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Prop. N doesn't pass muster

By David A. Carrillo,
Stephen M. Duvernay
and Brandon V. Stracener

In 1849, a man named José Antonio Carrillo, along with 38 others, signed the first California Constitution. He had been an alcalde in Los Angeles, and served in the Mexican army defending Alta California in the Mexican-American War. From his perspective, the Americans were immigrants and invaders. Still, he wrote the treaty that ended the war, and participated in the formation of a new government as a delegate to the first California constitutional convention in 1849. The constitution Carrillo helped write guaranteed suffrage to citizens of the United States and of Mexico who chose to become Californians.

The state constitution's power as a shield and a sword is unchanged since then: It protects the rights of citizens against diminution. Article 2, Section 2 of the California constitution states that a U.S. citizen 18 years of age and resident in this state may vote. Because the state constitution limits the franchise to citizens, a local government may neither prevent citizens from voting, nor grant the franchise to noncitizens.

San Francisco voters approved Proposition N in November 2016. It would permit "a noncitizen resident of San Francisco who is of legal voting age and the parent, legal guardian or legally recognized caregiver of a child living in the San Francisco Unified School District to vote for members of the Board of Education." This measure is contrary to controlling state law.

We concede that, as UC Irvine School of Law Dean Erwin Chemerinsky points out, nothing in the

U.S. Constitution prevents undocumented immigrants from voting. San Francisco State University Professor Ron Hayduk notes that from 1776 until the 1920s, 40 states allowed noncitizens to participate in state elections. And recently local governments in other states (Maryland and Illinois, for example) have extended the franchise to noncitizens in local matters.

But in modern times, only citizens have state and federal voting rights. The last state to end noncitizen voting (Arkansas) did so in 1926. In 1996, Congress made it a crime for noncitizens to vote in federal elections. Thus, today noncitizen voting is an outlier.

Prop. N raises two questions: Can a state bar a noncitizen from voting, and can a state permit a noncitizen to vote?

Decisions from the U.S. and California Supreme Courts confirm that states can bar noncitizens from voting. The states generally have discretion to determine voting requirements and qualifications. *Otsuka v. Hite*, 64 Cal. 2d 596 (1966); *Evans v. Cornman*, 398 U.S. 419 (1970). Citizenship "is a permissible criterion" for states to limit voting rights. *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973); see *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (citizenship is a reasonable voting eligibility restriction). Although some bans affecting noncitizens have been struck down on equal protection grounds, those cases primarily involved laws that affected economic participation, not political activity. Thus, laws prohibiting noncitizens from working violate equal protection (*In re Griffiths*, 413 U.S. 717 (1973)), while equal protection challenges to state bans on noncitizen voting have been rejected (see



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Sugarman, 413 U.S. at 648).

Whether states can permit noncitizens to vote is a different matter. Proponents argue that courts could uphold Prop. N as a municipal affair, because the measure only permits noncitizens to vote in a local San Francisco election. See *Johnson v. Bradley*, 4 Cal. 4th 389 (1992). Yet both the current and the former San Francisco city attorney (Dennis Herrera and Louise Renne, respectively) advised that local noncitizen voting measures violate the California constitution, as reported by the San Francisco Chronicle.

Those opinions accurately stated the law. California constitution Article 2, Section 2 says: "A United States citizen 18 years of age and resident in this State may vote." That limits the franchise to citizens. And under Article 2, Section 3, the California Legislature controls vot-

er qualifications for statewide elections: "The Legislature shall define residence and provide for registration and free elections." The Legislature reserved voter eligibility to U.S. citizens: "'Elector' means any person who is a United States citizen 18 years of age or older and ... is a resident of an election precinct at least 15 days prior to an election." Elections Code Section 321(a); see also Sections 359, 2000 and Government Code Section 274. Those authorities are conclusive: the state constitution and statutes limit the franchise to U.S. citizens.

Finally, voter eligibility is not a municipal affair. The integrity of the electoral process at the state and local level "is undoubtedly a statewide concern." *Johnson*, 4 Cal.4th at 409. Voter qualifications "have traditionally been matters of statewide concern and application." *Castro v. State of California*, 2 Cal. 3d 223, 242-43 (1970). And the state school system is a matter of general concern, not a municipal affair. *Esberg v. Badaracco*, 202 Cal. 110 (1927). The San Francisco measure permitting noncitizens to vote in local elections violates the state constitution, and is preempted by state law.

State law on this matter embodies a policy decision that political power, with all its benefits and burdens, is reserved to those who bear ultimate responsibility in California government: U.S. citizens. It has been so since 1849. It will remain so unless the state legislature acts or the state constitution changes.

David A. Carrillo is executive director, and Stephen M. Duvernay and Brandon V. Stracener are senior research fellows, at the California Constitution Center, UC Berkeley School of Law.