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# THE TEXAS STATE CONSTITUTION

## A Reference Guide

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Janice C. May

*Foreword by Thomas R. Phillips*

REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE  
UNITED STATES, NUMBER 26

G. Alan Tarr, *Series Editor*



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## Series Foreword

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution-makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively to changing circumstances. This—among other factors—encouraged political reformers to go to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the federal Bill of Rights for redress. As power and responsibility shifted

from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were "rediscovered." The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as Chief Justice of the United States Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren's tenure from erosion by the Burger Court. In particular, they began to look to state bills of rights to secure the rights of defendants and to support other civil liberties claims that they advanced in state courts.

The "new judicial federalism," as it came to be called, quite quickly advanced beyond its initial concern to evade the mandates of the Burger Court. Indeed, less than two decades after it originated, it has become a nationwide phenomenon. For when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees of the right to privacy and of gender equality, for example, that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken together, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

Yet the renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts with notable success; since 1960, ten states have adopted new constitutions and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars too have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

Janice May's fine study of the Texas Constitution is the latest volume in the series, *Reference Guides to the State Constitutions of the United States*, which reflects this renewed interest in state constitutions and will contribute to our knowledge about them. Because the constitutional tradition of each state is



distinctive, the volume begins with the history and development of the Texas Constitution. It then provides the complete text of Texas' current constitution, with each section accompanied by commentary that explains the provision and traces its origins and its interpretation by the courts and by other governmental bodies. For readers with a particular interest in a specific aspect of Texas' constitutional experience, the book offers a bibliography of the most important sources dealing with the constitutional history and constitutional law of the state. Finally, the book concludes with a table of cases cited in the history and the constitutional commentary, as well as a subject index.

G. Alan Tarr

## Foreword

Texas has had many constitutions, but all of them were born of necessity, emanating from fundamental changes in the political order. In the nineteenth century, revolution, independence, annexation, secession, reconstruction, radical reconstruction and restoration each demanded in turn a new organic document to reflect the latest political reality. Since the re-enfranchisement of Confederate soldiers and the adoption of the Constitution of 1876, Texans have eschewed wholesale constitutional change in favor of incremental modification.

Today, the Texas Constitution is a remarkably prolix document that bears all the marks of its one hundred and twenty year history. Some provisions are truly archaic, such as the Governor's authority to call out the militia to protect the frontier from hostile native incursions (Art. 4, sec. 7). Others create annoying roadblocks, literally as well as figuratively, like the need for amendments to authorize particular county road districts (Art. III, sec. 52-d and 52-e). The hostility to government initiative that pervades the document discourages modern leaders from even contemplating, much less enacting, bold solutions to new challenges.

While this book will interest any citizen concerned with the history and government of Texas, it should be of particular interest to lawyers and judges. As is true in most other states, litigators are asserting their rights under the Texas Bill of Rights with increasing frequency. Courts have relied on the mandates and prohibitions of the state constitution to require extensive changes in state public policy, particularly in the area of elementary and secondary education. This volume, the first on this subject in nearly twenty years, will be a welcome addition to most legal libraries.

In Texas, even more than in most other states, scholarly state constitutional

studies fill a distinct practical and scholarly need. Not only does Texas have one of the longest, most confusing constitutions in America, but those who try to discover the specific intent of the drafters of any particular provision of the Texas Constitution are almost certain to meet with frustration. While all five constitutional conventions produced journals of their proceedings, only the Convention of 1845 also produced a detailed report of debates. After several days of debate, the Convention of 1875 refused to employ a stenographer because it would cost too much. For the nearly four hundred constitutional amendments adopted since, committee testimony and legislative floor debates have been preserved only since 1973.

We are indeed fortunate that Janice C. May, Professor of Government at The University of Texas at Austin, has been selected to write this commentary. Professor May served with distinction on the Texas Constitutional Revision Commissions in 1967 and 1973, and I had the pleasure of working with her on the Citizens' Commission on the Texas Judicial System in 1991-92. No one is more qualified to make this study, and her excellent work will surely be a useful and much-used reference for years to come.

It is primarily the story of the Constitution of 1876, its many amendments, and the very few attempts to thoroughly revise it, that Professor May gives us as a preface to her comprehensive and informative commentary on each section. Professor May's work is completed by a bibliographical essay and a table of cases for those who desire to delve more deeply into the history and meaning of our state's fundamental law.

Thomas R. Phillips  
Chief Justice  
The Supreme Court of Texas

## Preface

Texas is not among the states in which the state constitution has been neglected. In fact state law requires consideration of the Texas Constitution in a government course to receive a bachelor's or lesser degree from a college or university that receives state funds. Bibliographical resources are substantial. Contributions have come from many sources, including the academic fields of political science, history and law and from citizens, political leaders, judges and administrators engaged in the practice of constitution-making. This guide builds on the available resources to provide an up-to-date reference on the Texas Constitution. It adopts what may be called an intermediate approach, one more than a citizens' guide for the general public and less than a comprehensive multi-volume legal treatise designed for the specialist. The approach necessitates some loss of in-depth political, historical and legal analysis and a reduced number of footnotes and cases.

The Texas Constitution is hard to nail down, subject as it is to constant change by amendment and interpretation. The legal research for the guide ended in February 1995 and the analysis of amendments has excluded the 1995 election in which 11 of 14 amendments were approved. The 1995 results have, however, been recorded in the four tables in Part I of the guide. It may be noted here that the most important change in 1995 was the abolition of the office of state treasurer, effective in 1996.

## Acknowledgments

For many years I have been a regular patron of the Legislative Reference Library in the state capitol and would like to acknowledge my debt to the current director, Sally Reynolds, and her predecessor, James Sanders, for their professional assistance with state constitutions and a host of other concerns of mine in state politics and government.

I owe particular thanks to G. Alan Tarr, editor of the Greenwood series on state constitutions, for his many useful comments and suggestions in the preparation of this reference guide.

I would also like to acknowledge my debt to the late Robert W. Calvert, chairman of the Texas Constitutional Revision Commission (1973) of which I was a member, for his leadership and friendship. I learned much about politics and the Texas Constitution from Judge Calvert whose public life included service as Chief Justice of the Texas Supreme Court, Speaker of the Texas House of Representatives and Chairman of the Texas Democratic Party.

It is unusual to include a book in the acknowledgments, but this guide could not have been written by one person without *The Constitution of the State of Texas: An Annotated and Comparative Analysis*. The authors of the two-volume work are George D. Braden, editor, author and legal consultant, and seven other attorneys: David A. Anderson, R. Stephen Bickerstaff, Darrell Blakeway, Ron Patterson, Seth S. Searcy III, Thornton C. Sinclair and Richard A. Yahr.

My thanks go to Frances Woods and Suzanne Colwell for their professional computer services.

# Introduction

Writing a reference guide to the Texas Constitution has been a daunting experience. The Texas Constitution is one of the longest in the nation (possibly second only to the Alabama charter),<sup>1</sup> boasting over 80,000 words (more than eight times the length of the U.S. Constitution), over 370 sections, and 364 amendments approved from 546 on the ballot. The Texas Secretary of State commented in 1995 that a difference between the Texas charter and *War and Peace* is that the latter is not getting any longer.<sup>2</sup> As might be expected, much of the Texas Constitution consists of statutory-like provisions as well as the fundamentals of government commonly associated with “model constitutions.” In Texas sewer and water laterals, fence and cattle brand laws and the superconducting super collider coexist with freedom of speech and religion. Cases and attorney general opinions interpreting the Texas Constitution are also numerous. (*Vernon’s Annotated Constitution of the State of Texas* contains 45 pages of “notes” and an index to cases concerning community property.) Constitutions limited to fundamentals are generally regarded as requiring more judicial interpretation than the longer documents. While this may be true generally, constitutional passages of a statutory character may also need considerable clarification.

Part I of the reference guide consists of a survey of Texas constitutional history pieced together from various sources. The reader will discover that not only is the current Texas Constitution one of the longest, Texas constitutions are also numerous in the history of a state that was once a province of Spain, a state in the Republic of Mexico, an independent republic and a state in the United States and of the Confederate States of America. Overall, constitutions have played an important role in Texas history. They have been integral to the

systemic changes in the larger political community of which Texas has been a part and to changes in political authority.

Arguably, the first Texas Constitution was a document adopted for the short-lived Republic of Texas of 1813 that met a bloody end during revolutionary activity by Mexicans to gain independence from Spain. The next three charters were drafted under the Mexican Republic of 1821 (the state constitution for Coahuila and Texas in the federal republic, a proposed separate statehood charter for Texas in 1833 and the 1835 provisional charter prior to Texas independence from Mexico). The Constitution of the Republic of Texas (1836) was followed by the Statehood Constitution of 1845 required for annexation by the United States. Secession from the United States and membership in the Confederate States of America led to the Constitution of 1861. After the civil war, two constitutions were adopted (1866 and 1869) and a Constitution for the State of West Texas (1869) was proposed. Before the adoption of the current constitution in 1876, a legislative committee draft was rejected by the legislature in 1874. Although the Texas Constitution of 1876 has never been replaced or revised, proposals for a new or revised charter were made by constitutional commissions in 1968 and 1973 and a constitution, based on drafts by the Texas Constitutional Convention of 1974, was referred to the voters in 1975 only to be rejected.

Despite crises and systemic changes in Texas history, there has been considerable constitutional continuity. Drafters of the early charters (1833-36) were Texans most of whom had immigrated from the United States. Their documents were squarely within the American tradition of state constitutions although Spanish-Mexican influences were also evident. Continuity is clearly apparent in the Bill of Rights of the 1876 Constitution. Of the original 29 sections, 25 can be traced in some form to the 1845, 1836 and 1833 Constitutions.<sup>3</sup> Also, the broad outlines of present-day Texas government and a number of specific provisions noted in Part II of this guide have been carried forward from the 1845 charter, as amended in 1850. Separation of powers, a bicameral legislature, a plural executive, an elective judiciary and county government exemplify the legacy. In addition, support for education in language very similar to that used in the 1876 Constitution, a severe limit on debt, a ban on banking corporations and provisions on land and land grants became a part of the 1876 charter. The importance of the 1845 Constitution is also indicated by the fact that the 1861 and 1866 Constitutions were in the form of amendments to it. The 1869 Constitution introduced some major changes from the 1845 version, but overall it was within the Texas constitutional tradition. Also supportive of continuity is state leadership during Reconstruction. The provisional governors, A. J. Hamilton and E. M. Pease, were Texas officials before the Civil War as were the presidents of the 1866 and 1868-69 Conventions (J. W. Throckmorton and E. J. Davis, respectively) who also were elected governors. Historians have found only a handful of "carpetbaggers" at the 1868-69 Convention.<sup>4</sup>

The 1876 Constitution, while representative of the past, also introduced changes of importance, as the first charter written after normal relations were

restored in the Union. When Texas Democrats regained political control after Reconstruction, it was a foregone conclusion that a new constitution would be drafted, but it was shaped by ideas and interests of the time and not simply as a reaction to Reconstruction. Numerous new fiscal and other restrictions were imposed on state and local government, but this was characteristic of many other state constitutions of this era. The dominance of the Grange and farmers generally was evident in provisions on railroad regulation and others favorable to agriculture.

The history of the 1876 Constitution has been one of amendments. Although most are minor, some have figured in the political issues of the day. Among these were the 1890 amendment supported by the Farmers' Alliance and gubernatorial candidate Jim Hogg to assure the constitutionality of a railroad regulatory agency; prohibition amendments, including the 1911 proposal favored by the Progressives; the poll tax voting requirement of 1902; numerous welfare amendments launched during the depression of the 1930s and the New Deal; and the large number of new programs following World War II, such as higher education facilities, veterans land purchases, water resources development and hospital districts. More recent changes have included assistance to private enterprise for economic development, an equal rights amendment and a state lottery.

Part I also describes efforts to revise of the Texas Constitution, all of which have failed. Contributing to the failure have been the lack of a crisis or systemic change comparable to those of the past, the easy amendment process initiated by the 1876 charter to allow adaptation to changes and the divisive politics of such a large state characterized by regional, urban-rural-suburban, conservative-liberal and other differences. Sustained political leadership necessary to build consensus for revision has been absent coupled with minimal citizen interest except for an occasional constitutional issue. Moreover the long document contains benefits for various groups who are wary of the risks of change. And in general a political culture marked by individualism and traditionalism with emphasis on limited government has been a conservative influence against wholesale change.

Part II of the reference guide is a section-by-section analysis of the 374 sections and sixteen articles of the Texas Constitution currently in effect. (There are seventeen-numbered articles because, even though Article XIII on Spanish and Mexican Land Titles was repealed, the article number was retained.)

The Texas Bill of Rights (Article I) contains philosophical statements as well as specific rights and is unusual, except for some southern charters, to acknowledge the supremacy of the U.S. Constitution. Several of the rights are expressed affirmatively ("Every person shall be at liberty to speak") rather than as a prohibition against government ("No bill of attainder, ex post facto law . . . shall be made"). This opens up a possible inroad on the "state action" limitation on the protection of rights characteristic of the U.S. Constitution. While the Texas Constitution contains rights similar to those of the U.S. Bill of Rights, none is



exactly the same although the section on Treason is virtually identical. Several Texas constitutional provisions are not addressed in the U.S. Constitution, among them the prohibitions in the Equal Rights Amendment, victims' rights and an interesting old provision against "outlawry."

With respect to the New Judicial Federalism, Texas courts have generally followed the federal courts' interpretation of the U.S. Constitution on rights, but they also have interpreted Texas constitutional provisions to provide greater protection than that afforded by the federal counterpart historically as well as in modern times. Several recent cases have concerned provisions for which there is no federal analogue. Although not based on the Bill of Rights, probably the best known are the Edgewood cases (1989-95) in which the Texas Supreme Court declared the Texas public school finance laws unconstitutional for violation of the Education Article of the Texas charter. On the same issue, the U.S. Supreme Court in 1973 in *San Antonio Independent School District v. Rodriguez* found no violation of the U.S. Constitution. The Texas courts have also interpreted the Equal Rights Amendment on gender discrimination more expansively than have the federal courts under the Equal Protection of the Laws Clause of the Fourteenth Amendment. Another Texas constitutional provision with no federal parallel is the "open courts" provision, which in some cases has enabled greater access to the courts and remedies than under the U.S. Constitution. Since the 1994 general elections, the Texas Supreme Court has a Republican majority for the first time since Reconstruction. How much difference this will make for the New Judicial Federalism remains to be seen. Partisanship was not determinative of the outcome of the Edgewood cases but it has been a factor in cases on "open courts," legislative apportionment and free speech, among others.

The Texas Constitution contains a separate article on separation of powers, which has generally been construed strictly by the courts and the attorney general and has had a significant impact on the operation of Texas government.

Under the Legislative Article the powers of the legislature have been interpreted to be plenary, that is, the legislature has all powers not denied by the Texas or U.S. Constitutions and other valid federal legal instruments. (The Texas Constitution is regarded as one of limitation rather than a grant of power, which is a traditional state constitutional construction.) One explanation for the length and restrictive character of the Texas charter is that unless there is a restraint in the constitutions (or in federal law), the legislature may act. Unlike other state constitutions, biennial regular legislative sessions are still required for the Texas legislature. Legislative salaries are also fixed constitutionally (currently at \$7,200 annually), which applies to the presiding officers as well as members. (Only by a popular vote on a recommendation of the Ethics Commission can the amount be increased.) Most limits on debt and expenditures are in the Legislative Article, one of which is the Pay-As-You-Go Amendment, as Texans call the requirement for a balanced budget.

The Executive Article provides for a relatively weak governor in a plural executive structure. Although the governor has a four-year term without term

limits and a strong veto power, including the item veto, the officer is ranked on various scales as among the very weakest in the nation.<sup>5</sup>

The Judicial Article establishes numerous courts including an intermediate level of appellate courts and two courts of last resort, the Texas Supreme Court for civil cases and the Texas Court of Criminal Appeals for criminal cases. Oklahoma is the only other state to share this unusual bifurcation of appellate power. In contrast to most other states, Texas judges are elected on a partisan ballot. The constitution requires elections but does not expressly require partisan elections, but that has been the practice.

The Suffrage Article has been virtually superseded by the federal government by means of federal cases, constitutional amendments and the Voting Rights Act.

The Education Article contains provisions on higher education as well as elementary and secondary schools and includes two significant funds, the Permanent School Fund and the Permanent University Fund (PUF), both of which have roots in past constitutions and laws. The PUF has been the largest public university endowment in the nation for many years. The Revenue and Taxation Article is essentially limited to the local property tax with only a few provisions on the occupation, the income and the motor fuels tax. The latter is dedicated to highways and schools. The constitution requires all real property and tangible personal property to be taxed on the basis of value (*ad valorem*); exceptions to the requirements require a constitutional amendment as a rule, and these have been numerous. (In 1995 the ballot contained six property tax exemption propositions.) The income tax provision was amended in 1993 to require a popular vote before a personal income tax can be levied and dedication of proceeds, if levied, solely to education. (Texas does not have an income tax.)

The Article on Counties has little to say about them. County governmental structure is located in the Judicial Article and is largely frozen despite the different needs of 254 counties. Hospital districts, which dominate the article, were established to provide services without coming under the municipal and county property tax limits. The Municipalities Article is noteworthy for the municipal home rule amendment of 1912, which by judicial interpretation has allowed significant local self-government. Articles on Railroads and Private Corporations are virtually obsolete. The Impeachment Article has been amended to include limited gubernatorial removal power, subject to a two-thirds vote of the Senate. The General Provisions Article contains a variety of provisions, many of which duplicate other constitutional provisions. Among the most important are the homestead protection from forced seizure for debt (Texas provides unique protection), community property, economic development provisions and alcohol regulation. Article XVII, the last in the constitution, sets forth the method for amending the Texas charter but, except for an obsolete section that authorized the 1973 Constitutional Revision Commission and the 1974 Constitutional Convention, is silent on the constitutional convention method of revision.

The focus of the section-by-section analysis is on the constitutional text and its interpretation by the courts and the attorney general; the analysis also includes interpretation by the Texas legislature and executive as well as constitutional practice not indicated by the text. The most conspicuous example of the latter is the modern office of lieutenant governor which rivals, if not surpasses, the office of governor (see Art. IV, sec. 16).

Following the section-by-section analysis are a bibliographical essay and a table of cases.

## NOTES

1. *The Book of the States, 1994-95* (Lexington, Ky.: Council of State Governments, 1994), 19. Table 1.1 based on estimated word counts listed only the Alabama Constitution as having over 80,000 words. A computer word count for this guide yielded over 80,000 words for the Texas Constitution before the amendments added in 1995.
2. Comment by Tony Garza, Texas Secretary of State, in "Public Forum," *Austin American Statesman*, Oct. 31, 1995.
3. J. E. Ericson, "Origins of the Texas Bill of Rights," *Southwestern Historical Quarterly* 62 (April 1959): 457.
4. Rupert N. Richardson, Adrian Anderson, and Ernest Wallace, *Texas: The Lone Star State*, 6th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1993), 232-33.
5. Virginia Gray, Herbert Jacob, and Robert B. Albritton, *Politics in the American States*, 5th ed. (Glenview, Ill.: Scott, Foresman/Little, Brown Higher Education, 1990), Appendix B, 568-74. The Texas governor ranked next to last among the 50 governors.