

State Constitutional Developments in 2016

By John Dinan

Several state constitutional amendments on the ballot in 2016 attracted significant attention. Voters approved citizen-initiated amendments legalizing medical marijuana in Arkansas and Florida, boosting the minimum wage in Colorado, and extending an income tax hike on upper-income earners in California. Victims' rights were recognized through passage of amendments in Montana, North Dakota and South Dakota, as were hunting and fishing rights through passage of amendments in Kansas and Indiana. Colorado voters approved an amendment increasing the barriers to passage of future amendments, in part by adding a super-majority voter-ratification rule.

Constitutional amendments were proposed and adopted at a brisk pace in 2016 on topics ranging from individual rights to governing institutions to public policies. What stands out from a review of amendment activity this year is the high rate of voter approval of both legislature-referred and citizen-initiated amendments. Voters approved more than four-fifths of legislature-referred amendments, which is slightly above the usual rate, and two-thirds of citizen-initiated amendments, which is well above the norm.

Constitutional Amendment and Revision Methods

Constitutional amendments were proposed in 31 states in 2016. This is slightly lower than the number of states considering amendments in recent even-numbered years: 36 states in 2014, 35 states in 2012, and 37 states in 2010.

Voters approved 90 amendments in 2016, including two citizen-initiated amendments in

Nevada that still need to be approved by voters a second time before they can take effect. This is on par with the number of amendments approved in recent even-numbered years: 72 in 2014, 92 in 2012, and 116 in 2010.

Legislative Proposals and Constitutional Initiatives

All 90 amendments approved in 2016 were proposed by legislatures or via the initiative process. Legislatures in every state—except one—can propose amendments that must be ratified by voters. Delaware is the exception; amendments in Delaware take effect once they are approved by a super-majority legislative vote in consecutive sessions. In 2016, legislatures proposed 91 amendments and voters approved 74 of them, for an approval rate of 81.3 percent. This is slightly higher than the approval rate for legislature-referred amendments in recent years, as shown in Table A.

Table A: State Constitutional Changes by Method of Initiation: 2012–13, 2014–15 and 2016

Method of initiation	Number of states involved			Total proposals (a)			Total adopted (b)			Percentage adopted (c)		
	2012–2013	2014–2015	2016	2012–2013	2014–2015	2016	2012–2013	2014–2015	2016	2012–2013	2014–2015	2016
All methods	37	38	31	151 (d)	122	115	109	85	90 (e)	70.2	68.9	78.3 (e)
Legislative proposal ...	34	37	29	132	112	91	102	83	74	75.0	73.2	81.3
Constitutional												
initiative	7	8	10	19 (d)	10	24	7	2	16 (e)	36.8	20.0	66.7 (e)
convention.....	...	...	...	...	...	...	...	...	...	...	...	...
commission.....	...	...	...	...	...	...	...	...	...	...	...	...

Source: John Dinan and The Council of State Governments.

Key:

(a) Excludes Delaware, where proposals are not submitted to voters.

(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 and another in 2011 and then three in 2013 and one in 2015).

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

(e) Includes two Nevada amendments that were approved by voters but are not formally adopted until they are approved by voters a second time in 2018.

Table B: Substantive Changes in State Constitutions, Proposed and Adopted, 2012–13, 2014–15 and 2016

Subject matter	Total proposed (a)			Total adopted (b)			Percentage adopted (c)		
	2012–2013	2014–2015	2016	2012–2013	2014–2015	2016	2012–2013	2014–2015	2016
Proposals of statewide applicability	130 (a)(d)	116 (a)	89	92 (b)	79 (b)	67	68.5 (c)	67.2 (c)	75.3
Bill of Rights	20	15	11	13	13	7	65.0	86.7	63.6
Suffrage & elections	5 (a)	10	6	3 (b)	6	4	40.0 (c)	60.0	66.7
Legislative branch	11	6	9	7	3	9	63.6	50.0	100.0
Executive branch	4	6	2	4	4	2	100.0	66.7	100.0
Judicial branch	12 (a)	10 (a)	5	7 (b)	8 (b)	4	41.7 (c)	70.0 (c)	80.0
Local government	3	5	4	2	4	4	66.7	80.0	100.0
Finance & taxation	32	32	28	25	24	22	78.1	75.0	78.6
State & local debt	5	5	3	4	4	1	80.0	80.0	33.3
State functions	16	11	4	11	2	2	68.8	18.2	50.0
Amendment & revision	0	0	2	0	0	2	0.0	0.0	100.0
General revision proposals	0	0	0	0	0	0	0.0	0.0	0.0
Miscellaneous proposals	22	16	15	16	11	10	72.7	68.8	66.7
Local amendments	21	6	26	17	6	23	81.0	100.0	88.5

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 and another in 2011 and then three in 2013 and one in 2015).

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

Voters can initiate amendments in 18 states, generally without any legislative involvement. In 2016, voters considered 24 citizen-initiated amendments and approved 16 of them, for an approval rate of 66.7 percent. This is nearly twice as high as the approval rate for citizen-initiated amendments in recent years, as shown in Table A.

Constitutional Conventions and Commissions

No constitutional conventions were held in 2016. This marks three decades since the last full-scale state convention was held in Rhode Island in 1986, and nearly a quarter-century since the last state convention of any kind—a short-lived and unsuccessful 1992 Louisiana convention composed of legislators. However, in November 2017 voters in New York will consider an automatically generated referendum on whether to call a convention. New York is one of 14 states where convention referenda are placed on the ballot at periodic intervals, in this case every 20 years.

One constitutional commission was operating in 2016 in Ohio. Established by the Legislature in 2011 and charged with proposing amendments for consideration of the Legislature and possible submission to voters, the Ohio Constitutional Modernization Commission in 2016 focused on

studying and recommending changes in the debt provisions of the state constitution.

Another constitutional commission will begin operating in Florida in 2017. Since its adoption in 1968, the current Florida Constitution has required that a constitution revision commission be established every 20 years with the power to propose amendments that are submitted directly to voters for ratification. Florida is unique in this regard. No other state permits constitutional commissions to submit amendments directly to voters. In fact, Florida provides for two such commissions. In addition to the constitution revision commission that will convene in 2017–18, the Florida Constitution provides for a taxation and budget reform commission that also convenes every 20 years, most recently in 2007–08, and can submit budget-related amendments directly to voters for ratification.

Constitutional Changes

As is the norm, amendments regarding finance and taxation outpaced all other types of amendments in 2016 (Table B). Amendments regarding governing institutions, especially concerning state legislatures, were also considered on a regular basis in 2016. Still other amendments dealt with individual rights—whether adding, revising, or repealing provisions of state bills of rights.

Table C: State Constitutional Changes by Legislative and Initiative Proposal: 2016

State	Legislative proposal			Constitutional initiative		
	Number proposed	Number adopted	Percentage adopted	Number proposed	Number adopted	Percentage adopted
Alaska.....	1	0	0.0			
Arizona.....	2	2	100.0			
Arkansas.....	3	3	100.0	1	1	100.0
California.....	1	1	100.0	6	5	83.3
Colorado.....	2	0	0.0	4	2	50.0
Florida.....	3	3	100.0	2	1	50.0
Georgia.....	4	3	75.0			
Hawaii.....	2	1	50.0			
Idaho.....	1	1	100.0			
Illinois.....	1	1	100.0			
Indiana.....	1	1	100.0			
Kansas.....	1	1	100.0			
Louisiana.....	6	3	50.0			
Maryland.....	1	1	100.0			
Minnesota.....	1	1	100.0			
Missouri.....	1	1	100.0	2	2	100.0
Montana.....				1	1	100.0
Nevada.....				2	2 (a)	100.0
New Jersey.....	2	1	50.0			
New Mexico.....	1	1	100.0			
North Dakota.....	2	2	100.0	1	1	100.0
Oklahoma.....	4	2	50.0	1	0	0.0
Oregon.....	3	2	66.7			
Pennsylvania.....	2	2	100.0			
Rhode Island.....	1	1	100.0			
South Dakota.....	1	1	100.0	4	1	25.0
Utah.....	3	2	66.7			
Virginia.....	2	1	50.0			
Washington.....	1	1	100.0			
Wyoming.....	1	1	100.0			
Totals.....	91	74	81.3	24	16	66.7

Source: John Dinan and The Council of State Governments.

(a) These two Nevada amendments were approved by voters; but

they are not adopted until they are approved by voters a second time, in 2018, as is required of citizen-initiated amendments in Nevada.

Rights

Three states approved amendments guaranteeing the rights of crime victims, bringing the number of state constitutions with victims' rights provisions to 35. Most states with victims' rights provisions adopted them in the 1980s and 1990s. But after a period of time when amendment activity focused on strengthening existing victims' rights amendments, voters in 2016 approved three new victims' rights provisions: in Montana, North Dakota, and South Dakota.

Voters in Kansas and Indiana adopted amendments guaranteeing the right to hunt and fish, while voters in Oklahoma rejected an amendment protecting the right to farm. Hunting and fishing rights amendments have been adopted on a regular basis during the last two decades. Prior to the mid-1990s, the Vermont Constitution was

unique in protecting the right to hunt and fish. From 1996 to 2016 voters in 20 states approved hunting and fishing rights amendments, bringing the current number of state constitutions with such provisions to 21. In voting down a right-to-farm amendment, voters in Oklahoma declined to join North Dakota and Missouri, which approved such amendments in 2012 and 2014, respectively, and remain the only two states that protect the right to farm in their state constitutions.

Voters approved several amendments affecting rights of criminal defendants. New Mexico became the most recent state to approve an amendment permitting denial of bail in cases when releasing the defendant would pose a danger to public safety. Oklahoma voters approved an amendment to insulate the state's death penalty law, along with the method of carrying out

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the death penalty, from invalidation by the state supreme court on state constitutional grounds.

Voters rejected several other rights-related amendments. Oklahoma voters rejected an amendment that would have eliminated a Blaine-amendment provision found in the Oklahoma Constitution since its inception and found in some form in two-thirds of the state constitutions. Blaine amendments, which were adopted in many states in the late 19th and early 20th centuries, are even stricter than the Establishment Clause of the First Amendment to the U.S. Constitution in that they explicitly bar use of public funds to support religious institutions. After a 2015 Oklahoma Supreme Court ruling relied on a provision of the Oklahoma Constitution to require removal of a Ten Commandments monument from the state capitol grounds, the Legislature crafted an amendment that would have repealed this provision in its entirety. Voters rejected this repeal amendment.

Colorado voters narrowly rejected an amendment that would have eliminated a clause in the state's ban on slavery or involuntary servitude. The language targeted for elimination makes an exception similar to an exception in the 13th Amendment to the U.S. Constitution, for "punishment of crime, whereof the party shall have been duly convicted." Supporters of the failed amendment sought to repeal this language, which they considered to be outdated, but critics feared that eliminating this language would place in doubt various prison work and community service programs.

Institutions

Voters in Alabama and Colorado approved amendments making changes to their states' constitutional amendment processes. In Alabama, about 70 percent of the 926 amendments to the state constitution are local amendments that deal with counties and subdivisions. In some cases, local amendments appear on the statewide ballot. In other cases, they appear only on ballots in the affected localities. The amendment approved in 2016 by Alabama voters adjusts the procedure for determining when these local amendments are considered only by residents of the affected localities.¹

Colorado voters approved an amendment making several changes to the state's amendment process, by adding a geographic-distribution requirement for collecting signatures for citi-

zen-initiated amendments, and increasing the voter-approval threshold for all amendments. Colorado becomes the 10th of 18 states with a constitutional initiative procedure to adopt a geographic-distribution requirement, as shown in Table 1.3. Going forward, signature-gatherers in Colorado will not only have to obtain a total number of signatures equal to 5 percent of votes cast for secretary of state in the last election, but also obtain signatures equal to 2 percent of registered voters in each of the state's 35 senate districts.

Additionally, all future Colorado amendments, whether legislature-referred or citizen-initiated, must be approved by 55 percent of voters casting ballots on the amendment. One exception is that amendments repealing all or part of any constitutional provision only have to be approved by a majority of voters, which is the voter-approval threshold in most states. Colorado is the second state in the last decade to add a super majority voter approval requirement, following a 2006 Florida amendment that established a 60 percent requirement for approving most amendments.

Prior to approval of this multi-faceted 2016 amendment, Colorado was the only state that failed to distinguish between the difficulty of adopting constitutional initiatives and statutory initiatives. It was no more difficult to pass the former than the latter. A principal reason for adding a geographic distribution requirement for constitutional initiatives (but not for statutory initiatives) and increasing the voter-approval threshold for constitutional changes was to increase the probability that supporters of policy changes would proceed through the statutory initiative process, when possible, rather than via the constitutional initiative process.

Voters also considered amendments dealing with other aspects of elections and electoral processes. Missouri voters approved a citizen-initiated amendment that imposed limits on campaign contributions after the Legislature eliminated campaign finance restrictions adopted through a previously passed citizen-initiated statute. Placing these campaign finance limits on a constitutional basis was viewed as necessary to entrench them against legislative reversal. Missouri voters also approved an amendment authorizing the Legislature to impose a photo ID requirement for voting, as a way of insulating such a requirement against invalidation at the hands of the state supreme court, which invali-

dated a prior voter ID law on state constitutional grounds. South Dakota voters rejected a pair of election-related amendments. One would have created an independent redistricting commission. Another would have made all federal, state and county elections non-partisan except elections for president and vice president.

Voters approved various amendments intended to bring more transparency and accountability to the legislative process. A California amendment requires the Legislature to post bills on the internet 72 hours prior to taking a vote on them. A Minnesota amendment establishes a citizens' council to set legislators' salary and any salary increases. A Rhode Island amendment authorizes the state ethics commission to investigate legislators for actions taken as part of their legislative duties. A 2009 Rhode Island Supreme Court decision interpreted the "speech and debate" clause of the state constitution as immunizing legislative activities from the purview of the ethics commission; but noted that this understanding could be changed through passage of a constitutional amendment. The 2016 Rhode Island amendment responded to this court ruling by authorizing such investigations. Meanwhile, California voters approved an amendment permitting the Legislature by a two-third vote not only to suspend legislators, as was already possible, but also to withhold their salaries and benefits.

Other amendments approved in 2016 deal with the executive branch or interactions between the executive and legislative branches. An Idaho amendment authorizes the Legislature to overturn rules issued by administrative agencies. This is the most recent of a half dozen state constitutional amendments around the country authorizing the legislative veto, generally in response to state court decisions invalidating or casting doubt on the legitimacy of the practice. The Idaho Supreme Court is the rare example of a state supreme court that upheld the legitimacy of the legislative veto in a 1990 ruling, but by the barest of margins. With an eye to placing the legislative veto on sounder constitutional footing and insulating the device from future legal challenges, the Legislature crafted a 2014 amendment that was defeated at the polls, but then returned with a 2016 amendment that was approved.

In terms of other amendments with implications for the executive branch, one Alabama amendment updated the language of the state constitution's separation of powers provision,

while another Alabama amendment made various changes to the impeachment provision, including by stipulating that convictions require support from two-thirds of senators. A Maryland amendment requires that in the event of a vacancy in the office of attorney general or comptroller the governor's appointee must share the same party as the departing official.

Voters considered several judiciary-related amendments, including the latest in a string of amendments that would increase or eliminate the judicial retirement age. Pennsylvania voters approved an amendment raising the retirement age from 70 to 75. But Oregon voters defeated an amendment that would have eliminated the retirement age, currently set at 75. A Georgia amendment eliminated the existing judicial qualifications commission and authorized the legislature to establish a reconfigured commission.

Several amendments on the 2016 ballot dealt with the power of local governments, including an Alabama amendment that added slightly to the power of county commissions in areas such as transportation and litter control.

Policy

Marijuana legalization, whether for medical or recreational use, has often been achieved through the initiative process—generally through initiated statutes, but occasionally through initiated amendments. In 2016, voters in nine states considered citizen-initiated marijuana legalization measures and approved all but one (an Arizona measure). Two of the successful medical marijuana measures, in Arkansas and Florida, were framed as constitutional amendments. This was the second time in recent years that Florida voters considered such an amendment. After a similar amendment fell just short of the 60 percent voter approval in 2014, the 2016 amendment easily passed this threshold.

Minimum-wage increases have also been achieved in several states in recent years through the initiative process, occasionally through the constitutional initiative process. Of the four minimum wage increase measures on the 2016 ballot, all of which were approved, one measure in Colorado was framed as a constitutional amendment. A decade earlier, Colorado voters approved a citizen-initiated amendment increasing the minimum wage and calling for annual adjustments for inflation. The amendment approved by voters in 2016 requires additional

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increases so that the minimum wage will jump to \$12 by 2020.

Voters in two states considered right-to-work amendments in 2016 with an eye to entrench in the constitution policies already in place on a statutory basis. Alabama voters approved an amendment stipulating that workers cannot be required to join a union or pay union dues as a condition of employment. Voters in Virginia rejected a similar amendment.

A significant number of state ballots in 2016 featured budget and finance amendments, with some of these amendments dedicating revenue to certain purposes and others barring diversion of revenue for other than intended purposes. Voters in Oregon approved an amendment dedicating a portion of proceeds from the state lottery to veterans' services. North Dakota voters authorized a broader use of severance tax revenue for education than previously permitted. An Arizona amendment increased the annual distribution from a state land trust fund to benefit K–12 schools and colleges. A Hawaii amendment allowed excess revenue that would have been deposited in a state rainy day fund to be used for debt service or public pension liabilities. On the other hand, voters approved amendments barring diversion of gas and other transportation-related taxes (Illinois and New Jersey), state parks funds (Alabama) and fees paid by hospitals to support the Medicaid program (California).

Amendments have long been a vehicle for increasing taxes, limiting taxes and authorizing tax exemptions, and 2016 was no exception. Notably, California voters approved a citizen-initiated amendment that extended an income tax increase on upper income earners. This income tax hike, along with a separate sales tax hike, was originally adopted in 2012 through a citizen-initiated amendment championed by Gov. Jerry Brown. The income tax hike was set to expire in another two years; but the 2016 amendment extended it for another 12 years. California voters also approved an initiated measure that made both statutory and constitutional changes to increase the cigarette tax by \$2 per pack and dedicate most of the revenue to health care programs. Meanwhile, Colorado voters rejected a citizen-initiated amendment that would have increased the cigarette tax by \$1.75. Oklahoma voters turned back a citizen-initiated amendment that would have increased the sales tax by a penny to dedicate revenue for schools.

Other amendments that were approved in 2016 limit taxes or exempt certain persons or products from taxation. A Missouri amendment barred any new sales or use tax on services or transactions not taxed as of 2015. Voters approved amendments that granted property tax exemptions for spouses of first responders killed in the line of duty (Virginia), spouses of first responders or military personnel killed in the line of duty (Louisiana), senior citizens (Florida), and first responders (Florida). Voters in Florida approved an amendment authorizing a property tax exemption for solar or other renewable energy devices, while Nevada voters gave the first of two required approvals to a citizen-initiated amendment exempting medical equipment from sales and use taxes.

Other amendments in 2016 dealt with the purposes and procedures for incurring state debt. Arkansas voters approved an amendment eliminating a cap on the amount of outstanding debt. Alaska voters rejected an amendment that would have allowed the state to incur debt to fund loans for college students. California voters rejected an amendment that would have required voter approval for any revenue bonds authorizing more than \$2 billion for an infrastructure project.

Voters also considered and occasionally approved amendments on various other topics. Arizona voters approved an amendment authorizing the Legislature to restructure the public employee pension system, in part by allowing more use of defined contribution retirement plans, in the face of a constitutional provision barring any reduction in public employee retirement benefits. Rejected amendments include a citizen-initiated Colorado amendment that would have established a universal health care system paid for with \$25 billion in additional annual tax revenue, a New Jersey amendment that would have authorized two new casinos, and a Georgia amendment that would have authorized the Legislature to create an opportunity school district to take over failing schools.

Conclusion

Several conclusions about recent trends in state constitutional amendment activity can be drawn from a review of 2016 amendments. First, amendments continue to be a vehicle for recognizing rights with no counterpart in the U.S. Constitution, as highlighted by passage of crime victims' rights and hunting and fishing rights amendments in

multiple states. Second, amendments continue to be adopted on a regular basis to restructure governing institutions, with a concern in recent years for tweaking amendment processes themselves, generally by making amendment rules more stringent. Third, groups and officials continue to rely on amendments, particularly citizen-initiated amendments, to enact and entrench policies unattainable or insecure in legislatures, as illustrated by amendments legalizing marijuana, boosting the minimum wage, and limiting campaign contributions. Fourth, groups and officials continue to turn to amendments to overturn state court decisions or insulate outcomes from state court reversal, as seen with amendments authorizing capital punishment and voter ID requirements.

Notes

¹The amendment eliminates a Local Constitutional Amendment Commission that previously had a role, along with the legislature, in making this determination. In the future, the legislature will take an initial vote on whether to forward an amendment to voters and then hold a separate vote on whether the amendment applies only to a single county or subdivision. If a single legislator in either house dissents on the second vote, then the amendment will be placed on the state-wide ballot, where it must be approved by a majority of voters state-wide and also by a majority of voters in the affected locality. If there are no dissenting votes in the legislature, the amendment will only be considered by voters in the affected locality and deemed approved if it secures a majority of the vote in that locality.

About the Author

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