State Constitutional Developments in 2014

By Audrey Wall [1]
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Although constitutional amendment activity was lower in 2014 than in recent even-numbered years, several of the 72 approved amendments attracted significant attention. These include amendments relaxing legislative term limits in Arkansas, creating a bipartisan redistricting commission in New York, eliminating a judicial merit selection commission in Tennessee, strengthening the right to bear arms in Alabama and Missouri, guaranteeing a right to farm in Missouri, and barring state and local officials from enforcing unconstitutional federal directives in Arizona.

About the Author

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State Constitutional Developments in 2014

Voters considered and approved fewer state constitutional amendments in 2014 than in any other even-numbered year in the 21st century. In other respects, however, the 105 proposed amendments and 72 adopted amendments demonstrate continuity with recent trends in amendment activity. Voters continue to approve a sizable number of rights-related amendments, sometimes recognizing rights with no counterpart in the U.S. Constitution, such as hunting and fishing rights, and sometimes requiring that certain rights, such as the right to bear arms, be given more protection than at the federal level.

Other amendments reflect ongoing experimentation with ways of selecting governing officials and structuring governing institutions—establishing a bipartisan redistricting commission in New York, relaxing legislative term limits in Arkansas, creating an intermediate appellate court in Nevada and eliminating a judicial merit selection commission in Tennessee. Policy amendments also continue to figure prominently in state ballots, with the adoption of several tax-limitation amendments, various amendments authorizing and, in some cases, limiting gambling, and an unusual Arizona amendment barring state and local officials from enforcing unconstitutional federal directives.

Constitutional Amendment and Revision Methods

Constitutional amendments appeared on the ballot in 36 states in 2014, which is comparable to the number of states considering amendments in recent even-numbered years—35 states in 2012 and 37 states in 2010. The 105 proposed amendments and 72 approved amendments in 2014, however, are substantially below the level of constitutional amendment activity in every even-
numbered year in the 21st century. In even-year elections held between 2002 and 2012, the number of proposed amendments ranged from a high of 175 in 2002 to a low of 135 in 2012. The number of enacted amendments ranged from a high of 125 in 2006 to a low of 87 in 2008.

It is no surprise that Louisiana and Alabama accounted for a quarter of all amendments approved in states in 2014. Louisiana voters considered more amendments, 14, than any other state, and approved six of them. Alabama voters approved more amendments than any other state, ratifying all 12 amendments placed on the ballot in elections in June, July and November. This included six amendments of statewide application as well as six local amendments placed on the ballot only in affected localities, but added to the state constitution upon approval. With the addition of these 12 amendments, Alabama’s 1901 Constitution now boasts 892 amendments and comprises more than 388,000 words.

**Legislative Proposals and Constitutional Initiatives**

As indicated in Table A, all 105 amendments on the ballot in 2014 were formally proposed either by legislatures or via the initiative process. Voters approved 70 of 97 legislature-proposed amendments for a passage rate of 72.2 percent. This is comparable to the approval rate for legislature-proposed amendments in recent years. Voters placed eight amendments on the ballot via the constitutional initiative process, which is available in 18 states. Only two of these citizen-initiated amendments were approved: an equal-rights amendment in Oregon and an amendment dedicating additional money to a land acquisition trust fund in Florida. This passage rate of 25 percent is somewhat below the rate for citizen-initiated amendments in recent years.

<table>
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<tr>
<th>Method of initiation</th>
<th>Number of states involved</th>
<th>Total proposals (a)</th>
<th>Total adopted (b)</th>
<th>Percentage adopted (c)</th>
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*Source: John Dinan and The Council of State Governments.*

(d) Excludes two Arkansas amendments that were placed on the 2012 ballot but whose results were not certified pursuant to a court order.

(f) Excludes one Oklahoma amendment that was approved by voters in November 2010, but not certified pursuant to a court order.

**Constitutional Conventions and Commissions**

Rhode Island voters rejected, by a 55 to 45 percent margin, an automatically generated proposition on the November 2014 ballot that would have established a convention to consider amendments to the state constitution. Rhode Island is one of 14 states to provide for a periodic convention referendum, which in the case of Rhode Island appears on the ballot every 10 years. In fact, Rhode Island voters approved a periodic convention referendum in 1984, which led in 1986 to the last full-scale convention held in the 50 states. The 2014 Rhode Island convention referendum attracted a good amount of public attention, much more than recent automatic convention referendums in other states. Convention backers established an organization, Renew RI, and raised funds and published a number of op-ed pieces in support of a yes vote on the referendum.
A coalition of convention opponents formed an organization, Citizens for Responsible Government, which raised even more funds and enjoyed the backing of influential public and private-sector unions, along with civil rights and abortion rights groups, and succeeded in defeating the measure.2

The Ohio Constitutional Modernization Commission was the only constitutional commission operating in 2014. established by the state legislature in 2011, this 32-member commission has until 2021 to recommend changes to the state constitution. Recommendations that secure the support of two-thirds of the commissioners are forwarded to the legislature, which can submit them for voter ratification upon a three-fifths vote in both houses. The commission in 2014 focused on considering alternatives to the current method of drawing state legislative and congressional district lines, among other topics.

The Alabama legislature in 2014 considered several recommendations from a 16-member Alabama Constitutional Revision Commission, but the legislature did not place any of these commission-recommended amendments on the 2014 ballot. The legislature had in 2012 placed on the ballot several amendments recommended by the legislature-established commission, which operated from 2011 to 2013 and was charged with reviewing and suggesting changes to 11 of the 18 articles of the state constitution. As legislators were wrapping up their 2014 session, however, Alabama Supreme Court Chief Justice Roy Moore and Associate Justice Tom Parker issued advisory opinions casting doubt on the legitimacy of this article-by-article approach to constitutional revision. These opinions brought a temporary halt to legislators’ consideration of the commission’s slate of recommendations. Legislators returned to the task after a brief pause, but the session concluded before both houses could agree on approving any of the commission-recommended amendments for placement on the ballot.

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Source: John Dinan and The Council of State Governments.

Key:
(a) Excludes Delaware, where amendments do not require popular approval.
(b) Includes Delaware.
(c) In calculating the percentages, the amendments adopted in Delaware (where proposals are not submitted to voters) are excluded (one amendment was adopted in 2010, one in 2011 and three in 2013).
(d) Excludes two Arkansas amendments placed on the 2012 ballot, but whose results were not counted pursuant to a court order.
(e) Excludes one Alabama local amendment approved by voters in November 2010 but not certified pursuant to a court order.
(f) Includes one Oklahoma amendment approved by voters in 2010, but whose enforcement was permanently enjoined by a federal district court.
Finance-related amendments in 2014 far outpaced the number of amendments on any other topic, as is the norm. Excluding miscellaneous amendments, rights-related amendments were the second most common type of amendment approved in 2014, as also has been the norm in recent years. It is notable that judiciary-related amendments were the third-largest category of approved amendments. Table B reports the number of proposed and enacted amendments in these and other categories.

Rights

Rights-related amendments on the 2014 ballot attracted substantial attention, as voters considered several amendments adding or strengthening rights with no counterpart in the text of the U.S. Constitution. Mississippi became the 18th state to recognize a right to hunt and fish in its constitution, with all but one of these states adopting their provisions in the past two decades. Vermont adopted a right to hunt and fish in its inaugural 1777 constitution and remained the only state to recognize such a right until 1996, when Alabama voters approved an amendment adding hunting and fishing rights to their state constitution. In 2014, Alabama voters approved a “Sportspersons’ Bill of Rights” amendment strengthening this original provision, in part by declaring: “The people have a right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to reasonable regulations, to promote wildlife conservation and management, and to preserve the future of hunting and fishing.” Missouri became the second state to guarantee a right to farm, following passage of a North Dakota measure in 2012. The narrowly approved Missouri amendment states, in part, that: “the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state.”

Voters approved several other amendments protecting rights with no counterpart in the text of the U.S. constitution. The Illinois Constitution is one of more than 30 state constitutions guaranteeing crime victims’ rights. In 2014, Illinois voters approved an amendment expanding the original list of rights of crime victims in that state and making it easier for them to assert these rights in court.

Oregon adopted a citizen-initiated equal rights amendment barring state or local governments from denying rights on account of sex. Most states with equal rights provisions of this sort adopted them in the 1970s and 1980s, when a federal equal rights amendment fell just short of being ratified by the requisite number of states.

Several amendments approved in 2014 deal with rights guaranteed in both the U.S. Constitution and state constitutions; their intent is to stipulate that the state constitution affords greater protection than is found in the federal constitution. Following a path taken by several other states in the past few years, Alabama voters approved an amendment declaring the right to bear arms is “fundamental” and “any restriction on this right shall be subject to strict scrutiny.” Missouri voters also strengthened their existing right-to-bear-arms provision by declaring that the right “shall be unalienable” and any restriction “shall be subject to strict scrutiny.” The Missouri amendment also broadened the right to bear arms to include “ammunition, and accessories typical to the normal function of such arms” and eliminated prior language that qualified this right by saying it did not apply to the carrying of concealed weapons. Missouri voters also approved an amendment making clear that the state guarantee against unreasonable searches and seizures applies to “electronic communications and data.”

Voters approved several amendments adjusting the rights of criminal defendants. Prior to this year, felony defendants in North Carolina could not waive their right to a jury trial. After voters approved a 2014 amendment permitting waiver of a jury trial in noncapital cases, North Carolina joined the other 49 states in permitting jury trial waivers. New Jersey voters approved an amendment adjusting the language in a right-to-bail provision by authorizing judges to deny pretrial release to defendants in certain situations.

State constitutional amendments can, in some instances, expand rights beyond federal guarantees. They also can be a vehicle in other instances for overturning state court decisions that interpret state constitutional rights more
expansively than federal guarantees. Voters approved two court-constraining amendments of this sort in 2014. In response to prior Missouri Supreme Court rulings disallowing admission of “propensity” evidence, Missouri voters approved an amendment authorizing prosecutors to introduce such evidence in certain cases. The Missouri amendment declares that notwithstanding other state constitutional provisions, in cases involving sex crimes against minors “relevant evidence of prior criminal acts, whether charged or uncharged, is admissible for the purpose of corroborating the victim’s testimony or demonstrating the defendant’s propensity to commit the crime with which he or she is presently charged.”

Tennessee voters approved an amendment responding to a 2000 Tennessee Supreme Court decision holding that the state constitution provides more protection for abortion rights than is guaranteed by the federal constitution and striking down several abortion restrictions on that ground. The 2014 Tennessee amendment declares, in part: “Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain this right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion.”

Rights-related amendments appearing on the 2014 ballot were approved in nearly all cases; the only two amendments of this sort rejected at the polls were fetal personhood amendments in Colorado and North Dakota seeking in various ways to define life as beginning at conception. Colorado voters rejected personhood amendments on two prior occasions, in 2008 and 2010, as did Mississippi voters in 2011. The 2014 Colorado amendment differed from prior amendments in that it focused narrowly on defining the terms “person” and “child” in the Colorado Criminal Code and Wrongful Death Act to include “unborn human beings.” The failed North Dakota amendment in 2014 was similar to the earlier and more broadly applicable personhood amendments in declaring, “The inalienable right to life of every human being at any stage of development must be recognized and protected.”

Looking ahead to 2015, Mississippi voters will consider competing education-related amendments. One proposed amendment, which reached the ballot through the initiative process, would amend the current education clause by guaranteeing a “fundamental right to educational opportunity” to be enforced by the state’s chancery courts. However, Mississippi’s constitutional initiative process is unusual in that the legislature has an opportunity to craft and submit to voters an alternative amendment alongside the citizen-initiated amendment. For the first time since adoption of the initiative process in Mississippi in 1992 the legislature took advantage of this opportunity, by crafting an amendment that makes only modest changes to the current education clause and lacks the fundamental-right or judicial-enforcement language. Voters in 2015 will have a chance to indicate whether they support making any change to the current education clause, and, if so, which amendment they prefer.

**Institutions**

Voters in 2014 considered a number of amendments altering governing or electoral institutions, with the judicial branch attracting the most attention. Heading the list of judiciary-related amendments is a notable change in the way Tennessee Supreme Court and intermediate appellate court judges are chosen. Although the relevant provision of the Tennessee Constitution had for many years directed that supreme court judges “shall be elected by the qualified voters of the state,” this is not how judges actually were selected in recent decades. Rather, Tennessee operated under a merit selection plan. In case of a vacancy, a judicial nominating commission forwarded a list of potential nominees to the governor, who made the appointment. Judges then stood periodically for retention elections. The amendment approved by Tennessee voters in 2014 eliminates the longstanding language providing for elected judges; it also eliminates the nominating commission and provides that the governor, with the consent of the legislature, shall make the initial appointment of appellate judges. Notably, the legislature is understood to have given its consent if it fails to reject a gubernatorial nominee within 60 days. Several other states, including Kansas, continue to debate amendments eliminating their current merit selection commissions and moving toward some version of the federal judicial-election plan.

One other notable change in judicial selection procedures approved by voters in 2014, aside from a technical change in New Mexico in the filing deadline for incumbent judges, was a Hawaii amendment requiring the merit commission to make public the names of all judicial nominees it forwards to the governor pursuant to the merit selection process in that state. Florida voters rejected an amendment permitting the governor to prospectively fill judicial vacancies. This would have been particularly important when judgeships become vacant on the same day as a gubernatorial inauguration, as will occur in 2019 when three current judges will have to step down by virtue of approaching the judicial retirement age. The failed Florida amendment would have permitted the
outgoing, rather than incoming, governor to make judicial appointments in these situations.

Voters considered, and in some cases approved, other judiciary-related amendments. Efforts to raise or eliminate the judicial retirement age invariably have been rejected in recent years, and voters in 2014 defeated two more such amendments. Hawaii voters once again defeated an amendment to raise the retirement age, in this case from 70 to 80. Louisiana voters were unwilling to approve an amendment seeking to eliminate the judicial retirement age altogether. In Nevada, voters finally approved an amendment creating an intermediate appellate court, after defeating similar amendments on four prior occasions dating to the 1970s, most recently in 2010. Alabama voters approved an “American and Alabama Laws for Alabama Courts Amendment” prohibiting courts from applying foreign law when doing so would violate the public policy of the state or rights guaranteed by federal and state constitutions. Although the amendment is motivated by some of the same concerns that in 2010 led to Oklahoma’s adoption of an anti-Sharia amendment— whose enforcement has been permanently enjoined by a federal court—the Alabama amendment does not make explicit mention of Sharia law.

Arkansas voters approved the most important legislature-related amendment in 2014, when they relaxed the current legislative term limits rules by allowing legislators to serve up to 16 years in the house or senate. This amendment also included provisions limiting lobbying, restricting certain campaign contributions and creating an independent commission to set elected officials’ salaries; it was seen as securing popular ratification largely on the strength of these other provisions. Prior to adoption of this amendment, legislators could serve a maximum of six years in the house and eight years in the senate. Arkansas becomes the second state to relax its legislative term limits in recent years, following California voters’ approval of a similar amendment in 2012.

Meanwhile, Illinois supporters of a measure to institute legislative term limits secured enough signatures to qualify an amendment for the November 2014 ballot via the initiative process. But Cook County Circuit Court Judge Mary Mikva ruled in June 2014 that this amendment could not appear on the ballot because it did not deal with structural or procedural aspects of the legislative branch, as required of initiated amendments in Illinois. Several decades ago, a court held another proposed term limits amendment invalid on the grounds that it dealt with eligibility and qualifications of legislators rather than with structural or procedural aspects of the legislature. Supporters of the proposed 2014 amendment sought to overcome these concerns by packaging the term limits provision with changes in the number of legislators and the percentage of legislators needed to override a gubernatorial veto. But this argument proved unsuccessful in court and the amendment was kept off the 2014 allot, along with another amendment that would have created an independent redistricting commission. Mikva concluded this other redistricting amendment also extended beyond structural and procedural aspects of the legislature, at least in the form it was drafted.

In other legislature-related amendments, Arkansas voters approved a measure stipulating that rules promulgated by state administrative agencies cannot take effect until they are reviewed and approved by a legislative committee. At the same time, Idaho voters narrowly rejected an amendment empowering the legislature to reject, in whole or in part, rules promulgated by state executive agencies. New York voters approved an amendment permitting legislators to file bills electronically.

Missouri voters approved a complex amendment limiting the governor’s budget power. At a time when the Republican-controlled state house and senate were at odds with Democratic Gov. Jay Nixon regarding the budget, the legislature proposed, and voters approved, an amendment barring the governor from reducing appropriations items passed by the legislature without the consent of the legislature, along with various other restrictions on the governor’s budget power. Other executive branch-related amendments approved in 2014 included a South Carolina amendment providing that the state adjutant general will now be a gubernatorial appointee rather than a popularly elected official and a Utah amendment clarifying that someone appointed to fill a
Voters approved several amendments regarding electoral institutions, including a New York amendment establishing a bipartisan commission responsible for drawing state legislative and congressional district lines. Constitutional amendments have been a vehicle on several recent occasions for creating independent citizen redistricting commissions, as in California, or establishing guidelines to restrain the legislature in the line-drawing process, as in Florida. The New York redistricting commission differs from several other redistricting commissions in that the majority and minority leadership of the senate and assembly appoint its members and the legislature can reject and modify any maps drawn up by the commission.

Looking ahead to 2015, Ohio voters will consider a legislature-referred amendment that would alter the current rules for drawing state legislative districts but would not apply to congressional districts. Among other changes, the proposed amendment would increase from five to seven the number of members on the current redistricting commission and ensure that the minority party appoints two members. Commission-drawn maps would have to secure the approval of at least two members of the minority party, or they would only remain in effect for four years, rather than the standard 10 years.

Other elections-related amendments on the 2014 ballot included a pair of defeated amendments in Connecticut and Missouri that sought to authorize an early voting period. Illinois voters approved an amendment barring the denial of the right to vote; the amendment was seen as motivated by opposition to voter identification requirements. Arkansas and North Dakota voters approved amendments changing the procedures for qualifying citizen-initiated measures, generally by making the process more difficult.

Policy

Finance amendments figured prominently on the 2014 ballot and were, in most cases, approved. Voters approved all three tax-limitation amendments on the ballot. Tennessee voters approved an amendment barring any tax on earned individual income and thereby reinforcing the current statutory policy against taxing such income. Dividend and interest income remain the only type of income subject to taxation. Georgia voters approved an amendment prohibiting any increase in the maximum individual tax rate beyond the rate as it stands in January 2015. North Dakota became the latest state to adopt an amendment barring real estate transfer taxes. Two of the six taxation-related measures defeated in 2014 sought to increase taxes. Missouri voters easily rejected an amendment temporarily increasing the sales tax by three-quarters of one percent and dedicating the revenue to transportation projects. Nevada voters narrowly defeated an amendment eliminating a longstanding 5 percent cap on taxes for mines, mining claims and mineral extraction.

A significant amount of recent finance amendment activity has dealt with creating and regulating budget stabilization funds and trust funds, and 2014 was no exception. Voters in California approved an amendment changing the rules regarding funds that are required to be deposited into an existing budget stabilization (rainy day) fund and the way the fund can be used. This complex amendment also created another rainy day fund dedicated for public schools. Texas voters approved an amendment allowing certain revenue that previously had been deposited in a rainy day fund to be deposited instead into a state highway fund to pay for transportation projects.

Voters in several states approved amendments establishing new funds or in some cases elevating funds that rested on a statutory footing to constitutional status. Voters in Maryland and Wisconsin approved similarly framed amendments elevating existing transportation funds to constitutional status, stipulating that certain transportation-related taxes and fees should be placed in the fund and limiting its use for any other purposes. Louisiana voters approved an amendment creating an Artificial Reef Development Fund. In Florida, voters approved an amendment providing another source of funding—a portion of the proceeds from a document tax—for an existing Land Acquisition Trust Fund. Voters in other states approved amendments providing a dedicated stream of funding for particular programs or projects, as in New Jersey, where a portion of corporate tax revenue will be devoted to preserving open space, farmland and historic sites during the next three decades.

Amendments authorizing or limiting games of chance appeared on a number of state ballots in 2014, as has generally been the case in recent years. In some states—such as Kansas, South Carolina and Tennessee—voters approved amendments allowing certain nonprofit groups to hold raffles, or in some cases lotteries, thereby making exceptions to existing constitutional restrictions on gambling. In Colorado voters rejected an amendment...
allowing additional forms of limited gaming at certain horse racetracks and depositing the additional tax revenue into a K–12 education fund. Rhode Island voters defeated an amendment that would have allowed additional forms of casino gaming at the Newport Grand facility; in the same election, voters approved an amendment requiring any future changes in the location of this gaming facility to be approved by voters in the state and in the affected locality.

A “Rejection of Unconstitutional Federal Actions” amendment approved by Arizona voters attracted national attention, both in the lead-up to the November election and after the measure’s narrow passage. This legislature-referred amendment prohibits state or local governments from “using any personnel or financial resources to enforce, administer or cooperate with” a federal action or program in the event of the passage of a state legislative statute or initiative measure to this effect.

Several other amendments placed on the ballot via the initiative process attracted national attention but were in each case defeated. An amendment allowing use of marijuana for medical purposes attracted the support of 57 percent of Florida voters; but the Florida Constitution has since 2006 required amendments to be approved by at least 60 percent of voters. Missouri voters overwhelmingly rejected an amendment to establish a teacher evaluation system where promotion and salary increases would be determined, in part, by student performance. Arkansas voters rejected by a solid margin an amendment that would have allowed the sale of alcohol in all counties and thereby overturned the local-option system.

Conclusion

One might choose to emphasize the way 014 amendment activity departed from recent practice by noting that amendment proposals and approvals were lower than in any other even-year election this century. But one might just as easily point to the degree of continuity in that the number of states considering amendments in 2014 was on par with recent even-umbered years. Other examples of continuity with recent amendment activity include passage of rights-related measures guaranteeing more state protection for certain rights than at the federal level; continued tweaking of institutional arrangements regarding judicial selection, legislative term limits and redistricting processes; and the usual slate of policy amendments limiting taxes, creating trust funds, and expanding, and occasionally limiting, gambling.

Notes


