

# 2

## TEXAS CONSTITUTIONS

### CHAPTER OBJECTIVES

- 2.1 Describe the purpose of a constitution.
- 2.2 Define federalism and discuss the difficulties in sharing power between the state and national government.
- 2.3 Identify Spanish and Mexican influences on the current constitution.
- 2.4 Explain how Texas's current constitution reflects the preferences of Texans today.
- 2.5 Evaluate problems with the current Texas Constitution.
- 2.6 Analyze the extent to which Texas's current constitution is consistent with Texan values.

Few Texas myths are as resilient as the gun-toting cowboy riding the frontier. The image of the cowboy has taken on a larger-than-life place in Texas culture. Life on the frontier was difficult, and Texans had to provide for their own defense while they “pulled themselves up by their bootstraps.” The role of guns in settling the vast lands of Texas cannot be denied, but antebellum Texas was also one of the first states to criminalize the carrying of handguns and knives.<sup>1</sup> The current Texas Constitution adopted language that guarantees the right to bear arms but also asserts the state legislature’s ability to regulate that right. For over a century, Texans loved their guns; they also embraced the need to regulate them. If Texans’ love of guns has persisted, their state’s gun regulations have changed dramatically.

At the same time, U.S. society is reconsidering the role of guns as mass shootings become more common. Recent shootings at Southerland Springs Church in 2017, Santa Fe High School in 2018, and in El Paso and Midland-Odessa in 2019 generated debate among Texans about the appropriate response. Lawmakers wavered between changing Texas gun laws and hardening Texas schools. By the time an 18-year-old walked into Robb Elementary in Uvalde in 2022 and killed 21 people—19 of them children—Texas gun laws had become much more permissive. In the previous decade, Texas adopted open carry, campus carry, and permitless carry, creating some of the least restrictive gun laws in the country. The debate about gun laws represents both a struggle against Texas’s identity and a fundamentally federalist struggle. In 2019, for example, Texas passed the Second Amendment Sanctuary Bill, which expressly prohibits state and local governments from enforcing new federal gun laws.

Local governments may soon join the fray. On the heels of the Uvalde shooting, Austin lawmakers adopted a resolution to explore every option to restrict the sale of guns to Texans under the age of 21. However, the same month Texas’s capitol city discussed tightening gun laws, the Texas Republican Convention adopted a resolution to amend the state’s constitution and remove

the ability of the legislature to regulate guns. While the national government will likely rule the state's sanctuary bill unconstitutional, the state government will likewise overrule local laws.



Uvalde native Matthew McConaughey delivered an emotional press conference after the Uvalde school shooting.

Sipa USA / Alamy Stock Photo

Texans continue to identify with independent cowboys who resent the government intruding into their lives, even as Texas also embodies a modern state. Texas fundamental law and identity will continue to struggle to reflect both the tradition of the cowboy and the constantly changing state. This chapter explores the constitutional arrangement of federalism and the development of the Texas Constitution more generally. We will first identify the purpose of a constitution, paying particular attention to the federalist structure of the national government and how Texas fits into that structure. We will then consider how the Texas Constitution has evolved over time, reflecting our rich history and culture. Next, we examine the principles and institutions embodied in Texas's current constitution. Finally, we discuss the problems of the current constitution and examine the prospects for constitutional reform.

## CONSTITUTIONAL GOVERNMENT

### 2.1 Describe the purpose of a constitution.

The American founders created a government based on a written **constitution** that outlines the powers of government and specifies limitations on those powers. The ideal constitution is a brief and flexible document that broadly defines what the government can and cannot do. The government, in turn, works within the boundaries of the constitution as it goes about day-to-day operations. The legislature, for example, must pass laws that do not violate the basic principles

outlined in the constitution. The more fundamental the constitution's provisions, the less likely the need for it to be updated over time. Ideally, a constitution should protect individual rights while being flexible enough to remain relevant as society changes. The U.S. Constitution is considered an ideal constitution. It is a relatively short document, with only twenty-seven amendments. Written in 1776, it contains principles that are still considered central to America, such as freedom of the press, freedom of religion, and the right to due process.

Our country's founders believed that a constitutional government was necessary to prevent tyranny. James Madison wrote in *Federalist* No. 51,

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The U.S. founders, concerned with tyranny, set out to create a new form of government. The U.S. Constitution created several checks on tyranny by empowering different levels of government (federalism), dividing power among different branches of government (separation of powers), and creating a government based on the will of the people (popular sovereignty). Adopting a written document designed to limit government was revolutionary in the eighteenth century; today, written constitutions are the norm. Since her independence, Texas has followed the U.S. model and created government based on a written constitution.

The founders of Texas viewed the Texas Revolution through the same lens as the American Revolution. Mexico's president, Santa Anna, dissolved both the national Congress and state legislatures and suspended the 1824 constitution. Texans branded this tyranny and adopted the Texas Declaration of Independence. The Texas Constitution embraces many of the principals of the U.S. Constitution, including separation of powers, checks and balances, and popular sovereignty.

## THE FEDERAL SYSTEM OF THE UNITED STATES

**2.2** Define federalism and discuss the difficulties in sharing power between the state and national government.

One of the central questions a constitution resolves is where to put the power. Most governments in the world today vest power in the central government, called a **unitary system**. In a unitary system, lower units of government have only the power that is granted to them by the central government. Today, about 75 percent of governments are unitary, making this the most prevalent type of government in the world. Colonial America was an example of a unitary government. The colonies had relatively little influence on decisions made by the central government in London. One way the American Founding Fathers attempted to prevent tyranny was by rejecting a unitary system.

The United States' first constitution, the Articles of Confederation, created a "firm league of friendship" in which the states enjoyed decision-making authority. A **confederal system** puts power in the lower units of government. Within a few years, the confederacy proved impotent and struggled to quell an uprising by a relatively small group of farmers. The founders went back

to the drawing board and wrote our second, current, national constitution. A modern-day example of a confederacy is the United Nations (UN), where member countries can participate in various treaties, choose to opt out of other treaties, and withdraw from the UN at any time. The UN has only the powers that are expressly granted to it by its member countries. Today's UN, often referred to as inefficient and ineffective, endures the same criticisms as did the Articles of Confederation.

The founders, having experienced both a unitary and confederal government, created a new form of government known as **federalism** in which power is shared between the national and state governments. Dividing power among levels of government prevents the national government from imposing one-size-fits-all standards that may not make sense for a particular state or region. On the one hand, federalism allows states to experiment with new policies and permits flexibility as states pass laws that represent their distinct political cultures and preferences. On the other hand, federalism is a more expensive and messy form of government since different levels of government create policy for the same issue areas—at taxpayers' expense. The founders believed that checking tyranny was more important than the inefficiency that multiple levels of government create. Moreover, national intervention is often necessary to prevent majority rule from overwhelming minority rights. Historically, most minority rights have been realized only after federal intervention.

Sharing power between levels of government is easier said than done. The U.S. Constitution specifically grants the national government exclusive authority over coining money, establishing a navy, declaring war, and regulating interstate commerce, among other things. Many of those **enumerated powers** are listed in Article 1, Section 8 of the U.S. Constitution. In 1819, the Supreme Court ruled in *McCulloch v. Maryland* that the “necessary and proper clause” of the U.S. Constitution created **implied powers**. Thus, in addition to those powers specified in the Constitution, the national government was given broad discretionary powers to enact any law necessary and proper to carry out its enumerated powers. The U.S. Constitution also identifies explicit roles for the states, including conducting elections, selecting electors to the Electoral College, establishing voter qualifications, and approving constitutional amendments. Moreover, Article 1, Section 10 of the U.S. Constitution explicitly prohibits states from entering into treaties, coining money, or granting letters of marque or titles of nobility, among other things. Other powers, such as the power to tax and spend, to establish courts, or to charter banks, are **concurrent powers** shared by the national and state governments.

### Vertical Federalism

Although the founders generally believed that dividing powers among levels of government would be beneficial, the exact division of power within our federal system is unclear. **Vertical federalism**, or the distribution of power between the national government and the state governments, has been highly contested for much of our history. The difficulty in describing the federal nature of the U.S. government is best exemplified by juxtaposing the supremacy clause and the reserved powers clause of the U.S. Constitution. The **supremacy clause** guarantees that the national government is the supreme law of the land. Thus, the U.S. Constitution and laws created by the national Congress supersede state laws and state constitutions. States can make laws within their territory as long as those laws do not conflict with national laws or the U.S. Constitution. The Tenth Amendment, or **reserved powers** clause, however, declares that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This provision suggests powers not expressly written in the U.S. Constitution are reserved for the state governments. These

two constitutional clauses have generated opposing views of the division of powers between the national government and the state governments. The reserved powers clause seems to indicate a federal system in which considerable power is reserved for states, whereas the supremacy clause points to a government where most of the power rests with the national government.

### Horizontal Federalism

The U.S. Constitution also includes provisions designed to regulate the relations among states. **Horizontal federalism** refers to the relationship between states. The founders specified certain state obligations to other states, in part to create a sense of national unity among the states. For instance, a state is required to grant the same **privileges and immunities** to citizens of other states as it grants to its own citizens. This provision means that a state may not treat citizens of other states fundamentally differently than its own citizens. The privileges and immunities clause facilitates travel between states and discourages discrimination against citizens of other states. Exceptions to the privileges and immunities clause have been recognized in two cases.<sup>2</sup> First, states may deny the right to vote to nonresidents. Thus, the laws of one state cannot be unduly influenced by citizens from neighboring states. In addition, states may distinguish between residents and nonresidents in the distribution of certain state-subsidized benefits, such as in-state tuition rates or government assistance programs. This exception has been deemed reasonable since otherwise “individuals could benefit from subsidies without being subject to the taxes that pay the subsidies.”<sup>3</sup> The **full faith and credit clause** creates an additional obligation between states. States are required to recognize the acts, records, and judicial decisions of other states. This means that court judgments or legal contracts from one state will be honored by all other states. Thus, debt or child support payments cannot be avoided by moving to another state. Finally, the U.S. Constitution requires that states deliver someone suspected or convicted of a crime in another state back to the state where the crime is alleged to have occurred so the accused can face trial and sentencing. This process, known as **extradition**, was designed to keep criminals from escaping justice by moving from state to state.





### The Evolving Idea of Federalism

It is clear that America’s founders sought to produce a system of government in which powers are shared between two levels of government. It is considerably less clear exactly what that distribution of power was supposed to look like. The supremacy clause and the Tenth Amendment create competing views on how much power the national government should have. Those who focus on the supremacy clause view the national government as more powerful, whereas those who focus on the Tenth Amendment view the national government’s power as extremely limited. The resulting tension led to a theory of **dual federalism**, in which state powers and federal powers were separate and distinct. In practice, dual federalism meant the national government stayed out of policy areas viewed as the state’s domain. The nature of federalism changed during the Great Depression. Initially, Texans viewed the Depression as a problem for people in New York who gambled in the stock market. Texans supported Hoover for president in 1928. Texas farmers were somewhat insulated from the early years of the Depression. Before long, however, Texans were unable to deny the impact of the Great Depression. In the next four presidential elections, more than 80 percent of Texans voted for Roosevelt and his New Deal policies. As a result, the federal government developed policies in areas traditionally left to state governments, called **cooperative federalism**.



# HOW TEXAS GOVERNMENT WORKS

## The Federal System

	Legislature	Executive	Judiciary
<b>National Government</b>			
	U.S. Senate U.S. House of Representatives	President	U.S. Supreme Court Federal Circuit Courts Federal District Courts
<b>State Government</b>			
	Texas Senate Texas House of Representatives	Governor Lieutenant Governor Agriculture Commissioner Attorney General Comptroller Land Commissioner Secretary of State	Supreme Court of Texas Texas Court of Criminal Appeals Texas Appellate Courts Texas District Courts
<b>County Government</b>			
	County Commissioner's Court		Constitutional County Courts Statutory County Courts Statutory Probate Courts Justice of the Peace Courts
<b>City or Municipality Government</b>			
	City Council	Mayor City Manager	Municipal Courts

The shift to cooperative federalism removed the wall between federal and state policy areas. The Great Depression affected how much federal government Texans were willing to live with, if only temporarily. The change in how much government people wanted was accompanied by a significant increase in national resources with the creation of a national income tax in 1913. Since that time, Congress has used its financial might to create policy change in areas that had previously been managed by state governments. Use of financial incentives to encourage policies at the state or local level is referred to as **fiscal federalism**. Initially, the national government awarded categorical grants to state and local governments to encourage policy change. A **categorical grant** is money given to state and local governments that must be spent for specific activities. When the national government specifies how the money is to be spent, it can in

essence set national policy goals in traditionally state-controlled policy areas. States historically enjoyed policy control over issues such as police power, marriage, education, and election laws. Yet in the last half century, the national government passed laws mandating education and election standards, while Supreme Court decisions have created national criteria for policing and same-sex marriage.

Cooperative federalism eventually generated a backlash, in which proponents of state power advocated **devolution**, or the idea that power should be returned to the states. In response to this, Republican administrations favored converting categorical grants to **block grant** as a way to return policy control to the states. A block grant is money given to state and local governments for a broader purpose with fewer restrictions on how the states can spend the money. In the 1970s, President Richard Nixon reorganized existing categorical grants into block grants as a way to return power to the states.

Medicaid illustrates the national government's use of categorical grants to encourage policy goals. Medicaid was established to provide health care to the children of low-income families, the elderly, and individuals with disabilities, among others. As long as a state meets the guidelines set by the national government, it receives national funds that supplement state funds to cover the cost of the program. In 2020, Texas received about \$66 in federal matching funds for every \$34 it spent on Medicaid in the state.<sup>4</sup> Republicans have advocated for the national government to convert Medicaid into a block grant. This would continue the flow of money from the national government to the state without the current federal requirements. Proponents of changing Medicaid to a block grant argue that it would give states more flexibility as to how to spend the money and that the state governments could save money. Opponents worry that removing the requirements attached to Medicaid dollars would allow states to discontinue covering certain groups or medical services. While block grants are a popular means of reviving state power, they have been politically difficult to achieve. Members of Congress prefer to allocate money attached to specific policies, making it easier for them to take credit for the resulting goods provided to their home states.

Health care policy continues to be a battleground between states and the national government. In 2010, Congress passed the Affordable Care Act (ACA), which expanded Medicaid and subsidized health insurance for Americans in need. The ACA encouraged states to expand Medicaid by guaranteeing to reimburse states for the cost of the expansion. Although many of the provisions of the ACA remain popular, including coverage for preexisting conditions and the ability to keep kids on their parent's health care plan until they turn 26, the federal government coercing states into participating rankled most Texans. Texas is one of a handful of states that opted out of the Medicaid expansion. Then-Governor Rick Perry released a statement that promised "Texas leaders will continue to do everything in our power to fight this federal excess and find ways to protect our families, taxpayers and medical providers from this gross federal overreach."<sup>5</sup> From the beginning of the battle over the ACA, Perry described the bill as an encroachment on states' rights and "the largest unfunded mandate in American history."<sup>6</sup> Still, Texas leads the country in the number of uninsured people, and Texans value health care. The health care debate illuminates the tension between the long-standing distrust of the federal government and the growing desire for better health care. In 2017, a majority of Texans, 52 percent, supported repeal of the ACA, but 68 percent of Texans wanted the government to have a replacement ready before repealing the law.<sup>7</sup> A 2020 poll shows 46 percent of Texans favoring the current health care system and 41 percent favoring some form of national health care.<sup>8</sup>

Congress sometimes passes a law that requires state or local governments to implement policy without providing funding. An **unfunded mandate** occurs when the national government

passes legislation that imposes requirements on state and local governments that then bear the cost of meeting those requirements. Examples include requirements that all states, including Texas, ensure equal access to public facilities for disabled persons, guarantee civil rights, provide public assistance for single parents, and enforce clean air standards.<sup>9</sup> In each of these cases, the states and local governments must pay to meet guidelines imposed on them by the national government.

## FEDERALISM IN ACTION

### ABORTION

Abortion is one of the most controversial issues in American society. It is not surprising, then, that which level of government creates abortion policy is equally controversial. The national government nationalized a woman's right to an abortion in *Roe v. Wade* (1973) when the U.S. Supreme Court ruled that state laws prohibiting abortion violated a woman's right to privacy. The 1854 Texas law prohibited any person from procuring a miscarriage of any woman with child, punishable by confinement and hard labor. Since 1973, pro-life advocates have searched for ways to undo *Roe*. At the heart of the issue for pro-life supporters is the argument that all life is sacred. Pro-choice advocates argue that women should have control over their own bodies. Moreover, they contend that privacy rights must be protected at the national level to protect individuals who may face discrimination locally. Yet pro-life supporters argue that abortion is a states' rights issue. From this point of view, issues such as abortion that are not directly addressed in the U.S. Constitution are left to state governments, which should adopt policies that reflect their state's cultural preferences.

Supporters of states' rights realized a significant victory when the U.S. Supreme Court ruled in *Webster v. Reproductive Health Services* (1989) that states could place restrictions on abortion. Since then, Texas has attempted to limit or deny abortions by passing onerous and expensive requirements on facilities that provide them. In 2011, Texas passed a law that required a sonogram at least twenty-four hours before an abortion. The practical effect is that a woman traveling for an abortion has to pay for an additional night's accommodation. In 2013, the Texas Legislature passed House Bill (HB) 2, which, among other things, required that doctors who provide abortions have admitting privileges at nearby hospitals and that clinics that provide abortions meet the same standards as ambulatory surgical centers, which would require multimillion-dollar renovations for almost all providers. The effect of the law was immediate—nearly half the abortion providers in the state closed or stopped providing abortions. The affected clinics also provided basic health care, including contraception, sexually transmitted disease (STD) testing, and cancer screening. The closure of these clinics disproportionately affected rural and poor Texans. Texans who lived in the South and the West were hit particularly hard, as it could now take them more than five hours to drive to a clinic for medical care. The constitutionality of HB 2 was challenged in the courts, and eventually, the U.S. Supreme Court weighed in. In 2016's *Whole Woman's Health v. Hellerstedt*, the Court ruled that the law created an undue burden on a woman's right to an abortion. It specifically struck down the provisions of the law that required abortion buildings to meet the same standards as hospitals and the requirement that doctors have nearby hospital admitting privileges.

Governor Abbott criticized the Supreme Court ruling, stating that it "erodes states' law-making authority to safeguard the health and safety of women."<sup>i</sup> The effect of efforts to end abortions in Texas, however, had already been significant. Even as the number of abortions nationally decreased overall, Texas's abortions fell at an even greater rate. Abortions in Texas are down about 25 percent since the 2011 law went into effect.<sup>ii</sup> There is also evidence of a rise in sales of misoprostol, a drug sold over the counter in Mexico that is sometimes used to self-induce an abortion at home.<sup>iii</sup> It is also difficult to estimate the number of Texans



who travel to other states to access abortions. One doctor at a clinic in New Mexico estimates that more than half of her patients come from Texas.<sup>iv</sup> Recent research suggests the number of Texans traveling to nearby states for abortions has increased twelvefold while the number of Texans ordering abortion-inducing medication online has tripled.<sup>v</sup>

Even after the Supreme Court ruled the law unconstitutional, nearly all the clinics that had closed in Texas remain closed, making the wait time for abortions much longer, which has resulted in an increase in second-trimester abortions.<sup>vi</sup>

In 2021, the Texas legislature passed two laws further restricting abortion. The first, attempted to circumvent *Roe* by creating a civil law and empowering private citizens to sue anyone who facilitates obtaining an abortion, from the doctor to an Uber driver, for \$10,000 plus legal fees. The second law would be triggered if the Supreme Court overturned *Roe*. Texas's trigger law made providing an abortion a felony with a fine of at least \$100,000. In a 5–4 decision, the U.S. Supreme Court overturned *Roe v. Wade* in June 2022. When *Roe* was overturned, the trigger law went into effect. In addition, Texas's previous abortion laws were once again in effect, along with Texas's new civil law.

Although technically the criminal laws allow for abortion if the mother's life is endangered, the sum total of Texas's laws are not that clear. When Elizabeth Weller's water broke at 18 weeks, doctors informed her that her pregnancy was not viable. The Wellers wanted to be able to try again in the future and worried about the threat of infection. For the next week, Elizabeth would deal with cramps, blood clots, and discharge; her doctors told her it was not yet bad enough to qualify as a medical emergency. The new abortion laws in Texas created significant uncertainty in how to proceed. Texas's old law made exceptions for a mother's life, but now, in 2021, the doctors had to navigate both criminal and civil laws. It is uncertain who determines when a mother's life is endangered. In the case of Elizabeth Weller, Houston Methodist Hospital assembled an ethics panel to deliberate. Eventually, after a week of severe symptoms, the panel agreed that her pregnancy could be induced; her child was stillborn.

In the post-*Roe* world, Texans want the issue to be black and white; for many pregnancies, there remains considerable gray area, and Texans continue to be divided on the issue. Twenty-four percent of Texans think abortion should be legal in all cases, and another 35 percent support legal abortion in most cases. On the opposite side, 35 percent of Texans think abortion should be illegal in most cases, while another 12 percent oppose legal abortion in all cases.<sup>vii</sup>



Texans protest the Supreme Court's decision to overturn *Roe v. Wade* in Austin, Texas.

Bob Daemrich / Alamy Stock Photo

In drafting restrictions against abortion, should the Texas Legislature have a responsibility to consider the impact of the legislation on women's access to other services offered at these facilities? **Social Responsibility**

Should abortion laws reflect the preferences of most Texans? **Critical Thinking**

<sup>i</sup> Jasleen Shokar, "Texans React to Supreme Court Ruling against Abortion Restrictions in HB 2," *Daily Texan*, June 27, 2016, <https://thedaytexan.com/2016/06/27/texans-react-to-supreme-court-ruling-against-abortion-restrictions-in-hb-2>.

<sup>ii</sup> "Vital Statistics Annual Report" for 2011, 2012, 2013, 2014, and 2015, Texas Department of State Health Services, <https://www.dshs.texas.gov/chs/vstat/annrpts.shtm>.

<sup>iii</sup> Erica Hellerstein, "The Rise of the DIY Abortion in Texas: A Pill That Revolutionized Reproductive Rights in Latin America Is Now Gaining Ground on the Black Market in South Texas," *Atlantic*, June 27, 2014, [www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240](http://www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240).

<sup>iv</sup> Abby Goodnough, "Texas Abortion Law Has Women Waiting Longer and Paying More," *New York Times*, March 18, 2016, <https://www.nytimes.com/2016/03/20/us/women-cite-longer-wait-and-higher-costs-for-abortions-in-texas.html>.

<sup>v</sup> Margot Sanger-Katz, Claire Cain Miller, and Quoc Trung Bui, "Most Women Denied Abortions by Texas Law Got Them Another Way," *New York Times*, March 6, 2022, <https://www.nytimes.com/2022/03/06/upshot/texas-abortion-women-data.html>.

<sup>vi</sup> Goodnough, "Texas Abortion Law."

<sup>vii</sup> Quinnipiac University Poll, "Texas Governor's Race Tightens in Wake of School Mass Shooting, Quinnipiac University Texas Poll Finds; 61% of Parents Concerned There Will Be a Shooting at Their Child's School," June 15, 2022, <https://poll.qu.edu/poll-release?releaseid=3849>, accessed June 17, 2022.

Today, the United States continues to grapple with exactly which powers belong to the national government and which should be reserved for the states. The push for respecting differing state preferences competes with the pull for the efficiency and uniformity offered by national policy. Proponents of a federal system that vests more power in the national government point to issues such as slavery and civil rights that did not improve until the national government intervened. On the other hand, Texans prefer to be masters of their own destiny, which has historically meant a preference for more local control. Negotiating these competing views continues to be a source of conflict within the United States—one that is not easily resolved. There remains a very real trade-off between respect for minority rights, which historically required national intervention, and respect for cultural preferences that might create a wide variance among state laws. For its part, Texas continues to fight the national government for the right to do as it pleases. Sometimes that fight is to simply ignore a federal mandate; often, that fight is played out in the federal courts. Even when Texas loses a battle, it often leaves its preferred policy on the books as a form of passive protest. Note, for instance, that Texas has not removed language from the constitution requiring public officials to believe in a "Supreme Being," nor has it removed the amendment defining marriage as only between a man and a woman. Similarly, a law outlawing sodomy, overturned by the U.S. Supreme Court in 2003, remains on the books in Texas.

### State–Local Power

Our discussion of federalism has focused on the division of power between the national government and state governments. In Texas today, there is also a struggle for power between the

state government and local governments. Frontier Texans didn't have much government to rely on and viewed government policies as more hindrance than help. If Texas needed government, they preferred local empresarios to the central government in Mexico. When the current constitution was written, Texans believed that government was best in the hands of the people; short of that, they favored local government. The relationship between Texas state government and local governments is defined by both the U.S. government and the Texas constitution. The U.S. Supreme Court upheld **Dillon's Rule** in 1907, which decrees that all local governments are creations of state governments and have only those powers granted to them by the state. This suggests a unitary relationship between state and local governments; city and county governments have only the power granted to them by their states. Texas local governments have decision-making authority to the extent that the state permits it. The federal government recognizes no independent authority below state governments. Texas's constitution reflects a clear preference for local control in Article 1, Section 1, which states that "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." Moreover, Article 3, Section 56 of the current constitution prohibits the state legislature from "regulating the affairs of counties, cities, towns, wards or school districts." However, in 1912, Texas further clarified this relationship when it amended its constitution to allow larger cities to be designated **home rule cities**. Home rule cities are given greater latitude to decide how their government is set up and to pass local ordinances (see full discussion of local governments in Chapter 11). That amendment included language that home rule cities could not pass any ordinances that were not consistent with the state constitution and with laws passed by the legislature.

Over time, the trend has been for the national government to encroach on state power; similarly, Texas state government has infringed on local control. State officials have been walking the precarious tightrope of telling the national government to stay out of Texans' lives while simultaneously becoming more willing to override local decisions. This fundamental change has occurred quietly—and swiftly—in almost all areas of policy. The Texas Legislature has begun to centralize a wide range of policies that once were left to local governments. In recent legislative sessions, the state government has overturned local laws on everything from tree removal to ride-sharing to minimum wage. Lieutenant Governor Dan Patrick spent most of the 85th legislative session trying to pass a bill that would override local school board policies on transgender bathrooms. In one of the clearest expressions of local preferences, Denton citizens voted to ban fracking within city limits in 2014. Other cities also adopted various ordinances limiting fracking. When the state's legislature met the following year, it passed a law that prohibited local governments from banning fracking. The argument that Texans know what is best for themselves also took a sharp turn. In 2017, Governor Abbott began to call for a statewide law that preempts all local regulations, arguing that a patchwork of local ordinances will make it more difficult for Texas to attract businesses. While the state has not passed a law preempting all local regulations, the state has increased its efforts to erode local power. Among Abbott's first targets were eleven cities that had banned plastic bags. Abbott maintained that this was the kind of regulation that would discourage businesses. Bennett Sandlin, representing the Texas Municipal League, pointed out that the plastic bag ban illustrates the benefits of local control. Plastic bags were banned in Laredo, where ranchers complained that they were ending up in cattle feed and killing livestock, and in South Padre, where the concern was for marine life.<sup>10</sup> Recently, a



**MAP 2.1 ■ The Republic of Texas**

Both Texas and Mexico claimed the Northern and Western Territory.



North Wind Picture Archives / Alamy Stock Photo

wide range of local ordinances, from minimum wage to lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA) rights and ride-share service regulations, has come under attack from the state. As governor, Abbott has moved to centralize power in the state and invalidate local regulations.

The move to centralize power at the state level has drawn criticism from local officials and longtime Republicans. Then-Texas House Speaker Joe Straus noted, “I don’t think a blanket policy on exerting power from Austin over locals is a particularly attractive idea.”<sup>11</sup> A more pointed objection was made by the Texas Municipal League, which suggested that “74 percent of

Texans live in our 1,215 towns and cities, and the decisions they have made at the local level have put Texas cities at the top of the nation in success. Stifling their voices through an all-powerful, overreaching state government is a recipe for disaster.”<sup>12</sup>

How power is distributed between levels of government has real implications for how we are governed and how we live. The tension between state policy and local control again came to a head as Texas grappled with how best to respond to COVID-19. The governor’s stay-at-home order was met with backlash in some cities and viewed as inadequate in others. The governor initially wavered between a state response and allowing local governments to craft their own responses, and citizens were left wondering what was required and who was in charge. Texans have long believed that they don’t need government to tell them what is best. Today’s Texans grapple with how much power they want at the local level and how much at the state level. One of the most fundamental questions about government arrangements is where power is vested. The preference for local rule balanced against the efficiency of state power dominates current debates in both the state legislature and the governor’s mansion.

## TEXAS CONSTITUTIONS

### 2.3 Identify Spanish and Mexican influences on the current constitution.

For almost three centuries, Texas was part of the Spanish Empire, its population was relatively sparse, and no written constitution existed. This period of Spanish rule left an indelible mark on Texas law. In contrast to English common law, Spanish law provided for property rights for women, including the right to hold property, the right to half of all property accumulated during a marriage, and the right to manage their own financial affairs.<sup>13</sup> In addition, Spanish law traditionally protected a debtor’s home and farming equipment from seizure for repayment of debt, and this protection has persisted throughout Texas’s constitutions under the homestead provisions.

Under Mexican rule, Texas, as part of the state of Coahuila y Tejas, experienced its first federal constitution when the 1827 Constitution of Coahuila y Tejas divided the state into three districts and created a unicameral legislature. Texans were always somewhat frustrated by their limited voice in the Mexican government, and most felt underrepresented in the state. Although they largely comprised the district of Bexar, Texans held only two of the state’s twelve legislative seats. Anglo-Texans also resented certain aspects of Mexican rule, in particular the use of the Spanish language for official state business and the establishment of Catholicism as a state religion. Officially, Texans were required to join the Catholic Church. As a result of these circumstances, Texans generally distrusted the central Mexican government and favored local rule.

As more Anglos moved to Texas for access to cheap land, Mexico became increasingly worried about its ability to control the region. The Mexican government responded by attempting to ban further immigration from the United States. While the central Mexican government saw further Anglo immigration as a threat to its control over the region, Anglo-Texans saw attempts to stop such immigration as a threat to their continued existence and began to favor a separate Texas state. The central government, which had long looked the other way as Texans brought enslaved persons into the region, also moved to outlaw all forms of slavery.<sup>14</sup> However, it was a change in tactics by Mexican president Antonio López de Santa Anna that made independence



from Mexico inevitable. President Santa Anna, originally popular in Texas because of his commitment to federalism, abolished the Mexican Constitution and moved to centralize power.<sup>15</sup> When the Mexican Army arrived in the town of Gonzales in the fall of 1835 to collect a cannon it had loaned the town, Texans attached a flag with the words “Come and Take It” to the cannon. The clash in Gonzales marked the point of no return.<sup>16</sup> Texans—Anglos and Tejanos alike—moved to fight for independence from Mexico. After several months of fighting, including the ill-fated battle of the Alamo, Texans finally turned the tides of the revolution at San Jacinto. On April 21, 1836, Texans defeated Santa Anna at the Battle of San Jacinto, and both sides signed the Treaties of Velasco, which granted Texas its independence.

### Immigration Rights

When Texans declared independence from Mexico, they brought up a lengthy list of complaints, including unfairness in the judiciary, a lack of adequate political representation, and the imposition of a state religion. Anglo-Texans were frustrated with Mexican laws that seemed to ignore their preferences. Texas was given only two seats in the legislature, and the Mexican judicial system often seemed to disregard the struggles of the new settlers. Still, much of Texans’ frustration with Mexico was that Mexico simply didn’t represent the cultural preferences of its Anglo settlers. Immigration issues were high among the grievances that fueled Texans’ desire to separate from Mexico. Texas under Mexico depended on immigration for the security of the sparsely populated state and initially encouraged immigration from both America and Europe. Under Spain and during the early years of Mexican rule, immigration laws were quite open. However, as Anglos began to outnumber Tejanos in the eastern part of the state, Mexican authorities became increasingly concerned about the growing influence of Anglos in Texas. Eventually, Mexico outlawed immigration from the United States with the Law of April 6, 1830, although a significant number of Americans continued to enter Texas illegally.<sup>17</sup>

Anglo immigrants to Texas under Mexico complained about their inability to understand the laws written in Spanish. Stephen F. Austin, in an attempt to avoid revolution, wrote to the Mexican government in 1833 that “with only two measures Texas would be satisfied, judges who understand English . . . and trial by jury.”<sup>18</sup> Texans would be satisfied if they understood the laws and could mete out justice locally. The basic difficulties of English-speaking immigrants living under a Spanish-speaking government were a frequent complaint of Anglo-Texans. One of the demands Texans made at the Consultation of 1832 was that the Mexican government create bilingual primary schools with instruction in both English and Spanish. In 1834, Santa Anna, responding to the unrest in Texas, passed several reforms, including making English the official language of the state of Coahuila y Tejas.<sup>19</sup> Nevertheless, Santa Anna soon abolished the constitution and concentrated power in the central government in Mexico, precipitating a war of secession. Once independent, Texans would not forget their experiences under Mexico, and they resolved to have their new constitution and any subsequent laws passed printed in multiple languages. Texas’s current constitution was originally printed in Bohemian, German, Spanish, and English.

Anglo-Texans’ experiences as an immigrant minority were manifest in the Constitution of 1836, which established open immigration policies. It declared that “All persons (Africans, the descendants of Africans, and Indians excepted), who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic.”<sup>20</sup> Furthermore, the constitution made the following provision for future immigrants: “[A]fter a residence of six months, [if the immigrant] make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this Constitution, and that he will bear

true allegiance to the Republic of Texas, [the immigrant] shall be entitled to all the privileges of citizenship.”<sup>21</sup> Before Texas declared its independence from Mexico, Anglo-Texans complained that they were inadequately represented in Mexico. The framers of the new Texas Constitution granted immigrants the right to vote, regardless of citizenship. That right persisted to the current constitution of Texas, which authorized “every male person of foreign birth” to vote in the state as long as he had “resided in this State one year next preceding an election, and the last six months within the district or county in which he offers to vote” and had declared “his intention to become a citizen of the United States.”<sup>22</sup>

Originally, Texas constitutions were designed to ensure that future immigrants could easily and reasonably attain both citizenship and the right to participate in the government. This provision remained in force until 1921 when Texans, by a slim majority (52 percent in favor, 48 percent opposed), passed a constitutional amendment allowing only citizens to vote. Texas has experienced constant immigration since leaving Mexico. Today’s immigrants fight for many of the same rights that Anglos demanded under Mexican rule more than a century ago.

### The Republic of Texas: The Constitution of 1836

No episode has contributed to the mythology of Texas more than its brief period as an independent country. Delegates from across the state met at Washington-on-the-Brazos to write a constitution for the future Republic of Texas. Of the fifty-nine delegates, almost half had been in Texas less than two years, and most of them had emigrated from southern American states. The constitutional convention occurred in the midst of the revolution, and delegates hurriedly wrote the new constitution, well aware that the conflict was in danger of arriving at their doorstep at any moment.<sup>23</sup> The resulting document was largely influenced by the U.S. Constitution in that it was relatively brief and flexible, provided for three branches of government, and established a system of checks and balances. The constitution embodies Texas’s distrust of government and Texas’s commitment to individual freedom. Texas’s president was elected to a three-year term but was prohibited from serving consecutive terms. A bicameral legislature was established, with one-year terms in the House and three-year terms in the Senate. The short legislative terms and the nonconsecutive presidential term reflected Texans’ distrust of government in general, an attitude that continues to dominate state politics today. The Republic Constitution sought to protect the Texans from an overreaching government declaring that “all power is inherent in the people.”<sup>24</sup> The constitution concluded with a declaration of rights, such as freedoms of speech, the press, and religion. In a reaction to the establishment of Catholicism as the state religion under Mexico, the Republic Constitution prohibited priests from holding office. The Republic Constitution also prohibits monopolies, which are “contrary to the genius of a free government.”<sup>25</sup>

Protecting the rights of Texans included particular attention to protecting property, including promising a portion of land to all citizens “who have not received their portion of land.”<sup>26</sup> Protection of property included the legalization of slavery, a provision that had irreversible consequences for both Texas and the United States. Texas’s Congress was prohibited from passing laws that prevented immigrants from bringing their enslaved persons with them, and Texas enslavers were prohibited from freeing their enslaved persons without the consent of the Congress. The constitution stopped short of allowing the slave trade in Texas. While Anglo and Hispanic males were given a broad range of freedoms, free persons of African descent were prohibited from residing in the state without the consent of the Texas Legislature. As part of Mexico, Texas had a relatively small population of enslaved people. Once Texas left Mexico, and with annexation into the United States seen as inevitable by many, the institution of slavery exploded in Texas, rising from

an estimated 5,000 enslaved persons (12 percent of the population) in 1836 to 58,161 (27 percent of the population) by the 1850 census and 182,566 (30 percent of the population) by 1860.<sup>27</sup> The rapid growth of slavery in the state following independence would solidify Texas as a slave state. Texas voters overwhelmingly supported the new constitution; Texans also supported immediate annexation by the United States.



A flag from the Republic of Texas, representing Texas's time as an independent country.

The Granger Collection, New York

Some of the greatest legends in Texas are built on this brief period of independence. Today, Texans speak fondly of a time when they were masters of their own domain. According to popular imagery, Texas's time as an independent country makes it exceptional among the states. In truth, the Republic of Texas, though unique, was also relatively short-lived, poor, and unproductive. Much of Sam Houston's presidency was spent trying to convince the United States to annex Texas while simultaneously attempting to secure international recognition of Texas's independence by the United States, Great Britain, France, and Mexico, as well as trying to procure financial aid from these governments.<sup>28</sup> While the United States hesitated to bring Texas into the Union, Britain wanted an independent Texas to counter growing American power and to continue to supply it with cheap cotton. The British encouraged Mexico to recognize Texas's independence in exchange for a guarantee that Texas would not join the United States. President Houston played British preferences against American distrust of British intentions to help increase support for Texas annexation. The Texas legend of a proud independent state often fails to mention that Texas was saddled with debt; devastated by a war that had seen towns destroyed, crops devastated, and much of the population displaced; and was under constant threat of attack from Mexico. Offshoots of this legend continue to prevail throughout the state. For instance, many Texans believe that Texas is the *only* state permitted to fly its flag at the same height as the U.S. flag, thinking this right is an indication of Texas's unique status. In truth, U.S. flag code permits all states to fly their flags at a height equal to that of the U.S. flag.

## Statehood: The Constitution of 1845

Once Texas was admitted into the United States, Thomas J. Rusk chaired a constitutional convention to write a constitution. The statehood constitution continued to specify separation of powers and a system of checks and balances while recognizing the federal nature of the United States. The terms for legislators were lengthened to two years for the Texas House and four years for the Texas Senate, although the legislature would now meet biennially, or every other year. The governor's term was shortened to two years, and the governor was prohibited from serving more than four years in any six. The governor was given the power to appoint the attorney general, the Supreme Court of Texas judges, district court judges, and the secretary of state. Texans' experiences under both Spain and Mexico were evident in the guarantees of property rights for women and homestead provisions in the new constitution.

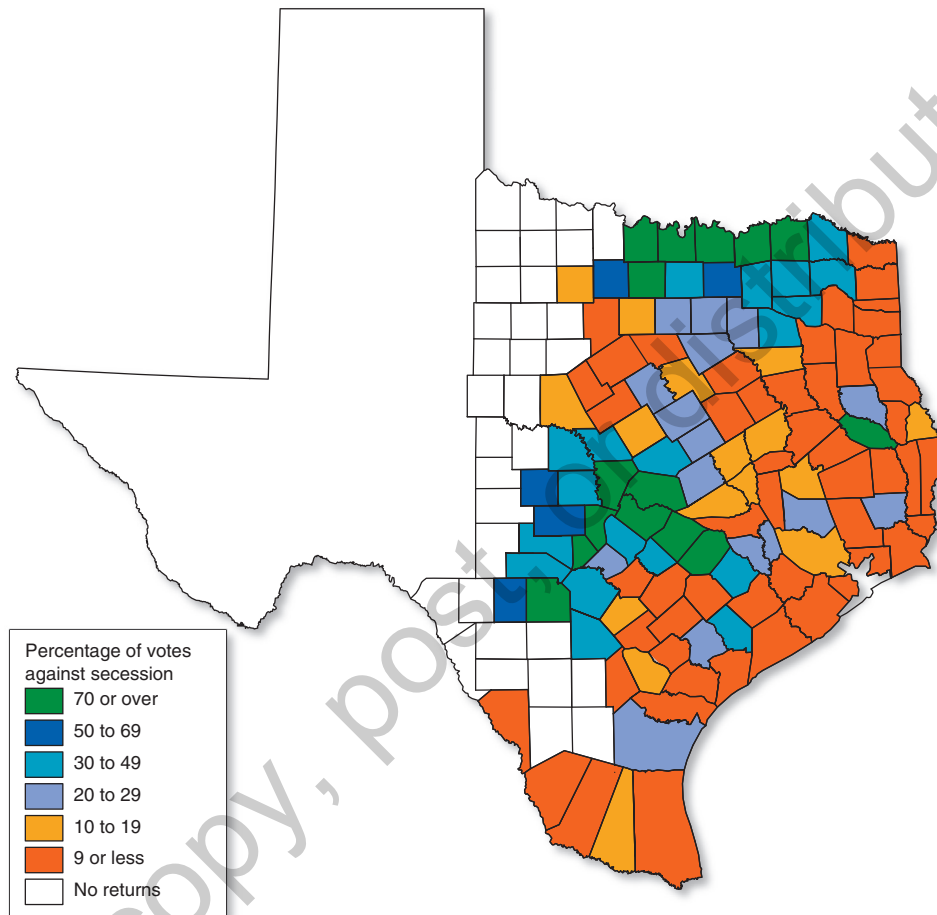
The new constitution reflected the experience of Texans in other ways as well. Many Texans were in debt and highly distrustful of creditors, and indeed, individuals such as Stephen F. Austin came to Texas to try to get out of debt. Thus, the statehood constitution prohibits imprisonment for debt. The bill of rights was moved to the beginning of the constitution, an indication of the importance Texans placed on individual freedom and limited government. Most of the Republic's constitutional guarantees, such as freedoms of speech and the press and protections for the accused, were continued. At the same time, the 1845 constitution prohibited the Texas Legislature from emancipating enslaved persons "without the consent of their owners, nor without paying their owners, previous to such emancipation, a full equivalent money for the slaves so emancipated." Voting rights for African Americans and women were not considered in the deliberations, although there was a vigorous debate over enfranchising all free "white" men. Many of the delegates held that in Texas the category of white had always included both Native Americans and native Mexicans, though some of the delegates expressed concern that the term might now be used to exclude those populations.<sup>29</sup> In the end, the right to vote was conferred on "every free male person who shall have attained the age of twenty-one years . . . (Indians not taxed, Africans, and descendants of Africans excepted)."<sup>30</sup> In addition, the constitution mandated that one-tenth of the state's annual revenue be set aside to create a permanent school fund. Overall, the statehood constitution was relatively brief and flexible. Daniel Webster, a U.S. senator at the time, referred to the framers of this constitution as the "ablest political body assembled in Texas," producing the best constitution of the day.<sup>31</sup>

When Texas joined the Union in 1845, its residents wanted a federal government that could help them control their remote frontier, but they did not particularly want much else from their government. With the election of Abraham Lincoln as U.S. president, however, secessionist movements erupted in many southern states, including Texas. According to Texas's *Declaration of Causes*, Texas joined the United States with the promise of "holding, maintaining and protecting the institution known as negro slavery"; when nonslaveholding states aligned to "demand the abolition of negro slavery throughout the confederacy, the recognition of political equality between the white and negro races, and avow their determination to press on their crusade against us, so long as a negro slave remains in these States," Texas dissolved her affiliation with the United States.<sup>32</sup>

When Texas voted to secede, Angelina County in East Texas was opposed, but in the rest of East Texas, where cotton was king, there was almost universal support for secession (see Map 2.2). Although the movement to secede was strong in Texas, Governor Sam Houston led a substantial opposition. Houston believed joining the confederacy would involve Texas in a war it could not afford and would not win. Several counties in Central Texas and North Texas also voted against secession. The Central Texas frontier relied on protection from the U.S. Army, and

the ethnic German population there morally opposed slavery, making secession less popular. Secession was also unpopular in North Texas, where slavery was virtually absent.<sup>33</sup> Nonetheless, on February 23, 1861, Texas voted to secede and join the Confederate States of America.

**MAP 2.2** ■ Texas Secession Vote, 1861



Source: Annals of the Association of American Geographers, "Vote on Secession, 1861," accessed September 25, 2012, [www.lib.utexas.edu/maps/atlas\\_texas/texas\\_vote\\_secession\\_1861.jpg](http://www.lib.utexas.edu/maps/atlas_texas/texas_vote_secession_1861.jpg).

### Secession and the Confederacy: The Constitution of 1861

Once it joined the Confederacy, Texas needed a new constitution. However, the 1861 Confederate constitution was primarily a revised version of the 1845 statehood constitution, replacing references to the United States with references to the Confederate States of America. One notable difference was that, under the Confederate constitution, slavery received even stronger protection. In the statehood constitution, enslaved persons could not be emancipated by their owners without permission of the legislature nor by the legislature without compensation. The 1861 constitution went further, specifying that neither the legislature nor any citizen had the power to "emancipate his slave or slaves." Otherwise, Texas's Confederate constitution retained the general structure of its 1845 statehood constitution.



## The First Reconstruction: The Constitution of 1866

With the end of the Civil War, Texas needed a new constitution that recognized the new political reality of the defeated Confederacy and reconstituted Union. A. J. Hamilton was appointed as provisional governor of Texas and immediately called for a constitutional convention. Adult white males who swore an oath of allegiance to the United States of America could participate in electing delegates to the convention. Once again, the approach of the drafters at the 1866 constitutional convention was to revise the 1845 statehood constitution rather than write an entirely new constitution. The United States required Texas and other seceding states to renounce secession, abolish slavery, and repudiate all debts associated with the Civil War to reenter the Union. The 1866 constitution acknowledged that slavery would cease to exist in Texas, it “having been terminated within this State, by the Government of the United States, by force of arms, and its reestablishment being prohibited, by the amendment to the Constitution of the United States.”<sup>34</sup>

Although slavery was no longer legal, African Americans were not granted voting rights in the 1866 constitution, and other provisions expressly prohibited them from holding office. In addition, the scope of the governorship was altered. Positions that had been previously appointed by the governor, such as the attorney general and state-level judges, would now be elected. The governor’s term was extended to four years, with the stipulation that the governor serve no more than eight years in any twelve-year period. The governor was granted a line-item veto for appropriations bills. Perhaps the most significant contribution of the 1866 constitution was a clause that made it legal for individuals to acquire the mineral rights of their property.<sup>35</sup> In the end, though, this constitution was short-lived, as Radical Republicans, frustrated with the lack of any substantive change in the South, gained control of the national Congress and passed the Reconstruction Acts designed to punish southern states and force more meaningful reform.

## The Second Reconstruction: The Constitution of 1869

The Reconstruction Acts passed by Congress divided the South into military districts and assigned military leaders. Texas, and other seceding states, were required to write a new constitution in which African Americans realized full political rights, and were further required to ratify the Thirteenth and Fourteenth Amendments before being readmitted into the Union. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment gave former enslaved persons citizenship rights and specifically repudiated debts associated with the Confederacy. The new state constitution would have to be approved by voters, including the newly empowered African Americans in Texas. Moreover, the Radical Republicans who gained control of Congress prevented ex-Confederates, including anyone who had held a political office during the Confederacy, from either participating as delegates at the constitutional convention or voting on the resulting constitution. The result was that only six of the ninety delegates at the 1866 constitutional convention attended the 1869 convention.<sup>36</sup> The delegates, most of whom were Unionist Republicans, were viewed with suspicion and resentment by the majority of Texans. Thus, the 1869 constitution is perhaps best viewed as an anomaly in Texas’s constitutional development, as many of its provisions were out of step with the preferences of most Texans. This is made clear in Article 1, which mandated the elimination of the “heresies of nullification and secession.” This constitution centralized power at the state level and away from local governments. The office of the governor was given broad appointment powers, including the power to appoint Texas’s Supreme Court justices, district court justices, the attorney general, and the secretary of state. The governor’s salary was increased, and the line-item veto was retained. The Republican authors of the 1869 constitution also adopted a broader range of social

services and corresponding tax policies, which most Texans, who overwhelmingly identified as Democrats, opposed. For example, the 1869 constitution created a road tax to pay for bridges and road improvements. In addition, this constitution made elementary education compulsory and funded it with one-fourth of the state's annual tax revenues, along with a poll tax and monies from the state's public lands. Adult males were guaranteed the right to vote, regardless of race, color, or previous condition, and both slavery and systems of peonage were outlawed. The convention delegates also proposed the creation of a new state of West Texas, although this was ultimately defeated.<sup>37</sup>

To protest the exclusion of ex-Confederates while including African Americans in the creation of the 1869 constitution, many Democrats boycotted the election to ratify the constitution. Nonetheless, in November 1869 the participating voters approved the new constitution, and Republican E. J. Davis was elected governor of Texas. The climate in which the 1869 constitution was written had lasting effects. After all, the U.S. Congress had mandated many of the provisions of the new constitution, and many Texans had not participated in the election of the convention members, the vote to ratify the constitution, or the subsequent election of Governor Davis. Davis would be the last Republican elected as governor in the state for over 100 years. Because the events surrounding the 1869 constitution occurred during a period of military administration of the state, most Texans doubted the legitimacy of both the new constitution and the new governor from the outset.

E. J. Davis would prove to be one of the most controversial governors in the state's history. The taint of illegitimacy was impossible for Davis—and, for the next century, the Republican Party—to overcome. After Reconstruction ended and former Confederates were again eligible to vote, Democrats won back control of the state legislature and the governorship, ousting Davis and replacing him with Democrat Richard Coke in the 1873 gubernatorial election. With a Democrat safely in office, Texans immediately set out to write a new constitution. Some aimed to prevent a “tyrant” such as Davis from ever again gaining so much power in Texas. Others sought to redeem Texas by replacing the constitution that the national government and the Republican Party had imposed on them. Either way, Texans were once again writing a constitution.

## TEXAS LEGENDS

### E. J. DAVIS

According to Texas legend, Texas needed the “Redeemer” constitution of 1876 to cleanse the state of the despotism endured under Republican governor E. J. Davis. Davis represented the more extreme branch of the Republican Party and narrowly won the gubernatorial election in 1869, which included newly enfranchised Black voters, while excluding ex-Confederates. This connection to both ex-enfranchised persons and the Republican Party riled many Texans, who viewed Davis as a tyrant. From their perspective, Davis ballooned the debt, centralized power in the state and away from local governments, directed the state militia and state police to tyrannize towns, and sold out the state's farmers to big business, including railroads, at the expense of the mainly agrarian population. To add insult to injury, when it became clear that Republicans would likely lose the next election, Davis postponed the legislative election and



Courtesy of the Texas State Library and Archives Commission

initially refused to leave office after losing the governor's race. This version of events allowed Texans, still stinging from their recent loss of the "War of Northern Aggression," to blame the North for the economic decline of the state and diminish the Confederates' recent military defeat. It also gave birth to the legend of Democrats as redeemers who saved the state from a corrupt "foreign" invader.

As with most myths, this version of events contains some truth and some embellishment. It is true that Davis increased the debt of the state, but this is only part of the story. The state of Texas had been financially devastated by the Civil War and faced a lack of revenue regardless of who occupied the governor's office. Davis advocated using taxes to expand social services favored by the Republican Party. For example, Davis proposed a compulsory education system that was viewed as exorbitant by many Texans. The Republican policies passed under Davis were no doubt more progressive than Texas Democrats preferred, though not necessarily wasteful or dishonest. Moreover, both taxes and state debt were actually higher under the succeeding Democratic administrations.<sup>i</sup>

The most damaging charge was that Davis was a tyrant who used the state police and the state militia to deal aggressively with lawless areas in Texas. Texas still had large expanses of frontier to protect, as well as a good deal of resistance remaining from the Civil War. In one notorious example, Davis declared martial law in Hill County in January 1871, following the arrest of a state police officer. The police officer offended locals when he attempted to arrest the son of the county's largest landowner for killing a freedman and his wife.<sup>ii</sup> Similarly, racially motivated attacks and murders in Limestone County, along with a mob threatening the state police, led Davis to declare martial law there in 1871. Davis used expanded police powers to protect newly freed African Americans.

Given that many Democrats were disenfranchised during Reconstruction, Davis knew that Republican control of both the governorship and the legislature would be short-lived. When Democrats regained control of the state legislature, they passed a law calling for the election of state and local offices, including the governor, to be held on December 2, 1873. In that election, Davis was overwhelmingly defeated by Democrat Richard Coke. Supporters of Coke snuck into the statehouse and inaugurated Coke, refusing to let Davis finish his term. Davis's request for military assistance from President Grant was denied, and Davis vacated the office and returned to his law practice.

<sup>i</sup> Janice C. May, *The Texas State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1996); see also Randolph B. Campbell, *Gone to Texas* (New York: Oxford University Press, 2004).

<sup>ii</sup> For more details of this incident, see "Hill County Rebellion," *Handbook of Texas Online*, accessed September 3, 2014, [www.tshaonline.org/handbook/online/articles/jchka](http://www.tshaonline.org/handbook/online/articles/jchka).

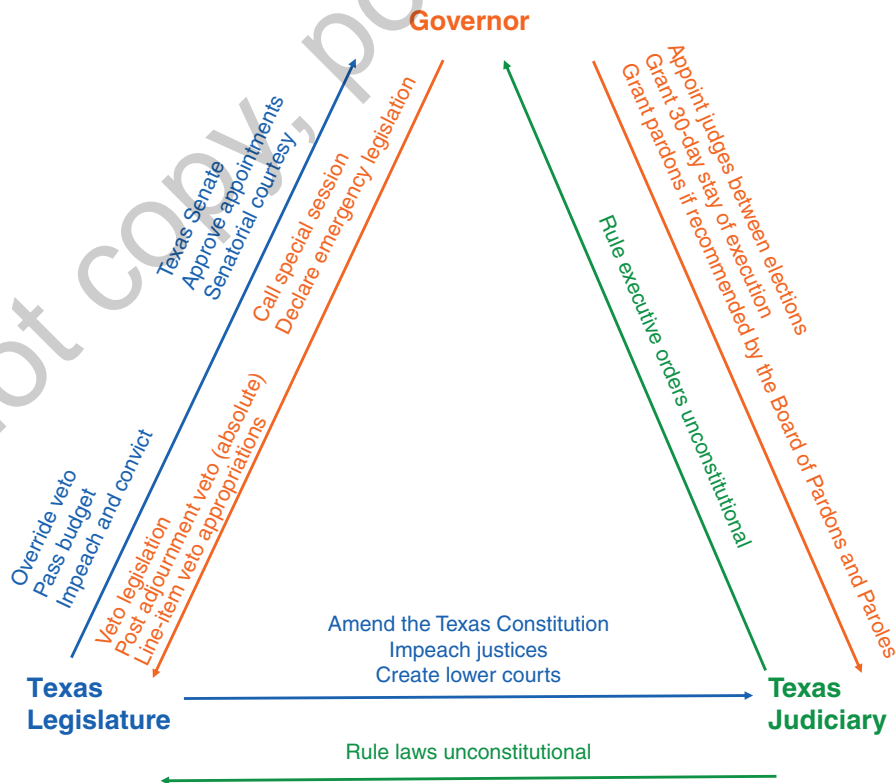
## THE CURRENT SYSTEM: THE CONSTITUTION OF 1876

### 2.4 Explain how Texas's current constitution reflects the preferences of Texans today.

The current constitution, often referred to as the "Redeemer" constitution, sought to wash away what many Texans viewed as the sins of the Second Reconstruction. Several clashes created the context for the current Texas Constitution. First, the Civil War and the subsequent Reconstruction fostered considerable resentment toward Northerners and Republicans throughout the South. Reconstruction was marked by military rule, with a Republican-dominated government in a Democratic state. The majority of Texans were excluded from participating in the creation of the Second Reconstruction Constitution and in the state's political processes in general. The result was that the Republican Party spent the next 100 years almost completely shut out of the state's political arena. Second, a preference for independence and individual freedom, along with a deep-seated distrust of government, characterized the state's political culture. Texas

has consistently sought to restrict the powers of government. While the current constitution represents the most extreme attempt at restricting Texas government, all of the constitutions, with the exception of the 1869 constitution, sought to create a government that would generally stay out of the lives of most Texans. The 1869 constitution was objectionable both because it represented the frustrations of losing the Civil War and because it consolidated power at the state level, away from local governments. The constitution drawn up in 1876 went further than any previous constitution in specifying exactly what the government could and could not do. Delegates who authored the current constitution were overwhelmingly Democrats who distrusted government, favored local control, preferred fiscal restraint, and wanted to fix the perceived injustices of the Republican-created 1869 constitution. Third, the delegates who wrote the current constitution were primarily concerned with protecting agrarian interests, as most Texans in 1876 were farmers. Indeed, close to half of the delegates were members of the Grange, an organization created to protect the interests of farmers. These farmers sought to limit the power of the railroads, which they relied on to deliver their crops and livestock to market. The Davis administration's policies aided the expansion of the railroads in Texas, which led to increased rail rates that frustrated the farmers in the state. The authors of the current Texas Constitution distrusted big business and sought to protect individual rights at the expense of businesses. Thus, the constitution includes a wide range of limits to big business in the state, including explicit restrictions designed to keep railroads, banks, and oil companies small. The resulting constitution is one of specific limitations on governmental power rather than a fundamental set of laws.

**FIGURE 2.1** ■ Checks and Balances



The current constitution of Texas is based on the idea of **popular sovereignty**, or that the power to rule is derived from the people. This is evidenced in the preamble, which reads, “Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution.” The constitution specifies a **separation of power**, meaning one branch does not hold all of the power. This is articulated in Article 2, which divides the government into three distinct branches and prohibits those branches from exercising “any power properly attached to either of the others.” The constitution further splits executive authority among a plural executive. Building on this separation of powers, the constitution gives each branch the ability to check the power of the other branches, called **checks and balances** (see Figure 2.1). For example, the legislature’s job is to pass policy, but the governor can check that power by vetoing legislation. The constitution also embodies the principle of federalism, recognizing that Texas is free “subject only to the Constitution of the United States.”<sup>38</sup>

### Distrust of Government

The most prominent feature of the current Texas Constitution is the general distrust of government. Article 1 underscores the attitudes of most Texans that “all political power is inherent in the people, and all free governments are founded on their authority . . . they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.” We see evidence of Texans’ distaste for government throughout the document. For example, the circumstances under which the government can tax and incur debt are spelled out in the Texas Constitution. To keep the government small, the powers, terms, and salaries of the executive and legislature are strictly limited. The framers of the Texas Constitution created a system in which political power is retained by the people. The result of attempting to keep all political power with the people in Texas is the **long ballot**, a system in which almost all positions in the state are elected rather than appointed. This distrust of government continues to pervade Texans’ attitudes today and is one of the main reasons attempts at reforming the constitution have failed.

### The Legislative Branch

Consistent with Texans’ preference for small government and their distrust of politicians, the current constitution was designed to create a part-time citizen legislature. The constitution restricts the legislature to biennial sessions for only 140 days. The idea was that, rather than having professional politicians, any citizen could participate in a legislature that met so infrequently. To discourage professional politicians further, the constitution originally spelled out only a modest salary for state legislators, a salary that required a constitutional amendment to change. This persisted until 1991, when the constitution was amended to create the Texas Ethics Commission (TEC) to set legislative salaries, subject to voter approval. Today, legislative salaries are set at \$7,200 a year plus a per diem for days the legislature is in session. The legislative branch is composed of a Texas House of Representatives with 150 members and a Texas Senate with 31 members. Members of the House are elected every two years, and senators serve four-year terms. While the legislature is limited to a relatively short session, thirty-day special sessions can be called by the governor, who sets the agenda for those sessions.

Much of the Texas Constitution is a list of things that the legislature is specifically prohibited from doing. For instance, the constitution spells out the types of taxes the legislature can and cannot levy. It explicitly prohibits the state from passing a property tax and sets ceilings on the



amount of property taxes that local governments can collect. The constitution further forbids the government from imposing a state income tax without approval by a majority of voters. The legislature is also required to place the subject of a bill in its title, and each bill can have only one subject. A reading of the current constitution makes clear that the main goal of the framers was to expressly limit the government rather than to create a broad governing mandate.

### The Executive Branch

Under Reconstruction, the Republican governor centralized power, often to deal with Texans who resisted extending rights to newly freed enslaved persons. As soon as all Texans were once again permitted to participate in elections and write a constitution, the reaction was swift. The authors of the current constitution wasted no time writing a new constitution that severely stripped the powers of the governor and distributed traditional executive powers into several offices. According to Article 4, the executive branch is divided among a governor, lieutenant governor, secretary of state, comptroller, land commissioner, and attorney general.<sup>39</sup> Thus, in contrast to the U.S. executive, the Texas Constitution created a plural executive, an institutional arrangement whereby traditional functions of the executive branch are divided among several officeholders rather than vested in a single person. To further limit the power of the governor, offices that had previously been appointed by the governor would now be elected. In fact, the secretary of state is the only member of the plural executive that is appointed by the governor. The delegates of the constitutional convention also shortened the term of office for the governor to two years, decreased the governor's salary, and limited the governor to two terms in office. Later amendments increased the governor's term to four years and removed the term limits. Clearly, though, one of the main goals of the delegates writing the constitution was to create an institutionally weak governor.

### The Texas Judiciary

Article 5 of the Texas Constitution created a judicial branch with county courts, commissioners courts, justice of the peace (JP) courts, district courts, and appellate courts, as well as "such other courts as may be provided by law." It also specifies the creation of two high courts: the Supreme Court of Texas to hear final civil appeals and the Court of Criminal Appeals to hear final criminal appeals.<sup>40</sup> Under the current constitution, judges would now be elected rather than appointed, although judicial vacancies that occur between elections are filled by gubernatorial appointment. This is in sharp contrast to the federal judiciary, which is appointed for the purpose of creating an independent judiciary. The move to appoint judges reflects both a distrust of the state executive and a desire to keep the power in the hands of the people. That comes at a cost, as all state judges in Texas are constantly raising campaign funds in order to get reelected, and most Texans don't pay attention to judicial campaigns.

## CRITICISMS OF THE TEXAS CONSTITUTION

### 2.5 Evaluate problems with the current Texas Constitution.

The state's current constitution was written in the era of cowboys and cattle drives. Today's Texas is one of computers and commuters. The population in the 1880s was slightly over

1.5 million people, whereas in 2021 the U.S. Census Bureau estimated Texas's population at 29.5 million. Hispanic and African American populations comprised the two largest minorities in Texas in the 1880s. The Hispanic population has increased significantly since then, but the African American population has declined, and other minorities, such as Asian immigrants, have a growing presence in the state today. Economically, Texas in 1876 was agrarian, with small farms and ranches dominating the state. Today, the state's economy is one of the most diverse in the United States and continues to diversify. Texas has a substantial aerospace and defense industry as well as a telecommunications and computer sector and is an important center of finance, shipping, energy, and other big business. It is not surprising, then, that the current constitution is considered outdated and inadequate for such a large and diverse state.

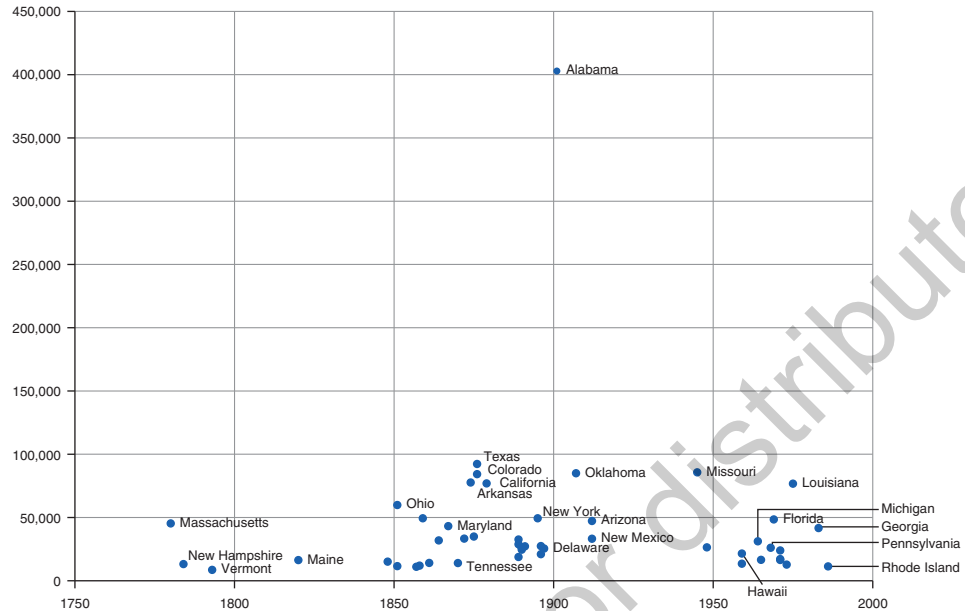
The current constitution reflects the desire of the framers to eliminate the last vestiges of Reconstruction rather than to write a long-lasting constitution. One of the most frequent criticisms is the amount of detail in the document. The Texas Constitution is a long list of specific rules rather than a set of fundamental principles for state law. For instance, in 2017, the constitution was amended to specify the definition of "professional sports team" for fundraising purposes. A 2019 amendment allows retired law enforcement animals to be adopted by their handlers. While both of these amendments may be commendable, they are the sort of specific policymaking ideally originating in the state legislature rather than being embedded in a constitution.

Including such detail in the state's constitution leaves Texas with the second-longest constitution in the United States, one that is both disorganized and unwieldy. The problem is compounded because the more detailed the constitution is, the more likely it is that passing new policy will require constitutional amendment. The result is a constitution that continues to grow; it is now approximately 92,345 words.

In addition, the constitution severely limits the government. The legislature's session is limited to 140 days every other year. While that may have been desirable in 1876 agrarian Texas, today's Texas is the second-largest state in the United States and has an increasingly diverse population and economy. Extremely low legislative pay means that average Texans cannot afford to take the job. Instead of being a citizen legislature, the Texas Legislature is dominated by wealthy individuals and big business. Finally, judges in Texas constantly have to raise money for reelection, which creates a climate of mistrust in the Texas judiciary. The result is a judiciary that most Texans believe is overly influenced by money.

### Amending the Constitution

The current Texas Constitution outlines the process by which it can be amended. Both houses of the Texas Legislature must approve any proposed amendments by a two-thirds vote. Once approved, the amendment must be published twice in major newspapers and posted in each county courthouse thirty days prior to Election Day. Finally, the amendment must be approved by a simple majority of voters. The Texas Constitution has been amended 517 times, making it one of the most frequently amended constitutions among the states.<sup>41</sup> Alabama's state constitution has been amended the most, passing 977 amendments, while Rhode Island's constitution has been amended the least, with a mere thirteen amendments. (See Figure 2.2 for a comparison of the constitutions of the fifty states by age and by length.)

**FIGURE 2.2** ■ The Length and Age of State Constitutions

## TEXAS VERSUS MASSACHUSETTS

The Massachusetts Constitution of 1780, which predates the U.S. Constitution by nearly ten years, is the oldest written constitution still in use not only in the United States but also anywhere in the world. The framers of the Massachusetts Constitution included three heroes of the American Revolution: John Adams, Samuel Adams, and James Bowdoin. These larger-than-life legends established a pattern that many states now follow for state constitutions: a preamble, a declaration of the rights of citizens, a framework for government, and amendments to the constitution. The relatively broad language of the Massachusetts Constitution has served the state well, as opposed to the highly specific and technical language of the Texas Constitution. Fewer constitutional amendments (120 total) have been passed in Massachusetts than in almost half the states—certainly fewer than Texas's 517 amendments. Also unlike Texas, Massachusetts still uses its original document, while Texas is on its sixth constitution, including the short-lived Constitution of the Republic of Texas.

The original Texas Constitution (1845), written after Texas joined the United States, shared many characteristics of state constitutions of the time, including that of Massachusetts. Some thirty-one years later, in 1876, the framers of the current constitution of Texas created a very different document. The 1876 document is long and specific, reacting to the experiences of Texans in the Civil War and Reconstruction eras of U.S. history.

A Constitutional Comparison of Massachusetts and Texas			
Feature	Massachusetts	Texas (1845)	Texas (1876)
Year adopted	1780	1845	1876
Word length	45,000	11,600	92,345
Amendments	120	1	517
Major sections	4	13	17
Executive offices elected	✓	✓	✓
Governor	✓	✓	✓
Lieutenant governor	✓	×	×
Secretary of state	✓	×	✓
Attorney general	✓	×	✓
Treasurer/comptroller	✓ (1)	×	✓ (2)
Other			
Legislature	General Court	Texas Legislature	Texas Legislature
Senate	40	At least 19 but no more than 33	31
Size	2 years	4 years	4 years
Length of term	160	At least 45 but no more than 90	150
House	2 years	2 years	2 years
Size			
Length of term			
Judiciary	Appointed	Appointed	Elected
Statewide referendum to amend constitution	✓	✓	✓
Statewide referendum to make general laws	✓	×	×
Initiative petition to amend constitution	✓	×	×
Initiative petition to make general laws	✓	×	×

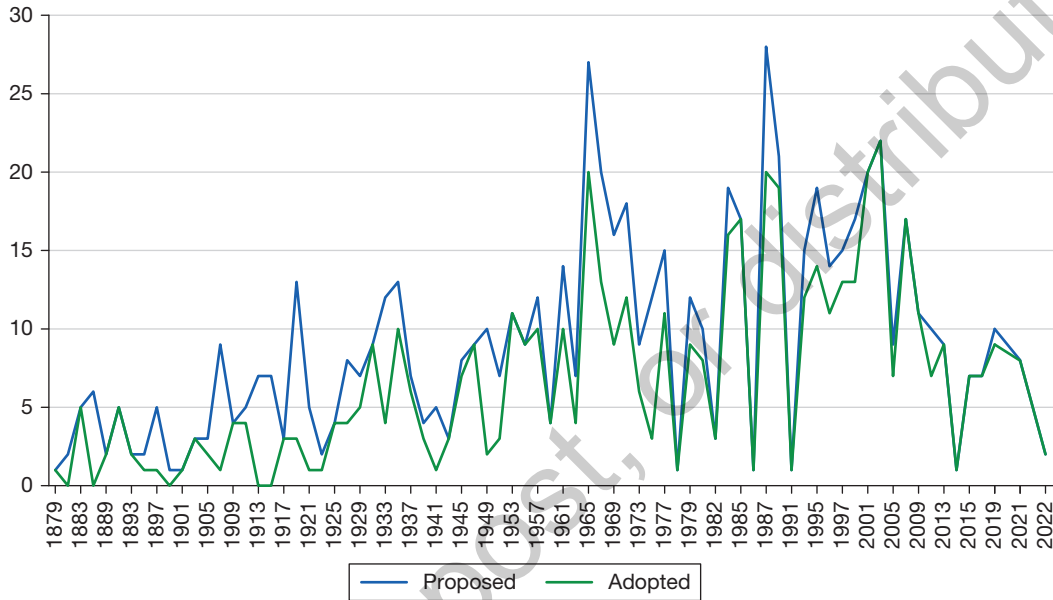
Why do you think the Massachusetts Constitution is a model for the constitutions of other states? **Critical Thinking**

How is the Texas Constitution (1845) similar to that of Massachusetts and to the current constitution of Texas? How is it different? **Empirical and Quantitative**

As Figure 2.3 illustrates, the overwhelming majority of proposed constitutional amendments in Texas are approved by electors; 88 percent of all proposed amendments have been adopted since 1985. Almost all constitutional amendments are put on the ballot in odd years or in special elections. Unfortunately, the voter turnout during special elections is significantly lower than during general elections (see Figure 2.4). Since 1985, the average turnout in elections with constitutional amendments has been 9 percent of the entire voting-age population.<sup>42</sup> Voter turnout remains low even when the proposed amendment is relatively popular or controversial.

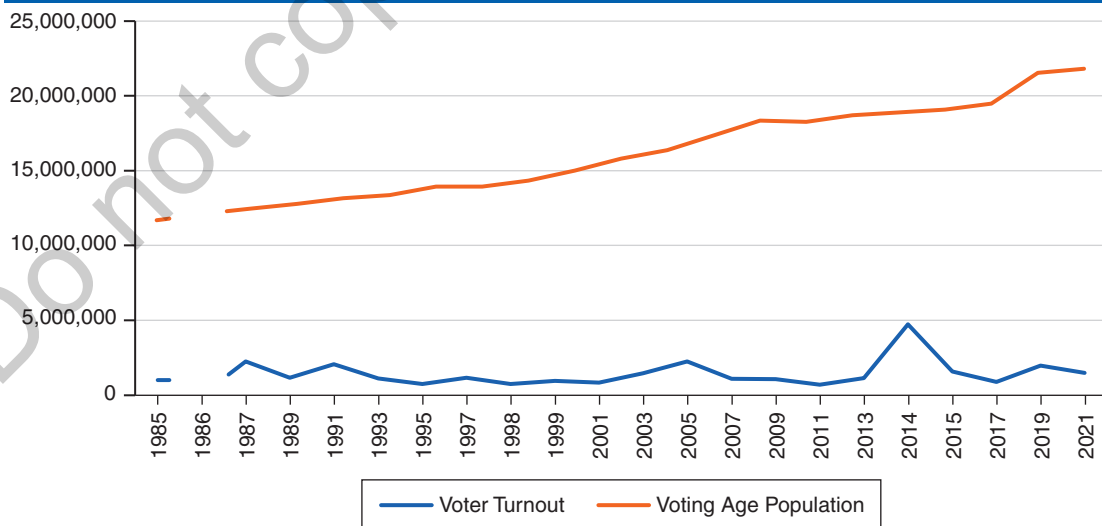
For example, in 2007, when 88 percent of voters approved school tax relief for the elderly and disabled in Texas, less than 7 percent of potential voters actually participated in that election. In 2005, 76 percent of voters approved a constitutional amendment defining marriage as a union between a man and a woman, based on a 14 percent voter turnout. Amending the fundamental state law with such low turnout rates raises serious questions about the nature of popular sovereignty in Texas.

**FIGURE 2.3** ■ Texas Constitution of 1876: Amendments Proposed and Adopted, 1879–2022



Source: Texas Legislative Council, [www.tlc.state.tx.us](http://www.tlc.state.tx.us).

**FIGURE 2.4** ■ Voter Turnout during Special Elections and Off-Year Elections, 1981–2021



Source: Texas Secretary of State, [www.sos.state.tx.us/elections/historical/70-92.shtml](http://www.sos.state.tx.us/elections/historical/70-92.shtml).

## Constitutional Revision

Distrust of government has generally translated to suspicion of change in Texas. The current constitution has been criticized since its inception. Demands for constitutional revision have been almost continuous in Texas, with early calls for constitutional conventions occurring in 1913, 1917, 1949, 1957, and 1967.<sup>43</sup> As early as 1922, Governor Pat Neff urged the legislature to write a new state constitution, arguing that the 1876 constitution had become a “patchwork”—this after only thirty-nine amendments.<sup>44</sup> However, it wasn’t until the early 1970s, in reaction to the Sharpstown scandal, a banking and stock fraud scandal involving officials at the highest levels of government, that Texas came close to substantial constitutional revision. The legislature created a constitutional revision commission that proposed sweeping changes to the current Texas Constitution. The proposal included providing annual sessions for the legislature, increasing the power of the governor, creating a single high court, and changing the selection process of the judiciary. The proposed document would have contained only 14,000 words and would have reduced the number of articles from seventeen to eleven. The final proposal was considered a well-drafted constitution and contained many of the changes constitutional experts continue to propose today. In the end, though, a joint meeting of both houses of the legislature failed by three votes to get the two-thirds vote necessary to pass it. In its next regular session, the legislature revived most of those proposals in the form of eight amendments to the constitution, but Texas voters overwhelmingly rejected each of the amendments.

Another serious attempt at significant constitutional revision came in 1998, spearheaded by Senator Bill Ratliff and Representative Rob Junell. The Ratliff–Junell proposal also reduced the document to about 18,000 words, granted expanded appointment power to the governor, increased the length of legislators’ terms while imposing term limits, created a salary commission appointed by the governor to set compensation for legislators (without voter approval), and reorganized the judiciary into a single high court with the gubernatorial appointment of judges followed by a retention election. Ratliff and Junell argued that the current constitution is clearly broken and imposes an intolerable cost on the state. Ratliff suggested that “[voters know] that any document you have to try to amend 20 times every other year is broke. It’s sort of a Texas tragedy, actually, that we can’t seem to come to grips with the fact that we need a new, basic document going into the next century and the next millennium.”<sup>45</sup> Moreover, the cost of the frequent elections necessary to amend the constitution is considerable, manifesting itself in both “voter fatigue and the temptation for special-interest groups to push amendments that aren’t in the public interest.”<sup>46</sup> In the end, the Ratliff–Junell proposal unceremoniously died from neglect in the legislature. As with previous attempts at constitutional revision, Texans resisted change and chose to continue to patch up the old constitution. The constitution thus remains mired in legislative detail, and Texas politicians remain unwilling or unable to create a constitution designed for the diversity and complexities of our state. Absent a constitutional convention, constitutional revision can occur in a variety of other ways. In Texas, constitutional revision has been accomplished primarily through amending the constitution. This incremental change in Texas, while not ideal, has been necessary since many Texans resist more sweeping changes, such as wholesale revision through constitutional conventions.



**TABLE 2.1** ■ Articles of the Current Texas Constitution

Preamble	
Article 1	Bill of Rights
Article 2	The Power of Government
Article 3	Legislative Department
Article 4	Executive Department
Article 5	Judicial Department
Article 6	Suffrage
Article 7	Education
Article 8	Taxation and Revenue
Article 9	Counties
Article 10	Railroads
Article 11	Municipal Corporations
Article 12	Private Corporations
Article 13	Spanish and Mexican Land (repealed August 5, 1969)
Article 14	Public Lands and Land Office
Article 15	Impeachment
Article 16	General Provisions
Article 17	Mode of Amending the Constitutions of This State

## WINNERS AND LOSERS

**2.6** Analyze the extent to which Texas's current constitution is consistent with Texan values.

In Texas, the general distrust of government and resulting resistance to change have created an environment in which the fundamental law is unyielding—a difficult situation for one of the nation's most rapidly changing states. The authors of the current Texas Constitution distrusted the Reconstruction government, which they viewed as the government of an occupying army. Their reaction was to create a constitution intended to limit the power of government, curb the potential for abuse by business, and preserve the power of citizens in the state. Ironically, the constitution entails such a high democratic cost to Texas citizens that the goals of the framers were guaranteed to fail. In an effort to safeguard the power of individuals, voters in Texas are literally overwhelmed by the number of offices and constitutional amendments they see on the long ballot in each election. Instead of ensuring popular control of government, such a burden on citizens ensures voter fatigue and apathy. When citizens don't play their role to keep government in check, professional politicians and special interests fill the gap.

The winners of the current constitutional rules tend to be big-business interests. Business in Texas can dominate both the elections of officials and the approval or defeat of constitutional amendments, as overwhelmed voters simply opt out. The voters comprise the losers of the stagnant Texas Constitution. Voters, who continue to distrust government and therefore resist change, face a political system in which business and political interests often override popular concerns. Moreover, the short biennial legislative sessions stipulated in the constitution create a government that has not kept up with the increasing complexities of the state. The goal of the framers was to create a citizen legislature. By keeping the legislative sessions fixed and biennial and the salary small, the framers hoped to preclude the creation of a professional legislature. In fact, in the twenty-first century, these constitutional impediments guarantee that the legislature is dominated by people who depend on business corporations or legal firms for their salaries—in other words, on entities that often have their own interests in the state legislature. The constitution has created a legislature that is indebted to big business and special interests.

The election of judges in Texas, when most citizens are already overwhelmed by the number of officials on the ballot, adds to an environment in which citizens' interests may be marginalized in favor of big-business interests. Judges must raise significant amounts of money to be elected in the state, even as most citizens are simply not paying attention to judicial elections. Big business and other special interests are willing to fill that gap. In general, the Texas Constitution as it currently stands does not effectively empower the people in the state, and the general distrust of government means the people do not favor changing the constitution.

## CONCLUSION

Texans continue to cling to a constitution written well over 100 years ago at a time when the state was largely dominated by agriculture. Texas has undergone constant and dramatic change since the constitution was written, and there is no sign that this change is slowing down. Gone are the days of the rugged frontier. In today's Texas, you are more likely to see a computer chip than a longhorn. Yet even as the state continues to change, Texans adhere to the myth that the constitution continues to serve them. Mistrust of government overrides concerns over an unresponsive governmental structure. Texas continues to face increasingly complex issues, but Texans' tradition of mistrust undermines the ability of the government to respond to the state's transformations. Reliance on its outdated constitution will not serve Texas in the future.

## KEY TERMS

block grant (p. 41)	extradition (p. 39)
categorical grant (p. 40)	federalism (p. 38)
checks and balances (p. 57)	fiscal federalism (p. 40)
concurrent powers (p. 38)	full faith and credit clause (p. 39)
confederal system (p. 37)	home rule city (p. 45)
constitution (p. 36)	horizontal federalism (p. 39)
cooperative federalism (p. 39)	implied powers (p. 38)
devolution (p. 41)	long ballot (p. 57)
Dillon's Rule (p. 45)	popular sovereignty (p. 57)
dual federalism (p. 39)	privileges and immunities (p. 39)
enumerated powers (p. 38)	reserved powers (p. 38)

separation of powers (p. 57)  
supremacy clause (p. 38)  
unfunded mandate (p. 41)

unitary system (p. 37)  
vertical federalism (p. 38)

### DISCUSSION STARTERS

- Should Texas cities be allowed to pass ordinances against discrimination? Or should state law preempt city ordinances? **Critical Thinking**
- How should government weigh the predominant political culture against minority rights? **Social Responsibility**
- To what extent does the Texas Constitution create a citizen legislature? **Critical Thinking**
- To what extent do you have a responsibility to participate in elections that include amendments to the Texas Constitution? **Personal Responsibility**

### ACTIVE LEARNING

- Break into groups of five. In each group, identify the arguments for giving more power to the state governments and the arguments for giving more power to the national government. **Teamwork**
- Draw a cartoon that illustrates a problem or problems with the current Texas Constitution. **Communication**