, its liberal democratic credentials are shakier than the others. I have nonetheless included Pakistan as a case study because, despite its challenges, it does have competitive elections and a liberal democratic constitution whose broad divisions of power and rights are generally adhered to, if imperfectly. Moreover, Pakistan offers an interesting context precisely because it has fuzzier liberal democratic credentials. It highlights the dynamic nature of democracy and the relationship that non-resident voting has to either maintaining or undermining a consolidated democracy.

[20] Kim Lane Scheppele, "Autocratic Legalism" (2018) 85 U of Chicago Law Rev 565 at 557-559.

D. Case Studies on Non-Resident Enfranchisement

a. Canada and the Electoral Legacy of British Colonialism

Canada is a former British colony, and its Westminster-styled system of governance is reflective of that heritage.[21] In Canada and many other commonwealth countries, there are no nationally-elected positions.[22] Voters elect one federal representative from their geographically-defined constituency. Thus, while the linkage between residence and political representation is not unique to Westminster democracies, it is especially potent in this context.

Political scientists have found that countries with a British colonial history are less likely to extend voting to non-resident citizens,[23] and have hypothesized that several elements of the Westminster-styled system are (at least partially) the reason.[24] Non-resident citizens don't easily fit within Westminster systems. Parliamentary elections require coordination with a large number of local constituencies,[25] and non-residents often must be assigned to a local constituency in order to be tabulated. This comes with a high degree of organizational and institutional complexity.[26] While there are systems to deal with these logistics, these fixes are neither simple nor without controversy.[27] In addition, elections under this system can happen on tight and/or

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[21] The preamble to *The Constitution Act, 1867*, 30 & 31 Vict, c 3 declares that Canada is to have a "Constitution similar in Principle to that of the United Kingdom" which structures Canada's Westminster-styled parliamentary democracy. For more, see Sarah Burton and Michael Pal, "Election Law, Judicial Review, and Canadian Democracy" in Cristina Fasone, Edmondo Mostacci and Graziella Romeo, eds, Judicial Review and Electoral Law in a Global Perspective (Bloomsbury Publishing, 2024).

[22] *Frank, supra* note 13 at para 89.

[23] Turçu and Urbasht, *supra* note 15 at 521; Wellman et al, *supra* note 12 at 916; Nathan Allen, Erin Kinzie, Ekta Singh, "Deferred Emigrant Voting Rights in South Asia: Analyzing the Puzzle of Non-Enfranchisement in Competitive Regimes" (2024) 27:2 International Area Studies Review 75 at 80-81, for discussion of this complexity in the context of Pakistani elections.

[24] Allen et al, *supra* note 23 at 80.

[25] Allen et al, *supra* note 23 at 80-1.

[26] Allen et al, *supra* note 23 80-1.

[27] See eg, options to count non-resident votes in one of an "assimilated" versus a "discrete" system of representation. In an assimilated system, non-resident votes are assigned to a geographic district on the territory, and votes are essentially scrubbed of their non-resident status and treated as if they were cast on the territory. The less common "discrete" system provides dedicated political representation to non-resident voters. Here, non-resident citizens are given their own political representative in government. For more, see: Peter J Spiro, "Perfecting Political Diaspora" (2006) NYU Law Rev 210 at 211.

unexpected timelines. This can make it difficult to get necessary materials in non-resident voters' hands. [28]

This is the structural backdrop against which the Canadian case study arose. In 2011, Canada's federal electoral legislation stated that non-resident Canadian citizens who had left the country more than 5-years prior were ineligible to vote. The claimants were citizens who were born and raised in Canada, but who lived in the United States for more than five years.[29] Both were highly educated in specialized fields, and argued that they remained connected to Canada, and would be living in Canada if they were able to locate work in their fields.[30] They were denied ballots for running afoul of the 5-year rule, and launched constitutional challenges alleging an unjustified breach of the *Canadian Charter of Rights and Freedoms.* Section 3 of the *Charter* guarantees the right to vote for all Canadian citizens. It states:

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.[31]

Like all *Charter* rights, s 3 is subject to reasonable limitation.[32] The Canadian government conceded that the law breached s 3, but argued that the 5-year rule was a reasonable limitation on that right. Ultimately, the Supreme Court of Canada disagreed. A 4-1-2 majority held that the 5-year rule unjustifiably infringed s 3 of the *Charter*.[33] As a result, the 5-year rule was struck down. Canada's electoral legislation now imposes no express residency restriction on voting in national elections.[34]

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[28] Allen et al, *supra* note 23 80-1.
[29] *Frank, supra* note 13 at paras 7-9.
[30] *Ibid.*
[31] *Canadian Charter of Rights and Freedoms,* s 3, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 3 [*Charter*].
[32] *Ibid,* s 1.
[33] Four judges aligned with the majority. Rowe J issued a concurring opinion with the majority.
[34] *Canada Elections Act*, SC 2000, c 9 s 223. It does, however, require a would-be voter to list their place of Canadian ordinary residence, suggesting that descent-based citizens may still face hurdles if attempting to vote (s 223(1)(e)).

The majority judgment began by framing the constitutional construction of the right to vote, and its relationship to citizenship and residency. The *Charter* "tethers voting rights to citizenship, and citizenship alone."[35] Given that the right of "every citizen to vote lies at the heart of Canadian democracy,"[36] intrusions on this "core democratic right" must be subjected to a stringent justification standard.[37] Residence, by contrast, is not mentioned in the constitutional text. While residence may be an important "organizing mechanism" for realizing the right to vote, it is not a constitutional imperative.[38]

Because the government conceded a breach of s 3, the majority judgment focused on whether that breach could be reasonably justified.[39] For the majority, the law struggled to satisfy most stages of this analysis. This struggle began with identifying a valid legislative objective. This issue plagued the government at lower courts, which was reflected in the fact that legislative objective had been reframed at various stages of appeal.[40] Before the Supreme Court, the government argued that its objective was to "preserv[e] the social contract".[41] The majority rejected this objective for three reasons.[42] First, it misconstrued earlier statements of the Supreme Court regarding the social contract theory.[43] Second, the social contract theory as presented by

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[35] *Frank, supra* note 13 at paras 29, 35.
[36] *Frank, supra* note 13 at para 25.
[37] *Frank, supra* note 13 at paras 43, 44: "The jurisprudence[on s 3] also requires that a stringent standard of justification be applied when the government seeks to justify a limit on the s. 3 right to vote ….This does not necessarily mean that the government bears a heavier burden in the context of this right than in the context of other *Charter* rights; as I mentioned above, the standard is always proof on a balance of probabilities. What it does mean is that reviewing courts must examine the government's proffered justification carefully and rigorously in this context rather than adopting a deferential attitude. Deference may be appropriate in the case of a complex regulatory response or a decision involving competing social and political policies, but it is not the appropriate posture for a court reviewing an absolute prohibition of a core democratic right ……[44] … "The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination…."[citations omitted]
[38] *Frank, supra* note 13 at para 28.
[39] *R v Oakes*, [1986] 1 SCR 103.
[40] *Frank, supra* note 13 at paras 18-22, 47.
[41] *Frank, supra* note 13 at paras 47-49.
[42] *Frank, supra* note 13 at paras 49-54.
[43] While the Supreme Court had previously relied on this theory to justify the inclusion of prisoners in the electorate (*Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519), it was a misread to use those statements as a way to justify excluding citizens from the electorate. *Frank, supra* note 13 at paras 50-52.

the government was "devoid of content, and problematically vague."[44] And third (and most notably for our purposes) a law *may not* have the preservation of the social contract theory as its purpose:[45]

> Perhaps most importantly, the social contract theory is just that: a theory. Preserving it is not an objective. Although moral philosophy doubtlessly has some role to play in the legislative sphere, it cannot readily serve as a source for a pressing and substantial objective in relation to an infringement of *Charter* rights…

In its place, a reframed "ensuring electoral fairness" objective was accepted.[46] The court was skeptical that the 5-year rule could be rationally connected to enhancing electoral fairness, but declined to determine this point. It did, however, hold that the 5-year rule was not minimally impairing.[47] The time limit was arbitrary and overinclusive because it excluded people who maintained deep and abiding connections to Canada and who, while not subject to all of Canada's laws, were impacted by government decisions on (among other things) taxes, social security, and the extinction of their voting rights.[48] There was nothing special about a five-year time lapse indicating if a person remained connected to Canada, and the inclusion of the complainants in this litigation spoke against this generalization. To the extent that non-resident citizens live without the impact of most Canadian laws, this line of reasoning required embarking

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[44] *Frank, supra* note 13 at paras 49, 53. The scope and meaning of the social contract is debatable, and most of its debatable elements (i.e. is it bounded by territory) were at issue in the dispute.
[45] *Frank, supra* note 13 at para 53. The full paragraph reads: "Perhaps most importantly, the social contract theory is just that: a theory. Preserving it is not an objective. Although moral philosophy doubtlessly has some role to play in the legislative sphere, it cannot readily serve as a source for a pressing and substantial objective in relation to an infringement of *Charter* rights, and any argument to that effect will require careful scrutiny. For the purposes of the s. 1 analysis, the "social contract" model that has been advanced in this case is devoid of content, and problematically vague. It also has analytical failings: it is at once too general, providing no meaningful ability to analyse the means employed to achieve it, and too narrow, effectively collapsing any distinction between legislative means and ends. This latter point was helpfully illustrated by the intervener David Asper Centre for Constitutional Rights: "[T]he objective (limiting the right to vote to citizens sufficiently subjected to law) and the means (the selection of those citizens who are sufficiently subjected to law) are mutually defined" (I.F., at para. 13). In other words, if we were to accept preserving the social contract as a pressing and substantial objective, then the legislation would have no real objective other than the measure itself: limiting the voting rights of long-term non-resident Canadian citizens."
[46] *Frank, supra* note 13 at paras 54-55.
[47] *Frank, supra* note 13 at 66-75.
[48] *Frank, supra* note 13 at paras 66-75.

on an impossible exercise. Laws impact Canadians to different degrees, regardless of their geographic location.[49]

At the final stage of the proportionality analysis, the majority criticized the proffered benefits as illusory, while the deleterious effects insurmountable. Denying citizens the right to vote "strikes at the heart of their fundamental rights" and denies their dignity and self-worth.[50] By contrast, the Attorney General presented no clear evidence of harm. Instead, the 5-year rule purported to declare that long-term absentees were less worthy of the vote. Worthiness cannot be used to justify denying voting rights to citizens.[51] As a result of this decision, the 5-year rule was struck down in Canada.

In dissent, two justices accepted the Attorney General's argument that the 5-year residency restriction was a reasonable limit on s 3. Parliament, in its view, clearly has the ability to pursue philosophical legislative objectives, including those "in pursuit of normative conceptions of what the Canadian political community is, and how it can best be protected and made to flourish".[52] While the language of "preserving the social contract objective" may be vague, this was simply shorthand for the law's true objective: preserving a relationship of currency between electors and their communities.[53]

The dissenting judges argued that voting rights must be brought to life through legislation which necessarily imposes limits on how they are exercised. To this end, it is valid for governments to structure the vote in way inspired by particular democratic philosophies such as the social contract. To make its point, the Canadian dissent relied most forcefully on a common-

[49] *Frank, supra* note 13 at para 71.
[50] *Frank, supra* note 13 at para 82.
[51] *Frank, supra* note 13 at paras 81-82.
[52] *Frank, supra* note 13 at para 139.
[53] *Frank, supra* note 13 at paras 112, 127.

sense argument: of course elected lawmakers can legislate regarding which citizens can vote – they do so every day.[54] Canadian citizens who are under the age of 18, and descent-based citizens who have never lived in Canada are both subject to blanket disenfranchisements. If elected lawmakers lack the authority to restrict the citizen's franchise, these other widely accepted limits must be unconstitutional as well.[55]

Not only may Parliament validly legislate on these matters, it is entitled to deference when doing so.[56] In navigating the justification analysis, the dissent argued that it must defer to Parliament's expertise on questions of membership in the political community: the five-year limit fell within a range of reasonable alternatives open to Parliament, and the integrity of preserving that system outweighed the deleterious effect of denying some citizens the right until they moved back to Canada.[57] As such, the dissenting justices would have upheld the 5-year rule.

Stepping back, the Canadian case study provides a useful starting point to introduce three themes that repeatedly arise over the remaining case studies. First, there is the debate over locating a valid legislative objective. This debate asks what the government is trying to do when it restricts a non-resident citizen's vote – i.e. what is the government's goal or purpose? While locating a valid government objective is rarely controversial in Canada,[58] here it became a flashpoint of disagreement.

The government argued that the purpose of the 5-year rule was to ensure that people who create laws have to obey them (i.e. the social contract objective). The question then becomes whether elected lawmakers can validly pursue this goal (i.e. is this a legitimate objective?). The

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[54] *Frank, supra* note 13 at paras 142-145.
[55] *Ibid.*
[56] *Frank, supra* note 13 at paras 140, 146.
[57] *Frank, supra* note 13 at para 172.
[58] See eg: Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2013) at 38:36 "We have noticed that courts have usually readily accepted that a legislative purpose is sufficiently important to justify overriding a Charter right (first step). … for the great majority of cases, the arena of debate is the third step, the requirement of [minimal impairment]"

majority answered this question in the negative. While democratic theory may have some vague role to play in lawmaking, the *Charter* determines the *demos*. Simply put, elected lawmakers lack the authority determine who rightfully belongs to the political community. The dissent took the opposite view. From its perspective, the government is clearly authorized to legislate in the name of political philosophy, including those which pursue a specific idea about who belongs to the *demos*.

This brings us to our second theme, which is focused on deference. The majority and dissenting opinions take diametrically opposed views on deference, and this directly impacted the outcome. For the majority, the positioning of the citizen's right to vote at the "heart of democracy" justifies vigorous scrutiny of attempted restrictions on it:[59]

> Voting is a fundamental political right, and the right to vote is a core tenet of our democracy. … Any limit on the right to vote must be carefully scrutinized and cannot be tolerated without a compelling justification.

The dissent, by contrast, adopted a deferential stance. This standard allowed the dissenting justices to avoid any detailed analysis of the typical hurdles (minimal impairment, for example) that must be satisfied in a justification analysis.[60]

Lastly, the Canadian case provides a preliminary insight into the ability of democratic accounts of voting to pass constitutional muster. The five-year law falls squarely within Bauböck's citizen stakeholder thesis:[61] it restrains the voting population to citizens who are

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[59] *Frank, supra* note 13 at para 1, see also para 43: "The jurisprudence[on s 3] also requires that a stringent standard of justification be applied when the government seeks to justify a limit on the s. 3 right to vote ….This does not necessarily mean that the government bears a heavier burden in the context of this right than in the context of other *Charter* rights; as I mentioned above, the standard is always proof on a balance of probabilities. What it does mean is that reviewing courts must examine the government's proffered justification carefully and rigorously in this context rather than adopting a deferential attitude. Deference may be appropriate in the case of a complex regulatory response or a decision involving competing social and political policies, but it is not the appropriate posture for a court reviewing an absolute prohibition of a core democratic right …"[citations omitted]

[60] *Frank, supra* note 13 at para 172.

[61] In Chapter 2, Bauböck advocated a system of laws in which stakeholding citizens be able to vote, with governments determining where to draw the line between stakeholding from non-stakeholding citizens.

adequately connected to the state, but permits legislators to impose a dividing line separating stakeholding from non-stakeholding citizens. This law was struck down because it did not pursue a valid objective, and in any event, it was overbroad and arbitrary. As such, at least from the perspective of Canadian constitutional law, there is a problem with implementing Bauböck's stakeholder account of voting. The Canadian majority's reasoning bears the closest resemblance to the pluralist account, in that it argued that citizens are subjects by virtue of holding citizenship.[62]

b. Germany and the Democratic Inclusion of Descent-Based Citizens

Germany is a federal parliamentary republic that elects its legislative (Bundestag) representatives through a mixed electoral system.[63] Its governance structure is set out in its Basic Law, of which Article 38 sets out the right of universal suffrage:[64]

> 38 (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.

In 2012, Germany's Federal Constitutional Court was asked to determine whether an electoral law which imposed a residency requirement on voting violated this provision.[65] The case centred on two descent-based German citizens who were born and raised in Belgium. They were denied ballots in an upcoming Bundestag election because the federal electoral legislation stated that expatriate German citizens could only vote for Bundestag members if they had

[62] Of course, the implications that this line of reasoning would have for non-citizen residents was not explored here.
[63] *Bundeswahlgesetz (BWG)* [*Federal Elections Act],* 23 July 1993, Federal Law Gazette I, at 1288, 1594 as amended by Article 2 of the Act of 3 June 2021 (Federal Law Gazette I p. 1482) English Translation online: <https://www.bundeswahlleiterin.de/en/dam/jcr/4ff317c1-041f-4ba7-bbbf-1e5dc45097b3/bundeswahlgesetz_engl.pdf.> (Germany)
[64] *Germany, Basic Law for the Federal Republic of Germany (Grundgesetz),* translation at http://www.gesetze-im-internet.de/englisch_gg/index.html. Art 38 [Basic Law], Alleged breaches of Art 38 may be appealed to the Federal Constitutional Court (see: Basic Law, Article 94(1)(4a)).
[65] BVerfG 2 BvC 1/11, *supra* note 13, paras 1-2.

habitually resided in Germany for at least 3 months at some point after May 23, 1949.[66] The Court was asked to determine if this 3-month rule violated Article 38.[67]

The context surrounding the 3-month residency rule bears unpacking here. Despite recent reforms, Germany remains the modern standard bearer for descent-based (*jus sanguines*) citizenship laws.[68] Given its roots in ethnic understandings of national membership and a perceived disconnect between this status and legal subjection, many democratic theorists point to descent-based citizenship laws as exemplifying the case against citizenship-based voting.[69]

While Germany's citizenship laws have expanded beyond *jus sanguines*, it maintains generous descent-based citizenship laws that can, in certain circumstances, be traced back multiple generations.[70] In lay terms, this means that there are a lot of people around the world who can access German citizenship who have never lived in the country. According to democratic theorists and political scientists, this context would speak heavily in favour of restrictions on citizenship-based voting. The three-month rule was the government's attempt to restrict voting to only the subset of citizens who had, at least for a short time, lived on German territory – the implication being that previous residence demonstrated a tangible connection to Germany that other descent-based citizens lack.

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[66] Text of impugned provision: BWG, *supra* note 63 as it read in 2012, as written in BVerfG 2 BvC 1/11, *supra* note 13: § 12 Right to vote (1) All Germans within the meaning of Article 116 Paragraph 1 [the citizenship clause] of the Basic Law who, on election day 1. Have reached the age of 18, 2. Have lived in the federal republic of Germany for at least three months or are otherwise habitually resident there, 3, are not excluded from the right to vote pursuant to s 13 (2) if the other requirements are met, Germans within the meaning of Article 116 paragraph 1 of the Basic Law who live outside the Federal Republic of German on election day are also entitled to vote, provided that they have had a residence or otherwise habitually resided in the Federal Republic of Germany for at least three months without interruptions after May 23, 1949 and before their departure [emphasis added].

[67] BVerfG 2 BvC 1/11, *supra* note 13, para 1.

[68] See Brubaker, *supra* note 1 at Chapter 3; BVerfG 2 BvC 1/11, *supra* note 13, para 42.

[69] See eg: Duarte, *supra* note 18.

[70] BVerfG 2 BvC 1/11, *supra* note 13 at para 42.

In terms of the law's content, the 3-month rule was the last vestige of historically much stricter residency restrictions imposed on voter eligibility for Bundestag elections.[71] Those earlier residency rules were constitutionally challenged and upheld in 1990.[72] Over the intervening decades, however, most of these restrictions were removed. German unification, increased integration within the Council of Europe, the increased movement of people across borders, and technological advancements collectively undermined the validity of territorial markers as determinant of a citizen's ability to participate in German political life from abroad.[73] By the time the current case arose, the 3-month rule was the only remaining residency restriction on voting.[74]

Notwithstanding this backdrop, a 7-1 majority of the Federal Constitutional Court struck down the three-month rule for violating Article 38. The right of universal suffrage formed one of the "essential foundations of the constitutional order,"[75] derivative of the core democratic principle of citizen equality.[76] Derogations from this core were not entitled to deference.[77] However, while restrictions on Article 38 would be vigorously scrutinized, the government had limited scope to impose restrictions on the vote.[78] The test was one of balance: the government

[71] BVerfG 2 BvC 1/11, *supra* note 13 at paras 4-9. Those restrictions were justified on the basis that (2) there was a need to differentiate between east and west Germans; (3) organizationally the vote needed to be linked to a prior residence; and (4) the limitations were compatible with principle of representative democracy.
[72] BVerfG 2 BvC 1/11, *supra* note 13, paras 12-17, referring to BVerfG 2 BvR 1266/90 2 Nov 1990 (NJW 1991, p. 689).
[73] BVerfG 2 BvC 1/11, *supra* note 13, paras 4-9, 30-32.
[74] BVerfG 2 BvC 1/11, *supra* note 13, paras 4-5.
[75] BVerfG 2 BvC 1/11, *supra* note 13, para 24.
[76] *Ibid.*
[77] BVerfG 2 BvC 1/11, *supra* note 13, paras 24-25. [Translated text using DeepL.com: "[I]t follows from the formal nature of the principle that the legislature only has a limited scope for restrictions when structuring the right to vote and stand for election. When examining whether a restriction is justified, a strict standard must generally be applied"].
[78] BVerfG 2 BvC 1/11, *supra* note 13, para 25 [Translated text: "However, the principle of universal suffrage is not subject to an absolute ban on differentiation. It does not follow from Article 38 Paragraph 2 of the Basic Law, which sets age limits for the right to vote and stand for election, that the legislature may not make further provisions on admission to the election in the exercise of its regulatory power pursuant to Article 38 Paragraph 3 of the Basic Law. However, it follows from the formal nature of the principle that the legislature only has a limited scope for restrictions when structuring the right to vote and stand for election. When examining whether a restriction is justified, a strict standard must generally be applied"].

could not impose rules that were not suitable for achieving their stated objective, or which exceed what is necessary to achieve this objective.[79] In other words, for restrictions on citizenship-based voting to stand, they had to survive a rigid proportionality analysis.[80]

As part of this quest, the Court focused on locating the purpose of the law. Here, it found that the law's objective - safeguarding the communication function of democracy – was valid.[81] Building on a longstanding line of case authority, this objective essentially espouses a deliberative account of democracy.[82] Citizen participation in democracy is not limited to voting; it requires involvement in the ongoing process of political opinion formation by engaging with political and social forces.[83] In the present case, the legislator's mechanism to protect this objective - imposing a minimum degree of personal connection and directly acquired familiarity with the political system via physical presence on territory – was suitable to achieve its ends. The legislator was entitled to take particular account of Germany's extensive descent-based citizenship laws, and the impact this would have on the communicative function of democracy without restrictions on voting.

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[79] BVerfG 2 BvC 1/11, *supra* note 13, paras 25-26.
[80] BVerfG 2 BvC 1/11, *supra* note 13, para 27 [Translated text: "The Federal Constitutional Court can therefore only find a violation of the principle of universal suffrage if the differentiating provision is oriented towards an objective that the legislature may pursue when structuring the right to vote if the provision is not suitable for achieving this objective or exceeds what is necessary to achieve this objective"].
[81] BVerfG 2 BvC 1/11, *supra* note 13, paras 31-35. [Translated text: "Among the reasons that may justify differentiations in the scope of application of the principle of universal suffrage are, in particular, the objectives pursued by democratic elections of securing the character of the election as a process of integration in the formation of the political will of the people or of ensuring the functioning of the representation of the people to be elected.... The former objective includes safeguarding the so-called communication function of the election…

Democracy, if it is not to be based on a purely formal principle of attribution, presupposes free and open communication between the rulers and the ruled ... The citizen's right to participate in the formation of political will is expressed not only in voting in elections, but also in influencing the ongoing process of political opinion-forming ...

Against this background, an exclusion from the right to vote may be justified under constitutional law if it can be assumed that a certain group of people does not have sufficient opportunity to participate in the communication process between the people and state bodies. Thus, it has always been considered compatible with the principle of universal suffrage that the exercise of the right to vote is linked to the attainment of a minimum age ...]
[82] *Ibid.*
[83] *Ibid.*

But while the 3-month rule had a valid objective, and was suitable to achieve that objective, it failed to "strike a careful balance between the principle of the universality of the election and the communication function of the election."[84] In other words, it was too blunt. A blanket law which required passing an arbitrary residence threshold would exclude citizens who were sufficiently familiar with German political life, and would include Germans who were not. A law infringing this fundamental right would have to be more tailored if it was to be constitutional.[85]

In reaching this decision, the Court declined to comment on the broader question - whether the exclusion of Germans abroad from voting could be justified by reference to their subjection (or lack thereof) to German laws or sovereignty. In its view, because the three-month rule did not differentiate on this basis (it included lots of people who were not subject to German laws) it would not consider whether this objective could justify the 3-month rule.[86]

The lone dissenting judge rejected the "the communication function of democracy" as a suitable objective. For him, the true legislative objective was focused on protecting the democratic link between authors and subjects of law.[87] In his view, the majority refused to acknowledge the true objective in order to avoid reopening a heated debate about *non-citizen*

[84] BVerfG 2 BvC 1/11, *supra* note 13, para 43.
[85] BVerfG 2 BvC 1/11, *supra* note 13, paras 39-43. Separately, the majority dismissed an argument that the 3-month rule would result in an accumulation of voters in a single constituency or a drastic change to the electorate. It held that there were less intrusive legislative mechanisms to deal with this issue aside from blanket disenfranchisement.
[86] BVerfG 2 BvC 1/11, *supra* note 13, para 38. [Translated text: "Whether the complete or partial exclusion of Germans living abroad from the right to vote can be justified by referring to differences in terms of being affected by German sovereign acts, the lack of a correlation between rights and obligations or potential conflicts of interest or loyalty does not need to be decided here. In any case, linking the right to vote to a previous three-month permanent residence in the federal territory is an inappropriate differentiation criterion in this respect. Germans living abroad who meet the requirements of section 12 paragraph 2 sentence 1 or 2 BWG are granted the right to vote regardless of whether they are currently subject to German sovereignty, whether the state can make them liable through honorary offices, through taxes or in any other way, or whether they could behave in a manner contrary to the meaning and purpose of elections to the German Bundestag as a result of conflicts of interest or loyalty. Accordingly, Germans living abroad who have not resided in Germany for an uninterrupted period of at least three months cannot be denied the right to vote on the basis of these considerations."]
[87] BVerfG 2 BvC 1/11, *supra* note 13, paras 65-66.

enfranchisement from a generation prior. In 1990, Germany's constitutional court rejected the claim that *non-citizens* (i.e. non-Germans) could vote on the basis that those who obey laws ought to have a voice in their creation. There, the Court held that while the idea of legal subjection is "correct in principle," it cannot lead to a "dissolution of the bundle" which links citizenship and the right to vote.[88] Rather than upend that debate, the majority in the present case opted to sidestep the issue by hanging its hat on a different (but arguably less genuine) democratic principle, hence the communication function of democracy.

For the dissent, while the three-month law was blunt and imperfect, it struck an appropriate balance between competing constitutional concerns. On the one hand, it acknowledged that many expatriate Germans still have links to Germany which grounds their rightful political inclusion. On the other, it prevented purely descent-based citizens from having a say in creating laws that would not bind them. [89] As such, the dissenting justice would have upheld the residency restriction on voting.

As a result of the majority decision, the 3-month rule was struck down.[90] A subsequent amendment reinstated a modified residency requirement, but added an individualized assessment process for German citizens who did not meet the residency threshold.[91] The new provision, which has yet to be constitutionally challenged, states that non-resident Germans can receive a ballot notwithstanding their inability to satisfy any residency requirement if "for other reasons,

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[88] BVerfG 2 BvC 1/11, *supra* note 13, para 70, referring to BVerfG 2 BvR 1266/90 2 Nov 1990 (NJW 1991, p. 689).
[89] BVerfG 2 BvC 1/11, *supra* note 13, para 64.
[90] BVerfG 2 BvC 1/11, *supra* note 13, paras 1-2.
[91] *Supra* note 63, English translation of recent 12 (2): "Provided the other conditions are fulfilled, Germans as defined in Article 116 paragraph (1) of the Basic Law who are resident in other territories outside the Federal Republic of Germany on the day of election shall also be eligible to vote provided that, after reaching the age of fourteen years, they had a domicile or were otherwise permanently resident in the Federal Republic of Germany for an uninterrupted period of at least three months and this stay dates back not more than 25 years **or for other reasons, they have become familiar, personally and directly, with the political situation in the Federal Republic of Germany and are affected by it.…** "[emphasis added].

they have become familiar, personally and directly, with the political situation in the Federal Republic of Germany and are affected by it."[92]

At its highest level, the German case stands for the proposition that descent-based German citizens who have never lived in the country can be included in the electorate. Despite the fact that its citizens can be traced back several generations, German citizens who have never lived on the territory may nonetheless have an adequate connection to the country to be constitutionally guaranteed the right to vote in national elections. This seemingly shocking constitutional outcome is, however, softened on closer inspection. In this regard, there are three points I wish to emphasize.

First, as in the Canadian case, the purpose of the voting restriction was a point of sharp disagreement. The majority would not address whether the social contract objective (here framed in the language of legal subjection) could be valid.[93] Instead, it grounded the law in a different – (but still philosophically grounded) goal: that of ensuring the communicative function of democracy. This choice cleverly side-stepped the foundational issue of democratic inclusion, and whether elected lawmakers can decide who belongs to the political community. The dissent argued that the true purpose of the residency rule was focused not on communication, but on ensuring those who pass laws should be subject to them. It grounded the law's objective squarely in the goals of legal subjection,[94] and criticized the majority's failure to do so.

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[92] *Supra* note 63.

[93] The majority reasoned that the 3-month rule would be ineffective and arbitrary at achieving this goal BVerfG 2 BvC 1/11, supra note 13 at para 37-38 [Translated text: "Germans living abroad who meet the [3 month rule] are granted the right to vote regardless of whether they are currently subject to German sovereignty… Accordingly, Germans living abroad who have not resided in Germany for an uninterrupted period of at least three months cannot be denied the right to vote on the basis of these considerations"].

[94] BVerfG 2 BvC 1/11, *supra* note 13 at para 70. The dissent tied the majority's linguistic choices as an attempt to avoid conflict with problematic statements about the linkage between voting and citizens in an earlier decision denying the inclusion of non-citizens in elections.

Second, and also like the Canadian case, deference played a large part in determining the outcome. The majority positioned the citizen's right to vote at the core of the constitutional order which justified rigorous constitutional scrutiny. The dissent, by contrast, adopted a much more deferential balancing exercise. In both cases, deference largely dictated the outcome.

Lastly, as in the Canadian case, a law which adheres to Bauböck's stakeholder citizen thesis is struck down. While here the 3-month rule which sought to divide stakeholding from non-stakeholding citizens was valid, the method chosen to demarcate this line was too blunt and arbitrary. However, unlike the Canadian case, given the majority's acknowledgment that elected lawmakers may validly legislate in this space, the Bundestag was able to respond to the decision by creating a voting regime which was more adequately tailored to individual relationships between citizen and state.

The crucial finding for our purposes does not lie in the exact wording of the legislative objective, but rather, in the more generalized acknowledgment from both sides that philosophical objectives are valid in this space.[95] While differing on which democratic understanding better framed the issue, both sides accepted that elected lawmakers can legislate in pursuit of essentially contested ideas about what democracy is and what it requires. By acknowledging that elected lawmakers can validly (but narrowly) act in this space, it gave the German Bundestag leeway to craft a more tailored law that imported a democratic idea of community membership, while also passing constitutional scrutiny. Thus, while the court ruled that descent-based citizens

[95] BVerfG 2 BvC 1/11, *supra* note 13 at para 32: [Translated text: "The reasons that may justify differentiations within the scope of application of the principle of universal suffrage include, in particular, the objectives pursued by democratic elections of safeguarding the character of the election as an integration process in the formation of the political will of the people or ensuring the functioning of the representation of the people to be elected…The first-mentioned objective includes safeguarding the so-called communication function of the election [citations omitted]].

cannot be excluded *en masse* from the electorate, nor was the door thrown open to their inclusion as a group.

c. The Marshall Islands' Disproportionately Large Expatriate Population

The Marshall Islands is a small southern Pacific island chain and constitutional republic in which the President is selected by a unicameral elected parliament known as the Nitijela.[96] According to their constitution, Nitijela members are elected "under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who have attained the age of 18 years, and who are otherwise qualified to vote pursuant to this Section".[97] Prisoners and persons "certified to be insane" are excluded from the electorate.[98] Votes are to be cast either in the electoral district in which the voter resides, or where they hold land rights.[99]

In 2016, the Marshallese Supreme Court was asked to determine the constitutionality of a law that eliminated the issuance of postal ballots to citizens overseas unless their absence was temporary (i.e. temporary absentees could still receive postal ballots, but permanent absentees could not).[100] The context surrounding this law bears unpacking here. Generally speaking, small island nations tend to have a larger proportion of their citizenry living outside the country than

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[96] *Constitution of the Republic of the Marshall Islands*, 1 May 1979, online: https://www.constituteproject.org/constitution/Marshall_Islands_1995 Art V s 3. [RMI Constitution]
[97] *Ibid,* Art IV, s 3(1). See also, Art II, s 14(2) and (3).
[98] *Ibid,* Art IV, s 3(2).
[99] *Ibid,* Art IV, s 3(3). "Land rights" in this context refers to an ancestral entitlement, of which most Marshallese citizens hold several. Most Marshallese citizens hold land rights on several atolls, owing to local custom and inheritance through different clans. See: Amata Kabua, "Customary Title and Inherent Rights: A General Guideline in Brief" (Majuro, RMI, 1993) online: https://rmicourts.org/wp-content/uploads/kabua_land.pdf. For more information on the Marshall Islands, see: ACE Electoral Knowledge Network, Case Studies on the Marshall Islands, online: https://aceproject.org/ace-en/topics/va/annex/country-case-studies/the-marshall-islands-a-high-proportion-of-external/mobile_browsing/onePag
[99] *Republic of the Marshall Islands, Public Law 2016-028*, s 118(b) online: Nitijela of the Republic of the Marshall Islands https://rmiparliament.org/cms/library/public-laws-by-years/14-2016.html?start=20, s 118 (reform 161:A registered voter who …(b) will be outside of the Republic temporarily on the date of the election, may apply for a postal ballot paper)
[100] *Lekka*, *supra* note 13; RMI Public Law (P.L.) 2016-028 proposed the following change to the electoral law: "s 118 A registered voter who …(b) will be outside of the Republic temporarily on the date of the election, may apply for a postal ballot paper" online: https://rmiparliament.org/cms/library/public-laws-by-years/14-2016.html?start=20 [emphasis added]

other countries. This makes them particularly interesting case studies for non-resident voting.[101] The narrative is particularly strong in the Marshall Islands. The country is party to an interstate agreement with the United States under which Marshallese citizens are permitted to live and work in the US without a visa.[102] As a result, while there are approximately 58,000 domestic inhabitants of the Marshall Islands[103] it is estimated that at least 30% of the Marshallese citizenry live and work in the United States, and this proportion is growing over time.[104]

The court case in question was launched by several Marshallese citizens who had permanently relocated to the United States. They argued that a law which eliminated their ability to receive postal ballots violated their constitutional right to universal suffrage (because citizens have the right to participate in the electoral process without the imposition of a "fee" – i.e. cost of a plane ticket) and to equal protection under the law (because it imposed a legal distinction between temporarily and permanently absent citizens).[105] In response, the government argued that

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[101] See eg: *supra* note 17.
[102] Compact of Free Association, United States of America and the Marshall Islands, 25 June 1983, as amended 30 April 2003: https://2009-2017.state.gov/documents/organization/173999.pdf. For more, see: Edward J Michal, "Protected States: The Political Status of the Federated States of Micronesia and the Republic of the Marshall Islands" (1993) 5:2 The Contemporary Pacific, 303.
[103] This number is taken from *Lekka*, *supra* note 13 at 2, 3 of Seabright AJ's concurring decision. For slightly different numbers, see The United Nations' Office for the Coordination of Human Affairs, "Marshall Islands: Population Distribution Census (2021)" (OCHA) online: https://www.unocha.org/publications/map/marshall-islands/marshall-islands-population-distribution-total-population-42418-census-2021.
[104] *Lekka*, *supra* note 13 at 2, 3 of Seabright AJ's concurring decision. For slightly different numbers, see: ACE Project, *supra* note 99.
[105] *Lekka*, *supra* note 13 at 2, 3 of the Majority decision. See also: RMI Constitution, supra note 96:

> Art IV section 3(1): Elections of members of the Nitijela shall be conducted by secret ballot under a system of universal suffrage for all citizens of the Republic of the Marshall Islands who have attained the age of 18 years, and who are otherwise qualified to vote pursuant to this Section.
>
> Art II section 14(2): Every person has the right to participate in the electoral process, whether as a voter or as a candidate for office, subject only to the qualifications prescribed in this Constitution and to election regulations which make it possible for all eligible persons to take part.
> (3) In the administration of judicial and electoral processes, no fee may be imposed so as to prevent participation by a person unable to afford such a fee.
> Art II, Section 12(1) All persons are equal under the law and are entitled to the equal protection of the laws (2) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any persons on the basis of gender, race, color, language, religion, political or other opinion, national or social origin, place of birth, family status or descent.

citizens are not constitutionally entitled to postal ballots.[106] Permanent non-resident citizens were free to fly home and cast a ballot in person. Separately, it argued that the constitution did not apply extraterritorially, and that the case involved a political question to which courts should not intervene.[107]

The Marshallese Supreme Court invalidated the law for violating both the universal suffrage and equality provisions of the Constitution.[108] In relation to the voting rights challenge, while the Constitution did not give citizens the right to demand a specific mechanism of voting, "[t]he right to participate in a representative democracy through the elective franchise granted by the Constitution is fundamental."[109] The Constitutional framers placed such a high value on the citizen's right to vote that it is characterized as being "universal" and available to "all citizens." This language evidenced the framers' intent that citizens be given the right to vote, and a system by which that right can be effectuated.[110] The government was required to comply with that intent by creating an electoral system that was available to all eligible citizens.[111] By eliminating all practical means for non-resident citizens to exercise their right to vote, the law effectively inserted a residency requirement on the vote that was not found the constitution.

The equal protection challenge argued that law created an unjustifiable distinction between voters who could or could not vote by postal ballot (temporary versus permanent absentees). Because the interest at stake in this case was voting, the Court held that a more exacting standard of review was required than what is typically applied in an equal protection

[106] *Lekka*, *supra* note 13 at 3.
[107] *Lekka*, *supra* note 13 at 3.
[108] This outcome is comprised of a majority decision from two justices and a concurring decision by AJ Seabright, *Lekka*, *supra* note 13.
[109] *Lekka*, *supra* note 13 at 8.
[110] *Lekka*, *supra* note 13 at 9.
[111] *Lekka*, *supra* note 13 at 9.

analysis.[112] Rather than simply looking for a rational basis for the distinction, the Court was required to engage in a balancing exercise, in which it weighed the burdens placed on the plaintiffs against the precise interests advanced by the government.[113]

In this regard, the burdens placed on the plaintiffs were substantial. By contrast, the three government justifications for the law were unpersuasive. First, a democratic objective posited that the purpose of the law was to ensure that only resident taxpaying citizens should be able to choose their representatives. The court rejected this claim on the basis that it proposed a constitutionally impermissible purpose. The Constitution does not require that voters be either taxpayers or residents. This objective sought to remove the right to vote from people who were constitutionally entitled to it. As such, this purpose would have failed even the rational basis standard.[114]

Second, an integrity-based argument posited that postal ballots often contained irregularities, and must be limited to prevent voter fraud. While this was a compelling government interest, the impugned law did not meet this goal. Temporary absentees could still rely on postal ballots, and there was no factual or logical basis for assuming fraud was only an issue for one class and not the other.[115]

Third, logistical arguments posited that the legal restriction was needed to expedite the counting and tabulation of ballots, and to keep costs down. The Court acknowledged the validity of these concerns, but found that the importance of protecting the fundamental right to vote outweighed the delay or expense imposed by making postal ballots available to them.[116]

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[112] *Lekka*, *supra* note 13 at 14.
[113] *Lekka*, *supra* note 13 at 14.
[114] *Lekka*, *supra* note 13 at 15-16.
[115] *Lekka*, *supra* note 13 at 16.
[116] *Lekka*, *supra* note 13 at 17.

In the final pages of its judgment, the court summarily rejected the government's extraterritoriality and justiciability arguments.[117] There was no legal basis for arguing that Marshallese citizens could not assert their constitutional rights in Marshallese courts just because they would be exercising those rights outside the country. As for the justiciability issue, this case engaged the plaintiffs' fundamental constitutional rights, of which Courts are the guardians.[118] This dispute fell squarely within the Court's jurisdiction.

Stepping back, the Marshallese decision revisits some themes we have already seen, and introduces new ones. At its highest level, it stands out for its absolute defence for the right of all citizens to vote without regard to residency. As a result of this decision, all of the (proportionately quite large) Marshallese voting population are constitutionally entitled to vote in Nijitela elections, and to be given some reasonable mechanism to carry out that right.

As in the previous case studies, we again see significant discussion about the legislative objective. A variety of objectives are presented to the Court. The first (ensuring only residents are voters) asks whether an elected body has the authority to alter the *demos*. The court flatly rejected this proposition. In its words, a law whose purpose sought to confine the voter pool to "taxpaying residents" was "constitutionally impermissible" and would not have even passed even the most generous standard of review.[119] This is one of the clearest statements we have seen indicating that elected lawmakers do not have the authority to reshape the electorate.

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[117] These two supplemental arguments (the presumption against extraterritoriality, and the political question doctrine) were not persuasive. (1) The presumption against extraterritoriality does not preclude Marshallese citizens from asserting their rights in Marshallese courts. Allowing Marshallese citizens to vote outside the country does not violate the sovereignty of either the Marshall Islands or the country in which the expatriate voter resides. (2) Insofar as it was alleged that this was a political question, the Court found that the framers of the Constitution made the policy decision of universal suffrage for all qualified Marshallese voters. The court was rightfully asked to enforce that intent. *Lekka*, *supra* note 13 at 19-24.

[118] *Ibid.*

[119] *Lekka*, *supra* note 13 at 15-16.

The other proffered objectives focused on logistical or electoral harms. Factors such as cost, complexity and integrity underpinned these rationales. Here, the Court strikes a different tune. While it accepted that these were valid objectives, in the present case the evidence did not substantiate these claims: the impugned law was ill-suited to handle them, and in any event, there was no evidence of the purported harms they presented.

We also see deference play a critical role in this case. The right of citizens to vote is framed as being fundamental to the constitutional order, and this framing influences the level of deference applied to the impugned law.[120] This relationship is clearest under the equal protection challenge where the importance of the right to vote justifies pushing the level of scrutiny beyond the ordinary "rational basis" test. It is also, however, evident in the discussion about justiciability. The government argued that courts should not wade into the non-resident voting debate because it is essentially political or philosophical. The court rejected this argument. For them, it was not a question of philosophy, it was a question that demanded the court's intervention and close scrutiny.

Lastly, when compared to democratic accounts of voting, the impugned law again casts doubt on the constitutionality of Bauböck's stakeholder citizen thesis. Instead of imposing a dividing line by reference to a time threshold (as we saw in Germany and Canada), the division here between stakeholding and non-stakeholding citizens here is measured by the individual's willingness to fly home to vote on election day. There are many critiques to launch against the imposition of financial or other barriers on exercise of the vote. Here, however, I am simply pointing out that the challenged law sought to carve out a subclass of citizens with 'real' connections to the country. As in the previous case studies, this effort was rejected.

[120] *Lekka*, *supra* note 13 at 14.

d. Pakistan and the Logistical Barriers to Inclusion

Pakistan has shakier liberal democratic credentials than the other case studies in this chapter. While it is a federal parliamentary republic possessing a Constitution empowered with judicial review, Pakistani democracy experiences a more pronounced blurring of institutional boundaries as different organs of state jostle for power and influence.[121] Its political landscape is heavily influenced by the military,[122] which has ruled the country for 33 non-consecutive years over the span of the country's 76 years since independence.[123] Even when not directly holding the reins of power, Pakistan's military exercise considerable political influence in relation to elections and governance. Among other things, has led some scholars to characterize Pakistan as a hybrid democracy[124] (possessing features of both liberal democratic and authoritarian regimes) while others paint a more optimistic picture.[125]

The Supreme Court is an important actor in this institutional jostling. Throughout its history, the Court has played a role in both legitimizing and challenging executive power and military control.[126] In years since the last period of military rule, the Court has positioned itself as the guardian of democracy,[127] and has not shied away from issuing bold judgments on high stakes political disputes.[128] However, its expansive interpretations and interventions has raised questions

[121] Muhammad Salman and Marzia Raza, "A Frozen Democratic Transition: Pakistan's Hybrid Regime and Weak Party System" in Swati Jhaveri, Tarunabh Khaitan and Disensha Samararatne, eds *Constitutional Resiliance in South Asia* (Oxford: Hart Publishing Inc, 2023) 369 at 372-5.
[122] *Ibid;* Katharine Adeney, "How to Understand Pakistan's Hybrid Regime: The Importance of a Multidimensional Continuum" (2017) 24 *Democratization* 119; Farhan Hanif Siddiqi, "Rescuing the Agency and Resilience of Civilian Political Actors: Civil–Military Relations in Pakistan, 2008–20" in in Swati Jhaveri, Tarunabh Khaitan and Disensha Samararatne, eds *Constitutional Resiliance in South Asia* (Oxford: Hart Publishing Inc, 2023) 351.
[123] Salman, *supra* note 121 at 369.
[124] Salman, *supra* note 121; Adeney, *supra* note 122
[125] See, eg: Siddiqi, *supra* note 122.
[126] Moeen Cheema, *Courting constitutionalism: the politics of public law and judicial review in Pakistan* (Cambridge University Press, 2022) at Ch 7.
[127] *Sunni Ittehad Council and v Election Commission of Pakistan and others*, (2024) Civil Appeal No. 333 of 2024 etc (Pak SC) (Date of Hearing 4 July 2024) at paras 5-13 [*Sunni Ittehad*].
[128] Salman, *supra* note 121 at 374; Moeen Cheema, *Courting constitutionalism: the politics of public law and judicial review in Pakistan* (Cambridge University Press, 2022); For examples of high stakes interventions see: *Miss Benazir*

over whether the Court's real motivation is power as opposed to protection.[129] Among other things, the Court has interpreted its powers of original jurisdiction to include *suo moto* and inquisitorial (fact-finding and summoning) powers on matters of public interest[130] - including electoral disputes.[131] A recent constitutional amendment has, however, clipped these original jurisdiction powers, and taken aim at judicial independence in ways evocative of other backsliding democratic regimes.[132] This latest move arguably pushes Pakistan's democracy further from democracy, although the story remains dynamic and subject to change.[133]

All this to say that Pakistani democracy, and the Court's role within it, is significantly more volatile than the other case studies in this collection.[134] While the country has held several competitive elections, they take place under the shadow of tutelary influences, and it is dogged by questions of electoral interference and a questionable record on civil liberties. The Supreme Court has regularly been called on to safeguard democracy and adjudicate serious electoral disputes. However, doing so has complicated its legacy and drawn the ire of the executive.

Bhutto v *Federation of Pakistan*, PLD 1988 Supreme Court 416; *Sunni Ittehad, ibid*; *Imran Ahmad Khan Niazi* v *Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan*, PLD 2017 Supreme Court 692.

[129] Lubna Ghulam Sarwar et al, "Article 184(3) of Constitution of Pakistan: Remedy or Judicial Activism?" (2024) 21:3 Migration Letters 577; Moeen H Cheema, "Pakistan: The State of Liberal Democracy" (2018) 16 I-Con 635, discussing *Imran Ahmad Khan Niazi v Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan*, (2016) Constitution Petition No. 29 of 2016 (the *Panama* case) in which the Supreme Court disqualified and dismissed a sitting Prime Minister from Office at 642. See also: *Sunni Ittehad, supra* note 127 at paras 8-11.

[130] Cheema: Courting Constitutionalism, *ibid* at 184, 200; Sunni, *supra* note 127 at paras 8-11. See also: *Darshan Masiah v State*, PLD 513 (SC 1990)

[131] *Supra* note 128. For more examples, see Cheema: Courting Constitutionalism, *ibid* at Ch 8.

[132] For a description of the Constitutional Amendment and its impact on judicial independence, see: Moeen Cheema and Marva Khan Cheema, "*Fractured Foundations and Pakistan's Kafkaesque Constitutional Amendment" online: VerfBlog,* 2024/10/21, https://verfassungsblog.de/pakistans-26-constitutional-amendment/. For more examples of shifting the rules for judicial appointments and the scope of constitutional court jurisdiction as part of the democratic decline playbook, see: "Autocratic Legalism" (2018) 85 University of Chicago Law Review 545 at 549-556; Aziz Huq and Tom Ginsburg, How to Save a Constitutional Democracy (Chicago: Chicago University Press, 2018) at Ch 4.

[133] For discussion of the current state of democracy and the Court's role within it, see Yasser Kureshi, "Courts, Constitutions and Authoritarian Consolidation in Pakistan" online: VerfBlog, 2024/10/31, https://verfassungsblog.de/courts-constitutions-and-authoritarian-consolidation-in-pakistan/.

[134] *Ibid.*

It is against this backdrop that the adjudication of non-resident citizens enfranchisement exists in Pakistan. Non-resident citizen enfranchisement has been a political issue in Pakistan for decades.[135] Pakistan has one of the largest emigrant populations in the world,[136] and its economy depends heavily on emigrant remittances.[137] Segments of the Pakistani diaspora are well-organized and engaged in extensive political advocacy. It has a history of political leaders living in exile, which strengthened connections to the diaspora vote.[138] The perceived political leanings and electoral outputs of non-resident voters has further politicized the issue.[139] All this to say that there are high stakes to the inclusion of non-resident citizens in the electorate. While there are significant claims to inclusion, there are also significant perceived gains (and losses) that weigh heavily in the balance.

On top of this, there are significant logistical challenges to actualizing a non-resident vote. The numbers and spread of Pakistani diaspora are likely to make inclusion costly and complicated. Many Pakistani emigrants live in non-democratic countries, and actualizing their

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[135] *Yasmin Khan and another v Election Commission of Pakistan and others*, 1994 SCMR 113 (Pak SC).
[136] International Organization for Migration, *Pakistan: Migration Snapshot* (IOM, August 2019) online: https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/Pakistan%20Migration%20Snapshot%20Final.pdf at 5: "With around 6 million emigrants, representing 3 per cent of the total Pakistani population, Pakistan is one of the top ten emigration countries in the world"; World Bank, Poverty and Equity Brief, Pakistan 2023 online: https://databankfiles.worldbank.org/public/ddpext_download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/current/Global_POVEQ_PAK.pdf. See also: Nathan Allen, Erin Kinzie and Ekta Singh, "Deferred Emigrant Voting Rights in South Asia: The Puzzle of Non-Enfranchisement in Competitive Regimes" (2024) 27(2) International Area Studies Review 75 at 80.
[137] United Nations International Organization for Migration (IOM), "Snapshot: Remittance Inflows to Pakistan January 2019-February 2024" online: https://dtm.iom.int/sites/g/files/tmzbdl1461/files/reports/Remittance%20Inflows%20to%20Pakistan_2024_Final.pdf. In which the IOM reports that remittances are one of the primary sources of income in the country and makes up approximately 8% of the official GDP. Other sources have cautioned, however, that it is extremely difficult to measure the remittances and the percentage likely much higher, as many remittances are likely transferred through unofficial channels Brittanica, "Finance of Pakistan" online: https://www.britannica.com/place/Pakistan/Finance; See remittances from expatriate citizens as being grounds for extending the right to vote: *Iqbal, supra* note 13 at para 8.
[138] Nathan Allen, Erin Kinzie and Ekta Singh, "Deferred Emigrant Voting Rights in South Asia: The Puzzle of Non-Enfranchisement in Competitive Regimes" (2024) 27(2) International Area Studies Review 75 at 82.
[139] For example, the leader of Pakistan Tehree-e-Insaf [PTI] party joined a public interest petition on behalf of Pakistanis living abroad seeking the vote, *Iqbal, supra* note 13. And has pushed for enfranchisement in political speeches, while criticizing the opposition's lack of cooperation on the issue: Allen et al: Deferred Voting, *supra* 138 at 88.

voting rights in these countries would be difficult.[140] On top of this, Pakistan shares the electoral system design hurdles identified in the Canadian case. Pakistan's electoral system is also derived from its British Colonial heritage, and brings with it all the institutional complexity demanded of that process spread over a much larger population.[141] In short, enfranchising non-resident citizens in Pakistan will be complicated and expensive, but "the material resources and administrative competencies required to conduct elections abroad are in short supply".[142]

This wider debate over non-resident voting periodically spills into the Supreme Court. Advocates have been using the Supreme Court's original jurisdiction (public interest litigation) powers to secure the vote since 1993.[143] In 2011, Imran Khan, the leader of one of Pakistan's political parties, joined a public interest petition on behalf of Pakistanis living abroad seeking the vote.[144] The Supreme Court agreed with the petitioners and ordered the government to facilitate emigrant voting.[145] The Court reasoned that "there is no distinction between the citizens living within Pakistan or outside the country, with regard to the right to vote".[146] Pakistanis have the right to vote because they are dignified citizens of the country, and cannot be denied the same rights on "technical grounds" such as logistical or financial concerns.

The Supreme Court also, however, accepted the electoral commission's argument that they did not have time to implement expatriate voting in time for the upcoming election. This, coupled with government delay, lead to the *de facto* continued disenfranchisement of non-resident citizens in the 2013 elections. In the years between the 2013 and 2018 elections,

[140] Allen et al: Deferred Voting, *supra* 138 at 80.
[141] Allen et al: Deferred Voting, *supra* 138 at 81-82.
[142] Allen et al: Deferred Voting, *supra* 138 at 80.
[143] Yasmin Khan, *supra* note 135.
[144] *Iqbal, supra* note 13.
[145] *Iqbal, supra* note 13.
[146] *Iqbal, supra* note 13 at para 8.

Pakistan's electoral management body oversaw implementation, but failed to develop a voting system. Cost and complexity were flagged as the reasons behind the delay.[147]

This lead to another wave of petitions to the Supreme Court, in which the Court again affirmed the right of non-resident citizens to vote, and an order for electoral bodies to implement it.[148] All of this culminated in legislative changes permitting non-resident citizens to vote,[149] which were later repealed without having extended past the pilot phase.[150] The repeal cites technical challenges as preventing the conduct of overseas elections, and the need for more pilot programs.[151] The ongoing role of the Supreme Court to pressure government agencies on non-resident voting has been called into question by the recent constitutional amendment.[152]

The Pakistani case study thus differs from the others in terms of the role played by the court, the number of adjudications, and the failure of those adjudications to result in the successful inclusion of non-residents citizens. In addition, this case study is unique in that the Supreme Court has not meaningfully addressed the scope of the right to be granted (i.e. whether it extends to some versus all non-resident citizens, or how they ought to be enfranchised). We don't see discussion about if or how the government proposes to divide non-resident citizen voters from non-voters. The focus has been on pushing resistant institutional bodies to create a system for non-resident voters, not on the exact contours of what that system looks like.

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[147] *Dr Farhat Javed Siddique et al vs Government of Pakistan et al*, PLD 2018 SC 788, (Pak SC) (Constitution Petitions Nos. 74 to 79 of 2015, 49 to 56 of 2016 and 2 of 2018 and Civil Misc. Applications No.4292 of 2017 and 162 of 2018) at paras 1, 2.
[148] *Siddique, ibid.*
[149] Election Laws (Amendment) Ordinance, 2013 (Ordinance No. IV of 2013) ss 47-B-47K, which amended the *Representation of the People Act*, 1976 (LXXXV of 1976) as well as the Electoral Rolls Act, 1974 (XXI of 1974). Online: https://na.gov.pk/uploads/documents/1381222473_746.pdf.
[150] Elections (Second Amendment) Act, 2021, amending *Elections Act 2017* (XXXIII of 2017), online: https://www.senate.gov.pk/uploads/documents/1623649921_502.pdf.
[151] Elections (Amendment) Act, 2022 amending *Elections Act 2017* (XXXIII of 2017), online: https://www.senate.gov.pk/uploads/documents/1653899485_889.pdf.
[152] Among other things, that amendment restricts Supreme Court's original jurisdiction powers. It also has changed how judges are appointed to the top court, thus engaging wider questions about the ongoing independence of the Court.

At the same time, however, there are similarities and important lessons to draw from this case. First, the Supreme Court has repeatedly affirmed that Article 17(2) of the Constitution gives non-resident citizens the right to vote.[153] The rationale underpinning this right is usually framed around the ideals of democracy ("In order to achieve the Constitutional objective of democracy" citizens must vote because they are "primary stakeholder[s] in the process of conducting elections").[154] It has also, however, been framed around the significant contributions expatriate citizens make to the country,[155] and the Constitution's direction that "obedience to the Constitution and the Laws is the obligation of every citizen wherever he may be".[156]

Throughout all of this, the underpinning acceptance that non-resident citizens have the right to vote has remained unchanged. The competing view – that governments are not required to give citizens the right to vote because they are not part of the rightful *demos* – is not argued. From this, we can discern a fairly absolute stance that is not open to interpretation or discretion as a matter of principle. Judges, lawyers, and the government appear to unquestionably accept that the constitution determines rightful *demos*. If the constitution says citizens vote, then citizens must vote. Alternative (democratic) accounts have not been given airtime in this conversation.

At the same time, however, the Pakistani case demonstrates that other purposes can restrict the right of non-resident citizens to vote (least temporarily). The government, while conceding that all citizens have the right to vote, has focused their pushback on the logistical and technological barriers to implementation: it is too complicated, expensive and/or requires too

[153] *Pakistan, Constitution of the Islamic Republic of Pakistan*, 1973, s 17(2). *Siddique, supra* note 147, Yasmin Khan, *supra* note 135, *Iqbal, supra* note 13.
[154] *Iqbal, supra* note 13 at para 6: "In order to achieve the Constitutional objective of democracy" citizens must vote because they are "primary stakeholder[s] in the process of conducting elections".
[155] *Iqbal, supra* note 13 at para 7.
[156] *Iqbal, supra* note 13 at para 14, referring to an earlier adjudication in this case.

much institutional coordination to be completed. Judges have been receptive to these arguments. This is in line with the trend emerging in the other cases which have held that the right to vote can be limited in order to protect the integrity of the electoral system.

On the point of deference, we do not see a clear debate emerge on this point. However, we can discern some willingness to defer to government bodies regarding logistical issues, with comparatively less willingness to defer to government on the question of the citizen's rightful inclusion.

Lastly, when overlaid with democratic accounts of inclusion, the Pakistani Supreme Court's stance arguably bears some elements of the stakeholding and pluralist reasoning. At some points, the inclusion of non-resident citizens is justified by reference to the stake they have in democracy[157] or the contributions they make to the country (which arguably speaks to their connection).[158] At other points, inclusion is more closely aligned with a relationship of subjection ("obedience to the Constitution and the Laws is the obligation of every citizen wherever he may be").[159] The most that can be said at this stage is that the Pakistani Supreme Court has not endorsed the notion that some citizens can rightfully be excluded where they lack an adequate stake. In this respect, its reasoning is more closely aligned with the pluralist stance.

e. Uruguay: A Constitutional Outlier

The Uruguayan case merits detailed investigation because it is the lone national court which upheld residency restrictions on the electorate. This story starts in 2018, when an electoral law was passed extending the franchise to Uruguayan citizens living outside the country.[160] Four

[157] *Iqbal, supra* note 13 at para 6: "In order to achieve the Constitutional objective of democracy" citizens must vote because they are "primary stakeholder[s] in the process of conducting elections".
[158] *Iqbal, supra* note 13 at para 7.
[159] *Iqbal, supra* note 13 at para 14, referring to an earlier adjudication.
[160] Law 19.654 (17 Aug 2018) (Uruguay) [translated]:"It is hereby declared, as an interpretation of Articles 77, paragraph 1 and 81 of the Constitution of the Republic, that the fact of residing outside the country does not hinder the exercise of

political parties and several individual legislators launched a constitutional petition seeking a declaration that the law was unconstitutional.[161] All five Supreme Court justices agreed that the law was unconstitutional, albeit for different reasons.[162] As a result, non-resident Uruguayan citizens cannot vote in national elections.

The decision proceeded in three parts. First, the Court had to determine that political parties and legislators had standing to challenge the law. Finding they did, the Court turned to a procedural challenge. Four of five justices held that the impugned law was unconstitutional because it was not passed in accordance with the special majority rules set out in the Constitution.[163] Separately, 3 of 5 judges held that the law was unconstitutional on substantive grounds. The substantive argument, which is relevant for our purposes, focused on Article 81 of the Constitution. It states (as translated):[164]

> Nationality is not lost even by naturalization in another country, it being sufficient for the purpose of retaining the rights of citizenship merely to take up residence in the Republic and register in the Civil Register.

Two important pieces of constitutional context bear unpacking here. First, Uruguay's constitution distinguishes between citizenship and nationality. As the Court explains, nationality speaks to national membership. It encompasses the "natural bond" which speaks to a "common past" and which "binds an individual to a state community".[165] A person cannot lose their

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the rights and obligations inherent to citizenship." online: Normativa y Avisos Legales del Uruguay: http://www.impo.com.uy/bases/leyes-originales/19654-2018.

[161] Uruguay Decision, *supra* note 13.

[162] Four of five judges invalidated the law on procedural grounds (the law was passed by a regular majority rather than the 2/3 majority needed for laws pertaining to the electoral register per the terms of the Constitution (see: *Constitution of the Oriental Republic of Uruguay*, 27 Nov 1966, Art 77(7)) [Uruguay Constitution].

[163] *Ibid.*

[164] Uruguay Constitution, *supra* note 162 at Art 81.

[165] Uruguay Decision, *supra* note 13 [translated text]: "In order to explain why the rule is not interpretative, reference should be made to the constitutional notions of nationality and citizenship.

Nationality goes hand in hand with life in society, with having a common past. On the other hand, the concept of citizenship points to a legal connotation that enables on to participate in the political life of the country. Nationality refers to the relationship of individuals with a state community and for which reason they acquire right and duties; it is up to domestic public law to establish who are its nationals.

nationality by their life circumstances or actions.[166] Citizenship, by contrast, is simply a juridical status whose rights can be activated or suspended based on satisfying certain criteria.[167] A person's citizenship can be constitutionally "suspended" for a number of reasons, including age, criminality, incompetence and other factors.[168] While suspended, the constitution suspends a person's rights associated with citizenship, including voting. Second, voting is not the exclusive domain of citizens under Uruguay's constitution. While citizens are automatically added to the voting register, resident non-citizens (permanent residents) can opt into voting after 15 years.[169]

With that background clarified, the Court noted that Article 81 clearly makes enjoyment of the rights of citizenship – including voting - conditional on residency:[170] "citizenship and its correlate in suffrage is only activated when we are within our country, within our community".[171]

…

Thus, the eminent Justino Jiménex de Aréchaga pointed out that "nationality appears to us as a natural bond, derived from birth, from blood or from a voluntary act, which binds an individual to a state community, which produces certain consequences of law, especially in the international order, and which normally attributes to whoever possesses such condition a vocation to acquire the status of citizen. Second: citizenship, on the other hand, appears to us as a simply juridical quality., defined by domestic law, which enables the individual to participate in the political life of the group, granting him certain special rights or imposing on him at the same time certain duties. (Justino Jiménex de Aréchaga: "La Constitutción Nacional, Ed Cámara de Senadores, T1, Montevideo, pp. 396-397""

[166] *Ibid.*

[167] *Ibid.*

[168] Uruguay Constitution, *supra* note 162 at Art 80: Citizenship is suspended: (1) By physical or mental ineptitude which prevents free and reflective action; (2) By being under indictment on a criminal charge which may result in a penitentiary sentence; (3) By being under eighteen years of age; (4) By being under sentence which imposes the penalty of exile, prison, penitentiary, or loss of political rights during the term of the sentence; (5) By habitually engaging in morally dishonest activities which shall be specified by law in accordance with item 7 of Article 77; (6) By being a member of social or political organizations which advocate the destruction of the fundamental bases of the nation by violence or propaganda inciting to violence. Those mentioned in Sections I and II of this Constitution are considered to be such for the purposes of this provision; (7) By a continuing lack of good conduct as required by Article 75. The last two grounds shall apply only with respect to legal citizens.

[169] Uruguay Constitution, *supra* note 162 at Art 78: Foreign men and women of good conduct, having a family in the Republic, who possess some capital or property within the country or are engaged in some profession, craft, or industry and have habitually resided at least fifteen years in the Republic have the right to vote without the necessity of previously obtaining legal citizenship. Proof of residence must be based on a public or private document of proven date, and if the evidence is satisfactory to the authority competent to pass upon it, the foreigner will be entitled to exercise the right to vote from the time he is inscribed in the Civil Register, as authorized by a certificate issued by the same authority for this purpose.

[170] *Ibid,* Art 81.

[171] Uruguay Decision, *supra* note 13.

The government attempted to argue that the challenged law simply interpreted the constitution. The court disagreed. An interpretation cannot contradict the rule it is attempting to interpret. In this case, the impugned law was attempting to undermine and modify the clear constitutional text found in Article 81.[172] The law, which had already been struck down for being procedurally defective, was substantively unconstitutional as well.[173]

Taken at face value, the Uruguayan case is an outlier in several respects. The other case studies challenged attempts to exclude non-resident citizens, whereas here the challenge is focused a law which attempted to include them. The other case studies proceeded against a constitutional backdrop that was silent on the role of residence to voting, while here we have explicit constitutional language. While the other outcomes sit in conflict with dominant takes in democratic theory, this case reveals an unexpected point of convergence. In this respect, while the government was attempting to move towards the more dominant constitutional stance, the output moves Uruguay closer to a residency or domicile-based understanding of democratic inclusion.

But while this outcome is different, the reason underpinning it is aligned with the other case studies. Like the Canadian, Marshallese and Pakistani cases, the Uruguayan court accepted that the constitution determines the *demos*. The Court did not engage with or defend the role of democratic understandings in delimiting the scope of the franchise. The judicial outcome was not based on accepting the validity of democratic objectives with regards to voting; but rather, on the clear words of the constitution. The only difference we have here is that Uruguay's constitution

[172] Uruguay Decision, *supra* note 13 [translated]: "Article 81…clearly establishes the consequences derived from a citizen settling outside the national territory in relation to the exercise of citizenship rights. Therefore, a legal rule that claims to be interpretative, by enabling the exercise of citizenship rights to those who do not reside on the national territory…modifies the rule it is claiming to interpret." See also the excerpted text at *supra* note 166.
[173] Uruguay Decision, *supra* note 13.

says something different than what is usually seen. Aside from a difference in constitutional language, much of the analysis is similar to that in the other case studies.

On the point of deference, there is no explicit reference to the standard of review. However, given the Court's flat rejection of the government's proffered explanations, we can infer that the Court was not inclined to adopt a deferential stance on the issue of voting.

Thus, while Uruguay is an outlier in terms of its outcome, the underpinning stance is not. Like the others, it held that the constitution determines the contours of the *demos*, and that this determination is not entitled to deference. Uruguay's outlier status flows from its unique constitutional language, not any unique principle or reasoning applied.

f. Conclusion

The five case studies above provide an overview of how non-resident voting rights are adjudicated around the world. As a group, they paint a fairly unidirectional picture. Despite being faced with a wide variety of contextual factors regarding the size, institutional complexity, cost, logistical burdens, or connectedness of citizens to the community, Courts have repeatedly affirmed that non-resident citizens have the constitutional right to vote. The lone national case study resulting in exclusion (Uruguay) flowed directly from unique constitutional language, rather than a novel analytical distinction.

The next section analyzes these cases in detail. At this stage, I would like to draw two key analytical points into focus. The first is focused on the purpose or objective of the impugned law. The courts above were given a variety of reasons why the government wanted to exclude non-resident voters from the electorate, including: lack of subjection or connection to the home state, cost, integrity, transparency, delay and technological complexity. Generally speaking, the objectives focused on protecting the electoral system from some external harm (for example: it is

too expensive, complex, or difficult to guarantee the integrity of external votes) were valid. However, aside from the Pakistani case, the evidence did not speak to these objectives. By contrast, objectives which challenged the rightful inclusion of non-resident voters in the political community were either ignored or flatly rejected.

This explains, at least partially, the contextual insensitivity we see in the case studies. Evidence relating to the cost, complexity, integrity and transparency components of a non-resident voting regime had the potential to impact outcomes, but in most cases the actual evidence was lacking. The story is different for facts which spoke to the rightful inclusion (or nor) of non-resident voters in the *demos*. If elected lawmakers lack the authority to decide that some citizens are outside the political community, facts which speak to that inquiry - such as the size of the non-resident community, the length or reasons for their absence, or their connectedness to their home state - become irrelevant. These factors are only relevant once you accept that elected lawmakers have the ability to push citizens who do not meet community membership credentials outside the *demos*. Because most judges rejected that premise, the contextual factors speaking to that issue have no bearing on the outcome.[174] This explains why the cases push towards similar outcomes despite a variety of different non-resident groups. The personal characteristics of the non-resident citizens were irrelevant to the legal analysis.

While this rejection explains the dominant judicial stance to non-resident voting rights, different opinions were expressed. The dissenting judgment from Canada, and both judgments out of the German case study accepted that election laws may validly exclude non-resident citizens from the *demos*. By adopting this stance, these judgments had footing to explore the

[174] For example, the Pakistani Court accepted that technological complexity could delay enfranchising non-residents citizens, *Iqbal, supra* note 13 at para 14, *Siddique, supra* note 147. The other case studies similarly accepted the notion that these were legitimate objectives, but found the facts didn't match the justification.

actual contextual features of the non-resident citizenry, and their connection (or lack thereof) to the community.

Deference is the second key point to emphasize. Most of the case studies vigorously scrutinized attempts to disenfranchise citizens on the basis that these restrictions struck at the core of the constitutional order. This scrutiny played a large part in striking down most of the non-resident voting restrictions. Again, however, this view was not uniform. The German and Canadian dissents argued elected lawmakers are entitled to more lenient constitutional analysis when legislating on the contested contours of democracy. Later in this chapter, I will consider how we should feel about this constitutional stance and about the linkage between these objectives and deference. Before doing so, however, the next section digs into more detail on these two key points of analytical distinction.

E. Constitutional Perspectives on Non-Resident Citizen Voting

a. Dominant and Minority Stances

The case studies above reveal a dominant and minority stance towards non-resident citizen enfranchisement. These stances differ in their analyses of (1) source and limits of state authority and (2) deference. The first factor asks whether lawmakers have the authority to determine who is a rightful member of the *demos*. Exemplified by the Canadian majority, Marshallese, Pakistani, and Uruguayan judgments, the dominant stance says no, they don't. Constitutions set out the terms by which the people (citizens) agree to be governed. Elected lawmakers lack the authority to dismantle this relationship and construct their own vision of a rightful *demos*. The minority stance, as exemplified by the Canadian dissent and the German majority and dissenting judgments, argues that elected lawmakers do have the authority to answer this question.

Secondly, the deference factor asks what role judges appropriately play in evaluating efforts to shape the *demos.* The dominant view rejects deference on the basis that restricting the citizen's right to vote strikes at the core of the constitutional order. The minority stance, by contrast, argues that courts should defer to elected lawmakers when they legislate on essentially contested matters of membership in the political community.

While the following sections dig into the details of each factor, at this point, I wish to highlight that these stances on each factor are typically fused: the dominant view rejects the validity of democratic objectives and vigorously scrutinizes limits on the right to vote; the minority view accepts the validity of democratic objectives and argues they are entitled to deference. Only the German majority decision bucks this trend. It, unlike the others, accepts the validity of democratic objectives, but subjects them to vigorous scrutiny. The relationship between these two factors is useful to keep in mind when thinking about judicial responses to the right to vote.

b. The Source and Limits of State Authority

Debates over the purpose of non-resident voting laws played an outsized role in the case studies. Most of the judgments spent significant time figuring out *why* the government wanted to prevent certain non-residents from voting. Several different answers were given to this question. The objectives of focused on protecting the electoral system from some external harm – such as cost, complexity, integrity or transparency - were acceptable to everyone.[175] In theory, it would be possible to restrict a non-resident citizen's right to vote if, for example, the integrity of those ballots could not be guaranteed.

[175] *Frank*, *supra* note 13 at paras 63, 55, 78; *Iqbal, supra* note 13 at para 14; *Siddique, supra* note 147, *Lekka, supra* note 13 at 15-18; BVerfG 2 BvC 1/11, *supra* note 13 at paras 51-52 (discussing an alternative objective of preventing a concentration of non-resident votes in one constituency). Note that in the Uruguay Decision the government did not raise these objectives.

Despite the acceptability of this objective, only the Pakistani case had the facts to match it.[176] In the other cases, the real purpose of these laws tended to be based on a different philosophy about what makes a rightful *demos*. In this argument, the purported harm is internal. We aren't just protecting the will of the people from external threat, the definition of 'the people' is the problem. Throughout this section, I will refer to this as the "democratic objective".

The democratic objective is invalid under the dominant stance. This rejection is revealed in different ways. The Pakistani case rejected it implicitly, in that the entire decades-long discussion about non-resident citizen voting takes for granted that the constitution alone determines the *demos*. Nobody argued that non-resident citizens are not rightful members of the *demos*, only that it was too complex or expensive to include them. Similarly, in the Uruguayan case nobody argued that democratic objectives were valid. The outcome in that case was driven by the underpinning belief that the constitution determined the rightful *demos*. In this regard, while the Uruguayan case was an outlier in its outcome, it is aligned with the others on the question of locating a valid legislative purpose.

The democratic objective's invalidity is more obvious in the remaining decisions. The Canadian judges found that preserving the social contract could not be a valid objective.[177] Similarly, the Marshallese judges found that an attempt to confine the voter pool to legal subjects was "constitutionally impermissible".[178] Even in the German case study, which is discussed more

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[176] *Iqbal, supra* note 13 at para 14; *Siddique, supra* note 147.

[177] *Frank*, *supra* note 13 at paras 53: Although moral philosophy doubtlessly has some role to play in the legislative sphere, it cannot readily serve as a source for a pressing and substantial objective in relation to an infringement of *Charter* rights.

[178] *Lekka, supra* note 13 at 16: "The first interest identified by the Bill Summary to "allow Marshallese citizens who are tax-payers and residing on the Islands to determine the persons or persons to represent them in their Constituencies" does not survive an intermediate level of scrutiny under *Anderson-Burdick* or even a less demanding "rational basis" test because the Constitution does not impose any qualification that a voter be either a "taxpayer" or "reside on the Islands." This interest is insufficient to justify an imposition on plaintiffs' right to vote because it suggests the purpose of P.L. 2016-028 is to disenfranchise constitutionally qualified voters who are no longer residents of the Marshall Islands which is a constitutionally impermissible purpose."

below, the majority judges refused to answer whether a law can validly restrict the citizen's vote based on their lack of legal subjection.[179] They did not want to engage with an argument which questioned the exclusive constitutional authority over the issue of democratic inclusion.

The minority view, most clearly expressed by the German and Canadian dissenting judgments, took a different stance. The Canadian dissent argued that governments are plainly allowed to legislate on matters of morality and philosophy.[180] In support of that claim, they pointed to age restrictions on the vote, and the existence of criminal laws.[181] In the German case, both the majority and dissenting opinions accepted the validity of democratic objectives, but differed in how it could be framed. The German dissent, like the Canadian counterpart, argued the law's purpose was clearly intended to ensure reciprocity between authors and subjects of law and chastised the majority for skirting the issue.[182]

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[179] BVerfG 2 BvC 1/11, *supra* note 13 at paras 37-38.
[180] *Frank*, *supra* note 13 at paras 126, 139-145.
[181] *Frank*, *supra* note 13 at paras 126-7, 139-145.
[182] BVerfG 2 BvC 1/11, *supra* note 13 at paras 66, 70: Communication is indeed essential for democracy. However, when it comes to the relationship established and intended to be established through democratic elections, it is not the relationship of communication but rather the relationship of responsibility is more fundamental—a relationship of responsibility of a real, serious nature, in which not only words are exchanged, but also, by voters and elected officials alike, the consequences of their own decision-making behavior must be borne. It is only through this that the democratic context of communication is established in the first place.
…
Today's decision is one of those phenomena that can only be explained historically – by telling the story. Among its determining factors is the ruling on voting rights for foreigners; more precisely, the overly generalizing part of the reasoning behind this ruling. After the court repeatedly justified the restriction of the voting rights of Germans living abroad by means of a residency requirement solely on the basis of tradition and disregarded the fundamental democratic principle that those who govern should derive their legitimacy from those they govern … it stated in its ruling on voting rights for foreigners that "the idea that it is in line with the democratic ideal ... to establish a congruence between the holders of democratic political rights and those permanently subject to a particular rule" was "correct in principle," but said that this should not lead to a "dissolution of the link" between German citizenship and membership of the national community, which confers the right to vote; Rather, discrepancies between subjugation to a particular authority and membership of the national community as defined by German status within the meaning of Article 116(1) of the Basic Law may only be eliminated by means of nationality law provisions. This generalization, which goes beyond the question of voting rights for foreigners considered and decided in isolation, is by no means intended to imply the partial decoupling of German citizenship and voting rights, which the Senate ruled in the case of Germans living abroad. [citations omitted]

The German majority declined to consider whether it was valid for elected law makers to pass a law that draws its own circle around authors and subjects of law. However, drawing on the exclusion of children from the electorate, it concluded that elected lawmakers have the ability to tailor the franchise in order to further other democratic objectives – here expressed in the language of "preserving the communicative function of democracy". While narrowed in its breadth, the German majority decision nonetheless accepted that democratic objectives were valid.

At their core, the arguments about the democratic objective and its validity (or lack thereof) boil down to conflicting accounts on who holds the reins of state authority. Democratic and constitutional accounts both accept that liberal democracy is rooted in the ideal of popular sovereignty: i.e. that all state authority ultimately lies with the people, and that the exercise of state power is legitimized by their consent. The problem arises in defining the people. Democratic accounts define the people as the governed in the strict sense. This definition requires reciprocity between authors and subjects of law. Constitutional accounts tie the definition to a citizenry that set out the terms of their collective subjection in a constitution. When attempting to locate a valid purpose for these voting restrictions, the Court is essentially asking whether lawmakers have the ability to challenge the constitutional script. So far, the dominant view has said no. This explains the collective positioning of the right to vote at the core of democracy, and the absolute nature by which citizenship and voting are fused by the court.

When transposed into the language of democratic theory, this dominant view rejects Dahl's principle as properly grounding the vote. Under the dominant view, the nation-citizenry are the people who have chosen to govern themselves. The citizenry is, save for external factors, fused with the vote. In terms of output, however, the dominant stance bears some resemblance to

portions of the pluralist account. While none of these decisions engage with Owen's views on citizenship's content or the inclusion of resident non-citizens. At points, however, they do pluck out and adopt his subjection argument that non-resident citizens are subject to laws by virtue of holding citizenship.[183]

The minority views rejected the argument that state institutions cannot determine the rightful *demos*. This is most obvious in the Canadian and German dissenting decisions - both of them would have allowed the legislature to exclude some citizens from the *demos*. The German majority did not address this issue directly, but nonetheless held that elected lawmakers can invoke democratic principles to determine the rightful *demos*.

When translated into the language of democratic theory, the minority views bring us closer to certain strands of Dahl's principle. While a surface reading of the Canadian dissent could be interpreted as being aligned with territorial strands of inclusion (residency or domicile), this ignores the fact that these statements took place within the confines of discussing the citizen's right to vote. In the absence of any suggestion otherwise, it is too far a leap to argue those statements support accounts of inclusion which do not believe that citizenship status should be the relevant proxy for voting.

[183] *Frank, supra* note 13 at para 72: "Non-resident citizens *do* live with the consequences of Canadian legislation. Many non-resident Canadians come home frequently and are subject to Canadian legislation during their visits. Many have family members living in Canada; as the application judge mentioned, Canadian laws affect the resident families of non-resident and resident Canadians alike. And there are Canadian laws that do apply to non-resident citizens while they are living abroad: many laws have extraterritorial application and confer both benefits and burdens on non-resident citizens, including laws with respect to taxation, criminal law, foreign anti-corruption measures, government benefits and citizenship (Canadian American Bar Association, I.F., at paras. 17-18). For example, a Canadian citizen living abroad on a visa obtained under a trade agreement could have his or her life disrupted should that agreement be renegotiated. Government policies can also have global consequences — for example, the government's military, environmental and trade policies have implications that extend well beyond Canada's borders — and non-resident citizens may also be acutely concerned about such issues. Finally, and importantly, Parliament can change laws on its own initiative and thus alter the extent to which Canadian legislation applies to non-resident citizens. The effect of the AGC's position is that the constitutional right to vote would be subject to shifting policy choices. Such an interpretation cannot be correct."

Instead, in my view the minority statements are more closely aligned with Bauböck's stakeholder citizen theory. Under both the minority and stakeholding accounts, citizenship status denotes membership in the state. However, in order for this legal membership to also denote membership in the *demos*, it must also be underpinned by a community relationship tying its holder to a community of fate. Stakeholding is the democratic barometer by which citizens measure access to that democratic right. As such, democratically elected governments can craft broad parameters (such as duration limits) in order to separate stakeholding from non-stakeholding citizens. Both accounts proceed from the basis that citizenship is a valid, but on its own insufficient, guarantor of membership in the political community.

c. The Role of Deference

The second analytical component differentiating the dominant and minority stances is that of deference. According to the dominant view, attempts to restrict a citizen's right to vote must be vigorously scrutinized. This discussion is most explicit in the German, Canadian and Marshallese cases.[184] Given the positioning of the right to vote at the core of democracy, the majority justices argued that restrictions on the vote must be subject to a rigorous standard of review.[185]

By contrast, the minority stance advocated for the more deferential standard of review. For example, per the Canadian dissent: "[w]e must exercise caution to avoid usurping Parliament's policy-making function. The inquiry is not what members of the Court prefer, but whether the limit was one that Parliament could reasonably impose."[186] Separately, the German dissent argued that it was impossible to tailor a general electoral law to the individual situations of the Germany

[184] In Pakistan, it is subtle – government bodies are continually pushing for space against the court's order. The Court, while vigorously pushing for realization of the right to vote, defers to government explanations on the barriers to implementation. *Iqbal, supra* note 13. In the Uruguayan decision, the issue of deference is not raised specifically, but the court does not adopt a deferential posture towards the government.
[185] *Frank*, *supra* note 13 at para 44; BVerfG 2 BvC 1/11, *supra* note 13 at para 25; *Lekka, supra* note 13 at 8.
[186] *Frank*, *supra* note 13 at para 159.

expatriate community. In light of that impossibility, this law struck a justifiable balance between common constitutional concerns.[187]

This divide echoes the well-developed scholarly debate on the role that deference rightfully plays in the adjudication of electoral rights. To briefly re-iterate what was explained in the Introduction, one view argues that questions about the makeup of the political community are essentially political and philosophical.[188] These ideas are essentially contested. As such, they are properly assigned to the state institution that is most directly tied to the people (the legislature), and which is vested with a policy mandate. When inserted into the non-resident voting debate, this stance would argue that questions about the right to vote are contestable and on that basis, judges should exercise restraint in evaluated where representatives of the people chose to draw the line. Courts are not given the mandate to answer "who are the people?", and judges should not insert their preferences over the legislature.

The competing 'structural' view argues that deferring to elected branches of power on electoral rights is akin to letting foxes guard the henhouse.[189] When transposed into the non-resident voting debate, this stance argues that we should look at changes to the electorate with suspicion. If an incumbent government is seeking to exclude some citizens from the electorate, courts ought to consider the motivations behind that push and the wider institutional implications of that change.

For the time being, the more rigorous 'structural' standard of review is prevailing. Given the positioning of Courts as guardians of the constitution and the citizen's vote at the core of that

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[187] BVerfG 2 BvC 1/11, *supra* note 13 at para 64.
[188]Richard L Hasen, "The 'Political Market' Metaphor and Election Law: A Comment on Issacharoff and Pildes" (1998) 50 Stan L Rev 719; Daniel Hays Lowenstein; Nathaniel Persily, "In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders" (2002) 116:2 Harv L Rev 649; Christopher Manfredi & Mark Rush, *Judging Democracy* (Peterborough, Ont: Broadview Press, 2008).
[189] Persily, *ibid;* Samuel Issacharoff and Richard H Pildes "Politics As Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643.

document, this stance is understandable. There is something inherently wrong about political actors using their elected authority to disenfranchise the very people who gave them that authority, and judges are wise to be skeptical of this context. At the same time, however, the existence of dissenting opinions demonstrates that this space is contested and open to change.

F. Critically Engaging with Approaches to Non-Resident Voting

a. Critically Engaging the Dominant Approach

The dominant constitutional approach can be summarized as follows: citizens are the source of all state authority, and Constitutions set out the terms upon which they consent to be governed. Elected lawmakers lack the ability to change this relationship, and any efforts they make to alter the *demos* must be vigorously scrutinized. This approach is commendable for several reasons. First, it protects the value of citizenship. Citizenship equality, while imperfectly realized in practice, is powerful guarantor of fundamental human rights, and remains one of the most effective global tools for recognizing and protecting a person's basic humanity.[190] On this basis, the rights of citizenship need to be vigorously protected. When elected governments can decide to disenfranchise citizens, we undermine its value to the detriment of everyone. More pointedly, when we give governments the power to disenfranchise citizens under the guise of philosophical disagreement, this opens the door much wider disqualifications on grounds other than residency.[191]

Second, it is the faithful to a constitutional account of state authority. Under this account, all state authority is ultimately traced back to a citizenry who set out the terms of their agreed-upon subjection in a constitution. Judges, in turn, are given the mandate to uphold the

[190] Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) at 2-3.
[191] See for example: Jason Brennan, *Against Democracy: New Preface*. (Princeton: Princeton University Press, 2016) (decision making better made by experts); or : Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton, Princeton University Press, 2021) (for an argument against electoral democracy).

constitution. Under this view, lawmakers can't disenfranchise citizens even if they wanted to. Courts and legislatures lack the authority to dismantle very powers upon which their own authority rests.

Third, it recognizes that citizens are subjected to many of the decisions made by their country of citizenship. Many rights of citizenship are either non-territorial by nature (consular services, diplomatic protection, international recognition) or need not be tied to territorial presence (taxation, access to social benefits, voting, citizenship laws). The dominant perspective protects the legal subjection that non-resident citizens experience by virtue of possessing that status.

Lastly, it is attuned to the community connection that citizenship status can denote. Constitutional citizenship bundles the idea of national membership and democratic membership. While there is reason to critique of this stance, it remains the case that the non-resident citizens outlined above tended to display the democratic credentials to which the stakeholding, pluralist and domicile accounts refer (i.e. the linking one's future and fate to the fate of the continued flourishing of the community). The fact that the non-resident citizens in the cases above have dedicated significant portions of their lives to secure the right to vote speaks to this linkage. It is difficult to say to these people that they aren't connected enough to merit the vote when they are engaged in years long litigation in furtherance of this right.

While there is undeniable value in the dominant view, there are also some clear faults in this perspective. Most of my critiques here are focused on the constitutional construction of citizens as the ultimate source of all state authority, and the inability for elected lawmakers to interfere with it. As explored below, as part of their efforts defend citizenship, there is a tendency to make absolute statements which leads to an account of voting that is both logically

questionable and problematic as a matter of policy. These weaknesses are explored in more detail below.

i. Overstating the Citizen's Right to Vote

First, when taken at face value, the dominant approach absolutely protects the right of all citizens to vote. As a matter of law and history, this is simply incorrect. No constitutional democracy gives every citizen the right to vote. Contrary to the impressions left by these judges, every democracy in the world has disenfranchised some of their citizens,[192] for reasons of age, imprisonment, incapacity or other reasons. The persistence and ubiquity of these restrictions demonstrates something more is feeding into questions about who rightfully has the vote aside from simply possessing citizenship status. Failing to grapple with this reality undermines the logical force of these judgments.

Different rationales can be put forward justifying the exclusion of these other groups. For example, some constitutions list the classes of citizens who cannot vote in their constitutions.[193] In these countries, the judicial logic that the constitution defines the *demos* still holds. At the same time, however, the very existence of those restrictions undermines the claim that all citizens must have the right to vote. Whether inserted in the constitutional text or not, the vote is not, nor has it ever been, universally guaranteed to citizens. The constitutional construction of popular sovereignty as being embodied by citizens is an ideal; limits have always been put in place when that ideal is reduced to reality. Judicial statements which ignore this reality are misleading.

[192] Behabib, *supra* note 190 at 20.
[193] See, for example: Pakistan Constitution, *supra* note 153 at s 51; RMI Constitution, *supra* note 96 at Art IV §3.

In countries without express constitutional language,[194] age and other restrictions must be defended on democratic and/or philosophical grounds. While there is nuance to each restriction (for example, children arguably lack competency to vote) at their core each of these restrictions is rooted in a democratic understanding of membership the *demos*, and the criteria needed to be part of it.[195] Judicial arguments which ignore this reality don't ring true.

All this to say that judicial statements suggesting that all citizens must have the right to vote are inspiring, but wrong. Some constitutions spell out which classes of citizens are excluded from voting. While these provisions preserve – on a surface level – the constitutionally-defined *demos*, they undermine the take that popular sovereignty rests in citizens, and that constituted powers (courts, legislatures etc.) have no ability to alter it. Many other constitutions do not spell out the distinctions between citizenship and voting. In those cases, limits on the right to vote are contained in ordinary legislation, and are defended by reference to the democratic credentials on voting. This important acknowledgment, when ignored, can leave a false and absolute impression.

ii. Manipulation of the Electorate

The dominant constitutional view says that citizenship status brings a person within the *demos*. This inquiry does not depend on the content of citizenship laws. In so doing, courts may be unwittingly opening the door to citizenship's misuse or manipulation as a tool of democratic decline.[196]

Explaining this argument requires me to back up for a moment. In Chapter 2, I flagged a concern with the pluralist view. This view argued that citizens and residents are entitled to vote

[194] See, for example: *Charter, supra* note 31, s 3.
[195] For a similar argument, see *Frank, supra* note 13 at para 143.
[196] See discussion of democratic decline in Chapter 1. See also: Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy" (2018) 65 UCLA L Rev 78.

because they are both subjected to the authority of the state (the subjection argument). In order to constrain the subjection argument to citizens with a meaningful connection to the state, Owen also argued that we should limit who is entitled to hold citizenship status (the citizenship argument). My concern there was that his subjection argument doesn't actually depend on the citizenship argument. In other words, the fact that citizenship status is bestowed without regard to Owen's preferred citizenship standard does not invalidate the claim that they are subject to the constitutional contract. The subjection argument stands on its own feet. Thus, when his subjection argument is applied without regard to his citizenship argument, it can be used to justify the inclusion of citizens in the demos who have no meaningful connection to the country. This leaves citizenship laws vulnerable to political misuse and manipulation.

The constitutionally dominant stance to non-resident voting appears to do exactly this. It argues that citizens have the right to vote because they hold citizenship status.[197] The other part of the argument (are citizenship laws being bestowed on or retained by the right people?) is left out of the conversation. So constructed, courts vigorously protect the right of citizens to vote, but governments can pick and choose who gets to be a citizen. If all citizens must vote, but citizenship can mean anything, courts are unwittingly opening the door to gerrymandering the electorate via citizenship laws. In other words, in its efforts to defend citizenship, the dominant constitutional stance may be creating a loophole in which a government can manipulate the electorate by simply changing its citizenship laws. The perverse outcome is that, in rigorously defending the right of citizens to vote without engaging these wider realities, constitutional courts may be inadvertently creating space for the manipulations of the electorate that they are seeking to eradicate.

[197] *Frank, supra* note 13 at para 72.

Unfortunately, this problem is not hypothetical. This script has already played out in different international contexts amidst countries that are retrenching from democracy.[198] This is not to suggest that non-resident voting is inherently bad. However, it does suggest that we should be alive to the ambivalent potential of non-resident voting laws when they are absolute and applied untethered from democratic guardrails.

iii. Changing Contextual Backdrops

The last weakness of the dominant approach lies in the fact that it has been developed against a backdrop of unspoken favourable, but quickly changing contextual factors. As outlined above, the dominant approach argues that it is possible to restrict the citizen's vote in order to protect external harms, but not on the basis that non-resident citizens are themselves the problem. For this reason, contextual factors which spoke to their membership credentials (the size, connectedness or reason for the citizen's absence) were rendered irrelevant. While these statements were easy to make when the non-resident voting population is thought to be relatively small or insignificant, will be much more difficult to defend in the event those contextual factors change.

To take an example, in the 2025 Canadian federal election 19.5 million people voted, including 57,440 of Canada's estimated 4 million non-resident citizens.[199] Per the dominant

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[198] Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018) at 69; Kim Lane Scheppele, "Hungary, An Election in Question, Part 4: The New Electorate (in Which Some Are More Equal than Others)" (NY Times, Feb 28, 2014), archived at http://perma.cc/69HC-4XJ5; For more, see: Kim Lane Scheppele, "How Victor Orbán Wins" (2022) 33:3 Journal of Democracy 45 at 55.

[199] Elections Canada, "UPDATED: The 45th Federal Election by the Numbers" online: https://www.elections.ca/content.aspx?section=med&dir=pre&document=apr2925&lang=e (accessed 30 July 2025). See also, data from the 2019 election (immediately post Frank decision): Elections Canada, Estimation of Voter Turnout by Age Group and Gender at the 2019 General Election (Chief Electoral Officer of Canada, 2020) at 22: At the 43rd general election, for the first time in history, Canadians living abroad could vote regardless of how long they have been living abroad as a result of a Supreme Court of Canada decision and of legislative changes. Consequently, the number of registered international voters more than tripled from 15,603 to 55,512. The number of actual voters was 34,144, that is, an official turnout rate of 61.5%. Given the influx of special ballots requested for the 2021 election as a result of the Covid-19 pandemic, the figures that came from overseas Canadians is not available. This data is not yet available for the 2025 election.

rationale, each of these non-resident citizens has the right to vote. But do we really believe judicial opinions would be unchanged if all 4 million of them cast a ballot? Under this view, the size of the voter block is irrelevant. If non-resident citizens have the right to vote because the constitution says so, their inclusion shouldn't be premised on their collective disinterest or lack of participation. And yet, public outcry would surely be amplified if elections were regularly determined by non-resident citizens. It is easy to ignore these contextual factors when they are minimal. It will be less easy to do so as these issues become larger.

b. Critically Engaging with the Minority Approach

Given these critiques, it may be that the minority approach offered the best account of non-resident citizen voting. Perhaps the best way to handle the questions of democratic inclusion is to acknowledge the essentially contestable and inevitably philosophical nature of this issue, and for judges to defer to elected lawmakers who are engaged in a policy making function.

In this regard, some elements of the minority stance are compelling. First, it gives a more realistic picture of how voting rights for citizens are exercised today. While constitutional language suggests that voting is a right of all citizens, this has never been true. The minority stance can account for this disconnect. In so doing, it gives courts the footing to look behind the curtain of citizenship status to explore its nuance, content, and imperfect democratic credentials. This serves the dual purposes of creating more realistic explanations for the restrictions on the right to vote, and provides a safeguard against politicized manipulations of the electorate via citizenship laws.

The 4 million figure emerges from a 2022 Statistics Canada estimate of the Canadian diaspora. Their estimate provided a very wide range - between 2.9 and 5.5 million persons. I use 4 million as a figure because it is selected as the median estimate: Statistics Canada, Julien Bérard-Chagnon and Lorena Canon "The Canadian diaspora: Estimating the Number of Canadian citizens who live abroad" (Statistics Canada, 2022) at 31.

On the other hand, however, the minority view suffers significant problems. In arguing that legislators need deference when shaping the electorate, they arguably undermine their own cause. If legislators are able to pick and choose their voters in the name of philosophy of community, they can manipulate that authority to disenfranchise unpopular or marginalized communities, or those to whom they are politically unpopular. From a judicial perspective, this is an extremely dangerous door to open. The space of democratic theory is terminally contested; for every political agenda, there is surely a matching philosophy to support its view.

In this view, it is unreasonable to expect courts to stand on the sidelines when elected lawmakers decide to disenfranchise their citizens. Judges are charged with interpreting the constitution, and for the most part, constitutions expressly protect the right of citizens to vote. While we can have a conversation about the limits which may be appropriately placed on that right, arguments that courts should defer to government choices when deciding to change voting laws are alarming. The negative implications of allowing an elected government to disenfranchise those who elected them without meaningful judicial oversight is too great.

c. Developing a Path Forward

To summarize, the biggest problem with the dominant stance lies in its approach to the question of state authority, while the problem with the minority stance lies in its approach to deference. On a wider level, this speaks to the tendency within both stances to conflate these two issues: the dominant approach says constitutions alone determine the rightful *demos*, and attempts to restrict that must be vigorously scrutinized; while the minority stance argues philosophical considerations can shape the *demos* and efforts to do so are entitled to deference.

The natural question that emerges from this is whether such fusion is necessary. Given its predominance, one could reasonably conclude that, for democratic objectives to be taken

seriously in the courtroom, judges must adopt a hands-off attitude. Conversely, if one wants to vigorously scrutinize government efforts, they must reject philosophical or moral objectives.

The German majority decision brings this false binary into focus. Bucking the wider trend, the majority adopted a 'hard look' posture while, at the same time, recognizing the validity of democratic contours on the franchise. By combining a vigorous standard of review with an openness to democratic objectives, the Court was able to mitigate many of the weaknesses raised above, without ceding the floor to elected lawmakers.

This approach permitted the German majority to reap many of the benefits offered by each approach, while mitigating their respective weaknesses. Unlike the dominant stance, the German majority was able to reconcile their decision on non-resident voters with other longstanding voting restrictions. In addition, judges were given space to consider the content of citizenship laws, which permitted it to protect against manipulation of the electorate via citizenship laws, and to account for unforeseen contextual changes to demographics of non-resident voting in the future. In short, the outcome gave a thicker understanding of the relationship that democracy and constitutionalism play in shaping the electorate, while at the same time being more realistic and reflective of social realities.

By adopting a rigorous standard of scrutiny, the German majority justices were able to hold elected lawmakers accountable. Rather than simply accepting their somewhat arbitrary distinction between voting and non-voting citizens, governments were forced to reconcile their choices with the fundamental nature of the right to vote.

This is not to say that the German majority decision was perfect. For example, while it accepted democratic contours on the franchise, it failed to provide a satisfying explanation on this possibility. This, and other weaknesses will be discussed in the next chapter. However, by

decoupling their democratic objective from a deferential standard of review, the German majority provides the most fulfilling explanation of constitutional voting rights in the dataset. This conclusion thus provides a useful launch point for developing a democratic and constitutional approach.

G. Aligning the Constitutional and Democratic Accounts

This chapter has explored the constitutional view on non-resident citizen voting. It sought to accomplish three goals: first, to demonstrate the existence of this perspective; second, to distill and critically engage with its content; and third, to situate this understanding alongside the democratic accounts.

This final section revisits the conclusions from Chapter 2 in light of the constitutional perspectives explored here. Chapter 2 began from the premise that the core of democracy is self-rule, in which rulers are also subjects. To this end, it explored various accounts of voting, citizenship and residence which tried to draw a circle separating rightful voters from non-voters.

When the views in Chapter 2 are compared to those in constitutional law, there are some significant points of disagreement. Most notably, there is a dispute on the appropriate holders of state authority: who are the people we are referring to when we speak of popular sovereignty? The constitutional story points to the citizenry. Citizens are constituent power from whom all state and political authority flows. In democratic theory, popular sovereignty points to the governed. While there is debate on how this is measured, the act of governing and being governed is the essence of self-rule, and the franchise must be justified based on this reciprocity.

However, within this wider disagreement, there are points of convergence. Some aspects of the dominant constitutional approach bear resemblance to Owen's pluralist account, under which citizenship status makes a person subject to the constitutional contract. Similarly, the

minority constitutional approach is compatible to Bauböck's stakeholder thesis (the right to vote belongs to citizens who have linked their fate to that of the community).

These points of convergence provide us with footing to explore a more democratic account of citizenship-based voting within a constitutional framework. Given that the dominant constitutional stance bears some resemblance to Owen's pluralist account, it is arguably the most fruitful space for exploring this overlap. Recall that, according the pluralist account, non-resident citizens should be entitled to vote because their status makes them subject to the constitutional contract, but that citizenship laws should be changed to ensure citizens are social members of the community.

On the other hand, the resemblance between the dominant constitutional account and the pluralist account may be only skin deep. While some courts (most notably the Canadian majority) accept that citizens are legal subjects, the core of the dominant approach remains the view that state authority rests with the citizenry. Owen's pluralist account rejects that story and replaces it with one based in subjection. Given the wider implications of this shift (namely, extending the right to vote to non-citizens), it is not appropriate to identify the majority stance as adopting the pluralist rationale. This is particularly true given we have not seen any judicial reasoning to suggest this approach is on the table.

This leaves us with Bauböck's stakeholder thesis. This theory, set out in more detail in Chapter 2, argues that the right to vote belongs to citizens who are stakeholders in the community of fate, but that the line dividing stakeholding from non-stakeholding citizens can be set by the existing political community. This view more closely aligns with the minority constitutional perspective adopted by the Canadian and German dissents. While imperfect, I have argued this minority stance does a better job of reflecting the actual relationship between voting

and citizenship, and better positions a court to protect democracy from attempts to manipulate the electorate.

For my purposes, the primary benefit of the stakeholder citizen account is that it does not require rejecting the constitutional view that the source of state authority rests with citizens. The stakeholder and dominant constitutional view agree that citizens are the ultimate source of state authority. Bauböck argues the right to vote rightfully lies with those whose *membership interests* are affected by a government decision. Citizens – properly conceived as members of a self-governing community whose life and wellbeing are linked to community flourishing - are the rightful holders of this membership interest. Bauböck's account does not require rejecting the constitutional story of state authority, it emphasizes the liberal democratic elements of that union. As such, his account arguably can co-exist with the constitutional account.

However, most of the case studies struck down laws that aligned with the stakeholder citizen thesis. The dissenting opinions which aligned with this account were tied to an excessively deferential standard of review which I view to be both unrealistic and unwise. Without the benefit of that deference, accounts of voting which aligned with Bauböck's thesis have failed to withstand constitutional scrutiny. This conclusion would suggest that the citizen stakeholder model is incompatible with a constitutional framework, and that the solution for a more democratic constitutional understanding of a non-resident citizen's vote either doesn't exist at all, or must lie elsewhere.

The lone outlier in this regard, the German majority decision, highlights the path forward. That decision, like the others, struck down a law which aligned with Bauböck's stakeholder thesis. However, in reaching this outcome, the Court acknowledged that democratic objectives can validly shape the electorate. That key acknowledgment - missing from the other majority

decisions - ultimately lead to the passage of a more tailored law that permitted narrow legislative restrictions on non-resident citizen enfranchisement. That legislative response provides space for a potential point of convergence between Bauböck's theory and constitutional law. It is the ideological sweet spot from which I will embark on creating my contextualized theory of voting for non-resident citizens. As explored in the next chapter, while it may not be possible to entirely eliminate the tension between democratic and constitutional understandings of what rightfully grounds the franchise, it may be possible to work in this space to bring these spaces closes together and develop a more democratically acceptable constitutional account of non-resident voting.

Chapter 4: A More Democratic Constitutional Theory

A. Introduction

The last chapter explored the constitutional adjudication of non-resident voting rights. As set out there, constitutional courts overwhelmingly affirm the right of non-resident citizens to vote in national elections. This outcome, I argued, is driven by the fact that liberal democratic constitutions position citizens as the ultimate source of all state authority. Legislative attempts to disenfranchise citizens are viewed as a directly challenge to this construction, and explanations for these laws are subjected to vigorous scrutiny. As a result, non-resident citizens are almost invariably given the constitutional right to vote. This dominant stance is not, however, universally accepted. Some judges have argued that legislatures do have the authority determine who can rightfully vote. Given the contestable and policy-oriented nature of these goals, this stance argues that elected lawmakers are entitled to deference when legislating in this sphere.

Each of these stances has offerings and drawbacks: the dominant approach protects the value of citizenship, but it is ill-equipped to handle an increasingly mobile citizenry and the many faces of citizenship laws; the minority approach is more realistic, but opens the door to politicized manipulations that will be difficult to constrain. One judgment from the case study – issued by the German majority – did the most admirable job of navigating this minefield. By accepting that legislatures have the authority shape the electorate, but also subjecting those choices to vigorous scrutiny, the German majority was able to craft a judgment that protected the right of citizens to vote, but also imposed democratic guardrails on their enfranchisement.

This chapter sets out my proposal to solve the puzzle of non-resident citizen enfranchisement. Through mapping out different paths of action, I distill my own contextualized theory of non-resident citizen voting. This theory – which I dub the Constitutional Stakeholder

model – is a nod Rainer Bauböck's stakeholder citizen account, to which my account bears similarity.[1] However, I modify this account to accommodate the rigours of a more onerous constitutional analysis. The outcome is a model that bears the closest constitutional similarity to the German legislative response, albeit justified in democratic terms. Placed in slightly different language, my solution bears the markings of both the German majority and the stakeholder citizen analysis, but modifies each to create a constitutional approach to non-resident citizen voting that is informed by democratic principles.

As explored in more detail below, my account holds that non-resident citizens should have the constitutional right to vote only if their citizenship status represents a "stakeholding" relationship between the individual and the state. This goal can be accomplished by either embedding this reciprocity into the bestowal of citizenship status, or by asking the question at the time of voting. There is also a subsidiary question as to whether genuine stakeholding citizens can lose that link over time (i.e. by moving away). While this is a more difficult argument to make in constitutional terms, I argue that it can be made, but that this can only be determined at the time of voting in a way that is sufficiently tailored to survive vigorous constitutional scrutiny.

I reach this conclusion in stages. After this introduction, Part B sets out the most theoretically pure way forward: ensuring citizenship laws reflect democratic principles of inclusion. If the problem with non-resident citizen voting lies in the fact that citizenship laws are arbitrary, we can fix that problem by tethering the definition of citizenship to democratic credentials. By dealing with the problem before it gets to the courtroom, this approach avoids a direct confrontation between democratic and constitutional accounts of 'the people'. But while

[1] Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393; Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) at 22-28 [Bauböck: Democratic Inclusion].

there are significant benefits to this path, it offers only a partial solution that, in any event, is politically unlikely. A more realistic short-term solution is also required.

Part C examines how courts can adjudicate the right of non-resident citizens to vote in the (likely) event that citizenship laws retain the *status quo*. Here, there are two options. First, courts may continue to apply their dominant stance: elected lawmakers are not able to determine who is a rightful member of the *demos*. In that case, legislative hands are restrained, but not entirely bound. The other path is to challenge the dominant constitutional account – i.e. to argue that elected lawmakers can exclude some citizens from voting on the basis that they are not rightful members. After exploring different formulations of this path, I find that the stakeholder framework is a particular useful tool for walking this line. Adopting it is constitutionally workable because it does not require rejecting the constitutional framing of 'the people' as being confined to citizens. It does, however, cast it in a liberal democratic light. Thus, this approach creates a constitutionally acceptable frame of reference by which we can impose democratic guardrails on the citizen's vote.

However, the scope of this ability is narrow and must be able to survive vigorous constitutional scrutiny. As a matter of practice, this means that blanket bans which divide voting from non-voting citizens are unlikely to be good enough. At the same time, however, we need general laws to ensure an electoral system is administratively workable. I conclude that the German legislative response provides the most workable example for walking the line between these concerns: pursuant to it, elected lawmakers can rely on general rules to divide stakeholding and non-stakeholding citizens, but this conversation is not a one-way street. Laws which exclude non-resident citizens on the basis of their lack of connection must be sufficiently tailored to individual circumstances to allow the citizen to be part of this conversation.

Part D synthesizes this analysis to present my contextualized political theory of non-resident enfranchisement. Pursuant to the Constitutional Stakeholder model, non-resident citizens should have the constitutional right to vote if the citizen has a stakeholding interest in the state of citizenship. This can be accomplished by embedding this relationship of reciprocity into the definition of citizenship itself, and by permitting this question to be asked at the time of voting. As a result, this approach builds democratic credentials into non-resident citizen voting in a way that responds to the rigours of constitutional analysis. In conclusion, I consider and respond to anticipated criticisms of my account.

B. Democratizing the Nation

The nebulous nature of citizenship has been a common refrain in this thesis. While liberal democratic constitutions overwhelmingly allocate the vote to citizens, there are no rules dictating the content of citizenship laws. At the international level, citizenship laws sit at the heart of state sovereignty, and there are few guardrails policing this bestowal.[2] At the state (country) level, the laws for bestowing citizenship status are usually not constitutionalized.[3] This means that elected lawmakers can usually enact, repeal or otherwise change citizenship laws through regular legislative channels. Birthright citizenship laws tend to be based on a mix of descent-based

[2] League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality*, 20 AJIL 21, 23 (Special Supp. 1926). For history and a discussion on possible inroads, see Peter J Spiro, "A New International Law of Citizenship" (2011) 105:4 American J of International Law 694. See also: Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) at 2.

[3] Jo Shaw, *the People in Question* (Britsol: Bristol University Press, 2021) at 36-39: "The word 'citizenship' appears in 151 constitutions, and 'nationality' in 140. Even more refer to 'citizen' or 'citizens' – nearly 190. The large majority of these references lack substantive or definitional content. Citizens are simply invoked as the baseline actors within the constitutional system, or as the objects of constitutional protection by the state. Some constitutions do regulate at least some of the conditions of citizenship, with a small number offering considerable detail." See also: Kim Rubenstein, and Niamh Lenagh-Maguire, "Citizenship and the Boundaries of the Constitution," in Rosalind Dixon, Tom Ginsburg, eds., *The Research Handbook in Comparative Constitutional Law* (2011) Edward Elgar.

and/or territorial understandings of national membership. Separately, naturalization laws bestow citizenship on persons in service of a variety of democratic, political, or instrumental motives.[4]

All this to say that, while liberal democratic constitutions often treat citizenship status as being inherently democratic (i.e. to be a citizen is to be a member of the *demos*) an important part in that story – that of a genuine link between the citizen and the community – isn't necessarily there. It is difficult to justify the link between voting and citizenship status if citizenship status has no defined content that embeds it with democratic credentials. Without any democratic foothold, voting for non-resident citizens abroad looks very much like an artifact of privilege bestowed on members of the nation.

Given this reality, one way to resolve the tensions embedded in non-resident citizen voting is to tighten the definition of citizenship. This solution works on the logic that, if the problem with non-resident citizens voting lies in the fact that citizenship status lacks any democratic content, we can change the content and eliminate the problem. If we follow this rationale, then all non-resident citizens should be able to vote because citizenship is only allocated to people who are genuine members of the political community.

There are several benefits to this approach. First, it addresses the divide between constitutional law and democratic theory upstream (i.e. before reaching the courtroom). As such, this approach is theoretically tidy because each institution stays in its own lane: judges adjudicate the right of citizens to vote; elected lawmakers determine who holds citizenship. Democratic

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[4] Shaw, *supra* note 3 at 3. Kim Barry, "Home and Away: The Construction of Citizenship in an Emigration Context." *New York University Law Review* 81 (2006) 11; For discussion of weaponized citizenship, see: Neha Jain "Weaponized Citizenship: Should international law restrict oppressive nationality attribution?" (30 June 2023) online: https://globalcit.eu/weaponized-citizenship-should-international-law-restrict-oppressive-nationality-attribution/**.** For other examples, look to citizenship by investment, or economic citizenship practices. For other discussion of see: Jeremias Stadlmair**: "**Earning citizenship. Economic criteria for naturalisation in nine EU countries" online: https://globalcit.eu/earning-citizenship-economic-criteria-naturalisation-nine-eu-countries/

legitimacy is supported by giving elected lawmakers the power to decide on the content of citizenship laws; while constitutional legitimacy is maintained by protecting citizenship as a status tied to full membership in the *demos*.

Second, this solution finds support among esteemed scholars of citizenship and other constitutional courts. For example, aside from Bauböck and others (discussed below), Seyla Benhabib has argued that the disconnect between citizenship, democratic voice and belonging can only be properly mitigated by a citizenry re-negotiating its own self-definition.[5] According to Benhabib, democratic peoples hold the legitimate power to renegotiate the line separating voters from non-voters via citizenship laws.[6] Benhabib's view also finds support in constitutional adjudication. The German Constitutional Court (in a separate decision from that discussed in Chapter 3) has also stated that the only constitutional way for elected lawmakers to address the disconnect between citizenship and voting is via citizenship laws themselves.[7]

In terms of the actual manifestations of this 'democratizing' shift in the content of citizenship laws, there are several options. Chapter 2 discussed Rainer Bauböck's stakeholding threshold and David Owen's social membership principle.[8] Separately, Ayelet Shachar has argued

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[5] Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004) at Ch 6.

[6] *Ibid* at 177: "It is the people themselves who, through legislation and discursive will and opinion-formation, must adopt policies and laws consonant with the cosmopolitan norms of universal hospitality. Defining the identity of the democratic people is an ongoing process of constitutional self-creation. While we can never eliminate the paradox that those who are excluded will not be among those who decide upon the rules of exclusion and inclusion, we can render these distinctions fluid and negotiable through processes of continuous and multiple democratic iterations." See also Benhabib's discussion of the German voting for foreigner's case at 202-209.

[7] Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court 83 BVerfGe 3/37 13 October 1990 [Foreign Voters Case]. See summary in Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvC 1/11, 2 BvC 2/11 4 July 2012 [BVerfG 2 BvC 1/11] at para 70
[translated with DeepL.com]: [The German Constitutional Court] explained in its ruling on voting rights for foreigners that "the idea that it is in accordance with the democratic ideal ... to establish a congruence between the holders of democratic political rights and those permanently subject to a particular rule" to be "correct in principle," but stated that this should not lead to a "dissolution of the bundle" between the characteristic of being German and the affiliation to the national community that conveys the right to vote; rather, discrepancies between subjugation to a particular government and the affiliation to the national community defined by the status of being German within the meaning of Article 116 para. 1 GG, may only be eliminated by means of provisions under nationality law.

[8] David Owen, "Transnational citizenship and the democratic state: modes of membership and voting rights" (2011) 14:5 Critical Review of International Social and Political Philosophy 641 at 647-8; Bauböck, *supra* note **Error! Bookmark**

for the replacement of territorial or descent-based birthright citizenship laws with laws based on *"jus nexi*" or "right of connection," – i.e. their genuine connection to a political community.[9] While there are benefits and drawbacks to each approach, each of them would better fix the problem stemming from the fact that democratic rights that are attached to citizenship but citizenship status has no democratic content. If implemented, any one of these approaches would improve the democratic credentials of citizenship and strengthen the claim that non-resident citizens should rightfully be able to vote.

However, no matter which 'democratizing' option is preferred, as a whole this solution has three limitations. First, by focusing entirely on citizenship laws, we limit our ability to engage with the changing nature of a citizen's relationship with the state over the course of their lifetime. In these cases, a citizenship-based solution would entail that non-resident citizens should either lose their citizenship status, or that their genuine connection to their state of citizenship cannot be lost during their lifetime.[10] Without more, this solution doesn't allow us to engage the idea that a person can hold citizenship status, but their democratic relationship with the state has changed.

Second, this path never actually addresses the role judges can or should play in policing the relationship between voting and citizenship. This solution contends that elected lawmakers should be given the exclusive power over citizenship, and judges should have the duty to ensure

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not defined.; Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018).

[9] Ayelet Shacher, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge: Harvard University Press: 2009) at Chapter 6.

[10] Some advocates (such as López-Guerra) argue that citizens to lose their citizenship status when that connection no longer exists (see discussion in Bauböck, *Democratic Inclusion, supra* note 8 at 187; Owen: Transnational, *supra* note 8 at 647). Others, like Owen, would argue that one's status as a social member is does not change over the course of their lifetime even if they move away, but that their descendants should not receive citizenship. (Owen: Transnational *supra* note 8 at 650). In one case the person is no longer a citizen, in the other the nature of their citizenship is static over their lifetime. Neither account accepts that a person can be a citizen whose democratic link to the country is gone.

those citizens can vote. While this approach mandates democratic citizenship laws, it concedes the space for legislators to implement that vision. It does not contemplate the need, authority, or ability of other bodies (like Courts) to police those choices.

Lastly, and most importantly, from a practical perspective this solution is unlikely. Citizenship laws sit at the heart of state sovereignty.[11] International law tends to stay clear of policing citizenship laws, and it is difficult to imagine an international body policing this space willingly and/or with any meaningful effect. While a stakeholding threshold provides a valuable yardstick by which to measure the democratic credentials of citizenship laws, there is a wide divide between this normative evaluation and any sort of functional policing mechanism.[12]

At the national level, there is also likely to be significant political resistance. Once the citizenship circle is widened, it is difficult to shrink back.[13] Whether rightful or wrongful, trends towards the expansion and/or instrumentalization of citizenship laws are unlikely to go away. It would be possible to codify the democratic link and minimize the politicization of citizenship laws via constitutional amendment. This would eliminate the ability of elected lawmakers to change citizenship laws on a whim. However, that task itself is politically herculean, and it is not at all clear that such codification would be grounded in democratic rather than political interests.

Moreover, in terms of public perception, the modern state is not just a political entity; it is a membership organization in which decisions about admission and exclusion are a powerful expression of the community's identity and autonomy.[14] While making citizenship laws more democratic may solve problems of democratic reciprocity, this undermines the ability of

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[11] *Supra* note 2.
[12] *Supra* note **Error! Bookmark not defined.** at 2424.
[13] Peter J. Spiro "Stakeholder theory won't save citizenship" in Bauböck: Democratic Inclusion, *supra* note 8 at 222.
[14] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard: Harvard University Press, 1998) at 21 and Chapter 1: Citizenship as Social Closure generally. See also Shacher's description, *supra* note 9 at 148-152.

members of a political community to both construct and reflect that shared identity.[15] While there are equally compelling counterpoints to this challenge,[16] for my purposes it is simply relevant to note that national identity is a powerful force with immense intrinsic value attached to it.[17] While it is possible to detach citizenship from national identity, the two are often conceptually linked such that a change to one would likely be seen as an attack on the other.

All this to say that finding the political will to change citizenship laws in the 'right' (i.e. democratic) way may be hard to find, particularly when it is prescribed to solve the comparatively more discrete problem of non-resident citizen voting. While the experience of non-resident citizen voting is better understood as a symptom of a much larger problem with citizenship laws, there does not seem to be any push to narrow the scope of citizenship laws. Thus, while embedding a democratic guardrail into the content of citizenship laws would minimize this conundrum as a matter of theory, this is not a practical solution (at least in the short term). For all these reasons, it is prudent to explore other options.

C. Democratizing the Right to Vote

There are two ways for courts to proceed in the (likely) event that there is no meaningful change to citizenship laws. Courts may stand firm in their determination that elected lawmakers cannot legislate on the boundaries of the *demos*, or they may change course and accept that elected lawmakers can do this. This section considers both options in detail.

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[15] For some discussion for how a political community can protect its national identity while living up to standards of multiculturalism, see: Will Kymlicka, "Solidarity in Diverse Societies: Beyond Neoliberal Multiculturalism and Welfare Chauvinism" (2015) 3:17 CMS 1. For a positive perspective on the potential of this change, See: Benhabib, *supra* note 5 at Ch 6.

[16] See eg: Shacher *supra* note 9 at 151-2.

[17] See generally: Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Brubaker, *supra* note 14 at Ch 1; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

a. Denying Legislative Efforts to Place Boundaries on the Franchise

Constitutional courts have overwhelmingly rejected attempts to alter the constitution's framing of the *demos*. While elected lawmakers can restrict a non-resident's vote in order to protect our electoral system from external harms (integrity, transparency, fairness etc.), judges have rejected the notion that they can exclude citizens from voting on the basis that they are not member of the political community.

Chapter 3 explored the practical and philosophical reasons for this stance. There is something deeply wrong about allowing elected lawmakers to use their authority to disenfranchise the very people from whom their authority is derived. By changing these laws, elected lawmakers can insulate themselves from electoral competition and eliminate the primary mechanism by which disgruntled citizens could hold those actors accountable. There are, of course, problems with the dominant judicial stance. But while these problems will be fleshed out in more detail below, we must confront the very real possibility that courts will not change their view on this matter.

If courts maintain this stance, it does not render legislators powerless. This view does not preclude lawmakers from acting in the face of some tangible external threat to the domestic electoral system. For example, elected lawmakers can still validly restrict the right of non-resident citizens to vote to protect the electoral system from fraud, technological limitations, or other integrity or transparency concerns.[18] While the evidence of a purported harm was usually viewed to be inadequate in the Chapter 3 case studies, as a matter of principle judges were open to these purposes.[19]

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[18] See discussion at Chapter 3, Section E.

[19] *Iqbal et al v Federation of Pakistan and Imram Khan et all v Federation of Pakistan* (2011), Const P 39/2011 and 90/2011 (SC Pakistan) (consolidated) (decision of 29 April 2013) (Pakistan) and *Ch. Nasir Iqbal and others v Federation of Pakistan and others*, PLD 2014 SC 72 (Pak SC) [collectively, *Iqbal*]; *Dr Farhat Javed Siddique et al vs Government*

One can imagine fact patterns in which a sufficiently serious external harm would present itself. It is not unthinkable, for example, to imaging a coordinated foreign interference effort being aimed at mobilizing non-resident citizen voters, or manipulating their ballots, to influence outcomes in their home state. In these or other similar cases, elected lawmakers are not powerless. They would be able to constitutionally justify restricting the right to vote for some non-resident citizens on the basis that it is necessary to protect the integrity of the electoral system and the state's democratic institutions.

There are several merits to this approach. Most obviously, it prevents elected officials from picking and choosing their voters. By placing the question of membership in the *demos* beyond their authority, this approach protects the integrity of democracy from electoral manipulation. Absent some measurable threat to the electoral system, elected lawmakers shouldn't be able to disenfranchise citizens. It is simply too dangerous in their hands.

Secondly, it protects the value of citizenship and citizenship equality. Throughout history, the vote was denied to large swaths of the citizenry (women, minorities, non-property owners) on the basis that they were, for whatever reason, outside the rightful *demos*. Placing the issue of rightful membership in the *demos* outside political hands provides a clear break from this troubled past in favour of a universal citizen access to the franchise.

Third, it is the faithful to a constitutional account as to the source of state authority.[20] The framing of the citizen as the source of all state power undergirds the entire liberal constitutional democratic framework. We don't need to dismantle this system in order to account for non-

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of Pakistan et al, PLD 2018 SC 788, (Pak SC) (Constitution Petitions Nos. 74 to 79 of 2015, 49 to 56 of 2016 and 2 of 2018 and Civil Misc. Applications No.4292 of 2017 and 162 of 2018); *Lekka v Kiluwe* and *Konou and Lehman v Kiluwe and Kawakami (as AAG)* SCT Civ 19-69 (9 Oct 2019) (consolidated) (Marshall Islands) [*Lekka*] at 16; *Frank v Canada (Attorney General),* 2019 SCC at paras 55-56, 63.

[20] See Discussion at Chapter 3, Section B.

resident citizens trying to vote. Instead, we should just place this issue beyond the scope of legislative meddling. If elected lawmakers don't want non-resident citizens voting, they should look to their citizenship laws, rather than start carving up the rights associated with citizenship status.

There are, however, drawbacks to this approach. First, it narrows the scope of action from lawmaking bodies. Elected lawmakers are unable to act in situations where the purported 'harm' is imbedded in the question of who holds citizenship. For example, most people would agree that the foreign interference example outlined above would constitute a harm justifying the exclusion of non-resident voters. But what if, without any nefarious motive, all 4 million of the estimated non-resident Canadian citizenry voted in the next election?[21] Given that just over 19 million Canadians voted in the last election, the non-resident population would likely be (or at least be seen to) determine electoral outcomes.[22] While this mass participation of non-resident voters would likely result in public outcry or a crisis of democratic legitimacy, it would not constitute a harm justifying legal restrictions on their participation. If all citizens rightfully are part of the *demos*, exercising this right *en masse* does not convert it to a harm.

In addition, by placing all of our eggs in the citizenship basket, courts limit their own ability to peak behind the curtain of citizenship. Imagine, for example, a country changes its citizenship laws to offer citizenship to a new non-resident population. While Hungary's mass granting of ancestral citizenship is the archetypical example, it is far from the only one.[23] In the

[21] In 2022, Statistics Canada provided an estimate of the Canadian diaspora. Their estimate provided a very wide range - between 2.9 and 5.5 million persons. Statistics Canada, Julien Bérard-Chagnon and Lorena Canon "The Canadian diaspora: Estimating the Number of Canadian citizens who live abroad" (Statistics Canada, 2022) at 31.
[22] Elections Canada, "UPDATED: The 45th Federal Election by the Numbers" online: https://www.elections.ca/content.aspx?section=med&dir=pre&document=apr2925&lang=e (accessed 30 July 2025).
[23] The Canadian government's ongoing efforts to re-capture so-called "lost" Canadians – i.e. children of parents who themselves possessed descent-based citizenship – is one example of a country extending its descent-based citizenship laws to a new population: Bill C-3: *An Act to amend the Citizenship Act*, 1 Sess, 45 Parl, 2025 (Second Reading in Progress as of July 2025).

face of this practice, by adopting the dominant approach courts have tied their own hands. If constitutions demand that all citizens must have the right to vote, they are bound to uphold that right no matter the basis upon which citizenship was bestowed. If courts control the rights of citizenship, but legislatures control who gets citizenship, we don't eliminate political manipulation, we simply move the legal instrument by which it is carried out.

Lastly, on a more intuitive level this stance is difficult to fully accept because it stands at odds with universal practice. All countries have laws which disenfranchise some of their citizens on the basis that they are not members of the *demos*. Children are the most poignant example here. If elected lawmakers lack the authority to make these changes, all of these other blanket bans must be invalid as well.

In summary, taking the question of democratic inclusion out of legislative hands has intuitive appeal. This stance does not render elected lawmakers powerless in the face of external threat, but limits their ability to meddle with the *demos* in pursuit of their own motives. When elected lawmakers can tinker with the citizen's right to vote, we can expect manipulation to follow. On this basis, while they can act in the face of harm, for the most part the question of who has the right to vote lies outside their scope of authority. In so doing, we protect the citizen as the site of state authority.

Underneath that surface, however, there are worrying problems. Among other things, this approach shifts the situs of control to citizenship laws themselves and gives courts no authority to examine or question that content. In this light, acknowledging that legislators may validly impose democratic guardrails on the franchise actually expands the scope of judicial scrutiny. As

such, it is worth exploring whether it is possible or advisable to open the door to legislative restrictions on the rightful *demos*. This is examined in the next section.

b. Defending Legislative Efforts to Place Boundaries on the Franchise

The other path forward is to reassert the validity of democratic objectives in the courtroom – i.e. to argue that elected lawmakers can validly exclude some citizens from the *demos*. This is a fraught exercise – it requires arguing that elected lawmakers can disenfranchise the very citizenry from which their own authority is derived. As explored in Chapter 3, constitutional courts are extraordinarily resistant to this stance, and this resistance is well-grounded. From a judicial perspective, this is an extremely dangerous door to open. The space of democratic theory is terminally contested; for every political agenda, there is surely a matching philosophy to support that view.[24] However, the constitutional approach has its own limits. The challenge here is to determine if it is possible to open the door wide enough to meet these challenges, but no so wide as to allow politicians to pick and choose their voters.

Given that the German case study and Canadian dissenting judgment walked down this path, their respective reasons provide a useful starting point of analysis. The Canadian dissenting judgment argued that voting rights must be brought to life through legislation which necessarily imposes limits on how they are exercised.[25] To this end, it is valid for governments to structure the vote in way inspired by particular democratic philosophies such as the social contract.[26] In this respect, the reasoning of the German and Canadian dissents were aligned.[27]

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[24] See for example: Jason Brennan, *Against Democracy: New Preface*. (Princeton: Princeton University Press, 2016) (decision making better made by experts): Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton, Princeton University Press, 2021) (for an argument against electoral democracy).
[25] *Frank, supra* note 19 para 142.
[26] In its terminology: ensuring a relationship of currency between voters and their communities, *ibid.*
[27] *Frank, supra* note 19 paras 126-7, 139-145; Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 4 July 2012, 2 Beschluss des Zweiten Senats vom, 2 BvC 1/11, 2 BvC 2/11 4 (Germany) at paras 65-66 [2 BvC 1/11]

To make its case, the Canadian dissent relied most forcefully on a common-sense argument: of course elected lawmakers can legislate on membership in the *demos* – they do so every day.[28] Canadian citizens who are under the age of 18, and of descent-based citizens who have never lived in Canada are groups of citizens who are excluded from the *demos*. If elected lawmakers lack the authority to restrict the citizen's franchise, these other widely accepted limits must be unconstitutional as well. Unless and until a constitutional court is willing to strike down all exclusions of citizens from the *demos* – including children - they cannot credibly claim that elected lawmakers have no ability to shape the *demos*.[29]

From an empirical standpoint, this argument is sound. No liberal constitutional democracy – past or present – has ever enfranchised all of its citizens. The case of child disenfranchisement is particularly striking here. No country in the world enfranchises all of its children, and it is difficult to foresee any country taking this step any time in the near future.[30] If we are to accept the constitutional story that all citizens must have the right to vote, the legislated exclusion of children from the *demos* must also be invalid.

On the other hand, relying on accepted practices to justify citizen disenfranchisement is a double-edged sword. It is true that no democracy has never enfranchised its entire citizenry.[31] However, it is also true that many of these exclusions – including non-property owners, women,

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[28] *Frank, supra* note 19 paras 143.
[29] *Frank, supra* note 19 paras 126-7, 139-149.
[30] While there are accounts which challenge children's disenfranchisement (See eg: Elizabeth F Cohen, "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" (2009) 9:2 Citizenship Studies 221) or ways to allow children's voices to be heard (see eg: Yoshio Kamijo, et al. "Effect of Proxy Voting for Children under the Voting Age on Parental Altruism towards Future Generations." (2020) 122 *Futures : The Journal of Policy, Planning and Futures Studies*) no one in the mainstream is advocating for 3-year-olds to be able to cast a ballot on election day.
[31] For example, early justifications of the right to vote excluded non-property owners on the basis that only those holding property held a sufficient interest in community well-being. For example, see the evolution of the right to vote in Canada: Elections Canada, *History of the Vote in Canada*, 3rd Ed (Gatineau: Chief Electoral Officer of Canada, 2021) at (see Ch 1 generally for the evolution of the franchise. The vote was also was also restricted by age, gender and religion).

and racial, religious or other minorities - are widely viewed by modern eyes to be stains on a democratic record. If anything, these accepted practices demonstrate precisely why elected lawmakers should not have control over the issue: when they have this power, they wield it in discriminatory ways. No matter its faults, the current constitutional approach protects the rights of women, prisoners, religious minorities or others from voting. Pursuant to this view, the continued disenfranchisement of some citizens simply demonstrates that the universal franchise remains an unfinished project. The fact that some citizens remain excluded from the franchise does not speak to its validity, but to the gradual nature of rights realization.

Separately, one could also criticize the Canadian dissent for relying on the disenfranchisement of children to justify non-resident exclusions on the franchise. Children and non-residents are disenfranchised for different reasons. No one denies that children are legal subjects, their exclusion is based on their perceived lack of competence. At the same time, however, these exclusions speak to the same core issue – membership in the *demos*. We can debate the validity of *which* criteria appropriately determines membership in the *demos* only after we acknowledge the fact that membership is something depends on meeitng discernable criteria aside from simply possessing citizenship status.

In my view, the Canadian dissenting judges were onto something when pointing out the universal existence of restrictions on the citizen's franchise. However, their reasoning fell short after that observation. Saying that citizens are routinely disenfranchised is not the same as saying the practice is valid in constitutional terms. At its core, the dissent's rationale is that elected lawmakers can import their own philosophy of membership onto Canada's electoral system. While their stated objective - ensuring a relationship of currency between voters and their

communities – may be a reasonable one, this underpinning rationale is wildly unwieldy, and also ignores the existence of a competing constitutional philosophy at play.

The German majority provided an alternative explanation. Citing longstanding case law regarding the substantive meaning of democracy in Germany,[32] the majority accepted that elected lawmakers can restrict the citizen's vote in order to protect the communicative function of democracy. According to the German majority, democracy is more than simply aggregating votes and attributing power. It also requires free and open communication between voters and their government. This communication includes voting, but also the citizen's ability to influence the ongoing process of political opinion-formation through the dialogue that occurs between parliament and social forces.[33]

Based on this definition, exclusion from the right to vote is justified if a particular group of citizens do not have the sufficient opportunity to meaningfully participate in this communication. In the context of non-resident citizens, elected lawmakers quite rightfully considered how democracy would be negatively impacted if citizens with no connection to Germany could vote. Voters must be familiar with conditions in Germany to participate in an informed way, and this familiarity can only be acquired after an uninterrupted stay of a minimum duration.[34] As such, this objective was constitutionally permissible. In other words, the German

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[32] 2 BvC 1/11, *supra* note 27 at paras 32-33; See also: 7 BVerfGE 198 (1958).

[33] 2 BvC 1/11, *supra* note 27 at para 39: "[E]xclusion from the right to vote may be constitutionally justified if it can be assumed that a particular group of persons does not have sufficient opportunity to participate in the communication process between the people and the organs of state. Thus, it has always been considered compatible with the principle of universal suffrage that the exercise of the right to vote is linked to the attainment of a minimum age."

[34] 2 BvC 1/11, *supra* note 27 at paras 40-41: "The link between voting eligibility and a three-month prior residence … is primarily intended to ensure that Germans living abroad are able to participate in the communication process between the people and the organs of state. … This must be accompanied by the ability to participate in the current political process of forming opinions and expressing will; this presupposes a minimum level of personal and directly acquired familiarity with the political system of the Federal Republic of Germany …

…This assessment … is not constitutionally objectionable. … According to this principle, the ability to make an informed decision is essential for participation in elections. This is lacking in the case of a lack of familiarity with conditions in Germany. The legislature's assumption that such familiarity can only be acquired after an uninterrupted stay of a minimum duration, which is in any case rather short, is understandable." (translation using DeepL.com).

majority justified the legislative restrictions by reference to a deliberative account of democracy. This choice cleverly side-stepped the foundational issue of democratic inclusion.

By way of explanation, this thesis has focused largely on debates about the foundational starting point of democracy (the question of democratic inclusion). Outside of the boundary dispute, there is also debate about the substantive requirements an already constructed *demos* must guarantee in order to call themselves a democracy.[35] Within that space, some people argue that democracy refers to an association that has competitive elections and basic civil rights.[36] For example, to be a democracy you have to be able to freely cast a ballot on election day. Others argue that true democracy demands something more - such as economic, social, cultural rights, equality of outputs, community engagement, or consensus building.[37] Someone subscribing to this strand of thinking would, for example, argue that a simple vote doesn't mean anything unless its holder has been given an adequate education by which to develop an informed opinion. Deliberative democracy is a strand of thought that relies on this more substantive branch of thinking. Among other things, it emphasizes processes of debate and deliberation as being essential ingredients of democracy.[38]

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[35] For an overview of this debate, see Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill LJ 269 at 286-289. While framed in different terms, see also Hélène Landemore's discussion of "talkers" versus "counters" in Hélène Landemore, *Democratic Reason: Politics, collective Intelligence and the Rule of the Many* (Princeton: Princeton University Press, 2013) at Chapter 3. Tereza Křepelová, "Aggregative and Deliberative Models of Democracy: Reciprocity as a Consolidating Concept?" (2019) working paper. Available online:< https://www.scribd.com/document/519102640/Aggregative-and-Deliberative-Models-of-Democracy-Reciprocity-as-a-Consolidating-Concept>; Robert Goodin, *Innovating Democracy: Democratic Theory and Practice After the Deliberative Turn* (Oxford: Oxford University Press, 2008) at 1 (discussing "minimalist" accounts of democracy).

[36] See eg: Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (London, UK: Routledge, 2010) at 241–51; *On Democracy* (New Haven: Yale University Press, 1998) at 37–38. For more examples, see: Pal, *ibid* at 286.

[37] See eg: Nadia Urbinati's views on democracy as a diarchy: Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Cambridge: Harvard University Presss 2014) at Ch 1 and Nadia Urbinati, *Me the People,* (Cambridge: Harvard University Press, 2019) at 7, 166; See also: Benhabib, *supra* note 5 in working with Jürgen Habermas discourse theory. For more examples, see: Pal, *supra* note 35 at 287.

[38] See eg: Gerry Mackie, "Deliberation and Voting Entwined" in Andre Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, 2018) at 218. For more examples, see: Pal, *supra* note 35 at 288.

The German court has a history of appealing to this deliberative account of democracy.[39] As such, it justified voting restrictions by reference to those demands, while avoiding any underpinning questions about the source of state authority. In other words, it held that elected lawmakers can disenfranchise citizens in order to protect democracy – but imported a very specific definition of what democracy means. In doing so, it did not have to consider the more difficult question about subjection and the source of state authority.

While interesting, as a solution this approach is neither universal nor uncontested. The reasoning here is closely tied to German constitutional interpretation, which limits its usefulness outside the German context. This is not to say it is impossible. Strands of deliberative democracy are recognized in other constitutional systems. The Canadian constitution, for example, is underpinned by the unwritten principle of democracy, which requires "a continuous process of discussion".[40] Using this understanding, there is nothing preventing the Canadian Supreme Court from justifying restrictions on the right to vote by reference to a similar deliberative understanding of democracy. Other countries could deploy a similar rationale where their constitutions are explicitly tethered to democratic standards.[41]

Before putting all our eggs in this basket however, the German majority's approach suffers from a credibility deficit. Do we really think that the residency restrictions on voting were put in place to ensure voters would be able to effectively communicate with their country of citizenship? To this end, it is odd that, while being grounded in the communicative function of

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[39] *Supra* note 32.
[40] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 68.
[41] For example, the Canada's *Charter* permits the right to vote be limited in a "free and *democratic* society" (*Canadian Charter of Rights and Freedoms,* s 3, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 1); the Marshallese constitution provides that "[i]n all cases, the provisions of this Constitution shall be construed to achieve the aims of fair and *democratic* government" (*Constitution of the Republic of the Marshall Islands*, 1 May 1979, online: https://www.constituteproject.org/constitution/Marshall_Islands_1995 Art 1 § 2; and Pakistan's preamble provides that "the principles of *democracy*…shall be fully observed" (*Pakistan, Constitution of the Islamic Republic of Pakistan*, 1973) [all my emphasis].

democracy, the Court did not see actual communication or deliberation as being a necessary part of it. Instead, all that was required was for non-resident citizens to have a sufficient level of "familiarity" with the state such that they could (figuratively) speak the same language as the German state.[42]

Instead, it is much more likely that the genuine purpose of the German residency was grounded in democratic understanding of rightful membership in the *demos* – i.e. that those who pass laws should be subject to them. This point was made forcefully by the German dissent.[43] According to the dissent, the majority refused to acknowledge this true objective because they had already rejected it a generation prior.[44] Rather than re-open that debate (the right of resident non-citizens to vote) they chose a workable, but not entirely genuine, alternative objective. All this to say that, while it worked, the German communication objective is not entirely plausible or persuasive. While deliberative accounts of democracy may be a useful tool for countries to handle questions about the right to vote, they face nagging questions that are not easily answered.

Thus, the Canadian and German case studies provide us with two purported objectives, neither of which are ideal. The Canadian and German dissents argued that legislators can pass laws based on their own political philosophy of democratic membership – namely that those who are not subject to laws should not be authors of them. They fail, however, to adequately explain how to police these objectives, and/or how to reconcile them with the constitutional

[42] 2 BvC 1/11, *supra* note 27 at para 40-41
[43] 2 BvC 1/11, *supra* note 27 at paras 63-64.
[44] 2 BvC 1/11, *supra* note 27 at para 70, referring to BVerfG 2 BvR 1266/90 2 Nov 1990 (NJW 1991, p. 689) in which the German Court struck down a municipal law allowing *non-citizens* (i.e. non-Germans) to vote. There, the constitutional court ruled that the while democratic objective of ensuring that subjects were authors of law was "correct in principle," it cannot lead to a "dissolution of the bundle" which links citizenship and the right to vote. Instead, the Court determined that the only way to remedy a discrepancy between voting and citizenship is for states to change their citizenship laws.

understanding of state authority. While the German majority's communication standard avoids many of these problems, it fails to address that core underpinning question.

What is needed in this space is an objective that can thread the needle between democratic and constitutional accounts of inclusion - i.e. that can bring democratic guardrails onto the issue of enfranchisement without subverting the constitutional construction of the citizenry as the source of state authority. The stakeholding rationale is a particularly useful tool to navigate this puzzle. Like the communication objective, the stakeholding threshold accepts the constitutional construction of citizenship as the source of state and political authority, and the fact that voting sits at the core of this construction. Unlike the communication objective, however, the stakeholding threshold actually addresses the issue of democratic inclusion directly in a way that complements, but does not ignore, this constitutional understanding.

By way of explanation, the stakeholder theory shares a common starting point to the constitutional story of authority. In the perennial chicken-and-egg question "What came first, the state or the people?" both frameworks point to the people. Under the constitutional story, the people are a nation-citizenry. Without necessarily endorsing or discrediting the nation-citizenry, the stakeholder rationale emphasizes a different element of that union. Whatever other cultural territorial or civic feature 'the people' may have had in common, they also shared a stake in democratic flourishing as a self-determining people. This, according to Bauböck, is the relevant feature to discern their membership in the *demos*. That linkage is the necessary piece of the puzzle needed to understand citizenship status not just as membership in the nation, but also rightful membership in the political community.

In other words, the stakeholder theory adds a liberal democratic layer on top of the nation, and chooses to focus on the features of that layer in discerning rightful membership in the

demos. While citizenship may speak to national, democratic or other identities, when it comes to the vote, the democratic grounding – the shared stake in the community's wellbeing – is what governs. Grounding voting laws in a stakeholding rationale (for example: ensuring that voting laws are confined to stakeholding members of the community) provides a comprehensive path for importing meaningfully guardrails on the vote in a way that is, *prima facie*, constitutionally justifiable.

By bringing democratic considerations into the constitutional network, this compromise deals with the tension by giving citizens the constitutional right to vote, but also imposing democratic guardrails for policing the designation of citizenship and voting therefrom. The solution to the problem of voting and citizenship is not to abolish the entire system of citizen-based voting, but to isolate and emphasize the democratic element of that relationship. This provides a workable solution that can be used within our present systems of governance.

But what would such a stakeholding law look like in practice? At the very least, the stakeholding threshold would divide the voting from non-voting citizenry based on the grounds upon which a person received citizenship. Those whose citizenship status flows purely nationalist membership (multi-generational descent-based citizenship laws, persons born on the territory by chance) should not have the right to vote. Their status speaks solely to national identity, not community membership. Citizens who live on the state territory are stakeholders, while citizens who have never lived on the state territory are not. Thus, at this basic level, the threshold thus separates out multi-generational descent-based, transient, or instrumental citizens as not rightfully having the vote.

While this framework is helpful in terms of policing the outer boundaries, it does not answer the hard cases. These hard cases would include claims by people who, while at one point

clear stakeholders, move away for indeterminate periods (or forever). In other words, It assumes that one's status as a stakeholder is static throughout one's lifetime. Something more nuanced is needed to address the fluid reality of community membership.

A more accurate legislative iteration of the stakeholding threshold would assess the citizen's status at the time of voting through factors such as a maximum time abroad, minimum residency period, or intent to return. Bauböck himself advocates for this approach.[45] For him, while the two poles are clear (citizens who were born and raised on a territory to citizen parents are clearly stakeholders; citizens who never been to their country of citizenship are not) there is also a fuzzy middle ground to which legislators can appropriately draw a line separating the two.[46] This, however, is the point at which the stakeholder theory falls off the constitutional rails. As explored in Chapter 3, laws that follow this prescription have been repeatedly struck down for being constitutionally invalid. The next section considers whether, and if so how, a more nuanced stakeholding law which divides the voting from non-voting population based on legislated thresholds could be constitutionally upheld.

c. Scrutinizing A Stakeholding Objective

The section above set out how to frame a legislative objective to disenfranchise some citizens in a way that is constitutionally acceptable. Having constructed that valid purpose, however, the law must withstand constitutional scrutiny. This presents another hurdle. Regardless of which constitutional structure or test is at play, how should judges evaluate these laws?

[45] Bauböck, *supra* note **Error! Bookmark not defined.** at 2426-7.
[46] *Ibid.*

One path forward relies on a deferential judicial posture. This argument was adopted by the Canadian and German dissenting justices.[47] Bauböck has also advocated for deference in this space. According to him, so long as the broad contours of stakeholding rationale are respected, elected governments should be given "broad discretion" to craft whatever residential limits on the citizen's franchise as they wish.[48]

A deferential posture would solve many of the problems which have hindered the implementation of stakeholding voting regimes, and there are persuasive arguments for this posture. Admittedly, this is an essentially contested space within which locating universally acceptable boundaries are impossible to achieve. In such a space, a judicial opinion is likely to be no more reasoned than a legislative one. If one follows that reasoning, then the best way forward may be to give this decision to the elected branch that represents the people, and which has a policy-oriented mandate.

Additionally, from a practical perspective, there is a valid concern that a blanket law which divides stakeholding from non-stakeholding citizens is simply not able to survive a rigorous constitutional analysis. In order to be administratively workable, laws that delineate access to the franchise will be - almost by definition - blunt and arbitrary. While different constitutional regimes and evaluation standards are deployed in different countries, blunt and arbitrary laws will always have a hard time surviving rigorous constitutional scrutiny. It is not possible to design a voting regime in which every would-be voter proves their stakeholding status on an individualized basis. And yet, without such individuation, these laws will never be minimally impairing (or similar) in the constitutional sense. This framing would suggest that

[47] *Frank, supra* note 19 at para 159; 2 BvC 1/11, *supra* note 27 at para 64.
[48] Bauböck, *supra* note **Error! Bookmark not defined.** at 2426-7.

some greater level of deference is needed to appropriately assess questions of citizen disenfranchisement.

On the other hand, the abusive potential of legislated voter disenfranchisement remains a powerful force of which judges are best positioned to evaluate. As a general matter, strict scrutiny of electoral laws is defended on the basis that, if left unguarded, politicians will manipulate electoral laws to serve their own interests.[49] When transposed on a stakeholding voting restriction, this stance would argue that the proverbial devil lies in understanding why one threshold was selected as opposed to another, and how this choice interacts with citizenship laws. Searching out these interactions requires a broadened lens which is ill-suited to a deferential standard of review.

From a practical perspective, given the importance of the right to vote that we have seen deployed by judges so far, it seems odd and unrealistic to expect judges to defer when assessing where exactly elected lawmakers are choosing to draw this line. The previous chapters set out – in great detail – how protective judges are in relation to the right to vote, and the valid grounding for their stance. A theory that expects judges to defer to elected lawmakers is inconsistent with everything we have seen and heard from constitutional courts.

From a theoretical perspective, the deferential perspective causes even more problems. David Owen has persuasively pointed out that, by allowing the existing voter base (however constituted) to draw the line between voters from non-voters, we perpetuate an arbitrary *demos* in which those who are already have the vote are able to gatekeep its access to others.[50]

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[49] Samuel Issacharoff and Richard H Pildes "Politics As Markets: Partisan Lockups of the Democratic Process" (1998) 50:3 Stan L Rev 643; Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299.

[50] For more discussion on Owen's discussion of the arbitrary demos problem, see: Owen: Transnational, *supra* note 8 at 656-9; David Owen, "Populous, Demos and Self Rule" in Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) 183 at 192, 201-2 in discussing the 'constitutional demos' on being reserved for citizens. [Owen: Democratic Inclusion] at 193.

Arbitrariness is also at the root of constitutional adjudication, and is the primary reason why so many voting regimes that adhered to Bauböck's stakeholding model were struck down. Given the importance of the right to vote, blanket laws which divide "stakeholding" from "non-stakeholding" voters will always exclude genuine stakeholders from voting, and will always be arbitrary in that sense.[51]

Indeed, while Bauböck himself defends a deferential stance, it arguably stands at odds with his own reasoning. For him, non-resident citizens can be rightfully ousted from the democratic community where they lack an adequate stake in the democratic community; i.e. where their individual fate is not linked to the fate of the community.[52] On its face, this threshold is not objective determinable. If stakeholders are persons who have linked their individual fate and wellbeing to the community, possessing that status clearly has some internal dimension (even if we lean on some objective criteria to facilitate that assessment). And yet, when concluding that elected lawmakers should be given "broad discretion" to the line dividing the stakeholding from non-stakeholding citizenry, he undermines the personal component of his own standard.[53] Stakeholding speaks to an individual linkage to a community, but the community gets to dictate that person's connection.

But while there is clearly a constitutional problem with the use of blanket bans to disenfranchise voters, it is also unreasonable to say that access to the vote should be given to anyone who feels like they are rightful members of the *demos*.[54] The right to vote isn't grounded

[51] The case studies in the prior Chapter reveal this inevitability. Whether the standard be 5 years abroad, 3 months of residence, or the willingness to fly home on election day – each of those cases were brought by claimants who felt connected enough to their community to dedicate a significant portion of their lives to securing that right. Who can say that a non-resident citizen who pursued constitutional litigation to secure their right to vote has not adequately linked their fate to that of this community?
[52] Bauböck, *supra* note **Error! Bookmark not defined.** at 2421-2.
[53] Bauböck, *supra* note **Error! Bookmark not defined.** at 2426-7.
[54] Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 231. Bauböck, *supra* note **Error! Bookmark not defined.** at 2421.

in a feeling, but in a reciprocal relationship involving two sides. Demonstrating the terms of that reciprocity runs into administrative reality. Governments can't ask every citizen if they are a stakeholder at the time of voting; they must be able to impose general laws in order to administer elections in an orderly way.

The problem with this apparent impasse lies in the binary assumption on which it is based: we can either have blanket bans or require every individual to prove their community membership. The German Bundestag broke through this false binary. In response to the German case, lawmakers passed a revised law which retained generalized contours on accessing the right to vote, but added a catchall provision for persons who could not satisfy the rule but who nonetheless could demonstrate their membership in the German community. This reformed law states:[55]

> 12 (2) Provided the other conditions [to vote] are fulfilled, Germans as defined in Article 116 paragraph (1) of the Basic Law who are resident in other territories outside the Federal Republic of Germany on the day of election shall also be eligible to vote provided that, after reaching the age of fourteen years, they had a domicile or were otherwise permanently resident in the Federal Republic of Germany for an uninterrupted period of at least three months and this stay dates back not more than 25 years **or for other reasons, they have become familiar, personally and directly, with the political situation in the Federal Republic of Germany and are affected by it.…**

This approach satisfies all the key features of a stakeholding law. For administrative purposes, it retains a general dividing line that can be grounded in locating stakeholders in the community ("living on the territory for at least 3 months over the last 25 years"). It also, however, satisfies the key features of constitutional scrutiny: it is grounded in a valid objective and creates an individualized path such that the law is not blunt or arbitrary ("being familiar,

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[55] *Bundeswahlgesetz (BWG)* [*Federal Elections Act],* 23 July 1993, Federal Law Gazette I, at 1288, 1594 as amended by Article 2 of the Act of 3 June 2021 (Federal Law Gazette I p. 1482) English Translation online: <https://www.bundeswahlleiterin.de/en/dam/jcr/4ff317c1-041f-4ba7-bbbf-1e5dc45097b3/bundeswahlgesetz_engl.pdf.> s 12(2) (Germany).

personally and directly, with the political situation in Germany and are affected by it"). Lastly, it solves the problem of the arbitrary *demos*. Existing voters do not get to determine who is, or is not, rightfully included in the *demos*. While a general law is in place for administrative purposes, individuals on the wrong side of a blunt divide can still demonstrate their credentials and have the vote. This response thus threads the needle between the need for general categories, without excluding rightful members of the *demos*.

Legislation need not deploy the exact specific language and parameters deployed in the German case. What matters is its rootedness in a stakeholding notion of *demos* membership, and the path for citizens to demonstrate that connection on an individualized basis. In practical terms, the dividing threshold could vary in terms of the time threshold and administrative capacity of the state. For example, disenfranchising citizens after a relatively shorter time abroad would likely result in more individual applications than a longer one. In terms of the content of that individualized analysis – this could be an affidavit or series of questions about the nature of the would-be voter's connection to the community.

The lesson to draw from this analysis is two-fold: first, is it inaccurate to say that no disenfranchisement can withstand strict scrutiny. The German legislative response crafts a regime which draws a general line between eligible and ineligible non-resident citizens, while also being tailored to accommodate exceptions to the general rule. Second, this solution would not have been reached without a heightened level of scrutiny. A deferential standard of review would have validated the existing regime, while accepting the disenfranchisement of some rightful voters.

As such, a deferential standard of review is neither necessary nor advisable when discussing the right to vote. In order to protect the citizens' right to vote and police the nuanced

interactions between voting and citizenship laws, judges should be empowered to look under the hood in order to protect the integrity of the electoral system. While this may require tailoring blanket exclusions on the right to vote, the German example demonstrates that it does not require their abandonment.

D. The Constitutional Stakeholder

a. Introducing the Constitutional Stakeholder

Synthesizing the above analysis leads to the following conclusion: non-resident citizens should have the constitutional right to vote insofar as they have a stakeholding interest in the community of that state. This outcome can be achieved by ensuring citizenship status is bestowed based on possessing those stakeholding credentials, and by satisfying a legislative regime by which this determination is made at the time of voting. For administrative purposes, that legislative regime can rely on a generalized classification system to divide stakeholding from non-stakeholding members. However, it must also by sufficiently tailored such that individual stakeholding citizens are not deprived of participating in national elections.

This conclusion is practical. Liberal democratic constitutions vigorously defend the right of citizens to vote because constitutions position them as the source of all state and political authority. Within that rubric, it is very difficult to disenfranchise them. However, the bestowal of citizenship status is itself undisciplined and untethered from this purpose. States grant citizenship status in recognition of various identities and for different purposes that have nothing to do with the democratic community. Given this reality, we have two options. We can either police the bestowal of citizenship, or the democratic rights ascribed to it. While placing a guardrail on citizenship is more theoretically tidy, practical hurdles prevent its implementation. On the other side, placing a guardrail on the citizen's vote is considerably messier, although not impossible.

This chapter has carved out a path by which we can justify limiting the citizen's vote, but it is narrow and properly subject to vigorous constitutional scrutiny.

The name Constitutional Stakeholder reflects the fact that my account bears the closest similarity to stakeholder citizen thesis, but modifies it to satisfy a more rigorous constitutional analysis. Like Bauböck, I agree that citizen stakeholders should be able to vote because their individual membership interest is affected by decisions made by the political community. Their right to vote flows from the fact that their individual autonomy, equality and wellbeing is linked to the continued democratic flourishing of their state of citizenship. This most obviously includes the people who live on the state territory (and naturalized citizenship laws should reflect this) but is not necessarily defined by it. Citizens who live outside the country of citizenship may still possess and demonstrate this connection.

Unlike Bauböck, however, I argue in a liberal constitutional democracy elected lawmakers cannot unilaterally craft a dividing line between stakeholding and non-stakeholding citizens. While a dividing line may be necessary for administrative purposes, this determination cannot be finally made using such a blunt measure. Community membership is not a unidirectional conversation. Citizens must be given a path to demonstrate their stakeholder status. It is only through this tailoring that the stakeholder model becomes appropriately constitutional.

Of course, in making this statement I cannot guarantee that my solution will be constitutionally upheld everywhere it is implemented. Constitutional litigation can be unwieldy, and different contexts constitutional language comes into play in unexpected ways. Even putting these contextual issues aside, my model is premised on courts accepting that laws may validly tailor the franchise, of which there is enormous judicial discomfort.

I can, however, say that this model gives restrictions on non-resident citizen voting much better constitutional footing. A stakeholding regime meets the transcendent hurdles that repeatedly appear in constitutional litigation in way that protects the democratic rights attached to citizenship while instilling valid democratic guardrails on it. To illustrate how my theory would work in practice, the next section applies my stakeholding threshold to selected case studies explored in Chapter 3.

b. The Constitutional Stakeholder in Practice

i. Germany

Given its close resemblance to the German majority decision, if my Constitutional Stakeholder rationale was applied to this decision it would result in a similar outcome to that reached by the majority, albeit for slightly different reasons.[56] Rather than being grounded in the communicative function of democracy, under my account the objective of the 3-month residency rule would be grounded in the purpose of ensuring the vote be confined to stakeholding citizens of the community. As a matter of practice, this would not change anything for the parties. As a matter of theory, however, it would provide a more comprehensive and accurate account of the law's purpose, and the validity thereof.

The 3-month rule (in its previous iteration) would have similarly been struck down and replaced with the tailored version that currently exists. The new tailored law, however, would allow non-resident citizens to vote if they can demonstrate their stakeholding connection to the state. In the future, therefore, rather than having to litigate this case, citizens in similar position to the claimants would apply for a ballot notwithstanding their inability to satisfy the residency rule.

[56] 2 BvC 1/11, *supra* note 27.

ii. Canada

If my Constitutional Stakeholding approach was deployed to evaluate Canada's 5-year residency rule, the law would still have likely been struck down. In place of the "electoral fairness" objective advanced by the Court, a constitutional stakeholding objective would roughly align with the dissent's stated objective (ensuring a relationship of currency between electors and their communities). Construed in this way, the 5-year rule would be rationally connected to that goal. However, on its own, the 5-year rule would still be too blunt or arbitrary to survive constitutional analysis.

However, unlike Canada's present situation, striking down the 5-year rule would not have been the end of the story. The legislature would be able to re-draft a tailored residency restriction on voting in line with the German example provided above. The individualized decision-making structure would likely enable the law to satisfy critiques that it is too blunt and arbitrary to be minimally impairing. In terms of the final balancing exercise, given the need for generalized laws constraining the vote to the stakeholding citizens with the citizen's right to exercise their democratic voice, the law would be considerably more likely to be found proportional.

In this respect, it is also worth noting that re-drafted constitutional stakeholder law may never end up in front of a judge because it would diffuse disputes before they arose.[57] For example, had this law been in place prior to 2011 the claimants in *Frank* (citizens living outside the country for more than 5 years) would have been able to apply to be able to vote notwithstanding their inability to satisfy the 5-year residency rule. Given their extensive connections to Canada, their application would have likely been successful.

[57] *Frank, supra* note 19.

iii. Pakistan

My proposed solution would not be able to sidestep or override political and logistical challenges that are dogging the external vote in Pakistan.[58] The fact remains that it is logistically and technologically very difficult to create a safe and transparent external voting regime in Pakistan. This fact, and its impact on constitutional adjudication, does not change with my prescription, nor does it impact the political hurdles preventing its implementation.

My account does, however, pre-emptively eliminate the argument that non-resident Pakistani citizens are not rightful members of the political community, while at the same time maintaining boundaries which would prevent the entire Pakistani diaspora from being given the right to vote. In this regard, organized diaspora organizations would no doubt utilize the individualized assessment process - a fact which may influence the calculus of where government chooses to draw the line dividing voting from non-voting citizens.

iv. Marshall Islands

Had the constitutional stakeholder rationale been deployed in regards to the Marshall Islands voting regime (in which non-resident citizens must return to the country to vote), the law would still likely have been struck down both as an unacceptable limit on the right to vote in addition to the constitution's equality provisions.[59] Tethering the right to vote to one's decision to travel to their home jurisdiction speaks to too many factors other than one's stakeholding connection to the polity (for example, one's financial situation or job flexibility).

If, however, the Marshall Islands passed a law which aligned with my constitutional stakeholder regime, would that law be constitutionally upheld? On the one hand, it is less likely

[58] *Iqbal, supra* note 19; *Siddique, supra* note 19.
[59] *Lekka v Kiluwe* and *Konou and Lehman v Kiluwe and Kawakami (as AAG)* SCT Civ 19-69 (9 Oct 2019) (consolidated) (Marshall Islands) [*Lekka*].

here than in Canada, Germany or Pakistan. The Marshallese judgment was the most forceful in stating that democratic objectives are "constitutionally impermissible".

On the other hand, the Marshall Islands has the most at stake in this issue. Given that their country is facing the proportionately largest non-resident population, a model for restraining the citizen's vote in a way that emphasizes the democratic credentials of the nation (i.e. does not require rejecting the constitutional story of state authority) may be more persuasive.[60] All this to say that, whether a law designed around my proposed model would be constitutionally upheld depends in large part on whether the Court accepted a democratic objective. If accepted, a stakeholding law coupled with an individualized assessment tool would be likely to survive the "flexible standard" of scrutiny advocated by the Court.[61]

v. Uruguay

Of all the case studies, the Uruguayan case is the least likely to be affected by my prescription, either as a model of judicial reasoning or as a framework for building a new voting law. First, it is unlikely that the Uruguayan Supreme Court would be willing to adopt a Constitutional Stakeholder framework for evaluating the citizen's right to vote. The Uruguayan constitution speaks directly to this issue, and has expressly chosen to tether the vote to residence.[62] Given that language, there would be no need to draw out the democratic credentials of citizenship for the purpose of voting - the constitutional has already done so. For the same reason, it is unlikely that a new voting law drafted in light of a constitutional stakeholder prescription would be upheld by Uruguayan Courts. Uruguay's constitution says that citizens

[60] *Lekka, supra* note 59 at 16.
[61] *Lekka, supra* note 59 at 14.
[62] *Constitution of the Oriental Republic of Uruguay*, 27 Nov 1966, Art 77, 81.

must live on the territory if they want to vote. In the face of that clear language, a law which adopts a different rationale is unlikely to be persuasive or constitutional.

On a broader level, Uruguay's unaffectedness speaks to the Constitution as the ultimate determinant of this issue. While my Constitutional Stakeholder model is a method for interpreting a constitution's understanding of the relationship between voting and citizenship, it cannot displace clear constitutional language. Uruguay's constitutional drafters have opted for a residency-based system. This example thus elucidates the limits of my proposal, and the powers of the constitution. As a limit, my prescription that stakeholding citizens be included in the electorate is unlikely to persuade a court to ignore the clear words of its own constitution.[63]

c. Conclusion

In conclusion, I have argued that the Constitutional Stakeholder model provides the most constitutionally palatable way to bring democratic guardrails to the citizen's franchise. Under it, non-resident citizens should have the constitutional right to vote insofar as they have a stakeholding interest in the community. This rationale works because it does not require rejecting the constitutional understanding that citizens are the source of state authority, but emphasizes the democratic elements of that relationship. When put into practice, it provides a narrow path for judges to accept democratic limits on the citizen's franchise, and for elected lawmakers to legislatively restrict non-resident citizen voting.

My solution does not promise to bring democratic theory and constitutional practice into harmony, nor does it guarantee that my prescription will be constitutionally acceptable in every country and circumstance. It does, however, provide a reasonable pathway in which constitutional and democratic accounts of membership in the *demos* can co-exist. In so doing, it

[63] Supreme Court of Justice, Montevideo, 3 April 2020, *Sentencia Definitiva* 57/2020 (Uruguay).

provides a workable short-term solution to the normatively ambivalent potential of non-resident citizen voting.

E. Responding to Anticipated Criticism

Like many compromises, my Constitutional Stakeholder model has the potential to leave everyone feeling a little unsatisfied. Given that my account works at the intersection of democratic theory and constitutional law, I expect there will be criticisms on both sides of the divide. Below, I address and respond to anticipated critiques of my account.

a. Constitutional Critiques

i. Devaluing citizenship

Because my model imposes limits on the rightful enfranchisement of citizens, I can expect critics to argue that I am devaluing citizenship. There are different strands of critique under this umbrella, of which I focus on three. First, some may argue that by constitutionally justifying a separation between voting and citizenship, my accounts makes it easier for elected lawmakers to create second-class citizens.[64] For these people, the issues associated with non-resident voting are either not important enough to justify stripping the vote from citizenship, or should rightly be fixed by focusing on the content of citizenship laws themselves.

In response, I note that I do prescribe changes to citizenship laws. However, given the significant resistance I anticipate this is likely to receive, I don't put all my eggs in that basket. My subsequent conclusion – that lawmakers have a narrow ability to separate voting from citizenship - is a response to this reality. Elected lawmakers will continue to deploy citizenship to meet a variety of non-democratic ends, and a theory of non-resident citizen enfranchisement must be wise to this fact. In other words, my response to this critique is that I am not devaluing

[64] For an overview of this argument, see: Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 The Journal of Political Philosophy 216 at 227.

citizenship, I am responding to the fact that elected lawmakers are. My proposal attempts to steer citizenship towards democratic principles despite the practical fact that there is, for the most part, nothing constraining elected lawmakers from taking it in whatever direction they choose.

Second, there is also a historically-tinged argument which draws on the record of the universal franchise as a tool of rights recognition.[65] These critics may argue that, by making it okay for elected lawmakers and courts to constitutionally limit the citizen's franchise, I am undermining this foundation and risk retrenching these hard-fought wins. It is true that citizenship status has been an enormously useful tool to help marginalized groups achieve greater equality. I have no interest in retrenching or re-opening that door. I reject, however, the notion that the Constitutional Stakeholder does so. If anything, it provides fuel for the rightful enfranchisement of marginalized groups who were (or are) excluded from the electorate.

To this, it may be argued that to the extent I acknowledge this door can be constitutionally opened at all, I create space for new and much more controversial spaces of citizen disenfranchisement. Under this view, while the terms of my Constitutional Stakeholder model may not be offensive, the fact that I acknowledge elected lawmakers can operate in this space is a problem. In response, my research demonstrates that liberal democratic constitutions create exceptionally high bars for disenfranchising citizens. I have worked within this reality to find democratic account of voting that could be viewed constitutionally acceptable. While I welcome scholarly engagement in this space, to the extent that research similarly engages with the confines of constitutional adjudication, I expect they will find a similar difficulty. I can,

[65] This line of argument can be discerned by the majority in *Frank, supra* note 19 at para 2: "Canada's history has been one of progressive enfranchisement. The right to vote in federal elections was originally restricted to property-owning men aged 21 or older, but the franchise has gradually been extended to include almost all citizens aged 18 or older. Women, racial minorities, individuals formerly described as having a "mental disease", penitentiary inmates, and Canadian residents living abroad in service of Canada's armed forces and public administration were once excluded but now have the right to vote."

however, say that my account will not be of assistance in depriving stakeholding citizens from the franchise.

Lastly, there are also arguments in line with David Owen's pluralist stance.[66] My account, contra Owen, rejects the view that all first-generation citizen are rightful voting citizens for their lifetime and that all non-resident citizens must always be included in constitutional referenda. In defence of his view, Owen argued that excluding these non-resident citizens from the electorate would result in an arbitrary *demos*. Indeed, this is Owen's primary critique of Bauböck: a system in which existing voters (however determined) can draw the line separating voting from non-voting citizens perpetuates an arbitrary *demos.* Per Owen, the only way to avoid this problem was to give all citizens the right to vote.

In response, I note that the Constitutional Stakeholder model also avoids the arbitrary *demos* problem, albeit in a different way than Owen prescribes. Owen was clearly onto something in noting the arbitrary *demos* problem. Indeed, the arbitrary nature of legislated dividing lines is the main reason that non-resident voting laws are repeatedly found unconstitutional. But while Owen reasoned the only way to fix this problem is by giving all citizens the vote, I solve this problem by allowing citizens to individually navigate this divide per the German legislative model. Under it, there is no arbitrary *demos* because there is no arbitrary dividing line. While a dividing line may exist for administrative purposes, citizens are able to transverse this dividing line themselves.

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[66] David Owen, "Transnational citizenship and the democratic state: modes of membership and voting rights" (2011) 14:5 Critical Review of International Social and Political Philosophy 64; David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State (London: Palgrave Macmillan, 2009) 53.

ii. Tailoring as an Administratively Unworkable Solution

A second collection of critiques would argue that the 'tailoring' feature of my proposal (i.e. citizens on the wrong side of a general stakeholding threshold should be given the opportunity to challenge that designation) is simply unworkable. Pursuant to this view, it is not practical to individually assess a non-resident's stakeholding status. Clear categories (i.e. blanket bans) which separate voting from non-voting citizens are needed.[67]

In response, I note that the 'tailoring' portion of my proposal is drawn from real world practice. The fact that this system is currently operating in Germany weakens the argument that it is not workable.[68] In addition, many countries already have individualized portals by which non-resident citizens register to vote.[69] Given that these systems already exist, it is not unthinkable to create space for would-be non-resident citizen voters to demonstrate their connections to the country from which they seek to vote.

Of course, not every country is the same. Different countries will face different administrative challenges when implementing a non-resident voting law. In response, I would argue that the anticipated administrative burden of an individualized system can be mitigated by the legislation itself. For example, countries concerned about being overwhelmed by individual

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[67] This argument can be discerned from the German majority decision, *supra* note 27 at para 67 [translated text]: "The difficulties of the matter lie in the diversity of living conditions that any conceivable regulation of voting rights for Germans living abroad encounters, in the gradual nature of the differences in this regard, and in the fact that a large part of the circumstances and combinations of circumstances that may be relevant from a constitutional point of view in terms of communicative and other connections to Germany, such as actual contacts, intentions to return, connections and interests in the form of income, assets and/or close relatives who have remained in the country, cannot be recorded in a way that is practicable for the purposes of electoral law. Any practicable solution is therefore inevitably associated with the disadvantage that it produces either questionable inclusions or questionable exclusions or – to a lesser extent in each case – both."

[68] *Supra* note 55.

[69] In both of these cases, this portal already asks for basic information – such as their last place of ordinary residence (and in past Canadian contexts, an affirmation of their intent to return). Bauböck. *supra* note **Error! Bookmark not defined.** at 2424. For an idea of how current mechanisms to assign non-residents to the voter register operate, see: Elections Canada, "Registration and Voting Processes for Canadians Who Live Abroad" online: <https://www.elections.ca/content.aspx?section=vot&dir=reg/etr&document=index&lang=e>.

non-resident voters may want to implement a more generous threshold to ease that administrative burden. At a certain point, an impossible administrative burden can be canvassed within the confines of constitutional litigation itself. To the extent this burden is truly unworkable, the focus of the inquiry is not on whether non-resident voters are valid members of the *demos*, but on the logistical burdens associated with including them. Short of such a determination, we can't assume that a tailored voting system is too burdensome to implement.

Separately, it could be argued that my tailoring solution is incomplete insofar as it cannot remedy the problems of citizen disenfranchisement more broadly. This view would argue that we cannot, for example, deploy my approach to solve the issues associated with disenfranchising children, prisoners, or persons who lack capacity. Under this critique, my solution doesn't solve the boundary problem, it only addresses one block of disenfranchised people.

The focus of my research has been on non-resident citizens. Their democratic exclusion flows from their alleged lack of reciprocity within the closed loop circle of democracy. To this end, the models I have focused on are directed at navigating this specific democratic boundary. This thesis does not purport to explain whether or not we should exclude persons who, while clearly stakeholders, lack the competence to be rightful members of the *demos*. Whether or not characteristics of competence or morality can rightfully (or constitutionally) exclude a citizen from the franchise is beyond the scope of this thesis.[70]

At the same time, however, my conclusion that exclusions from the franchise are rightfully subjected to vigorous scrutiny (and as such, a tailored solution to withstand that scrutiny) calls into question the constitutionality of these other blanket bans. For example, children are excluded based on their perceived lack of competence. It could be argued that a

[70] For more, see Will Kymlicka and Sue Donaldson, "Metics, Member and Citizens" in Rainer Bauböck, ed, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester: Manchester University Press, 2018) 160.

similarly tailored test is needed to assess their competence individually. On the other hand, a 'competence' test bears similarity to defunct literacy tests that were used to disenfranchise minority groups in the past.[71]

While this thesis does not answer the question of children's disenfranchisement, I would note that competence is an increasingly complex area of law. Many fields have had to change how they treat it insofar as a perceived lack of competence is used to deny a person's autonomy or freedom.[72] This broader trend would suggest there is indeed something wrong with the way we use blanket bans to deem a block of citizens incompetent to vote. As such, there is some constitutional need (its contours being as yet undetermined) to go beyond arbitrary dividing lines to engage more substantively with the issue. While I do not offer up those precise contours here, we cannot just accept the validity of blanket bans on voting because it's how things are done now. The justifications and best practices for negotiating the dividing lines between other groups of disenfranchised citizen voters is as fruitful area of further research that must be explored without preconceived outcomes.

b. Democratic Critiques

On the other side of the ledger, I anticipate that there will be democratic scholars and advocates who are dissatisfied with my solution. Five of these are explored below.

i. Democratic Window-Dressing?

On a general basis, some may argue that my account does not bridge any democratic-constitutional divide. Instead, it accepts the constitutional story of the nation and relegates democratic considerations to an after-the-fact tidying up of a national *demos*. On this view, my

[71] For a history, see eg: Natasha N Jones and Miriam F Williams, "Technologies of Disenfranchisement: Literacy Tests and Black Voters in the US from 1890 to 1965" (2018) 65:4 Society for Technical Communication 371.
[72] This is most notable in the context of health law. See eg: Joan M Gilmour, "Legal Capacity and Decision Making" in Joanna Erdman ed, *Canadian Health Law and Policy* 5th Ed (Lexis Nexis, 2017).

account is better understood as an exercise of democratic window-dressing rather than bridging any divide.

It is true that my solution does not satisfy all accounts of democratic inclusion. The fact that the constitutions vest state authority in the nation - while most democratic accounts expressly reject that premise – clearly narrows the space with which these different ideologies can coexist. I reject, however, the suggestion that my account simply window-dresses the pre-determined constitutional electorate. My account purports to do something that at least a dozen elected governments have failed to do – constitutionally restrict the citizen's franchise on the basis of residence. While my account can be accused of playing on the democratic margins, the work done in that space is real and significant.

By working within these confines, my model seeks to impose democratic guardrails on the citizen's franchise in a constitutionally acceptable way. Without discrediting purer democratic accounts of inclusion, my account offers the benefit of being workable right now. It doesn't require dismantling the foundations of national or international constitutional systems. While it may limit the revolutionary potential of my solution, it does impose real limitations on the largely unfettered practice of attaching voting to citizenship status.

ii. Unnecessarily Tethering Voting to Citizenship

I expect to face several criticisms of the way I link citizenship to voting. First, some critics may argue that my defence of citizen-based voting as a necessary consequence of liberal constitutional democracy is flawed. While Chapter 3 touched on the history of constitutional citizenship, a deeper dive would reveal the contradictions and inconsistencies embedded in the dominant constitutional account.[73] For persons subscribing to this view, the dominant

[73] See, for example, discussions of citizenship, governance and nation by Rousseau and Sieyès: JJ Rousseau, *The Social Contract* (in Susan Dunn, ed, *The Social Contract and the First and Second Discourses* (New Haven: Yale University

understanding of constitutional citizenship is simply wrong, and that change more rightfully emanates from exposing this fact rather than accepting it.

I am not blind to the contradictions of constitutional citizenship, but nor am not blind to the national and international legal orders which have been built upon it. Within this reality, rejecting the constitutional close relationship between citizenship and voting would lead to either the upheaval of national and international structures of governance, or – more likely – would lead nowhere (in that my recommendations would simply being ignored). While there are many ways to craft an account of voting that more directly challenges the constitutional story which fuses citizenship and voting, my goals have always been grounded in the decision making structures of governance that exist now.

More specific critiques under this heading would argue that my account wrongfully fails to challenge the vote as being the exclusive domain of citizens.[74] As such, my account could be interpreted to effectively support the continued disenfranchisement of millions of non-citizens who live with the benefits and burden of laws every day, but cannot vote simply because they do not have citizenship status.

The denial of voting rights to people living on a territory and subject to its laws is clearly a problem. The answer, however, is how best to remedy it. In this respect, my model argues that citizenship laws ought to reflect a threshold such that people who live on a country and have tied their fate to it should be made eligible for citizenship (and with that, voting). Some scholars have persuasively critiqued of the use of citizenship status to gatekeep access to the vote.[75] Without

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Press, 2002) Book 1 at 7 FN2; Oliver W Lemcke and Florian Weber, eds, *Emmanuel Joseph Sieyès: The Essential Political Writings* (Leiden: Koninklijke Brill, 2014).

[74] Scholars who challenge this linkage more directly include, for example: Patti Tamara Lenard, "Residence and the right to vote" (2015) 16:1 Journal of International Migration and Integration 119; Melina Duarte, "Who should be granted electoral rights at the state level?" (2018) 12:2 Nordik Journal of Applied Ethics 27; Owen: Transnational, *supra* note 66.

[75] Duarte, *ibid* at 33-38. See also Owen's discussion of this: Owen: Transnational, *supra* note 66.

discrediting those accounts, I simply note that my model does not condone the continued and indefinite exclusion of non-citizens from the *demos*. To the extent these people are stakeholders in the community, they are rightfully included in the electorate. The easiest way to constitutionally accomplish this goal is by amending citizenship laws. However, it remains an open question this is the *only* way to do so.

On this that latter point, there is some authority for the proposition that citizenship laws are the only way to constitutionally enfranchise non-citizens,[76] but alternative views have also been expressed.[77] Future research should consider whether the relationship I articulated precludes extending the vote to non-citizen stakeholders. In this regard, while constitutions generally grant the right to vote to citizens, there is a compelling argument to make that they do not grant the right to vote only to citizens. How this extension interacts with the constitutional story of democratic membership, and whether it would require a more direct challenge of that precept, remains to be seen.

Separately, others may also argue that I am inordinately focused on keeping the right to vote and citizenship bound. There are lots of rights (the right to healthcare or free speech, for example) that non-resident citizens do not enjoy when they are off the territory. For persons who subscribe to this view, I am wrongfully focused on fusing voting with citizenship, when citizenship and its associated rights are unbundled all the time.

In response, my focus on the intimate linkage between citizenship and voting reflects the institutional reality created by liberal democratic constitutions – not my own personal beliefs. Constitutions are constructed around a core premise that nests nation-citizenry-governance.

[76] BVerfG 2 BvR 1266/90 2 Nov 1990 (NJW 1991, p. 689).
[77] For an alternative view, however, see: *Spragins v Houghton* (1840) as discussed in Owen: Transnational, *supra* note 66 at 648.

Constitutions are creations of a self-governing nation who set out the terms upon which they agree to be governed. In blunter terms, I am not intent on ensuring that voting rights must be tethered to citizenship - but liberal democratic constitutions do so. My task in all of this has been to find a constitutionally palatable way to loosen that grip in a way that doesn't expose the electoral system to manipulation.

iii. The Tipping and Flooding Scenarios

My model can also be accused of being vulnerable to the so-called "tipping" and "swamping" scenarios. The tipping scenario refers to situations in which the non-resident vote is seen to 'tip' electoral outcomes.[78] This issue is particularly poignant when elections are close and non-resident votes are counted last (as they often are). The timing and method of adding non-resident votes on top of domestic ones can feed into concerns about voter fraud and electoral integrity.[79] In addition, in very close elections, it can shine a light on amplifying the non-resident votes, who are viewed as essentially deciding an election.[80]

However, stances opposed to the "tipping" scenario are, for the most part, veiled arguments against the inclusion of non-resident votes entirely.[81] It bears emphasising that, insofar as non-resident citizens are stakeholders (and therefore rightfully enfranchised), they should obviously be able to impact electoral outcomes. Indeed, some would argue this is the entire point of having the right to vote. Insofar as these arguments are aimed at transparency and neutralizing domestic opposition to non-resident voters, the tipping scenario can be mitigated by logistical

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[78] Bauböck, *supra* note **Error! Bookmark not defined.** at 2444.
[79] See discussion: Bauböck, *supra* note **Error! Bookmark not defined.** at 2432-5; See also: Peter J Spiro, "Perfecting Political Diaspora" (2006) NYU Law Rev 210 at 220-222.
[80] For a notable example, see: David Barstow & Don Van Natta Jr., "How Bush Took Florida: Mining the Overseas Absentee Vote", *NY Times* (15 July 15, 2001) and discussion of *Bush v Gore* 531 U.S. 98 (2000) as discussed in Spiro, *ibid.*
[81] Bauböck, *supra* note **Error! Bookmark not defined.** at 2444-5.

choices on how non-resident votes are tabulated, and the electoral system within which they are counted.

Separately, the "swamping" or "flooding" scenario refers to situations where a domestic electorate is surprised and overwhelmed by the non-resident voting population.[82] Swamping can exist in benign and nefarious forms. In its benign form, the non-resident population is mobilized for genuine reasons. A political campaign which strikes a chord with the non-resident population - such as a change to citizenship, taxation or consular laws - could result in swamping. In a nefarious form, the non-resident population becomes mobilized as part of foreign efforts to undermine domestic electoral integrity, influence domestic electoral outcomes. It could also be orchestrated by domestic actors in contravention of domestic electoral laws.[83]

A related iteration of swamping would refer to situations where the non-resident voting population is structurally sized such that it will outnumber the domestic population. Small island nations are the paradigmatic example here. While we may accept non-resident citizens to vote so long as they are small portion of the non-voting population, it is another story entirely when non-resident voters will always outnumber domestic voters. And yet, as the Marshall Islands case study demonstrated, concerns about swamping don't get much traction in the courtroom.

I have three responses to concerns about swamping. First, to the extent that swamping is caused by nefarious motives or foreign interference efforts, governments can act on that basis without regard to the stakeholder thesis. My research has indicated that governments remain empowered to protect the integrity of the electoral system from harm, which would include

[82] Bauböck, *supra* note **Error! Bookmark not defined.** at 2446.
[83] See eg: Graham Hassall, "Case Study: The Cook Islands: Seat for overseas voters abolished" in Challenging the Norms and Standards of Election Administration (2007) at 50, online (pdf): International Foundation for Electoral Systems <www.ifes.org > [perma.cc/FAZ4-7X6R]. Which describes how the Supreme Court overruled an election for 'unlawful conduct' after certain political parties were found to pay the air fare to fly in overseas voters.

foreign interreference efforts. Second, my model brings guardrails to the swamping scenario. Unlike the dominant constitutional approach, my model argues that there is an outer barrier to the rightful inclusion of certain non-resident citizens as voters. Lastly, the swamping scenario does not necessarily speak to the problem of non-resident inclusion, but in the method by which non-resident votes translate into political representation. This is explored in more detail I the following section. At this point, however, it is simply relevant to note that swamping can be responded to not with questions of *if*, but *how* non-resident votes are tabulated.

iv. Distorting Residency-Based Electoral Systems

Lastly, it may be argued that, by rightfully including some voters who do not live on the territory, my model will unfairly compromise the essence of residency-based electoral systems. When we insert non-resident voters into a residency-based electoral system, some would argue that we unfairly dilute the representation of domestic voters and non-resident voters – insofar as both groups have the regional representation of their voting interests distorted.

While this issue transcends any one electoral system, it is most poignant in the context of Westminster-styled democracies. A non-resident voting in Canada, for example, will have their ballot cast in their last place of Canadian ordinary residence.[84] While this voter may meet the definition of stakeholder for Canada, they may be less likely to be familiar with the particularities of the constituency in which their vote will be cast.[85] Is it fair - for the domestic voter or the non-resident - for votes to be counted in a location where they have little connection?

Note, however, that this issue is not focused on whether these voters should be included, but to the more granular question of how and where these valid votes should be counted. As

[84] *Canada Elections Act,* SC 2000, c 9, s 8(2.1).
[85] To see a similar observation, see: *Frank, supra* note 19 at para 103.

such, the appropriate solution to this problem is not to eliminate non-resident citizen votes, but change how they are counted. In this regard, there are several options. For example, while most countries use a "diffuse" system in which non-resident votes are cast alongside domestic ones, other countries use "discrete" systems in which non-residents are given distinct territorial representation.[86]

Choices regarding the modalities by which non-resident votes should be cast involve trade-offs in terms of transparency and voter equality.[87] For my purposes, the relevant point in all this is that this critique is focused on *how* we include non-resident voters, not whether or if they should be included at all.

F. Conclusion

This Chapter has sets out my proposal to solve the constitutional puzzle of non-resident citizen enfranchisement. I have argued that non-resident citizens should have the constitutional right to vote only if their citizenship status represents a "stakeholding" relationship between the individual and the state. This goal can be accomplished by embedding this reciprocity into the bestowal of citizenship status, and – by reference to the Constitutional Stakeholder model - by asking the question at the time of voting. This model lives at the intersection of Rainer Bauböck's stakeholder citizen model and the German majority's constitutional analysis. It justifies Baubock's account in constitutional terms, and the German majorities account in democratic terms. In short, my solution bears the markings of both the German majority and the stakeholder analysis, but modifies each to create a constitutionally workable theory of non-resident enfranchisement that is informed by democratic principles.

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[86] Spiro, *supra* note 79 at 211.

[87] See discussion: Bauböck, *supra* note **Error! Bookmark not defined.** at 2432-5; See also: Peter J Spiro, "Perfecting Political Diaspora" (2006) NYU Law Rev 210 at 220-222. See also: Sarah Burton, "Schrödinger's Citizen: A path to the democratically legitimate inclusion of non-resident citizens" [Working Paper] copy on hand with the author.

While there is no perfect solution, I believe this account does the best job of navigating the space that separates constitutional and democratic accounts of democratic membership. On the constitutional side of the coin, this account protects the important function courts play in safeguarding our democracy from political manipulation. On the democratic side, my approach provides a constitutionally acceptable way to import meaningful community membership credentials to the citizen's franchise. When put into practice, it provides a reasonable pathway in which constitutional and democratic accounts of membership in the democratic and constitutional community can co-exist. In so doing, it provides a workable short-term solution to the normatively ambivalent potential of non-resident citizen voting. The concluding chapter considers the use and implications of my account, as well as areas for future research.

Concluding Thoughts

A. Solving the Puzzle of the People

This thesis started by asking whether non-resident citizen voting a good thing or a bad thing. In the chapters that followed, I hope to have demonstrated firstly, that answering this question matters when thinking about the right to vote, and secondly, that the answer is not one or the other - but both. The constitutional protection of non-resident citizen voting is good in that it takes the question of enfranchisement out of political hands, and recognizes that the rightful boundaries of a *demos* can transcend borders. On the other hand, it is bad when it fails to recognize that citizenship does not necessarily endow its holder with a genuine link to the community, and when it opens a backdoor to political manipulation. The challenge we face within this reality is to place guardrails on the practice in such a way that emphasizes the good while minimizing the bad. I have argued that bringing constitutional adjudication and political theory into conversation with each other reveals the best constitutional account of the hard case presented by non-resident citizens.

The practical output of my analysis has been that restrictions on non-resident citizen voting can be constitutionally acceptable so long as they are justified by reference to a citizen stakeholding understanding of membership. However, the terms delineating this dividing line cannot be one-sided. In order to survive constitutional scrutiny, citizens on the wrong side of a legislated division must have a path by which they can demonstrate their rightful inclusion. To assuage critiques that such individuation is unworkable, my solution is derived from a model that is already in place in Germany.

I do not expect my prescription to please everyone. Constitutional critics may argue that my account wrongfully deprives citizens of the vote, and that the challenges I speak to may be

better handled by other methods. On the other hand, democratic critiques may argue that my account unduly privileges citizens, and gives short shrift to other wrongfully excluded non-voting blocks. While these arguments are valid, I maintain that my Constitutional Stakeholder model is the most workable way to move the democratic dial in the right direction. It imposes democratic guardrails on the right to vote without handing the reins of democratic inclusion over to political actors.

B. Areas for Future Research

This thesis has focused on the rightful democratic inclusion, and limits thereon, of non-resident citizens in the *demos*. This research has revealed several other areas of future research. Below, I briefly set out four such areas.

a. Voting for Non-Citizen Residents?

My account of voting for non-resident citizens has not directly challenged the constitutional stance that citizens are the source of all state and political authority. Embedded in this choice is a larger question that I have not answered here: that is, whether another block of disenfranchised persons – non-citizen residents (permanent residents, migrant workers etc.) – have any constitutional path to enfranchisement. In this regard, my account provides only tangential relief (like Bauböck, I agree that all those who meet a stakeholding threshold should be offered citizenship and with that, the vote). While I have argued that the constitution vigorously protects a citizen's right to vote, I have not directly rendered an opinion as to whether it also mandates that only citizens can vote.

On this point, there is authority for the proposition that a constitutional understanding of voting and citizenship laws precludes the enfranchisement of non-citizens.[1] On this view, a constitutional account of voting cannot be opened to non-citizens, except insofar as we amend our citizenship laws. There are, however, critiques of this account,[2] and as a matter of practice, non-citizen residents are increasingly being given voting rights.[3] Both of these sources would suggest that there are contours to the constitutional account of voting that has yet to be uncovered. It is likely that such an account will require either more directly confronting the constitutional construction of the citizen, or be more directly focused on non-national (i.e. local) voting regimes. Given that non-citizen voting rights tend to be more generously offered at the local level, there may be a more compelling argument that the constitutional construction citizenship is less forceful here. All this to say that, how non-citizen voting rights can be defended in a constitutional framework requires more dedicated study.

b. Exploring other Boundaries of the Vote

While the focus of my research has been on the exclusion of non-resident citizens from the *demos,* I have also briefly touched on the existence of other groups of citizens (children, prisoners, persons who lack capacity) who are disenfranchised. The rationale grounding non-resident disenfranchisement differs from these other groups. No one, for example, denies that children are legal subjects - their exclusion is based on their perceived lack of competence. As

[1] Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court 83 BVerfGe 3/37 13 October 1990 [Foreign Voters Case]. See summary in Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court], 2 BvC 1/11, 2 BvC 2/11 4 July 2012 [BVerfG 2 BvC 1/11] at para 70.

[2] See eg: discussion of *Spragins v Houghton* (1840) in David Owen, "Transnational citizenship and the democratic state: modes of membership and voting rights" (2011) 14:5 Critical Review of International Social and Political Philosophy 641 at 648.

[3] For discussion of noncitizen voting rights see Rainer Bauböck, "Expansive Citizenship – Voting Beyond Territory and Membership", (2005) Pol Sci & Pol 683. See also, Owen, *ibid;* David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State (London: Palgrave Macmillan, 2009) at 55.

such, a constitutional stakeholder rationale does not justify the inclusion nor exclusion of this block of voters from the electorate.

However, the underpinning issue of membership in the *demos* is common to all accounts. In this regard, I have argued that a citizen's exclusion from the *demos* is rightfully subjected to vigorous scrutiny (and as such, a tailored solution to withstand that scrutiny). This is directly relevant to these other citizen groups who are excluded from the electorate for reasons of competence or morality. Like the stakeholding threshold, blanket bans dividing voting from non-voting citizens based on their competence or morality are likely insufficiently tailored to survive the constitutional scrutiny I have called for.[4]

At the same time, my proposed solution to deal with non-resident citizens - dividing stakeholding from non-stakeholding voters with an individualized path to demonstrate one's status - is not likely to work in these other contexts (for example, imposing some sort of competency test on children invokes the problematic practice of literacy tests). While I do not resolve this question here, the fact remains that blunt dividing lines are unlikely to survive vigorous constitutional scrutiny. While an individualized test may not work, nor should we simply accept that blanket bans declaring people incompetent or lacking in moral standing must be the solution.

On the point of competence specifically, I note that this is an increasingly complex area of law experiencing an overhaul across many subject areas.[5] When fundamental individual rights are at stake, the notion that we can simply declare a person incompetent is increasingly subject to challenge. As such, there is arguably some constitutional need (its contours being as yet

[4] For an ongoing case about age-based restrictions, see: *Penney-Crocker et al v Canada*, Ontario Superior Court of Justice, Court File No.CV-21-00673219-0000; filed December 2021.
[5] This is most notable in the context of health law. See eg: Joan M Gilmour, "Legal Capacity and Decision Making" in Joanna Erdman ed, *Canadian Health Law and Policy* 5th Ed (Lexis Nexis, 2017).

undetermined) to go beyond arbitrary dividing lines to engage more substantively with the issue.[6] While I do not offer up those precise contours here, we cannot just dismiss the idea that blanket bans on voting must be acceptable because it's how we do things now. The justifications and best practices for negotiating the dividing lines between other groups of disenfranchised citizen voters is as fruitful area of further research that must be explored.

c. Weaponized Citizenship and Democratic Decline

At the outset of this thesis I flagged democratic decline as a relevant backdrop upon which the normativity of non-resident voting rights takes place. I argued that non-resident voting laws are vulnerable to exploitation within this larger phenomena, and at various stages of this paper, I have flagged points at which this vulnerability to manipulation is a concern.

Some scholars of democratic decline have flagged non-resident voting laws and "weaponized" citizenship laws as tools of political manipulation.[7] On this point, Hungary tends to be invoked as the archetypical example.[8] However, to date there has not been a dedicated analysis or empirical investigation studying the use of citizenship and non-resident voting as a tool of democratic decline. Such a study would be particularly interesting given that practices of democratic decline tends to display patterns, and similar tend to be invoked across a variety of

[6] For examples of this discussion in the context of children voting, see: See eg: Elizabeth F Cohen, "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" (2009) 9:2 Citizenship Studies 221) or ways to allow children's voices to be heard (see eg: Yoshio Kamijo, et al. "Effect of Proxy Voting for Children under the Voting Age on Parental Altruism towards Future Generations." (2020) 122 *Futures : The Journal of Policy, Planning and Futures Studies*) no one in the mainstream is advocating for 3-year-olds to be able to cast a ballot on election day.
[7] Aziz Huq and Tom Ginsburg, *How to Save a Constitutional Democracy* (Chicago: Chicago University Press, 2018) at 69-70; Kim Lane Scheppele, "Hungary, An Election in Question, Part 4: The New Electorate (in Which Some Are More Equal than Others)" (NY Times, Feb 28, 2014), archived at http://perma.cc/69HC-4XJ5; For more, see: Kim Lane Scheppele, "How Victor Orbán Wins" (2022) 33:3 Journal of Democracy 45 at 55. For discussion of weaponized citizenship, see: Neha Jain "Weaponized Citizenship: Should international law restrict oppressive nationality attribution?" (30 June 2023) online: **https://globalcit.eu/weaponized-citizenship-should-international-law-restrict-oppressive-nationality-attribution/**. For other examples, look to citizenship by investment, or economic citizenship practices. For other discussion of see: Jeremias Stadlmair**: "**Earning citizenship. Economic criteria for naturalisation in nine EU countries" online: https://globalcit.eu/earning-citizenship-economic-criteria-naturalisation-nine-eu-countries/
[8] Huq, *ibid;* Scheppele, *ibid.*

regimes.[9] It would be interesting to see if non-resident voting laws have formed part of a wider network of "anti-constitutional" migration of ideas.[10] If that were the case, it would provide credence for my argument that we need a more democratically grounded understanding of the practice, and would provide useful case studies to measure the salience of my recommendations.

d. Global versus Local Values

Lastly, debates about non-resident voting engage underpinning political theories and worldviews about the relationship of human beings to those around them. On one side of the spectrum, nationalist and communitarian ('local') worldviews are associated with the belief that humans are collective beings whose meaningful existence is tied to bonds of affinity or membership.[11] On the other side, liberal and cosmopolitan ('global') worldviews centre on the individuality and universality of human worth.[12] Between these poles, there are a variety of hybrid visions and compromises.[13]

In previous work, I have written about how non-resident voting laws sits uncomfortably within these competing lines of thought.[14] On the one hand, a local stance could argue that people who are not on the territory are no longer part of the community, and are rightfully excluded. A

[9] Kim Lane Scheppele, "Worst Practices and the Transnational Legal Order (or how to build a constitutional "democratorship" in plain sight" (working paper 2016), archived at http://perma.cc/Q266- MJEK ; —-. "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work" (2013) 26 *Governance* 559 (4 pages)
[10] Kim Lane Scheppele, "The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency" in Sujit Choudhry, ed. *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006)
[11] See eg: Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (New York: Basic Books, 1983) ("Nations look for countries because in some deep sense they already have countries: the link between people and land is a crucial feature of national identity" at 44); Michael J Sandel, Democracy's Discontent: America in Search of a Public Philosophy (Cambridge, Mass: Belknap Press of Harvard University Press, 1996) at 1–24.
[12] Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004); Luis Cabrera, "Global Citizenship as the Completion of Cosmopolitanism" (2008) 4:1 J Intl Political Theory 84 at 86.
[13] See eg: Patti Tamara Lenard & Margaret Moore, "A Defence of Moderate Cosmopolitanism and/or Moderate Liberal Nationalism" in Will Kymlicka & Kathryn Walker, eds, *Rooted Cosmopolitanism: Canada and the World* (Vancouver: UBC Press, 2012) 47; Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993) at 166; Will Kymlicka, *Multicultural Citizenship: A liberal theory of minority rights* (Oxford: Oxford University Press, 1995).
[14] Sarah Burton, "Locating the People: An Exploration of Non-Resident Citizen Voting in Frank v Canada (Attorney General) (2021) 66:4 McGill LJ 1.

different take on the local would, however, argue that people's link to a community persists no matter where they live, and therefore, they should keep the vote. On the other hand, a global view could argue that rights are universal and persist no matter the physical boundary (i.e. they should be included). A deeper dive into this stance would, however, reject the idea that voting should be linked to a special status such as citizenship.

My thesis has not delved into this classification exercise, but its conclusion adds some interesting fodder for the ongoing debate. In this regard, it is arguable that my Constitutional Stakeholder model would fall under a liberal nationalist label.[15] Whether non-resident voting is something rightfully belongs under that banner is, however, a point of contention between different theorists.[16] Working through this debate at the level of theory gives us space to tease out how we should think about non-resident voting in an increasingly globalized world.

C. Final Thoughts

This thesis has argued that the constitutional right of non-resident citizens to vote can be justified when tethered and understood by reference to a democratic understanding of community membership. To this end, I have presented the Constitutional Stakeholder model as a plausible way to satisfy this mandate. While we will never fully resolve the tension constitutional and

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[15] While not engaging with the issue of non-resident voting directly, I infer from statements from Will Kymlicka, like Bauböck, would endorses the vote for those with a stake in the community notwithstanding their physical absence. In this respect, Kymlicka and Bauböck agree on many (but not all) matters about citizenship (see eg, their dialogue in Rainer Bauböck, ed, Democratic Inclusion: Rainer Bauböck in Dialogue (Manchester: Manchester University Press, 2018).

To the extent my account falls under this heading, I am not arguing that a liberal nationalist understanding of non-resident voting is normatively superior to others. Rather, my output is influenced by the fact that I see it to be the most practical and most workable solution we have within the liberal democratic constitutional framework within which most of us live.

[16] see David Owen, "Resident Aliens, Non-resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging," in Gideon Calder, Phillip Cole & Jonathan Seglow, eds., Citizenship Acquisition and National Belonging: Migration, Membership and the Liberal Democratic State (London: Palgrave Macmillan, 2009) at 66; Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393 2416-7.

democratic accounts of membership in the *demos*, I have argued that they can tolerate one another under this construction.

Reaching this point has requires compromise from both sides of the ledger. The democratic side is asked to accept citizenship's relationship to voting in modern liberal democratic state. The constitutional side has been asked to acknowledge that it is valid for legislatures to tailor the electorate to meet the core edicts of democracy. I argue that these compromises provide space to improve the theory and practice of non-resident enfranchisement in ways that better safeguard democracy without undermining the constitutional structures that place citizens as the source of all state authority.

For the most part, we remain at the front end of understanding the impact and implications of non-resident voting. The exponential expansion of non-resident citizen voting laws have largely occurred over the past generation, and participation rates are nowhere near their potential. While over a dozen constitutional courts have considered the issue, many more have yet to do so. In short, most countries have yet to grapple with the implications of the non-resident voting laws that they themselves have passed. When that time does come – under the guise of public perception, electoral might, or otherwise - governments may be surprised to discover that this door is not as easily closed as it was opened. When that time comes, this thesis provides an off-the-shelf solution for how to understand and tame this practice. In so doing, I hope to provide a way to safeguard democracy in an increasingly globalized world.

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