

John G. Matsusaka

2004 Initiatives and Referendums

By John G. Matsusaka, University of Southern California

Ballot propositions continue to drive the policy agenda in the states, and this year spilled over into the presidential election. The most popular issue was marriage, with 13 states approving constitutional amendments defining marriage as between a man and a woman.

Ballot propositions have been driving the policy agenda in the states for some time now, and this year was no exception. Constitutional amendments defining marriage played a role in the presidential campaign, and wins by high profile propositions on illegal immigration, stem cell research, and clean energy are likely to trigger a wave of similar legislative activity across the country.

In all, 162 state-level measures went before the voters on November 2, with about two-thirds of them passing. The total number of measures was down by about 25 percent from November 2000, with much of the drop-off due to a decline in bond and revenue measures as states put their fiscal crises behind them. The 162 propositions were distributed across 34 states. California had the most—16—although this number was below the state’s average of 18 for general elections, and well below the peak of 48 measures in 1914. Table 1 lists the number of propositions by state, and the highest profile issues in each state. The passage rate of 67 percent was essentially up somewhat from 62 percent in 2002.

Of the 162 propositions, 101 were placed on the ballot by legislatures (“legislative measures”) and 59 were “initiatives,” qualified by citizen petition. There were also two petition referendums, measures that proposed to repeal laws passed by the legislature, and that qualify for the ballot by petition (Prop. 72 in California and R-55 in Washington).²

The number of initiatives is up from 53 in 2002, and brings the total for the last 10 years to more than 360. As Figure 1 shows, this is the highest 10-year total in history, and comes on the heels of big jumps in initiative activity in the preceding two decades. The initiative revolution that began with California’s Prop. 13 in 1978, shows no sign of slowing, and in fact seems to be accelerating.

I&R and the Presidential Election

One of the most interesting developments this year was the possibility that ballot propositions could influence the presidential election. Colorado’s Amendment 36 proposed to allocate the state’s nine presidential electors in proportion to the popular vote received by each candidate instead of giving them all to the state winner. The twist was that the measure was writ-

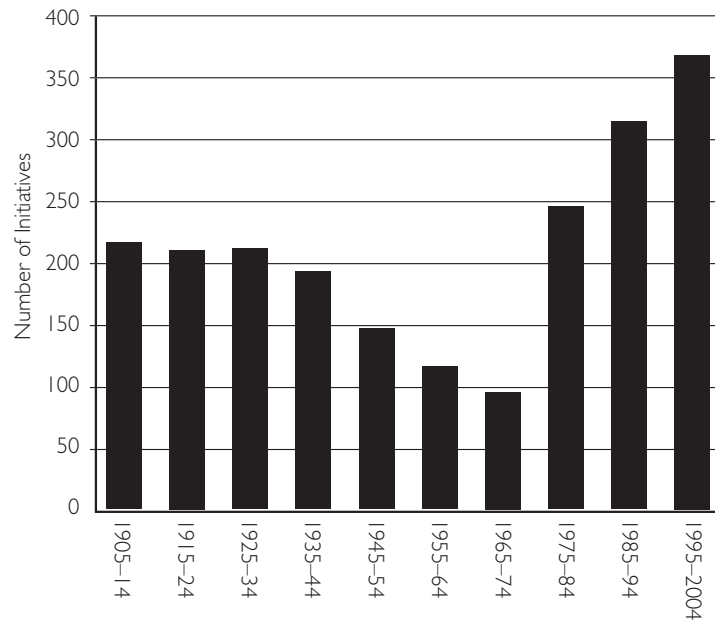
ten to be retroactive: if approved, it would have applied to the presidential votes cast on the same day, in effect transferring four electoral votes from George Bush to John Kerry.

Leading up to the election, there was speculation that the electoral votes of the two candidates could be close enough so that the election would turn on the fate of Amendment 36. If so, the initiative would have promptly landed in court, requiring judges to determine the winner in a reprise of 2000.

As it turned out, the presidential election was not as close as expected, and Amendment 36 was soundly defeated, 34 percent to 66 percent. The measure was intended to jumpstart reform of the Electoral College, partly in response to dissatisfaction with the fact that the popular vote winner did not become president in 2000. The thrashing of Amendment 36, and the lack of controversy in the 2004 presidential race, will likely put a damper on reform efforts in the near future.

The other issue that played a role in the presidential cam-

Figure 1 Number of Statewide Initiatives



Source: Initiative & Referendum Institute.

paigned was marriage. Constitutional amendments to define marriage as solely the union of a man and a woman were on the ballot in 11 states, including the critical “battleground” states of Michigan and Ohio (the others were Arkansas, Georgia, Kentucky, Mississippi, Montana, North Dakota, Oklahoma, Oregon and Utah; and Louisiana and Missouri adopted earlier in 2004). These measures were responses to a Massachusetts supreme court ruling in February 2004 holding that the state’s constitution contained a right to gay marriage. Legislatures and in some cases citizen groups placed these amendments on the ballot to prevent their own judges from finding a right to gay marriage in their constitutions. All of the amendments were approved by large margins.

There were several schools of thought of how the marriage amendments might matter. One view was that the amendments would mobilize religious conservative voters to go to the polls, and once there they would support the GOP. The other view was that gay marriage proponents would turn out disproportionately and this would help the Democrats. Yet another possibility was the amendments would bring out black voters—who register among the highest disapproval of gay marriage among major demographic groups—which would help the Democrats.

What actually happened is not clear at the time of writing. Exit polls noted a large fraction of voters who claimed to be motivated by “values” but what this means is unclear. Moreover, there is not yet any reliable evidence that the marriage amendments did in fact disproportionately boost turnout of any particular group. Even if they did not affect turnout, they may have crystallized the distinction between the two presidential candidates for voters with strong feelings about the issue.

Conservatives versus Liberals

The initiative and referendum processes have stubbornly refused to play ideological favorites. Direct democracy had its origins in the Progressive movement of the early 20th century, and progressives used the processes to advance a host of issues that would be called “liberal” under today’s terminology, such as welfare, old age pensions, and women’s suffrage.³ Starting in the 1970s, conservatives began to score big wins as well, especially on tax measures, but also on social policies such as capital punishment, abortion, and affirmative action/racial preferences. 2004 was a fairly typical year in this regard. Conservatives won big on the 11 marriage amendments, a Florida amendment requiring parental notification of abortion, and a Colorado measure cutting

off public services to illegal immigrants. Conservatives suffered a loss when a Maine initiative that would have capped property taxes was rejected. Liberals got their share with wins in Florida and Nevada on measures that increase the minimum wage, and a Colorado amendment that requires large utilities to generate a certain amount of power from clean energy sources such as solar, hydro, wind and biomass. Liberals were defeated in an attempt to legalize the use, production, and sale of marijuana in Alaska, and the repeal of California law that required large businesses to provide health insurance to their workers.

The mixed results for liberals and conservatives reinforce that initiatives and referendums are ideologically neutral. They provide opportunities for groups of any ideology that are not given a fair hearing by the legislature.⁴

Table 1 State-by-State Totals

State	Number of initiatives & referendums*	Number of legislative measures*	Notable issues
Alabama	0	8 (3)	Obsolete racial language
Alaska	3 (1)	1 (1)	Marijuana legalization
Arizona	1 (1)	7 (3)	Illegal immigrants
Arkansas	1 (1)	3 (1)	Marriage
California	12 (5)	4 (4)	Stem cell bonds, employer health care
Colorado	4 (2)	2 (1)	Presidential electors
Florida	6 (6)	2 (2)	Contingency fees, malpractice
Georgia	0	2 (2)	Marriage
Hawaii	0	4 (4)	Criminal procedures
Indiana	0	3 (3)	
Kentucky	0	1 (1)	Marriage
Louisiana	0	4 (4)	Right to hunt and trap
Maine	2 (0)	0	Property tax limit
Michigan	2 (2)	0	Marriage
Mississippi	0	1 (1)	Marriage
Missouri	1 (1)	0	
Montana	4 (3)	3 (2)	Marriage, mining with cyanide
Nebraska	4 (2)	4 (2)	Gambling
Nevada	6 (3)	2 (1)	Education spending
New Hampshire	0	1 (0)	
New Mexico	0	7 (0)	Four bond measures
North Carolina	0	3 (3)	
North Dakota	1 (1)	0	Marriage
Ohio	1 (1)	0	Marriage
Oklahoma	0	9 (9)	Marriage, lottery
Oregon	6 (2)	2 (2)	Marriage, logging
Rhode Island	0	14 (10)	12 bond measures
South Carolina	0	2 (1)	Minibottles
South Dakota	1 (0)	2 (0)	
Utah	1 (0)	3 (3)	Marriage, bonds for open space
Virginia	0	2 (2)	Apportionment
Washington	5 (2)	0	Sales tax for education
West Virginia	0	1 (1)	
Wyoming	0	4 (2)	Pain and suffering awards
Total	61 (33)	101 (69)	

Source: Initiative & Referendum Institute.
Key: *The number of initiatives, referendums and legislative measures approved are in parentheses.

High Profile Issues

As usual, a wide variety of issues were considered this year. Table 2 lists the number of various types of issues. Some of the more prominent issues are discussed in what follows:

Marijuana

The marijuana legalization movement appears to be losing steam. The most far-reaching proposition, Alaska's Measure 2 that would have entirely legalized marijuana for people over the age of 21, was decisively rejected 43-57. An attempt to establish state-run medical marijuana dispensaries in Oregon (Measure 33) was also rejected. The only success was in Montana, where voters approved a measure to allow limited use of marijuana for medical purposes (I-148). A total of 11 states now allow medical marijuana.⁵

Gambling

Gambling was one of the most popular topics this year, with 13 measures on the ballot in six states. These measures were among the most expensive, with over \$100 million spent on two gambling initiatives in California alone. Voters were not particularly receptive to expansions in gambling, rejecting a California measure that would have allowed unlimited tribal gambling, a California measure that would have allowed non-tribal gambling, and a Washington measure that would have allowed non-tribal gambling.

Nebraska voters faced five measures related to casinos, and rejected the three that would have authorized the casinos. The only bright spot for gambling was in Oklahoma, where voters approved two propositions establishing a state lottery and another that expanded Indian gaming. A measure in Florida that allowed slot machines in Miami-Dade and Broward counties narrowly passed.

Election Reform

The Electoral College was the most visible issue concerning elections, due to Colorado's Amendment 36, discussed above. Proposals to create runoff primary elections instead of closed primaries were rejected in California (Prop. 62) and approved in Washington (I-872). A measure to allow runoff primaries in local elections was rejected in New Mexico (Amendment 3).

Fiscal Measures

A total of 41 tax and bond measures went before the voters in November, down by about one-third from 2002. The bond measure involving the most money was Prop. 71 in California, an initiative that authorized a \$3 billion bond issue to

be used for stem cell research. The measure was approved 59 percent to 41 percent, attracting support from both conservatives and liberals. California voters also approved Prop. 61, which authorized a \$750 million bond issue for children's hospitals. All told, the state's voters added an estimated \$250 million to the state's annual debt service when all the bonds are issued, according to the state's nonpartisan Legislative Analyst. Arkansas voters approved \$500 million bond issue for economic development. The largest bond issue to fail was Utah's Initiative 1 that would have authorized \$150 million for open spaces, and increased the sales tax to service the debt.

The most expensive tax measure was Washington's I-884 that would have increased the state's sales tax by 1 percent (to a national high of 7.5 percent) with the money going to education. The tax increase was anticipated to generate about \$1 billion per year. Voters turned it down, 39 percent to 61 percent. California voters approved a 1 percent surtax on millionaires, with the proceeds dedicated to mental health services. Sin tax measures were approved in Colorado, Montana and Oklahoma, and rejected in Alabama.

Environment

Voters decided 10 environmental measures, endorsing the "green" position in four cases and the "brown" position in six cases. The most far-reaching was Colorado's Amendment 37, discussed above, that requires large utilities to use clean energy sources. Voters in four states expressed their support for hunting either by approving hunting rights (Louisiana and Montana) or rejecting limits on bear hunting (Alaska and Maine).

Health Care Costs, Malpractice, and Lawsuits

The rising cost of health care featured prominently in the presidential campaigns and played out in the states with 10 measures. An alleged cause of rising costs is lawsuits, and trial lawyers were the target of several propositions. Measures to limit pain-and-suffering awards were approved in Nevada (Question 3) and rejected in Oregon (Measure 35) and Wyoming (Amendment D). Measures to limit attorney fees or require mediation were approved in Florida (Amendment 3) and Wyoming (Amendment C). Counter-initiatives sponsored by trial lawyers were rejected in Nevada (Questions 4, 5) and approved in Florida (Amendments 7, 8). California's Prop. 72 mandating employer-provided health insurance was rejected.

Money

Final totals are unavailable at the time of writing, but the amount of money involved was considerable. Estimates are that roughly \$200 million was spent in

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Table 2 Subjects in 2004

Subject	Number of propositions
Abortion	1
Alcohol & marijuana	4
Apportionment	1
Bonds	21
Crime	6
Economic development	5
Education	7
Elections	7
Environment (includes animals)	10
Gambling	13
Government administration	6
Government powers	10
Health care	3
Initiative & referendum	5
Immigration	1
Insurance	1
Lawsuits	7
Marriage	11
Minimum wage	2
Miscellaneous	7
Officeholders, qualifications & salaries	4
Impeachment and succession	3
Taxes	22
Term limits	4
Transportation	1

Source: Initiative & Referendum Institute.

reform the current law to expand term limits to allow more service time in the Legislature. The fault lines in term limits are recognized by virtually everyone familiar with the process. Legislators, staff, interest groups and academics agree that some changes would be good. However, term limit legislation in Michigan was a citizen-initiated constitutional amendment and any change also

would have to be citizen-initiated. At this time, I don't think many citizens would put reforming term limits high on their list. In the meanwhile, Michigan will continue to make the best of an interesting, but flawed, term limit requirement.

Bio

Sen. Patricia Birkholz (R-Saugatuck Township) is in her first terms in the Michigan Senate. She serves as president pro-tempore and chairs the Senate Natural Resources and Environmental Affairs Committee. Sen. Birkholz served in the Michigan House of Representatives from 1996-2000 under term limits. P.O. Box 30036, Lansing, MI 48909. (517) 373-3447. SenPBirkholz@senate.michigan.gov.

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California, over \$30 million in Florida, and over \$10 million in Colorado. To put these numbers in perspective, the presidential campaigns of George Bush and John Kerry were expected to spend in the vicinity of \$300 million to \$350 million. Despite concerns about the role of money in ballot proposition campaigns, however, it remains the case that money can't buy you law. Gambling interests spent upwards of \$100 million on two initiatives in California yet only managed 16 percent and 24 percent of the votes in favor. Money allows groups to make proposals but does not determine the final outcome.⁶

Endnotes

¹ This article uses referendums instead of referenda as the plural of referendum following the *Oxford English Dictionary* and common practice.

² For state-by-state descriptions of legal provisions, see: Dane M. Waters, *The Initiative and Referendum Almanac*, (Carolina Academic Press, 2003), or www.iandrinstute.org.

³ John G. Matsusaka, "Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century," *Journal of Law and Economics*, 43 (October 2000), 619-48.

⁴ *Ibid.*

⁵ Waters.

⁶ Elisabeth R. Gerber, *The Populist Paradox: Interest Group Influence and the Promise of*

Direct Legislation, (Princeton University Press, 1999).

Bio

John G. Matsusaka is a professor of business and law at the University of Southern California and president of the Initiative and Referendum Institute at USC. He is the author of *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (University of Chicago Press, 2004). USC, Los Angeles, CA 90089. (213) 740-1693. matsusak@usc.edu.

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extended period of time. And most often, these were the individuals who held the important committee and leadership posts. These were the people who possessed the "institutional memory" and experience that allowed the chamber to function even while many of the legislative seats turned over from one session to another. Under term limits, all legislative seats, including those occupied by leadership, are subject to mandatory turnover.

Endnotes

¹ The data reported in this article were collected by Gary Moncrief, Richard Niemi and Lynda Powell with assistance from National Science Foundation grant SES-0212310 and the Smith-Richardson Foundation in support of the Joint Project on Term Limits. For a more detailed analysis of turnover and term limits, see Moncrief, Niemi and Powell, "Time, Term Limits and Turnover: Trends in Membership Stability in U.S. State

Legislatures," *Legislative Studies Quarterly* volume 29, 357-81.

² Duane Lockard, "The Legislature as a Personal Career," in *Strengthening the States: Essays on Legislative Reform* eds. Donald Herzberg and Alan Rosenthal (Garden City, New York: Doubleday & Co, 1971), 14.

³ While measuring turnover may seem like a simple procedure, there are in fact several different ways that this can be done, and the way that it has measured has not been consistently applied. Often, turnover is measured in the following manner: compare the list of members of the legislature just before election day with the list of members just after the election. This yields a figure based on (a) those legislators who declined to run again and (b) those who ran but lost. What it does not capture, however, is those people who left office during their term. This is potentially an important component of turnover, especially in term-limited states. If a legislator knows she is precluded from serving again because of a term limit law, she may be more likely to leave office early to take an administrative position or to run for

another office. Turnover of this type is best captured by comparing the legislative roster immediately after one election to the roster immediately after the next election. This is the method we use here.

⁴ Alan Rosenthal provides a detailed and thoughtful discussion of these and other reforms—and their consequences—in Chapter 2 of his book, *The Decline of Representative Democracy* (Washington, D.C., CQ Press, 1998).

Bio

Gary Moncrief is professor and former chair of the Political Science Department at Boise State University. A frequent speaker at events sponsored by The Council of State Governments, he has written publications such as *Who Runs for the Legislature* (with Peverill Squire and Malcolm Jewell, Prentice Hall, 2002), about state legislative candidate recruitment. BSU, Boise, ID 83725. (208) 426-3686. gmoncri@boisestate.edu.