State Constitutional Developments in 2017

By Heather Perkins [1]
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Twenty-two state constitutional amendments were enacted in 2017, with voters approving every amendment of state-wide applicability that appeared on the ballot. This included the lone citizen-initiated amendment, an Ohio amendment that strengthened victims’ rights. Other notable amendments require transportation-related taxes to be dedicated to transportation projects, as in Delaware and Louisiana, and authorize courts to reduce or revoke the public pension of officials convicted of felony offenses related to their official duties in New York. Voters in New York overwhelmingly rejected a referendum on calling a convention to consider changes to the state constitution. A constitutional commission in Ohio came to a premature end, while another commission in Florida began work.

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Constitutional amendment activity in 2017 was on par with recent odd-numbered years, in that a modest number of amendments appeared on the ballot. The subject matter of amendments in 2017 was also typical of recent years, in that finance-related amendments were prevalent and other amendments dealt with individual rights, governing institutions, and policy changes. In one respect, 2017 was unusual: voters approved every amendment of state-wide applicability on the ballot.

Constitutional Amendment and Revision Methods

Constitutional amendments were considered in 10 states in 2017, which is comparable to the number of states that considered amendments in recent odd-numbered years. Twenty-two amendments were approved in 2017, which is also comparable to the number of amendments approved in recent odd-numbered years.

Legislative Proposals and Constitutional Initiatives

The 22 amendments approved in 2017 took various routes to enactment. Delaware is unique, in that amendments in that state are not ratified by voters. Rather, amendments are enacted once they are approved by two-thirds of legislators in consecutive sessions. In 2017, the Delaware Legislature gave its final approval to three amendments.
The vast majority of amendments enacted each year apply state-wide and are approved by the legislature and then ratified by voters in the entire state. In 2017, voters ratified all 17 legislature-generated amendments of state-wide applicability appearing on the ballot.

Relying on a device that is only available in a few states, some legislatures can also craft local amendments that apply to specified localities and are generally placed on the ballot only in these localities but are nevertheless added to the state constitution upon their approval in these local elections. These local amendments were at one time found in several other southern states but are now prominent mostly in Alabama. Voters approved two of the three local amendments on the ballot in Alabama in 2017. The only local amendment rejected by voters—and the only amendment of any kind defeated around the country in 2017—would have increased the sales tax in Lamar County, Alabama.

A final route to enacting amendments that was on display in 2017 bypasses legislatures altogether. Eighteen states provide for citizen-initiated amendments, whereby voters craft amendments and vote to approve them, generally without any involvement of the legislature. Voters in Ohio approved the only citizen-initiated amendment on the 2017 ballot, an amendment strengthening Ohio’s existing victims’ rights amendment.

**Constitutional Conventions and Commissions**

In the most highly anticipated vote with state constitutional implications in 2017, New York voters rejected an automatically generated convention referendum by an 83-17 percent margin. In one sense, New York voters’ rejection of a convention referendum was not surprising, given that these referendums have been defeated every time they have appeared on the ballot across the country in the last three decades. The last time voters approved a convention referendum was in 1984 in Rhode Island, which is another one of the 14 states, along with New York, where a convention referendum appears on the ballot at periodic intervals.

In other respects, the results of New York’s convention referendum were unexpected. For much of the year leading up to the November 2017 vote, the outcome was uncertain, with several prominent groups supporting the referendum and arguing that conditions were ripe for a convention whose delegates would be well positioned to approve various institutional reforms that legislators were not inclined to adopt. It was only in the final weeks of the campaign that polling began to show an advantage for the opposition, which included a wide-range of liberal and conservative groups who were better funded than supporters and benefited from a *New York Times* editorial urging rejection a week out from the election.

The margin of defeat was striking. Although voters rejected all of the convention referendums held during the past three decades, the margin of defeat for prior convention referendums was in a number of cases rather slim. Focusing just on convention referendums held in the 2010s, the most recent convention referendum, held in Rhode Island in 2014, attracted the support of 45 percent of voters. All three convention referendums held in 2012—in Alaska, New Hampshire and Ohio—secured support from over 30 percent of voters. In fact, in 2010, when convention referendums were on the ballot in four states—Iowa, Maryland, Michigan and Montana—a majority of Maryland voters who voted on the referendum supported it; but the Maryland referendum was unable to secure the support of a majority of voters casting ballots in the entire election, as is required in Maryland, with abstentions essentially counting as no votes. Given this recent history, the 17 percent of New York voters who supported a convention fell well below the level of support for any convention referendum held in the last several decades.

In terms of constitutional revision commissions, in 2017 a commission ended its work prematurely in
Ohio and another commission began operating in Florida. The Ohio Legislature established the Constitutional Modernization Commission in 2011 and gave the commission a ten-year charge to study the state constitution and recommend amendments for the consideration of the Legislature. But the Legislature brought an early end to the commission, forcing it to conclude business in July 2017. In its nearly six years of work, the commission recommended various technical and substantive amendments for the Legislature’s consideration. But the Legislature did not approve any of these amendments for submission to voters. Nevertheless, the commission served as a forum for discussing and giving a boost to several amendments that were recently approved by voters, including a 2015 citizen-initiated amendment changing the process for redrawing state legislative districts.

Florida is the only state that authorizes constitutional commissions to place amendments directly before voters; commissions in other states can only recommend amendments for the legislature’s consideration. In fact, the Florida Constitution provides for two commissions with the power to place amendments directly before voters. The Florida Constitution Revision Commission and the Florida Taxation and Budget Reform Commission each meet every twenty years, on a staggered schedule. The Taxation and Budget Reform Commission, which can recommend constitutional or statutory changes related to fiscal measures, last met in 2007-08. The Constitution Revision Commission, which can recommend constitutional changes on any topic, is meeting in 2017-18. The 37 members of the commission include members appointed by the governor (15 members), speaker of the house (9 members), senate president (9 members), and chief justice of the state supreme court (3 members), and are joined by the state attorney general. In 2017, the commission held public hearings and considered citizen recommendations, with an eye to voting on amendments in 2018. Amendments can be submitted by the public or by commissioners and need the support of 22 of the 37 commission members before they are placed on the 2018 ballot, where they would be approved if they secure the support of at least 60 percent of voters.

**Constitutional Changes**

*Rights*

An Ohio amendment expanding the rights of victims of crime was the only rights-related amendment on the 2017 ballot. The Ohio Constitution has included a victims’ rights provision since the passage of a victims’ rights amendment in that state in 1994, during a period in the 1980s and 1990s when victims’ rights amendments were approved on a regular basis across the country. In fact, 35 state constitutions now include victims’ rights provisions. However, in recent years, groups have sought to strengthen protection for victims’ rights by adopting what are known as Marsy’s Law provisions. California voters adopted the first Marsy’s Law amendment in 2008, followed by Illinois in 2014, and South Dakota, North Dakota, and Montana in 2016, although the Montana Supreme Court in a November 2017 ruling invalidated Montana’s victims’ rights amendment on the grounds that it violated the state constitution’s separate-vote requirement for enacting citizen-initiated amendments. Ohio voters' enactment of a citizen-initiated Marsy’s Law amendment in 2017 marks the latest effort to strengthen existing victims’ rights provisions.

*Institutions*

Several amendments enacted in 2017 dealt with the state judiciary, including a Texas amendment specifying procedures that state courts must follow when entertaining constitutional challenges to state laws. This amendment authorizes the Texas Legislature to require a court to notify the state attorney general when a constitutional challenge is brought against any state law and then to wait at least 45 days after notice is given before entering a final judgment declaring a law unconstitutional. The Texas Legislature adopted a similar notice-and-waiting-period measure in 2011, albeit as a statute, which the Texas Court of Criminal Appeals struck down as a violation of the state
constitution’s separation-of-powers principle. In response, the Legislature crafted a similar measure, albeit this time as a constitutional amendment in 2017, as a way to overcome the court’s objections and authorize such a requirement.

New York voters approved an amendment authorizing courts to revoke or reduce the public pension of any official convicted of a felony for actions related to his or her official duties. This amendment was prompted by several recent felony convictions of several state legislative leaders and was seen as necessary because the state constitution prohibits the impairing or diminishing of a public official’s pension. The 2017 amendment makes an exception to this general prohibition in cases where officials are convicted of a felony.

**Policies**

Amendments enacted in 2017 in Louisiana, Delaware and New Jersey offered the most recent examples of non-diversion amendments requiring revenue to be used for certain purposes. Lockbox amendments of this sort have been adopted on an increasing basis, often with the goal of requiring lottery revenue to be dedicated to education programs or stipulating that gas-tax revenue be spent only on transportation projects. Louisiana voters approved an amendment requiring that all revenue from any new gas tax that the Legislature might impose must be placed in a fund to be used only for transportation projects. In a similar fashion, a Delaware amendment requires that money in the state’s transportation trust fund be used only for transportation projects, unless a super-majority of the state legislature votes to permit use of the fund for other purposes. A New Jersey amendment creates a lockbox for revenue obtained through settlement of environmental contamination lawsuits; the money can only be used to protect natural resources or to pay legal costs incurred in filing environmental-contamination claims.

A number of amendments adopted in 2017 authorize actions otherwise barred by longstanding provisions limiting debt, requiring taxes to be imposed on a uniform basis, and banning lotteries. As a way of overcoming a constitutional limit on debt, a West Virginia amendment authorizes up to $1.6 billion in bonds over a four-year period to pay for road and bridge construction and maintenance.

Amendments in Louisiana, Texas and Pennsylvania authorize property-tax exemptions and thereby carve out exceptions to longstanding tax-uniformity provisions. For instance, amendments in Louisiana and Texas authorized property tax exemptions for the surviving spouse of an emergency responder killed in the line of duty. A Pennsylvania amendment authorized the Legislature to permit local governments to grant additional property-tax exemptions beyond what they were currently allowed to provide.

Two amendments in Texas authorize games of chance in the face of a longstanding prohibition on lotteries. One amendment allows credit unions and other financial institutions to hold promotional raffles. Another updates a two-year-old amendment that allows professional sports teams to hold charitable raffles by expanding the number and type of teams that can hold such raffles.

Amendments in 2017 also dealt with a range of additional matters, often by making exceptions to other longstanding prohibitions. For instance, a New York amendment made an adjustment to the state’s forest preserve constitutional provision, by allowing localities to use certain parts of this land for designated purposes such as building bike paths.

**Conclusion**

In looking ahead to constitutional amendments that have qualified for the 2018 ballot, it is evident that several matters that attracted interest in 2017 are likely to be of continuing interest. In terms of
individual rights, amendments extending the rights of victims of crime will appear on the Nevada and Oklahoma ballots in 2018. Voters in California and Connecticut will consider transportation lockbox amendments. Voters in Hawaii will vote on a convention referendum, which appears on the Hawaii ballot every 10 years.

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