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Locating the People: An Exploration of Non-Resident Enfranchisement and Political Belonging in *Frank v. Canada (Attorney General)*

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Article abstract

This piece situates non-resident voting within the larger divide between global and local values. The Supreme Court of Canada held in *Frank v. Canada (Attorney General)* that disenfranchising certain non-resident citizens violated the *Canadian Charter of Rights and Freedoms*. I argue that this opinion is driven by a disagreement on the meaning of belonging, in which the constitutional status of non-resident citizens is emblematic of broader questions about political membership in a globalized world. Non-resident voting offers a compelling case study, in which theoretical attempts to reconcile global and local values are exposed as having unexpected contours. The Supreme Court majority's global stance is notably patriotic, while the dissent's call for local connections unwittingly brings it in line with cosmopolitan thinkers. These insights offer a better understanding of the strands of thought within the global-local divide and highlight the nebulous nature of arguments based in political belonging.

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Locating the People: An Exploration of Non-Resident Enfranchisement and Political Belonging in *Frank v. Canada (Attorney General)*

*Sarah Burton**

This piece situates non-resident voting within the larger divide between global and local values. The Supreme Court of Canada held in *Frank v. Canada (Attorney General)* that disenfranchising certain non-resident citizens violated the *Canadian Charter of Rights and Freedoms*. I argue that this opinion is driven by a disagreement on the meaning of belonging, in which the constitutional status of non-resident citizens is emblematic of broader questions about political membership in a globalized world. Non-resident voting offers a compelling case study, in which theoretical attempts to reconcile global and local values are exposed as having unexpected contours. The Supreme Court majority's global stance is notably patriotic, while the dissent's call for local connections unwittingly brings it in line with cosmopolitan thinkers. These insights offer a better understanding of the strands of thought within the global-local divide and highlight the nebulous nature of arguments based in political belonging.

Cette chronique de jurisprudence situe le vote des non-résidents au sein de la division plus large entre les valeurs globales et locales. La Cour suprême du Canada, dans *Frank c. Canada (PG)*, a statué que priver certains non-résidents du droit de vote violait la *Charte canadienne des droits et libertés*. Je suggère que cette décision est motivée par un désaccord quant à la signification de l'appartenance, au sein duquel le statut constitutionnel des citoyens non-résidents est emblématique de questions plus larges d'appartenance politique dans un monde globalisé. Le droit de vote des non-résidents offre une étude de cas intéressante, qui expose les contours inattendus de tentatives théoriques de réconciliation de valeurs globales et locales qui paraissent être en compétition. La position globale de la majorité est particulièrement patriotique, alors que l'appel de la dissidence aux connexions locales l'amène involontairement en ligne avec des penseurs cosmopolites. Ces perspectives offrent une meilleure compréhension des volets de pensée au sein de la division globale-locale et mets en lumière la nature nébuleuse des arguments basés sur l'appartenance politique.

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Introduction

In 2011, Gillian Frank was a law-abiding Canadian citizen and former reservist who was born and raised in Ontario, watched *Hockey Night in Canada*, and listened to CBC Radio.[1] He could not, however, vote in Canadian elections. In fact, when Mr. Frank attempted to register, he was informed that he and millions of other citizens like him were legislatively barred from participating in Canadian elections. His disenfranchisement flowed from residence. Several years prior, Mr. Frank had moved to the United States to pursue graduate studies, and despite numerous attempts, he was unable to find work at a Canadian university. Because he had left more than five years prior, the *Canada Elections Act* barred him from voting until such time as he resumed residence in Canada.[2]

Mr. Frank's discovery spawned a seven-year legal battle whose resolution drew him into questions regarding the meaning of democracy, the nature of belonging to a political community, and the role of membership in a globalized world. In the end, a deeply divided Supreme Court of Canada struck down his legislated disenfranchisement. According to the majority, physical borders mean little in an increasingly globalized world. Non-resident citizens may live somewhere else, but this does not weaken their Canadian identity. In dissent, two justices lamented the breakdown of the nation's Westminster tradition and parliamentary democracy. To them, non-residents may carry Canadian passports, but Parliament is justified in treating them as outsiders from the political community.

My interest in *Frank v. Canada (Attorney General)*[3] is not primarily about the legal decision reached, but about how the judges conceptualize and defend their visions of non-resident voting. I argue that the judges in *Frank* are locked in an argument about political belonging that echoes the larger culture wars between so-called "local" and "global" values. The topic of belonging is common in political theory, but there is surprisingly little attention given to the philosophical foundations of non-resident voting itself. This case comment takes on this task. Contrary to its frequent characterizations, I argue that non-resident voting is not necessarily a nationalist phenomenon—indeed, it stands at odds with many strands of nationalism. Nor, however, is it an expression of global, or cosmopolitan,

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1 See *Frank v Canada (AG)*, 2014 ONSC 907 (Affidavit of Gillian Frank) at paras 5–13, 19–22 [*Affidavit of Gillian Frank*]; *Frank v Canada (AG)*, 2014 ONSC 907 at para 10 [*Frank* Sup Ct]. For more Canadian connections cited by the Application Judge for the co-applicants Gillian Frank and Jamie Duong, see *ibid* at paras 10–18. See also *Frank v Canada (AG)*, 2015 ONCA 536 at para 179 [*Frank* CA].

2 *Canada Elections Act*, SC 2000, c 9, s 11(d) as it appeared on May 2011 [*CEA*].

3 2019 SCC 1 [*Frank* SCC].

ideologies. *Frank* demonstrates that non-resident voting can be better understood as occupying the hybrid space between nationalist and cosmopolitan poles, which I explore in the paragraphs below.

The remainder of this case comment proceeds as follows. Part I introduces the practice of non-resident voting and traces the progression of the *Frank* case from the Ontario Superior Court to the Supreme Court of Canada. Through this analysis I demonstrate that the judges in *Frank* are locked in a philosophical disagreement on the nature of political belonging in which non-resident citizens are either celebrated as ambassadors or excluded as political outsiders. Part II considers scholarly treatment of the political belonging of non-resident citizens. Within the existing literature, support or rejection of non-resident voting is often secondary, and operates in service of other, more central claims. Within these narratives, non-resident voting is either dismissed as a representation of parochial interests and insidious strands of nationalism, or is presented in the language of universal rights and of a borderless cosmopolitan reality. Part III considers the accuracy of these characterizations. The "global" and "local" labels are used as a shorthand for umbrella concepts which themselves envelop a number of ideological or philosophical stances. The global label encompasses liberal and cosmopolitan philosophies, while the local label denotes communitarian and nationalist thought. Various scholarly attempts to reconcile these poles are also considered, including strands of patriotic, instrumentalist, and rooted cosmopolitanism, constitutional patriotism, and liberal nationalism. This part concludes by considering how non-resident voting should be situated within these lines of thought. Part IV aligns the reasons in *Frank* with these labels. Taken, as the majority did, in a favourable light, non-resident voters are best thought of as cosmopolitan patriots who believe that moral duties do not stop at a state's borders. The dissent's skeptical vision of non-resident voters is best described through a liberal nationalist lens. This analysis demonstrates that non-resident voting is more complex than its typical characterization, and that it resists a one-size-fits-all test of legitimacy. The practice lives within the nebulous space between competing cosmopolitan and nationalist poles, which offers both promise and cause for concern.

I. Overview of Non-Resident Voting and the *Frank* Case

A. Non-Resident Voting in Canada

Non-resident enfranchisement refers to the ability of people to vote in their country of citizenship despite residing elsewhere.[4] It is defined by the disconnect between citizenship and residence: the voters in question are casting ballots in their state of citizenship, but they live somewhere else.[5] As a practice, non-resident voting has global reach and relevance. Every democratic state must address whether and how to enfranchise citizens who move away. Its significance as a voting issue will only grow in the future, as technology and travel make it easier for people to move away from their country of origin while staying connected to it.[6]

Despite this ubiquity, non-resident voting has historically failed to receive significant scholarly or legal attention.[7] While the practice of non-resident voting is not new,[8] it was reserved throughout much of its history

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4 Sometimes referred to as external voting, out-of-country voting, absentee voting, remote voting, or expatriate voting: see Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" (2007) 75:5 Fordham L Rev 2393 at 2398; Dieter Nohlen & Florian Grotz, "External Voting: Legal Framework and Overview of Electoral Legislation" (2000) 33:99 Boletín Mexicano de Derecho Comparado 1115 at 1119; Pasquale Lupoli, "Foreword" in Andrew Ellis et al, *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]; Jean-Michel Lafleur, *Transnational Politics and the State: The External Voting Rights of Diasporas* (New York: Routledge, 2013) [Lafleur, *Transnational Politics and the State*].

5 There is much discussion in the literature on what exactly qualifies as external voting. That is, does it include non-resident citizens who return to the state of citizenship to vote? Does it include service members stationed overseas who vote at consulates? Does it include students who maintain a domestic address? These distinctions are not essential to the arguments presented here. Because this piece addresses the question through an analysis of the *Frank* decision, its conception of non-resident voting is focused on, but not limited to, citizens who reside out of the country for a minimum of five years and will remain so indefinitely. See Bauböck, *supra* note 4 at 2398–99. See also Nohlen & Grotz, *supra* note 4 at 1119–20.

6 For statistics on global migration trends over the past twenty years, see Nadja Braun & Maria Gratschew, "Introduction" in Ellis et al, *supra* note 4, 1 at 2. See also Grace, *supra* note 4 at 35. For a review of the literature on emigrant-home state relations, see Lafleur, *Transnational Politics and the State*, *supra* note 4 at 1–9, 45–49.

7 See *Lafleur*, *Transnational Politics and the State*, *supra* note 4 at 1 (non-resident voting as a neglected topic). See also Claudio López-Guerra, "Should Expatriates Vote?" (2005) 13:2 J Political Philosophy 216 at 216.

8 See Andrew Ellis, "The History and Politics of External Voting" in Ellis et al, *supra* note 4, 41.

for exceptional categories of citizens whose overseas status was necessary for their service to the state.[9] Over the past thirty years, however, non-resident voting has grown significantly in both the number of countries that permit the practice, and in the categories of non-residents who are eligible.[10] This recent expansion has caused the practice of non-resident voting to grow faster than its legal and philosophical footing. There is no global standard for how or whether non-residents should be permitted to vote.[11] Aside from national constitutional guarantees, states are free to decide whether (or how) to enfranchise their citizens abroad. Each state has answered the question of non-resident voting by reference to a mix of economic, logistical, and political calculations, which has resulted in a patchwork of practices and stances.[12]

For its part, Canada has permitted some form of non-resident voting since 1917.[13] This enfranchisement, which was initially limited to soldiers overseas, was gradually expanded to new discrete classes over the course of the twentieth century.[14] In 1982, the *Canadian Charter of Rights and Freedoms*'s guarantee that "[e]very 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" brought renewed attention to residency restrictions on voting.[15] Four post-*Charter* parliamentary studies recommended abolition of the residency restriction for federal elections.[16] Based on concerns about the potential lost "affinity" or "con-

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9 See Lafleur, *Transnational Politics and the State*, *supra* note 4 at 17–18.

10 See *ibid*; Grace, *supra* note 4 at 38; Nohlen & Grotz, *supra* note 4 at 1125–26; Carlos Navarro Fierro, Isabel Morales & Maria Gratschew, "External Voting: A Comparative Overview" in Ellis et al, *supra* note 4, 11 at 18.

11 See Grace, *supra* note 4 at 38; Lafleur, *Transnational Politics and the State*, *supra* note 4 at 33–38; Nohlen & Grotz, *supra* note 4 at 1123; Fierro, Morales & Gratschew, *supra* note 10 at 22–28; Braun & Gratschew, *supra* note 6 at 1.

12 See Nohlen & Grotz, *supra* note 4 at 1123. See note 78, *below*, for more discussion on the development of non-resident voting policies.

13 See *The Military Voters Act, 1917*, SC 1917, c 34, s 2(c).

14 For a summary of this expansion, see *Frank* Sup Ct, *supra* note 1 at paras 38–45.

15 *Canadian Charter of Rights and Freedoms*, s 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

16 See Canada, Privy Council, *White Paper on Election Law Reform* (June 1986) at 5–6; Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, vol 1 (Ottawa: Communication Group, 1991) at 46–47; Elections Canada, *Completing the Cycle of Electoral Reforms: Recommendations from the Chief Electoral Officer of Canada on the 38th General Election*, Catalogue No SE1-5/2005 (Ottawa: Elections Canada, 2005) at 36–37; House of Commons, *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*, *Report of the Standing Committee on Procedure and House Affairs* (June 2006) (Chair: Gary

nection" to Canada, however, a House of Commons Special Committee recommended that non-resident citizens be permitted to cast a vote in Canadian federal elections only if they had been living abroad for less than five years, and intended to return to Canada.[17]

This recommendation was ultimately incorporated into the *Canada Elections Act*. As of 2011, Canadian citizens over the age of eighteen were entitled to have their names included in the list of electors for the polling division in which they were ordinarily resident, and to vote at the polling station associated with that polling division.[18] Citizens who did not meet the residence requirement could, however, vote by way of special ballot, provided they fit within a certain class of exceptions.[19] Exceptions to the residency requirement included members of the Canadian Forces, public servants posted outside the country, citizens employed by certain international organizations outside Canada, and citizens who were absent from Canada for less than five consecutive years and intended to return to Canada as residents.[20] As such, a Canadian citizen who did not ordinarily reside in Canada for five years or more (and who did not fit in another

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Goodyear) at 11. For an overview and relevant excerpts of the reports, see *Frank* CA, *supra* note 1 at paras 208–16.

17 See House of Commons, Special Committee on Electoral Reform, *Third Report to the House*, 34-3, No 7 (11 December 1992), Annex A, s 27(5).

18 See *CEA*, *supra* note 2 ("Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector", s 3; "Subject to this Act, every person who is qualified as an elector is entitled to have his or her name included in the list of electors for the polling division in which he or she is ordinarily resident and to vote at the polling station for that polling division", s 6).

19 See *ibid*, s 127(c).

20 See *ibid*, s. 11:

> Any of the following persons may vote in accordance with Part 11: (a) a Canadian Forces elector; (b) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada; (c) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada; (d) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident; (e) an incarcerated elector within the meaning of that Part; and (f) any other elector in Canada who wishes to vote in accordance with that Part", s 11 [emphasis added].

The claimants in *Frank* also challenged provisions in the *CEA* containing (1) certain rules regarding the content and maintenance of the register of electors who were residing outside Canada (s 222(1)(b), (c)), (2) the rules for issuing a special ballot to confirm the voter resided outside Canada for less than 5 years and intends to resume residence in Canada (s 223(1)), and (3) the definition of "elector" in the special ballot rules which only extended to Canadians temporarily residing outside Canada (s 220).

category of exception) could not vote in a federal election unless and until they re-established residence in Canada.[21]

It is against this backdrop that the *Frank* case arose. Gillian Frank and Jamie Duong were Canadian citizens who were born and raised in Canada, but who lived in the United States for several years.[22] Both were highly educated in specialized fields, and argued that their inability to locate work in Canada prevented them from returning.[23] Both applicants were denied ballots in Canada's 2011 federal election because they had been living outside Canada for more than five years. They both launched constitutional challenges alleging an unjustified breach of section 3 of the *Charter*.

While section 3 guarantees "[e]very citizen of Canada" the right to vote, the *Charter* does not itself define citizenship.[24] That task is left to the *Citizenship Act*, which uses a blended model for bestowing status citizenship on those born on Canadian territory (*jus soli*), and those born to parents with Canadian citizenship (*jus sanguinis*).[25] Like all *Charter* rights, section 3 is subject to reasonable limitation.[26] *Frank* asked if the five-year residency rule was constitutionally valid in a federal election.

At the application level, the court held that it was not. Justice Penny adopted a plain language approach to section 3, holding that the five-year rule was a straightforward violation of its guarantee.[27] The restriction also failed to meet any stage of the section 1 analysis. Drawing heavily on the precedent set by *Sauvé v. Canada (Chief Electoral Officer)*,[28] which dealt with prisoner disenfranchisement, the court held the government's proffered "fairness" and "integrity" objectives were too vague and unsupported by evidence to be considered pressing and substantial.[29] Nor was there a rational connection between those proffered objectives and the law.[30] The arbitrary and overbroad five-year cut-off date failed the mini-

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21 Penny J of the ONSC summarizes this legislative scheme (see *Frank* Sup Ct, *supra* note 1 at paras 31–36).

22 See *Affidavit of Gillian Frank*, *supra* note 1 at para 5.

23 See *Frank v Canada (AG)*, 2014 ONSC 907 (Affidavit Jamie Duong) at paras 4, 13 [*Affidavit of Jamie Duong*]; *Affidavit of Gillian Frank*, *supra* note 1 at para 3.

24 *Charter*, *supra* note 15, s 3.

25 RSC 1985, c C-29, s 3.

26 See *Charter*, *supra* note 15, ss 1, 3.

27 See *Frank* Sup Ct, *supra* note 1 at paras 79, 85.

28 2002 SCC 68 [*Sauvé*].

29 See *Frank* Sup Ct, *supra* note 1 at paras 112–15.

30 See *ibid* at paras 123–30.

mal impairment inquiry, and the lack of any evidence of harm associated with non-resident voting was fatal to the final proportionality analysis.[31]

While organized in the frame of a *Charter* analysis, the Superior Court decision was driven by a view of political belonging and markers of Canadian "values" and "heritage."[32] Cultural touchstones—such as an affinity for Tim Hortons and the NHL, participation in Terry Fox runs, service in the Canadian reserves, and ongoing family connections—coloured the court's view that territory has little bearing on membership in the Canadian political community.[33] The applicants' diasporic longing to return to Canada and their attempt to vote both demonstrated a deep and abiding connection to Canada which weighed in favour of their enfranchisement.[34]

The Court of Appeal, however, took a different view.[35] While agreeing that the residency restriction violated section 3, a majority of the Court of Appeal held that the violation could be justified under section 1.[36] A significant factor in this shift was the government's decision to reshape its "fairness" objective into one focused on the preservation of the social contract. That theory is itself steeped in a particular view of political belonging, in which the law's legitimacy flows from the fact that citizens are both authors and subjects of law.[37] Drawing on the majority's endorsement of the social contract in *Sauvé*, the majority reasoned that because non-residents do not bear the burden of obeying the law, that connection is broken.[38] As such, Parliament adopted a proportional response in determining that non-residents who "voluntarily severed their connections with Canada in the pursuit of their own livelihoods" are outside the political community after a five-year absence.[39]

In his dissent, Justice Laskin criticized the majority and adopted the application judge's reasoning.[40] He attacked the social contract theory because it was not raised before the applications judge, violated the principle against shifting objectives, and, in any event, did not pass constitu-

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31 See *ibid* at paras 136–53.

32 See *ibid* at para 12.

33 See *ibid* at paras 8–18.

34 See *ibid* at paras 10, 12, 142, 151.

35 See Frank CA, *supra* note 1 at paras 130–31.

36 See *ibid* at paras 81, 159.

37 See *ibid* at paras 118–22.

38 See *ibid* at paras 95–99, 131, 141, 156.

39 *Ibid* at para 143.

40 See *ibid* at paras 162–63.

tional muster.[41] After reproducing the lower court's summary of Canadian connections, Justice Laskin accused the majority of wrongfully disenfranchising a group based on its preferred political philosophy over and above the clear words of the *Charter*, a notion which had been rejected in *Sauvé*.[42] Moreover, he disputed the notion that non-residents lie outside the social contract, as many laws apply to non-residents, and membership does not depend on the degree to which a person is impacted by a particular law.

By the time the case reached the Supreme Court of Canada in 2019, the five-year rule had been legislatively removed.[43] Nonetheless, the government vigorously defended its authority to impose a residency restriction as a justified limitation on section 3. Before the Supreme Court, the Attorney General conceded a breach of section 3. Four of the seven sitting justices held that non-resident disenfranchisement failed all but the pressing and substantial objective phase of the section 1 inquiry. Justice Rowe, concurring with the majority, believed that the current residency restriction was unconstitutional for failing the final proportionality analysis.[44]

Before delving into a section 1 inquiry, the majority explained their interpretation of political community as being tied to the words of the *Charter*.[45] Because section 3 of the *Charter* "tethers voting rights to citizenship, and citizenship alone,"[46] residence amounts to little more than an "organizing mechanism" which is increasingly outdated in our globalized society.[47]

At the justification stage, the majority justices rejected the proffered social contract objective as being unacceptably vague and ill-suited to a section 1 analysis, and on misinterpreting the discussion in *Sauvé*.[48] It accepted a reframed electoral fairness objective,[49] but expressed doubt that disenfranchising voters could be rationally connected to the goal of elec-

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41 See *ibid* at paras 165–70, 184–86.

42 See *ibid* at paras 233, 236.

43 See Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*, 1st Sess, 42nd Parl, 2018, cls 5, 7 (assented to 13 December 2018).

44 Rowe J, however, did not foreclose the possibility of finding similar constitutional limits should non-resident voting practices change in the future.

45 See *Frank* SCC, *supra* note 3 at para 35.

46 *Ibid* at para 29.

47 *Ibid* at paras 28, 34.

48 See *ibid* at para 49.

49 See *ibid* at para 54.

toral fairness.[50] They further rejected the argument that a rational connection could be demonstrated by looking to similar restrictions in provincial and international contexts. In particular, international jurisdictions had nothing to offer Canada "in determining what is required by *Canadian* democratic rights, as enshrined in this country's *Charter*."[51]

The law failed the minimal impairment stage because it was arbitrary and overinclusive. The five-year limit excluded persons who maintain deep and abiding connections to Canada and who are, by virtue of attempting to vote while abroad, demonstrating a profound connection to the country. As a result of globalization, citizens can spend time away from Canada without weakening their subjective connection to or knowledge of the country. While they may not live with all of Canada's laws, non-residents remain legal subjects who are impacted by decisions on (among other things) taxes, social security, and voting rights.

At the final proportionality analysis, the majority criticized the proffered benefits of the law as illusory, and its deleterious effects as insurmountable. Canada's "best and brightest" live abroad, and in so doing, they act as "ambassadors of Canadian values."[52] These people have not voluntarily "severed their connection" to Canada, and denying their voting rights is premised on an unacceptable notion that non-residents are "less deserving" of the vote than others.[53]

In dissent, Justices Côté and Brown accepted the Attorney General's concession on section 3, but argued that the five-year residency restriction was a reasonable limit on that right.[54] Parliament, in their view, should be entitled to deference when legislating on matters of moral and political philosophy.[55] The majority's approach served only to inappropriately re-

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[50] See *ibid* at para 60.

[51] *Ibid* at para 62. This stance is particularly odd given the influence of foreign legal practice in drafting the *Charter*, and because of the otherwise largely accepted practice of drawing on foreign legal sources in interpreting the *Charter* (see e.g. Lorraine E Weinrib, "The Postwar Paradigm and American Exceptionalism" in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge, UK: Cambridge University Press, 2006) 84; Jordan D Cooper, "The Influence of U.S. Jurisprudence on the Interpretation of the Canadian Charter of Rights and Freedoms: An Initial Survey" (1986) 9:1 Boston College Intl & Comp L Rev 73; *R v Keegstra*, [1990] 3 SCR 697 at 738–44, 749–55, 61 CCC (3d) 1 [*Keegstra*]).

[52] *Frank* SCC, *supra* note 3 at para 80.

[53] See *ibid* at paras 81–82.

[54] See *ibid* at para 112.

[55] See *ibid* at paras 140, 146.

place Parliament's philosophy of political belonging with that of the Court.[56]

At the section 1 analysis, the dissenting justices reframed the government's proffered legislative objective, this time as "privileg[ing] a relationship of some currency between electors and their communities."[57] This objective, in their view, ought to be assessed in light of Parliament's ability to draw on a particular moral philosophy when legislating on the relationship between citizen and state. Residence is a fundamental requirement of the right to vote in Canada because citizenship, on its own, does not speak to the relationship an elector has to a particular Canadian community.[58] Parliament "quite properly" exercised its authority in deciding not to enfranchise long-term non-residents.[59]

The residency requirement was pressing and substantial for two reasons. First, it ensured reciprocity between electing lawmakers and bearing the burden to obey the laws that are passed. Non-resident voters are not subject to Canadian laws, and should not be able to vote until they rejoin the community. While non-residents can maintain connections to Canada via technology and travel, it does not follow that connections to particular Canadian communities are as easily maintained.[60]

Second, the residency restriction protects the integrity of the electoral system because it preserves the foundation upon which Westminster-style democracy was built. Elected representatives in Canada come from geographically-defined areas to represent local interests at the federal level.[61] While citizenship, and not residency, is used in the language of section 3, residency is built into the fabric of Canadian democracy and must inform any examination of Canada's electoral system.[62]

The dissenting justices briefly dealt with the remaining portions of the section 1 analysis. They critiqued the majority's patriotic language as trending toward exceptionalism, and they argued that the widespread practice of residency restrictions in other Westminster systems ought to be considered persuasive.[63] Far from being ambassadors of Canadian values, the dissent viewed non-residents as outsiders to be viewed with am-

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56 See *ibid* at paras 146–47.

57 *Ibid* at para 127.

58 See *ibid* at para 150.

59 See *ibid* at para 140.

60 See *ibid* at para 156.

61 See *ibid* at paras 154–55.

62 See *ibid* at paras 155, 157.

63 See *ibid* at paras 166–67.

bivalence. In their view, non-resident citizens "may leave Canada for all sorts of 'non-ambassadorial' reasons, ranging from better career prospects, to lower taxes, to a preference for the 'values' of other countries."[64]

The five-year limit fell within a range of reasonable alternatives open to Parliament, and was thus minimally impairing. Moreover, the salutary effects of preserving the integrity of Canada's electoral system and upholding a democratically enacted conception of the right to vote outweighed the deleterious effect of denying some citizens that right. Indeed, this negative impact was mitigated by the fact that the restriction was temporary.[65]

B. Frank *and the Law of Democracy*

Frank's outcome tends to confirm existing trends and divisions within the law of democracy jurisprudence. Canadian courts lack a coherent theory of democracy.[66] Election litigation is plagued by unpredictability that flows from judicial disagreement as to whether impugned laws should be reviewed with "careful examination"[67] or "a natural attitude of deference."[68] In this respect, *Frank*'s majority and dissenting judgments confirm this impasse.

Frank does, however, contribute to a pattern—if not a coherent theory—within voting jurisprudence. This is particularly true when examined in conjunction with *Sauvé v. Canada (Attorney General)*.[69] *Sauvé* and *Frank* are Canada's high-profile blanket disenfranchisement cases, in that the impugned laws in both cases excluded a segment of the citizenry from voting.[70] While dealing with very different groups (prisoners versus non-residents), the majority reasoning in each case possess a number of

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64 *Ibid* at para 170.

65 See *ibid* at para 172.

66 See Michael Pal, "Breakdowns in the Democratic Process and the Law of Canadian Democracy" (2011) 57:2 McGill LJ 299 at 304.

67 *Sauvé*, *supra* note 28 at para 9.

68 *R v Bryan*, 2007 SCC 12 at para 9 referencing *Harper v Canada (AG)*, 2004 SCC 33 at para 87. For academic commentary, see Pal, *supra* note 66. To contrast Pal's recommended path forward, see Christopher Manfredi & Mark Rush, *Judging Democracy* (Peterborough, Ont: Broadview Press, 2008) at 123–26.

69 *Supra* note 28.

70 There are other blanket disenfranchisement cases which did not generate the same level of scrutiny or controversy: see e.g. *Canadian Disability Rights Council v Canada*, [1988] 3 FC 622, 12 ACWS (3d) 112 (the enfranchisement of persons with disabilities); *Belczowski v Canada*, [1992] 2 FC 440, 90 DLR (4th) 330 (the enfranchisement of incarcerated individuals).

similarities that are useful in defining the contours of Canada's voting rights jurisprudence.

For example, it now seems clear that blanket disenfranchisement attracts careful examination, and as such is much more difficult for the government to justify.[71] The majority judges in each case harboured a skepticism that bordered on hostility to the very concept of group disenfranchisement.[72] Any suggestion that lawmakers can deem certain groups unworthy of the vote drew harsh rebuke.[73] *Frank* also tends to confirm that philosophical objectives are inadequate justifications for blanket disenfranchisement.[74] When read in conjunction with *Sauvé*, objectives such as the social contract or respect for the rule of law appear to be too vague and unworkable for a section 1 analysis. Absent a specific harm, blanket disenfranchisement is unlikely to survive most stages of the *Charter*'s justification analysis.[75]

Taken together, it appears unlikely that the federal government can disenfranchise groups of citizens based on their behaviour. Short of abdicating citizenship, it is unlikely that people can act in a certain way that negates their right to vote federally. What remains to be seen, and what looms large over this subject matter, is whether groups can be disenfranchised based on a status outside their control. In this respect, rumblings of a challenge to age restrictions on voting are growing.[76] The precedents set by *Frank* and *Sauvé* pose interesting opportunities and challenges for proponent and detractors, as well as for courts and legislators. [77]

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71 The deferential standard that characterized the early election jurisprudence still appears in cases where voting restrictions are more individualized (see e.g. *Henry v Canada (AG)*, 2014 BCCA 30).

72 For a discussion of the majority's hostility in *Sauvé*, *supra* note 28, see Christopher P Manfredi, "The Day the Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45:1 Osgoode Hall LJ 105 at 119.

73 See *Frank* SCC, *supra* note 3 at para 82; *Sauvé*, *supra* note 28 at para 37.

74 See *Sauvé*, *supra* note 28 at paras 10, 12.

75 For a review of the court's analysis in *Sauvé*, *supra* note 28, see Manfredi, *supra* note 72 at 118.

76 See, for example, a constitutional challenge recently launched by a group of 12–18-year-olds: Justice for Children and Youth, Media Release "Young Canadians File Court Challenge to Lower Federal Voting Age – Calling it Unconstitutional" (1 December 2021), online (pdf): *Justice for Children and Youth* <jfcy.org/> [perma.cc/VPB5-HZ5C].

77 Notably, previous challenges to age restrictions have been summarily rejected based on *obiter dicta* in *Sauvé*, *supra* note 28: see *Fitzgerald v Alberta*, 2004 ABCA 184 at para 10. Given the Court's parsing of *Sauvé*'s social contract discussion in *Frank*, it is unclear what influence *Sauvé*'s statements will have in future challenges. See also Elizabeth F Cohen, "Neither Seen Nor Heard: Children's Citizenship in Contemporary Democracies" (2005) 9:2 Citizenship Studies 221; Colin Feasby, "Taking Youth Seriously:

C. Frank *and Democratic Theory*

The majority and dissenting judgments in *Frank* clash on a variety of issues, including the role of courts in policing election law, the supremacy of *Charter* versus parliamentary values, and even the appropriate language to employ in a *Charter* analysis. Each of these issues are underpinned by disagreements on the meaning of political community. In the majority's conception, the words of the *Charter* clearly state that citizenship is the marker of political inclusion. In the dissent's view, Parliament quite rightly limited this right by adding residence as the true guarantor of membership in the political community.

This disagreement between residence and citizenship has roots in a deep and largely unresolved tension in democratic theory regarding the role of territory in political membership. Whatever the outcome in this case, there remain deep divisions about how we should think about the citizenship of non-residents, and how we should define belonging. Are non-resident citizens, as the majority thinks, ambassadors of Canadian values who should be lauded in an increasingly de-territorialized society? Or, are they outsiders who are properly excluded until such time that they choose to return to the territory? Questions of community and belonging are common in normative political theory. The next part turns to this theory to shed light on how non-resident citizens are conceptualized.

II. Non-Resident Enfranchisement Theory

There is a widening (but still narrow) cohort of scholars who have addressed the normative and socio-political questions associated with non-resident voting.[78] Unfortunately, much of this literature tends to refer to non-resident voting in service of other, more central, claims.

Reconsidering the Constitutionality of the Voting Age", Case Comment, (11 June 2019), online (pdf): *ABlawg* <ablawg.ca> [perma.cc/BQ4N-H7KN].

78 There is a rich body of research within the social sciences that explores the realpolitik motivations behind voting systems change, including non-resident voter enfranchisement. This research argues that changes to voting laws are "steeped in politics" (see Dennis Pilon, *Wrestling with Democracy: Voting Systems as Politics in the Twentieth-Century West* (Toronto: University of Toronto Press, 2013) at 28), and that non-resident enfranchisement is implemented based on practical rather than ideological grounds, including emigrant lobbying (see Lafleur, *Transnational Politics and the State*, *supra* note 4 at 45–46) as well as the belief that enfranchising non-residents will benefit certain political actors or parties (see Susan Collard & Paul Webb, "UK Parties Abroad and Expatriate Voters: The Brexit Backlash" (2020) 73:4 Parliamentary Affairs 856; Jean-Michel Lafleur "Why Do States Enfranchise Citizens Abroad? Comparative Insights from Mexico, Italy and Belgium" (2011) 11:4 Global Networks 481 at 484, 497); open channels of global trade (see *ibid* at 483; Collard & Webb, *supra* note 78 at 15); and reward their enfranchisement with increased remittances and/or political loyalty

While there are exceptions to the rule,[79] literature normatively opposed to non-resident citizen voting is often primarily preoccupied with securing the voting rights of *non-citizen residents*, including refugees, temporary foreign workers, permanent residents, or irregular migrants who are physically present on a territory on the date of an election.[80] Relying on various theories of democratic inclusion, this literature often emphasizes the role that territory plays in subjecting persons to the rights and duties of national membership. The illegitimacy of non-resident voting is thus viewed as a logical extension, rather than the primary preoccupation, of this argument.

These authors reject forms of non-resident voting based on the view that non-residents do not bear the consequences of their electoral deci-

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(see Jean-Michel Lafleur, "The Enfranchisement of Citizens Abroad: Variations and Explanations" (2015) 22:5 Democratization 840 at 854). See generally Lafleur, *Transnational Politics and the State*, *supra* note 4 at 45–49.

The role of politics and political conflict in designing voting systems is undeniable. Indeed, it is borne out in Canada's historical and contemporary experience with non-resident enfranchisement (see Desmond Morton, "Polling the Soldier Vote: The Overseas Campaign in the Canadian General Election of 1917" (1975) 10:4 J Can Studies 39 at 39; Brian Platt, "John Baird, Nigel Wright Head Up New Group to Organize Right-Leaning Canadians Abroad" *National Post* (26 January 2021) online: <nationalpost.com> [perma.cc/XSQ8-KPCC]). With that said, this case comment remains focused on the philosophical underpinnings of the practice of non-resident voting. Notwithstanding its politicized drivers, an inquiry into the philosophies drawn upon in justifying or rejecting non-resident voting remain vital because (1) insofar as the social science research acknowledges that arguments over voting systems are, at core, disagreements about "the parameters of democracy itself" (Pilon, *supra* note 78 at 30) a deeper understanding of the philosophies that inform democratic theory complements this research; (2) given judicial hesitancy to inquire into the politicized motivations of enfranchisement, disputes about voting tend to be resolved on more ideologically-driven grounds, which present issues into which this inquiry offers unique insight, and (3) an exploration of the rationales advanced regarding enfranchisement, whatever their underlying motivations, may be better understood and harnessed by other stakeholder groups.

79 See López-Guerra, *supra* note 7.

80 See Patti Tamara Lenard, "Residence and the Right to Vote" (2015) 16:1 J Intl Migration & Integration 119 at 120 [Lenard, "Residence and the Right to Vote"] (proposes severing the right to vote from citizenship and tying to residence); Ludvig Beckman, *The Frontiers of Democracy: The Right to Vote and its Limits* (London, UK: Palgrave MacMillan, 2009) at 76–80; Melina Duarte, "Who Should be Granted Electoral Rights at the State Level?" (2018) 12:2 Nord J Appl Ethics 27 (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). See also Nohlen & Grotz, *supra* note 4 at 1142 (the authors are primarily focused on critiquing non-resident voting but also endorse residency-based voting).

sions;[81] that physical absence renders non-residents external to the political culture;[82] that implementation is too onerous and expensive for (resident) taxpayers to bear;[83] that enfranchisement requires unacceptable trade-offs in voter equality or transparency;[84] or that it is vulnerable to fraud, bias, and manipulation.[85]

Embedded in this discussion is an express or implied belief that non-resident voting is grounded in parochial and often ethnically-based expressions of nationalist belonging.[86] The distastefulness of ethnic nationalism colours the analysis, and makes it an easy concept to reject in favour of territorially-based voting rights.

Non-resident voting suffers from similar summary treatment by its supporters. There are fewer scholars writing in favour of non-resident enfranchisement. Support is typically tacit, and also tends to be used in furtherance of other claims. For example, Seyla Benhabib implicitly supports the practice because it signals a necessary uncoupling of citizenship from territory that is instrumental to her cosmopolitan goal of a right to membership in a political community.[87] Non-resident voting is also defended as

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81 See Beckman, *supra* note 80 (all those "bound by" decisions); Nohlen & Grotz, *supra* note 4 at 1136 (only those who bear the consequences of electoral decisions should have the right to vote); López-Guerra, *supra* note 7 ("the governed" as excluding long term non-residents, also raises compulsion to obey the laws); Ruth Rubio-Marín, "Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants" (2006) 81:1 NYUL Rev 117 ("directly and comprehensively affected" at 129, in which non-residents are not affected enough to claim a right to vote); Bauböck, s*upra n*ote 4 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).

82 See Lenard, "Residence and the Right to Vote", *supra* note 80 at 122.

83 See Nohlen & Grotz, *supra* note 4 at 1139; Braun & Gratschew, *supra* note 6 at 8; Lafleur, *Transnational Politics and the State*, *supra* note 4 at 42–44.

84 See Nohlen & Grotz, *supra* note 4 at 1139–40; Lafleur, *Transnational Politics and the State*, *supra* note 4 at 42–44.

85 See Nohlen & Grotz, *supra* note 4 at 1138; Bauböck, *supra* note 4 at 2406–09.

86 See López-Guerra, *supra* note 7 at 216–17; Nohlen & Grotz, *supra* note 4 at 1137; Lenard "Residence and the Right to Vote", *supra* note 80 at 122; Bauböck, *supra* note 4 at 2394, 2414; Rubio-Marín, *supra* note 81 at 120–21.

87 Specifically, Seyla Benhabib writes:

> Disaggregated citizenship permits individuals to develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as transnational contexts. Cosmopolitanism, the concern for the world as if it were one's *polis*, is furthered by such multiple, overlapping allegiances which are sustained across communities of language, ethnicity, religion, and nationality (*The Rights of Others: Aliens, Residents, and Citizens* (Cambridge,

an expression of universal suffrage,[88] a human right,[89] a form of justice for situations of forced exile,[90] and as a coping strategy in dealing with the political and economic realities of a globalized world.[91]

These supporters have, to a limited extent, engaged with the challenges launched by critics. Advocates have challenged the assertion that the enfranchisement of certain non-citizens necessitates the corollary of disenfranchising non-residents,[92] and they are careful to distance their endorsement from an ethnic entitlement to the vote.[93] What is lacking, however, is a direct investigation of the philosophical underpinning of the practice.

Thus, scholarly inquiry tends to depict non-resident voting as an expression of ethnic nationalism, or as a harbinger of a coming cosmopolitan reality. These views stand on opposite ends of a wide spectrum, which raises the question of whether such constructions are accurate. To answer this question, we must consider, interrogate, and critique these characterizations. While history demonstrates that non-resident voting may be grounded in ethnic nationalistic identities, this is not invariably the case, nor is it necessarily the dominant practice. Before offering a modern con-

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UK: Cambridge University Press, 2004) at 174–75 [Benhabib, *Rights of Others*]).

88 Universal suffrage arguments often note that expatriates generally lack voting rights in their country of residence. See e.g. Rubio-Marín, *supra* note 81 at 130–31, which offers a description of Kim Barry's argument and a critique of this approach. For further descriptions see Nohlen & Grotz, *supra* note 4 at 1135; Bauböck, *supra* note 4 at 2409–11 (Bauböck himself does not advocate for this position, but presents it).

89 See Braun & Gratschew, *supra* note 6 at III–V; Grace, *supra* note 4 at 42, 46 (Grace's suggestion of non-resident voting as a right is specific to forced migrants). For a critique, see also Rubio-Marín, *supra* note 81; López-Guerra, *supra* note 7 at 228.

90 See Bauböck, *supra* note 4 at 2400; Grace, *supra* note 4 at 42. *Contra* López-Guerra, *supra* note 7 at 230–31.

91 See Grace, *supra* note 4 at 38–42; Lafleur, *Transnational Politics and the State*, *supra* note 4 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-Marín, *supra* note 81 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-based claims, see Bauböck, *supra* note 4 at 2413; López-Guerra, *supra* note 7 at 229–30; Rubio-Marín, *supra* note 81 at 131–35.

92 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, UK: Palgrave Macmillan, 2010) 52.

93 See Grace, *supra* note 4 at 43, 45; Braun & Gratschew, *supra* note 6 at 4.

ceptualization of non-resident voting, we must clarify the philosophical playing field.

III. Nationalism, Cosmopolitanism, and the Space in Between

The normative accounts of non-resident voting set out above are themselves built upon, and invoked in service of, underpinning political theories. In other words, the view toward non-resident voting flows out of particular worldviews, which can be grouped under the global and local labels. The following sections unpack what is encompassed within these labels, and how each theory conceives of non-resident voting.

A. The Local Account

The territorial or local worldview is used as shorthand for nationalist and communitarian lines of thought. 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.[94] It is a form of "collective consciousness" that is often accompanied by a group touchstone (historical, cultural, territorial) that forms a claim to belonging.[95] Communitarianism shares the nationalist belief that humans cannot be understood as atomized individuals. It emphasizes the role an individual plays within their community, and the social importance of larger units.[96]

Together, these theories share a belief that the ties that bind us—be they cultural, territorial, ethnic, or otherwise—matter deeply, and that they are worthy of protection from outsiders.[97] Thinking that falls within this local label can be identified by (a) taking groups as the central unit of concern, (b) placing value in the protection of a group's distinctive identi-

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94 See 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).

95 See Jürgen Habermas, "Citizenship and National Identity: Some Reflections on the Future of Europe" in Omar Dahbour & Micheline Ishay, eds, *The Nationalism Reader* (Atlantic Highlands, NJ: Humanities Press, 1995) 333 at 334.

96 For an introduction to the communitarian view, see 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.

97 Within different strands of communitarian and nationalist thought there is, however, disagreement on what community is. While some view it in territorial terms, others connect community to historical or ethnic origin (see e.g. Micheline R Ishay, "Introduction" in Dahbour & Ishay, *supra* note 92, 1 at 3; Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993) at 166).

ty, and (c) viewing duties to specific others as primarily existing by virtue of co-membership.

These ideas find political praxis in views on sovereignty. A local worldview is protective of sovereignty in both its forms. State sovereignty—the right of a state to act with absolute authority on matters within its territory—protects a distinct group identity and resists the imposition of foreign ideals onto a people.[98] Popular sovereignty—the notion that "the people" are the sovereign—holds that a people should only be bound by laws that they have collectively agreed upon. Such laws embody the general will of the people, which both represents and binds a people to a common endeavor.[99]

This preference for sovereignty manifests itself in political views weighted toward the elected branches of government and their ability to protect particular ways of life. A person aligned with local ways of thinking would be more likely to resist the imposition of foreign law within a state and to favour limits on a court's ability to strike down democratically enacted laws. They would also be more likely to support laws that promote public morality and policies that are protective of a distinct culture. Lastly, they would be more prone to view their government as having a greater moral obligation toward its members and to adopt a more normative understanding of citizenship.[100]

At the heart of these stances is an assumption that a clear distinction between members and non-members of a polity exists. Members have a moral and legal claim to representation because they share a stake in the protection of their community. These community insiders are worthy of special privileges by virtue of their membership. Community outsiders lack this allegiance, and their views can be appropriately ignored.

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98 See Walzer, *supra* note 94 at 38–39 (re: distinct identity); Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford, UK: Oxford University Press, 2001) at 219.

99 See Ishay, *supra* note 97 at 5–6.

100 Nationalism and communitarianism have often been fused with republican ideas of citizenship where citizenship is a virtue that is built out of one's actions, community education, and engagement. See e.g. Walzer, *supra* note 94 at 310, where a citizen is "ready and able, when his time comes, to deliberate with his fellows, listen and be listened to, take responsibility for what he says and does. Ready and able: not only in state, cities, and towns but wherever power is exercised, in companies and factories, too, and in unions, faculties, and professions." See also Ishay, *supra* note 97 at 6. For a description and critique of the normative account of citizenship, see Elizabeth F Cohen, *Semi-Citizenship in Democratic Politics* (New York: Cambridge University Press, 2009) at 16–22.

B. The Global Account

The global label is invoked as a shorthand for liberal and cosmopolitan worldviews. Liberalism posits that humans are inherently equal, autonomous, and rational agents whose individual personhood is entitled to protection from state coercion. Liberal thought can be identified by its emphasis on individual rights and restrictions on state power. Cosmopolitanism recognizes the equal moral worth of individuals without regard to political boundaries.[101] Cosmopolitan ways of thinking can be identified by a focus on individuals as the "ultimate units of moral concern,"[102] and in a rejection of the legitimacy of favourable treatment based on membership status.[103]

These theories centre on individuality and universality. They share a belief that (a) individuals are the central unit of concern; (b) all humans possess equal moral worth; and (c) the duties owed to others are universal (i.e., that these mutual obligations are not dependent on co-membership in a group).

These context-transcending beliefs translate into a restrictive understanding of sovereignty. The authority of a state to control its territory becomes contingent upon respect for the inherent rights of those within it. The ability of the people to make laws which bind the community are circumscribed by respect for individual worth.[104] Conflicts between community and individuals must be resolved in light of a floor of guaranteed individual rights below which the community cannot fall.

Given these views, a person who follows global ways of thinking is more likely to demand that laws protect individual rights. Because the legitimacy of laws flows out of respect for universal truths, they do not have to reflect specific community views. Generally speaking, global thinkers are more likely to favour strong judicial review underpinned by a constitutionally entrenched bill of rights. They would also be more likely to support the integration of universal norms into domestic systems, foreign interventions in domestic decision-making, and the free movement of peoples across borders. Lastly, they would be more likely to reject a

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101 See Benhabib, *Rights of Others*, *supra* note 87 at 174.

102 See Luis Cabrera, "Global Citizenship as the Completion of Cosmopolitanism" (2008) 4:1 J Intl Political Theory 84 at 86.

103 See *ibid*; Patti Tamara Lenard & Margaret Moore, "Cosmopolitanism and Making Room (or Not) for Special Duties" (2011) 94:4 Monist 615 at 615 [Lenard & Moore, "Special Duties"].

104 See Cohen, *supra* note 100 at 111.

state's unfettered power to impose conditions on citizenship.[105] At the heart of these stances is an assumption that state borders are irrelevant insofar as they dictate different treatment and rights to individuals.

C. Bridging the Gap: Hybrid Models

The conceptual space between the local and global poles is filled with hybrid visions that attempt to reconcile this values divide. This middle ground seeks to acknowledge the universal worth of all individuals, while at the same time recognizing that relationships give meaning to human life. It is populated by nationalists who embrace universal values, cosmopolitans who acknowledge the value of special attachments, and various shades of grey within each of these compromises.[106]

For example, Kok-Chor Tan's "patriotic cosmopolitanism" rejects the premise that cosmopolitan thinking cannot accommodate the special connections people have with their national identity.[107] So long as global values provide the boundaries within which patriotic nationalism is pursued, there is no conflict between these interests. In other words, cosmopolitan patriots can favour their compatriots, so long as pursuing those interests does not undermine their globally-aligned values. Cosmopolitan patriots understand that their moral duties do not stop at a state's borders, but nonetheless strongly identify with a national political culture, possess a

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[105] These restrictions of sovereignty bleed directly into understandings of what it means to be a citizen of a state. Liberal theories are more closely aligned with a rights-based conception of citizenship, which is granted to individuals and affords them certain privileges which the state cannot infringe, but which do not come packaged with a bundle of participatory obligations (see Elizabeth Cohen & Cyril Ghosh, *Citizenship* (Cambridge, UK: Polity Press, 2019)). Cosmopolitanism, by contrast, has a more complicated relationship with formal citizenship status. In arguing for the irrelevance of political boundaries, cosmopolitanism is often equated with the abolition of formal citizenship status. More moderate cosmopolitans accept the value and legitimacy of state citizenship, but argue for restrictions on a state's sovereign ability to arbitrarily withhold citizenship status from newcomers (see Benhabib, *Rights of Others*, *supra* note 87 at 3. See also more generally Seyla Benhabib, "Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times" (2007) 11:1 Citizenship Stud 19).

[106] For a summary of shades along the nationalist–cosmopolitanism spectrum, see 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 [Lenard & Moore, "Moderate Cosmopolitanism"].

[107] See Kok-Chor Tan, "Cosmopolitanism and Nationalism" (2012) 77:3 Il Politico 188 at 192–93.

sense of solidarity and special attachment with fellow citizens, and carry a sense of belonging in a distinct political community.[108]

Another variant—dubbed by its proponents as "instrumental cosmopolitanism"—views the special attachments and privileges given to local groups as acceptable, but only insofar as it helps advance universal goals. Robert Goodin's argument that citizenship is merely a device for efficiently discharging universal duties fits this mold.[109]

Patti Lenard and Margaret Moore's self-described "rooted cosmopolitanism" accepts that particularist and general duties are not inherently in tension, that special attachments have value in and of themselves, and that there must be a middle ground where universal and specific values make room for one another. They, however, reject the premise that reconciliation can be achieved on an abstract basis. Cases of genuine tension demand a contextual analysis, especially when dealing with territory, which draws decision-making into the realm of "political and moral judgment."[110]

Other scholars argue for a hybrid view that is weighted toward the local end of the spectrum. Liberal nationalisms defend the nation by virtue of the value it has to the individual members within it. Will Kymlicka, for example, emphasizes the role that national culture plays in the realization of individual autonomy.[111] While liberal nationalists embrace liberal notions of equality, they maintain a belief in the inherent value of groups and the preservation of culture.[112] They wish to engage in cultural interchange, but reject cultural assimilation in the name of global values.[113] In other words, they wish to "be cosmopolitan ... without accepting ... [a] 'cosmopolitan alternative', which denies that people have any deep bond to their own language and cultural community."[114]

Lastly, "constitutional patriotism" maintains that there is inherent value to group identity, but separates it from territorial, historical, or ethnic variables. National pride and unity can arise via a shared political

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[108] See *ibid* at 193.

[109] See Robert E Goodin, "What Is So Special about Our Fellow Countrymen?" (1988) 98:4 Ethics 663 at 686.

[110] See Lenard & Moore, "Moderate Cosmopolitanism", *supra* note 106 at 60–63; Lenard & Moore, "Special Duties", *supra* note 103 at 626.

[111] See Lenard & Moore, "Moderate Cosmopolitanism", *supra* note 106 at 49.

[112] See Kymlicka, *supra* note 98 at 212.

[113] See *ibid*.

[114] *Ibid*.

culture that is acquired through the praxis of citizenship.[115] This theory views citizenship as being a voluntary enterprise that requires citizens to be forthcoming and active. If governments can embrace and become receptive to the informal and spontaneous communications that take place on anonymously interlinked flows of communications, a shared political community can exist that transcends territorial, language, and cultural barriers.

D. Non-Resident Voting at the Intersection of Global and Local

Each of the philosophies outlined above are able to create space for non-resident voting, but none of them accommodates the practice without qualification.

Normative opposition to non-resident voting tends to view the practice as an expression of ethnic nationalism, in which belonging by blood and ethnicity stands in place of territorial presence. This would extend to practices by which citizenship is acquired *jus sanguinis* (right of blood) as a result of the nationality of one or both parents. This view, however, does not account for situations in which non-resident voting rights are extended without regard to ethnicity, nor does it address the liberal and universalist tone that frequently accompanies the enfranchisement of non-resident citizens.

Most hybrid nationalisms and communitarian strands of thought fail to address this gap. Within these theories, non-resident voting is presumptively illegitimate as it is incommensurate with normative conceptions of citizenship. Thus, Yael Tamir's liberal nationalist vision expressly disenfranchises diaspora communities, and David Miller likens emigration to "jumping boat" from one's national identity.[116] Both Michael Sandel and Michael Walzer's ideal of citizen would appear incompatible with non-resident voting, because in the former case, a more normative practice of citizenship and tighter community bounds are prescribed for socie-

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[115] See Jürgen Habermas "Citizenship and Nationality: Some Reflections on the Future of Europe" in Ronald Beiner, ed, *Theorizing Citizenship* (Albany, NY: State University of New York Press, 1995) 255 at 269–71.

[116] Tamir argues that "[m]embers of diaspora communities should not be allowed to participate directly and formally in the decision-making process, whereas all formal members of the national entity, irrespective of their national membership, have a right to participate in this process" (*supra* note 97 at 158). David Miller notes that "[w]e do of course recognize the right of individuals to emigrate, which is the equivalent in this context to jumping boat ... We are surely prepared to disapprove of people who desert their country in its hour of need merely in order to enjoy a more comfortable life" (*On Nationality* (Oxford, UK: Oxford University Press, 1995) at 42, n 50).

ty's ills,[117] and in the latter, the notion that community participation can be adequately proxied by technology is rejected.[118] Jürgen Habermas's constitutional patriotism permits citizens to voluntarily abdicate membership by leaving a community, but makes room for non-residents who choose to participate in a transnational discourse. Presumably, those who fail to engage in that discourse would be rightfully disenfranchised.

On the global side of the spectrum, non-resident voting rights can be viewed as being in alignment with a liberal's conception of free movement and autonomy, or a cosmopolitan's ideal of a world where borders are less meaningful. However, because non-resident voting is reserved for formal citizens, it undercuts liberal universalism and sidesteps the primary con-

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[117] See Sandel, *supra* note 96:

> But to deliberate well about the common good requires more than the capacity to choose one's ends and to respect others' rights to do the same. It requires a knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake (at 5–6).

And later at 349–50:

> The global media and markets that shape our lives beckon us to a world beyond boundaries and belonging. But the civic resources we need to master these forces ... are still to be found in the places and stories, memories and meanings, incidents and identities that situate us in the world and give our lives their moral particularity ... Political community depends on the narratives by which people make sense of their condition and interpret the common life they share.

[118] See Walzer, *supra* note 94 at 306–307:

> Modern technology makes possible something like this [political decision-making without physical presence], bringing individual citizens into direct contact, or what seems as good as direct contact, with policy decisions and candidates for office. Thus, we might organize push-button referenda on crucial issues, the citizens alone in their living rooms, watching television, arguing only with their spouses, hands hovering over private voting machines. And we could organize national nominations and elections in exactly the same way ... But is it the exercise of power? I am inclined to say, instead, that it is only another example of the erosion of value – a false and ultimately degrading way of sharing in the making of decisions.

And later at 310:

> The casual or arbitrary exercise of power won't generate self-respect, that's why push-button participation would make for a morally unsatisfying politics. The citizen must be ready and able, when his time comes, to deliberate with his fellows, listen and be listened to, take responsibility for what he says and does. Ready and able: not only in states, cities and towns but wherever power is exercised, in companies and factories, too, and in unions, faculties, and professions.

This interpretation does not conflict with Walzer's discussion of emigration at 39–40 and territory at 42–45.

cern of cosmopolitans who argue for equal rights regardless of citizenship status. Non-resident voting rights are thus not a primary preoccupation within either line of thinking. When it is invoked, cosmopolitan thinkers often support non-resident voting not because it is a goal in and of itself, but because it serves as a litmus test for measuring the global appetite for their more pressing ambitions. Acceptance of non-resident voting constitutes a decoupling of citizenship from territory, which is a necessary step toward the recognition and legitimacy of a transnational, or even post-national, conception of membership.[119]

Within the hybrid visions, patriotic cosmopolitanism would permit the pursuit of non-resident voting only if conducted in accordance with universal values. Similarly, instrumental cosmopolitanism *could* approve of the practice, but only insofar as it advances universal values such as suffrage or equality. Both accounts would presumptively include some practices of non-resident voting, while excluding practices that worked against universal values, such as ethnicity-based enfranchisement.

Lenard and Moore's assessment of non-resident voting is difficult to predict without delving into a contextual analysis. Their view that the question is essentially political or moral would, however, suggest that the question ought to be left to legislators. It also presumes that clarity can be located within a particular context. As the discussion in *Frank* will show, this contextual clarity has also proven to be illusive.

Non-resident voting thus sits at an uncomfortable intersection of competing lines of thought. It exists as a result of the movement of people and the resultant blurring of political boundaries, but is reserved for formal citizens, and often grounds its justification in dubious claims of intrinsic belonging.[120] 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.

Nationalist and communitarian detractors are forced to abandon non-territorial claims to belonging, and with that must confront an uncomfortable truth that many people who live within a state lack voting rights. This brings them face-to-face with a preoccupation of cosmopolitan thought: extending voting rights to permanent residents, refugees, and other non-citizens.

In light of this uncertainty, the next section examines the context offered by *Frank*. As demonstrated below, the *Frank* decision may assist

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119 See Benhabib, *Rights of Others*, *supra* note 87 at 173.

120 See Bauböck, *supra* note 4 at 2394.

our understanding, and fill in gaps about how to understand the philosophical footing of non-resident citizen enfranchisement in Canada.

IV. Theories of Non-Resident Voting in *Frank*

The competing judgments of the Supreme Court of Canada in *Frank* implicitly frame the matter of non-resident voting as pivoting on an axis of global versus local interests, in which the majority lauded the globalized cosmopolitan reality and the dissent called for community interests. As explored below, rather than reinforcing the difference between global and local interests, these decisions actually bring forth the hybrid visions between each worldview.

A. The Majority Judgment

The majority aligned its reasoning with global orientations. In addition to coming down on the side of the world's cosmopolitan citizens, the decision itself is underpinned by a normative thrust that argues for the right of individuals to cross national boundaries without sacrificing their core democratic rights.[121]

In the majority's view, globalization has inevitably and irreversibly changed the world in ways that diminish the importance of political and geographic boundaries.[122] State lines no longer confine money, people, or ideas, nor do they delineate the borders of proper concern. A voter need not live within a state's borders to be impacted by, for example, its foreign policy or climate change priorities.[123] The right to vote belongs to the individual, and is not contingent on their stake in the issue at hand.[124]

The global orientation is also evident in the majority's skepticism toward sovereign discretion. It granted Parliament no deference in its efforts to shape the contours of the electorate. Rather, government attempts to shape the electorate demanded careful examination for constitutional compliance, and only those incursions onto voting rights that were supported by clear evidence of harm would be acceptable.[125]

The reasoning touched on most, but not all, of the three key markers of global thought. First, individual harm formed the backbone of the deci-

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[121] This normative thrust is reflected in the literature on cosmopolitanism (see e.g. Tan, *supra* note 107 at 188; Benhabib, *Rights of Others*, *supra* note 87).

[122] See *Frank* SCC, *supra* note 3 at para 35.

[123] See *ibid* at para 72.

[124] See *ibid*.

[125] See *ibid* at paras 63–64.

sion. Disenfranchisement constituted a serious harm in and of itself to citizens, which was not mitigated by a citizen's ability to regain voting rights by returning to Canada. *Charter* rights belong to individuals; they are not earned through voluntary conduct. This harm was amplified by the fact that voting rights are, on a global scale, usually tied to citizenship. As such, the restriction in Canada's voting laws effectively amounted to an unacceptable global disenfranchisement of these particular individuals.

The majority was alive to the idea of community, but reshaped it to fit a globally-oriented perspective which was premised on individual participation. Through their conduct, individuals are able to maintain membership in the *Canadian* community through modern technology and travel.[126] However, their right to vote is not contingent on this participation.

Second, the majority tied its reasoning to the equal moral worth of humans by linking enfranchisement to the universal value of dignity. Disenfranchisement was not only unacceptable because it denied non-residents a fundamental right, but also because it came at "the expense of their dignity and their sense of self-worth."[127] Without any evidence of harm, the reasoning in favour of the decision to disenfranchise non-residents essentially boiled down to the claim that they were less worthy of the vote than other Canadians. Voting rights in Canada cannot be tied to a proof of individual worthiness.[128]

On the third marker of global thought, however, the majority reasons falter. The majority did not argue that membership in a community was irrelevant to the enjoyment of rights and duties. Instead, the majority adopted a deeply patriotic stance by arguing that non-residents have a special normative claim to voting rights. Non-resident citizens, in their view, are entitled to enfranchisement because they are Canada's "best and brightest."[129] These "ambassadors of Canadian values" carry within them a diasporic national identity and an abiding connection to Canada that persists no matter how long they are absent from the territory.[130]

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126 See *ibid* at para 69.

127 *Ibid* at para 82.

128 See *ibid*.

129 *Ibid* at para 80.

130 This special claim to national belonging is embedded throughout the claimants' evidence. Both claimants describe their diasporic longing to return to Canada, their family connections, Canadian heritage, national pride, military service, and group membership (see *Affidavit of Gillian Frank*, *supra* note 1; *Affidavit of Jamie Duong*, *supra* note 23). None of these factors are relevant on a purely rights-based liberal or cosmopolitan point of view. They are, however, central to a nationalist conception of belonging, which found its way into the majority judgment.

Resident Canadians should be celebrating these individuals as global representatives of the state's values, rather than denying their membership status.

The importance of national membership to the majority also appeared in their treatment of foreign law. The majority uncharacteristically rejected not merely the conclusions that other countries had reached on the question of non-resident voting, but the underlying notion that such experiences could have relevance to Canadians. In place of its interdependent global reality, the majority invoked a novel brand of Canadian exceptionalism that warned against reliance on foreign law, which it viewed as providing "little assistance to us in determining what is required by *Canadian* democratic rights, as enshrined in this country's *Charter*."[131] While the rationale behind this hostility could be boiled down to judicial cherry-picking, the decision to dismiss the underlying relevance of foreign practice signals a rejection of the global point of view that stands in contrast to the rest of its decision.[132]

The resulting vision painted by the majority is one that invokes cosmopolitan and liberal language which is embedded with a deeply nationalistic stance. It lauds the potential of a borderless cosmopolitan world, but grounds its claim in deep-seated personal characteristics. In stating that "the world has changed. Canadians are both able and encouraged to live abroad, but ... maintain close connections with Canada in doing so,"[133] the majority describes the grey area within global and local worldviews.

Elements of the majority judgment align with several of the hybrid visions between the global and local poles. Habermas's theory of transnational discourse undeniably creates room for non-resident voting. However, the majority does not premise its voting rights on citizens actually engaging in any particular activities before being granted voting rights. It therefore does not provide an accurate account of the majority view. Rooted cosmopolitanism would offer the observation that non-resident voting is a manifestation of the coexistence of special and general duties within individuals. On a normative basis, it would argue that the majority viewed itself as striking the right balance between competing interests in the particular context, although it is unclear whether Moore and Lenard

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[131] *Frank* SCC, *supra* note 3 at para 62 [emphasis in original]. This stance is also peculiar given that foreign legal practice influenced the drafting of the *Charter*, and is often used to guide interpretation of the *Charter*: see e.g. Weinrib, *supra* note 51; Cooper, *supra* note 51; *Keegstra*, *supra* note 51.

[132] The dissent noted as much in *Frank* SCC, *supra* note 3 at para 167.

[133] *Ibid* at para 35.

would agree that the right balance was struck.[134] The instrumentalist vision would only view non-resident voting as valid insofar as it advanced universal values such as dignity and worth. While on the surface this accords with the majority reasoning, it stands at odds with the value the majority places on intrinsic belonging, unconstrained by the pursuit of universal values.

Of all the hybrid visions, the majority reasoning most closely aligns with Tan's cosmopolitan patriot. Like Tan's description, the majority's non-resident voters hold global values, but maintain deep and abiding connections to their state of nationality. Through the use of technology and travel, they live overseas while maintaining special attachments with citizens living in their home country, and a strong sense of identification with the national political culture.

Tan's account, while descriptive of the majority reasoning, would only accept non-resident enfranchisement insofar as its operation was constrained by universal rights. This means that non-resident voting would be valid if pursued within the bounds of universal values such as equality and dignity. While not an issue in *Frank*, under Tan's view, non-resident voting would be illegitimate if offered on grounds that denied equality and dignity, such as race or ethnicity.

Despite its global overtones, the majority in *Frank* does not deliver a rallying cry for a global worldview in its purest sense. Instead, it provides context in support of a nuanced set of values that seeks to reconcile the space between global and local poles. It is rooted in universal dignity, but also understands the intrinsic value that relationships have to their imagined communities. It argues that the choice between global and local is false. It is possible for Canadians to pursue global values while remaining rooted in their home country.

B. The Frank *Dissent*

The dissenting opinion provides a counter stance to the majority's cosmopolitan patriotism. In place of the majority's careful examination, the dissent argues for deference as the state shapes the contours of the political community. In the dissenters' view, the state should be able to craft legislation that "breathes life" into voting rights in alignment with its vision of political morality.[135] Such positive laws fall within the proper

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[134] Lenard has, in separate works, sought to sever the right to vote from citizenship. See Lenard, "Residence and the Right to Vote", *supra* note 80 at 120.

[135] See *Frank* SCC, *supra* note 3 at para 142.

purview of elected representatives and are naturally resistant to judicial intervention.[136]

The dissent's reasoning checked off all the key markers of local thought. First, unlike the majority's individualized focus, the dissent took distinct "communities of interest" as its core unit of concern.[137] There are no nationally elected positions in Canada. Its Westminster-style democracy is built on the understanding that elected representatives come from geographically-defined areas to represent local interests at the federal level.[138] While citizenship, and not residency, is used in the language of section 3, residency is built into the very fabric of our constitution which must inform any consideration of our electoral system.[139]

Non-resident voters subvert the system, because their votes are cast within a local constituency with which they are not adequately connected.[140] It is not enough for a non-resident to have an awareness of local issues—they must live within a community to understand and have a stake in its politics.[141] This special relationship cannot be decoupled from residency, and cannot be approximated by technology or travel.[142] As such, Parliament has a valid interest in excluding their voice until such time as they rejoin the community by re-establishing residence.[143]

Far from being ambassadors of Canadian values, the dissent viewed non-residents as outsiders to be viewed with ambivalence. In their view, non-resident citizens "may leave Canada for all sorts of 'non-ambassadorial' reasons, ranging from better career prospects, to lower taxes, to a preference for the 'values' of other countries."[144]

Second, the dissent also believed in the inherent value of preserving group distinctiveness. Parliament is entitled to a wide berth in creating its own normative conception of what the political community is, and how it can be best protected.[145] This community is legitimately based on a particular moral philosophy that derives from Canada's unique historical and

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136 See *ibid*.

137 See *ibid* at para 156.

138 See *ibid* at paras 154–55.

139 See *ibid* at paras 155, 157.

140 See *ibid* at para 156.

141 See *ibid*.

142 See *ibid* at paras 150, 156.

143 See *ibid* at paras 152–53.

144 *Ibid* at para 170.

145 See *ibid* at para 139.

cultural group identity.[146] On matters of political philosophy, the Court owes Parliament a "natural attitude of deference"[147] and should not second-guess where it has chosen to draw the line between those who are in, and those who are out.[148]

Lastly, the dissent treated membership as the defining feature for the entitlement to rights and duties. The law's legitimate objective was "privileg[ing] a relationship" between the citizens who live within their community.[149] These electors enjoy the privileges of membership (voting) because they accept the consequent duties that come with it (bearing the burden of obeying Canadian laws). Citizenship, while often treated as a proxy for membership, does not guarantee this reciprocity. Thus, Parliament quite properly excluded non-resident citizens from membership.[150]

The dissenting opinion fits the mold for a local worldview. Several of the more global-leaning hybrid visions (cosmopolitan patriotism, instrumentalist patriotism, rooted cosmopolitanism) that are premised on an understanding that duties exist beyond a state's borders are inconsistent with the dissenting judgment. In addition, the dissent would equally reject Habermas's thesis that political community can be forged through transnational discourse.

However, three factors push the dissent away from a purely local label, and toward a liberal nationalism. First, the dissenting decision is premised on unstated liberal assumptions of equality and autonomy. While the exclusion of non-residents may appear unequal on a global scale, it ensures that the "members" (resident citizens) are heard on an equal basis without having their voices distorted by outsiders.

The rejection of non-resident voters promotes autonomy on an individual level because it gives citizens the free choice to remain or exit the political community whenever they wish. While citizenship is assigned at birth, membership remains voluntary—it is a choice that can be exercised via physically exiting the state. At a state level, autonomy is served by respecting the state's inherent ability to self-determine how it is governed without external influence.

Second, while a purely nationalist and communitarian vision would reject the value of foreign viewpoints, the dissent reaches out to foreign legal practice to argue in favour of deference to government decision-

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146 See *ibid* at para 140.

147 *Ibid* at para 159.

148 See e.g. *ibid* at para 166.

149 See *ibid* at para 127.

150 See *ibid* at para 140.

making.[151] This engagement paints the picture of a nationalist people who are willing and interested in cross-cultural engagement, which aligns with Kymlicka's liberal nationalist vision.

Lastly, the dissent's choice to make residence the defining feature of membership unwittingly undercuts a pure nationalist position by aligning itself with universalist thinking. In prioritizing residence over citizenship,[152] the dissent forges an unlikely alliance with liberal and cosmopolitan-minded thinkers who seek to decouple enfranchisement from citizenship. These thinkers agree that residence is the critical factor for allocating voting rights, but have taken this point to argue that temporary foreign workers, refugees, and asylum seekers (among others) should also have the right to vote.

Thus, the dissent's local and nationalist stance is mitigated to some extent by the tools it chose to employ, and the alliances it unwittingly forged. By binding membership to residence, the dissent reinforces a territorial conception of "local," while at the same time undercutting any intrinsic personal claim a person has thereto.

C. Analysis of Frank

The competing judgments in *Frank* offer a normative debate as to whether non-residents should be members of the political community. The majority's argument, grounded in the words of the *Charter* and an individualist slant, views non-resident citizens through the lens of cosmopolitan patriotism. The dissent, favouring Parliament's conception of—and authority to define—political community views the issue through a liberal nationalist lens.

Two insights flow from this account. First, the prevalent characterizations of non-resident voting in democratic theory are too blunt, and fail to account for the nuance of the practice. Support for non-resident voting does not fall squarely in global thinking, because borderless enfranchisement reinforces state boundaries by relying on nationalistic ideas of intrinsic belonging to connect citizens to a state. Nor can its rejection be considered to champion local philosophies, because such arguments prioritize residence in ways that align with cosmopolitan thinkers, and an active form of citizenship premised on physical presence. The most accurate characterizations often lie between these poles.

Second, while the hybrid models offer more promise in explaining non-resident voting, they also do not resolve the wider philosophical debate.

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[151] See *ibid* at paras 166–67.

[152] See *ibid* at para 150.

Non-resident voting resists being boxed into one theory, because it depends not just on the practice itself, but also the rules upon which citizenship is based, and on personal conceptions of belonging. In this regard, Moore and Lenard's caution against answering political philosophical questions in the abstract is especially forceful.

Frank provides different conceptions of belonging that are borne out of judicial interpretations in a specific national legal context. These visions do not, however, exhaust the countless stances toward non-resident voting that could flow from other situations or personal beliefs. While the support or rejection of non-resident voting is tied to cosmopolitan patriotism and liberal nationalism in *Frank*, it need not be. In other words, there are as many views toward non-resident voting as there are conceptions of belonging. It is easy to imagine other conceptions of belonging that would permit non-resident voting in a manner at odds with cosmopolitan patriotism (such as ethnic nationalism) or reject it on grounds other than liberal nationalism (such as some strands of institutional cosmopolitanism). Views toward non-resident voting are deeply tied to its context and practice, and resist either a generalized takeaway or a one-size-fits-all test of legitimacy.

This uncertain footing offers both potential benefits and dangers. On a positive note, this nuance offers sites of commonality and overlap that may help dismantle blunt stereotypes that pit nationalist People against liberal-minded cosmopolitan elites. On a more cautious note, however, this demonstrates how belonging can be manipulated to seamlessly support different viewpoints and outcomes.

While this wider debate remains unresolved, there is nonetheless value in having a conversation about belonging grounded in this specific context. Exploring these differing conceptions, and the sites of commonality between them, provides insight into unstated beliefs and the implications that flow therefrom.

Both judgments at the Supreme Court of Canada framed their decision in the language of the *Charter* and of law, but the decisions were underpinned by a personal philosophy of who rightfully belongs. In this respect, the dissent was right to note that voting rights are rooted in philosophical and moral understandings. They were wrong, however, to suggest that the majority was alone in importing their philosophical and moral views to their judgment.[153]

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[153] See *ibid* (in which the dissenting judges reveal their philosophical preference for Parliament's stance "by drawing a line at citizens who have a current relationship to the community in which they seek to cast a ballot" at para 140).

The majority attempts to align membership with citizenship status and the words of section 3 of the *Charter*, and its outcome is faithful to that wording. It goes on, however, to attribute personal characteristics and markers of national culture to the applicants that should be irrelevant to their claim. If "citizenship, and citizenship alone" demarcates membership, it should not matter if non-residents go to Tim Hortons and participate in Terry Fox runs, maintain connections to Canada, deeply identify with their home state, or act as "ambassadors" of Canadian values.[154] And yet, these articulations are integral to their argument. These questions are immaterial to the constitutional requirements of the *Charter*, yet they matter deeply to the question of belonging. Those who favour the majority's approach must confront questions about what makes citizenship so special, whether the rules for its allocation are fair, and how to treat citizens who lack the patriotic flourishes imputed to them.

The dissenting judges attempt to align membership with Parliament's stance on residence and on the need for a relationship of currency to one's community. Their judgment makes clear that, questions of judicial deference aside, the dissenting judges believe that non-residents should be excluded from voting because they lack that relationship.[155] The stance that residence is an essential component of political belonging brings with it a consideration of the millions of resident non-citizens who are subject to law yet lack the right to vote. Whether the social contract can rightfully exclude people who must obey laws while lacking a voice in their creation is a door that remains open.

Conclusion

This case comment has argued that the disagreement in *Frank* was not just about non-resident voters and the *Charter*, but about competing political philosophies of belonging in a globalized world. It also offers a compelling example of the attempts to reconcile these ostensibly competing visions. The exact site at which non-resident voting sits within these poles depends on how belonging is ultimately defined and defended.

This understanding of non-resident voting suggests several avenues for future research. First, there would be value in extending this lens beyond the Canadian context to explore other formulations and theories underpinning non-resident voting. The explanation of non-resident voting as a cosmopolitan patriot versus liberal nationalist position is specific to a Canadian judicial decision. A more comprehensive understanding of non-

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[154] See *ibid* at paras 29, 80.

[155] See *ibid* at para 140.

resident voting can only come from considering whether this experience is mirrored in other state practices.

Second, this research invites scholarly inquiries into the appropriate institutional role of the courts on questions of national belonging. While this piece has been focused on determining who belongs, the related question of "who decides?" also requires answering. The majority and dissenting opinions in *Frank* differed sharply on this question, which raises an opportunity to study competing theories of the role of courts within the law of democracy.

Third, the ideas of belonging that proved pivotal in *Frank* would benefit from an interdisciplinary lens. For example, research on the nature of and drive for human belonging developed by psychologists and behavioral scientists could offer insight into judicial opinions. Social science of this kind could also, more broadly, help legitimate (or not) public views toward non-resident voting.[156]

Lastly, this research could be expanded to explore other disenfranchised groups. The transcendent value of *Frank* lies in its ability to use non-resident voting to bring unstated conceptions of national belonging to the surface, and to consider the implications of those beliefs. The values exposed by *Frank* can be tested against the enfranchisement rules for non-citizen residents, children, or other groups whose interests are affected by a national vote. A more comprehensive examination of disenfranchised groups could further develop the themes explored here.

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[156] See e.g. Roy Baumeister & Mark Leary, "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117:3 Psychological Bulletin 497.