Chapter Objectives

★ Explain the purpose of a constitution.
★ Define federalism and discuss the difficulties in sharing power between the state and national government.
★ Describe the evolution of Texas’s previous constitutions and the historical events that influenced them.
★ Explain how Texas’s current constitution reflects the preferences of Texans today.
★ Identify problems with the current Texas Constitution.

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. A few years later, the election of President Abraham Lincoln, who Texans feared would threaten the institution of slavery, pushed the state toward secession. Texans were concerned that the federal government would come and take their slaves, and most Texans at the time preferred to leave the Union rather than remain on what they viewed as such unjust grounds. The rhetoric in Texas leading up to the Civil War was filled with speeches about states’ rights and federal intrusion. The Texas Ordinance of Secession drafted by Texans at the 1861 Secession Convention indicated the general mood in the state:

The recent developments in Federal affairs, make it evident that the power of the Federal Government is sought to be made a weapon with which to strike down the interests and prosperity of the people of Texas and her Sister slaveholding States, instead of permitting it to be, as was intended, our shield against outrage and aggression.

Frontier Texans lived a hard life but one in which they largely made their own destiny and provided for their own defense. Today’s Texans continue to want the federal government to control their border but otherwise stay out of their lives. In the past few years, Texas politicians have once again focused on federal policies they view as too intrusive and as a threat to state sovereignty. Texans don’t want the federal government to tell them how to conduct their business, whether that business involves elections, guns, clean air, or health care. Texans would rather have policies that represent their
preferential; Washington politics seem too distant from the everyday life of a Texan. Texans have long been individualistic, espousing a “pull yourself up by your bootstraps” approach to life and holding individuals responsible for their own welfare. Texans had only themselves to depend on, and that was just fine with them.

Texas politicians continue to espouse this deep-seated individualism that defines the Texas identity. Railing against the national government remains a popular way to connect with Texans. Texans have long distrusted governments, both national and state, and preferred that those governments stay out of their lives. Texas frontier life created a preference for as little government as possible. If we have to have government, the government that is closest to the people is the best. Former governor Rick Perry, who was the poster boy for federalism during Obama's administration, argued he is fed up with the national government's arrogance in telling Texans how to live their lives. Perry often referenced the need for local control, claiming that “the very essence of America stems from a limited, decentralized government. When we empower Washington at the expense of local control, we rip apart the concept of civic virtue by removing the ability of the citizens to govern themselves.” At the same time, in the last few years Texas politicians have fundamentally redefined their approach to federalism. 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 most jarring examples, when Denton citizens voted to ban fracking within city limits, the state legislature passed a law to overturn the citizens’ decisions. Governor Abbott appears particularly poised to centralize control even further, arguing that this is not “the United States of Municipalities.”

The move to centralize power at the state level has drawn criticism from local officials and longtime Republicans. Then–Texas House Speaker Joe Straus once noted, “I don’t think a blanket policy on exerting power from Austin over locals is a particularly attractive idea.” A more pointed objection was made by the Texas Municipal League, who pointed out that “seventy-four 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.”

Texans continue to oppose national government encroachment into their lives. It remains to be seen whether Texans will accept the move to centralize power at the state level or if they want decisions made closer to home. This chapter explores the constitutional arrangement of federalism and the development of the Texas Constitution more generally. We will first outline the federalist structure of the national government and how Texas fits into that structure. We will then survey how the Texas Constitution has evolved over time, reflecting our rich history and culture. Finally, we discuss the problems of the current constitution and examine the prospects for constitutional reform.

CONSTITUTIONAL GOVERNMENT

The founders created a government based on a written constitution that outlines the powers of government and limitations on those powers to protect the rights of citizens. Ideally, a constitution should be a brief, 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, passes 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. The U.S. Constitution, for instance, has lasted over 200 years, with Congress passing and repealing more specific laws to reflect the changing times. Ideally, a constitution should protect individual rights while being flexible enough to remain relevant as society changes.

Our country’s founders believed that a constitutional government was necessary to prevent tyranny. James Madison wrote in Federalist No. 51 the following:

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 often displayed by the monarchs at the expense of the people, set out to create a new form of government. The U.S. Constitution checked potential tyranny in several ways: by creating different levels of government (federalism), by separating power among different branches of government (separation of powers), and by empowering the people to check the government (popular
sovereignty). While the U.S. Constitution was revolutionary in the eighteenth century, today written constitutions are the norm. Since independence, Texas has followed the U.S. model and created government based on a written constitution.

The idea of popular sovereignty, or creating a government in which the power to govern is derived from the will of the people, is a critical aspect in limiting tyranny. This idea stands in sharp contrast to rule by divine right, where the right to rule is derived from the will of God. The founders, rebelling against the unchecked power created by divine right, instead created a government where power comes from the people. The U.S. Constitution explicitly references popular sovereignty in the preamble, which begins “We the people.” The founders of Texas invoked similar principles in the Texas Revolution; Texas had to free itself from tyranny imposed by Mexico’s rule under Santa Anna. The Texas Constitution explicitly invokes the idea of popular sovereignty in the preamble, which affirms that the people of Texas establish the constitution. Popular sovereignty is pervasive throughout Texas government: Texas voters elect almost all state officials, including members of the legislative, executive, and judicial branches, as well as approve amendments to the state’s constitution.

The United States invented modern constitutional government, and the U.S. Constitution is a model of brevity and flexible language. It is a relatively short document, with only twenty-seven amendments. The Constitution outlines the fundamental functions and limits of government while leaving the legislature to pass more specific legislation.

Rather than creating a brief and flexible document that outlines the fundamentals of government, Texas has a constitution that is extremely long and specific. This means that specific changes in Texas law often require constitutional amendment rather than legislation. The result is a state constitution that undergoes constant amendment as the government tries to keep up with a rapidly growing and changing state. The current Texas Constitution, Texas’s sixth since its independence from Mexico, reflects Texas’s historical experiences under Mexico and Spain, its reaction to the Civil War and Reconstruction, and its experiences as a frontier state. The current constitution also represents the federal nature of the U.S. government.

THE FEDERAL SYSTEM OF THE UNITED STATES

Federalism—the sharing of powers between two levels of government—is a uniquely American creation. The North American colonies had relatively little influence in decisions made by the central government back in London. The founders were frustrated over lack of representation in the British government, and they believed that governmental tyranny could be checked by separating the powers of government. In an attempt to limit the potential for tyranny, the framers divided powers among the branches of government as well as between the levels of government. The federalist concept specifies a division of powers between the central, or national, government and the lower levels, or state governments.

In creating a federal system, the U.S. framers compromised between two alternative ideal systems: unitary and confederal. A confederal system is a governmental arrangement where the lower units of government retain decision-making authority. The United States experienced a confederacy twice: first under the Articles of Confederation and later in the short-lived Confederacy created by southern states during the Civil War. In both cases, the states retained decision-making authority, creating a relatively weak...
national government. A modern-day example of a confederacy is the United Nations, 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.

A **unitary system**, by contrast, vests power in a central government; lower units of government have only the power that is granted to them by the central government. For the most part, the North American colonies had only the powers granted to them by the British government. Today, about 75 percent of governments are unitary, making this the most prevalent type of government in the world. An example of a unitary government close to home is the relationship between Texas and its local governments. Cities and counties in Texas are granted only limited lawmaking authority by the state constitution and the state legislature.

The founders, having experienced both a unitary and confederal government, created an alternative form of government known as federalism. **Federalism** is a system of government where power is shared between the national and state governments, and it represents a compromise between a unitary and confederal system. The U.S. Constitution created a federal system by vesting certain powers in the national government while reserving other powers for the states. Theoretically, 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 culture and preferences. On the other hand, federalism imposes significant costs on the United States, since different levels of government create policy for the same issue areas—at taxpayers’ expense. The founders believed that the prevention of tyranny was more important than the inefficiency that different levels of government create. Moreover, federal intervention is often necessary to prevent majority rule from overwhelming minority rights. As Madison explained in *Federalist* No. 10, larger governments are more likely to respect minority rights, a fact we learned during the fight against slavery and the subsequent civil rights movement.

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. Implied powers refer to a group of powers that are unspecified and thus constantly expand our understanding of the role of the national government. The U.S. Constitution also outlines explicit roles for the states about the conduct of elections, the selection of electors to the Electoral College, the establishment of voter qualifications, and the approval of 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 so 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 creates a class of powers called reserved powers, although the Supreme Court has interpreted these powers narrowly in recent times. 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 states have most of the power, 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 them. For instance, states are required to grant the same privileges and immunities to citizens of other states as they grant to their own citizens. This provision means that states may not fundamentally treat citizens of other states differently than their own citizens. The privileges and immunities clause makes travel between states easier and discourages discrimination against citizens of other states. However, exceptions to the privileges and immunities clause have been recognized in two cases. 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 welfare payments. This exception has been deemed reasonable since otherwise “individuals could benefit from subsidies without being subject to the taxes that pay the subsidies.” 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 entered into in 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

Creating a new type of government generated a significant amount of uncertainty. 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. From its inception, the idea of federalism has engendered a good deal of controversy, culminating, in part, in a civil war less than a century after the republic was founded. Very few policy areas have escaped this tension.

The idea of sharing power between the national government and the states was an ambiguous one from the beginning. The tension of trying to reconcile the supremacy clause and the Tenth Amendment continues to create different outlooks on how big the national government should be and exactly what it should do. Not surprisingly, 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 exceedingly limited. In the past, this tension led to a theory of dual federalism, in which state powers and federal powers were separate and distinct. However, after the New Deal, those policy distinctions began to erode as the federal government developed policies in areas traditionally left to state governments, such as civil rights. As the strict separation between levels of government gave way to both levels of government sharing authority over the same policy areas, dual federalism gradually transformed into cooperative federalism. This moniker suggests that the national government and the states cooperate in various policy areas. In reality, the national government is often leading the policy change and state governments often engage in active resistance to federal policy.

Today, the United States continues to grapple with exactly which powers belong to the national government and which should be reserved for the states. Sentimental attachment to the idea of federalism is often usurped by a preference for efficiency and uniformity. The result is that, over time, the power of the states has eroded significantly. Most notably, states have historically enjoyed policy control over issues such as police power, marriage, education, and election laws. Yet in the last half century, the national government has begun to encroach on policy areas traditionally reserved for the states. 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 without national intervention. On the other hand, Texans prefer to be masters of their own destiny, which has historically meant a preference for more local control. Proponents of state power support devolution, or the idea that power should be returned to the states. 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.

Perhaps the most effective tool the national government uses to gain control of state policy areas is money. With the creation of a national income tax in 1913, the national government enjoyed a significant increase in revenues. Since that time, Congress has used its financial advantage to influence issues that were traditionally
# HOW TEXAS GOVERNMENT WORKS

## The Federal System

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considered state policy areas. Use of financial incentives to encourage policies at the state or local level is referred to as **fiscal federalism**. The national government has awarded two types of grants to state and local governments. The **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 then set national policy goals in traditionally state-controlled policy areas. In response to this, Republican administrations favored the **block grant** as a way to return policy control to the states. A block grant is given to state and local governments for a broader purpose and imposes fewer restrictions on how the states can spend the grant money. In the 1970s, President Richard Nixon reorganized existing categorical grants into block grants to continue the flow of money from the national government to the states while allowing the states to exert more discretion on how the money was spent.

A current example of a categorical grant is Medicaid. 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 states meet the guidelines set by the national government, they receive national funds that supplement state funds to cover the cost of the program. Currently, Texas receives about $58 in federal matching funds for every $42 it spends on Medicaid in the state. Many in the GOP have pushed 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 and the national government would 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. One example of fiscal federalism occurred in the 1980s when Congress wanted to establish a national drinking age. Congress, faced with increasing pressure from the organization Mothers Against Drunk Driving, and absent clear constitutional authority to establish a national drinking age, passed legislation that would take away 10 percent of a state’s federal highway funds if the state did not raise its drinking age to twenty-one within two years. South Dakota sued the national government, arguing that the policy amounted to coercion and was a blatant intrusion on states’ rights. In *South Dakota v. Dole*, the U.S. Supreme Court ruled that the national government could reasonably attach conditions to national grants. In a dissenting opinion, Justice Sandra Day O’Connor concurred with South Dakota that the law violated the spirit of federalism, arguing that “the immense size and power of the Government of the United States ought not obscure its fundamental character.” Nonetheless, Texas, along with most states, raised its drinking age to twenty-one as a result of the law. This case illustrates how the national government has used its substantial tax base to considerably increase its policy authority beyond its delegated powers.

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
Abortion

In 1973, the U.S. Supreme Court ruled in Roe v. Wade that state laws prohibiting abortion violated a woman’s right to privacy. Since then, 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. A secondary issue is whether the national government or the state governments have the power to decide whether or not to allow abortions. 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. Indeed, James Madison argued in Federalist No. 10 that minority rights are more likely to be protected when a government covers an expanded sphere. Yet critics 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, numerous states have attempted to limit or deny abortions by passing onerous legal requirements on facilities that provide abortions. In 2011, Texas passed a law that required a sonogram at least twenty-four hours before an abortion. 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 once the requirement that doctors have nearby hospital privileges went into effect. The affected clinics were also key providers of 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. The constitutionality of HB 2 was challenged in the courts, and eventually the Supreme Court weighed in. In 2016’s Whole Woman’s Health v. Hellerstedt, the Supreme Court ruled that the law created an undue burden on a woman’s right to an abortion. The Supreme Court specifically struck down the provisions of the law that required abortion providers to meet the same standards as hospitals and the requirement that doctors have nearby hospital admitting privileges.

Abbott criticized the Supreme Court ruling, stating that it “erodes states’ lawmaking authority to safeguard the health and safety of women.” The effect on abortions in Texas, however, has already been significant. Even as the number of abortions nationally has decreased, Texas’s abortions have fallen at an even greater rate. Abortions in Texas are down about 25 percent since the 2011 law went into effect. Yet there is also preliminary 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. It is also difficult to estimate the number of Texans who are seeking abortions in other states. One doctor at a clinic in New Mexico estimates that more than half of her patients come from Texas. Even after the Supreme Court ruled the law unconstitutional, nearly all the clinics that had closed in Texas remain closed. In addition, since so many clinics have closed, the wait time for abortions is much longer, which has resulted in an increase in second-trimester abortions.

The Fifth Circuit Court of Appeals struck down the law that banned the most common type of second-trimester abortion. However, the Fifth Circuit Court of Appeals struck down the ban that required hospital admitting privileges for abortion providers. In 2016’s Whole Woman’s Health v. Hellerstedt, the Supreme Court ruled that the law created an undue burden on a woman’s right to an abortion. The Supreme Court specifically struck down the provisions of the law that required abortion providers to meet the same standards as hospitals and the requirement that doctors have nearby hospital admitting privileges.

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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. In each of these cases, the states and local governments must pay for a significant portion of these regulations that are imposed on them by the national government.

The debate over the appropriate division of power between the national government and state governments has intensified in the last decade. The expansion of the national government, first with the wars in Afghanistan and Iraq and later with the bailouts of American financial and automobile industries, renewed America’s interest in the proper role and size of the national government. The subsequent stimulus package, followed by the divisive passage of the Affordable Care Act (ACA), once again put the issue of federalism at the forefront of the political debate in America. Other issues, such as gay marriage, education policy, and responses to natural disasters such as Hurricane Katrina and, more recently, Hurricanes Harvey and Maria, serve to highlight the differing views of Americans concerning the responsibilities of government.

One of the most contentious debates over federalism currently involves the states’ customary authority over marriage. Traditionally, states have enjoyed almost complete control over rules governing marriage, including defining licensing requirements, establishing an age of consent, providing for common-law marriages, and determining general guidelines for divorce. While states defined the specific requirements for marriage, the full faith and credit clause required all states to recognize marriages performed in other states. So when Vermont approved civil unions and Massachusetts became the first state to allow same-sex marriage, other states worried that they would have to recognize same-sex marriages. The national government responded by passing the 1996 Defense of Marriage Act, which defined marriage as between a man and a woman for the purposes of federal laws and also allowed each state to adopt its own definition of marriage. With this act, the national government explicitly attempted to relieve the states of their obligation to grant full faith and credit to public acts in other states. At the state level, many states began to pass laws explicitly denying the validity of same-sex marriages within their state. Thirty-one states, including Texas, amended their state constitutions to allow marriage between only a man and a woman. In 2015, the Supreme Court ruled that all states must recognize same-sex marriages. The same-sex marriage controversy illustrates the inherent struggle with federalism, which is the fundamental question of who gets to decide who can get married: the national government, the state governments, or local governments? In addition to the question of which government has the power to decide the question, governments have the responsibility to protect...
civil rights of various minority groups who might hold different values than the majority. The preferences of a community must be weighed against the civil rights of the gay community. In the case of same-sex marriage in Texas, the political culture is slowly changing. A 2017 University of Texas (UT)/Texas Tribune poll indicates that a majority of Texans, 55 percent, support same-sex marriage and 32 percent oppose it, indicating that Texas's attitudes toward same-sex marriage have slowly shifted. That same poll indicates that a majority of Texans oppose exempting people from antidiscrimination laws even for a sincerely held religious belief. Nonetheless, when the national government extends civil rights to any minority group, there is some portion of the population that fervently resists that extension.

While the battle over same-sex marriage has been contentious, the battle over the passage of a national health care policy has taken the conflict over federalism to a whole new level. A national health care system has been a goal of the Democratic Party since President Harry Truman proposed a national health insurance plan in 1945. Indeed, health care reform was the hallmark of Massachusetts senator Ted Kennedy's nearly five decades in Congress. Hillary Clinton made national health care central to her 2008 presidential campaign after championing a similar proposal as first lady. When Barack Obama campaigned for president in 2008, he promised to make health care reform a priority. While national health care has been popular among Democrats for some time, it has been equally unpopular among Republicans. Even as President Obama signed the ACA into law on March 23, 2010, Republican opposition to the bill was still growing. Though many provisions of the ACA are quite popular, the most controversial provision required all citizens to either purchase insurance or pay a penalty. Ironically, this provision originated among conservatives as a way to prevent free riders in health care. Nonetheless, Texans, who tend to distrust government in general, by and large don't want anything approaching universal health care. Only a few hours after the bill passed, Governor Rick Perry released a statement suggesting that "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." 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." In that spirit, Perry championed a bill reaffirming Texas's commitment to the Tenth Amendment. The so-called Tenthers contend that policies such as national health care reform, Social Security, and Medicare are an unconstitutional violation of the Tenth Amendment. According to a statement posted on his website when he was attorney general, Greg Abbott joined other states in suing the federal government “to protect all Texans' constitutional rights, preserve the constitutional framework intended by our nation's founders, and defend our state from further infringement by the federal government.” When the Supreme Court upheld the ACA in 2012 as a constitutional tax, Governor Perry responded that "freedom was frontally attacked by passage of this monstrosity—and the court utterly failed in its duty to uphold the Constitutional limits placed on Washington.” As of 2017, a majority of Texans, 52 percent, support repeal of the ACA, but 68 percent of Texans want the government to have a replacement ready before repealing the law. Texans continue to oppose the ACA overall, although they support many of its individual provisions. A 2013 University of Texas (UT)/Texas Tribune poll showed that a majority of Texans support providing tax credits to small businesses, providing financial assistance to low- and
moderate-income Americans to help purchase insurance, allowing children to stay on their parents’ insurance until they are twenty-six, and increasing Medicare payroll tax for upper-income Americans as well as the creation of health insurance marketplaces. As we can see, after 200 years, federalism in the United States continues to evolve. How much power the national government should have and how much power should be retained by the states remains an issue as contentious today as it was at our nation’s founding. Nevertheless, state constitutions vary greatly in their length and specificity, the amount of power they confer to each branch of government, and the structure of their state judiciary, among other things.

TEXAS CONSTITUTIONS

Texas’s constitutions, including the current document, reflect its experiences as a province of Spain and later Mexico. 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. Under Spanish law, in contrast to English common law, property rights for women were well defined and included 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. 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 with their limited voice within 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 Spanish language for official state business and the establishment of Catholicism as a state religion. Officially, Texans were required to join the Catholic Church. In general, Texans favored local control of government and distrusted centralized government, a preference that endures today. 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 to this concern by attempting to bar 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. Texans began to favor the creation of a separate Texas state. The central government, which had long looked the other way as Texans brought slaves into the region, also moved to outlaw all forms of slavery. 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. When the Mexican Army arrived in the town of Gonzales in the fall of 1835 to collect a cannon they 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. 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. But 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' impetus to separate from Mexico. Ironically, much the way today's Texas economy benefits from immigrant labor, Texas under Mexico depended on immigration for the security of the sparsely populated state and initially encouraged immigration from both America and Europe.
during the early years of Mexican rule, immigration laws were quite liberal. 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.\textsuperscript{18}

Anglo immigrants to Texas under Mexico faced a variety of difficulties arising from their inability to speak or write Spanish. Indeed, Anglo immigrants complained about their inability to understand the laws or Spanish law books. 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.”\textsuperscript{19} The basic difficulties of English-speaking immigrants living under a Spanish-speaking government were a primary concern of Anglos in Texas. 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.\textsuperscript{20} 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 subsequent laws passed printed in multiple languages.

Anglo-Texans’ experiences as an immigrant minority were manifest in the Constitution of 1836, which established extraordinarily liberal 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.”\textsuperscript{21} Furthermore, the constitution made the following provision for future immigrants: “After 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.”\textsuperscript{22}

Before Texas declared its independence from Mexico, Anglo-Texans complained that they were inadequately represented in Mexico. The framers of the new Texas Constitution sought to grant immigrants the right to vote, regardless of citizenship. That right has persisted to the current constitution of Texas, which authorized “male persons of foreign birth” to vote in the state so long as they 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 their “intention to become a citizen of the United States.”\textsuperscript{23} 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.

Hispanics in Texas today fight for many of the same rights that Anglos demanded under Mexican rule more than a century ago. Immigrants in modern-day Texas make similar demands for easing citizenship requirements and for language rights.
Anglo-Texans today, sufficiently distanced from their own experience as an immigrant population, have, in many cases, forgotten the difficulties they faced as the immigrant minority. Nevertheless, the immigration issue was as critical in the independence movement of Texas as it is in Texas politics today.

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. 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 president was elected to a three-year term, prohibited from serving consecutive terms, and appointed commander in chief of the Texas military. 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. At the end of the constitution was a declaration of rights, which enumerated individual rights similar to those found in the national Bill of Rights, such as freedoms of speech, the press, and religion. 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.

There were, however, some notable differences between the U.S. Constitution and the Republic of Texas Constitution. For instance, the Texas Constitution was distinctly unitary rather than federal in nature, since the Republic of Texas did not create lower units of government with any independent power. In a reaction to the establishment of Catholicism as the state religion under Mexico, the republic’s constitution prohibited priests from holding office. Perhaps the most important feature of the new constitution was its legalization of slavery, a provision that had irreversible consequences for both Texas and the United States. Immigrants moving to Texas were permitted to bring their slaves with them, and Texas slave owners were prohibited from freeing their slaves without the consent of the legislature. However, the constitution stopped short of allowing the slave trade in Texas. When Texas was a part of Mexico, its slave population was relatively small. Once Texas left Mexico, and with annexation into the United States seen as inevitable by many, the slave population exploded in Texas, rising from an estimated 5,000 slaves (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. 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. While Texans wanted to join the Union, annexation was not immediate. There were two significant obstacles to Texas joining the United States. First, Texas’s claim of independence was precarious. Upon his return...
to Mexico, Santa Anna renounced the Treaties of Velasco and reiterated Mexico’s claims to Texas. Any attempt by the United States to annex Texas could potentially provoke a war with Mexico. Second, Texas’s constitutional protection of slavery made annexation controversial within the United States. Abolitionists objected to the addition of another slave state; at the same time, existing slave states saw the admission of Texas into the United States as a guarantee of the future of slavery. Initially at least, the annexation of Texas was unpopular in the United States, particularly outside the South. Thus, a first annexation treaty failed to receive Senate ratification. Eventually, though, the idea of Manifest Destiny, or the inevitability of the expansion of the United States across the continent, won out. James K. Polk campaigned for the presidency based on expanding the United States through immediate annexation of Texas and expansion into Oregon. In 1845, Texas was finally admitted into the United States. According to the annexation agreement, Texas retained responsibility for its debt as well as the rights to its public land. In addition, Texas could divide itself into as many as five states as the population continued to expand and then be admitted to the United States under the provisions of the national constitution.

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, and France, as well as trying to procure financial aid from these governments. While the United States hesitated to bring Texas into the Union, Britain wanted an independent Texas to counter growing American power. 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 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 as an indication of its 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, a new constitution was necessary. 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's appointment power was expanded to include the attorney general, the Supreme Court of Texas judges, and district court judges, in addition to 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. Most Texans were in debt and highly distrustful of creditors, and indeed, many individuals, including Stephen F. Austin, came to Texas to try to get out of debt. Thus, the statehood constitution specified guarantees against 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 provisions protecting slavery remained, and the Texas Legislature was prohibited from emancipating slaves without compensation. 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. Historically, the category of white had 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. 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).” 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.

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 know 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 their affiliation with the United States.

When Texas voted to secede, Angelina County in East Texas was opposed, but in the rest of East Texas, where cotton farming dominated the economy, 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 voted against secession. The Central Texas frontier relied on protection from the U.S. Army, and the ethnic German population there opposed slavery, making secession less popular. 

Secession was also unpopular in North Texas, where slavery was virtually absent. Nonetheless, on February 23, 1861, Texas voted to secede and joined the Confederate States of America.

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

Joining the Confederacy meant that a new constitution was needed. 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, the legislature was prohibited from emancipating slaves without compensating their owners, and owners were prohibited from emancipating slaves without permission of the legislature. In the 1861 constitution, both slave owners and the state legislature were prohibited from emancipating slaves under any circumstance. Otherwise, the Confederate constitution kept the same general governmental structures as the 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. Lincoln assigned a provisional governor, A. J. Hamilton, who 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 include certain provisions in their constitution. The 1866 constitution specifically renounced secession, repudiated the debts associated with fighting the Civil War on the side of the Confederacy, and acknowledged that slavery was “terminated by this State, by the Government of the United States, by force of arms.”

Although slavery was ended, 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. In addition, 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. 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.
The Second Reconstruction: The Constitution of 1869

The Reconstruction Acts passed by Congress divided the South into military districts and assigned military leaders. Texans were required by Congress to write a new constitution in which African Americans realized full political rights, and were further required to ratify the Thirteenth and Fourteenth Amendments to end military rule in the state. 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 this 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. The delegates then, 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. For instance, the office of the governor was again 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 1869 constitution also created a plural executive that consisted of eight offices, including the governor. The Republican authors of the 1869 constitution also adopted a broader range of social services and corresponding tax policies that most Texans, who overwhelmingly identified as Democrats, opposed. For example, the new constitution created a road tax that funded bridge building and road improvements in Texas. 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.

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 a hundred 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
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 with the backing of black voters. This connection to both ex-slaves and the Republican Party no doubt helped to alienate most Texans. In the eyes of many, Davis ballooned the debt, declared martial law in much of the state with his control of the state militia and state police, and sold out the state’s farmers to big business, including railroads, at the expense of the mainly agrarian population. And, to add insult to injury, when it became clear that Republicans would likely lose the next election, Davis postponed the legislative election and initially refused to leave office after losing the governor’s race. This version of events allowed Texans, still stinging from their loss of the recent “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.

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 would have faced a lack of revenue regardless of who occupied the governor’s office. Davis advocated an expansion of social services favored by the Republican Party, which necessarily translated into higher state taxes. The Republican policies were no doubt more progressive than Texas Democrats preferred. That does not necessarily indicate wastefulness or dishonesty, though. For example, Davis advocated a compulsory education system that was viewed as exorbitant by many Texans. Moreover, both taxes and state debt were actually higher under the succeeding Democratic administrations.

Davis also 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. There was also a good deal of resistance remaining from the Civil War. For instance, Davis declared martial law in Hill County in January 1871, following the arrest of a state police officer. The police officer had offended locals when he attempted to arrest the son of the county’s largest landowner for killing a freedman and his wife. 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. So, while it is true that Davis used expanded police powers to maintain order in the state, often the disorder was the result of whites attempting to repress the newly freed African American minority and reject the authority of the Republican-dominated state government and police.

Given that many Democrats were disenfranchised during punitive Reconstruction, Davis knew that Republican control of both the governorship and the legislature would be short-lived. Although Davis postponed the legislative and congressional elections, when they finally did take place, the Democrats won decisively. The new Democratic-controlled legislature 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. However, the validity of the election was challenged by Republicans in the Ex parte Rodriguez case in the Supreme Court of Texas. The 1869 constitution stated that “all elections for State, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o’clock, a.m., until 4 o’clock, p.m., of each day.” Democrats argued that the constitution allowed the legislature to change either the allotted time or the place of the election. Republicans argued that the semicolon after the phrase “provided by law” created two independent clauses, and that though the legislature could change the location of the polls, it could not change the time allotted for the elections. The Supreme Court of Texas sided with the Republicans, thus earning the nickname “the Semicolon Court.” Although the Supreme Court of Texas ruled that Coke’s election was invalid, Democrats ignored the ruling and inaugurated Coke. Davis, unwilling to resort to force to protect his position, vacated the office.

In many ways, vilifying the Davis administration extended the tensions of the Civil War, as Democrats blamed Republicans for all of the state’s problems. That we still see many textbooks repeat the one-sided view of the Davis administration even today is a testament to the pervasiveness of the anti-Republican and anti-northern myth.

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iii. Texas Constitution (1869), art. 3, sec. 6.
out to write a new constitution. Some sought to prevent a “tyrant” such as Davis from ever again gaining so much power in Texas. Others leaped at the opportunity to replace the constitution that the national government and the Republican Party had imposed on them. Either way, Texans were once again writing a constitution.

**THE CURRENT SYSTEM: THE CONSTITUTION OF 1876**

The current constitution of Texas emerged from the tangled mess left by the demise of Radical Republican rule and the return to power of the Democrats. The 1876 constitution created three branches of government, with separation of power between the branches and a system of checks and balances. Texas’s constitution is based on the idea of popular sovereignty, evidenced in the preamble: “Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution.” The constitution also embodies the principle of federalism in recognizing that Texas is free, “subject only to the Constitution of the United States.”

Several clashes created the context for the current Texas Constitution. First, the Civil War and the subsequent Reconstruction fostered considerable resentment toward northern Republican interests throughout the South. The Reconstruction era in Texas saw a Republican-dominated government exclude the majority of Texans from participating in the creation of the constitution and in the state’s political processes in general. Thus, 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, has always 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, in reaction to its comparatively progressive predecessor, 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. In fact, the founders of the 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.

**Individual Freedom**

Texans have always placed a high value on individual freedoms. Since 1845, a bill of rights has been the first article in each Texas constitution, demonstrating the importance Texans place on individual freedom (see Table 2.1). The Texas Constitution carries over rights from the previous constitution, such as freedoms of speech, the press, and assembly, along with the right to bear arms. It also includes protections against unreasonable search and seizure and cruel and unusual punishment and guarantees a trial by jury.

Texans' experiences during the Civil War also influenced the writers of the current constitution. Because President Lincoln had suspended habeas corpus during the war so that people who were suspected of disloyalty could be arrested and held indefinitely without being charged, the framers of the current Texas Constitution specified that the right to habeas corpus shall never be suspended. The authors kept the provisions for freedom of religion while adding a requirement that state officeholders “acknowledge the existence of a Supreme Being.” Moreover, the current constitution prohibits public money from being used for the benefit of “any sect, or religious society, theological or religious seminary.” Long-standing prohibitions against imprisonment for debt, provisions for community property, and protections for family homesteads were retained in the new constitution.

**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 why a complete constitutional revision has failed to get support in the state.

**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 remain limited to only $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 thirty-one members. Members of the House continue to be elected every two years, while the terms of the senators have been shortened to four years. 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 required to place the subject of the bill in the title, and each bill can only have 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, supporters of the Confederacy were banned from voting and participating in the creation of the constitution. In the resulting government, the Republican governor centralized power, often to deal with Texans who resisted extending rights to newly freed slaves. 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. Thus, in contrast to the U.S. executive, the Texas Constitution created a plural executive, an institutional arrangement where 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 only significant state-level appointment left to the governor is the secretary of state. 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 creating the current 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. Moreover, the constitution specified the election of all state judges, although judicial vacancies are filled by gubernatorial appointment. Thus, all state judges in Texas are constantly raising campaign funds in order to get reelected. This is in sharp contrast to the federal judiciary, which is appointed for the purpose of creating an independent judiciary.

**Civil Rights in Texas**

As soon as slavery was abolished, Texas created new ways to deny civil rights to minorities. Immediately following the Civil War, African Americans were allowed to own property and enter into contracts, but black codes were enacted to attempt to control virtually every other aspect of life, prohibiting blacks from marrying whites, gaining public lands, or sharing in the public school fund. Railroad companies were required by law to segregate. Although black codes were written to target the black population, in practice they were often applied to Hispanics as well. Texas also passed a law that required laborers to enter binding contracts when they worked for an employer for more than thirty days. The contract prohibited the laborer from leaving the employment, required laborers to be polite, fined laborers for work missed for “feigned sickness,” and required them to promptly answer calls and obey commands on all days and at all hours. Many Texans devised new ways to continue slavery across the state. Apprenticeship laws provided a means for black and Hispanic children under twenty-one to be contracted to employers for unpaid work. Parents could enter their children into such contracts, children could enter into apprenticeship contracts themselves, or county judges could create a contract without the parents’ consent, so long as they placed a notice in the county newspaper. In some cases, local law enforcement would cite youths for vagrancy and the court would order an apprenticeship. More common was the use of sharecropping and peonage to keep unpaid labor in service. Peonage
The constitutions of Texas and Connecticut date from very different eras in the country’s history. The Texas Constitution, the state’s sixth, was written in 1876 and reflects the agrarian, rural nature of the state at the time. The Connecticut Constitution is one of the country’s newer state constitutions, having been written and adopted in 1965. It is the state’s third, following the Fundamental Orders of Connecticut (1638) and the Connecticut Constitution (1818).

The Connecticut Constitution reflects in many ways the world of the 1960s. Its language is less formal and archaic than that of either the Texas Constitution or the U.S. Constitution. An extensive list of civil rights and liberties takes center stage in the Connecticut Constitution. We might expect issues surrounding the free exercise of religion and separation of church and state to be reflective of the time and to therefore be more pronounced in the Connecticut Constitution than in the Texas Constitution. After all, Connecticut wrote and adopted its constitution after the U.S. Supreme Court eliminated mandatory prayer and mandatory religious instruction in public schools.

In fact, the Texas Constitution and Connecticut Constitution share a number of characteristics regarding religious liberty. For example, both guarantee freedom of worship, prohibit compulsory attendance at religious services, and prohibit any requirement that individuals give money to build places of worship. The constitutions of both states also contain a number of prohibitions on their respective state governments. Yet the two documents differ in many respects, too. The Connecticut Constitution features specific language that guarantees the right of ministers and religious teachers to pursue their professions. Texas lacks such language in its constitution. In Texas, public lands cannot be given to religious organizations; a similar provision does not appear in the Connecticut Constitution.

The table in this box lists key provisions of the Texas Constitution and Connecticut Constitution in the area of religious liberty.

<table>
<thead>
<tr>
<th>Issue/Topic</th>
<th>Texas Constitution</th>
<th>Connecticut Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of worship is guaranteed</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Attendance at services cannot be compelled</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Contributions to build places of worship cannot be required</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Preference for any religious society cannot be conferred</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Equality of denominations is guaranteed</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Equal protection of the law cannot be denied based on religion</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Alternative voting is permissible where religion forbids action on Election Day</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>The right of ministers and religious teachers to pursue their profession is guaranteed</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Religious tests as a prerequisite to holding office are not permitted</td>
<td>✓</td>
<td>×</td>
</tr>
<tr>
<td>Disqualification as a witness in court based on religion is not permitted</td>
<td>✓</td>
<td>✓*</td>
</tr>
<tr>
<td>State funds cannot be given to religious organizations</td>
<td>✓</td>
<td>×</td>
</tr>
<tr>
<td>Public lands cannot be given to religious organizations</td>
<td>✓</td>
<td>×</td>
</tr>
</tbody>
</table>

* In equal protection clause.
allowed debts to be paid with labor. In South Texas, debts, real or merely alleged, could result in young African American or Hispanic men being taken to a farm to work without pay. One example that made national news was the Willacy County peonage case, in which the local sheriff, the justice of the peace, and local cotton farmers cooperated to force young men into unpaid labor. When young men were arrested for vagrancy, the sheriff assessed fines and then forced the men to work in the cotton fields under armed guards to pay their fines. To prevent laborers from leaving the county, a “pass system” was utilized, which required laborers to have a pass signed by a local farmer in order to leave the area.40

When the current constitution was written, Texans wanted to erase the memory of Reconstruction. However, some elements of Reconstruction, most notably the Fourteenth Amendment’s guarantee of equal protection and the Fifteenth Amendment’s extension of suffrage to African Americans in Texas, could not be undone. There were those at the 1875 Constitutional Convention, however, who favored a poll tax in order to vote, ostensibly in an attempt to disenfranchise African Americans in Texas. However, the Grange and other poor farmers objected to the poll tax, which would also disenfranchise poor whites in Texas. In the end, the convention delegates defeated the poll tax. The 1876 legislature promptly adopted a poll tax as a means to generate revenue, but it was not until 1902 that the Texas Constitution was amended to make payment of a poll tax a requirement for voting.41

The poll tax remained in place until it was abolished by the Twenty-Fourth Amendment to the U.S. Constitution. A second official means of disenfranchising African Americans included the Democratic Party’s use of a whites-only primary (see full discussion of voting rights in Chapter 8), which the Texas Legislature formalized with a 1923 law explicitly banning blacks from voting in the Democratic primary. The white primary was particularly effective because the Democrats held a virtual monopoly of state offices for about 100 years. Unofficially, local groups, often including law enforcement, would use intimidation and violence to discourage participation. Hispanics in Texas were similarly disenfranchised in many parts of the state. In other parts of the state, local political bosses organized the local Hispanic vote to deliver large blocs of votes to a particular candidate.42 The framers of the current Texas Constitution also refused to grant women’s suffrage. Interestingly, the current constitution protects voters from arrest on their way to and from the polls on Election Day, a provision intended to protect minority voters from intimidation by local law enforcement.

Perhaps an even more controversial topic than voting rights was the educational system, which was originally mandated in the 1869 constitution. During the Reconstruction period, education was compulsory, regardless of race, and was paid for with tax revenue. At a time when the Texas economy had been devastated by the Civil War, a majority of Texans saw a universal educational system as excessive. Opposition to this system was widespread, as white landowners objected to paying for the education of African American children, and farmers in general favored local control of education, which could be tailored to the needs of particular communities while corresponding to crop cycles.43 Thus, the 1876 constitution ended compulsory education. The 1876 constitution did mandate the “Legislature of the State to establish and make suitable provision for the support and maintenance of an
efficient system of public free schools” but specified that “[s]eparate schools shall be provided for the white and colored children.” Texas would not reinstate compulsory education until 1915.

In response to attempts by southern states to legalize discrimination, the National Association for the Advancement of Colored People (NAACP) was formed to fight discrimination in the courts. The NAACP was created nationally in 1909, and the first NAACP branch in Texas was established in El Paso in 1914. The early NAACP in Texas concentrated on voting rights and segregation laws. Segregation laws in Texas were subject to the standard set by the U.S. Supreme Court in *Plessy v. Ferguson* (1896). According to this case, laws segregating the races did not violate the Fourteenth Amendment of the U.S. Constitution so long as the facilities were equal. In Texas, the first significant limit to segregation was *Sweatt v. Painter* (1950), in which the U.S. Supreme Court ordered the University of Texas at Austin (UT Austin) to admit black students. The NAACP successfully argued that the establishment of a blacks-only law school in Houston was not equal, in facilities or opportunities, to UT Austin. Desegregating primary and secondary schools would be more difficult. In 1954, the U.S. Supreme Court overturned the *Plessy* decision with *Brown v. The Board of Education of Topeka*. The Supreme Court ruled that segregation was inherently unequal and ordered schools to desegregate with all deliberate speed.

In 1956, the Mansfield school district was continuing to bus its black students to Fort Worth. The NAACP sued on behalf of three black children, and federal courts ordered the school district to comply with the *Brown* decision and desegregate. That fall when the black students showed up for school, they were met with a large and angry mob determined not to allow the children to enter the school. The governor of the state sent the Texas Rangers to ensure the school remained segregated, and the three black students were once again sent to Fort Worth. The governor successfully prevented desegregation of Mansfield Independent School District (ISD) and no doubt inspired the governor of Arkansas, who would try a similar approach the following year in Little Rock. Although some school districts in the state quietly desegregated, others engaged in long-term, massive resistance,
Before the desegregation of Little Rock High School became the turning point in the desegregation of public schools in America, a similar battle was fought in Texas. Mansfield, a small town southeast of Fort Worth, had 1,450 residents in the 1950s, about 350 of them African American. As in most southern communities, Mansfield’s restaurants, churches, schools, and social functions were segregated. And, as in many southern communities, African Americans realized that the path to full citizenship and equality led through quality schools.

In an effort spawned by the Bethlehem Baptist Church and organized by the National Association for the Advancement of Colored People (NAACP), black residents began to look for ways to get the Brown v. Board of Education decision declaring segregated schools unconstitutional applied to Mansfield. Black parents were not interested in seeing their children receive the kind of second-rate education that would virtually assure them a life as a second-class citizen. While some advocates of continuing segregation asked that the state be able to set its own timeline for ending segregation, many hard-liners saw the separation of the races as a traditional value that should not be tinkered with. Governor Shivers demonstrated the uncompromising view of many segregationists when he proclaimed, “We are going to keep the system that we know is best. No law, no court, can wreck what God has made.”

As was often the case in Texas, opposition to desegregation was passionate and carried implied or explicit threats to students crossing the separation between the races. While Mansfield High was technically open to black students, they knew attending put their lives at risk. Large crowds gathered in front of the school when it opened for registration in the fall of 1956. For several days, an effigy of a black figure hung from the flagpole in front of Mansfield High School instead of the American flag, and black students who were thinking about enrolling likely understood that the local law enforcement officers who would not remove the black figure would also not protect black students attempting to enroll at the campus beneath it. State and local officials refused to ensure the safety of black students, and those students decided that making the long bus ride into schools in Fort Worth was safer than risking their lives at Mansfield High School.

Typically involving busing students to alternative school districts to maintain separate schools. Eventually, the federal government intervened to implement integration in the holdouts. In United States v. Texas (1971), the U.S. District Court in Tyler was granted the authority to oversee and implement desegregation of the remaining segregated schools.

Ironically, today, many schools in the state are more segregated than they were under legal segregation. As whites have moved to the suburbs, many urban school districts are predominantly black and Hispanic. According to the Texas Education Agency, “fifteen years ago, about one out of every five Texas public schools had a student population that was 90 percent or more minority . . . Now it’s one in

How should government weigh the predominant political culture against minority rights?

Social Responsibility

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Other persistent effects of segregation are less obvious. In 2016, a woman in Normanna was told she could not bury her husband in the “whites only” cemetery because he was Hispanic. Although Anglos and Tejanos fought side by side for Texas’s independence, the segregated South saw increased racial discrimination against Hispanics across the state. The League of United Latin American Citizens (LULAC) was founded in Corpus Christi in 1929 to fight discrimination and segregation targeting Hispanic populations. An early and significant success for LULAC was Hernandez v. State of Texas (1954), which ruled that Hispanics and other racial groups had equal protection under the Fourteenth Amendment. Hernandez’s lawyers argued that Hispanics were systematically excluded from juries, which violated their constitutional rights. Hispanics and other non-English-speakers achieved a victory of another sort in 1973, when the state legislature passed the bilingual education act. This act required every school district with a population of twenty students in any language classification to implement a bilingual education program.

While Hispanics in Texas have faced a wide range of difficulties, they are the largest minority in the state and have continued to contribute to the political landscape across the state.

Women in Texas fared somewhat better than women in other parts of the United States. This is in part due to Texas’s roots in Spanish law, which recognized women’s property rights and established community property. Texas also granted women the right to vote in state elections in 1918, just ahead of the national government granting women the right to vote in national elections in 1920. Women would not get the right to serve on juries in Texas until 1954. Roe v. Wade (1972) granted women the right to an abortion, although recent Texas legislation has attempted to restrict that right (see the “Federalism in Action: Abortion” section in this chapter). The Texas Constitution does include a provision to prevent discrimination based on sex; in 1972, it was amended to guarantee equality under the law regardless of “sex, race, color, creed or national origin”—the so-called Texas equal rights amendment. A similar amendment failed to pass at the national level.

The civil rights issue currently dominating the attention of the Texas Legislature revolves around lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights. Many Texans continue to oppose criminalizing discrimination against the LGBTQ community. Legal widespread discrimination against the LGBTQ community has been fairly common until recently. The first significant victory for the LGBTQ community was the 2003 U.S. Supreme Court case Lawrence v. Texas. Prior to this case, Texas had outlawed “deviant sexual intercourse,” which was a class C misdemeanor. The Supreme Court ruled that outlawing homosexual sex violated the right to privacy. The second momentous victory focused on the right to marry. After the national Congress passed the Defense of Marriage Act, which allowed each state to define marriage, Texans voted in 2005 to amend the state’s constitution to define marriage as “the union of one man and one woman.” However, political culture was changing rapidly across the country, and in 2009, Texas elected its first openly gay mayor, Annise Parker, in Houston. Still, gays could not openly serve in the military until 2012 and could not legally get married in many states, including Texas, until 2015. In 2015, in Obergefell v. Hodges, the U.S. Supreme Court ruled that states must recognized same-sex marriages.

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reasoning that choice in marriage is fundamental to individual rights and that the right to marry provides safeguards to families and children. In addition, a 2016 U.S. Supreme Court ruling made it legal for gay couples to adopt children in all fifty states.

There are still no state laws prohibiting discrimination based on sexual orientation and gender identity. In 2014, the Houston City Council passed legislation that would prevent discrimination in housing, public places, and employment based on a wide range of criteria, including race, gender, sexual orientation, age, disability, and military status. The Houston Equal Rights Ordinance, or so-called HERO law, eventually went before the voters, who overwhelmingly defeated the legislation. Nonetheless, there are twelve Texas cities with populations of more than 100,000 that have some rules in place to protect city employees or residents based on sexual orientation or gender identity. Political leaders continue to push for a transgender bathroom law.

CRITICISMS OF THE 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 2017 the U.S. Census Bureau estimated Texas’s population at 28.3 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 greater 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 significant 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 frequently cited 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 2003, Texans approved twenty-two constitutional amendments, including one permitting cities to donate their surplus firefighting
FIGURE 2.1  Texas Constitution of 1876: Amendments Proposed and Adopted, 1879–2017

equipment to volunteer fire departments. Similarly, in 2017, the constitution was amended to expand the definition of professional sports team for fund-raising purposes. 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 enactment of new statutes will require constitutional amendment rather than passage in the legislature. The result is a constitution that continues to grow; it is now approximately 87,000 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 498 times, making it one of the most frequently amended constitutions among the states.\(^{48}\) Alabama’s state constitution has been amended the most, passing 926 amendments, while Rhode Island’s constitution has been amended the least, with a mere twelve amendments. (See Table 2.2 for comparison of other facts about the constitutions of the fifty states.)

As Figure 2.1 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 2.2). Since 1985, the average turnout in elections with constitutional amendments has been 9.1 percent of the entire voting-age population.\(^{49}\) Voter turnout remains alarmingly 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 2003, voters approved twenty-two constitutional amendments, including a controversial limit on medical malpractice lawsuits, with a mere 9.3 percent turnout rate. In 2005, 76 percent of voters approved a constitutional amendment
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 heroes 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 virtues of the relatively broad language of the Massachusetts Constitution have 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 498 amendments. Also unlike Texas, Massachusetts still uses its original document, while Texas is on its fifth constitution since statehood (and its sixth if you add the short-lived Constitution of the Republic of Texas).

The original Texas Constitution (1845) after Texas joined the United States reflected 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 informed by experiences in the Civil War and Reconstruction eras of U.S. history.

**Why do you think the Massachusetts Constitution is a model for other states?**

**Critical Thinking**

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

**Empirical and Quantitative**

### A Constitutional Comparison of Massachusetts and Texas

<table>
<thead>
<tr>
<th>Feature</th>
<th>Massachusetts</th>
<th>Texas (1845)</th>
<th>Texas (1876)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year adopted</td>
<td>1780</td>
<td>1845</td>
<td>1876</td>
</tr>
<tr>
<td>Word length</td>
<td>45,000</td>
<td>11,600</td>
<td>87,000</td>
</tr>
<tr>
<td>Amendments</td>
<td>120</td>
<td>1</td>
<td>498</td>
</tr>
<tr>
<td>Major sections</td>
<td>4</td>
<td>13</td>
<td>17</td>
</tr>
<tr>
<td>Executive offices elected</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Governor</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Lieutenant governor</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Secretary of state</td>
<td>✓</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>Attorney general</td>
<td>✓</td>
<td>x</td>
<td>✓</td>
</tr>
<tr>
<td>Treasurer/comptroller</td>
<td>✓</td>
<td>x</td>
<td>✓</td>
</tr>
<tr>
<td>Other</td>
<td>✓ (1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislature</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senate</td>
<td>40</td>
<td>At least 19 but no more than 33</td>
<td>31</td>
</tr>
<tr>
<td>Length of term</td>
<td>2 years</td>
<td>4 years</td>
<td>4 years</td>
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<tr>
<td>House</td>
<td>160</td>
<td>At least 45 but no more than 90</td>
<td>150</td>
</tr>
<tr>
<td>Size</td>
<td>2 years</td>
<td>2 years</td>
<td>2 years</td>
</tr>
<tr>
<td>Judiciary</td>
<td>Appointed</td>
<td>Appointed</td>
<td>Elected</td>
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</table>

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<table>
<thead>
<tr>
<th>Feature</th>
<th>Massachusetts</th>
<th>Texas (1845)</th>
<th>Texas (1876)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statewide referendum to amend constitution</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Statewide referendum to make general laws</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
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<tr>
<td>Initiative petition to amend constitution</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Initiative petition to make general laws</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
</tbody>
</table>

**TABLE 2.2** Comparison of State Constitutions

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Constitutions</th>
<th>Date of Current Constitution</th>
<th>Approximate Word Length</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>6</td>
<td>1901</td>
<td>388,882</td>
</tr>
<tr>
<td>Alaska</td>
<td>1</td>
<td>1959</td>
<td>13,479</td>
</tr>
<tr>
<td>Arizona</td>
<td>1</td>
<td>1912</td>
<td>47,306</td>
</tr>
<tr>
<td>Arkansas</td>
<td>5</td>
<td>1874</td>
<td>59,120</td>
</tr>
<tr>
<td>California</td>
<td>2</td>
<td>1879</td>
<td>67,048</td>
</tr>
<tr>
<td>Colorado</td>
<td>1</td>
<td>1876</td>
<td>66,140</td>
</tr>
<tr>
<td>Connecticut</td>
<td>2</td>
<td>1965</td>
<td>16,401</td>
</tr>
<tr>
<td>Delaware</td>
<td>4</td>
<td>1897</td>
<td>25,145</td>
</tr>
<tr>
<td>Florida</td>
<td>6</td>
<td>1969</td>
<td>56,705</td>
</tr>
<tr>
<td>Georgia</td>
<td>10</td>
<td>1983</td>
<td>41,684</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1</td>
<td>1959</td>
<td>21,498</td>
</tr>
<tr>
<td>Idaho</td>
<td>1</td>
<td>1890</td>
<td>24,626</td>
</tr>
<tr>
<td>Illinois</td>
<td>4</td>
<td>1971</td>
<td>16,401</td>
</tr>
<tr>
<td>Indiana</td>
<td>2</td>
<td>1851</td>
<td>11,476</td>
</tr>
<tr>
<td>Iowa</td>
<td>2</td>
<td>1857</td>
<td>11,089</td>
</tr>
<tr>
<td>Kansas</td>
<td>1</td>
<td>1861</td>
<td>14,097</td>
</tr>
<tr>
<td>Kentucky</td>
<td>4</td>
<td>1891</td>
<td>27,234</td>
</tr>
<tr>
<td>Louisiana</td>
<td>11</td>
<td>1875</td>
<td>69,876</td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
<td>1820</td>
<td>16,313</td>
</tr>
<tr>
<td>Maryland</td>
<td>4</td>
<td>1867</td>
<td>43,198</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1</td>
<td>1870</td>
<td>45,283</td>
</tr>
<tr>
<td>Michigan</td>
<td>4</td>
<td>1864</td>
<td>31,164</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
<td>1858</td>
<td>11,734</td>
</tr>
<tr>
<td>Mississippi</td>
<td>4</td>
<td>1890</td>
<td>26,229</td>
</tr>
<tr>
<td>Missouri</td>
<td>4</td>
<td>1945</td>
<td>69,394</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Constitutions</th>
<th>Date of Current Constitution</th>
<th>Approximate Word Length</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana</td>
<td>2</td>
<td>1973</td>
<td>12,790</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2</td>
<td>1875</td>
<td>34,934</td>
</tr>
<tr>
<td>Nevada</td>
<td>1</td>
<td>1864</td>
<td>37,418</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2</td>
<td>1784</td>
<td>13,060</td>
</tr>
<tr>
<td>New Jersey</td>
<td>3</td>
<td>1948</td>
<td>26,360</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1</td>
<td>1912</td>
<td>33,198</td>
</tr>
<tr>
<td>New York</td>
<td>4</td>
<td>1895</td>
<td>44,397</td>
</tr>
<tr>
<td>North Carolina</td>
<td>3</td>
<td>1871</td>
<td>17,177</td>
</tr>
<tr>
<td>North Dakota</td>
<td>1</td>
<td>1889</td>
<td>18,746</td>
</tr>
<tr>
<td>Ohio</td>
<td>2</td>
<td>1851</td>
<td>53,239</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1</td>
<td>1907</td>
<td>81,666</td>
</tr>
<tr>
<td>Oregon</td>
<td>1</td>
<td>1859</td>
<td>49,016</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>5</td>
<td>1968</td>
<td>26,078</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2</td>
<td>1986</td>
<td>11,407</td>
</tr>
<tr>
<td>South Carolina</td>
<td>7</td>
<td>1896</td>
<td>27,421</td>
</tr>
<tr>
<td>South Dakota</td>
<td>1</td>
<td>1889</td>
<td>27,774</td>
</tr>
<tr>
<td>Tennessee</td>
<td>3</td>
<td>1870</td>
<td>13,900</td>
</tr>
<tr>
<td>Texas</td>
<td>5</td>
<td>1876</td>
<td>87,000</td>
</tr>
<tr>
<td>Utah</td>
<td>1</td>
<td>1896</td>
<td>17,849</td>
</tr>
<tr>
<td>Vermont</td>
<td>3</td>
<td>1793</td>
<td>8,565</td>
</tr>
<tr>
<td>Virginia</td>
<td>6</td>
<td>1971</td>
<td>21,899</td>
</tr>
<tr>
<td>Washington</td>
<td>1</td>
<td>1889</td>
<td>32,578</td>
</tr>
<tr>
<td>West Virginia</td>
<td>2</td>
<td>1872</td>
<td>33,324</td>
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<tr>
<td>Wisconsin</td>
<td>1</td>
<td>1848</td>
<td>15,102</td>
</tr>
<tr>
<td>Wyoming</td>
<td>1</td>
<td>1890</td>
<td>26,349</td>
</tr>
</tbody>
</table>

*Source:* Data from The Book of the States, vol. 49 (Lexington, KY: Council of State Governments, 2017), Table 1.1.
defining marriage as a union between a man and a woman. An amendment this controversial was 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.

**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. 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. 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 with a single high court and 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.” Moreover, the cost of the frequent elections necessary to amend the constitution is considerable, manifesting itself in the forms of “voter fatigue and the temptation for special-interest groups to push amendments that aren't in the public interest.” Unfortunately, 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. Theoretically, change could also be accomplished with the voter-led initiative and referendum. An initiative occurs when voters gather signatures on a petition in order to place either statutes or constitutional amendments on a ballot. A referendum allows voters to cast a popular vote on statutes passed by the legislature. These two voter-led mechanisms are consistent with Texans’ legendary preference for limited government and popular control. So it is particularly surprising that the Texas Constitution does not have provisions for either procedure. While Texans’ preference for limited government may be notorious, in this case it is apparently trumped by their equally entrenched resistance to change. In the end, prospects for constitutional change seem limited. Most Texans, even as they acknowledge the problems with the current constitution, still distrust the potential problems of a new one more.

**WINNERS AND LOSERS**

In Texas, the general distrust of government and resulting resistance to change has 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 routinely face a long ballot and are literally overwhelmed by the number of offices and constitutional amendments put before them at 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. The 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 salary, entities that often have business before the state legislature. The constitution has created a legislature that is indebted to big business and special interests rather than one concerned with representing the people.

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...

---

*FIGURE 2.2* Voter Turnout during Special Elections and Off-Year Elections, 1981–2017

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.

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KEY TERMS

- apprenticeship laws (p. 63)
- black codes (p. 63)
- block grant (p. 46)
- categorical grant (p. 46)
- concurrent powers (p. 42)
- confederal system (p. 41)
- constitution (p. 40)
- cooperative federalism (p. 44)
- devolution (p. 44)
- dual federalism (p. 44)
- enumerated powers (p. 42)
- extradition (p. 43)
- federalism (p. 42)
- fiscal federalism (p. 46)
- full faith and credit clause (p. 43)
- horizontal federalism (p. 43)
- implied powers (p. 42)
- initiative (p. 75)
- long ballot (p. 61)
- Manifest Destiny (p. 54)
- peonage (p. 63)
- popular sovereignty (p. 41)
- privileges and immunities (p. 43)
- referendum (p. 75)
- reserved powers (p. 43)
- supremacy clause (p. 43)
- unfunded mandate (p. 46)
- unitary system (p. 42)
- vertical federalism (p. 43)
**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*

**CHAPTER REVIEW**

1. The type of constitutional arrangement where power is shared between two levels of government is called _____.
   - a. unitary
   - b. confederal
   - c. federalism
   - d. constitutional

2. A categorical grant is money given by the national government to state and local governments and is spent _____.
   - a. however the state wants to spend the money
   - b. according to the guidelines outlined by the national government
   - c. according to the vote of the people

3. Which constitution made it legal for Texans to acquire mineral rights of their property?
   - a. The Republic Constitution
   - b. The statehood Constitution
   - c. The Confederate Constitution
   - d. The first Reconstruction Constitution

4. Which Texas constitution had the strongest provisions to protect slavery?
   - a. The Republic Constitution
   - b. The statehood Constitution
   - c. The Confederate Constitution
   - d. The first Reconstruction Constitution

5. The first Reconstruction Constitution was written to _____.
   - a. satisfy the requirements of the national government
   - b. guarantee African Americans the right to vote
   - c. guarantee African Americans equal protection
   - d. guarantee women the right to vote

6. The men who wrote the current Texas Constitution preferred _____.
   - a. fiscal restraint
   - b. local control
   - c. limiting the power of big businesses
   - d. all of these
7. The current Texas Constitution requires
   a. thirty days’ notice to suspend habeas corpus
   b. all state officeholders to have law degrees
   c. all state officeholders to acknowledge the existence of a Supreme Being
   d. all of these

8. In the Willacy County peonage case, if you were passing through town, you could be arrested and
   a. sent back to where you came from
   b. put in jail indefinitely without bond
   c. forced to work in the cotton fields to pay your fine
   d. have your land sold to pay your debts

9. When a federal court ordered Mansfield ISD to desegregate in 1956, it
   a. refused to desegregate after the governor sent Rangers to Mansfield
   b. desegregated only after the president sent troops to Mansfield
   c. desegregated after a local vote
   d. quietly desegregated

10. The League of United Latin American Citizens (LULAC) was founded in Corpus Christi in 1929 to fight discrimination targeting
    a. women
    b. Hispanics
    c. African Americans
    d. LGBTQ persons