Analysis on the Election
From the State Perspective
Party Control Shifts 2010 -- 24 Chambers

Democrat Gains

Ties

Republican Gains

- Alabama House & Sen.
- Colorado House
- Indiana House
- Iowa House
- Louisiana Senate
- Maine House & Senate
- Michigan House
- Minnesota House & Senate
- Mississippi House & Senate
- New Hampshire House & Senate
- New York Senate
- North Carolina House & Senate
- Ohio House
- Pennsylvania House
- Wisconsin Assembly & Senate

Oregon House
Virginia Senate
Party Control Shifts 2014 -- 11 Chambers

Democrat Gains

Republican Gains

Colorado Senate
Maine Senate
Minnesota House
Nevada Assembly
Nevada Senate
New Hampshire House
New Mexico House
New York Senate
Washington Senate
West Virginia House
West Virginia Senate
Party Control Shifts 2016 -- 8 Chambers

**Democrat Gains**
- New Mexico House
- Nevada Assembly
- Nevada Senate
- Washington Senate

**Tie**
- Connecticut Senate

**Republican Gains**
- Minnesota Senate
- Kentucky House
- Iowa Senate
Pre-election Legislatures by Party

State Legislators:
- Nonpartisan: 49
- 16 vacant
- Other: 28
- Total: 4120

Chamber Control:
- Democrat: 31
- Total: 67

Republican - 32
Democrat - 13
Split - 3
Nonpartisan/Undecided - 2
Legislative Chambers 2017
Seat Changes by Region 2014 to 2016

South

East

Midwest

West
Southern Legislatures-1992
GOP Seats in the South 1938 - 2016

- 1938: 64.3%
Governor Party 2017

- **Republican** - 33
- **Democrat** - 14
- **Independent** - 1
State Governments 2017

- Republican - 24
- Democrat - 6
- Divided - 17
- Nonpartisan/undecided - 3
# Seats Gained/Lost by President 1900-2014

<table>
<thead>
<tr>
<th>President</th>
<th>Party</th>
<th>Elections</th>
<th>Net Legislative Seats Gained/Lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Theodore Roosevelt</td>
<td>Republican</td>
<td>1900, 1902, 1904, 1906</td>
<td>177</td>
</tr>
<tr>
<td>William Taft</td>
<td>Republican</td>
<td>1908, 1910</td>
<td>-1089</td>
</tr>
<tr>
<td>Woodrow Wilson</td>
<td>Democrat</td>
<td>1912, 1914, 1916, 1918</td>
<td>-547</td>
</tr>
<tr>
<td>Warren Harding</td>
<td>Republican</td>
<td>1920, 1922</td>
<td>-1142</td>
</tr>
<tr>
<td>Calvin Coolidge</td>
<td>Republican</td>
<td>1924, 1926</td>
<td>260</td>
</tr>
<tr>
<td>Herbert Hoover</td>
<td>Republican</td>
<td>1928, 1930</td>
<td>-1058</td>
</tr>
<tr>
<td>Franklin Roosevelt</td>
<td>Democrat</td>
<td>1932, 1934, 1936, 1938, 1940, 1942, 1944</td>
<td>1130</td>
</tr>
<tr>
<td>Harry Truman</td>
<td>Democrat</td>
<td>1946, 1948, 1950</td>
<td>85</td>
</tr>
<tr>
<td>John Kennedy</td>
<td>Democrat</td>
<td>1960, 1962</td>
<td>-414</td>
</tr>
<tr>
<td>Lyndon Johnson</td>
<td>Democrat</td>
<td>1964, 1966</td>
<td>-234</td>
</tr>
<tr>
<td>Gerald Ford</td>
<td>Republican</td>
<td>1974</td>
<td>-628</td>
</tr>
<tr>
<td>George H. W. Bush</td>
<td>Republican</td>
<td>1988, 1990</td>
<td>-21</td>
</tr>
<tr>
<td>Donald Trump</td>
<td>Republican</td>
<td>2016</td>
<td>40</td>
</tr>
</tbody>
</table>
President's Party in Mid-Term Elections

Seats Gained/Lost

<table>
<thead>
<tr>
<th>Year</th>
<th>Seats Gained/Lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1902</td>
<td>-2000</td>
</tr>
<tr>
<td>1922</td>
<td>-1500</td>
</tr>
<tr>
<td>1934</td>
<td>-1000</td>
</tr>
<tr>
<td>1958</td>
<td>-500</td>
</tr>
<tr>
<td>1974</td>
<td>0</td>
</tr>
<tr>
<td>1994</td>
<td>500</td>
</tr>
<tr>
<td>2002</td>
<td>1000</td>
</tr>
<tr>
<td>2014</td>
<td>1500</td>
</tr>
</tbody>
</table>
Analysis on the Election
From the State Perspective
2016 Ballot Measures: Results & Analysis

Wendy Underhill,
Director, Elections and Redistricting
NCSL, Denver
Q: What is a ballot measure?
A: The voters’ opportunity to “legislate.”
Legislative Referendum States
2016 by the Numbers

- 72 citizens’ initiatives
- 3 advisory questions
- 75 legislative referrals
- 4 popular referendums

154 measures on statewide ballots
November 8, 2016
Total Ballot Measures by Year
1990 - 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Measures</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>207</td>
</tr>
<tr>
<td>1992</td>
<td>187</td>
</tr>
<tr>
<td>1994</td>
<td>238</td>
</tr>
<tr>
<td>1996</td>
<td>268</td>
</tr>
<tr>
<td>1998</td>
<td>271</td>
</tr>
<tr>
<td>2000</td>
<td>235</td>
</tr>
<tr>
<td>2002</td>
<td>223</td>
</tr>
<tr>
<td>2004</td>
<td>173</td>
</tr>
<tr>
<td>2006</td>
<td>226</td>
</tr>
<tr>
<td>2008</td>
<td>174</td>
</tr>
<tr>
<td>2010</td>
<td>184</td>
</tr>
<tr>
<td>2012</td>
<td>185</td>
</tr>
<tr>
<td>2014</td>
<td>159</td>
</tr>
<tr>
<td>2016</td>
<td>154</td>
</tr>
</tbody>
</table>
Legislative Referendums and Citizens’ Initiatives by Year, 2000-2016

From Citizens
From Legislatures
Passage Rates

2016 Citizens Initiatives vs. Average

CI 2016: 66%
CI Average: 45%

2016 Legislative Referrals vs. Average

LR 2016: 83%
Average: 72%
Ballot Measures
Bonds

California    Maine    New Mexico    Rhode Island
Taxes

California

Maine

N. Dakota

Louisiana

Oklahoma

Oregon
Minimum Wage

AZ
CO
ME
WA

SD
Marijuana

Medical
Arkansas
Florida
Montana
N. Dakota

Adult Use
Arizona
California
Maine
Massachusetts
Nevada
Marijuana

Medical
Arkansas
Florida
Montana
N. Dakota

Adult Use
Arizona
California
Maine
Massachusetts
Nevada
Marijuana

Medical
Arkansas
Florida
Montana
N. Dakota

Adult Use
Arizona
California
Maine
Massachusetts
Nevada
Firearms

- Background Checks
  - Maine
  - Nevada

- Checks and Ammunition Limits
  - California

- Extreme Risk Protection Orders
  - Washington
Capital Punishment

Eliminate
California Prop. 62

Keep
California Prop. 66

Nebraska

Oklahoma
Crime Victim’s Rights

Montana
North Dakota
South Dakota
Evergreen Issues
Elections & Redistricting

- Ranked-Choice Voting
  - Maine
- Nonpartisan Elections & Redistricting
  - South Dakota
- Voter ID
  - Missouri
<table>
<thead>
<tr>
<th>Campaign Finance</th>
<th>Overturn Citizens United</th>
<th>Contribution Limits</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CA, WA</td>
<td>MO, SD</td>
</tr>
<tr>
<td>Disclosure</td>
<td>MO, SD</td>
<td>Public Financing</td>
</tr>
<tr>
<td></td>
<td>SD, WA</td>
<td>SD, WA</td>
</tr>
</tbody>
</table>
Agriculture and Animals

Farm/Ranch
Oklahoma

Hunt/Fish
Indiana
Kansas

Traps—Montana
Cages—Mass.
Endangered Species—Ore.
One-of-a-Kind Measures (That Failed)

- CA: Condoms
- AK: Student Debt
- CO: Single Payer Health Care
- MA: Charter Schools
- WA: Carbon Emissions
One-of-a-Kind Measures (That Passed)

- CA: Bilingual Ed
- OK: Sunday Sales
- CO: Aid-in-Dying
- GA: Safe Harbor
- CO: Passing Amendments
Transportation

Increasing Funding

IL ME NJ LA RI
Wendy Underhill
wendy.underhill@ncsl.org
303-856-1379
NCSL Capitol Forum | 2016

Find out what the election means for the states
Dec. 6-9 | Washington D.C. | nctl.org/forum
The National View

Amy Walter, national editor, The Cook Political Report
Washington, D.C.
A Leadership Prospective

Lieutenant Governor Dan Patrick, Texas
Senate Majority Leader Mike Gronstal, Iowa

Moderator: Tim Storey, director of state services, NCSL
Changes On The Hill: What It Means For States

Reid Wilson, national correspondent, The Hill
Washington D.C.

Moderator: Senator Curt Bramble, Utah
The U.S. Supreme Court: Outlook & Analysis

Lisa Soronen, executive director, State and Local Legal Center
Washington, D.C.

Moderator: Senator Curt Bramble, Utah
What We Are Certain About

- Merrick Garland will not join the U.S. Supreme Court
- This is President-elect Trump's first known test
  - Vacancy will exist on day 1
  - Wasn’t inevitable that the first big thing he must do will test his conservative credentials
What We Are **Certain** About

• Gives him an opportunity to show Americans what kind of President he will be
  ▫ Stick to the list (of very conservative) candidates
  ▫ Pick a female or minority candidate as a nod to Democrats
  ▫ Pick someone unexpected, a non-judge, or someone with less rock solid conservative credentials
I Could Not Say in Better

• "The real question to which we may now find out the answer is just how serious Mr. Trump was about replacing Justice Scalia with a judge cut from the same cloth, and how much pressure he'll receive from Republicans in the Senate to stick to his original list -- or a judge with similarly conservative credentials."

• "President Bush tried to go outside the box when he nominated his White House Counsel, Harriett Miers, to replace Justice O'Connor -- but ended up having to withdraw her after facing conservative blowback."

• Steve Vladeck, CNN contributor and professor of law at the University of Texas School of Law
What We Are Almost Certain About

• It should be a pretty easy test to pass
  ▫ Trump already has two lists of possible nominees with solid conservative credentials
• Trump should have little trouble getting a nominee through the Senate confirmation process
  ▫ If Senate Democrats filibuster Trump’s nominee to replace Justice Scalia’s seat, Senate Republicans will exercise the nuclear option meaning only a majority of Senators are needed to confirm the nominee
What We Are Uncertain About

- Does President-elect Trump really want a conservative Justice on the Court?
  - “An open question is what happens when Trump realizes that the sorts of judges he’s been advised to appoint would rule against him on various matters.”
  - Ilya Shapiro, CATO at Liberty
- Identity crisis?
  - Most conservatives are angry about the Court’s ruling on social issues; Trump doesn’t seem that interested in those issues
- Who will be his advisors on picking a nominee?
Let’s Make Some Assumptions

• Trump nominates someone from one of his two lists
• That person is confirmed
• Everyone on the list is conservative to very conservative so basically interchangeable
What Changes?

• Not all that much (for now) if one conservative is replaced by another?
  ▫ Justice Scalia wrote a lot of dissents...particularly recently
• Justice Kennedy was the real winner on November 8!?
  ▫ And Justice Roberts as well
How Was the Old Supreme Court for States?

• Mixed bag
  ▫ 4-4 on the big issues with Justice Kennedy in the middle (states rights guy sympathetic to liberals on many social issues)
  ▫ In theory, good on federalism and preemption
  ▫ Good: qualified immunity, religion in public spaces, the losing courthouse doors, public employment
  ▫ Bad: land use, First Amendment, tax
Justice Scalia’s Idiosyncrasies

- Justice Scalia isn’t necessarily interchangeable with any other conservative
  - Really conservative on social issues
  - You can be a conservative without being an origionalists or a textualist
  - Wasn’t a conservative on the Fourth Amendment or Sixth Amendment right to confront accusers
  - Maybe the Justice most comfortable with religion in public spaces and most supportive of private property rights?
  - Maybe the Justice who liked the EPA the least and loved guns the most?
Biggest Change Could Be...

- Issues brought to the Supreme Court
- Almost all of which will impact states directly!
I Could Not Say in Better

• “If you live by executive action, you die by executive action—which means that many high-profile cases looming on the Supreme Court docket will simply go away. DAPA (executive action on immigration) and the Clean Power Plan will be rescinded, religious nonprofits will be exempt from Obamacare, Trump’s HHS won’t make the illegal payments that have led to House v. Burwell, and more. That may include the transgender-bathroom guidance, which if rescinded would remove the biggest controversy from the Court’s current term.”

• Ilya Shapiro, CATO at Liberty
What Could Go Away This Term

- *Gloucester County School Board v. G.G.* (transgender bathroom case based on a letter)
- *Trinity Lutheran Church of Columbia, Inc. v. Pauley* (new attorney general)
What Could Go Away in the Future

- **Statute**
  - Obamacare

- **Regulations**
  - Clean Power Plan
  - Waters of the United States definition
  - FLSA white collar exemption dollar amount increase

- **Non-regulations**
  - Deferred Action for Parents of Americans
Caveat: Hard to Get Rid of Regulations!

- Trump could:
  - Ask Congress to repeal them (subject to filibuster)
  - Write new regulations
  - Not enforce them
  - Not defend them in a court challenge
100 Day Action Plan

• 10,000 foot level reaction: Trump may find himself in Obama’s shoes!?  
  ▫ Most of the things he wants to accomplish he can’t do unilaterally  
  ▫ Even a Republican Congress may not support a number of his plans  
  ▫ So like Obama he may act through regulations, letters, executives orders, etc.  
  ▫ The means he uses maybe challenged (along with the substance of what he does)
President Trump: Meet the Current Conservative Justices!

- Will the Court’s current conservatives be friendlier to President Trump’s use of executive power?
  - “But what's been really unusual about the last eight years is the deep suspicion evidenced by the court's conservatives about executive power, presidential power and the relative deference of the court's liberals. So it's going to be particularly interesting to see if that changes when the president is a Republican with an agenda instead of a Democrat with an agenda.”
  - Nina Totenberg, NPR
First Page of Action Plan

• Seems to assume unilateral action?
• Most of these measures will impact states
• Many legal challenges if Congress doesn’t okay
  ▫ Eliminating two regulations for every regulation passed
  ▫ Bans on lobbyists
  ▫ Withdrawal from NAFTA
  ▫ China=currency manipulator
  ▫ Extreme vetting of immigrants
• It may be that NO Supreme Court Justices would be okay with any of the above
• Some legal challenges with Congressional approval
  ▫ Withdrawal from NAFTA
  ▫ Extreme vetting
• Assumes Congressional approval
• Hard to know if any of these laws might be unconstitutional without knowing their details
  ▫ Voucher programs might be unconstitutional depending on how structured
Beyond Scalia Vacancy and Trump Agenda

- Average retirement age for Supreme Court Justices is 79
- Oldest Justices are liberals and Justice Kennedy
  - Justice Ginsburg (83)
  - Justice Breyer (78)
  - Justice Kennedy (80)
- Justice Thomas (68) retirement rumors
- Could have a 7-2 conservative Court that is relatively young very soon
Issues that Matter to States

- Fair share for public unions
- Weakening of agency deference
- More favorable to religion and religious discrimination claims
- Qualified immunity will be safe
- Private property rights will be expanded
- Big public employment cases will favor state and local governments
- Guns?
- Eighth Amendment
Social Issues

• Court would no longer need Justice Kennedy on the social issues where he leans left:
  ▫ LGBTQ issues
  ▫ Death penalty
  ▫ Race
Roberts Court Agenda Continues

- Broad reading of the First Amendment
- Reinvigorating limiting race-conscious decision-making
- Further closing of the courthouse doors
Change is Slow at the Supreme Court

- Will be no “automatic” overturning of *Roe v. Wade*
- Most of current Justices are pretty committed to *stare decisis*
- Court tends to cut back/expand the law incrementally
NCSL CAPITOL FORUM | 2016

FIND OUT WHAT THE ELECTION MEANS FOR THE STATES
DEC. 6-9 | WASHINGTON D.C. | NCSL.ORG/FORUM
Join NCSL’s Executive Director, Bill Pound for a discussion on hot issues for the states in 2017

Webinar: *Hot Issues in the Upcoming 2017 Sessions*
Nov. 30 at 1 p.m. ET

Hear from NCSL Executive Director Bill Pound about emerging issues in education, criminal justice, transportation and fiscal policy, and how states will tackle them in 2017.

Register now at [www.ncsl.org](http://www.ncsl.org)