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Federalism and the Texas Constitution

Half the ballot items are ridiculous because they deal with doing away with a constable's position in Erath County or somewhere and the other half no one can understand because they involve bond financing or some arcane part of the Constitution that has to be fixed.

—Former Texas Senator Bill Ratliff, on the Inefficiencies of the Texas Constitution



As the 2013 legislative session opened, Democratic state representative Richard Pena Raymond launched a quixotic campaign as he introduced a constitutional amendment to require the Texas Legislature to do what their counterparts in 46 other states already do: meet in annual session. It would be a different approach for Texas, allowing the legislature to take up problems as they arise and to avoid the harried last days of the biennial legislative circus. The proposal was as dead on arrival as any single piece of legislation or proposed amendment introduced in 2013. Out of their mistrust of government, the men who crafted the current Texas constitution had deliberately limited the

2.1

Explain how state power is constrained by federalism and by the national and state constitutions.

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Analyze how the national government has gained power within the federalism equation.

2.3

Explain why state constitutions tend to be long and restrictive.

2.4

Differentiate among the first six constitutions of Texas.

2.5

Analyze how Texas's current constitution is partially a reaction to the previous Reconstruction-era document and partially a return to pre-Civil War policies.

2.6

Explain why those who benefit from the current constitution will work to make comprehensive reform difficult.



Lieutenant Governor David Dewhurst gaveling a special session of the Texas senate to a close. All but four states have annual legislative sessions, but the state constitution limits the legislature to one meeting every other year, and such special sessions that may be called by the governor.

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federalism

A constitutional sharing of powers between the national and state governments.

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frequency of legislative sessions because of their belief that the less frequently the legislature met, the less mischief in which they could engage. Many things have changed in Texas over the intervening 14 decades, but an underlying distrust of government remains.

When the delegates to the Texas Constitutional Convention convened in 1875, they had suffered through economic depression, military defeat, and a forced Reconstruction that many found humiliating and emasculating. The delegates wanted to return to a simpler time, when they controlled their lives and their destinies. This search for the familiar would lead them backward toward a framework that limited the power of the governor and the government. It was imperative, the delegates believed, to ensure that no public official ran roughshod over their rights again. In essence, they traded one form of shackle for another. In the process of severely restricting the power of government, they created a constitution that would be in perpetual amendment mode for a simple reason. In modern Texas, there are, from time to time, things that government needs to do or needs to do differently. And whether that something is significant or trivial, as the chapter-opening quote implies, that change often requires a constitutional amendment, and the strange dance among the Texas house, the Texas senate, and the voters begins. In this chapter, we consider the evolution of constitutional government in Texas. But we will start by examining the state's role in the federalist system under the United States Constitution.

Federalism

2.1

Explain how state power is constrained by federalism and by the national and state constitutions.

In the United States, states and the national government share power under a unique structure called **federalism**. Federalism is a dual system of government. Two systems operate concurrently, one at the national level and another within each of the states. Both levels have authority over their citizens, meaning that you have to obey the laws of both the United States and the state of Texas, as well as the ordinances of local governments, which are technically subdivisions of the state. Both the state and national governments have their own executive, judicial, and legislative branches. The president serves as the nation's chief executive; the governor holds the equivalent office in Texas. The U.S. House and U.S. Senate comprise the national Congress, while the state house and state senate serve as the Texas Legislature. The national government and the state each have their own court systems. The national court system considers alleged violations of national law and hears civil suits involving residents of different states. Texas courts handle state criminal matters and civil suits in which both parties are from Texas.

□ Federalism Applied

Federalism is one of the most confusing aspects of American government. Citizens often find it difficult to distinguish between national and state functions. Many people are only vaguely aware that legislators and members of Congress are not the same people. It doesn't help matters that the U.S. Congress and Texas Legislature often deal with the same basic issues, such as crime control and welfare policies.

Originally, the delineation of duties between the national and state governments was clearer. The national government dealt with problems of national importance. Military and foreign policy issues are, to this day, the primary responsibility of the U.S. government. Issues with a larger local impact, such as education and aid to the poor, have traditionally fallen under the control of the state. Although the national government has taken a significant role in setting standards for education, most decision making and funding come from the state and local levels. For all the campaign rhetoric about the importance of education that you hear from national candidates,

U.S. Constitutional Limits on State Power

Article I

Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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85 percent of funding for the Texas education system is generated within the state. It is not the same in social services. Most of what Texas spends on the poor comes from federal grant programs, with the national government setting minimum standards of service that the state must provide.

An important aspect of our American system of federalism is that the delineation of power—who does what—is set out in the U.S. Constitution. This is what makes federalism “federalism,” so to speak. In theory, the only way to alter that balance of power is to change the Constitution or have the U.S. Supreme Court change its interpretation of that document. In practice, the balance involves other factors, which we’ll discuss later.

Federalism is a departure from the more traditional unitary or central government, where power is concentrated at the national level. Under a centralized system, the national legislature can lend power to the local level, but it retains the authority to take this power back. Real power, then, never leaves the central government. That’s an important distinction. Under federalism, the U.S. government can’t wake up one day and do away with the state of Texas.

□ Constitutional Limits on States

In our system, many of the limits on states are found in Article I, Section 10 of the U.S. Constitution (see U.S. Constitutional Limits on State Power). States, for example, are prohibited from levying taxes on goods arriving from other states. A state may not enter into treaties on its own; neither may it engage in war independently unless it is attacked. States cannot issue money.

Article IV of the Constitution establishes how states must treat one another. For example, when an accused or convicted felon escapes from Texas to Oklahoma, Oklahoma is obligated to return the fugitive to Texas. Likewise, Texas must give full faith and credit to civil proceedings emanating from Oklahoma. A person cannot skip from state to state in order to avoid paying civil damages (see U.S. Constitutional Provisions Regarding Interstate Relations).

□ Shared Powers

Under federalism, many government powers are shared. Both states and the national government collect taxes. Both work jointly to implement many programs, such as

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constitution

The basic document under which a state or nation's government operates.

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U.S. Constitutional Provisions Regarding Interstate Relations

Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

social services. Long ago, the limited social assistance programs were administered almost exclusively by state and local governments. Beginning with the economic chaos of the Great Depression, the national government assumed a larger role in welfare policy. By the 1960s and 1970s, the national government had the primary role in social services. State governments still administer most aid programs, but the national government mandates minimum standards. Many of the programs are implemented by county governments, which are an administrative subdivision of the state.

The national government provides much of the money for social programs. In Texas, federal grants generate more than half of welfare spending. Education, transportation, and health care are programs administered concurrently by federal and state governments. We traditionally think of distinct divisions between national and state powers and responsibilities, but in practice there is much overlap and interaction.

□ Constitutions

The purpose of a **constitution** is to provide a framework in which government operates. It is, in essence, the blueprint for government. Ideally, it should specify which branch of government has what responsibilities. It should grant power to these

branches but also set limits on what government can do. An important ideal of the American system of government is that a constitution should establish a system of checks and balances that keeps any branch from possessing too much power.

Most Americans learn at an early age to value democratic ideals. Politicians repeatedly proclaim that their actions reflect “the will of the people.” In a pure representative democracy, the majority rules. Elected officials, in theory at least, carry the agenda of citizens forward to the legislature. The coalition that can form a majority on a particular issue will have its policy enacted.

However, we don’t live in a pure democracy. We live in a constitutional republic, where constitutional law is supreme, as are acts of Congress enacted under the constitution and treaties created in accordance with the national constitution. Laws created by either the U.S. Congress or the Texas Legislature that conflict with the U.S. Constitution can be struck down, despite what the majority might want. Texas cannot, for instance, place import taxes on goods coming in from Oklahoma. Portions of a state constitution are void if courts determine that they conflict with the U.S. Constitution.

The U.S. Constitution gives 18-year-olds the right to vote; therefore Texas could not set 21 as the voting age in state elections. Similarly, a state legislature is prohibited from enacting laws that violate its state constitution. Through a process called **judicial review**, courts determine when laws are unconstitutional. Both state and national courts can exercise this power, with the U.S. Supreme Court having the last say. In 2012, for example, the Court struck down large portions of Arizona’s anti-illegal immigration law because the act was preempted by existing federal law.

judicial review

The power of the courts to strike down laws that violate the state or national constitution.

amendments

Additions or deletions to the constitution; passed in a prescribed manner.

Bill of Rights

The portion of the Constitution limiting the government and empowering the individual.

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National Gains

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Analyze how the national government has gained power within the federalism equation.

Over the past 200 years, the balance of power has shifted significantly to the national government at the expense of the states. **Amendments** to the national constitution have played a role in this shift, but other factors have also had an impact.

□ Constitutional Amendments

Since passage of the **Bill of Rights**, which was aimed at limiting national government power, many constitutional amendments have restricted state action. After the Civil War, the Thirteenth and Fifteenth amendments ended slavery and gave African American males the right to vote. The Fourteenth Amendment required state governments to extend due process and equal protection under the law to all their citizens. Over the past five decades, the U.S. Supreme Court has used the Fourteenth Amendment to apply significant portions of the Bill of Rights to state governments as well. In 1989, the Court threw out the state’s conviction of Gregory Lee Johnson for burning the American flag, applying the First Amendment of the U.S. Constitution’s free speech clause. The Seventeenth Amendment stripped state legislatures of the power to appoint U.S. senators. The Nineteenth, Twenty-fourth, and Twenty-sixth amendments prohibited states from restricting voters’ rights. They respectively granted women the right to vote, ended poll taxes, and extended voting rights to 18- to 20-year-olds.

Without amending the Constitution, the national government has gained greater control over the states through its taxing and spending policies. The national budget exceeds \$3.8 trillion a year. A large part of that spending is returned to the states through various grant programs. About a third of Texas’s state budget comes from federal government sources.

It is important to understand that when the national government sends money to states, it comes with strings attached. The U.S. Constitution constrains Congress just as it constrains the states; limiting Congress to powers explicitly listed in Article I, Section 8 (see U.S. Congressional Powers). Congress, however, can get around this roadblock and compel the states to pass legislation by threatening to withhold federal grants.

Focusing on just one area of the budget, transportation, provides insight into the magnitude of the money and power involved. Approximately half of Texas highway funding comes from federal grants, totaling over \$3 billion in both 2012 and 2013. In order to receive all of that money, the state has to abide by a series of restrictions placed on it by Congress and the U.S. Department of Transportation. In the 1970s, states were required to set maximum speed limits at 55 miles per hour in order to receive highway funds. This particular restriction has since been lifted, but the precedent for congressional control remains.

In the 1980s, states were forced to raise the drinking age to 21 in order to receive federal money for transportation. Moreover, it was in connection with the drinking age provision—in *South Dakota v. Dole*—that the U.S. Supreme Court explicitly upheld Congress’s prerogative to withhold grant money, provided its direction was related to the “general welfare” of the nation. Later that decade, the Department of Transportation threatened to cut funds to states that did not adopt seat belt laws. Federal grants are available in most areas of state government spending, and similar restrictions affect almost every area of state government.

U.S. Congressional Powers

Article I

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads; To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; To constitute Tribunals inferior to the supreme Court; To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

It is equally important, when discussing these grants, to understand that this is “Texas money” in the first place. The federal government’s budget comes primarily from taxes on the income of individuals within the several states. In other words, Washington will give Texas *some* of its money back, but only if the state abides by its rules.

□ The Federal Courts

As a result of federal laws and the Fourteenth Amendment to the U.S. Constitution, federal courts often have jurisdiction in areas once completely under state control. Over the last few decades, Texas officials have found themselves constrained by federal court orders involving areas such as prison control, mental health and retardation services, higher education funding and minority recruitment programs, and school desegregation.

□ A Brief History of Federalism

From the beginning of the Republic through the 1920s, **dual federalism** defined the operation of the U.S. constitutional system. Under this interpretation, each level of government had its own sphere of influence, separate and distinct. States exercised great power in areas of local concern, which meant practically anything outside of national defense and trade policy. The end of dual federalism began with the advent of the Great Depression.

Citizens and politicians, desperate for economic relief, were unconcerned with philosophical questions over the nature of federalism. The problem seemed too large for states to solve independently, so power collected at and programs flowed from the national level. Under **cooperative federalism**, the role of the national government expanded significantly. Power that migrated to the national level during the depths of the Great Depression and World War II remained there after the crisis ended. Cooperative federalism was supposed to define an era under which national and state governments worked together in the administration and implementation of programs. Many state leaders, however, believed that more coercion than cooperation took place. The greatest expansion of national power, however, occurred in conjunction with President Lyndon Johnson’s Great Society programs in the mid-1960s. The national government found that it could compel state and local compliance with national wishes by threatening to withhold government grants.

The significance of this approach bears reiteration. The national government found a way to enforce policy it has no constitutional power to mandate. Relevant rule-making power is clearly reserved to the states in many of these policy arenas. Nonetheless, national grants make up at least a third of most state budgets. In order to receive grant money back from Washington, states must accede to the national government’s will. Often, the parameters have nothing to do with the purpose of the program. Rather, they are intended to achieve social goals deemed worthy by Washington. Proponents of national government intervention argue that the threat of sanctions has reduced discrimination, helped clean the air and water, and created a safer nation. Opponents paint the restrictions as a power play by the national government.

Several latter-day presidents, beginning with Richard Nixon, have claimed to favor a **new federalism**. Generally, new federalism entails a significant reduction in the use of categorical grants—which can only be used for narrowly defined purposes—opting for less restrictive block grants. During Ronald Reagan’s administration, these block grants were used more frequently and many of the regulations that went along with grants were eased. Nonetheless, the overall size and power of the national government continued to increase.

□ The “New” New Federalism

When the Republican Party took control of the U.S. House and Senate in 1995, members promised to reduce the scope of national government. Republican leaders

dual federalism

Well-defined divisions between national and state powers and responsibilities.

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cooperative federalism

Era of expanded national government power, mandates, and funding.

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new federalism

Greater discretion to state governments in the use of federal grants.

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devolution

The transfer of government programs from the national to the state level.

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argued that decision making should be returned to the states. However, the proponents of this “new” new federalism movement proved less than committed to substantive change. States regained some limited control. The rapid expansion of national government funding slowed, although it picked up again in the 21st century. **Devolution**, the transfer of programs from the national to the state level, occurred in some areas. Speed limits, for instance, are once again the responsibility of state governments. Federal grants may come with fewer strings attached, but the states pay for this freedom by having to pick up a larger share of many social service programs. On the other hand, restrictions may have just shifted. States that didn’t adopt federal blood-alcohol levels for driving while intoxicated lost some federal transportation funds, a policy backed by some of the same Republican members of Congress who decried national interference on the issue of speed limits. If we measure government by the size of its expenditures, it grew rapidly during the George W. Bush administration. Federal grants have grown in tandem with the larger federal budget, outpacing the federal budget during the early portion of the Barack Obama administration.

Over the last two decades, however, the U.S. Supreme Court has issued decisions that have limited the power of the national government. Two major decisions have breathed life back into the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not denied them by the national document. In *United States v. Lopez* (1995), the Court struck down a federal law that banned guns in the vicinity of schools. Congress argued that, because it can regulate interstate commerce, it had the power to pass the law. The Court rejected the argument, saying that if Congress is granted such a broad reading of the clause, “We are hard pressed to posit any activity by an individual that Congress is without power to regulate.” In 1997, the Court



Waiting to receive care at Houston’s Ben Taub Hospital, this patient is a symptom of the stresses placed upon an overburdened medical care system, exacerbated by the state’s large number of uninsured residents. Those without insurance often end up in the emergency room, at taxpayers’ expense, for issues that could have been treated much less expensively had they been dealt with earlier.

struck down a key provision of the Brady Bill, which required local law enforcement agencies to perform background checks on people attempting to purchase handguns. The Court ruled that Congress didn't have the power to force these governments to help administer this federal program. In the 2000 case of *United States v. Morrison*, a divided Court took a second step toward narrowing the commerce clause, striking down a law that would have allowed women who had been sexually assaulted to recover damages against the perpetrator in federal civil court. Congress had used the commerce clause to justify the act, reasoning that a hostile sexual environment could damage business opportunities for women. The Court struck down the law, finding again that such an expansive reading of "commerce" would give virtually limitless power to Congress. These rulings signal a willingness on the part of the U.S. Supreme Court to cap the national government's expansion of power. Some recent decisions, however, have not sided with state rights, as evidenced by the 2005 case of *Gonzales v. Raich*, which affirmed the Drug Enforcement Administration's authority to prosecute medicinal marijuana cases despite state laws allowing such use. Likewise, the 2012 Arizona immigration ruling limited state power, as did *Miller v. Alabama*, which struck down determinate sentencing requiring life sentences for first degree murders under the age of 18. Even the Court's decision on the health care reform act was a split decision for federalism, upholding a provision that allowed Congress to tax those without health insurance but prohibiting Congress from penalizing states that don't participate in Medicaid expansion.

The states have expressed frustration with national government **mandates**. The U.S. Congress often passes regulations that set standards for state conduct. For example, states, and the businesses that operate in them, are required to meet accessibility standards under the 1990 and 2008 Americans with Disabilities Act. Enlarging doorways, building additional wheelchair ramps, and making other such improvements cost state and local governments millions of dollars. Congress provided no money to help meet these requirements, making this an **unfunded mandate**. The national government has set such standards in areas ranging from voter registration to water quality and from hazardous waste disposal to asbestos removal. These mandates force state officials to spend funds they may wish to use elsewhere and so increase the tax burden on the state's citizens.

mandates

Regulations set by Congress that state and local government must meet.

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unfunded mandates

Congressional directives that are issued without corresponding federal funding.

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State Constitutions

2.3 Explain why state constitutions tend to be long and restrictive.

The U.S. Constitution is a model of brevity. At 8,500 words, it established not only the national government, but the federal system as well. State constitutions, on the other hand, tend to be lengthy. Thirty-three state constitutions exceed 20,000 words, and several others exceed 17,000. Alabama's constitution is the longest at 340,000 words. The Texas constitution contains almost 90,000 words.¹ See Table 2.1 for a comparison of selected state constitutions.

State Constitutional Structure

Most state constitutions are similar in structure. Separate articles empower the executive, legislative, and judicial branches. The legislative branch makes the laws, the executive branch carries out the laws, and the judicial branch determines the constitutionality of the laws and interprets them. Another article contains the state's Bill of Rights, which protects individuals from unreasonable government action. Most constitutions include a separate article detailing the powers of and limitations on local government.

legislative law

Law passed by the legislature.

TABLE 2.1 LENGTH AND EFFECTIVE DATE OF SELECT STATE CONSTITUTIONS

State	Effective Date	Number of Words
Alabama	1901	367,000
California	1879	67,048
Delaware	1897	125,445
Indiana	1851	11,476
Louisiana	1975	69,876
Kansas	1861	14,097
Maine	1820	16,313
Massachusetts	1780	45,283
Minnesota	1858	11,734
New York	1894	44,397
North Carolina	1971	17,116
Oklahoma	1907	81,666
Texas	1876	86,936
Vermont	1793	8565

Note: States that are in boldface are close to the national model for constitution length.

Source: *The Book of the States 2011* (Lexington, KY: Council of State Governments, 2011), p. 12.

Ideally, the state constitution serves as a blueprint from which government emerges. In other words, it answers the question, Who does what? Theoretically, the structure of government should be more difficult to change than the laws governing the day-to-day operations of government. In reality, though, most states blur constitutional law and **legislative law**—the bills passed by the legislature and enacted by the governor. Many constitutions include issues that go well beyond governmental structure. Most state constitutions include policy matters as well.

This mixing of constitutional law and legislative law is quite evident in the Texas constitution. Take, for instance, the cases of parimutuel gambling and the state lottery. Both are avenues through which the state profits from gambling. Neither parimutuel gambling nor the state lottery has a role in determining the government's framework, so ideally both should be dealt within the state's statutes. However, while a state law forbids horse racing, a constitutional provision bans a lottery. Legalizing betting on the horses took a simple majority vote in the House and Senate and approval from the governor. Authorizing the lottery required the much more difficult process of amending the state constitution. The same holds true for legalizing casino gambling: It would require a constitutional amendment.

Because state constitutions contain so many legislative provisions, they tend to be restrictive. There are exceptions. Vermont's constitution, which follows the national model, has only 8,565 words. It has been in effect for 220 years.² More often, these documents handcuff government, giving it little room in which to operate. Because of this restriction, the typical state constitution has been amended many times. Alabama holds the record. Adopted in 1901, its constitution had already been amended 854 times by 2011. California follows close behind, exceeding 500 amendments. Twenty-seven other states have more than 100 amendments. Texas is at the high end, being one of four states with more than 300 amendments. Contrast that with Vermont's constitution, amended just 54 times in the last 215 years,³ and the U.S. Constitution with 27 amendments, only 17 of which occurred after 1791.

Table 2.2 shows the great variance in the frequency of constitutional amendments. As already suggested, the U.S. Constitution has been amended the least frequently. Although the Texas document has been amended often, it pales in comparison to South Carolina, California, and Alabama. At the other extreme are Kentucky, Rhode Island, Vermont, and Delaware, which have averaged fewer than one amendment every two years.

TABLE 2.2 FREQUENCY OF CONSTITUTIONAL AMENDMENT IN SELECTED STATES

State	Total Amendments	Amendments Per Year*
Alabama	854	7.7
Arkansas	98	0.7
California	525	3.9
Delaware	141	1.2
Hawaii	110	1.8
Idaho	123	1.0
Kentucky	41	0.3
Massachusetts	120	0.5
Maine	171	0.9
Nebraska	228	1.7
New York	220	2.0
North Dakota	150	1.3
Rhode Island	10	0.4
South Carolina	497	4.3
Texas	467	3.5
Vermont	54	0.2
Wyoming	98	0.9
United States	27	0.1

*Number of amendments per year is derived from dividing the number of amendments adopted by the number of years the constitution has been in existence. The table includes all amendments passed through January 2011.

Note: The U.S. Constitution has been amended much less frequently than the average state document.

Source: *The Book of the States 2011* (Lexington, KY: Council of State Governments, 2011), p. 12.

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The Constitutions of Texas

2.4 Differentiate among the first six constitutions of Texas.

□ Coahuila y Tejas

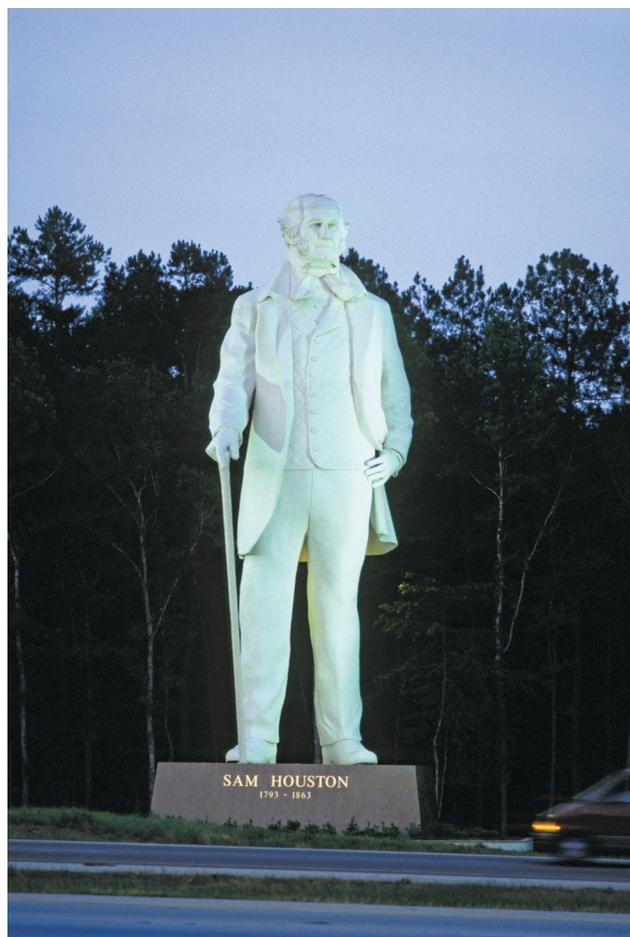
Texas has had seven constitutions; only Georgia and Louisiana have had more. The first of these, created in 1827, governed Texas while it was still a part of the Mexican Federation. Texas was joined with Coahuila as one state, although Coahuilan representatives dominated the legislature. Texans lobbied to have their own state within the Mexican Federation. This created tensions between Texas and Mexico. Texans twice asked Mexico for separate statehood, but Mexico denied both requests. To the Texans, it represented a simple request for self-government, understandable when viewed from their American background. To Mexico, the request was slightly short of treason. Their national constitution explicitly prohibited an area with such a small population from becoming its own state.

□ The 1836 Constitution

The 1836 constitution of the Republic of Texas emerged between the fall of the Alamo and Sam Houston's stunning victory at San Jacinto. The constitution was written quickly because it had to be. Delegates were fleeing in the face of Santa Anna's advancing troops.

The 1836 constitution generally followed the U.S. model. It created a house of representatives, a senate, and a president. Limits were placed on the president's term—he was not allowed to succeed himself. In an effort to reduce religious influences, the

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As this huge statute implies, Sam Houston is still a larger-than-life figure in Texas. He was president, governor and senator, despite having already served as governor of Tennessee before moving to Texas. Most significantly, he successfully won the Republic's revolution against Mexico.

constitution prohibited clergy from holding office. Slavery was legalized, and the head of each household was given a sizable land grant.⁴

□ The 1845 Constitution

After a decade-long struggle as a republic, Texas reached an annexation agreement with the United States at the end of 1845. No longer independent, Texas needed a state constitution.

The legislature retained a house and a senate to make state laws. A governor headed the executive branch. Term limits prohibited the heads of state from serving for more than four years of any six-year period. The governor appointed other executive officials, such as the attorney general and the secretary of state, but not the lieutenant governor, who was independently elected.⁵ The governor also appointed judges at the district court level and above. As in the current Texas constitution, limits were placed on the powers of government. State debt was severely restricted, and the legislature was scheduled to meet every other year. Slavery was permitted.

In a wave of “Jacksonian democracy,” selection of the attorney general, comptroller, treasurer, and judges was transferred to the voters through an 1850 amendment.⁶ Jacksonian democracy, based on the political philosophy of Andrew Jackson, asserts that power should reside with the people. As a result, citizens should elect, rather than have the governor appoint, as many government officials as possible.

□ The 1861 Constitution

Fifteen years after its successful struggle to become part of the United States, Texas seceded from the Union and became part of the Confederate States of America.

As a part of a new nation, the state needed another constitution. In reality, changes from the amended version of the 1845 constitution were not substantive; they merely acknowledged the state's place in the Confederacy. One provision did, however, forbid slaveholders from emancipating slaves without permission from the state government.

□ The 1866 Constitution

After the Confederacy lost the Civil War, Texas was forced back into the Union. As a conquered power, Texas was expected to write a new constitution making slavery illegal. In essence, though, the 1866 constitution was nothing more than an amended 1846 document.

The term of the elected executives was lengthened, and government officials received pay raises.⁷ The constitution denied African Americans the right to vote. Also, the newly freed slaves were not allowed to hold office or to testify in court unless African Americans were party to the case.⁸ Operating under this constitution, the new Texas Legislature further restricted the rights of African Americans through passage of a series of **Black Codes**. Such legislation limited job opportunities for and social interaction of the newly freed slaves. In effect, the Texas constitution and legislature had created a caste system in the state, under which African Americans were trapped in a limbo between freedom and servitude.

□ The 1869 Constitution

The U.S. Congress vehemently opposed the efforts of the former Confederate states to keep African Americans downtrodden. In March 1867, all Southern state governments were disbanded, and the former Confederacy was divided into five military districts. A new constitution that guaranteed African American suffrage had to be written in each state, and each had to ratify the Fourteenth Amendment to the U.S. Constitution.

Democrats were the predominant political party in Texas at the time, but members were so angered by the federal government's action that most boycotted the elections leading to creation of the new constitution. Therefore, Republicans, both Radical and moderate, dominated the 1868 Constitutional Convention. Many of the delegates were African American, as detailed in the Texas Mosaic on African American leaders. The Radicals and moderates divided over three main issues. The first was called *ab initio* and dealt with the question of whether all actions of the state government during the time of rebellion should be made null and void. Moderates, who would prevail, believed that only those actions taken in direct rebellion should be voided. The second issue was *division*. Texas's annexation agreement with the United States allows it to divide into up to five states at any time. Although there are serious constitutional questions about the viability of this provision, Radicals launched a plan to create the separate state of West Texas. Radicals knew that they could not compile an elective majority in Texas after the Democrats returned to the political process, so they figured they would create a state out west where there weren't many people, move the Radicals and their African American brethren there, and be able to control *that* state government. Obviously, the moderates won on that issue, too. **E. J. Davis**, a Radical who served as the convention chair, succeeded in his efforts to grant African American men the right to vote. The extension of voting rights was substantial. Although Davis had among his loyal supporters the freedmen, there is evidence that his concern for racial equality was genuine. On issues other than voting rights, though, Davis saw the convention slipping away from the Radicals. Rather than submit, the chair adjourned the convention. It was left to the state's military commander to mold the document into a workable constitution and submit it to the voters.

In 1869, the new state constitution was adopted by an overwhelming margin: 72,446 to 4,928. Progressive and modern, the document centralized much power in the hands of the governor. The state's chief executive had the power to appoint not

Black Codes

Post-Civil War laws restricting the freedom of African Americans.

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E. J. Davis

The Republican governor of Texas during the era of Reconstruction.

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Texas ★ Mosaic

Early Diversity in Texas: African Americans in 19th-Century Texas Politics

George Ruby was a carpetbagger, which simply means that he came South after the Civil War to seek his fortune. He came to Texas in the post-Civil War era to reconstruct the recently rebellious state and help the former slaves integrate into society. Ruby was a well-educated teacher from Maine who arrived with the occupying forces shortly after the war ended. On the way to New Orleans, Ruby had been denied first-class passage on a ship for one reason: He was African American. This blatant discrimination, a kind that he had not before encountered, was an experience he would never forget.

Ruby quickly became the dominant African American in Texas politics. Residing in Galveston, he became an active leader in both the Union League and the state's infant Republican Party. The party's leaders knew that they must reach out to the African American community in order to remain politically viable in Texas. As a result, the majority of the delegates to the party's first state convention in 1867 were African American. Ruby was named vice president of the convention.

If Anglo party leaders thought that Ruby would be content with a token position within the party, they were mistaken. Ruby effectively controlled the Galveston branch of the Union League by the fall of 1867. He used this power to win election as a delegate to the 1868 state constitutional convention. He campaigned for the convention with an unwavering promise to work for the protection of African American rights. A savvy politician, Ruby worked to keep his bloc of African American delegates positioned between the other factions, siding with whichever group best protected his interests on an issue-by-issue basis.

In June 1868, Ruby became president of the statewide Union League. The league had started as a secretive, white, pro-union organization at the beginning of Reconstruction. It aimed to galvanize the newly freed slaves behind the idea of unions. Having Ruby as its head was not what league founders had in mind, but Ruby was able to convince the African American delegates to oust the sitting white president and elect him instead.

Ruby's most important role in a busy 1868 involved splitting the state party into radical and moderate factions. The moderates controlled the regular state Republican convention. E. J. Davis led his Radicals out of the convention when it failed to address issues that he considered important. Davis knew that his band of white Radicals was not large enough to have an impact on state politics on its own. Ruby, who controlled a sizable African American faction, was the key to the Radicals' viability. When the Radicals convinced Ruby to side with them by adopting many of his pet issues, Texas in effect had two Republican parties.

Moderate Republicans, attempting to discredit Ruby, resorted to a campaign of character assassination. They accused him of taking a bribe. African Americans



George Ruby was a prominent African American Republican after the Civil War. He wielded significant power during Reconstruction-era Texas.

rallied around their leader, sensing a conspiracy. Ruby and the Radicals would back Davis in his bid for governor. Davis won a close race and rewarded those who had helped him with appointments to important offices. Davis's superintendent of schools, for instance, appointed Ruby and his protégé, Norris Wright Cuney, to the Galveston County school board. Ruby also served as a state senator during the Davis administration.

Ruby, whose time at the political forefront was coming to an end, would use his power to help Cuney ascend. With Ruby's aid, Cuney became chair of the executive committee of the National Labor Convention of the Working Men of Texas, a major African American interest group. Cuney, also an African American, was born in Texas. He was sent north prior to the Civil War to acquire an education. He later studied law in Galveston and, at the age of 26, served as a delegate to the Republican National Convention in 1872. Cuney would serve as a delegate to all Republican national conventions through 1892.

When Davis died in 1883, Cuney became chair of the state Republican Party. In 1886, Cuney would add the position of Republican National Committeeman to his resume after being elected by the African American majority at the party's state convention.

In the last two decades of the nineteenth century, the Republican Party in Texas was essentially a

patronage vessel: It dispensed federal jobs to loyal party members whenever Republicans controlled the White House. Outside of a few local positions, Republicans had no chance to win elections. Cuney exploited the patronage aspect in 1889 and obtained the position of customs collector in Galveston, a high-paying and prominent job.

By the end of the 1880s, white Republicans began a concerted effort to regain control of the party from African Americans. By organizing, they were able to control the party and garner nominations for their slate of statewide candidates in 1890. At the 1892 state convention, Cuney retained control for his faction by railroading the convention and running over the “lily white” Republicans. As a result, white Republicans held a separate “rump” convention and selected their own national delegates and gubernatorial ticket. At the national convention, Cuney’s delegation was seated, and he was elected to another four-year term on the Republican National Committee.

Cuney’s faction of the party chose not to run a gubernatorial ticket in 1892. In 1894, there were again two Republican state conventions. This time, each side

opted to run its own gubernatorial ticket. While the Democrats easily won the governor’s race, Cuney’s candidate outpolled the “lily white” candidate by a 10-to-1 margin.

By 1896, however, as a result of an intraparty battle over the Republican presidential nomination, Cuney found himself left out of the process because he had backed the wrong candidate. He was shut out of the national convention, lost his national committee position, and, finally, was ousted as party chair. He would be replaced by another African American, H. C. Ferguson, but the days of African American control of the state’s Republican Party were all but over.

Sources: Carl H. Moneyhon, *Republicanism in Reconstruction Texas* (Austin: University of Texas Press, 1980); Paul Douglas Casdorph, “Norris Wright Cuney and Texas Republican Politics, 1883–1896,” *Southwestern Historical Quarterly* 67(1963):68, 455–464.

1. How did Ruby increase African American power during Reconstruction?
2. What was the benefit of remaining Republican once the Democrats regained control of state politics?

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only the secretary of state and the attorney general, but judges as well. Looking toward the future, the convention created the Permanent School Fund, which earmarked money generated from public lands for education. Black men, as well as most white ex-Confederate males, were guaranteed the right to vote.⁹ The document provided a framework in which a strong government could operate. The factors that led to its relatively quick demise had more to do with the actions of Governor E. J. Davis, both real and attributed, than with the constitution itself.

After the constitutional convention, Davis was elected governor, winning a hotly contested race against A. J. Hamilton, a fellow Republican. Still slow to organize, the Democrats failed to field a candidate, although many eventually supported Hamilton as the lesser of two evils. Both sides claimed their opponent participated in fraud and intimidation during the election. Despite claims of corruption by the Hamilton backers, Davis might have won by a larger margin had African Americans been granted freer access to the polls. African American turnout actually dropped from the 1868 to the 1869 elections, due to intimidation in the registration and voting process.¹⁰

THE DAVIS ADMINISTRATION The Davis administration is infamous in Texas for its alleged abuses. Chief among the complaints was the governor’s implementation of the **Obnoxious Acts**, the name opposing Democrats gave to the cornerstone of Davis’s legislative agenda.

First, the governor and the Republican legislature created a state militia and a state police force. According to Texas legend, the purpose of these forces was to intimidate and harass poor white Texans. In reality, the organizations were formed to protect the frontier from Indian incursion, to stop the lynching of African Americans, and to halt the general lawlessness that engulfed Texas. The militia and police were generally effective at achieving their goals. Three factors, however, led to the negative perceptions held by generations of white Texans. First was the enormous cost of the endeavor. Second, the forces included African American militia and policemen. Anglo Texans were not thrilled with the prospect of armed former slaves patrolling the state.¹¹ Finally, Davis had forced the enacting bill through the legislature in a high-handed way. When some Senate opponents of the militia bill realized they didn’t have the votes to stop it through traditional methods, they skipped out on the session,

Obnoxious Acts

The derisive name given to the legislation included in E. J. Davis’s agenda.

Texas ★ Mosaic

Diversity of Thought: E. J. Davis

Edmond J. Davis, the Republican governor of Texas during Reconstruction, was one of the most controversial figures in Texas history. The son of an attorney, Davis arrived in Texas when he was 20 years of age. He served as a clerk at the Galveston post office while studying law. The next year, he was admitted to the bar in Corpus Christi. He used connections within the Democratic Party to secure a job as customs inspector in Laredo. Later, he was an elected Democratic district judge and, in 1857, a delegate to the Democratic state convention. Davis, a Union officer in the war, joined the Republican Party after the rebellion ended.

Davis's wife, Anne Elizabeth Britton Davis, was the daughter of Major Forbes Britton, a powerful Jacksonian Democrat who had served in both houses of the Texas Legislature. Lizzie was a strong, influential woman. She was a driving force behind her husband's political career and, no doubt, helped shape his political outlook. She considered his election as governor to be the first step toward the White House. While he was governor, she addressed the legislature, giving a speech for her husband almost 50 years before women were granted the vote in Texas.

Davis's Programs. Despite all the controversy surrounding his administration, Davis had a vision for Texas. He believed the state needed to educate its citizens. Toward that end, the governor and his legislative supporters created a centralized and free public education system. Such a program was costly and increased the state's debt. The centralization was so complete that the governor's patronage power actually extended to hiring teachers. School employees could therefore be counted upon for their loyalty to the governor.

Similarly, the state's railroad construction program, consisting partially of monetary grants to railroad companies, was expensive. Davis was a supporter of extending the rail lines and would ultimately be blamed for the debt incurred, but the legislation authorizing the monetary grants was passed over his veto. Davis favored land grants and other innovative enticements to the railroad companies.

After his term as governor, Davis did not fade quietly from the political scene. He controlled the state Republican



E. J. Davis was the last Republican governor of Texas for almost 100 years. A controversial figure, he receives less credit and more blame than he deserves. As the leader of the state during Reconstruction, he was certain to anger many of his contemporary Texans.

Party until his death in 1883. He made one last run for the governor's office in 1880, but captured less than 25 percent of the vote. In the end, he believed that the national party had abandoned the Republicans of Texas.

Sources: Carl H. Moneyhon, *Republicanism in Reconstruction Texas* (Austin: University of Texas Press, 1980); Ronald N. Gray, "Edmund J. Davis" (Ph.D. diss., Texas Tech University, 1976).

1. Why was Davis's education plan controversial?
2. Why did Davis switch parties?

thereby preventing a quorum. The governor had the missing senators arrested for contempt. The authorities returned only four of the nine absent senators to the chamber, achieving a quorum while at the same time holding opposition to a minimum, thus guaranteeing passage of the bill.¹²

Another of the Obnoxious Acts gave the governor broad power to fill vacancies created at the state or local level. Because readmittance to the Union resulted in the removal of many officeholders of questionable loyalty, Davis had the power to fill thousands of political offices. And with the consent of the United States Congress, he also postponed elections for state and congressional offices, thereby guaranteeing extended terms for Radical officeholders. You can read more on Davis in the Texas Mosaic detailing his career.

THE DEMOCRATS RETURN TO POWER The Democrats regained control of the legislature after the 1872 elections. They immediately began to dismantle the Radical programs. Davis went along with some changes, agreeing, for instance, to decentralize the school system. When he vetoed efforts to repeal portions of the “Obnoxious Acts,” Democrats found enough sympathetic Republicans to help override the vetoes.¹³

In late 1873, Davis lost his bid for reelection to Democrat Richard Coke. Some Republicans, citing an alleged technical discrepancy between the state constitution and the execution of the 1873 election, argued that the election was unconstitutional. Democrats believed that Davis, who had previously stated he would not contest the election, would use the controversy to stay in office. They demanded that the governor relinquish power immediately rather than wait until his term ended in April. The Democrats convened the legislature and inaugurated Coke as governor. Davis continued to serve in office as well. In January 1874, the Republican-controlled Texas supreme court sided with Davis, declaring the elections invalid.¹⁴

Davis asked for federal intervention, requesting that President Ulysses S. Grant send U.S. troops to Texas to help him keep order until the election matter could be resolved. Grant refused. On January 19, before his term officially ended, Davis resigned, determined to prevent violence, which he feared might occur should the impasse continue.

Grange

A populist farmers’ alliance influential in the creation of the 1876 constitution.

1876 constitution

The current Texas constitution, written after Reconstruction.

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The 1876 Constitution

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Analyze how Texas’s current constitution is partially a reaction to the previous Reconstruction-era document and partially a return to pre-Civil War policies.

Firmly in control of both the legislative and executive branches, the Democrats moved to consolidate power. As governor, Coke was not as enthusiastic as some other Texans to downgrade his office. The Democratic leadership in 1874 authored a series of amendments to the constitution that would have retained many governmental powers. The legislature would continue to meet each year. While state debt was limited, it was 10 times more than the debt allowed under the 1846 constitution. No ceiling was placed on state or local taxes; neither were there restrictions on the uses of state tax revenue. The governor’s term of four years was retained, as was the office of state superintendent of schools.¹⁵ While the proposed constitution differed from the 1869 document, it retained the basic tenet of centralized state power. The legislature failed to act on the proposal, however, and a constitutional convention became inevitable.

The convention changed the playing field. No longer would the process be controlled by party leaders. Instead, independently elected delegates would be free from leadership constraints. The most influential group, comprising a 38-member plurality of the 90-delegate convention, was the Texas **Grange**.¹⁶ Grangers were a populist farmers’ group whose members blamed their economic decline on railroad companies, Radical Republicans, and the newly freed slaves. They believed the government was spending too much money, and they sought to rein in state debt.

The easiest interpretation of the document produced by the 1875 convention is that it represented a simple backlash against Radical Republican rule and the perceived abuses of the Davis administration. Certainly, this was a major factor. In many vital ways, however, the **1876 constitution** would mirror the pre-Civil War document. Furthermore, the new document was in line with state constitutional development throughout the nation at the time.¹⁷ Other constitutions enacted during that period, even those created outside of the post-Reconstruction South, sought to limit government control.

The 1846 constitution had called for biennial legislative sessions, relatively low legislative salary, a two-year term limit for the governor, and six-year terms for an elected member of the Texas supreme court. It placed strict limits on state debt and prohibited state grants to banks or railroads.¹⁸ All these provisions reappeared in the

1876 document. The Grangers' insistence on a reduction of government power was at least partially aimed at the Democratic leadership in 1874–1875, because the 1876 constitution restricted the Democrats' power as well. Many Grangers were leery of the governor and other party leaders who pushed the 1874 revision attempt in the legislature, ignoring the traditional method of changing constitutions through the convention process. This action was viewed as an effort by those already in office to retain power for the government. The perception, of course, was correct.

LIMITS ON GOVERNMENT POWER The 1876 constitution aimed to restrict the power of the government. It did not seek to limit the executive branch alone; it limited all branches. The power of the legislature was restricted by the return to biennial sessions. The reasoning was simple: The less time the legislature was in session, the fewer opportunities it had to pass laws. The salary was low, encouraging members to limit service. Senate terms were cut from six years to four. Expense money dropped as the session went on so that legislators would finish their business quickly and go home. Any increase in legislative salary required a constitutional amendment, which required voter approval. The legislature was prohibited from calling itself into special session. By giving this responsibility exclusively to the governor, power was further dispersed.

The most significant limit on the legislature, though, was the balanced budget provision, which greatly restricted the state's ability to go into debt. This was certainly a reaction to the spending habits of the Radical Republicans. Limiting the amount of money available to the legislature limits its ability to enact programs. But it was nothing new for Texans, as it echoed similar stipulations in the 1846 document.

The governor's office was restricted through stripping his appointment powers. No longer could the governor appoint his cabinet. Rather, other executive heads, such as the attorney general, lieutenant governor, and comptroller, would be elected independently. Each executive officer would have his own constituency. His loyalty would be owed to those voters, not the governor. The governor's salary was reduced as well.

The size of the judicial branch was reduced as the number of district courts decreased. The term of judges was reduced, and they were chosen by popular election, not by appointment.

THE BILL OF RIGHTS One of the most significant portions of the 1876 Constitution was its long, detailed Bill of Rights. Texans wanted to ensure that individual liberties would never be trampled again, even if those liberties, as was the case in 1876, extended only to white males. Again, the Bill of Rights cannot be viewed entirely as a reaction to Reconstruction. Most of the key components of the 1876 document are derived directly from the 1846 constitution. Many provisions in the Bill of Rights date back to the 1836 Republic of Texas constitution.¹⁹

A state Bill of Rights is important for two reasons. First, the U.S. Bill of Rights does not explicitly extend protections to the relationship between a state and its citizens. It wasn't until the 1940s that the U.S. Supreme Court began applying most provisions of the U.S. Bill of Rights to state and local governments, almost 70 years after the Texas constitution was created. (See the Inside the Federalist System box.)

Second, while a state cannot give less protection to its citizens than is allowed through U.S. Supreme Court interpretations, it can give more. For instance, the effort to include an Equal Rights Amendment in the U.S. Constitution, which would have banned gender-based discrimination, was defeated in 1982. The Texas constitution, however, contains such a provision as a result of a 1972 amendment (art. 1, sec. 3a).

Whereas the national constitution's Bill of Rights contains only 10 provisions, the Texas Bill of Rights has 30. In addition to protections against unreasonable searches and seizures and double jeopardy, as well as guarantees of freedom of the press and freedom of speech, it also ensures that individuals will not be imprisoned for debt and that monopolies will not be allowed in the state. Texas may not deport a citizen from the state for any offense committed in Texas.

Two portions of the Bill of Rights seem most directly attributable to a reaction against Reconstruction. Article I, Section 1 says, "Texas is a free and independent state, subject

Inside the Federalist System

Texas and the Environmental Protection Agency

By its nature, federalism requires some level of cooperation between the national and state governments in a variety of circumstances, particularly those that are regulatory in nature. So while the national government sets most pollution standards, policy implementation has, at least until the Obama administration, been left primarily to the states. In two particular cases, and there have been several others, Texas officials believed that the Environmental Protection Agency (EPA) had so overstepped its bounds that Texas sued to stop federal action. One case involved federal takeover of the permitting process for plants that produce greenhouse gases, and the other concerned cross-state air pollution rules.

Both the state's governor and attorney general accused the EPA of overreaching. The *Wall Street Journal* went a step further, accusing the EPA of waging war on Texas after the agency stripped the state's own environmental board of the power to issue permits. The state of Texas sued the EPA, which was nothing new, as the state had ongoing lawsuits against the EPA on other matters. The EPA's justification for taking over permitting was that it suddenly found issue with a plan that had been submitted to the EPA for approval some 16 years earlier. The Fifth Circuit Court sided with Texas.

It found that the EPA's decision was "arbitrary and capricious."²⁰

Just a week later, the U.S. Court of Appeals for the District of Columbia struck down the EPA's Cross-State Air Pollution Rule, holding that the agency had violated the Clean Air Act, which requires that the national and state governments work together in setting clean air standards. Texas was one of several parties to the suit. Judge Brett Kavanaugh wrote, "Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable."²¹

What this means, from the perspective of federalism, is that the Texas Commission on Environmental Quality (TCEQ) has a role to play in setting environmental policy in the state. That in no way means that TCEQ has unfettered leeway in how it set standards. The Fifth Circuit decision remanded the case back to the EPA, meaning that the agency can still review state standards, but they must do so in a logical and consistent manner.

1. How much power should the states have in setting air quality standards?
2. Are there areas where the national government should have unlimited control? Why or why not?

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only to the Constitution of the United States."The language tries to create powers for Texas that were denied to it during Reconstruction. Its placement at the beginning of the Bill of Rights emphasizes its importance. The second item is a direct strike against Davis: It prohibits the use of state money for religious purposes. Its aim was to dismantle the education structure erected by the Republicans, which included state funding for parochial schools. Neither of these two provisions had appeared in previous Texas constitutions.²²

The Texas Bill of Rights extends many protections to those accused of crime. A person cannot be held without charges, has the right to confront accusers, and has a right to a trial by jury. Unlike some states, no person can be tried for a felony crime without first being charged by a grand jury. On the other hand, a 1989 amendment extended rights to crime victims, including the right to confer with a representative from the prosecutor's office and the right to restitution from the perpetrator.

Amending the Constitution

Amending the Texas constitution is a two-step process. First, both the house and the senate must approve the proposed amendment by at least a two-thirds vote. This is the most difficult step in the process because 51 house members or 11 senators can block an amendment. Even with today's Republican majorities, any amendment vote that divides along party lines will be defeated.

Ratification of amendments approved by the legislature requires majority approval from the voters. Most of the time, voters approve proposed amendments. From 1985 through 2009, Texans had the opportunity to vote on 227 amendments. All but 29 passed. In other words, 87 percent of all proposals that reached the voters were ratified. In 1987, when 25 amendments were offered, 8 were defeated (see Figure 2.1). In 2001, all 19 proposed amendments passed, as did all 22 in 2003, all 17 in 2007, and all 11 in 2009. In 2011, as the state's antigovernment sentiment was even more pronounced than usual, voters defeated 3 out of 10 proposed amendments.

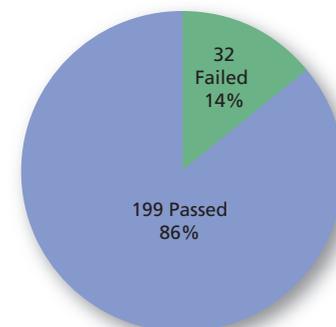


FIGURE 2.1 Proposed Constitutional Amendments, 1985–2012.

The overwhelming percentage of proposed amendments are passed by the voters.

The Texas Constitution

A Closer Look

The creators of the 1876 constitution wanted to restate their independence and distance themselves from Reconstruction policies. The first three sections of Article I illustrate this well.

Article I. Bill of Rights

Sec. 1. Freedom and Sovereignty of State. Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

Sec. 2. Inherent Political Power; Republican form of Government. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Sec. 3. Equal Rights. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

1. Why did the drafters believe it important to write that “Texas is a free and independent State”?
2. What did the drafters, who disliked the Republican Party, mean by ‘a republican form of government’? Why did they consider that their only limitation in regard to altering government?

The governor has no formal role in the amendment process. Informally, he or she can use the visibility of the office to campaign for or against an amendment. The governor’s support does not always help. In May 1993, Governor Ann Richards worked hard for passage of the “Robin Hood” school reform amendments, which would have redistributed money from property-rich school districts to poorer ones. The amendments went down to overwhelming defeats, foreshadowing Richards’s own ouster from office a year and a half later.

The Texas constitution had been amended 474 times as of 2012. In the same amount of time, only 12 amendments were added to the U.S. Constitution.

Constitutional Revision

2.6

Explain why those who benefit from the current constitution will work to make comprehensive reform difficult.

The Texas constitution of 1876 was written for a backward, agrarian, racist state recovering from the humiliation of a military defeat and subsequent Reconstruction. The 19th-century document did not provide for an efficient governmental system in the long term, especially with myriad amendments that have served to make the constitution even bulkier and more confusing. Numerous efforts have been made to revise or rewrite the Texas constitution. Most have failed completely. Voters have shown little interest in the process.

The document itself is a model of disarray. It contains sentences that seem to go on forever. One stretches to several hundred words. This particular instance of incompetence cannot be blamed on the Grange. It was part of an amendment allowing for the creation of the Dallas/Fort Worth International Airport.

A 1999 constitutional amendment eliminated three outdated passages. First, for purposes of privilege against arrest, the original document had assumed a legislator could only travel 20 miles a day (art. 3, sec. 14). Second, the governor had been allowed to call out the militia to “protect the frontier from hostile incursions by Indians” (art. 4, sec. 7). The legislature had specifically been granted the power to give “aid to indigent and disabled confederate soldiers and sailors” (art. 3, sec. 51). But many problems remain. Article III, Section 52 contains parts a, b, and d, but not c. The legislature was confused as to the numbering sequence when it submitted the amendment to the voters. In addition, Article VII has two section 16s: one dealing with terms of office in school systems, the other pertaining to taxation of university lands.

In 1969, several obsolete provisions, such as one dealing with Spanish and Mexican land titles, were removed. Instead of renumbering the document to reflect the changes, blank sections and articles now litter the constitution. Prior to a 1991 amendment, all bond issues approved by the voters became a permanent part of the Texas constitution. Although they go through the same process for approval, new issues do not clutter the constitution.

□ The 1974 Constitutional Convention

The last major attempt to revise the constitution occurred in the 1970s. During a period of dissatisfaction with government in general, Texas politics entered an era of reform. The legislature embarked on an effort to give the state a new governing document. A constitutional amendment, approved by the voters in 1972, called for the creation of a revision commission that would submit its recommendations to a constitutional convention scheduled for January 1974. The convention’s delegates were the elected members of the House and Senate, sitting as one body. In the wake of Watergate and the increasingly unpopular Vietnam War at the national level and the Sharpstown scandal at the state level, there was genuine hope for reform.

The revision committee produced a much shorter document, which would have drastically changed the structure of government in Texas. The proposal was only 17,500 words long. The revision would have required annual sessions of the legislature and provided for the appointment of judges.

After haggling over proposed changes from January to July 1974, the convention killed its own document. Needing two-thirds approval from the 181 members, the proposal fell three votes short. Had it succeeded, there is no guarantee that the voters would have approved the new constitution. A controversial right-to-work provision, which guaranteed that a Texan could not be required to join a union in order to get a job, contributed to the defeat. Representatives and senators from labor strongholds were pressured to vote against the document. School funding equalization, a topic that would dominate Texas’s political focus from the mid-1980s through the mid-1990s, was also a factor. Delegates from property-poor areas wanted more state money devoted to education. Nonetheless, a significant majority of delegates believed that the proposed constitution was better than the present one. In 1975, reconvened as the legislature, the House and Senate submitted it to the voters in the form of eight separate propositions.

With the vocal opposition of the governor, who claimed the new document could result in a state income tax, voters overwhelmingly defeated all the provisions, with none of the eight receiving 30 percent approval. Ironically, there was no clause in the 1876 constitution at that time that would have prevented an income tax. Since then, an amendment has been added that requires voter approval before such a tax can be levied.

□ Prospects for Revision

For 20 years after the collapse of the last major revision effort, no serious attempt to achieve reform emerged. Given the expenditure of time, energy, and money on the

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This 1974 Constitutional Convention was the last serious attempt at constitutional reform in Texas. Here, lieutenant governor William Hobby addresses the convention, which would ultimately fall three votes short of adopting a new governing document.

futile last effort, it is easy to understand why state leaders were not motivated to revisit the convention process.

There are major obstacles to revision. Any effort to change the constitution will garner opposition from groups that benefit from the way things are. The Republican Party, for instance, now confident of its ability to win statewide judicial races is likely to oppose any reform mandating judicial appointment. Likewise, the University of Texas and Texas A&M University systems, as well as their powerful alumni associations, would oppose a further division of the Permanent University Fund (PUF) revenue if they were forced to share with all public colleges and universities.

Those who would lose benefits under a new constitution are more committed to its defeat than those who might gain would be committed to its adoption. To the prospective winners under reform, promises of long-term benefit some time in the future are less tangible and less concrete. Furthermore, constitutional revision isn't a hot topic with most Texans. Families don't talk about it around the dinner table.

Many Texas political actors understand that the current constitution is ill suited for our era. Major newspapers have called for revision. Over a decade ago, Republican Senator Bill Ratliff and Democrat House Member Rob Junell collaborated on a proposed constitution that was less than a quarter of the length of the present document. It contained several significant changes for Texas government. Legislative terms would be lengthened, for instance, but terms would be limited. The governor would appoint a cabinet, including the agriculture and land commissioners, but the attorney

general and comptroller would still be elected. The biggest change would be in the judiciary. The highest civil and criminal courts would be combined. Judges at the district court level and above would initially be appointed by the governor, then subjected to periodic retention elections, where voters could give a thumbs-up or thumbs-down to their continued service. Their proposal died in committee, but such is the fate of most innovative ideas on their first introduction to the Texas Legislature. Since then, both Ratliff and Junell have retired from public office, depriving the movement of its leadership, and the makeup of the legislature is less hospitable to progressive reform.

In the near future, hopes for comprehensive constitutional reform are limited. It is difficult, time-consuming, and costly, and the political rewards are limited at best. If you achieve your goal, only people who write government books will remember your name. Your reward will be a better Texas, but you're likely to make more enemies than friends simply by making the attempt.

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Review the Chapter



Federalism

2.1 Explain how state power is constrained by federalism and by the national and state constitutions.

Federalism is the constitutional division of power among the national and state governments. State governments are limited by both the powers given to the national government and the authority denied to the states. In addition, the powers of individual state governments are limited by their own state constitutions.

National Gains

2.2 Analyze how the national government has gained power within the federalism equation.

The national government has gained power in the equation because of a number of constitutional amendments that limit state authority. In addition, the national government has gained because of an expansive reading of the interstate commerce clause and by the enormous power of the federal purse and the national government's ability to attach strings to federal grants.

State Constitutions

2.3 Explain why state constitutions tend to be long and restrictive

Long, restrictive state constitutions are intended to limit the power of government.

The Constitutions of Texas

2.4 Differentiate among the first six constitutions of Texas.

Texas's first constitution was created while it was still part of the Mexican Federation. In 1836, the Republic of Texas had

a national constitution. The 1845 document allowed Texas into the United States but was significantly amended in 1850. In 1861, Texas needed a new constitution as it joined the Confederate State of America, and another new one in 1866 to be readmitted to the Union. Congress, however, believed the state to be in de facto rebellion, so it dissolved the state government and ordered it to write a new document. The 1869 constitution both protected minority rights and centralized government power, granting extensive power to the governor and allowing the legislature to borrow money and incur debt.

The 1876 Constitution

2.5 Analyze how Texas's current constitution is partially a reaction to the previous Reconstruction-era document and partially a return to pre-Civil War policies.

Although the circumstances that led to the 1875 convention were a direct reaction to the 1869 constitution, the document that passed in 1876 provided the same basic governmental powers and restrictions that the amended 1845 document did.

Constitutional Revision

2.6 Explain why those who benefit from the current constitution will work to make comprehensive reform difficult.

Many groups benefit from provisions in the current constitution, benefits they may lose if the constitution is rewritten, The University of Texas and Texas A&M systems, for instance, share proceeds from the PUF fund with each other, but not with the rest of the state colleges and universities.

Learn the Terms



1876 constitution, p. 49

amendments, p. 37

Bill of Rights, p. 37

Black Codes, p. 45

constitution, p. 36

cooperative federalism, p. 39

devolution, p. 40

dual federalism, p. 39

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Obnoxious Acts, p. 47

unfunded mandates, p. 41

Test Yourself



Study and Review the Practice Tests

2.1 Explain how state power is constrained by federalism and by the national and state constitutions.

The most important component of the federalist system is the

- Supreme Court.
- Congress.
- Constitution.
- president.
- governor.

2.2 Analyze how the national government has gained power within the federalism equation.

Congress has greatly increased its control over states through

- taxes on state government.
- the judicious use of federal grants.
- the Civil Rights Act of 1964.
- veto power over state actions.
- treaties with other nations.

2.3 Explain why state constitutions tend to be long and restrictive.

Most states

- seldom amend their constitutions.
- cannot amend their constitutions.
- do not have formal constitutions.
- amend their constitutions more often than the national government.
- model their constitutions after the U. S. Constitution.

2.4 Differentiate among the first six constitutions of Texas.

Which Texas constitution was most closely modeled after the U.S. Constitution?

- 1836
- 1845
- 1861
- 1866
- 1869

2.5 Analyze how the current constitution is partially a reaction to the previous Reconstruction-era document and partially a return to pre-Civil War policies.

Which is true of the current Texas constitution?

- It is similar to the pre-Civil War constitution.
- It was adopted in 1975.
- It has been amended less than the U.S. Constitution.
- It carefully separates constitutional law from legislative law.
- Because of the Civil War, all amendments are subject to congressional approval.

2.6 Explain why those who benefit from the current constitution will work to make comprehensive reform difficult.

Which is true of the 1970s effort to revise the Texas constitution?

- The convention failed to meet because it lacked a quorum.
- The convention passed a new constitution, but it was rejected by the voters.
- The convention defeated the constitution, and voters rejected it when it was offered as a series of amendments.
- The convention defeated the constitution, but voters approved it after it was offered as a series of amendments.
- The governor courageously fought for the new constitution from the beginning to the end of the process.

Explore Further

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You can read the Texas Declaration of Independence at <http://www.lsjunction.com/docs/tdoi.htm>.

The resolution admitting Texas to the United States can be found at <http://www.lsjunction.com/docs/annex.htm>.

The Texas Ordinance of Secession is available at <http://www.lsjunction.com/docs/secession.htm>.