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PUTTING STUDENTS FIRST: WHY NONCITIZEN PARENTS SHOULD BE ALLOWED TO VOTE IN SCHOOL BOARD ELECTIONS

*Jennifer Butwin**

INTRODUCTION

This Essay addresses whether noncitizen parents of school children should be allowed to vote in school board elections. They are currently prohibited from doing so in all but a dozen jurisdictions in only three states.

Part I provides background on school boards of education. Part II explores the debate surrounding noncitizen voting in school board elections. It then argues that noncitizen parents' distinct interest and stake in school board elections support affording them the right to vote in these elections. Moreover, studies show that allowing noncitizen parents to vote would increase the academic achievement of immigrant children, most of whom are U.S. citizens.

I. SCHOOL BOARDS OF EDUCATION

This Part provides background on school boards of education. Part I.A discusses the history of school boards. Part I.B observes that education is primarily a state and local responsibility. Part I.C outlines the many purposes school boards serve. Part I.D. explains how school board members are elected or appointed. And Part I.E discusses voting qualifications.

A. The “American” Board of Education Predates the Constitution

The “American” Board of Education “was a strongly rooted tradition in our country long before it became an independent nation.”¹ In 1647, the Massachusetts Bay Colony mandated that every town establish and maintain a public school.² Citizens ran these early schools through town meetings.³

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1. *Frequently Asked Questions about School Boards and Public Education*, NAT'L SCH. BOARDS ASS'N, <https://www.nsba.org/about-us/frequently-asked-questions> [https://perma.cc/U8JZ-DVPE] (last visited Mar. 2, 2019) [hereinafter *Frequently Asked Questions*].

2. *See id.*

3. *See id.*

By the early nineteenth century, school matters became more complex and “control was given to citizens’ elected representatives . . . and later to committees of townspeople who hired the schoolmaster, provided schoolhouses, and attended to other school-related matters.”⁴ In 1826, Massachusetts formally established a system of school committees by requiring each town to elect a separate school committee to have “the general charge and superintendence of all the public schools of the town.”⁵ “Over time, this model spread to the rest of the nation, insuring that local citizens would have a direct voice in the development and governance of their public schools.”⁶

B. School Boards Derive Power and Authority from the State

The Tenth Amendment of the Constitution supplies the basis for making education a state function. It provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁷ Education is not mentioned in the Constitution, and therefore education is primarily a state and local responsibility.

The U.S. Supreme Court has repeatedly recognized the importance of local control over public schools. In *San Antonio Independent School District v. Rodriguez*,⁸ the Court explained that “local control is valuable because it facilitates ‘the greatest participation by those most directly concerned’ with school decision making, builds public support for public schools, and provides ‘opportunity for experimentation, innovation, and a healthy competition for educational excellence.’”⁹ In *Milliken v. Bradley*,¹⁰ the Court later stated that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”¹¹

School boards derive their authority through state constitutions and state statutes that delineate how schools should be governed.¹² The specificity of statutes governing public school operation varies from state to state, but most state laws create local school districts and give school boards the authority to

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. CONST. amend. X.

8. 411 U.S. 1 (1973).

9. Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 292 (2005) (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 53 n.108).

10. 418 U.S. 717 (1974).

11. *Id.* at 741–42.

12. MICHAEL IMBER ET AL., EDUCATION LAW 2 (5th ed. 2014); see Jennifer Butwin, Note, *Children Are Crying and Dying While the Supreme Court Is Hiding: Why Public Schools Should Have Broad Authority To Regulate Off-Campus Bullying “Speech”*, 87 FORDHAM L. REV. 671, 678 n.50 (2018).

raise taxes, borrow money, determine the curriculum, and discipline students.¹³

C. School Boards Serve Many Purposes

School boards, also known as boards of education, are elected or appointed to be leaders and champions for public education in their communities.¹⁴ State boards of education constitute the governing and policymaking body for the state system of public education whereas local school boards exercise responsibility for the decisions and policymaking for individual school districts.¹⁵ Both state and local school boards set visions and goals for school districts.

Local school boards establish policies and regulations by which their local schools are governed.¹⁶ Of course, these policies and regulations must comply with state and federal laws.¹⁷ Additionally, local school boards are often charged with creating conditions that will foster student achievement and community engagement within their school districts. Their primary duties often include establishing specific priorities for improving student learning and school performance, ensuring staff and resource allocations meet district goals, and leveraging resources to address the needs of all students.¹⁸ Other responsibilities may include employing the superintendent, overseeing budget and facilities issues, negotiating contracts with employee unions, approving curriculum materials, and adopting school calendars. A successful school board is able to balance the business of running the district with the need to focus on the district's priorities for students' academic achievement and well-being.¹⁹

D. School Board Members Are Elected or Appointed

School board members are often dedicated volunteers who engage community members in formal and informal ways.²⁰ Formally, school board members hold town meetings. Informally, they speak with parents and local organizations.

State school board structures vary from state to state. In most states, board members are appointed by the governor (and often confirmed by the legislature).²¹ In some states, board members are elected in a process similar

13. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 3 (6th ed. 2005); see, e.g., CONN. GEN. STAT. § 10-222d(b) (2017).

14. *Frequently Asked Questions*, *supra* note 1.

15. *State Boards of Education*, NAT'L ASS'N ST. BOARDS OF EDUC., <http://www.nasbe.org/about-us/state-boards-of-education/> [https://perma.cc/7BKB-A2PL] (last visited Mar. 2, 2019) [hereinafter *State Boards*].

16. *Frequently Asked Questions*, *supra* note 1.

17. *Id.*

18. *State Boards*, *supra* note 15.

19. See *Frequently Asked Questions*, *supra* note 1.

20. *Id.*

21. *State Boards*, *supra* note 15.

to other elected offices.²² The selection of local school board members also varies and even changes from time to time. For example, in 2015, the New Haven Public Schools Board of Education²³ transitioned from an appointed board system to a partially appointed board system.²⁴ Previously, the board consisted of the New Haven mayor and seven mayoral appointees.²⁵ At the time of writing, it consists of the mayor, four mayoral appointees, two elected members, and two student members.²⁶

E. Voting Qualifications

In all federal elections, only United States citizens may vote, and the same is true in most, but not all, local elections.²⁷ Twelve jurisdictions currently allow noncitizens²⁸ to vote in some local elections: (1) ten municipalities in Maryland;²⁹ (2) San Francisco;³⁰ and (3) Chicago.³¹

Voting qualifications vary from state to state and district to district. To vote in Connecticut elections, a person must be eighteen years old and a United States citizen living in Connecticut.³² Therefore, noncitizen parents with children enrolled in the New Haven Public School District can only

22. *Id.*

23. The New Haven Public School district is referenced throughout this piece for two reasons. First, about one-half of all its immigrants are noncitizens (legal permanent residents, legal temporary residents, or undocumented immigrants). MARY BUCHANAN & MARK ABRAHAM, UNDERSTANDING THE IMPACT OF IMMIGRATION IN GREATER NEW HAVEN 3 (2015). Therefore, the issues discussed in this piece are of great importance to this community. Second, I taught in the New Haven Public School district for three years and have familiarity with, and strong ties to, the community, which is comprised of school administrators, teachers, students, and students' parents (citizen and noncitizen parents).

24. *New Haven Public Schools Elections (2017)*, BALLOTPEDIA [https://ballotpedia.org/New_Haven_Public_Schools_elections_\(2017\)](https://ballotpedia.org/New_Haven_Public_Schools_elections_(2017)) [https://perma.cc/NKN5-BWDD].

25. *Id.*

26. *Id.*

27. Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1062 (2017).

28. "The term 'noncitizens' encompasses a broad group of individuals, including permanent residents, visa holders, people granted asylum or under programs like Temporary Protected Status, among others." See Madison Park, *Noncitizens in San Francisco Can Register to Vote, But Only for School Board Elections*, CNN (July 20, 2018), <https://www.cnn.com/2018/07/20/us/noncitizens-vote-san-francisco/index.html> [https://perma.cc/QV2L-G9VW].

29. See Ian Simpson, *Maryland City Approves Letting Non-Citizens Vote in Local Elections*, REUTERS (Sept. 13, 2017), <https://www.reuters.com/article/us-usa-immigration-maryland/maryland-city-approves-letting-non-citizens-vote-in-local-elections-idUSKCN1BO242> [https://perma.cc/3ELN-6XAJ].

30. Park, *supra* note 28; Taylor Swaak, *A San Francisco School Board Election Is Giving Non-Citizens a Vote—a First in California. But Here's Why Many Are Staying Away*, THE74 (Nov. 5, 2018), <https://www.the74million.org/article/a-san-francisco-school-board-election-is-giving-non-citizens-a-vote-a-first-in-california-but-heres-why-many-are-staying-away/> [https://perma.cc/2WHJ-FFKN].

31. See Simpson, *supra* note 29.

32. *2018 Election Dates and Deadlines*, CONNECTICUT'S OFFICIAL STATE WEBSITE (2019), <https://portal.ct.gov/SOTS/Election-Services/Voter-Information/First-Time-Voter-Fact-Sheet> [https://perma.cc/BH3W-VJDL].

make their voices heard by attending school board meetings, contacting school administrators, and teaming up with other parents to advocate.³³

II. NONCITIZEN PARENTS SHOULD BE ALLOWED TO VOTE IN SCHOOL BOARD ELECTIONS

After exploring the debate surrounding noncitizen voting in school board elections, this Part argues that noncitizen parents should be allowed to vote in these elections. Part II.A examines legal and policy arguments for and against noncitizen voting. Part II.B discusses noncitizen parents' distinct interest and stake in school board elections. Part II.C explains that allowing noncitizen parents to vote in school board elections would increase their children's academic achievement. Part II.D argues that school boards should represent the communities they serve, a goal supported by allowing all parents to vote, regardless of their citizenship. And Part II.E discusses noncitizen voting trends in other contexts—both across the globe and in the 2018 U.S. midterm elections.

A. *There Are Many Arguments For and Against Noncitizen Voting*

Proponents of noncitizen voting typically make four legal arguments against citizen voting requirements in school and local elections. They assert that citizen voting requirements violate the Constitution's equal protection, due process, and supremacy clauses, and are also unlawful attempts to regulate immigration.³⁴ In *Skafta v. Rorex*,³⁵ a permanent resident alien attempted to register for a school election, but was denied permission to do so because he was not a U.S. citizen.³⁶ The Colorado Supreme Court held that Colorado's citizenship requirement did not contravene the Fourteenth Amendment's Equal Protection Clause because "[t]he state has a rational interest in limiting participation in government to those persons within the political community."³⁷ The court also held that the citizen voting requirement did not violate the Due Process Clause³⁸ or the Supremacy Clause,³⁹ and did not attempt to regulate immigration.⁴⁰

In addition to defending the legality of citizen voting requirements,⁴¹ opponents of noncitizen voting also assert "that allowing illegal immigrants the right to vote devalues the franchise and diminishes the voting power of

33. Swaak, *supra* note 30.

34. *See e.g.*, *Skafta v. Rorex*, 553 P.2d 830, 831 (Colo. 1976).

35. *Id.*

36. *Id.* at 831.

37. *Id.* at 832. The court also reasoned that the citizenship requirement was properly tailored to the state's interests. *Id.* at 833.

38. *Id.* ("The statutes do not purport to be concerned with prohibiting from voting persons with some common trait, which trait is conclusively presumed from the status of alienage.").

39. *Id.* at 834 ("Voter qualification is a primary example of an area which the states have historically occupied.").

40. *Id.* ("[T]he Supreme Court has never held that every state provision which deals with aliens is a regulation of immigration.").

41. *See supra* notes 34–40 and accompanying text.

United States citizens.”⁴² Based on this rationale, Colorado’s House Majority Leader, Kevin McCarthy, recently proposed a resolution opposing undocumented immigrant voting in U.S. elections, including in cities where laws have allowed noncitizens the chance to participate in local elections.⁴³ According to McCarthy, allowing noncitizens to vote “dilutes why people work so hard to become citizens [and] dilutes an election as well.”⁴⁴

One response to this argument is that “there are many factors . . . that distinguish citizens from noncitizens, and many reasons why noncitizens will still have a strong incentive to naturalize even if they are permitted to vote in local elections.”⁴⁵ For example, a noncitizen can be deported from the United States while a citizen cannot. A noncitizen, including a green card holder, cannot freely travel outside of the United States without risking his ability to reenter.⁴⁶ And, of course, there is no basis to conclude that citizenship applications would decrease if noncitizens were allowed to vote in school board elections.

B. Noncitizen Parents Have a Distinct Interest and Stake in School Board Elections

Local elections, laws, and policies affect noncitizens every day.⁴⁷ As a result, some jurisdictions allow resident noncitizens to vote in local elections when they have a particular interest in the election. This would be the case when noncitizens legally send their children to public school. Noncitizen parents also have a direct stake in school policies because those policies impact their children. One professor believes that, “local jurisdictions should enfranchise *anyone* who has a sufficient stake in local affairs and has the proper incentives and ability to make informed choices about who should lead them.”⁴⁸

Chicago has allowed noncitizens to vote and even serve on its school councils since 1988, and so “did New York City from 1968 until 2002, when the city disbanded its elected school boards.”⁴⁹ Recently, San Francisco

42. Marianna Sotomayor, *House GOP Passes Measure Blasting Allowing Non-Citizens to Vote in Local Elections*, NBC NEWS (Sept. 26, 2018), <https://www.nbcnews.com/politics/congress/house-gop-passes-measure-blasting-allowing-non-citizens-vote-local-n913591> [https://perma.cc/XM23-8PP5].

43. *Id.*

44. *Id.*

45. Kini, *supra* note 9, at 317.

46. *Id.*

47. Joshua A. Douglas, *Noncitizens Are Gaining the Right to Vote. Good.*, WASH. POST. (Aug. 18, 2017), https://www.washingtonpost.com/opinions/noncitizens-are-gaining-the-right-to-vote-good/2017/08/18/805b86e2-4d3e-11e7-9669-250d0b15f83b_story.html?utm_term=.9a47d417118e [https://perma.cc/48TB-HCLQ].

48. Douglas, *supra* note 27, at 1044 (emphasis added).

49. *Id.* at 1064; Sara Grossman, *Voting Rights for Immigrants & the Incarcerated: The Case For Inclusion*, HASS INST. (May 11, 2016), <https://haasinstitute.berkeley.edu/voting-rights-immigrants-incarcerated-case-inclusion> [https://perma.cc/D599-6Z2N].

voters passed Proposition N, which allows noncitizens⁵⁰ to vote in school board elections.⁵¹

In 2017, “[o]ne out of three kids in the San Francisco unified school system ha[d] a parent who [was] an immigrant, who [was] disenfranchised and [who didn’t] have voice.”⁵² That changed in 2018, when Proposition N went into effect. One commentator explained, in supporting Proposition N: “San Francisco has a legitimate interest in fostering a more representative, responsive local school board that will take into account the needs of its large immigrant student population when making important educational policy decisions affecting San Francisco’s public schools.”⁵³ Thus, Proposition N helps “provide a voice to those with a vested stake in their communities”⁵⁴ and allows all parents “to hold the school board members accountable to community needs.”⁵⁵

C. Allowing Noncitizen Parents to Vote Would Increase Educational Achievement in Schools

Allowing noncitizen parents to vote in school board elections would increase the academic achievement of immigrant children, who are likely U.S. citizens.⁵⁶ It is widely accepted in the field of education that parental participation in schools has a positive effect on children’s educational achievement. “Whether parents get involved by helping children with their homework or voting in school elections, parents who take an active role in their children’s education are likely to feel invested in their child’s academic success and to convey a sense of encouragement and support to that child.”⁵⁷ A U.S. Department of Education-funded research laboratory found that “[w]hen schools, families, and community groups work together to support learning, children tend to do better in school, stay in school longer, and like school more.”⁵⁸ The same laboratory concluded that regardless of family income or background, students with involved parents are more likely to earn higher grades and test scores.⁵⁹ In addition, these students are even more likely to attend school regularly, have better social skills, graduate, and go to college.⁶⁰

50. See Park, *supra* note 28 and accompanying text.

51. See *supra* note 30 and accompanying text.

52. Douglas, *supra* note 47.

53. Kini, *supra* note 9, at 292.

54. Douglas, *supra* note 47.

55. Swaak, *supra* note 30.

56. Kini, *supra* note 9, at 308.

57. *Id.* at 310.

58. ANNE T. HENDERSON & KAREN L. MAPP, NAT’L CTR. FOR FAM. & CMTY. CONNECTIONS WITH SCHS., *A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY, AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT* 7 (2002).

59. *Id.*

60. *Id.*

D. School Boards Should Represent the Communities They Serve

School boards should represent the communities they serve⁶¹ by advocating for all students, including those with learning disabilities, those who speak English as a second language, and those who are bullying victims.⁶² School boards should account for every student's needs when making school decisions like approving how school resources are allocated and developing school-improvement plans. One way to ensure that school board members take every student into account when making these decisions is allowing all parents to vote in school board elections, regardless of their citizenship.

E. Voting Rights Are Expanding

Noncitizen voting has been expanding across the globe as “[m]ore than 45 countries on nearly every continent allow resident noncitizens to vote at the local, regional, or national level.”⁶³ And while noncitizens have not fared as well in the United States, voting rights advocates here have made progress in other areas.⁶⁴

In the North Dakota 2018 midterm elections, the “Citizen Requirement for Voting Amendment Initiative” was on the ballot as a proposed constitutional amendment.⁶⁵ The amendment was approved, meaning that voters supported amending the North Dakota Constitution to provide that “only a citizen” of the United States can vote in federal, state, and local elections.⁶⁶ Opponents to the amendment argued that the North Dakota Constitution already defines a voter as a U.S. citizen “so there is no need to clutter the constitution with unneeded verbiage.”⁶⁷

In any event, voting rights advocates also achieved gains. In a blog post titled “Midterm Voters Significantly Expanded The Right to Vote,” Sam Levine explained that voters “sent a resoundingly clear message in favor of making elections more accessible and fairer.”⁶⁸ For example, that “[a]fter Tuesday’s election, approximately 1.4 million people with felony convictions in Florida will regain the right to vote” and “[i]t will be much

61. *State Boards*, *supra* note 15.

62. Bullying kills. *See generally* Butwin, *supra* note 12, at 674.

63. *See* Rachel M. Cohen, *Letting Noncitizens Vote in the Trump Era*, NATION (Nov. 1, 2008), <https://www.thenation.com/article/noncitizen-voting-trump/> [<https://perma.cc/RR2U-C2GY>] (last visited Mar. 2, 2019).

64. *See infra* notes 69–70 and accompanying text.

65. *North Dakota Measure 2, Citizen Requirement for Voting Amendment Initiative (2018)*, BALLOTPEDIA [https://ballotpedia.org/North_Dakota_Measure_2,_Citizen_Requirement_for_Voting_Amendment_Initiative_\(2018\)](https://ballotpedia.org/North_Dakota_Measure_2,_Citizen_Requirement_for_Voting_Amendment_Initiative_(2018)) [<https://perma.cc/5U6H-8VUQ>] (last visited Mar. 2, 2019).

66. *Id.*

67. *Id.*

68. Sam Levine, *Midterm Voters Significantly Expanded The Right To Vote*, HUFFPOST (Nov. 7, 2018), https://www.huffingtonpost.com/entry/midterm-elections-voting_rights_us_5be27da6e4b0dbe871a47ce0 [<https://perma.cc/HL77-Y6JJ>].

easier for people in Michigan to vote.”⁶⁹ Moreover, “[i]n Kansas, Kris Kobach, who championed perhaps the most restrictive voting law in the country and led President Donald Trump’s voter fraud commission, lost the race for Kansas governor to Democrat Laura Kelly.”⁷⁰ While these events do not address noncitizen voting, they do expand the right to vote. Perhaps the midterm elections are a harbinger of change. Hopefully, other states will follow San Francisco’s lead by allowing noncitizen parents to vote in school board elections.

CONCLUSION

With the exception of twelve jurisdictions in only three states, noncitizen parents cannot vote in school board elections. The other states should change their voting eligibility requirements to allow noncitizen parents to vote in local elections, such as school board elections. Doing so would give noncitizen parents—who have a strong interest and stake in school board elections—a voice in matters that affect their children. And allowing them to vote would have the added benefit of increasing educational achievement in schools.

69. *Id.* Voters in Michigan “will now be automatically registered to vote when they interact with the state’s motor vehicle agency unless they opt out. They’ll also be able to register to vote on Election Day, as opposed to the state’s current registration cut-off of 30 days before an election.” Sam Levine, *Michigan Just Made It a Lot Easier to Vote*, HUFFPOST (Nov. 6, 2018), https://www.huffingtonpost.com/entry/michigan-promote-the-vote_us_5bdcda50e4b09d43e31f00e9 [https://perma.cc/4FSA-993K].

70. *See* Levine, *supra* note 68.