
THIRD READING

Bill No: SCA 1
Author: Hertzberg (D)
Introduced: 12/7/20
Vote: 27

SENATE ELECTIONS & C.A. COMMITTEE: 4-1, 6/28/21
AYES: Glazer, Hertzberg, Leyva, Newman
NOES: Nielsen

SENATE APPROPRIATIONS COMMITTEE: 5-2, 8/26/21
AYES: Portantino, Bradford, Kamlager, Laird, McGuire
NOES: Bates, Jones

SUBJECT: Elections: referenda

SOURCE: Author

DIGEST: This constitutional amendment, if approved by the voters, provides that a “Yes” vote for a referendum measure 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.

ANALYSIS:

Existing law:

State Constitution

- 1) Provides, generally, that a statute shall go into effect on January 1 next following the enactment date of the statute unless a referendum measure challenging the statute qualifies for the ballot.
- 2) Establishes the referendum, which is the power of the electors to approve or reject statutes or parts of statutes.

- 3) Provides that statutes passed by the Legislature are subject to referendum, except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.
- 4) Provides that, before circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law.
- 5) Provides that the Legislature may amend or repeal a referendum statute.
- 6) Provides that an initiative statute or referendum approved by a majority of votes cast thereon takes effect on the fifth day after the Secretary of State (SOS) files the statement of the vote for the election at which the measure is voted on, but the measure may provide that it becomes operative after its effective date. Provides if a referendum petition is filed against a part of a statute, the remainder of the statute shall not be delayed from going into effect.
- 7) 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.

Elections Code

- 8) Provides, generally, that state and local laws are subject to referendum and provides procedures for qualifying a referendum for the ballot.
- 9) Defines a ballot label to mean the portion of the ballot containing the names of the candidates or a statement of a measure.
- 10) 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.
- 11) 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.
- 12) 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 constitutional amendment amends the State Constitution as follows:

- 1) 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.
- 2) 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.
- 3) 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 SOS files the statement of the vote for the election at which the measure is voted on.
- 4) 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, 2021), which is pending in the Assembly, enacts 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.

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 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) *Author’s statement.* 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.

Related/Prior Legislation

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

AB 241 (Bonta, 2021) is nearly identical to SB 443. The bill is pending in the Assembly.

AB 623 (Berman, Chapter 863, Statutes of 2019) 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.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee, this constitutional amendment would result in one-time General Fund costs to the SOS in the range of \$546,000 to \$728,000, likely in 2021-22, for printing and mailing costs to place the measure on the ballot in a statewide election. Actual costs may be higher or lower, depending on the length of required elements and the overall size of the ballot.

SUPPORT: (Verified 8/26/21)

California Federation of Teachers
League of Women Voters of California
Union of Concerned Scientists

OPPOSITION: (Verified 8/26/21)

California Chamber of Commerce
Howard Jarvis Taxpayers Association
Southwest California Legislative Council

ARGUMENTS IN SUPPORT: In a letter supporting SCA 1, the League of Women Voters of California stated, in part, the following:

SCA 1's proposed change is important because the current framing 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.

ARGUMENTS IN OPPOSITION: In a letter opposing SCA 1, the California Chamber of Commerce stated, in part, the following:

There is no evidence that this current process has confused voters. The Secretary of State has documented that between 1912 and 2020, a total of 52 referenda qualified for the ballot. Of the 52 that qualified, 21 referenda (40%) were approved by the voters and 30 referenda (58%) were rejected by the voters. And, despite suggestions otherwise, there is no evidence that the referenda process is controlled or manipulated by "corporations." Based upon

the most recent data on the Secretary of State's website regarding referenda, there have only been four referenda that have qualified in the last ten years to be voted on by the Legislature: (1) redistricting; (2) ban on single use plastic bags; (3) Indian gaming compact; and (4) bail reform. The Legislature has passed and approved thousands of new laws in the past ten years and yet only four referenda have been filed.

Changing the referenda process that has been in place for over 100 years will create more confusion to the public and voters, not eliminate confusion. Qualifying a referendum for the ballot is already a time sensitive and costly endeavor. Changing the process will further limit the ability for targeted groups by the Legislature to seek relief.

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