

# CONSTITUTIONAL DEMOCRACY IN TEXAS



CHARLES F. CNUDDÉ & ROBERT E. CREW JR.

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## PREFACE

This book is an introduction to the government and politics of the nation's third largest state. It provides a description and analysis of the major institutions of government in Texas and of a variety of forces that affect the nature of politics in the state.

As its title implies, the book starts from the premise that the system of government in Texas is both democratic and constitutional. A constitutional government is one that enforces clearly understood and regularly applied limits on the powers of those who govern. The limits are spelled out in a written document that serves as a reminder to officeholders that government is an instrument of the people, and that it is the people who are the first great safeguard against abuse of authority. How the document defines, disperses, and constrains the powers of government affects mightily the conduct of political life in the relevant jurisdiction.

Since this written document is so important to a constitutional democracy, we use it as a starting point and a framework for our analysis of government and politics in Texas. We begin our discussion of each topic in the text with an analysis of the importance of the Texas Constitution to that topic. Thus, our discussion of the office of governor begins with a description of the constitutional position of the Governor of Texas and an analysis of the forces that led the position to be treated as it is in the document. We then move to a discussion of the impact on the office of this constitutional treatment. In this fashion, we illustrate the importance of the document in structuring the nature of political activity in the state.

While we recognize the impact of the constitution on political life in Texas, we are also aware that variables other than this document affect politics in the state. Further, there is a reciprocal relationship between the constitution and the political behavior of individuals and institutions. Contemporary political forces can bring about change in the document and adapt it to new needs. The text, therefore, identifies other important factors affecting Texas politics and examines the interplay between them and the constitution. We hope this analysis leads to real understanding of the complex nature of political life in the state.

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# CONTENTS

I.	ESTABLISHING GOVERNMENT IN TEXAS: CREATING A CONSTITUTION .....	1
	A. A Brief Constitutional History .....	1
	a. <i>Constitution of Coahuila y Tejas</i> .....	2
	b. <i>The Constitution of the Republic of Texas</i> .....	2
	c. <i>Statehood and the Constitution of 1845</i> .....	3
	d. <i>The Civil War and Its Aftermath</i> .....	3
	e. <i>The Constitution of 1876</i> .....	4
	B. Policy Issues In The Constitution .....	4
	a. <i>Governmental Power and Authority</i> .....	4
	b. <i>The Distribution of Economic Benefits and Deprivations</i> .....	7
	C. Constitutional Change .....	7
	a. <i>The Formal Amending Process</i> .....	8
	b. <i>The Nature of Constitutional Change in Texas</i> .....	8
	D. Evaluating the Texas Constitution .....	10
	a. <i>Governmental and Political Values in the Texas Constitution</i> .....	11
	b. <i>The Role of the Individual Citizen</i> .....	12
	c. <i>A Politics of Economics</i> .....	12
	E. Conclusion .....	13
	F. References .....	13
II.	POLITICAL PARTICIPATION IN TEXAS .....	15
	A. Factors Affecting Participation .....	15
	a. <i>Social, Demographic, and Economic Variables</i> .....	15
	b. <i>Formal Legal Factors</i> .....	16
	c. <i>Political Culture</i> .....	16
	B. The Nature Of Political Participation .....	17
	C. The Participatory Environment In Texas .....	17
	a. <i>The Formal-Legal Environment</i> .....	17
	b. <i>Political Cultures in Texas</i> .....	20
	D. The Extent Of Participation In Texas .....	27
	a. <i>Voter Registration in Texas</i> .....	27
	b. <i>Voter Turnout in Texas</i> .....	27
	c. <i>Participation in Other Political Activities</i> .....	28
	E. Conclusion .....	33
	F. References .....	33
III.	POLITICAL PARTIES IN TEXAS .....	35
	A. The History Of The Texas Party System .....	36
	B. Party Organization .....	37
	a. <i>Nominations</i> .....	39
	C. Primary Elections .....	39
	a. <i>The Second Primary</i> .....	39
	D. Party Strength .....	40
	a. <i>Democratic Factions</i> .....	41
	b. <i>Indicators of Party Strength</i> .....	42
	E. The Future Of Two-Party Competition In Texas .....	44
	F. Democrats and Republicans In Texas .....	46
	G. Minority Voters And The Parties .....	47
	H. Conclusions .....	48
	I. References .....	49

IV. INTEREST REPRESENTATION IN TEXAS POLITICS .....	51
A. Who is Organized?.....	51
a. <i>Major Interest Groups in Texas</i> .....	51
B. The Pattern Of Group Conflict .....	54
C. The Exercise Of Group Power .....	56
D. Factors Affecting The Operation Of Interest Groups .....	57
a. <i>The Permeability of the Texas Political System</i> .....	57
b. <i>The Operation of The Legislature</i> .....	57
c. <i>Regulation of Interest Groups</i> .....	57
E. The Operation Of Interest Groups In Texas .....	58
a. <i>Regulating Group Influence</i> .....	60
F. Conclusion.....	61
G. References .....	61
V. THE TEXAS LEGISLATURE .....	63
A. Constitutional Doctrine .....	63
a. <i>Representation</i> .....	64
B. Unique Features Of The Texas Legislature.....	66
a. <i>The Governor's Legislative Power</i> .....	66
b. <i>Other Distinctions</i> .....	67
C. The Constitution And Legislative Action .....	67
a. <i>Normal Legislative Procedure</i> .....	68
D. The Rules And Basic Structure .....	69
a. <i>The Agenda</i> .....	69
b. <i>The Committee System</i> .....	70
E. The Leadership .....	71
F. Legislative Process .....	74
G. Other Legislative Procedures .....	77
H. The Legislatures Of Other States .....	78
I. Lobbying And The "Interests" .....	81
J. Conclusion.....	83
K. References .....	83
VI. THE OFFICE OF GOVERNOR OF TEXAS.....	85
A. Factors Affecting The Nature Of The Job .....	86
a. <i>Individual Governors</i> .....	86
b. <i>Political Reforms Affecting the Office</i> .....	89
c. <i>Citizen Expectations</i> .....	90
B. Elements Of The Governor's Job .....	91
C. Gubernatorial Power.....	93
D. The Organization Of The Governor's Office.....	93
E. Gubernatorial Performance And Success.....	99
a. <i>Gubernatorial Success Measured By Election Returns</i> .....	99
b. <i>Gubernatorial Success Measured By Public Opinion Polls</i> .....	101
c. <i>Gubernatorial Success Measured Against Subjective Criteria</i> .....	101
F. Conclusion.....	102
G. References.....	103
VII. STATE CONSTITUTIONAL OFFICES AND THE BUREAUCRACY: THE OTHER EXECUTIVE BRANCH.....	105
A. State Constitutional and Statutory Offices .....	105
a. <i>Lieutenant Governor</i> .....	106
b. <i>The Attorney General</i> .....	106
c. <i>The Controller of Public Accounts and The State Treasurer</i> .....	107
d. <i>Commissioner of the General Land Office</i> .....	108
e. <i>The Railroad Commission</i> .....	108



## CONTENTS

f. <i>The State Board of Education</i> .....	109
g. <i>Commissioner of Agriculture</i> .....	110
B. <i>The Texas State Bureaucracy</i> .....	110
a. <i>Organization of the Texas Bureaucracy</i> .....	111
b. <i>Decentralization of the Texas Bureaucracy</i> .....	111
c. <i>Texas State Employees</i> .....	126
C. <i>Conclusion</i> .....	127
D. <i>References</i> .....	127
VIII. <i>THE TEXAS COURT SYSTEM</i> .....	129
A. <i>The Courts And Respect For The Law</i> .....	129
a. <i>Trial By Jury</i> .....	130
b. <i>The General Basis of the Court System</i> .....	130
c. <i>Functions of the Types of Courts</i> .....	131
B. <i>Organization Of The Courts In Texas</i> .....	132
a. <i>The Grand Jury</i> .....	134
b. <i>Corrections</i> .....	134
c. <i>Implications of Judicial Complexity</i> .....	135
C. <i>Comparisons With Other States</i> .....	135
D. <i>The Business Of The Court System</i> .....	137
a. <i>Court Personnel</i> .....	138
E. <i>The Politics Of Decision Making</i> .....	139
F. <i>The Possibilities Of Reformation</i> .....	140
G. <i>Conclusion</i> .....	141
H. <i>References</i> .....	141
IX. <i>PUBLIC POLICY IN TEXAS</i> .....	143
A. <i>The State Budget As A Policy Document</i> .....	144
B. <i>Taxes As A Policy Statement</i> .....	145
a. <i>State Tax Possibilities: An Assessment</i> .....	148
b. <i>Taxes in Texas: An Overview</i> .....	148
C. <i>Economic Development</i> .....	149
D. <i>Some New Policy Concerns</i> .....	151
a. <i>Hazardous Waste</i> .....	152
b. <i>Prison Overcrowding</i> .....	152
c. <i>Education Reform</i> .....	154
E. <i>Conclusion</i> .....	156
F. <i>References</i> .....	158
X. <i>LOCAL GOVERNMENT AND PUBLIC POLICY IN TEXAS</i> .....	159
A. <i>The Constitutional Position Of Local Government</i> .....	159
B. <i>The Nature Of Local Governments In Texas</i> .....	161
a. <i>Municipal Governments</i> .....	161
b. <i>County Governments</i> .....	162
c. <i>Special Districts</i> .....	163
C. <i>The Functions Of Local Government</i> .....	164
D. <i>Urban Problems In Texas</i> .....	165
E. <i>Urban Policy In Texas</i> .....	167
F. <i>Conclusion</i> .....	169
G. <i>References</i> .....	169
APPENDIX A: <i>CONSTITUTION OF THE STATE OF TEXAS</i> .....	171
APPENDIX B: <i>1988 AMENDMENTS</i> .....	313

# 1

## ESTABLISHING GOVERNMENT IN TEXAS: CREATING A CONSTITUTION

In the year 1989, Texas will have been a formal partner in the American federal system for 143 years. In February of 1846, the Republic of Texas became the twenty-eighth state of the union. Although this date is significant in Texas history, it does not mark the beginning—nor the end—of constitutional government in Texas. Constitution making in Texas began nearly twenty years before 1846 and continues today. It is not a single intellectual and literary event. Rather, it is a political, policy-making *process* that reflects the dominant political values and interests of particular time periods.

This chapter examines the process of constitution making in Texas. We discuss the seven state constitutions composed over the course of our history and the events surrounding their adoption. We address four questions: What policy issues are addressed in the Texas state constitutions and how are these issues resolved? How does the document distribute power and authority throughout Texas government? What limitations are placed on governmental institutions and how do these limitations affect politics in the state? And what political values are expressed in the document?

### A BRIEF CONSTITUTIONAL HISTORY

Texas constitutional history is somewhat unique among the American states. Texas was governed by three constitutions before it came a partner in the Federal Union. Moreover, before settling on a final version that endures today in amended form, Texas adopted and discarded three more constitutions. A brief examination of this history illustrates the extent to which constitution making is a political process influenced by events of the times.

## Constitution of Coahuila y Tejas

When Mexico seceded from Spain in 1821, two former Spanish provinces, Texas and Coahuila, merged into a single state under the new Mexican government. Each state in this new country was permitted to adopt its own constitution and, in 1827, the Constitution of Coahuila y Tejas became the first constitution of the state of Texas.

This document reflected dominant cultural features of the Mexican state of Coahuila that were to become major points of friction between Texas and Mexico. For example, Catholicism was made the state religion and the exercise of other religions was prohibited. Also, slavery was prohibited and “the introduction of slaves under any pretext” was forbidden. Governmental authority was distributed through separate legislative, executive, and judicial branches. The legislature was unicameral and consisted of twelve members, only two of whom were allocated to represent Texas.

The result of this political underrepresentation and the dominance of the Hispanic culture was governmental neglect in Texas. Laws were published in Spanish, a promised school system was not created, and the interests of Texans were generally ignored.

These conditions were soon challenged and, by 1835, the need to be free of Mexico’s influence led Texas to declare independence. It established its own provisional government and called a constitutional convention to draft a basic law for the new Republic of Texas.

## The Constitution of the Republic of Texas

On March 2, 1836, Texas declared its independence from Mexico and drafted its second constitution. This document reflected the influence of three forces: the experience under Mexican rule, the desire to be accepted into the United States, and strong feelings about the issue of slavery.

Remembering the abuses of Mexican President Santa Anna, the constitution limited the term of the state’s chief executive officer (called a president at the time) and prohibited his election to consecutive terms. However, bowing to the pressure of economic elites, those who drafted the constitution dramatically reversed the antislavery policies of the Mexican government. In addition to permitting slavery, this constitution forbade slaveowners to free their own slaves without the consent of the state legislature. In fact, it specified that “free Negroes might not reside in Texas without the consent” of that body. The document was modeled after the U.S. Constitution and several state constitutions of the time. The result was clearly a product of a different social and political culture. In this case the dominant social culture was defined by the white Southerners who settled the state, and the dominant political theory was Jacksonian democracy.

## Statehood and the Constitution of 1845

Upon adoption of the Constitution of 1836, the citizens of Texas also petitioned the U.S. Congress for annexation into the Federal Union. However, Congress delayed action on this request until 1845 because of growing opposition in the North to admission of additional slave states. In that year, statehood was offered and a new constitution was adopted. To accomodate entry into the Union, this new document recognized the supremacy of the federal government and adapted its position on slavery.

This marked the beginning of lengthy constitutions in Texas; this constitution was nearly twice as long as the Constitution of 1836. Most of the increased length reflected the framers' concerns about the power of the legislature, and most of the thirty-six sections of the Article of General Provisions were limitations on that body.

## The Civil War and Its Aftermath

In the period 1861–1876, Texas adopted four constitutions to meet the social, economic, and political demands of the Civil War and its aftermath. The first of these, the Constitution of 1861, was very similar to the document of 1845, except that it recognized the Confederacy as the dominant governmental entity and the clauses on slavery were changed to give greater emphasis and protection to that institution.

With the demise of the Confederacy in 1865, Texas wrote another constitution (of 1866) that it hoped would satisfy reentry into the Union. This constitution nullified secession and abolished slavery. However, these concessions did not satisfy the radical Republicans who controlled the new U.S. Congress. Refusing to seat the Texas congressional delegation, Congress imposed military rule and forced Texas to write a third constitution (of 1869).

By the standards of some constitutional theorists the Constitution of 1869 was a model document, despite its association in Texas history with the unpopular and corrupt administration of Governor E. J. Davis. Composed by the Texas Republicans selected in elections supervised by the U.S. military, the constitution provided for annual sessions of the legislature, a four-year term for the governor and other executive officers, and gubernatorial appointment rather than election of judges. The Constitution of 1869 reflected little of the concern about centralized government that later became a dominant feature of Texas government. In fact, it contained several features articulated by the so-called governmental reformers of the early 1900s (a strong governor, for example) and at least one feature currently under debate as a possible amendment to the present constitution (appointment of judges). Unfortunately, the abuses by state officials elected under its provisions were substantial. For example, both the militia and the police were under control of the governor, which is in itself not a “bad” thing. However, “some of the worst desperadoes in the state were accepted by the force [and] under its shield of authority committed many high-handed outrages, barefaced robbery, arbitrary assessments upon helpless

communities, unauthorized arrest, and at times even murders” (Citizen’s Advisory Committee on Revision of the Constitution of Texas 1959, 20–21). In the eyes of many Texans this was a constitution designed to provide unrepresentative government officials the power to rule a hostage state.

### The Constitution of 1876

In the elections of 1872, 1873, and 1874, the Democrats successfully wrested control of the legislature, the governor, and the courts from the Republicans. The first task of this unreconstructed group was to rewrite the Republican Constitution of 1869. Meeting in Austin in 1875, the delegates of the constitutional convention set out to undo the work of their 1869 counterparts. Determined to strip government of the power they believed the Republicans had misused, the Democrat-controlled convention reduced the governor’s power and term of office, severely curbed the taxing and spending powers of the legislature, prohibited voter registration, and lowered the salaries of public officials. The document adopted in 1876 demonstrated pervasive distrust of government. In an effort to resolve major policy questions, it went into considerable detail. The result was one of the longest, worst-organized, and most cumbersome constitutions among the American states. Although by 1986, it had been amended 287 times, this document still serves the State of Texas.

## POLICY ISSUES IN THE CONSTITUTION

The preceding discussion of the constitutional history of Texas supports the major contention of this chapter: Constitution making is a political as well as a literary exercise. Each new constitution was the result of both major social and political changes in the Texas environment, and the product of the dominant forces in these changes. These changes brought major issues and policy choices to the attention of the constitution makers.

We turn now to an examination of the issues and choices facing the framers of the Texas Constitution of 1876. Two issues were predominant: the allocation of governmental power and authority, and the distribution of economic benefits and deprivations.

### Governmental Power and Authority

All constitutions grant power to government, define and create the principal governmental bodies, and specify the relations of these bodies to each other and the people. Many of the most important debates in the convention of 1875 focused on these issues. Three issues were of particular importance: whether the government should be guided by general principles or be provided with specific authorizations for action; whether governmental power should be centralized or widely dispersed throughout

several levels and branches of government; and the extent to which citizens should participate directly in the governmental process.

*A Government of Fundamental Principles or Great Detail.* The authors of the Texas Constitution had two choices when they addressed the problem of authorizing the powers to be exercised by the government: (1) to provide general grants of power through statements of fundamental principles, or (2) to grant specific powers to solve particular problems. To the everlasting regret of constitutional scholars and many governmental practitioners, the authors chose the second alternative. The result was a long (exceeded only by three states), cumbersome, and inflexible document.

The authors wanted to solve problems themselves rather than authorize someone else to solve them. Apparently, they were unwilling to trust future legislatures to make even small adjustments on their decisions. Innumerable examples of this distrust appeared in the constitution. It explained how stationery used by the state must be purchased; it prescribed the maximum interest rate to be charged on loans; it specified the percentage of state money to be spent for education; and it prohibited anyone who had fought a duel with a deadly weapon or sent or accepted a challenge to fight such a duel from holding public office. A member of the Illinois Constitutional Convention of 1870 could have been talking about the Texas convention when he spoke these words:

It is assumed that when we depart from this hall all virtue and all wisdom of the state will have departed with us. We have assumed that we alone are honest and wise enough to determine for the people the ordinary, and in many instances even the most trivial, questions affecting the public welfare; as if the mass of people of the State of Illinois were not as competent hereafter to select others that are as honest and capable as they were to select us (Dodd 1972, 96).

The effects of the decision to incorporate what are essentially statutory details into the fundamental law of the state have been widely discussed. Briefly, these effects solidify the entrenchment of special interests, make temporary matters permanent, deprive governmental offices of desirable flexibility, encourage the search for methods of evading constitutional provisions, hinder action in times of emergency, and confuse the public.

*Centralized or Fragmented Power.* When structuring the government of Texas, the authors of the constitution copied, in general terms, the features of the U.S. Constitution: separation of powers among three branches of government, a bicameral legislature, and the well-known system of checks and balances. When allocating power *within* this structure the framers faced two choices: concentrate power in such a way as to facilitate decision making and pinpoint responsibility for those decisions, or circumscribe that power with a variety of specific limitations and disperse it throughout the machinery of government.

The delegates to the Constitutional Convention of 1875 were in a mood to dismantle rather than authorize governmental power. These men represented the unreconstructed interests in Texas; interests that were bitter about the humiliation, corruption, and extravagance of Republican rule during the Reconstruction. They were fearful of a government like that prescribed in the Constitution of 1869, which centralized political power and created opportunity for action. Their strategy was to reduce the power of individual offices, limit the subjects about which the legislature could make decisions, and disperse executive power throughout several offices. Specifically, the authors reduced the term, salary, and powers of the governor, made all executive offices (with the exception of secretary of state) elective, and weakened the legislature through biennial sessions, restrictions on the length of these sessions, low salaries, and restricted legislative authority. It was a weak and decentralized government; we examine the consequences in later chapters.

*Popular Participation in Government.* A basic objective of a constitution is to identify the relationship between citizens and their government. All constitutions in the United States are based on the presumption that government derives its authority from the people, but the precise nature of the government–citizen relationship can vary; particularly in the extent to which citizens elect public officials and participate directly in policy decisions.

A great deal of the literature on American state politics focuses on a discussion of the merits of long versus short ballots, on whether many public officials should be accountable to the people through direct election or indirectly accountable through appointment by an elected official. A second, related issue is whether citizens should be permitted to make policy decisions directly through the initiative and by participation in referenda on specific issues.

Those who support the election of many officials almost invariably cite the dangers of a concentration of power in the hands of a few people. Those on the opposing side of the discussion argue that some centralization of power is essential to the performance of government. Those who support the use of the initiative and the referendum argue that permitting the electorate to take part in the process of lawmaking will curb the influence of special interests, reduce the amount of unpopular legislation, and prevent the thwarting of majority will. Opponents suggest that direct democracy impairs the sense of responsibility of a legislative body and the ideal of representative government.

On the issues of balance, the framers of the Constitution of 1876 opted for a government subject to substantial popular control. Most state officials were elected: all offices in the executive branch, except secretary of state, all judges, and, of course, the legislature. Furthermore, most of these positions were for two-year terms, requiring frequent reports to the electorate. In addition, the constitution required certain tax and bond issues and constitutional amendments to be subject to citizen approval. These



devices ensured that the state government would be influenced substantially by the democratic process. On the other hand, Texas is one of only ten states whose citizens are denied direct participation in state lawmaking through the mechanics of an initiative. The effect of these strictures is discussed more explicitly in later chapters.

### The Distribution of Economic Benefits and Deprivations

Constitutions in the United States are best known for both statements about individual rights and privileges and efforts to ensure their distribution throughout society. Just as important, however, is the role played by constitutions in the distribution of economic benefits. By specifying the economic powers and limitations of the government, by requiring state support for some functions and prohibiting such support of other functions, and through a variety of taxes and tax loopholes, constitutions confirm privileges for many private interests at the expense of others.

The Texas Constitution of 1876 reflected a distinctive economic bias. The delegates to the constitutional convention of that year represented economic interests that had suffered during the years of Republican rule. These men blamed banks, railroads, and a profligate state government for their economic woes. They were determined to use the constitution to redress their economic situation.

Accordingly, they dealt with banks by simply prohibiting them from incorporating in the state. With railroads, they were more ambivalent. Although Texans needed an expanded railroad system to transport products to market, they resented what they thought was price-gouging. The constitutional solution was to provide railroads with large tracts of land on which to expand the system, and, at the same time, to give the state the right to regulate freight charges. The role of the state in economic matters was restricted by a provision limiting the state debt to \$200,000. The result was a constitution that reflected the dominant economic interests of the era.

## CONSTITUTIONAL CHANGE

The Constitution of 1876 established a framework for Texas government that still endures. It is not, however, the same document drafted in 1876. Many of the original provisions have been reversed, others have been modified, and many have been added.

These changes have come about through constitutional amendments, a process that is just as important to the constitution as the original document. Constitutional amendments are more prevalent at the state level than at the national level of government. The U.S. Constitution, originally written in broad generalization, accomodates change with few formal amendments. It has been amended only twenty-six times and ten of these—the Bill of Rights—were adopted *en masse* within four years of the ratification of the original document. State constitutions are generally



written in great detail, and consequently changes in interpretation are not possible without changes in wording. As a result, there is a need for more constitutional amendments.

### The Formal Amending Process

Formal changes in state constitutions are accomplished through a process that takes several forms. In any case, two steps are involved: *initiation* of the suggested change and *ratification* or approval of the initiated alteration. Initiation requires fulfillment of a variety of legal steps, and approval by specified majorities in the legislature, or in the case of the initiative process, approval of a specified number of voters. In all states except Delaware ratification is secured at elections during which the voters exercise their prerogative to approve or reject amendments. Table 1.1 classifies the states according to their initiation and ratification procedures.

In order to amend the constitution of Texas one must first get two-thirds of the state legislature to support an amendment, as well as a majority vote supporting the amendment in the election at which it is submitted for ratification. Compared to the process in other states, the amendment procedure in Texas is relatively simple.

### The Nature of Constitutional Change in Texas

The constitution of Texas has undergone substantial change through this process. Between 1876 and 1986, 445 amendments have been approved by the legislature for presentation to the people of Texas and 287 have been ratified. These additions have brought about changes in the powers and duties of public officials, provided rewards and incentives to new economic interests, both enlarged and constricted the political rights of Texans, and made specific policy decisions that many think should come about through the legislative process. Growth has occurred in the state bureaucracy, the party system has changed, and special districts and commissions have proliferated (Lutz and Tedin 1987). Several examples of these changes illustrate the effect of the amendment process.

The powers of state and local officials have been altered through the amendment process. The term of the governor has been extended and he or she has been given some power to remove some of the officials he or she appoints. Local governments have been permitted to choose the form of government they want and fourteen courts, formerly presiding exclusively over civil matters, have been permitted to hear criminal cases.

Since the adoption of the Constitution of 1876, the state economy has undergone tremendous growth and change. The "awl bidness," major financial institutions, and large agribusiness, have replaced the family farm and the cattle business as the backbone of the state's economy. These interests have been successful in amending the constitution to their benefit. James Lamare provided several examples of the nature of these changes.