

- g) Provides that referendum powers may be exercised by the electors of each city or county under procedures provided by the Legislature, but provides that this provision does not affect a city having a charter.

2) In the Elections Code:

- a) Provides, generally, that state and local laws are subject to referendum and provides procedures for qualifying a referendum for the ballot.
- b) Defines a ballot label to mean the portion of the ballot containing the names of the candidates or a statement of a measure.
- c) Requires that, for a state ballot measure, the Attorney General write a ballot label of no more than 75 words that is a condensed version of the measure's ballot title and summary and the fiscal impact summary prepared pursuant to existing law.
- d) Provides that, for a state or local referendum, the ballot shall have printed on it the words "Shall the statute (or ordinance) (stating the nature thereof, including any identifying number or title) be adopted?" Further provides that, opposite this statement and to its right, or immediately below it, the words "Yes" and "No" shall be printed on separate lines, with voting targets.
- e) Provides that, for a state or local referendum, if a voter marks the voting target next to the printed word "Yes," the voter's vote shall be counted in favor of the adoption of the ordinance or statute, and if the voter marks the voting target next to the printed word "No," the voter's vote shall be counted against its adoption.

This measure:

1) Amends the State Constitution as follows:

- a) Provides that a referendum petition shall provide that a "Yes" vote is in favor of the referendum and rejects the statute or part of the statute subject to the referendum, and a "No" vote is against the referendum and approves the statute or part of the statute subject to the referendum.
- b) Specifies that a ballot shall provide that a "Yes" vote is in favor of the referendum and rejects the statute or part of the statute subject to the referendum, and a "No" vote is against the referendum and approves the statute or part of the statute subject to the referendum.
- c) Provides that, if a referendum measure fails by not receiving a majority of votes cast, the statute or part of a statute that was the subject of the referendum takes effect on the fifth day after the Secretary of State files the statement of the vote for the election at which the measure is voted on.
- d) Clarifies that the Legislature may amend or repeal a part of a statute that is the subject of a referendum.

BACKGROUND

Relationship to SB 443. SB 443 (Hertzberg) of 2021, which is pending in the Assembly, would enact Elections Code changes to implement SCA 1. SB 443 amends the text of the prompt that is printed on the ballot for state and local referendum measures to: “Shall the statute (or ordinance) (stating the nature thereof, including any identifying number or title) be rejected?” SB 443 also changes the meaning of a “yes” and “no” vote for a referendum in the Elections Code to be consistent with SCA 1. Both of these changes only go into effect if SCA 1 is approved by voters.

Under existing law, statewide referenda are listed after statewide initiatives on the ballot. SB 443 also provides that initiatives and referenda are listed together based on the order in which they qualify. If SB 443 becomes law, this change would go into effect regardless of whether or not SCA 1 passes the Legislature and is approved by the voters.

This committee passed SB 443 on a 4-1 vote. SB 443 passed the Senate on a 31-6 vote.

Referendum Question Framing in Other States. According to a report by the National Conference of State Legislatures (NCSL), in 23 states, legislative acts may be repealed by a popular referendum, also called a “veto referendum.” According to NCSL research of those states’ laws or practices, in the majority of states, including California, a “yes” vote indicates that the voter approves of the law passed by the Legislature and wants it to remain in effect.

However, in at least three states, Alaska, Maine, and Wyoming, a “yes” vote indicates that the voter disapproves of the law and wants it repealed, as proposed with this amendment. For example, in Alaska the ballot label describes the law that is the subject of the referendum, then provides voters with the following prompt: “A yes vote rejects the law. A no vote approves the law. Should this law be rejected?” Immediately after the prompt, a voter may mark either “yes” or “no.”

In a few states, the voting options for a referendum ballot measure are something other than “yes” or “no.” For example, in Maryland voters mark their ballots either “for the referred law” or “against the referred law,” in Nebraska voters choose whether to “retain” or “repeal” the act in question, and in New Mexico voters must check a box either “for approval of the act” or “for rejection of the act.”

Referenda Statistics & Status Quo Bias. Historically, Californians vote “yes” at similar rates for referenda and initiatives. According to the Secretary of State (SOS), between 1912 and 2020, 51 referenda appeared on the statewide ballot, resulting in 21 statutes (41%) being approved by voters. In that same period, 393 voter initiatives qualified for the statewide ballot, of which 137 (35%) were approved by voters.

The reason for why most ballot initiatives are defeated remains a matter of debate amongst political scientists. Some academics theorize that voters have a status quo bias when considering initiatives. According to this theory, if a voter is unsure of what an initiative does, or unsure if that change is beneficial or not, the voter is more likely to default to voting “no” to retain the status quo. A related theory, negative framing bias,

argues that opposition arguments are simply more effective at generating more “no” votes than support arguments are at generating more “yes” votes. This is because, again relative to a status quo position, most people tend to pay more attention to and react stronger to the risk of a negative outcome compared with the possibility of a positive outcome of similar significance. Still other academics dispute the existence of a status quo bias at all. Ballot measures may fail at a higher rate just because they propose more controversial policies.

COMMENTS

- 1) According to the Author. In recent decades, California voters have been asked to weigh in on an increasing number of complex, highly technical ballot propositions. This trend has brought greater focus to our state’s system of direct democracy and its three major components – the initiative, the recall, and the referendum. The last of these, the referendum, is easily the least utilized, and accordingly, suffers from an unclear legal framework. SCA 1 makes voting on referenda more intuitive by explicitly including the meaning of a “YES” and “NO” vote in the California Constitution.
- 2) State Only? SCA 1 amends Sections 9 and 10 of Article II of the State Constitution, pertaining to state referenda, but not Section 11, which pertains to city and county referenda. It might be argued, therefore, that SCA 1 only changes the effect of a “yes” or “no” vote as to state referenda, and not city or county referenda. However, courts have sometimes looked to Sections 9 and 10 to interpret the local referendum power. For example, the California Supreme Court has held that the enumerated constitutional exceptions to the *state* referendum power – i.e. for urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses – also apply to the *local* referendum power. See *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County*, 8 Cal.4th 765, 778 (1994).

It is therefore potentially unclear whether SCA 1 governs the effect of a “yes” or “no” vote for local referenda, or only state referenda. However, this potential ambiguity may not matter because Section 11 allows the Legislature to adopt procedures for city and county referenda and SB 443, which is necessary to implement SCA 1 and contingent on the measure’s adoption, expressly changes the effect of a “yes” and “no” vote for local as well as state referenda.

- 3) Further Fine-Tuning the Ballot Question. As described above, some states provide voting options other than “yes” or “no” for referenda. The author may wish to consider whether other voting options may provide even more clarity to voters on the effect of their vote. In doing so, the author may wish to consult the ballot design advisory committee being established by the SOS pursuant to AB 623 (Berman), Chapter 863, Statutes of 2019, for its recommendations on referendum question and voting options wording. This advisory committee, which is charged with advising the SOS on ballot design and format, must be composed of county elections officials and ballot design experts with knowledge of presenting election materials to voters using plain language methods.

- 4) Is a Constitutional Amendment Needed? The State Constitution does not expressly address the effect of a “yes” or “no” vote on a referendum, or even mention these voting options. Section 10 of Article II also requires that the Legislature provide “the manner in which a measure shall be submitted to the electors.” An argument might, therefore, be made that the substantive change proposed in SCA 1 could be accomplished purely by statute.

However, other constitutional provisions may point in the opposite direction, which might make such a statute vulnerable to legal challenge without the passage and voter approval of SCA 1. Section 9 of Article II describes the referendum as the power of the voters to “approve or reject” statutes. Section 10 also specifies that a “referendum *approved* by a majority of votes cast thereon takes effect on the fifth day after the Secretary of State files the statement of the vote for the election.” Approval, which is more consistent with a “yes” vote, is therefore required for the statute to take effect. Courts have also described the voters’ referendum power as being “the same as the Legislature’s approval of a bill. The power is to determine whether a legislative act should become law. It is not to determine whether a legislative act, once effective, should be repealed.” *Yesson v. San Francisco Municipal Transportation Agency*, 224 Cal.App.4th 108, 117 (2014) (cleaned up).

Other stand-alone statutory changes to the referendum voting options that are closer to the language of the Constitution might not carry the same degree of legal risk. For example, a statute amending the referendum voting options to “approve the statute” or “reject the statute” would mirror the current language in the State Constitution describing the referendum power.

- 5) Argument in Support. In a letter supporting SCA 1, the League of Women Voters of California states, in part, the following:

SCA 1’s proposed change is important because the current framing [of referendum voting options] is counterintuitive to voters, causing confusion as to whether they are voting to overturn or preserve a law.

According to a Public Policy Institute of California October 2020 report, 82 percent of likely voters reported confusion due to complicated ballot language. The League believes that SCA 1 helps to ameliorate this problem. It would be improved if the language to appear on the ballot was subject to community review to ensure that it is precise, clear, understandable, and meet standards of readability. For example, framing along these lines might be preferable: “The ballot shall provide that a “Yes” vote means that the voter does not want the law that was passed to go into effect and a “No” vote means that the voter supports the law and wants to keep it.” While we offer that as an example, it is important that language be tested through community review to ensure that voters understand its meaning.

The League supports SCA 1 to improve voters’ opportunities to understand the ballot and make informed decisions.

RELATED/PRIOR LEGISLATION

SB 443 (Hertzberg) of 2021, discussed above, makes amendments to the Elections Code to implement SCA 1, if that measure is passed and approved by the voters. The bill is pending in the Assembly.

AB 241 (Bonta) of 2021 is nearly identical to SB 443. The bill is pending before the Assembly Committee on Elections.

AB 623 (Berman), Chapter 863, Statutes of 2019, discussed above, made various changes to how measures are presented on ballots, including minor changes to the presentation of referendum measures, and required the SOS to establish a ballot design advisory committee to assist the SOS in promulgating regulations that prescribe ballot design and format.

POSITIONS

Sponsor: Author

Support: League of Women Voters of California
Union of Concerned Scientists

Oppose: None received

-- END --