

Improving Commercial Sign Regulations: A Preliminary Framework to Evaluate Commercial Sign Regulations in Texas

By

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Applied Research Project

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Abstract

Legislative efforts to regulate commercial signs or outdoor advertising in the United States have met repeated contest from those who are regulated by poorly drafted sign code. Historically such codes utilized the content of signs to determine how the sign would be regulated, differentiating the treatment of signs according to message and speaker. Repeated litigation finds that this methodology infringes on first amendment protections of speech making such legislation unconstitutional.

The purpose of this applied research project consists of three portions. The primary purpose is to develop a preliminary framework to be used in evaluating commercial signs regulatory legislation in Texas. The secondary purpose is to assess the utility of the framework by using it to evaluate Texas' existing commercial signs legislation. Third, the research provides recommendations to improve legislation and the framework.

The preliminary framework developed as a product of this research is based on four categories fleshed out in the literature review: Constitutionality and Defensibility, Establishment of Effective Control, Societal Implications and Program Administration. These broad categories are sub-divided and operationalized into formulated questions used to evaluate Texas Transportation Code Chapter 391 and associated rules Title 43 Texas Administrative Code Subchapter 21: I (43 TAC 21: I) and Texas Transportation Code Chapter 394 and associated rules Title 43 Texas Administrative Code Subchapter 21: K (43 TAC 21: K).

The evaluation discovered that the framework is functional for analyzing commercial sign legislation for its alignment with the four categories. The results find that Texas Transportation Code Chapter 394 and associated rules Title 43 Texas Administrative Code Subchapter 21: K align poorly to the framework which may suggest that if challenged, they could be found to be unconstitutional.

Formal Statement of Research Purpose:

The purpose of this research is to develop a preliminary framework to evaluate current Texas sign regulations using the literature. Second, the framework is then utilized to assess Texas billboard legislation, specifically, Title 6 Chapter 391 and 394 of the Texas Transportation Code, and Title 43 Part 1 Chapter 21 Subchapter I and K of the Texas Administrative Code. As a final step, suggestions for the revision of sign legislation and the preliminary framework are established. The framework is summarized and linked to the literature in Table 2.3.

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Introduction

Setting the Stage

It is 2012 and America is in the throes of a presidential election. Representative Ron Paul had thrown his hat in the race and was campaigning across the nation (Cook, 2011). In Texas, Bee Caves to be more accurate, a Central Texas business known as Planet K proudly displayed the sign in **Figure 1.1**, a campaign sign in support of Paul for president (*Auspro v. Texas Department of Transportation*, 2016).

Figure 1-1 Campaign Sign in Front of Planet K in Bee Caves, TX

Figure 1.1



Source: http://www.austinchronicle.com/binary/7ad4/pols_feature35.jpg

The sign persisted after the campaign ended with the re-election of Barack Obama to his second term. Noticing this, The Texas Department of Transportation acted, ordering the sign removed (*Auspro v. Texas Department of Transportation*, 2016). At that time, 43 TAC § 21.146 contained a provision allowing for the display of campaign signs no earlier than ninety days prior to an election, requiring removal within ten days after the election. Planet K refused to remove the sign and according to statute and rule, the Texas Department of Transportation petitioned

Travis County District Court for injunctive relief along with applicable civil penalties (*Auspro v. Texas Department of Transportation, 2016*). The parent company of Planet K, Auspro Enterprises, LP, responded by filing suit against the department, alleging that the enforcement action violated their right to free speech (*Auspro v. Texas Department of Transportation, 2016*).

In the initial ruling, the courts decided in favor of the department. Auspro, determined to keep the sign, appealed this decision to the Texas Third Court of Appeals in Austin, Texas (*Auspro v. Texas Department of Transportation, 2016*). Subsequent to the United States Supreme Court ruling in *Reed v. The Town of Gilbert*, the Texas Third Court of Appeals ruled in favor of the appellant, Auspro, severing parts B and C from chapter 391 of the Texas Transportation Code, effectively pulling the carpet out from under the feet of regulators at the Texas Department of Transportation (*Auspro v. Texas Department of Transportation, 2016*). The decision aligned with that of *Reed*, holding that the content-based method of regulating signs utilized by the department violated first amendment protections to freedom of speech (*Auspro v. Texas Department of Transportation, 2016*).

The severing of these sections of the law required immediate action by the legislature and the department to develop new legislation and administrative rules. In the interim, the department had no official mandate to regulate outdoor advertising in Texas. Due to the terms of the Highway Beautification Act of 1965, this placed in jeopardy ten percent of the department's federal transportation dollars as without a mandate, the state may not be able to meet the Act's requirement to maintain effective control of outdoor advertising along interstate and primary roadways (23 US Code § 131). To prevent this action from occurring, the Texas Legislature passed senate bill 2006 to amend the law in an effort to make it constitutional. The department then proceeded to draft new rules (Texas Department of Transportation, 2017). As demonstrated

here, poorly drafted laws can place funding in jeopardy and may unnecessarily infringe on free speech protections. From here arises the need for a tool that administrators can utilize when drafting new legislation or reviewing and revising existing legislation.

Value of a Framework

An evaluative framework can provide legislators and administrators with a unique tool to perform a comprehensive review of new or existing sign code to search for potentially problematic language. Revision of such language would avoid similar situations in other states or municipalities across the nation. If developed and used properly, such a framework will serve to strengthen sign legislation making it more effective (Shields & Rangarajan, 2013, 165).

Research Concept

This applied research project establishes a preliminary framework to be used in evaluating new or existing commercial signs legislation. As demonstrated earlier, sign codes risk being invalidated if challenged on first amendment grounds. A literature review informs the development of the framework based on four broad categories: Constitutionality and Defensibility, Establishment of Effective Control, Societal Implications and Program Administration. Chapter 391 of the Texas Transportation Code and the associated rules found in 43 TAC 21: I were revised subsequent to the events that occurred as a result of the *Auspro* decision. For this reason, they are utilized to test the framework and to evaluate the new language of the statute and rules for alignment to the framework. To provide for a more comparative analysis, Chapter 394 of the Texas Transportation Code and the associated rules found in 43 TAC 21: K is also evaluated utilizing the framework.

Summary of Chapters

Chapter two discusses the literature, introduces the research purpose and develops a conceptual framework to evaluate commercial signs legislation. Chapter three moves on to a discussion of the methodology of this research, focusing on the operationalization of the categories of the framework established in chapter two. Chapter four provides an in-depth review of the results of the analysis. Lastly, chapter five summarizes the findings, discusses the performance of the framework and provides suggestions for future research.

Chapter 2 Literature Review & Conceptual Framework

Chapter Purpose

This chapter outlines in depth the four categories of the preliminary framework to assess billboard regulations, beginning with a discussion of the literature and its connection to the four categories. Each component is divided into categories with corresponding sub-categories to provide a detailed understanding of the development of the resulting framework.

Key Terms and Definitions

To better understand the subject matter at hand, it is useful to open this discussion with a brief overview of several key terms and the corresponding definition.

1. Highway Beautification Act of 1965

23 US Code § 131 – Control of Outdoor Advertising (1965)

The Highway Beautification act was passed in 1965 largely as a result of the advocacy of the then First Lady, Ladybird Johnson (Floyd, 1979, 77). The act had the effect of making the control of billboards mandatory for all states along the interstate and primary roadways of the nation. The act constituted an unfunded mandate and carried the penalty of 10 percent reduction in the amount of the federal dollars contributed to a state's transportation budget if a state failed to **effectively control** outdoor advertising in the prescribed areas (Floyd, 1979, 77-82).

2. Effective Control

This term is derived directly from the Highway Beautification Act of 1965 and is a measure of the level of control exercised by the state over outdoor advertising. Effective control is measured primarily through four indices: Permitting in commercial or industrial areas, Removal of non-conforming signs, Acquisition and removal of signs and Program Administration. (Floyd, 1979), (Cunningham, 1973), (23 US Code § 131, 1965)

3. Strict Scrutiny

A form of judicial review used to determine the constitutionality of certain laws. Under strict scrutiny, the law must further a “compelling governmental interest,” and be narrowly tailored to achieve that interest (Legal Information Institute, 2018). As will be seen, the ability of a regulation to stand up to this level of scrutiny, when applied to the government’s control of non-commercial speech, is highly unlikely (*Reed v. Town of Gilbert*), (*Auspro v. Texas Department of Transportation*).

4. Intermediate Scrutiny

Intermediate scrutiny is a test used to determine a statute's constitutionality and is only applied when a state or the federal government statute negatively affects certain protected classes. To pass intermediate scrutiny, the challenged law must:

1. further an important government interest
2. and must do so by means that are substantially related to that interest.

Intermediate scrutiny is less rigorous than strict scrutiny (Legal Information Institute, 2018). In the context of this research, the concern with intermediate scrutiny is with its application to commercial speech.

5. Content Neutrality

This term is most easily defined by the logic outlined by Supreme Court Justice Thomas in the Opinion of the court in the case of *Reed v. Town of Gilbert*. “A law is content based, and therefore triggers strict scrutiny, (1) if on its face [the law] draws distinctions based on the message a speaker conveys” or on the topic of the speech, or (2) if the law cannot be justified without reference to the content of the regulated speech” (Mason, 2015, 956). Thus, if a law avoids the pitfalls described by Justice Thomas, it can be deemed content neutral.

Framing of the Problem

Beginning with the enactment of the Bonus Act of 1958 and later the Highway Beautification Act of 1965, the billboard industry has been at odds with government entities who sought to regulate them (Floyd, 1979). **Figure 2.1** shows Lady Bird Johnson present at the signing of the act in 1965. Her advocacy was instrumental in the act’s passage and for this reason it is named Lady Bird’s Bill (Floyd, 1979).

Figure 2-1 Image of Lyndon Johnson & Lady Bird Johnson at the signing of the Highway Beautification Act in 1965

Figure 2.1

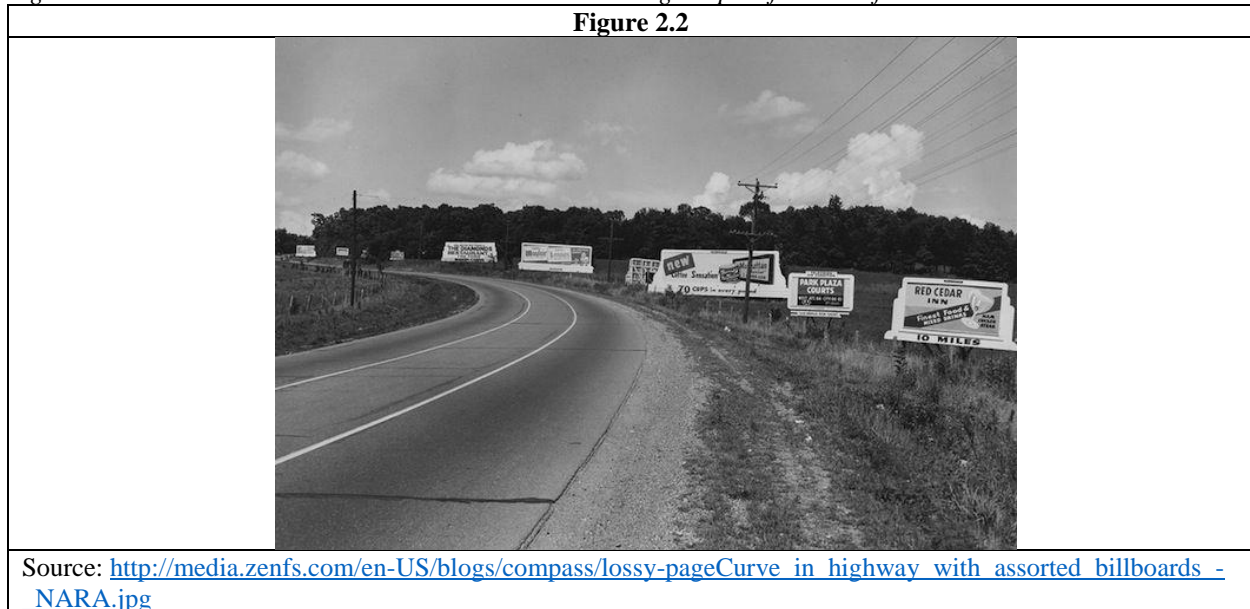


Source: <http://www.lbjlibrary.org/assets/uploads/lbj/Press/786-8.jpg>

The history of sign regulation demonstrates the public's will to regulate the proliferation of signs along the nation's roadways through the actions of federal, state and local governments.

Figure 2.2 demonstrates billboard proliferation in rural areas, the very thing that the Highway Beautification act sought to prevent through effective control.

Figure 2-2 Cluttered Billboards in a rural area demonstrating the proliferation of billboards



There are three recurring categories that emerge from a review of the literature essential to effective and lawful government regulation of the outdoor advertising industry¹. These categories are: Constitutionality and Defensibility, Establishment of Effective Control, Societal Implications and Program Administration.

One of the most prevalent problems of existing sign regulation is a reliance on content-based rules having been found unconstitutional based on First Amendment protections of speech

¹ Baker and Wolpert (2006), Burt (2006), Connally (2012), Weinstein and Connally (2015), Mason, (2015), Galva (2005), Cunningham (1973), Cullingham (1991), Floyd (1979), Menthe (2010), Sekulow and Zimmerman (2015), Franke (2017), Johnson (1981), Mollu (2018), Stavrinou et al (2016)

(*Reed v. Town of Gilbert*, 2015), (*Metromedia v. San Diego*, 1981), (*Thomas v. Schorer*, 2017)².

Baker and Wolpert (2006, 4) state the intent of the industry plainly, “The billboard plaintiff’s strategy is as follows: First they attempt to topple the community’s entire sign code and create a regulatory vacuum; if they are successful, they then seek a court order approving their sign applications...” A very recent example of this premise was played out in US District Court in *Reagan National Advertising Inc v. City of Cedar Park, Texas*. Although in this case, the court did not rule in favor of the plaintiff, the example serves to highlight the continuing attacks on billboard regulations by the industry (*Reagan National Advertising Inc. v. City of Cedar Park, Texas*, 2018). It is essential that sign regulations address this important challenge lest they be stricken by the courts.

Properly formulated and enforceable sign legislation can provide for the protection of public interests and achieve effective control, while at the same time protecting the First Amendment right to freedom of speech. The development of a preliminary framework to incorporate these categories as minimum standards for effective legislation serves to provide governments with an evaluative tool to assess current and planned legislation. To that end, what follows is an in-depth look at the literature pertaining to these standards. From the literature, a conceptual framework is developed to outline the categories of the preliminary framework.

² An example of this can be found in Chapter 394 of the Texas Transportation code. Chapter 394 defines an on-premise sign as, “a freestanding sign identifying or advertising a business, person, or activity, and installed and maintained on the same premises as the business, person, or activity” (394 Texas Trans. Code). While the text of the definition may seem innocuous, it requires one to read the content of the sign in order to know how the sign should be treated under the regulation. This differentiation in the treatment of a sign according to content is the crux of the problem.

Category 1: Constitutionality and Defensibility

Constitutionality and Defensibility is the first category of the preliminary framework which must be addressed when evaluating, drafting or revising sign legislation. According to Burt (2006, 475), "... the free speech protections of the First Amendment are restraints on the police powers of the state to regulate mediums of communication." This restraint requires that laws do not infringe on a person's right to speak. Otherwise, the regulations would be in violation of the constitution. As demonstrated earlier, the repeated contest of sign regulations by both private individuals and commercial entities on First Amendment grounds makes it vital that laws and rules concerning sign regulation be drafted in a manner that ensures they are constitutional and defensible (Connally, 2012, 202). Any challenge to rules which finds them unconstitutional could result in the legislation being struck down, creating a regulatory void. Such was the case for the State of Texas where it was ordered to re-write its sign legislation as a result of the court's decision in *Auspro v. Texas Department of Transportation* (*Auspro v. Texas Department of Transportation*, 2016).

Based on the literature³, it is evident that key issues have been fleshed out and refined through repeated litigation permitting a narrowing to three key subcategories which will serve to bolster the constitutionality and defensibility of sign regulations. These three subcategories are as follows:

- Content Neutral
- Strong Regulatory Purpose

³ Baker and Wolpert (2006), Burt (2006), Connally (2012), Weinstein and Connally (2015), Mason, (2015), Galva (2005)

- Avoidance of Exclusions or Exemptions

Drafting regulations in a manner that considers these three key factors would serve to increase the likelihood that the law or rule is both constitutional and defensible. Thus, this need is addressed by the first category of the framework:

Category 1: Constitutionality and Defensibility

1.1 Content Neutral

As a result of the Supreme Court’s decision in *Reed v. The Town of Gilbert (Reed)*, laws which are content-based on their face must be able to survive strict scrutiny else they be stricken down (Mason, 2015, 964). Prior to *Reed*, there was a degree of flexibility afforded to the courts in making the determination if a law was content-based, however the *Reed* decision resulted in an element of inflexibility, which dictates that if a law is content based on its face, then it must survive strict scrutiny (Mason, 2015, 964). This strict interpretation lends itself to the idea that when considering the constitutionality of sign regulation, the regulation should be content neutral to best withstand legal challenges as it would not be subject to strict scrutiny (Connally, 2012, 202). An important caveat to the *Reed* decision is that subsequent case law has found that the decision only applies to non-commercial signs (*Thomas v. Schorer*, 2017). The opinion of the court puts is succinctly, “In short, a court strictly scrutinizes content-based restrictions of non-commercial speech, but regulations on commercial speech [whether] content-based or content-neutral, [would be subject to] intermediate scrutiny”(Thomas v. Schorer, 2017).

The concept of Content Neutrality in regulation is not new. Many challenges regarding the infringement of freedom of speech protections and equal treatment under the law have collectively established a doctrine of content neutrality (Mason, 2015, 959-961). One of the first

cases to highlight first amendment infringement by means of a content-based regulation is the *Police Department of the City of Chicago v. Moseley* (Mason, 2015, 959). The opinion of the court stated, “The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter” (*Police Department of the City of Chicago v. Moseley*, 1972). This case was based on a regulation that allowed for peaceful labor protests near schools, but prohibited other types of peaceful protest near schools and as such discriminated based on the content (subject matter) of the speech (Mason, 2015, 959). Though not related to sign regulation, this case established the expectation of content neutrality for regulations that control, even incidentally, the free speech of a person. Essentially, the court’s ruling dictated that this regulation must either equally ban all types of peaceful protests near schools or allow them all. To distinguish between them would put the city in the position of promoting one person’s speech over another. *Metromedia v. San Diego* (*Metromedia*) also supports the inclusion of content neutrality in this framework. *Metromedia* revolved around the implementation of an ordinance that would ban commercial signs in the city (*Metromedia v. San Diego*, 1981). The regulation was challenged on First Amendment grounds and the court held that the regulation did in fact violate the First Amendment as it would have given preference to commercial speech over non-commercial speech through the prohibition of offsite advertising and the limitation of onsite advertising to commercial speech (*Metromedia v. San Diego*, 1981).

Remaining content neutral enables the regulation to avoid strict scrutiny. This serves to ensure that the sign regulation is both constitutional and defensible and more likely to remain intact when challenged.

1.2 Strong Regulatory Purpose

The ability of the government to regulate the conduct of the citizenry is a long-established principal known as the police powers doctrine. The police powers doctrine of the States is enshrined in the tenth amendment to the US Constitution and enables the state to enact laws to provide for the health, safety, morals and general welfare of the public (Galva, 2005, 20). In *Village of Euclid, Ohio v. Ambler Realty Co.*, the Supreme Court upheld the right of municipalities to zone within their boundaries as doing so was deemed a legitimate practice under the police powers doctrine (*Village of Euclid, Ohio v. Ambler Realty Co.*, 1926). This decision along with others like it⁴ legitimized the ability of states and municipalities to regulate the location of buildings and structures such as signs. At issue regarding sign regulations is the location of signs within these zoned areas. In addition to the regulation of the location of signs through zoning ordinances, the supreme court has also held in *Metromedia V. San Diego* that laws which serve to promote aesthetic beauty are also a justifiable exercise of the police powers of the state (Baker and Wolpert, 2006, 3). Thus, sign regulations are consistently held as a justifiable exercise of state authority under the police powers doctrine and serve to promote the health, safety, morals and general welfare of the public. However, it is not sufficing to say that such laws can survive the scrutiny of the court without a strong purpose statement.

Regarding the constitutionality and defensibility of sign regulation, the drafting of a strong purpose statement creates a credible justification for the law when such regulations are challenged on first amendment grounds (Connally, 2012, 190). Repeatedly, the courts utilize the purpose of a regulation in the application of the intermediate scrutiny test applicable to

⁴ *Village of Euclid, Ohio v. Ambler Realty Co.*, 1926. *Thomas Cusack Co. v. City of Chicago*, 1917. *Reinman v. City of Little Rock*, 1915.

commercial speech or the strict scrutiny test applicable to non-commercial speech as evidenced in *Metromedia* (Menthe, 2010, 232). According to Baker and Wolpert (2006, 9), the regulatory purpose of legislation is routinely referenced to determine if the regulation is properly tailored to achieve its stated goals. Examples for this abound in case law. One such case, *Thomas v. Schroer*, challenged the state's content-based sign regulation of non-commercial speech. The court found that the regulation in question did not pass strict scrutiny as it did not further a compelling interest of the state and that the regulation was not narrowly tailored to achieve the state's stated regulatory purpose of the protection of the aesthetics and safety of the community (*Thomas v. Schroer*, 2017). The analysis of the purpose of the regulation is the portion of importance in *Thomas v. Schroer*. The opinion contains a precise breakdown of the stated regulatory purposes and shows how the purpose does not pass the test of being considered compelling, but rather only substantial or significant (*Thomas v. Schroer*, 2017). This analysis, performed by the court, highlights the importance of a strong regulatory purpose that serves to make regulations more defensible when challenged. The analysis of the regulatory purpose in this opinion also suggests that empirical evidence, were it provided, would serve to support the regulatory purpose of the state. Additionally, Weinstein (2015, 59) speaks to the subject of evidentiary support to ensure a strong regulatory purpose stating, "Local governments are therefore advised to conduct studies, or at least consult studies prepared by national experts, to more carefully determine the safety concerns associated with outdoor signage."

A case of marked importance cited in the opinion for *Thomas v. Schroer* is that of *Members of City Council of City of Los Angeles v. Taxpayers for Vincent (Tax Payers for Vincent)*. This case found that the law in question was constitutional through its application of intermediate scrutiny through an examination of the regulatory purpose to determine if the

regulation as written achieves a substantial government interest. It should be noted that regulations that pertain to commercial speech need only survive intermediate scrutiny; however, the importance of a strong regulatory purpose remains no matter the level of scrutiny applied (Connally, 2012, 192).

In sum, the minimum component parts that make up a strong regulatory purpose are empirical support for the regulation and substantial government interest in regulating signs (*Thomas v. Schroer*, 2017), (*Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 1984). As has been demonstrated, through the judiciary's handling of challenges to existing regulation, it is necessary for sign regulations to be written with a strong regulatory purpose to ensure that they are both constitutional and defensible.

1.3 Avoidance of Exclusions or Exemptions

Related to the preceding two subcategories is the third and final subcategory, Avoidance of Exclusions or Exemptions. Exclusions and exemptions have the effect of weakening legislation by differentiating between different sign types (Weinstein, 2015, 15). Typically sign regulation is designed to differentiate based on the sign type such as on-premise signs or off-premise signs (23 US Code § 131, 1965). Additionally, many sign regulations provide for exemptions for certain sign types that the public may find useful, this was one of the primarily contested issues in *Reed*. This may seem inconsequential, however, according to *Reed* this differentiation in the treatment under the law of a sign based on its content is unconstitutional (*Reed v. Town of Gilbert*, 2015). As previously stated, the decision in *Reed* is only applicable to non-commercial speech, however the nature of most sign codes is such that they regulate both

commercial and non-commercial signs via the same regulation (*Auspro v. Texas Department of Transportation*, 2016). Once a sign code embraces the use of exemptions or exclusions, it crosses into the realm of content-based regulation of non-commercial speech and thus will likely be required to meet strict scrutiny when challenged on First Amendment grounds following *Reed*.

Category 2: Establishment of Effective Control

Establishment of Effective Control is the second category of the framework. The concept of effective control comes directly from the federal Highway Beautification Act of 1965 (Floyd and Shedd, 1979, 91). To achieve effective control, the state's regulatory program must control signs within 660 feet of the right of way boundary of a regulated highway, controlling primarily for lighting, size, number, and spacing of signs (23 U.S. Code § 131(c), 1965). The legislation does not define the exact method by which the states will control the lighting, size, number, and spacing of signs, but rather points to an agreement to be entered into by the Secretary of Transportation (The Secretary) and the state. This agreement outlines the regulatory regime required to achieve effective control for that state, allowing for the formulation of state laws to implement the federal requirements (23 U.S. Code § 131(d), 1965). This agreement has become known as the Federal-State Agreement.

Therefore, the specifics of what constitutes effective control outlined in the agreement although similar, vary from state to state (Cunningham, 1973, 1304). According to the Federal-State Agreement for Texas (1972), the broad basis for establishing effective control required by the federal statute can be reduced to five main subcategories;

- Permitting of Outdoor Advertising Only in Commercial or Industrial Areas
- Removal of Non-Conforming Signs and Acquisition and Removal of Signs
- Removal of Illegal Signs
- Controls for Size, Lighting and Spacing of Signs
- Program Administration

Drafting regulations in a manner that considers these five key factors would serve to increase the likelihood that the state achieves the required effective control to avoid the reduction in federal funds associated with non-compliance. Thus, this need is addressed by the second category of the framework:

Category 2: Establishment of Effective Control

2.1 Permitting Only in Commercial or Industrial Areas

Within the codified text of the Highway Beautification Act found in 23 U.S. Code § 131, the law stipulates, "...signs, displays, and devices...may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas..." The law, however, does not go on to clarify or define a zoned commercial or industrial area or an unzoned commercial or industrial area, but instead leaves this determination to be worked out in an, "agreement between the several States and the Secretary" (23 U.S. Code § 131, 1965). This agreement is known as the Federal-State Agreement. As such, achieving effective control regarding permitting only in commercial or industrial areas looks different from state to state and no common model of analysis for this

requirement of the law is sufficient to evaluate effective control (Floyd and Shedd, 1979, 84).

For the purposes of this research, however, a brief review of the 52 federal-state agreements finds that they are similar regarding the definition of what constitutes an unzoned commercial area, the nature of which can be best summarized in Table 2.1.

Table 2.1
The Nature of Unzoned Commercial or Industrial Areas

Category	Number of States
Restricts Permitting only to Zoned Commercial or Industrial Areas/Does not have unzoned Commercial or Industrial areas.	6
Three Businesses Required for an Unzoned Commercial or Industrial Area	2
Two Businesses Required in an Unzoned Commercial or Industrial Area	2
One Business Required in an Unzoned Commercial or Industrial Area	42
Location of Sign Permitted on opposite side of the road from an Unzoned Commercial or Industrial area	21
States with regulatory zone greater than the minimum 660 feet from the right of way boundary	1
Distance of sign site from Unzoned Commercial or Industrial area is 500 feet	9
Distance of sign site from Unzoned Commercial or Industrial area is 600 feet	19
Distance of sign site from Unzoned Commercial or Industrial area is 700 or 750 feet	3
Distance of sign site from Unzoned Commercial or Industrial area is 800 or 850 feet	11
Distance of sign site from Unzoned Commercial or Industrial area is 1000 feet	4

*Note: The District of Columbia and Puerto Rico are included in this analysis.

**Federal-State agreements source: Scenic America. <http://scenic.org/billboards-a-sign-control/highway-beautification-act/federalstate-agreements>

As can be seen from Table 2.1, the criteria for an unzoned commercial area are similar but vary from state to state. It would seem those states that only permit in areas zoned commercial or

industrial are best positioned to ensure effective control. Unfortunately, these states are few and cannot be used to determine a standard basis for effective control. It is worth noting though, according to Cunningham (1973, 1331) not all states regarded the zoning authority of local municipalities as authoritative for the purposes of regulation outdoor advertising. While this may cause the concept of a zoned commercial or industrial area to differ somewhat from state to state, it remains a rather uniform standard across the states.

As Cunningham (1973, 1306) points out, the federal government did not set a minimum standard for an unzoned commercial area and as a result there arose differences from state to state largely as a result of local political influences. These factors present difficulties in establishing a blanket standard to flesh out what effective control means in terms of Permitting Only in Commercial or Industrial areas. Instead, an examination of the federal-state agreement in conjunction with the state's governing statute and rules would best determine if effective control can be achieved through requiring permitting of outdoor advertising signs only in commercial or industrial areas. To achieve effective control, sign regulation should provide for permitting of outdoor advertising signs only in recognized commercial or industrial areas.

2.2 Removal of Non-Conforming Signs and Acquisition and Removal of Signs

This subcategory, like the one before it, arises directly from the Highway Beautification Act. The law is a bit more exacting in the manner in which this requirement for effective control is defined. 23 U.S. Code § 131(e) which pertains to this requirement reads as follows:

“Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this

section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming."

Therefore, signs in existence made non-conforming by the enactment of the legislation are required to be removed by 1970. Signs erected subsequent to the effective date of the law are to be removed five years after they become non-conforming.

In addition to this requirement, subsection (g) of the law requires the payment of just compensation to the sign owner to affect the removal of the sign at the end of the five-year term. 23 U.S. Code § 131(g) states the following:

"(g)Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A)The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B)The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

This section of the law requires that payment for the sign be made for any taking of a legally-erected sign resulting from the sign becoming non-conforming or from other actions such as right of way acquisitions by the state. According to Cullingham (1991, 404), this requirement of

the law resulted from industry lobbying to sway the hand of legislators to write more favorable terms for the surrender of non-conforming structures. An important thing to notice in this subsection is the provision that the federal government will be responsible for 75 percent of the payment to the sign owner for the taking. According to Cunningham (1973, 1319), this section required that states provide compensation not only to the sign owner but also to the lessor of the land on which the sign is located. One case, which demonstrates this concept well is that of *State of Vermont v. Brinegar*. The opinion of the court held that Vermont was indeed to pay just compensation and its refusal to do so would trigger the reduction in federal transportation dollars by 10 percent according to the Highway Beautification Act (*State of Vermont v. Brinegar*, 1974). However, the law was subsequently amended, the following is stated in subsection (n) of the law:

“(n)No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment. Funds apportioned to a State under section 104 of this title shall not be treated for purposes of the preceding sentence as being available to the State for making such a payment except to the extent that the State, in its discretion, expends such funds for such a payment.”

It is important to note here that the removal requirement is conditioned on the apportionment of federal funds. Without the availability of apportioned funds, no state can comply with the 75 percent requirement found in subsection (g) of the law. This effectively makes removal of non-conforming signs a moot requirement in the absence of federal funds apportioned under the Highway Beautification Act as the state must then provide all monies to pay the required just compensation. Be that as it may, it would seem in the best interest of any state to maintain

effective control of non-conforming signs insofar as it is financially able to avoid penalty from the federal government. To achieve effective control, sign regulation should provide for the Removal of Non-conforming Signs and Acquisition and Removal of Signs.

2.3 Controlling for Size, Lighting and Spacing

As with the removal of non-conforming signs, the Highway Beautification Act is exceptionally vague in what constitutes effective control for the size, lighting and spacing of signs. Here again the Act states no minimum standards to which the states must adhere, but instead these standards will be based on “customary use” within the states (23 US Code § 131(d)). The vagaries of the law make determining what exactly effective control means without reference to the federal-state agreement exceedingly difficult. According to Cunningham (1973, 1303), in 1967 the federal government drafted an exemplary set of standards to control for size, spacing and lighting after conference with all the states, however, in the drafting of the federal state agreements, the “customary use” clause ultimately resulted in a wide variety of requirements across the states. A memo from the US Department of Commerce’s Bureau of Public Roads dated July 19, 1966 details the suggested minimum standards for size, lighting and spacing. The department’s recommendation for spacing standards are best summarized in the following table.

Table 2.2
Proposed Baseline Standards for Spacing

Proposed Spacing Requirements		
	Outside of City Limits	Inside of City Limits
Spacing of Signs from Interchanges and Intersections or Rest Areas Along Interstate and Primary Freeways	2000 ft	2000 ft
Spacing of Signs from Interchanges and Intersections Along Primary Non-Freeways	200 ft	100 ft
Minimum Distance from a Public Park	500 ft	500 ft

*Summarized from US Department of Commerce’s Bureau of Public Roads July 19, 1966 Memo.

**Memo Source: Scenic America.

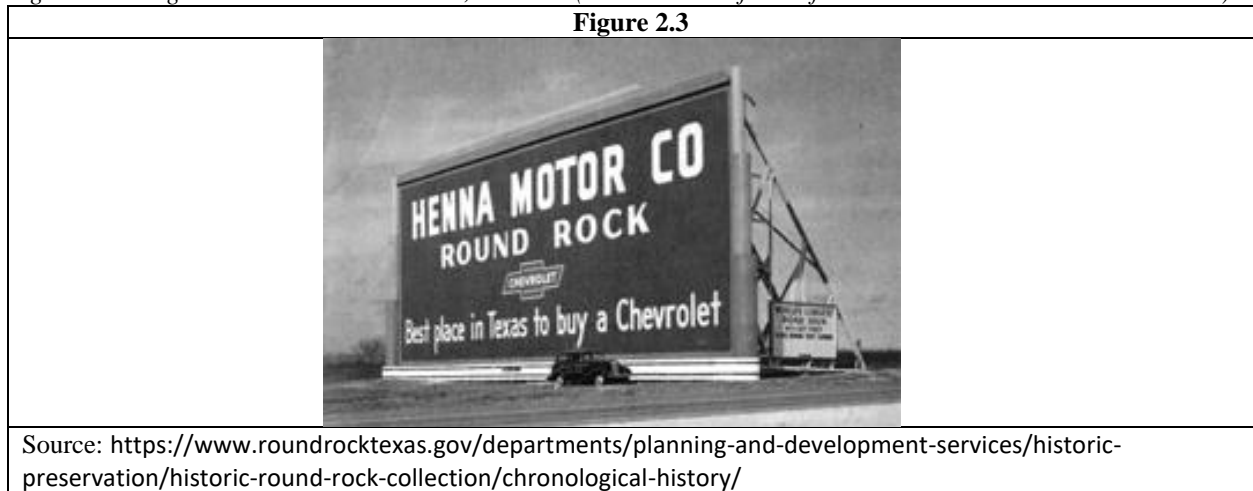
http://scenic.org/storage/PDFs/deputy%20federal%20highway%20administrator_s%20circular%20memorandum%20regarding%20the%20hba%20dated%20july%2019%201966%20an%203.pdf

The Bureau's recommendations concerning lighting essentially determined that lighting be safe. This was achieved by recommending the prohibition of flashing lights but then exempting signs that display temperature or time from such a prohibition (Jones, 1966, 11). Additionally, the recommendations required controls for the direction of the lighting so as not to interfere with a motorist's ability to see while driving and a prohibition on the interference by the lighting of existing traffic control signals (Jones, 1966, 11).

Concerning size, the Bureau set forth a set of proposed standards that would limit overall face size to 750 square feet (Jones, 1966, 11). According to Floyd, (1979, 118) the eventual agreed-upon minimums were vastly different than what was discussed in the memo or what was posted to the federal register in 1966. Eventually the maximum size face was limited to 1200 square feet (Floyd, 1979, 118).

Prior to entering into any federal-state agreement, the Bureau established a set of minimum standards to be utilized in the drafting of the agreements (Floyd, 1979, 117). These baseline standards established that the maximum allowed face size would be 1200 square feet, spacing was to be determined through a density per mile standard not to exceed 42 signs per mile on interstates, 70 signs per mile on primary roads in rural areas and 212 signs per mile on primary roads in urban areas (Floyd, 1979, 118). **Figure 2.3** depicts a very large sign and shows how large sign owners were willing to build to make sure their message was seen, demonstrating the need for size controls in sign legislation.

Figure 2-3 Large Billboard in Round Rock, TX 1938 (The vehicle in front of the billboard demonstrates the scale.)



As with the removal of non-conforming signs, the determination of what constitutes effective control regarding Controlling for Size, Lighting and Spacing is somewhat difficult as it differs from state to state and therefore no useful basis for an across-the-board standard can be established. However, aside from the requirement of permitting only in commercial or industrial areas, the law requires that states control for these factors as it is defined in the Federal-State Agreements and in so doing can achieve the required effective control (23 US Code § 131(d)). To achieve effective control, sign regulation should provide for the control of signs regarding size, spacing and lighting.

2.4 Removal of Illegal Signs

The Removal of Illegal Signs is more straight forward when determining if effective control can be achieved. The Highway Beautification Act addresses the removal of illegal signs through the following two statements in subsection (r) of the law:

“(1)By owners.—

Any sign, display, or device along the Interstate System or the Federal-aid primary system which was not lawfully erected, shall be removed by the owner of such sign, display, or device not later than the 90th day following the effective date of this subsection.

(2)By states.—

If any owner does not remove a sign, display, or device in accordance with paragraph (1), the State within the borders of which the sign, display, or device is located shall remove the sign, display, or device. The owner of the removed sign, display, or device shall be liable to the State for the costs of such removal. Effective control under this section includes compliance with the first sentence of this paragraph.”

Here, the law does not require just compensation for the removal of the sign as it is considered illegal (23 US Code § 131(r)). Therefore, the cost of such a requirement theoretically is not borne by the state but rather by the sign or property owner. Seemingly, not being confined by the size of state regulatory budgets, the states can more easily meet this requirement. According to Cunningham (1973, 1330), the removal of illegal signs relies on the police power of the state. As such, it is a relatively easy measure to achieve as the signs have no legal basis for their erection outside of regulatory requirements. To achieve effective control, sign regulation should provide for the Removal of Illegal Signs.

Category 3: Societal Implications

The Societal Implications of the use of billboards as an advertising medium and billboard regulation have been quite controversial as is evidenced by the great number of legal challenges to billboard regulation discussed earlier such as *Metromedia*. For this reason, it is important that regulations consider the societal concerns corresponding to billboards (Glaser, 2015, 146). A review of the literature⁵ finds that the most prevalent societal concerns regarding billboard regulation fall into three areas;

- First Amendment Protections
- Aesthetic Protections
- Safety Protections

By considering these three societal concerns, legislators and public managers will likely compose better sign legislation. Drafting regulations in such a manner would serve to increase the likelihood that the regulations do not run afoul of speech protections and protect the public's interests in aesthetics as well as safety (Baker and Wolpert, 2006, 11). Thus, this need is addressed by the third category of the framework:

Category 3: Societal Implications

3.1 Protection of Speech

First Amendment protections provide a wide defense for the sign owner to participate in the activity of displaying a sign as a form of protected speech as evidenced in many different court opinions (*Reed v. Town of Gilbert*, 2015) (*Auspro v. Texas Department of Transportation*,

⁵ Cunningham (1973), Burt (2006), Franke (2017), Connally (2012), Cullingworth (1991), Menthe (2010), Baker and Wolpert (2006), Johnson (1981), Burt (2006), Franke (2017), Sekulow and Zimmerman (2015)

2016) (*Thomas v. Schorer*, 2017). Though sign regulations are not designed to regulate individual speech, they often run afoul of this constitutional protection due to their design and implementation (Connally, 2012, 201). The issue of Protected Speech in this portion of the framework is closely related to the concept of Content Neutrality discussed early on in this chapter. Sekulow and Zimmerman (2015, 457-458) provide the following test of the five types of laws to avoid when writing legislation that impacts speech:

“1. The government’s actual purpose is to suppress speech based on its content or viewpoint, or to impose subjective editorial control over content or viewpoint.

2. The government interest that the law is intended to further relates to an aspect of the direct or emotive communicative impact of regulated expression, rather than the manner of its delivery.

3. The law, on its face, treats speakers differently due to the content or viewpoint of their message, or excludes from its coverage speech or conduct relating to different subject matter or viewpoints that pose similar threats to the government’s asserted interests.

4. The actual or inevitable effect of the law is to prevent speakers espousing certain messages from effectively reaching their intended audience, such as by targeting a particular location or manner of expression that is closely tied to one subject matter or viewpoint.

5. The law lends itself to use for content- or viewpoint-discriminatory purposes, or there is a realistic possibility that official suppression is afoot.”

Through the application of this test, Sekulow and Zimmerman (2015, 494) assert that legislators can assure that the law is written so that it will not impact speech freedoms afforded by the

constitution. Measures such as these can assist legislators in writing better legislation in terms of free speech protections. This will serve the public interest, but will also serve to make the sign laws more defensible were they to be contested in court (Connally, 2012, 201). With the protection of constitutional rights paramount to any regulatory regime, it is expected that sign legislation should contain measures to protect against First Amendment infringements.

3.2 Protection of Aesthetics

Protection of Aesthetics is no less controversial than protections for speech. Originally not acknowledged by the judiciary as a valid exercise of police powers, aesthetics eventually became one of the driving reasons for sign regulatory legislation (Cullingworth, 1991, 401). Importantly, it is worth noting that two of the justifications for the Highway Beautification Act found in 23 US Code § 131(a) relate to control for aesthetic purposes, “recreational value” and “to preserve natural beauty.” As Menthe (2010, 227) states, “The important legal battles over aesthetic regulations ... stem from the justifications advanced to regulate signs and displays.” This controversy arises from the conflict between an individual’s property right to erect such a sign and society’s valuation of the aesthetics of the built and natural environments (Baker and Wolpert, Year, 1188). One case that exemplifies the judiciary’s standing on the regulation of aesthetics as it pertains to billboards is *Metromedia v. San Diego*. Concerning the findings in this case, Johnson (1981, 1051) states, “The California Supreme Court in *Metromedia* properly recognized that under modern law and in response to the needs of a modern community, the government's interest in aesthetics justifies exercising the police power.” Thus, it is a just use of the police powers to control the aesthetics of a community through regulations (Baker and Wolpert, 2006, 1).

3.3 Protection of Safety

An additional societal concern surrounding billboards is the subject of their impact on the safety of the motoring public (Stavrinos et al et al, 2016, 20). Here again, the federal legislature acknowledged this concern by including safety in the purpose statement of the Highway Beautification Act (23 US Code § 131(a)). Safety studies, as they relate to the billboards, show that billboards, especially digital billboards, may be a contributing factor to distracted driving and caution should be exercised regarding placement near “attention demanding areas” (Mollu, 2018, 54). Mollu’s (2018,55) findings would seem to indicate that a setback of at least 200 feet from intersections or pedestrian crossings of such signs would serve to protect the safety of the public. An additional study finds that teens are also more likely to be distracted by digital billboards while driving than other age groups and that static digital signs as opposed to those with animation are less distracting to motorists (Stavrinos et al et al, 2016, 26). Regulations addressing the length of display time may do well to protect the public safety as it pertains to billboards and distracted driving. Taking this information into account, sign regulation should seek to Protect the Safety of the public as one of its guiding purposes.

Category 4: Program Administration

The fourth and final category of the framework is Program Administration. According to Irle (2011, 67), the design of agencies is important to ensure their success. Through good agency design, politicians can ensure the longevity of agencies through changing political climates (Macey 1992, 93). Designing an agency so that it can continue its mandate into the future

requires intentional delineation of procedures ensuring that the goals of the legislation are realized (Macey 1992, 95). Often the mandates of agencies consist of the protection of societal norms or expectations and the resulting regulation of an affected industry or citizens to ensure that the desired legislative outcomes are achieved (Christensen 2007, 503). Agency Design must enable the necessary “structures and practices” which would allow for the agency to realize its stated purpose (Christensen 2008, 275). To understand the effectiveness of the agency in achieving its stated purpose legislation must embody a measure of accountability both to the legislative body that created it as well as to the public (Taylor, 2005, 601). This accountability is achieved through means of systematic program evaluation through reporting of key performance indicators to the public and politicians alike (Kelly, 2005, 76). Performance indicators aid in the objective evaluation of programs (Aristigueta, 2002, 159). It is necessary that legislation contain guidelines which adequately ensure the effective execution of the agency’s stated purpose and that a system of accountability be in place to ensure the success of the agency. Thus, this need is addressed by the fourth category of the framework:

Category 4: Program Administration

4.1 Agency Design

Agency Design forms an important part of the evaluative framework. According to Hyaman and Kovacic (2014, 1463-1464), good agency design should reflect an effective mandate, define the agency’s jurisdiction and outline the form of administration and governance within the agency. In other words, the purpose, authority and administrative and management structure of the agency should be clearly established within the enabling legislation and

promulgated rules. This type of focus on Agency Design may help to maintain the original spirit of the legislation through time (Macey, 1992, 94).

An important component of an agency mandate is funding. Legislation should consider capability and capacity in the allocation of resources to the agency (Hyman and Kovacic, 2014, 1475). Proper apportionment of funds to support the stated legislative purpose serves to strengthen the agency (Aristeguieta 2002, 164). Without the proper resources to carry out the legislation, an agency may become ineffectual. The risk here of failing to achieve the very purpose of the Agency's existence, is a loss of social capital and legitimacy (Hyman and Kovacic 2014, 1484). As Floyd (1982, 448-449) points out, this unfortunate problem occurred with the Highway Beautification Act of 1965 when the federal government failed to properly apportion funds for the removal of non-conforming signs. To avoid these pitfalls, sign legislation should contain a clear mandate and ensure that proper funding is available.

4.2 Administrative Structures

Careful consideration must be given to the administrative functions of the agency when enacting legislation. This portion of the legislation addresses such things as the availability of judicial review of agency decisions and outlines the rule-making process (Macey, 1992, 102 & 108). Importantly, administrative protections to minimize the influence of the regulated industry on an agency can be achieved by broadening agency jurisdiction, thereby ensuring that the agency must focus attention on competing interests (Macey, 1992, 104). Additionally, agencies should be organized in such a way as to optimize efficiency, while at the same time, ensuring that the proper capacity is maintained by the agency to carry out its mandate (Birkland, 2011,

235). Accordingly, sign regulation should establish Administrative Structures which ensure the lasting success of the agency.

4.3 Program Evaluation

The third component of this category prevalent in the literature is Program Evaluation. Moynihan (2006, 77) states, "Efficiency and effectiveness improvements can be achieved by adopting a focus on results while increasing managerial flexibility." This focus on results can be achieved in legislation through Program Evaluation requirements that stipulate the required results and the methods by which performance is to be measured (Aristgueta 2002, 159-160). Taylor (2005, 605) points out that evaluation encourages "self-regulation," as agencies do not wish to be known for deficiencies. A good example of this is the measurement of output indicators which can aid in diagnosis of performance problems (Carman, 2011, 365). This diagnosis can help an agency avoid falling short of required performance indicators as they continually keep a finger on the pulse of its performance. Additionally, the outputs of Program Evaluation can be used to implement strategic plans and for the identification of program successes and deficiencies (Carman, 2011, 365). Further, Program Evaluation can be obtained from a much more subjective source, the public (Shlinger, 2008, 1102). This subjective evaluation can provide a linkage between the more concrete outcomes of a program and the perception of success or failure by the public (Shlinger, 2008, 1110). The combination of both subjective and objective measures allow an agency to see the true impact of its work on the public and can provide an important feedback loop of perceived program effectiveness (Shingler, 2008, 1110). Considering the benefits of Program Evaluation, this beneficial element of legislation should be integrated into sign regulations.

Conceptual Framework

The categories of the of the framework are used to evaluate sign regulations. The categories are organized with corresponding sub-categories to better conceptualize the framework components. The sub-categories provide supporting evidence for the inclusion of each of the main categories in the framework.

Research Purpose

The purpose of this research is to develop a preliminary framework to evaluate sign regulation using the literature. Second, the framework is then utilized to assess Texas billboard legislation, specifically, Title 6, Chapter 391 and 394 of the Texas Transportation Code, and Title 43 Part 1 Chapter 21 Subchapter I and K of the Texas Administrative Code. As a final step, suggestions for the revision of sign legislation and the preliminary framework are established. The framework is summarized and linked to the literature in Table 2.3.

Table 2.3
Conceptual Framework

Conceptual Framework Table	
Category	Scholarly Support
1 Constitutionality and Defensibility	
1.1 Content Neutral	Baker and Wolpert (2006), Burt (2006), Connally (2012), Weinstein and Connally (2015), Auspro v. Texas Department of Transportation (2016), Reed v. Town of Gilbert, Arizona (2015), Mason, (2015), Thomas v. Schorer (2017), Police Department of the City of Chicago v. Moseley (1972), Metromedia v. San Diego (1981)
1.2 Strong Regulatory Purpose	Baker and Wolpert (2006), Connally (2012), Weinstein and Connally (2015), Galva (2005), Village of Euclid, Ohio v. Ambler Realty Co (1926), Thomas v. Schorer (2017), Tax Payers for Vincent (1984)
1.3 Avoidance of Exclusions or Exemptions	Connally (2012), Baker and Wolpert (2006), Weinstein and Connally (2015), Reed v. Town of Gilbert, Arizona (2015), Auspro v. Texas Department of Transportation, 2016
2 Establishment of Effective Control	
2.1 Permitting Only in Commercial or Industrial Areas	Cunningham (1973), 23 U.S. Code § 131 - Control of Outdoor Advertising (1965), Cullingham (1991), State of Vermont v. Brinegar (1974), Floyd (1979)
2.2 Removal of Non-Conforming Signs and Acquisition and Removal of Signs	23 U.S. Code § 131 - Control of Outdoor Advertising (1965), Cunningham (1973), Floyd (1979), Jones (1966)
2.3 Controlling for Size, Lighting and Spacing	Cunningham (1973), Jones (1966), Floyd (1979), 23 U.S. Code § 131 - Control of Outdoor Advertising (1965)
2.4 Removal of Illegal Signs	23 U.S. Code § 131 - Control of Outdoor Advertising (1965), Cunningham (1973), Floyd (1979)

Table 2.3 Continued
Conceptual Framework

Conceptual Framework Table	
Category	Scholarly Support
3 Societal Implications	
3.1 Protection of Speech	Cunningham (1973), Burt (2006), Franke (2017), Connally (2012), Menthe (2010), Reed v. Town of Gilbert, Arizona (2015), Auspro v. Texas Department of Transportation (2016), Thomas v. Schorer (2017), Sekulow and Zimmerman (2015)
3.2 Protection of Aesthetics	Burt (2006), Franke (2017), Connally (2012), Cullingworth (1991), Menthe (2010), Baker and Wolpert (2006), Johnson (1981), 23 U.S. Code § 131 - Control of Outdoor Advertising (1965)
3.3 Protection of Safety	Burt (2006), Franke (2017), 23 U.S. Code § 131 - Control of Outdoor Advertising (1965), Mollu (2018), Stavrinos et al et al(2016).
4 Program Administration	
4.1 Agency Design	Christensen & Laegreid (2007), Macey (1992), Hyman and Kovacic (2018), Aristeguita (2002), Floyd (1981)
4.2 Administrative Structures	Christensen & Laegreid (2007), Macey (1992), Birkland (2011)
4.3 Program Evaluation	Floyd (1973), Christensen & Laegreid (2007), Connally (2012), Macey (1992), Moynihan (2006), Aristeguita (2002), Taylor (2005), Carman (2011), Shlinger (2008)

Chapter Summary

This chapter has defined the four categories that constitute the framework for the evaluation of sign regulations. Utilization of the framework to evaluate sign regulations should avoid the historical pitfalls of sign legislation and lead to the overall improvement of sign regulations. Again, as Baker and Wolpert (2002, 4) points out, “The billboard plaintiff’s strategy is as follows: First they attempt to topple the community’s entire sign code and create a regulatory vacuum; if they are successful, they then seek a court order approving their sign applications...” It is likely that states and municipalities would be better served to evaluate their current sign regulations to protect against costly litigation and the possible invalidation of sign regulations. The foregoing literature review explains the essential requirements necessary to create better sign legislation.

Use of this framework as an evaluative tool will enable future sign legislation to protect the constitutional freedoms of the public, while at the same time protecting the aesthetic values of the community and providing for the safety of the motoring public. Additionally, the framework will be a guide to construct an agency that is more effective at achieving its mandate and more responsive to the needs of the public.

The next chapter will discuss the research methodology which is used in conjunction with the framework to assess sign regulations.

Chapter 3

Methods

Chapter Purpose

This chapter presents the methodology utilized to test each category of the framework and evaluate existing legislation. First, a discussion of the research methodology demonstrates the applicability of the Practical Ideal Type model to this study including the appropriate methods of analysis. Second, the operationalization of the categories is presented in table format to demonstrate how each category of the framework will be analyzed. Third, the categories of the framework and their respective sub-categories are further broken down to provide an exacting view of the criteria to be used in the document analysis. The fourth section of this chapter discusses the research technique to be utilized in this study: document and archival record analysis. The final section summarizes the methodology discussion and transitions to chapter four.

Discussion of Research Methodology

The methodology utilized in this research is modeled on what Shields and Rangarajan (2013, 161) refer to as the “gauging/practical ideal type”⁶. This methodology is best suited to this study as it guides the development of a preliminary framework and logically organizes it into a series of categories and sub-categories. These categories serve as a basis for evaluating existing or planned legislation to address specific pitfalls typical of sign legislation and to test the validity of the framework⁷. A gauging methodology such as the Practical Ideal Type is well suited to developing evaluative criteria for current or planned sign legislation due to the exploratory and

⁶ For an example of an ARP that utilizes the Practical Ideal Type, see: Whitmore, M.A. (2006) Success through succession: Implementing succession planning at the Texas Department of Insurance. *Applied Research Projects, Texas State University*. Retrieved from <https://digital.library.txstate.edu/bitstream/handle/10877/3693/fulltext.pdf?sequence=1&isAllowed=y>

⁷ Many of the pitfalls which are considered “typical” are exclusions or exemptions in the sign code, *Reed v. Town of Gilbert* 2015.

descriptive nature of public administration research (Shields & Tajalli, 2006, 317). Iterative use of the framework developed in this study, utilizing document analysis, will serve to evaluate existing sign legislation and to test the validity of the framework. The practical goal of this analysis is to support the notion that the framework serves as a useful tool for legislators to improve sign legislation.

The operationalization of the categories in the framework is represented in tables 3.1 through 3.4. These tables demonstrate the relationship between the established categories of the framework and the criteria used to evaluate existing legislation through document analysis. The literature review in the preceding chapter has informed the development of the criteria established in this study.

The statutes and rules evaluated are as follows:

- 1) Chapter 391 Texas Trans. Code
- 2) Chapter 394 Texas Trans. Code
- 3) 43 TAC § 21.141 – 21.206
- 4) 43 TAC § 21.401 – 21.457

To perform the assessment, each category is correlated to a question or series of questions drawn from the literature that when answered, demonstrate the degree to which the statute or rule conforms to the framework.

Table 3.1 - Category 1 - Constitutionality and Defensibility

	Category	Research Method	Question
1.0	Constitutionality/Defensibility	Document Analysis	
1.1	Content Neutral	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Are these statutes and administrative rules Content Neutral on their face? Are these statutes and administrative rules Content Neutral in their justification? Do these statutes and administrative rules avoid favoring commercial speech over non-commercial speech? Do these statutes and administrative rules avoid speaker-based discrimination in regulations?
1.2	Strong Regulatory Purpose	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules have a strong regulatory purpose? Are the statutes and administrative rules narrowly tailored to the regulatory purpose? Is the regulatory purpose supported by empirical evidence?
1.3	Avoidance of Exclusions or Exemptions	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules avoid exclusions or exemptions? Do these statutes and administrative rules avoid differentiating between sign types?

Table 3.2 - Category 2 – Establishment of Effective Control

	Category	Research Method	Question
2.0	Establishment of Effective Control	Document Analysis	
2.1	Permitting Only in Commercial or Industrial Areas	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules contain language prohibiting signs outside of commercial or industrial areas?
2.2	Removal of Non-Conforming Signs and Acquisition and Removal of Signs	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules contain language regarding the treatment of non-conforming signs? Do these statutes and administrative rules contain language regarding the acquisition and removal of signs?
2.3	Controlling for Size, Lighting and Spacing	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules have language to control the size of signs? Do these statutes and administrative rules have language to control the lighting of signs? Do these statutes and administrative rules have language to control the spacing of signs?
2.4	Removal of Illegal Signs	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules provide for the removal of illegal signs?

Table 3.3 - Category 3 - Societal Implications

	Category	Research Method	Question
3.0	Societal Implications	Document Analysis	
3.1	Protection of Speech	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules violate free speech protections? Do these statutes and administrative rules make differentiations between speakers? Do these statutes and administrative rules prevent the display of certain messages? Do these statutes or administrative rules discriminate according to viewpoint? Does the government state a legitimate purpose for this regulation?
3.2	Protection of Aesthetics	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Are these statutes and administrative rules written such that they protect aesthetics? Is the Protection of aesthetics stated in the purpose of these statutes and administrative rules?
3.3	Protection of Safety	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Are these statutes and administrative rules written such that they protect public safety? Is the Protection of public safety stated in the purpose of these statutes and administrative rules?

Table 3.4 - Category 4 – Program Administration

	Category	Research Method	Question
4.0	Program Administration	Document Analysis	
4.1	Agency Design	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules contain a clear mandate? Do these statutes and administrative rules clearly outline the agency's jurisdiction?
4.2	Administrative Structures	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and rules contain guidelines for administration? Is the agency jurisdiction broad in scope?
4.3	Program Evaluation	1) Chapter 391 Texas Trans. Code 2) Chapter 394 Texas Trans. Code 3) 43 TAC § 21.141 – 21.206 4) 43 TAC § 21.401 – 21.457	Do these statutes and administrative rules contain evaluation requirements? Do these statutes and administrative rules specify output indicators? Do these statutes and administrative rules contain language regarding public involvement?

Constitutionality and Defensibility (Category 1)

When laws are called into question through legal challenge, the government and, to a certain extent, the public have a vested interest in the law remaining intact. Drafting new legislation can be costly and contentious. Additionally, if laws are struck, it can leave a regulatory vacuum. For this reason, it is essential that sign legislation be drafted in a manner that results in law that is both constitutional and defensible. As seen in the previous chapter, three main components serve to ensure that sign regulation is both constitutional and defensible; content neutrality, a strong regulatory purpose and an avoidance of exemptions or exclusions. The criteria to evaluate for the presence of these components are what follows. Should the statute or administrative rules result in “yes” for all criteria then it would likely be content neutral.

Criteria:

1. Content Neutral

- a. Are these statutes and administrative rules Content Neutral on their face?
- b. Are these statutes and administrative rules Content Neutral in their justification?
- c. Do these statutes and administrative rules avoid favoring commercial speech over non-commercial speech?
- d. Do these statutes and administrative rules avoid speaker-based discrimination in regulations?

2. A Strong Regulatory Purpose

- a. Do these statutes and administrative rules Avoid speaker-based discrimination in regulations?

- b. Are the statutes and administrative rules narrowly tailored to the regulatory purpose?
 - c. Is the regulatory purpose supported by empirical evidence?
- 3. Avoidance of Exemptions or Exclusions
 - a. Do these statutes and administrative rules avoid exclusions or exemptions?
 - b. Do these statutes and administrative rules avoid differentiating between sign types?

Establishment of Effective Control (Category 2)

As previously discussed, the category of Effective Control stems directly from the federal Highway Beautification Act. This category represents the regulatory meat of the law and represents the controls that are placed on signs. In order to follow federal requirements, the statutes and administrative rules of each state's sign legislation must enforce at least the minimum requirements of the federal law. The requirements of the federal law focus on four main components and what follows are the criteria pulled from the literature to support these four components. Should the statute or administrative rules result in a "yes" answer for all the criteria, then the legislation is deemed to have established a means by which to maintain effective control.

Criteria:

- 1. Permitting Only in Commercial or Industrial Areas
 - a. Do these statutes and administrative rules contain language prohibiting signs outside of commercial or industrial areas?

2. Removal of Non-Conforming Signs and the Acquisition and Removal of Signs
 - a. Do these statutes and administrative rules contain language regarding the treatment of non-conforming signs?
 - b. Do these statutes and administrative rules contain language regarding the acquisition and removal of signs?
3. Controlling for Size, Lighting and Spacing
 - a. Do these statutes and administrative rules have language to control the size of signs?
 - b. Do these statutes and administrative rules have language to control the lighting of signs?
 - c. Do these statutes and administrative rules have language to control the spacing of signs?
4. Removal of Illegal Signs
 - a. Do these statutes and administrative rules provide for the removal of illegal signs?

Societal Implications (Category 3)

The regulation of signs has many points of intersection with society. As has been demonstrated, free speech, aesthetics and safety are the three main components of societal implications. In order to ensure the protection of these fundamental societal concerns, it is necessary that sign legislation be drafted with language to refrain from infringement. What follows are the criteria taken from the literature. Should the statute or administrative rules result

in a yes answer for all the criteria, then the legislation is deemed to have sufficient protections in place for these three societal concerns.

Criteria:

1. Protection of Speech

- a. Do these statutes and administrative rules avoid violating free speech protections?
- b. Do these statutes and administrative rules avoid making differentiations between speakers?
- c. Do these statutes and administrative rules avoid preventing the display of certain messages?
- d. Do these statutes or administrative rules avoid discriminating according to viewpoint?
- e. Does the government state a legitimate purpose for this regulation?

2. Protection of Aesthetics, Environmental Protection

- a. Are these statutes and administrative rules written such that they protect aesthetics?
- b. Is the protection of aesthetics stated in the purpose of these statutes and administrative rules?

3. Protection of Safety

- a. Are these statutes and administrative rules written such that they protect public safety?
- b. Is the protection of public safety stated in the purpose of these statutes and administrative rules?

Program Administration (Category 4)

The design of an agency is important to its ability to carry out its mandate. Agency Design, Administrative Structures and Program Evaluation all work in concert to help the agency perform its best. What follows are the criteria concerning agency design taken from the literature. Should the statute or administrative rules result in a “yes” answer for all the criteria, then the legislation appropriately addresses the concept of agency design and evaluation.

Criteria:

1. Agency Design
 - a. Do these statutes and administrative rules contain a clear mandate?
 - b. Do these statutes and administrative rules clearly outline the agency’s jurisdiction?
2. Administrative Structures
 - a. Do these statutes and rules contain guidelines for administration?
 - b. Is the agency jurisdiction broad in scope?
3. Program Evaluation
 - a. Do these statutes and administrative rules contain evaluation requirements?
 - b. Do these statutes and administrative rules specify output indicators?
 - c. Do these statutes and administrative rules contain language regarding public involvement?

Research Technique

The research technique utilized in this study is that of document and archival analysis. This research technique has many applications and is well suited to the current study as the study seeks to analyze legislation for the presence or lack of certain qualities of the framework. According to Bowen (2009, 31), the advantages of document and archival analysis are many. The technique allows for a level of efficiency that is well suited to this study, as it does not require sampling of large populations, rather the researcher can simply locate the necessary documents to be utilized in the analysis (Bowen, 2009, 31). Bowen also highlights that document and archival analysis is more stable, less obtrusive and more cost efficient (2009, 31). Indeed, these statements are indicative of the current study as well. Statutes and rules utilized for the analysis are codified documents that must be changed only through formalized processes which ensures the stability of the document. While it is acknowledged that laws and rules do evolve over time, the present study sought to evaluate the current condition of these laws and rules and therefore past versions were not incorporated into the study. Additionally, the use of document analysis in this study is wholly unobtrusive as the documents are readily available to the public. This lowers the impact that a study of this nature may have, and steers clear of possible ethical missteps that may occur when collecting data. This technique also has inherent problems as well such as document availability, bias and a possible low level of detail (Bowen, 2009, 32). While these limitations of the research technique may be true in some instances, they did not affect the current study. Document availability is not an issue as in this case, all documents selected for analysis are publicly available documents.

In fact, all are published on the internet by the State of Texas.⁸ While bias may be prevalent in policies or internal organization documents, the process through which legislation is adopted helps to minimize bias as it is typically debated publicly and must be passed into law by legislative and executive bodies. For these reasons, document analysis is well suited to this study. The combination of the Practical Ideal Type conceptual framework and document analysis allows for a straightforward program evaluation. The framework that is established in the literature review and the subsequent use of the framework allow to prod the legislation for problems and also to formulate potential improvements (Shields & Tajalli 2005, 27). To aid in the document analysis, a rating scale was developed to measure the degree of alignment to the framework found in the legislation. The rating scale is summarized in Table 3.5 below.

Table 3.5 Rating Scale

Rating	Description
1 = Strong Alignment	Complete or near complete alignment to framework
2 = Mostly Aligned	Mostly aligned to the framework with minor exceptions
3 = Moderately Aligned	Moderately aligned with the framework with multiple exceptions
4 = Weakly Aligned	Marginally aligned with the framework with Significant exceptions
5 = Not Aligned	Not Aligned to the framework

8

Chapter 391 Texas Trans. Code
<https://statutes.capitol.texas.gov/docs/TN/htm/TN.391.htm>

Chapter 394 Texas Trans. Code
<https://statutes.capitol.texas.gov/Docs/TN/htm/TN.394.htm>

43 TAC § 21.141 – 21.206
[https://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac_view=5&ti=43&pt=1&ch=21&sch=I&div=1&rl=Y](https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=43&pt=1&ch=21&sch=I&div=1&rl=Y)

43 TAC § 21.401 – 21.457
[https://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac_view=5&ti=43&pt=1&ch=21&sch=K&rl=Y](https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=43&pt=1&ch=21&sch=K&rl=Y)

Human Subjects Protection

Human subjects were not utilized in this study; therefore, an Institutional Review Board (IRB) authorization was not required. As previously stated, all documents utilized for the purpose of this analysis are publicly available documents that can be retrieved from online resources.

Summary of Methodology

The methodology discussed in this chapter details the operationalization of the four categories of the conceptual framework established in chapter two. Each category of the framework was utilized to systematically analyze the documents utilizing the questions in the operationalization table. This iterative use of the framework in analyzing four documents also served to test the validity of the framework itself and its utility as a tool for improving sign legislation. The next chapter will provide a discussion of the results of this document analysis.

Chapter 4

Results

Chapter Purpose

This chapter discusses the results of the document analysis outlined in the preceding chapter. This analysis was conducted to evaluate commercial sign legislation based on four categories: Constitutionality and Defensibility, Establishment of Effective Control, Societal Implications and Program Administration. The results of this analysis are organized by category, each with a corresponding discussion.

Analysis

The literature review in chapter two has informed the formulation of the four categories of the conceptual framework. To enable a thorough analysis, each of the categories was operationalized into three to four sub-categories which address necessary components of each of the broader categories. Each of these sub-categories was then formulated as a question or questions which were then utilized to perform the analysis of the legislation and administrative rules. What follows is a review of those findings.

Category 1: Constitutionality and Defensibility

1.1 Content Neutral

Content neutrality is key to ensuring the constitutionality and defensibility of sign legislation. The literature review demonstrates the necessity of this as legislation that remains content neutral is more likely to avoid strict scrutiny when legal challenges arise.⁹ As evidenced

⁹ One such case, *Thomas v. Schroer*, challenged the state's content-based sign regulation of non-commercial speech. The court found that the regulation in question did not pass strict scrutiny as it did not further a

from the literature, legislation should be content neutral on its face, content neutral in its justification, not favor commercial speech over non-commercial speech and avoid speaker-based discrimination. The results of the document analysis for each of these criteria is summarized in the Table (4.1) below. Largely, the regulations over primary roadways, Chapter 391 of the Texas Transportation Code and 43 TAC 21: I, were found to be content neutral, while Chapter 394 of the Texas Transportation Code and 43 TAC 21: K were not found to be content neutral.

Criterion: Are these statutes and administrative rules Content Neutral on their face?

Document Analysis

Both chapter 391 of the Texas Transportation Code and the associated administrative rules, 43 TAC § 21.141 – 21.206, were deemed to be mostly content neutral with two exceptions. The first exception is present in Sec 391.001 of the statute and subsection 21.142 of the rules. The wording is identical in the statute and the rule and thus demonstrates strong alignment to the model. The definition states,

*43 TAC § 21.142 Definitions"(1) Commercial sign--A sign that is:(A) at any time intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, **except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or"***

The bolded text indicates the content-based exception. The language is such that in order to determine if the sign correlates to a business on the same property as the sign, one would have to look at the content of the sign. This small carve out in the law essentially allows what are

compelling interest of the state and that the regulation was not narrowly tailored to achieve the state's stated regulatory purpose of the protection of the aesthetics and safety of the community (*Thomas v. Schroer*, 2017).

commonly referred to as marquee signs to be exempt from the law. These types of signs are commonly found at shopping centers and strip malls.

The second exception is present in section 391.070 of the Transportation Code entitled Exceptions for Certain Nonprofit Organizations. Here the language is much more direct in its attempt to control content, stating:

391.070 Texas Transportation Code “(a) The combined license and permit fees under this subchapter may not exceed \$10 for a commercial sign erected and maintained by a nonprofit organization in a municipality or a municipality's extraterritorial jurisdiction if the sign relates to or promotes only the municipality or a political subdivision whose jurisdiction is wholly or partly concurrent with the municipality.”

This language directly spells out that a sign that falls under this exception would be limited to displaying only that content which relates to or promotes only the municipality or a political subdivision within the municipality. No such exception is found in the corresponding administrative rules, 43 TAC § 21.141 – 21.206.

Chapter 394 of the Texas Transportation Code and the associated administrative rules, 43 TAC § 21.401 – 21.457, were not deemed to be content neutral. Both contain many content-based regulations. Some examples of content-based language are as follows:

394.001 Texas Transportation Code”(1) “On-premise sign” means a freestanding sign identifying or advertising a business, person, or activity, and installed and maintained on the same premises as the business, person, or activity. (2) “Off-premise sign” means a sign displaying advertising that pertains to a business, person, organization, activity,

event, place, service, or product not principally located or primarily manufactured or sold on the premises on which the sign is located.”

*43 TAC § 21.442”(c) An on-premise sign is a sign that: (1) is located on the real property of a business **and consists only of: (A) the name, logo, trademark, telephone number, and internet address of that business; or (B) an identification of that business's principal and accessory products or services offered on the property; or (2) only advertises the sale or lease of the real property on which the sign is located and is removed within 90 days after the date of the closing of the real property transaction.”***

Here, in both the statute and the rule, the content-based language is much more evident as it speaks directly to the content of the signs, causing the regulation of those signs to require decision making based on the content of the sign’s message and resulting in differential treatment of the sign based on the content.

Criterion: Are these statutes and administrative rules Content Neutral in their justification?

Document Analysis

To test for the existence of this criteria, the purpose of the legislation and rules was examined to determine if they are content neutral in their justification. Both chapter 391 of the Texas Transportation Code and the associated administrative rules, 43 TAC § 21.141 – 21.206, were deemed to be content neutral in their justification, as they do not utilize the content of a sign to justify its regulation. Chapter 391 of the Texas Transportation Code prioritizes adherence to the federal Highway Beautification Act as well as safety and protection of the public investment stating:

*391.002 Texas Transportation Code “Subject to the availability of state and federal funds, it is the intent of the legislature to **comply with the Highway Beautification Act of 1965** (23 U.S.C. Sections 131, 136, 319) to the extent that it is implemented by the United States Congress. **This chapter is conditioned on that law.**”*

*“The legislature declares that it is necessary to regulate the erection and maintenance of commercial signs... in areas adjacent to the interstate and primary systems to: (1) **promote the health, safety, welfare, morals, convenience, and enjoyment of the traveling public; and (2) protect the public investment in the interstate and primary systems**”.*

The purpose outlined in 43 TAC § 21.141 is much leaner and does not mimic the purpose laid out in the governing statute however, it does avoid the use of content in the justification stating only:

43 TAC § 21.141 Purpose “This subchapter is established to regulate the orderly and effective display of commercial signs along a regulated highway within the State of Texas.”

Chapter 394 of the Texas Transportation Code contains no formal purpose statement in the legislation. However, no evidence was found indicating that the justification is content based and therefore, the legislation is deemed content neutral in its justification. The associated administrative rules, 43 TAC § 21.401 – 21.457, were deemed to be content neutral in their justification as they do not utilize the content of a sign to justify its regulation within the purpose statement of the rules. The purpose statement here is more concerned with outlining the jurisdiction of the regulation rather than supplying a justification.

*43 TAC § 21.401 Purpose “This subchapter is established to regulate the orderly and effective display of outdoor advertising **along rural highways and roads located outside corporate limits of cities, towns, and villages.**”*

Criterion: Do these statutes and administrative rules avoid favoring commercial speech over non-commercial speech?

Document Analysis

Chapter 391 of the Texas Transportation Code and the associated administrative rules, 43 TAC § 21.141 – 21.206, appear to completely avoid the favoritism of commercial speech over non-commercial speech. The regulations are written in such a way as to regulate only “commercial signs” and do not regulate non-commercial speech such as political campaign signs. The definition of a commercial sign sets the tone for the remainder of the legislation as no sign is regulated under the legislation unless it first is deemed to meet the definition of a commercial sign.

391.001 Texas Transportation Code “(1-a) (A) intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or (B) located on property owned or leased for the primary purpose of displaying a sign.”

Essentially the definition outlines that to be regulated under this legislation, the sign structure itself must be a revenue generating structure either through the fees charged for advertising on the sign or through a land lease for the purpose of the sign. This excludes

campaign signs for instance as they do not align to the definition, allowing the legislation to steer clear of the favoritism of commercial speech over non-commercial speech.

Chapter 394 of the Texas Transportation Code and 43 TAC 21: K both do not meet this criterion as both were found to favor commercial speech over non-commercial speech. The most obvious example of this is in the treatment of political campaign signs. Under the legislation, these signs are required to adhere to stricter controls simply based on the content of the sign. The legislation accomplishes this by exempting campaign signs from regulation so long as they adhere to the requirements.

394.003 Texas Transportation Code “(7) a sign erected solely for and relating to a public election if the sign: (A) is on private property;(B) is erected not earlier than the 90th day before the date of the election and is removed not later than the 10th day after the election date;”

Another exemption within the statute that demonstrates favoritism of commercial speech over non-commercial speech is an exemption for small businesses.

394.003 Texas Transportation Code “(c) This chapter does not apply to a directional sign for a small business, as defined by Section 2006.011, Government Code, if the sign:(1) is on private property; and (2) has a surface area not larger than 50 square feet.”

The lack of any time constraint for this sign type which relates to commercial speech shows deference to commercial speech over that of political speech as the controls are less restrictive.

Criterion: Do these statutes and administrative rules Avoid speaker-based discrimination in regulations?

Document Analysis

Again, here as with the previous criteria, the rules regarding the regulation of commercial signs along primary roadways, Chapter 391 of the Texas Transportation Code and the associated administrative rules, 43 TAC § 21.141 – 21.206, do avoid speaker-based discrimination. No evidence was found in either the statute or rules to demonstrate deferential regulation of a sign based on the speaker. Conversely, Chapter 394 of the Texas Transportation Code and 43 TAC 21: K do appear to provide deferential treatment according to speaker. One example of this can be seen in the exemptions section of the rules.

43 TAC § 21.405 Exemptions "(12) a sign of a nonprofit service club, charitable association, religious organization, chamber of commerce, or nonprofit museum that gives information about the meetings, services, events, or locations of the entity and that does not exceed an area of 32 square feet; "

This exemption allows for a sign to be displayed solely based on the speaker, were the speaker not to be a non-profit service or one of the others mentioned in the rule, then they would not be permitted to place an off-premise sign without first obtaining a permit. There are additional examples that recur throughout the statute and rules, causing them not to meet this criterion.

Summary

Table 4.1 summarizes the results of the neutrality component of the constitutionality criteria. Regarding content neutrality, the analysis finds that Chapter 391 and 43 TAC 21: I are largely content neutral and conform to this sub-category of the framework. Only two exceptions were found through the course of this analysis. However, Chapter 394 and 43 TAC 21: K are not

content neutral, both exemplify how regulations can utilize the content of speech to regulate signs differently. This type of regulation is what the literature review found to be problematic, placing the legislation in questionable standing regarding both its constitutionality and defensibility.

Table 4.1 Criteria to be Content Neutral

	Category	Question	Document Analyzed*			
1	Constitutionality and Defensibility		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
1.1	Content Neutral	Are these statutes and administrative rules Content Neutral on their face?	2	5	1	5
		Are these statutes and administrative rules Content Neutral in their justification?	1	1	1	1
		Do these statutes and administrative rules avoid favoring commercial speech over non-commercial speech?	1	5	1	5
		Do these statutes and administrative rules Avoid speaker-based discrimination in regulations?	2	2	2	2

** 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

1.2 Strong Regulatory Purpose

A strong regulatory purpose is another aspect of legislation that serves to bolster the constitutionality and defensibility of sign regulations. The regulatory purpose serves as a sort of backstop for the regulation, providing a firm footing from which to administer the law. The literature review found that a strong regulatory purpose uses language to define what sort of authority or police power the regulation falls under, such as the protection of public safety, as well as the rules being narrowly tailored to the stated purpose. Additionally, a strong regulatory purpose would ideally be supported by empirical evidence. Chapter 391 of the Texas Transportation Code was found to have a moderately strong purpose while 43 TAC 21: I, Chapter 394 of the Texas Transportation Code, and 43 TAC 21: K, all were found to be rather

weak in terms of this sub-category of Constitutionality and Defensibility. The results of the document analysis for each of these criteria is summarized in Table 4.2.

Criterion: Do these statutes and administrative rules have a strong regulatory purpose?

Document Analysis

It is evident from the document analysis that these regulations, apart from Chapter 391, do not have strong regulatory purposes. Chapter 391 is the only document of the four analyzed that was found to have a strong regulatory purpose. The purpose includes language that ties it back to the federal legislation for which it was enacted to enforce.

391.002 Purpose “...,it is the intent of the legislature to comply with the Highway Beautification Act of 1965... This chapter is conditioned on that law.”

The purpose also asserts the police powers of the state to, “(1) promote the health, safety, welfare, morals, convenience and enjoyment of the travelling public; and (2) protect the public investment in the interstate primary systems” (391.002, Texas Transportation Code). Assertion of these recognized police powers of the state places the legislation on firm ground. It is worth noting that this document was most recently revised in 2017 and as a result, aligns closely with the findings of the literature review.

Chapter 394 does not have a regulatory purpose outlined in the legislation, thus rendering the legislation exceedingly weak in this regard. Both sets of the administrative rules, 43 TAC 21: I and 43 TAC 21: K, do have a purpose statement, however they are not aligned to the statute’s purpose. Both are very similar,

43 TAC § 21.141 Purpose “This subchapter is established to regulate the orderly and effective display of commercial signs along a regulated highway within the State of Texas.”

43 TAC § 21.401 Purpose “This subchapter is established to regulate the orderly and effective display of outdoor advertising along rural highways and roads located outside corporate limits of cities, towns, and villages.”

What is striking here is that there is no link to the stated purpose in the statute. There is no assertion of police powers, nor is there reference to the federal legislation present in Chapter 391. As a result, these administrative rules were determined to have weak regulatory purpose statements.

Criterion: Are the statutes and administrative rules narrowly tailored to the regulatory purpose?

Document Analysis

To be narrowly tailored, laws must be written to utilize the least restrictive means to achieve the stated purpose. If the law is found to be written in a way that is outside of the scope of the stated purpose, then it is not narrowly tailored. The document analysis here finds that Chapter 391 does appear to be narrowly tailored as the legislation does not appear to have impacts outside the scope of the stated purpose. Additionally, 43 TAC 21: I does appear to be narrowly tailored. Neither the statute or ordinance would appear to suppress speech. However, Chapter 394 and the related rules, 43 TAC 21: K, were determined to not be narrowly tailored due to the content-based nature of the regulations. The most glaring evidence for this is in the treatment of political signs found in 43 TAC § 21.405 Exemptions,

43 TAC § 21.405 Exemptions “(a) The following are exempt from the requirements of this subchapter: (7) a sign erected solely for and relating to a public election, but only if:(A)

the sign is on private property;(B) the sign is erected after the 91st day before the election and is removed before the 11th day after the election;”

The limitation of when a political sign can be displayed here causes the regulation to be overly broad as it would suppress speech and favor commercial speech over non-commercial speech because the commercial signs are permitted to be displayed at all times, while political signs are not. This same language is present in Chapter 394 causing it to be overly broad was well.

Criterion: Is the regulatory purpose supported by empirical evidence?

Document Analysis

Empirical evidence to support legislation serves to bolster the purpose for enacting the law. For instance, safety studies that may show that signs along the roadway may present a danger to the public in some way, such as driver distraction. A review of the four documents examined in this study finds that none of the regulatory purposes, where present, cite any sort of empirical evidence, causing all to be very weak in this regard.

Summary

Table 4.2 summarizes results of the regulatory purpose component of the constitutionality criteria. In summation, the document analysis utilizing this sub-category of the framework determined that none of the documents contain a purpose statement supported by empirical evidence. The only document to have a strong regulatory purpose was Chapter 391, the purpose relies on the known police powers of the state and provides suitable justification for the regulation. Lastly, Chapter 391 and its accompanying rules, 43 TAC 21: I, were determined to be narrowly tailored while Chapter 394 and 43 TAC 21: K are not.

Table 4.2 Criteria for a Strong Regulatory Purpose

	Category	Question	Document Analyzed*			
1	Constitutionality and Defensibility		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
1.2	Strong regulatory Purpose	Do these statutes and administrative rules have a strong regulatory purpose?	1	5	4	5
		Are the statutes and administrative rules narrowly tailored to the regulatory purpose?	1	5	1	5
		Is the regulatory purpose supported by empirical evidence?	5	5	5	5

** 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

1.3 Avoidance of Exclusions or Exemptions

The avoidance of exclusions or exemptions serves to achieve equal treatment across all sign types. This has the effect of making the regulation stronger as it also avoids the differential treatment of signs based on their content or the speaker. The findings of the document analysis are similar to the preceding two sub-categories in that Chapter 391 and its associated rules, 43 TAC 21: I, are much more aligned to the framework than Chapter 394 and its associated rules, 43 TAC 21: K. The results of this analysis are summarized below in Table 4.3.

Criterion: Do these statutes and administrative rules avoid exclusions or exemptions?

Document Analysis

As seen in the literature review, exclusions and exemptions within sign codes may cause regulators to treat signs differently based on the message or the speaker¹⁰. An analysis of the four

¹⁰ Once a sign code embraces the use of exemptions or exclusions, it crosses into the realm of content-based regulation of non-commercial speech and thus will likely be required to meet strict scrutiny when challenged on First Amendment grounds following *Reed*.

documents finds that Chapter 391 and its associated rules, 43 TAC 21: I, largely avoid the use of exclusions or exemptions; the only exception being that of marquee signs discussed previously in this chapter under section 1. The exception is made in the definition established for a commercial sign.

*43 TAC § 21.142 Definitions”(1) Commercial sign--A sign that is:(A) at any time intended to be leased, or for which payment of any type is intended to be or is received, for the display of any good, service, brand, slogan, message, product, or company, **except that the term does not include a sign that is leased to a business entity and located on the same property on which the business is located; or***

This exception may likely require the regulator to utilize the content of the sign to determine how it must be regulated.

Conversely, Chapter 394 and its associated rules, 43 TAC 21: K, do not avoid exemptions or exclusions. In fact, the administrative rules have an entire subchapter entitled Exemptions that outlines the differential treatment of signs according to content and to speaker. For example, 43 TAC § 21.405(12) outlines an exemption for a “non-profit service club, charitable organization, religious organization.” Here the exemption is speaker based. The statute is similarly crafted, containing the same exemptions outlined in the rules.

Criterion: Do these statutes and administrative rules differentiate between sign types?

Document Analysis

This criterion is seemingly redundant to the previous however, legislation may be drafted in such a way that differentiates the treatment of signs based on the type by means other than an exemption or exclusion. Examination of this aspect of the sign code is useful to determine the

presence of possibly problematic language. Here the results mimic that of the section above, as in Chapter 391, marquee signs are set aside albeit through an exemption. Additionally, the definition of a commercial sign in and of itself differentiates between sign types causing a non-commercial sign to remain unregulated and a commercial sign to be regulated. This is potentially problematic in that one must determine the nature of the sign to determine how it is to be regulated. Aside from this, Chapter 391 and 43 TAC 21: I are largely devoid of this problematic language.

Chapter 394 and 43 TAC 21: K have a great deal of differentiation between sign types. The regulations contain references to “directional signs” and signs related to election for public office. The regulations are applied differently based on this differentiation. For example, a political sign is limited as to when it is okay to be displayed, if displayed outside of that time frame, it is in violation of the statute and rules. As was discussed in the literature review, this differential treatment based on the content has been found to violate the constitution.¹¹

Summary

Table 4.3 summarizes the results for the exclusion and exemptions component of the constitutionality criteria. Exclusions and exemptions were found to be prominent in Chapter 394 and 43 TAC 21: K. In fact, the code regulates through these exemptions especially in the case of political campaign signs. Additionally, these two documents regulate signs differently according to sign type. Both Chapter 391 and 43 TAC 21: I do not make extensive use of exemptions or exclusions and, for the most part, are in line with this sub-category of the framework.

¹¹ Additionally, many sign regulations provide for exemptions for certain sign types that the public may find useful, this was one of the primary contested issues in *Reed*. This may seem inconsequential, however, according to *Reed* this differentiation in the treatment under the law of a sign based on its content is unconstitutional (*Reed v. Town of Gilbert*, 2015).

Table 4.3 Criteria for Avoids Exclusions or Exemptions

	Category	Question	Document Analyzed*			
1	Constitutionality/ Defensibility		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
1.3	Avoids Exclusions or Exemptions	Do these statutes and administrative rules avoid exclusions or exemptions?	2	5	2	5
		Do these statutes and administrative rules avoid differentiating between sign types?	2	5	2	5

** 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

Category 2: Establishment of Effective Control

2.1 Permitting Only in Commercial or Industrial Areas

One of the main tenants of establishing effective control is to limit the permitting of outdoor advertising to commercial or industrial areas. Recognizing that not all jurisdictions make use of zoning, the federal Highway Beautification Act and the Federal-State agreements utilize municipal zoning as well as other specified criteria to determine if an unzoned area is a commercial or industrial area.¹² The results of the document analysis for these criteria is summarized in Table 4.4 below. Across the board, the four sets of regulations were found to prohibit permitting outside of zoned and unzoned commercial or industrial areas. However, only the regulations regarding interstate and primary roadways contained language regarding zoned and unzoned commercial areas, while the regulations over rural roads only contained language regarding commercial activities.

¹² Within the codified text of the Highway Beautification Act found in 23 U.S. Code § 131, the law stipulates, "...signs, displays, and devices...may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas..." The law, however, does not go on to clarify or define a zoned commercial or industrial area or an unzoned commercial or industrial area but instead leaves this determination to be worked out in an, "agreement between the several States and the Secretary" (23 U.S. Code § 131, 1965). This agreement is known as the Federal-State Agreement.

Criterion: Do these statutes and administrative rules contain language prohibiting signs outside of commercial or industrial areas?

Document Analysis

Prohibiting signs outside of commercial or industrial areas is one of the key elements of control under the federal Highway Beautification Act. Laws enacted by states that comport to the requirements of the federal statute must then also have a means to prohibit the permitting of outdoor advertising outside of commercial or industrial areas. In Chapter 391 and 43 TAC 21: I, this prohibition is successfully established by requiring that signs be built either in areas zoned commercial or industrial or unzoned commercial or industrial areas. In Chapter 391 this control is achieved in 391.031(b-1):

“A person does not commit an offense under this section if the person: (1) erects or maintains a commercial sign located within 660 feet of the nearest edge of a right-of-way in an area in which the land use:(A) is designated industrial or commercial under authority of law; or (B) is not designated industrial or commercial under authority of law, but the land use is consistent with an area designated industrial or commercial; and”

While the language here does not utilize the term “zoning”, the phrase “designated commercial or industrial under authority of law” is indicative of municipal zoning. Additionally, if unzoned, the land use must be “consistent with an area designated industrial or commercial.” The corresponding administrative rules are more thorough in the explanation of what constitutes a commercial or industrial area, zoned or unzoned.

43 TAC §21.178 Zoned Commercial or Industrial Area

“A zoned commercial or industrial area is an area that is designated, through a comprehensive zoning action, for general commercial or industrial use by a political subdivision with legal authority to zone regardless of the specific label used by the zoning authority. An area is not considered a zoned commercial or industrial area for regulatory purposes if it: (1) is a small parcel or narrow strip of land that cannot be put to ordinary commercial or industrial use, as described in §21.180; (2) is designated for a use classification that is not commercial or industrial in nature; or (3) has no actual development of the property for commercial or industrial activity, as described in §21.180, other than specifically sign-related infrastructure.”

The three exceptions to the rule appear to be in place to thwart the use of zoning solely to allow for the construction of a sign in an area that is not commercial or industrial in nature. The unzoned criteria are much different but serve to simulate a zoned area when outside of a municipality.

43 TAC § 21.179 Unzoned Commercial or Industrial Area

“(a) An unzoned commercial or industrial area is an area that: (1) is within 800 feet, measured from the nearest point along the edge of the highway right of way perpendicular to the centerline of the main-traveled way, of and on the same side of the highway as the principal part of at least two adjacent recognized governmental, commercial, or industrial activities that meet the requirements of subsection (c) of this section; (2) is not predominantly used for residential purposes; and (3) has not been zoned under authority of law.

Here, through the requirement of proximity to two or more commercial or industrial businesses, defines a zone that is like a zoned commercial area. Here as well, there are several

exceptions to prevent signs from being permitted under this guideline in residential areas or in zoned areas. Part (2) dictates that this criterion is not to be used in evaluating an area zoned by law.

Chapter 394 and 43 TAC 21: K do not contain references to zoning, as the legislation was not drafted to comport to the federal statute as rural roads are not required to be regulated under the federal guidelines. These two documents do however stipulate that to obtain a permit, the sign is to be within 800 feet of a singular commercial or industrial business. This lax standard enables billboards to be erected in areas along rural roads that are largely not developed commercially. While this does not align to the framework, it is not likely problematic as the federal government places no obligation on the states to regulate commercial signs along rural roads as they do not receive federal monies for construction.¹³

Summary

Table 4.4 summarizes the permitting only in commercial or industrial areas component of the effective control criteria. The documents diverge here in their alignment to the framework. Chapter 391 and 43 TAC 21: I, meet the criteria to allow permitting in only commercial or industrial areas. Chapter 394 and 43 TAC 21: K do attempt to co-locate a sign along a rural road with a business however, the control is more lax than those present in the primary and interstate regulations.

¹³ “(a) The Congress hereby finds and declares that the erection and [maintenance](#) of outdoor advertising signs, displays, and devices in areas adjacent to the [Interstate System](#) and the primary system should be controlled in order to protect the public investment in such [highways](#), to promote the safety and recreational value of public travel, and to preserve natural beauty” (23 U.S. Code § 131).

Table 4.4 Criterion for Permitting Only in Commercial or Industrial Areas

	Category	Question	Document Analyzed*			
2	Establishment of Effective Control		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
2.1	Permitting Only in Commercial or Industrial Areas	Do these statutes and administrative rules contain language prohibiting signs outside of commercial or industrial areas?	1	3	1	3

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

2.2 Removal of Non-Conforming Signs and Acquisition and Removal of Signs

The removal of non-conforming signs is an important aspect of sign legislation that addresses the existence of signs that no longer conform to regulatory requirements. As demonstrated in the literature review, this federal requirement is conditioned on the apportionment of funds, however in the absence of funds it remains important that states have guidelines for the removal of non-conforming signs and acquisition of signs.¹⁴ The results of the document analysis for each of these criteria are summarized in the Table 4.5 below. The documents all contain language regarding the treatment of non-conforming signs although none go so far as to require their removal in the absence of federal funding. The process of acquisitions of signs is present in some regard across some of the documents however, it lacks clarity.

¹⁴ It is important to note here that the removal requirement is conditioned on the apportionment of federal funds. Without the availability of apportioned funds, no state can comply with the 75 percent requirement found in subsection (g) of the law. This effectively makes removal of non-conforming signs a moot requirement in the absence of federal funds apportioned under the Highway Beautification Act as the state must then provide all monies to pay the required just compensation. Be that as it may, it would seem in the best interest of any state to maintain effective control of non-conforming signs insofar as it is financially able to avoid penalty from the federal government.

Criterion: Do these statutes and administrative rules contain language regarding the treatment of non-conforming signs?

Document Analysis

While the aim of federal legislation is to remove non-conforming signs, the state regulations examined here stop short of that requirement. Instead, the regulations utilize a sort of grandfathering for signs once they become non-conforming. Curiously, no mention of the treatment of non-conforming signs is made in Chapter 391. 43 TAC 21: I contains several provisions outlining the treatment of non-conforming signs. For example, 43 TAC § 21.150(c) limits the sign owner from upgrading a non-conforming sign, “(c) A nonconforming sign may not be: (1) removed and re-erected for any reason, other than a request by a condemning authority; or (2) substantially changed, as described by §21.191 of this subchapter (relating to Repair and Maintenance of Commercial Signs).” Additional provisions are found in 43 TAC § 21.190 relating to the reconstruction of a non-conforming sign post destruction from natural disasters. Under 394.044 similar language is used to address the destruction of non-conforming signs, “(a) A sign or a substantial part of a sign that is blown down, destroyed, taken down, or removed for any purpose other than for maintenance or for changing a letter, symbol, or other matter on the sign may not be re-erected, reconstructed, or rebuilt unless the sign conforms with this chapter. (b) For purposes of this section, a sign or substantial part of a sign is considered destroyed only if the cost of repairing the sign is more than 50 percent of the cost of erecting a new sign of the same type at the same location.” The language utilized in 43 TAC 21: K is identical to that found in 43 TAC 21: I.

Criterion: Do these statutes and administrative rules contain language regarding the acquisition and removal of signs?

Document Analysis

To accommodate growth and expansion along the right of way, it is necessary that regulators have the capacity to acquire and remove signs. The document analysis finds that there are elements in all the documents addressing the acquisition and removal. However, the quality varies across these documents. For example, in Chapter 391, the acquisition and removal of signs is clearly laid out,

“Sec. 391.033. ACQUISITION OF COMMERCIAL SIGNS BY COMMISSION. (a) The commission may purchase or acquire by eminent domain a commercial sign that is lawfully in existence on a highway in the interstate or primary system. (b) If an acquisition is by eminent domain, the commission shall pay just compensation to:

(1) the owner for the right, title, leasehold, and interest in the commercial sign; and

(2) the owner or, if appropriate, the lessee of the real property on which the commercial sign is located for the right to erect and maintain the sign.”

Additional language is present in 391.151 and 391.152 regarding acquisition for the purposes of scenic enhancement or public accommodation respectively. This gives robust authority to the state to ensure that it has the legal capacity to remove signs as necessary while at the same time requiring just compensation. There is a disconnect between the statute and the rules, as 43 TAC 21: I does not discuss the acquisition process at all, nor does it contain reference to any other subchapter in the Texas Administrative Code that outlines the process of acquisition. Chapter

394 does not contain language regarding acquisition. The associated rules found in 43 TAC 21:K contain a specific provision regarding acquisition in 43 TAC § 21.438.

43 TAC § 21.438 Relocation Benefits

“(a) Relocation benefits will be paid in accordance with Subchapter G of this chapter (relating to Relocation Assistance and Benefits) for the relocation of a sign under §21.435 of this subchapter (relating to Permit for Relocation of Sign). (b) The owner of an existing sign that is being relocated must enter into a written agreement with the governmental entity that is acquiring the right-of-way in which the sign is located. In the agreement the owner, in consideration of the payment by the governmental entity of relocation benefits, waives and releases any claim for damages against the governmental entity and the state for any temporary or permanent taking of the sign.”

This language is clear and logically has references to the appropriate chapter in the Texas Administrative Code that outlines the acquisition process.

Summary

Table 4.5 summarizes the removal and acquisition component of the effective control criteria. The analysis shows that the documents vary in the presence and quality of language regarding both the treatment of non-conforming signs and the acquisition and removal of signs. It is valuable to note the disconnect present between the statutes and rules as they do not appear to be in alignment. Chapter 391 discusses acquisition however the associated rules do not. Chapter 394 has no mention of acquisition, yet the associated rules outline the process and provide reference to the relevant chapter in the Texas Administrative Code.

Table 4.5 Criteria for Removal of Non-Conforming Signs & Acquisition and Removal of Signs

	Category	Question	Document Analyzed*			
2	Effective Control		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
2.2	Removal of Non-Conforming Signs and Acquisition and Removal of Signs	Do these statutes and administrative rules contain language regarding the treatment of non-conforming signs?	5	3	3	3
		Do these statutes and administrative rules contain language regarding the acquisition and removal of signs?	1	5	5	1

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

2.3 Controlling for Size, Lighting and Spacing

As discussed in the literature review, controlling for size, lighting and spacing are a necessary component of any state legislation intended to comport with the guidelines of the federal Highway Beautification Act.¹⁵ The specific requirements regarding this are found within the federal-state agreements. The results of the document analysis for each of these criteria is summarized in the Table 4.6 below. All the documents except for Chapter 391 adequately address this category of the framework.

Criterion: Do these statutes and administrative rules have language to control the size of signs?

Document Analysis

Regulation of the size of a sign is an essential element of sign legislation intended to enforce the requirements of the Highway Beautification Act. The requirements under the Texas

¹⁵ However, aside from the requirement of permitting only in commercial or industrial areas, the law requires that states control for these factors as it is defined in the federal state agreements and in so doing can achieve the required effective control (23 US Code § 131(d)). To achieve effective control, sign regulation should provide for the control of signs regarding size, spacing and lighting.

Federal-State agreement limit the face size of signs to 1200 square feet with maximum face height of 25 feet and face width of 60 feet. Additionally, a sign with a face that exceeds 350 square feet in size may only have one face in each direction. This dictates that signs that have two faces per direction must not exceed a combined area of 700 square feet, with each face not to exceed 350 square feet. The analysis of Chapter 391 finds that it contains no reference to size limitations. The only language found that alludes to controls for signs is found in 391.032, “(a) The commission by rule may regulate the orderly and effective display of commercial signs consistent with the customary use of commercial signs in this state in an area in which the land use.” This language mimics that found in the federal Highway Beautification Act regarding customary use.¹⁶ 43 TAC 21: I explicitly outlines controls for sign face sizes in 43 TAC § 21.182. This rule limits a single sign face to 672 square feet with the same maximum dimensions found in the federal state agreement. There appears to be one area where this rule may not be in alignment with the federal-state agreement in 43 TAC § 21.182(d). Here the overall face surface area of a sign with two faces in the same direction is limited to 700 square feet however, the limitation of 350 square feet per face is not present as it is in the federal-state agreement.

43 TAC § 21.182(d)

“Except as provided in subsection (g) of this section, a sign may have two or more sign faces that are placed back-to-back, side-by-side, stacked, or in “V” type construction with not more than two faces presented in each direction. If such an arrangement is used, the sign structure or structures are considered to be one sign for all purposes. Two sign faces which together exceed 700 square feet in area may not face in the same direction.”

¹⁶ Here again the Act states no minimum standards to which the states must adhere but instead these standards will be based on “customary use” within the states (23 US Code § 131(d)).

Federal-State Agreement Section III(D)(3)

“Signs which exceed 350 square feet in area may not be double-faced (stacked or side by side.”

A review of Chapter 391 finds that it does include specific language as to the size limitations for signs in 394.042. The area specified mimics that found in Chapter 391 however the dimensions are not present. The associated rules, 43 TAC 21: K address size in 43 TAC § 21.428. The maximum face dimensions are established here and are the same as found in 43 TAC § 21.182.

Criterion: Do these statutes and administrative rules have language to control the lighting of signs?

Document Analysis

The regulation of lighting is equally essential to that of size. The federal guidelines concerning lighting are primarily concerned with the safety of any lighting utilized but do not place any limitations on the number or placement of light fixtures¹⁷ As with size, Chapter 391 is silent and relies on the implementation of rules that reflect customary use to regulate lighting. 43 TAC § 21: I contains regulations concerning the safety aspect of lights like that present in the federal-state agreement. Additionally, a limitation in the number of lights per side of sign is

¹⁷“F. Lighting: Signs may be illuminated subject to the following restrictions: 1. Signs which contain, include or are illuminated by any flashing, intermittent or moving light or lights are prohibited, except those giving public service information such as time, date, temperature, weather or similar information. 2. Lights which are not effectively shielded as to prevent beams or rays of light from being directed at any portion of the travelled ways of the interstate or primary highway and which are of such intensity or brilliance as to cause glare or to impair the vision of the driver of any motor vehicle, or which otherwise interfere with any driver’s operation of a motor vehicle are prohibited. 3. No sign shall be so illuminated that it interferes with the effectiveness of or obscures an official traffic sign, device or signal” (Texas Federal-State Agreement, 1972).

established as well as a limitation for the direction, either up or down. Similarly, Chapter 394 does not contain any mention as to lighting of a sign, but it is present in the associated rules, 43 TAC 21: K, utilizing identical language to that found in 43 TAC 21: I.

Criterion: Do these statutes and administrative rules have language to control the spacing of signs?

Document Analysis

Within the federal-state agreement, spacing is addressed according to roadway classification coupled with location inside or outside of the boundaries of a municipality (Texas Federal-State Agreement, 1972). Here again chapter 391 does not explicitly outline spacing requirements, leaving this up to the rule-making process. 43 TAC 21: I does contain provisions for spacing; these requirements are as strict or stricter than the federal guidelines. Chapter 394 does specify spacing requirements at the statutory level. These requirements also are as strict or stricter than those found in the federal-state agreement. These same spacing requirements are also incorporated into the administrative rules in 43 TAC § 21.429.

Summary

Table 4.6 summarizes the controls for size, lighting and spacing component of the effective control criteria. Largely, the document analysis reveals that these four documents do address the size, lighting and spacing of signs. Chapter 391 does not explicitly mention any of these but rather contains a clause indicating that such controls will be established by rule. The apparent non-conformity regarding sign face is potentially problematic. Overall, these documents demonstrate that the regulations are as strict or stricter than federal guidelines, indicating that this category of the framework is adequately represented.

Table 4.6 Criteria for Controlling for Size, Lighting and Spacing

	Category	Question	Document Analyzed*			
2	Effective Control		391TTC	394TTC	43 TAC 21: I	43 TAC 21: K
2.3	Controlling for size, lighting and spacing	Do these statutes and administrative rules have language to control the size of signs?	5	1	1	1
		Do these statutes and administrative rules have language to control the lighting of signs?	5	5	1	1
		Do these statutes and administrative rules have language to control the spacing of signs?	5	1	1	1

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

2.4 Removal of Illegal Signs

The removal of illegal signs is required under 23 US Code 131(r). This portion of the Highway Beautification Act requires that sign owners remove illegal signs at their own expense and that if they do not, the state must remove them, deferring the cost of removal to the sign owner (23 US Code § 131(r)). The results of the document analysis for this criterion is summarized in the Table 4.7 below. All the documents adequately address this category of the framework.

Criterion: Do these statutes and administrative rules provide for the removal of illegal signs?

Document Analysis

Adequate language regarding the removal of illegal signs to include authority and associated mechanisms to affect the removal of a sign in the absence of sign owner compliance is essential for sign legislation to satisfy this requirement of the Highway Beautification Act. The document analysis determined that illegal sign removal is addressed in all four documents. The statutes establish such acts as misdemeanor offenses and allow for penalties of \$500 to \$1000 for each day the sign persists in an illegal state. Additionally, provisions are present to permit the

state to seek an injunction to require the removal of the sign at the owner's expense if the sign owner does not comply¹⁸. Within the administrative rules examined, the administrative process is outlined with the requirements for correspondence and timeframes for compliance both being established. Additionally, as with most enforcement actions, an element of due process is present ensuring that the police power of the state is administered fairly.

Summary

Table 4.7 summarizes the removal of illegal signs component of the effective control criteria. This sub-category of the framework is well represented across all documents analyzed. The legislation provides for both administrative controls to require the removal of illegal signs as well as the ability of the state to utilize civil penalties to increase the likelihood of compliance. The language empowers the legislation to be effective, although the penalties may not be significant for large corporations. Additionally, the regulations provide for due process for the owner of the illegal sign and the ability to permit the sign should it comport with the rules.

Table 4.7 Criterion for Removal of Illegal Signs

	Category	Question	Document Analyzed*			
2	Effective Control		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
2.4	Removal of Illegal Signs	Do these statutes and administrative rules provide for the removal of illegal signs?	1	1	1	1

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

¹⁸ ...If the owner does not remove the sign within 45 days of the date of the notice, the department may direct the attorney general to apply for an injunction to:(1) prohibit the owner from maintaining the sign; and (2) require the removal of the sign. (c) The state is entitled to recover from the owner of a commercial sign removed under an action brought under Subsection (b) all administrative and legal costs and expenses incurred to remove the sign, including court costs and reasonable attorney's fees (Texas Transportation Code § 391.033).

Category 3: Societal Implications

3.1 Protection of Speech

As discussed previously, it is essential that regulatory legislation be drafted in such a manner that it avoids violating the constitutional principle of free speech. In this instance, the criteria utilized to perform the document analysis are five guidelines established by Sekulow and Zimmerman in their 2015 article in Emory Law Journal entitled, “Uncertainty is the Only Certainty: A Five-Category Test to Clarify the Unsure Boundaries Between Content-Based and Content-Neutral Restrictions on Speech.” It is evident from the analysis that Chapter 391 and associated rules, 43 TAC 21: I, align well with these criteria whereas Chapter 394 and 43 TAC 21: K do not.

Criterion: Do these statutes and administrative rules avoid violating free speech protections?

Document Analysis

The avoidance of regulations that might infringe upon the protected rights to free speech enables regulations to remain effective in achieving their stated purpose. In this instance, the document analysis finds that Chapter 391 and 43 TAC 21: I do not violate free speech protections. The legislation is crafted in a manner that avoids this by clearly defining a commercial sign as a sign that itself is a source of revenue either through lease payment for advertising on the sign or for the land where the sign is located. This definition makes no mention of speech and does not require regulators to look at the content of the sign in order to determine how it should be regulated. On the other hand, Chapter 394 and 43 TAC 21: K do

violate freedom of speech in that they control signs based on content. The message contained on a sign is the determining factor as to if the sign is on-or off-premise. Regulating in this manner requires that one must read the sign and then regulate according to the message contained thereon. An example of this is found in 42 TAC § 21.442(c)(1)(A),

“(c) An on-premise sign is a sign that: (1) is located on the real property of a business and consists only of: (A) the name, logo, trademark, telephone number, and internet address of that business.”

Here the sign is clearly defined by the message displayed on the sign which then differentiates how it is treated under the law. This is a clear violation of the freedom of speech.

Criterion: Do these statutes and administrative rules make differentiations between speakers?

Document Analysis

Differentiating between speakers has also proven problematic when it comes to the drafting of legislation. *Police Department of the City of Chicago v. Moseley* in 1972 exemplified this concept.¹⁹ This case set the precedent that speech is not to be curtailed simply because of who is talking. The document analysis similarly finds that Chapter 391 largely avoids making any differentiations between speaker except for in one notable instance where an exception is provided to what would appear to be chambers of commerce or similar type organizations.

¹⁹ The opinion of the court stated, “The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter” (*Police Department of the City of Chicago v. Moseley*, 1972). This case was based on a regulation that allowed for peaceful labor protests near schools but prohibited other types of peaceful protest near schools and as such discriminated based on the content (subject matter) of the speech (Mason, 2015, 959). Though not related to sign regulation this case established the expectation of content neutrality for regulations that control, even incidentally, the free speech of a person. Essentially, the court's ruling dictated that this regulation must either equally ban all types of peaceful protests near schools or allow them all. To distinguish between them would put the city in the position of promoting one person's speech over another.

391.070

“(a) The combined license and permit fees under this subchapter may not exceed \$10 for a commercial sign erected and maintained by a nonprofit organization in a municipality or a municipality's extraterritorial jurisdiction if the sign relates to or promotes only the municipality or a political subdivision whose jurisdiction is wholly or partly concurrent with the municipality.

(b) The nonprofit organization is not required to file a bond as provided by Section 391.062(a)(3).”

Based on the speaker, the regulation exempts these “nonprofit organizations in a municipality,” from having to obtain a license or pay the full fee for a permit. Curiously, this same language is absent from the associated rules, 43 TAC 21: I. When examining Chapter 394 and its associated rules, differentiation between speakers is prevalent. The same language demonstrated above is found in Chapter 394. Additionally, the law differentiates between speaker again in its treatment of small business signs. The associated rules, 43 TAC 21: K, do largely mimic the language of the statute and contain the same pitfalls.

Criterion: Do these statutes and administrative rules avoid preventing the display of certain messages?

Document Analysis

The direct regulation of speech by controlling the actual content of a message may also violate free speech. The document analysis here finds that the only document of the four that appears to be free of this is 43 TAC 21: I. The regulation of content only appears to be present in Chapter 391 in the previously mentioned exception for chambers of commerce in that it dictates

that the content of the sign, “relates to or promotes only the municipality or a political subdivision whose jurisdiction is wholly or partly concurrent with the municipality.” Again, this same language is present in Chapter 394 and 43 TAC 21: K. These both also contain additional content controls in their treatment of signs exempted from the regulations. An example of this is the exemption of signs for ranchers in 43 TAC § 21.405. To meet the exemption a sign can only contain, “...the name of a ranch on which livestock are raised or a farm on which crops are grown and the directions to, telephone number, or internet address of the ranch or farm...”

Criterion: Do these statutes or administrative rules avoid discrimination according to viewpoint?

Document Analysis

Discrimination according to viewpoint would take the form of disallowing anti-abortion messages but allowing for pro-abortion messaging, or a sign for a certain political candidate being allowed but not that of her opponent. The document analysis finds no evidence of this in any of the four documents analyzed.

Criterion: Does the government state a legitimate purpose for this regulation?

Document Analysis

The purpose statement of the legislation is important when the law is called into question. As previously discussed, the application of strict scrutiny utilizes the purpose of the legislation to determine in part if the regulations are narrowly tailored to the stated purpose. Legitimate entails that the purpose cites recognized powers and purposes for regulation. In other words, the purpose should align the regulation to the police powers of the state. The document analysis mirrors that of the earlier analysis regarding a strong regulatory purpose. 43 TAC 21: K does not appear to

have legitimate purpose because the authorizing legislation, Chapter 394, contains no regulatory purpose at all. The purpose in Chapter 391 is legitimate and seemingly well drafted. It ties the regulation to federal legislation and asserts the police powers of the state in carrying out the mandates contained within the law. 43 TAC 21: I strips the purpose down to a statement not found in the authorizing statute. This devalues the legitimacy of the purpose within the administrative rules.

Summary

Table 4.8 summarizes the free speech component of the societal implications criteria. Within this sub-category of the framework, the documents vary substantially. The statute regarding rural roads, Chapter 394, lacks a purpose statement altogether while the purpose statement of 391 is well composed. 43 TAC 21: I is the only document of the four that does not regulate the permissible content of a sign, while all four documents were found to refrain from discrimination based on the viewpoint expressed on the sign. Additionally, there is quite a bit of variation in the documents when examined for violations of free speech or differentiating treatment according to the speaker.

Table 4.8 Criteria for Protection of Speech

	Category	Question	Document Analyzed*			
3	Societal Implications		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
3.1	Protection of Free Speech	Do these statutes and administrative rules avoid violating free speech protections?	1	5	1	5
		Do these statutes and administrative rules avoid making differentiations between speakers?	2	5	1	5
		Do these statutes and administrative rules avoid preventing the display of certain messages?	1	5	1	5
		Do these statutes or administrative rules avoid discrimination according to viewpoint?	1	1	1	1
		Does the government state a legitimate purpose for this regulation?	1	5	3	5

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

3.2 Protection of Aesthetics

The concept of protection of aesthetics is an established police power according to case law.²⁰ It is understood that society has a vested interest in the aesthetics of the built and natural environment. The passage of the Highway Beautification Act of 1965 was predicated on this notion.²¹ Analyzing these documents for the presence of language which would serve to protect aesthetics can determine if the legislation adequately addresses this societal concern. The results of the document analysis utilizing the criteria for the protection of aesthetics is summarized in the Table 4.9 below. The analysis shows that Chapter 391 is the only one of the four documents to adequately address aesthetics to protect the visual environment.

²⁰ *Metromedia v. San Diego* 1981

²¹ 23 US Code § 131(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

Criterion: Are these statutes and administrative rules written such that they protect aesthetics?

Document Analysis

Concerning billboards, aesthetics involve such things as size and construction as well as the height and location, similar concerns as buildings in particular zoning districts. The document analysis in this section includes regulations that control such factors as a demonstration of aesthetic protection. Chapter 391 does not control for the dimensions directly as was previously discussed regarding effective control. Nor does it address spacing of signs. It does control for location, dictating that signs are to be permitted only in commercial or industrial areas. Chapter 391 also controls for the height of signs, an aesthetic concern not contained in the federal guidelines. The associated rules, 43 TAC 21: I, also contain these same controls and have additional controls to prevent signs from being located within proximity to public spaces such as parks. Chapter 394 and 43 TAC 21: K contain similar language and aesthetic controls that serve to control the visually intrusive nature of billboards.

Criterion: Is the protection of aesthetics stated in the purpose of these statutes and administrative rules?

Document Analysis

As discussed earlier in this research, the purpose statement of legislation is critically important. It outlines the premise for the regulation and sets the guidelines for what the legislation is to control. It is this understanding of the importance of the purpose that underlines the importance of this criteria. In analyzing all the documents, it was determined that of the four, only Chapter 391 achieves this. Chapter 391 states that in the purpose that it was conditioned on

the Highway Beautification Act of 1965.²² This aligns the purpose to the aesthetic protection called for in the federal legislation. Additionally, the purpose contains language providing for further aesthetic protections. Chapter 394 lacks a purpose statement. Therefore, it does not match this criterion. The purpose statements of both 43 TAC 21: I and 43 TAC 21: K say nothing in terms of aesthetics.

Summary

Table 4.9 summarizes the aesthetics component of the societal implications criteria. Aesthetics is a primary concern of the Highway Beautification Act of 1965. The documents analyzed were found to have controls that would regulate the aesthetics of billboards and prevent them from being constructed in unwanted areas. However, the purpose statements of three of the documents analyzed to not stipulate this important police power as a method to legitimize this aesthetic regulation.

Table 4.9 Criteria for Protection of Aesthetics

3	Category	Question	Document Analyzed*			
	Societal Implications		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
3.2	Protection of Aesthetics	Are these statutes and administrative rules written such that they protect aesthetics?	1	5	1	1
		Is the Protection of aesthetics stated in the purpose of these statutes and administrative rules?	1	5	5	5

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

²² Tex. Transportation Code Chapter 391 Sec. 391.002(a), "Subject to the availability of state and federal funds, it is the intent of the legislature to comply with the Highway Beautification Act of 1965 (23 U.S.C. Sections 131, 136, 319) to the extent that it is implemented by the United States Congress. This chapter is conditioned on that law."

3.3 Protection of Safety

Another consideration of billboard regulation should be the safety impact on the motoring public. The federal government acknowledged this with its inclusion of safety in the purpose statement of the Highway Beautification Act of 1965. Like the preceding analysis on aesthetics, this analysis first examines the rules for controls on safety and then looks to the purpose statement of each of the documents to determine if safety is adequately addressed. The results of the document analysis are summarized in Table 4.10 below. Overall, the statutes and rules analyzed do not align well to the framework.

Criterion: Are these statutes and administrative rules written such that they protect public safety?

Document Analysis

Safety along the roadways is paramount. There are many distractions for today's drivers that take their eyes from the road. Billboards present a possible safety problem and for this reason, legislation must include provisions for the protection of public safety. Chapter 391 was found to mention the word safety only within the purpose statement. No specific safety provisions were found within the statute. The associated rules do however contain language which would prevent the construction of signs in locations that obscure a driver's view of traffic. Additionally, requirements for wind load pressures are established to ensure that signage is not toppled during high winds. Furthermore, regulations regarding the placement of signs in proximity to intersections and to exit and entrance ramps help to establish controls. However, one noticeable exemption to several of these safety guidelines is within the limits of a municipality. For this reason, some of the safety guidelines, while present lack true value as they are only enforceable outside of a municipality. Chapter 394 makes no mention of safety throughout the entirety of the statute. The associated administrative rules, 43 TAC 21: K have

much the same safety controls as 43 TAC 21: I. However, because they control signs along rural roads, they lack minimum required distances to entry and exit ramps.

Criterion: Is the Protection of public safety stated in the purpose of these statutes and administrative rules?

Document Analysis

Much the same as aesthetics, safety is regarded as a police power of government. To that end, legislation that seeks to regulate an industry with potential safety issues should include safety as a component within the regulatory purpose. Of the four documents, the only document to mention safety within the regulatory purpose is Chapter 391. The other three either make no mention of safety in the purpose statement or like Chapter 394, lack a purpose statement altogether.

Summary

Table 4.10 summarizes the public safety component of the societal implications criteria. Safety is a primary concern for governments at all levels of society. The documents analyzed were found to have controls for safety however, they are limited in scope and allow for seemingly opposite treatment of signs depending on their location inside or outside of municipal boundaries. The purpose statements are generally weak regarding safety. As seen, only one of the four documents mentions safety in the purpose of the legislation while the other four are completely silent.

Table 4.10 Criteria for Protection of Public Safety

	Category	Question	Document Analyzed*			
3	Societal Implications		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
3.3	Protects Public Safety	Are these statutes and administrative rules written such that they protect public safety?	4	5	2	2
		Is the Protection of public safety stated in the purpose of these statutes and administrative rules?	1	5	5	5

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

Category 4: Program Administration

4.1 Agency Design

The term agency design here reflects the mandate given the agency and the jurisdiction over which the agency must exercise its authority. Both components of agency design are essential for success. If the mandate is not clearly defined, then it may present difficulties in administering the law. If the jurisdiction is not clearly defined, the agency may over step its boundaries or ignore aspects of the legislation thought to be regulated under the law. The document analysis for this sub-category is summarized in Table 4.10 below. The statutes and rules examined align well with the framework.

Criterion: Do these statutes and administrative rules contain a clear mandate?

Document Analysis

In analyzing these documents for evidence of a clear mandate, it is necessary to look at not only the stated purpose of the law, but the supporting structures contained within the law that allow for the law to remain enforce throughout changing political climates.²³ The document

²³ Designing an agency so that it can continue its mandate into the future requires intentional delineation of procedures ensuring that the goals of the legislation are realized (Macey 1992, 95). Often the mandates of agencies consist of the protection of societal norms or expectations and the resulting regulation of an affected

analysis here shows that Chapter 391 does have a clear mandate. The purpose statement of the law is clearly defined and intentionally is conditioned on the federal statute that it is supportive of. The law seeks to protect societal norms of safety and to protect the public investment in roads. And there are clear administrative structures in place to support this such as the authority to remove illegal signs and the authority to regulate signs. The rules associated to Chapter 391, 43 TAC 21: I do not fair as strongly in this sub-category largely due to the drafting of the purpose statement. The purpose statement here reads,

43 TAC § 21.141 Purpose

“This subchapter is established to regulate the orderly and effective display of commercial signs along a regulated highway within the State of Texas.”

This purpose statement does not align with the statute. It is unclear the origins of this purpose statement however it would seem to weaken the mandate of the rules since they are not tied back to the purpose of the enacting legislation. It is as if the rules were established for a different purpose altogether. As has been repeatedly stated, chapter 394 lacks a purpose statement. This seriously undercuts the power of the mandate as the legislation was seemingly enacted without purpose or intent. The legislation does outline the authority of the state to regulate signs along rural roads and like Chapter 391, provides for enforcement mechanisms. 43 TAC 21: K utilizes the same purpose statement as 43 TAC 21: I and thus has the same issues.

industry or citizens to ensure that the desired legislative outcomes are achieved (Christensen 2007, 503). Agency Design must enable the necessary “structures and practices” which would allow for the agency to realize its stated purpose (Christensen 2008, 275).

Criterion: Do these statutes and administrative rules clearly outline the agency's jurisdiction?

Document Analysis

Jurisdiction is equally important to mandate as it defines the who, what, when and where of the legislation. This serves to clearly limit the authority of the legislation to a specific industry or population, again aligned to the stated purpose of the legislation. The document analysis finds that the jurisdiction is adequately outlined across all the documents analyzed. Chapter 391 and 43 TAC 21: I clearly define the jurisdiction as being an area 660 feet wide that runs parallel to all interstate and primary roads within the state. In other words, all billboards within 660 feet of interstate and primary roads, inside or outside municipal boundaries, are to be regulated according to Chapter 391 and 43 TAC 21: I. Likewise, Chapter 394 and 43 TAC 21: K contain similar language only the regulations here control an area of 660 feet along rural roads outside of municipal boundaries. The language here clearly defines the jurisdiction of the agency.

Summary

Table 4.11 summarizes the results of the agency design component of program administration criteria. The document analysis finds that three of the four documents analyzed do not align with the framework regarding a clear mandate. Either the purpose is not present or is not aligned to the enacting legislation in any way. However, all the documents analyzed did clearly delineate the agencies jurisdiction. The language here is unambiguous and clearly separates the jurisdiction between rural roads and interstate primary roads.

Table 4.11 Criteria for Agency Design

	Category	Question	Document Analyzed*			
4	Program Administration		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
4.1	Agency Design	Do these statutes and administrative rules contain a clear mandate?	1	5	4	4
		Do these statutes and administrative rules clearly outline the agency's jurisdiction?	1	1	1	1

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

4.2 Administrative Structures

Good legislation will outline administrative functions and ensure that essential functions such as due process are clearly outlined. Administrative structures, if well-established, help to ensure that the agency is well equipped to carry out its stated mandate. The document analysis for this sub-category is summarized in Table 4.12. The analysis shows that although the statutes do have some administrative functions outlined, they leave most of the heavy lifting to administrative rules.

Criterion: Do these statutes and rules contain guidelines for administration?

Document Analysis

In terms of administrative guidelines, this document analysis examined language that outlines the requirements of specific administrative functions. The documents vary in the level and exactness in which they establish administrative guidelines. Chapter 391 utilizes very specific language as to administrative processes for complaints stating in § 391.066, “(b) The department shall develop and provide a simple form for filing complaints with the department. (c) The department shall provide to each person who files a written complaint with the department, and to each person who is the subject of a complaint, information about the department's policies and procedures relating to complaint investigation and resolution.” While

this is not the entirety of the language, it is useful to demonstrate the level of specificity utilized concerning complaints. The statute also contains language dictating the minimum process for violation notices and the required time to be provided for compliance. Moreover, the statute has some stipulations regarding due process and the rules of evidence to be utilized when assessed penalties are appealed in administrative court. The associated rules, 43 TAC 21: I, go into much deeper detail as to the administrative processes, remaining consistent with the language in the statute. There are further provisions for due process within the administrative rules such as the ability of an applicant to appeal the department's decision on a denied permit application. Chapter 394 contains identical language regarding the handling of complaints and includes language enabling the commission to enact rules regarding a process for the appeal of denied permits, an authorization strangely absent from Chapter 391. One administrative structure present in Chapter 394 that is not present in chapter 391 is that of a variance. The variance allows for the commission to bypass the rules but does not specify the conditions under which this may occur. As with 43 TAC 21: I, 43 TAC 21: K, largely shadows the statute with regard to administrative guidelines, only with more detail and specificity.

Criterion: Is the agency jurisdiction broad in scope?

Document Analysis

The document analysis for this section is straightforward. In reading the statutes and rules, it is evident that the agency's scope is limited to the regulation of a single industry, the commercial sign industry. These statutes do include legislation for other signs programs managed by the state, however they are not regulatory in nature and therefore do not fall under the jurisdiction of the agency. The only other industry that is somewhat regulated by this

legislation is that of junkyards, however the legislation grants little to no authority in this regard, only concerning itself with screening of junkyards in the case they fall within the regulated areas.

Summary

Table 4.12 summarizes the results for the structure component of the program administration criteria. The analysis of the documents for this sub-category results in a strange dichotomy. The statutes and rules align well with the first criterion, containing substantial provisions for administrative structures and procedures. However, none of the documents examined demonstrate that the agency has a broad jurisdiction. To the contrary, the regulations apply to a single industry, the commercial signs industry.

Table 4.12 Criteria for Administrative Structures

	Category	Question	Document Analyzed*			
4	Program Administration		391TTC	394TTC	43 TAC 21:I	43 TAC 21:K
4.2	Administrative Structure	Do these statutes and rules contain guidelines for administration?	1	1	1	1
		Is the agency jurisdiction broad in scope?	5	5	5	5

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

4.3 Program Evaluation

Program evaluation is a useful tool that can be utilized within legislation to determine the effectiveness of the legislation after enactment. Metrics and standards of performance and review can be established such that administrators can be held accountable for program compliance. The document analysis in this sub-category finds that overall the legislation does not address any methods for measuring the agency performance. The analysis is summarized in Table 4.12.

Criterion: Do these statutes and administrative rules contain evaluation requirements?

Document Analysis

This portion of the document analysis looked for language that outlined, even in minimal ways, guidelines for evaluating the performance of the legislation in achieving its stated purpose. The document analysis regarding evaluation requirements finds that none of the four documents contains language to outline program evaluation requirements.

Criterion: Do these statutes and administrative rules specify output indicators?

Document Analysis

Output indicators are metrics that can show what has been accomplished or ongoing accomplishments of the agency charged with enforcing the legislation. Chapter 391 and Chapter 394 both are void of any output indicators. No standard is established in the statutes for organizational performance. Similarly, no metrics are specified within the corresponding administrative rules. However, standards are established as to when the department must notify a permit holder that their license or permits are eligible for renewal. Additional standards exists for the time it takes the department to render a decision on a permit application or to handle complaints. While not specifically outlined as a performance metric, these standards can be tracked within the agency to ensure compliance with regulations. This action establishes an output indicator without specific language. Beyond these examples, no evidence was found related to output indicators within the administrative rules.

Criterion: Do these statutes and administrative rules contain language regarding public involvement?

Document analysis

Public involvement is valuable to the administrative success of any legislation. Afterall, it is the public who is served in through the administration of the legislation. Well drafted legislation encourages public participation by outlining the terms and guidelines for public involvement. The document analysis finds that the only obvious language to outline the terms of public involvement in both the statutes and the rules is that of complaints. Complaints can be submitted by any member of the public regarding commercial signs. The process and required actions of the Agency are detailed and prescribe a responsive process for addressing complaints from the public. Aside from complaint handling, there is no additional language in the documents that addresses public involvement.

Summary

Table 4.13 summarizes the results of the evaluation component of the program administration criteria. The analysis here demonstrates that in some ways the documents partially align with the framework. When considering evaluation requirements, the legislation is found to be completely void of this quality. The documents were found to have minimal language that could be utilized to report output however, no output measures were specified directly by the statutes or the administrative rules. Lastly, one section found throughout, that of complaints, does outline quite the process for complaints handling by the department.

Table 4.13 Criteria for Program Evaluation

	Category	Question	Document Analyzed			
4	Program Administration					
4.3	Program Evaluation	Do these statutes and administrative rules contain evaluation requirements?	5	5	5	5
		Do these statutes and administrative rules specify output indicators?	5	5	3	3
		Do these statutes and administrative rules contain language regarding public involvement?	3	3	3	3

* 1 = Strong Alignment; 2= Mostly Aligned; 3=Moderately Aligned; 4= Weakly Aligned; 5= Not Aligned

Conclusion

The document analysis, while lengthy demonstrates that in large part that Chapter 391 and its corresponding administrative rules, 43 TAC 21: I, are closely aligned with the framework. These two documents are most closely aligned to the framework in terms Category 1 and Category 2, Constitutionality and Defensibility and Effective Control respectively. The alignment of Chapter 391 and 43 TAC 21: I to the framework varies among the other categories. Chapter 394 and 43 TAC 21: K diverge in significant ways from the framework at almost every level of each of the categories. The most significant deficiency noted in the legislation is a lack of a purpose statement. Many of the categories and sub-categories are dependent on the establishment of a sound regulatory purpose. The lack of this in the legislation significantly diminishes the alignment of these two documents with the framework.

The next chapter provides a conclusion and discusses the validity of the framework based on the results and offers suggestions for future research.

Chapter 5 Conclusion

Chapter Purpose

The final chapter of this research begins with a discussion on the implications of the findings of the document analysis performed in the preceding chapter. Based on the derived conclusions, recommendations are provided to improve the quality of commercial sign regulatory legislation. Second, the validity of the framework is discussed to highlight strengths and weaknesses and provide recommendations for refinement. Lastly, suggestions for future research are given to close out the chapter.

Overview of Results

This study utilized methods outlined in *A Playbook for Research Methods* to develop a framework based on the “Practical Ideal Type Model” (Shields, P. M., & Rangarajan, N., 2013). The literature review informed the development of the four categories that comprise the framework. The categories of the framework help to evaluate existing or planned legislation for potential problems allowing administrators to craft better legislation that in turn will better serve the public.

The results of the analysis in the preceding chapter bring to light many opportunities for improvement in commercial sign legislation. Additionally, the analysis highlights some language that appears to be ideal for use within the context of commercial signs legislation. While not exacting in nature, the results provide valuable insight into how commercial sign legislation can be improved overall. What follows is a discussion of the results as they pertain to each category of the framework.

Category 1– Constitutionality and Defensibility

The Constitutionality and Defensibility of commercial sign legislation is paramount to its success. The document analysis evaluated two pieces of sign legislation and in the process brings to light a useful comparison of legislation that appears to be largely constitutional contrasted against another that appears to fall far short of this important requirement.

Chapter 391 demonstrates many of the qualities in the framework required for legislation to remain constitutional and defensible when challenged. It is largely content neutral and in comparison, to Chapter 394, has a well formulated regulatory purpose. Additionally, the legislation is largely devoid of any exclusions or exemptions that have historically proven to be problematic. 43 TAC 21: I, the rules promulgated from Chapter 391 reflect this same character.

Conversely, Chapter 394 aligns poorly with the framework. This indicates the likelihood that if challenged, the legislation may likely be found unconstitutional. The most striking shortcoming of Chapter 394 is that it lacks a purpose statement. The legislative purpose is central not only to the concept of constitutionality but also plays a significant role in supporting the agency mandate. The content-based regulation called for in Chapter 394 and 43 TAC 21: K runs counter to established legal principles regarding the regulation of commercial signs.

The comparison of these two pieces of legislation highlights that commercial sign code that is drafted in a manner like that of Chapter 394 is potentially problematic. First, legislation should be drafted such that it avoids the poor language utilized in Chapter 394. The language utilized in Chapter 391 may quite possibly be model language for regulating signs based on if the sign structure itself generates revenue. This removes the need to evaluate content to surmise how the sign is being utilized. Second, sign legislation must have a strong purpose statement. While

Chapter 391 was found to have a relatively strong purpose statement, all the other documents did not. This highlights that legislation and the rules should be in alignment regarding purpose in order to strengthen the mandate of the legislation. Lastly, Chapter 391 effectively restricts the legislation to focus purely on commercial signs through the definition of a commercial sign, leaving other sign types unregulated. This allows the legislation to avoid the use of exclusions and exemptions. This methodology should be considered for chapter 394 and 43 TAC 21: K as it avoids differential treatment of signs based upon content or speaker.

The language found in Chapter 391 and 43 TAC 21: I as well as the recommendations can enhance revised or new sign legislation in terms of its constitutionality and defensibility.

Table 5.1 summarizes the findings and recommendations for category one of the framework.

Table 5.1 Summary of Findings and Recommendations for Constitutionality & Defensibility

Constitutionality and Defensibility					
Sub-Category	Findings				Recommendations
Document	Ch. 391	Ch. 394	43 TAC 21: I	43 TAC 21: K	
Content Neutral	Strong Alignment	Not Aligned	Strong Alignment	Not Aligned	Chapter 394 and 43 TAC 21: K Should be revised to remove content-based regulations
Strong Regulatory Purpose	Strong Alignment	Not Aligned	Weak Alignment	Not Aligned	Chapter 394 should be revised to include a strong regulatory purpose The regulatory purpose of 43 TAC 21: K should align to Chapter 394 The regulatory purpose of 43 TAC 21: I should be revised to better align with Chapter 391
Avoidance of Exclusions or Exemptions	Strong Alignment	Not Aligned	Mostly Aligned	Not Aligned	Chapter 394 and 43 TAC 21: K should be revised to avoid the use of exclusions or Exemptions 43 TAC 21: I may benefit from revision to remove exclusions or exemptions

Category 2 – Establishment of Effective Control

Effective Control is the second most consequential category of the framework. If a state does not maintain effective control of outdoor advertising, they stand to lose up to ten percent of federal transportation dollars²⁴. While Chapter 394 is not conditioned on the Highway Beautification Act of 1965, its mandate is similar on a state level and the construction of the statute and rules mimics that of Chapter 391. For this reason, the analysis of 394 helps to demonstrate the strengths and weaknesses of Texas' commercial sign legislation.

To demonstrate provisions for the maintenance of effective control the framework indicates that sign legislation should control for the following factors:

1. Permitting only in Commercial or Industrial Areas
2. Removal of Non-Conforming Signs and the Acquisition and Removal of Signs
3. Controlling for Size, Lighting and Spacing
4. Removal of Illegal Signs

First, Chapter 391 is aligned strongly to the framework regarding permitting only in commercial and industrial areas and likely maintains effective control. The language in 394 is such that it is more lenient. As mentioned, this law is not required to comport with federal guidelines in this respect. However, this relaxed language may allow for permitting in areas that are not truly commercial or industrial in nature. This presents an issue if the roadway classification were to change over time, as it would result in the existence of a non-conforming structure when it moves under the regulations of Chapter 391. Treatment of non-conforming

²⁴ The act constituted an unfunded mandate and carried the penalty of 10 percent reduction in the amount of the federal dollars contributed to a state's transportation budget if a state failed to effectively control outdoor advertising in the prescribed areas (Floyd, 1979, 77-82).

signs under the law is relaxed as well and for this reason it is recommended that the requirements to constitute a commercial or industrial area under chapter 394 be made more stringent to avoid the existence of non-conforming signs in the future. Secondly, Chapter 391 does not reference non-conforming signs but does mention acquisition. Conversely, 43 TAC 21: I does contain minimal language regarding the treatment of non-conforming signs but does not discuss acquisition. To correct this mis-alignment, it is recommended that chapter 391 and 43 TAC 21: I be revised to address the treatment of non-conforming signs and acquisition to more clearly define their treatment under the statute and rules. The same recommendation is made to revise Chapter 394 and 43 TAC 21: K to bring them into alignment regarding the treatment of non-conforming signs and acquisitions. While it is understood that statutes often leave details to the rulemaking process, there are stark differences here that make for confusing legislation. No recommendation is made regarding controls for size lighting and spacing. These controls are mostly not present in the statutes but are present in the administrative rules. The removal of illegal signs is the only element of the framework consistently present across all the documents.

While the legislation examined here likely achieves the required effective control, the recommendations can enhance the legislation in terms of alignment between the statutes and rules, resulting in a more coherent and cohesive legislative framework. Table 5.2 summarizes the findings and recommendations for category two of the framework.

Table 5.2 Summary of Findings and Recommendations for Effective Control

Effective Control					
Sub-Category	Findings				Recommendations
Document	Ch. 391	Ch. 394	43 TAC 21: I	43 TAC 21: K	
Permitting of Signs in Commercial or Industrial Areas	Strong Alignment	Moderately Aligned	Strong Alignment	Moderately Aligned	Chapter 394 should be made more stringent regarding requirements to constitute a commercial or industrial area to avoid the future existence of non-conforming signs
Removal of Non-Conforming Signs and the Acquisition and Removal of Signs	Moderately Aligned	Weak Alignment	Weak Alignment	Mostly Aligned	Chapter 391 and 43 TAC 21: I should be revised regarding the treatment of non-conforming signs and acquisition to more clearly define their treatment under the statute and rules. Chapter 394 and 43 TAC 21: K should be revised regarding the treatment of non-conforming signs and acquisition to more clearly define their treatment under the statute and rules.
Controls for size, lighting and spacing	Not Aligned	Moderately Aligned	Strong Alignment	Strong Alignment	No recommendation is made
Removal of Illegal Signs	Strong Alignment	Strong Alignment	Strong Alignment	Strong Alignment	No recommendation is made

Category 3 – Societal Implications

This category of the framework examines more of what legislation should be rather than what it must. However, certain aspects of this category align with category I of the framework in that they are related to constitutional principles.

To begin, when analyzed for protections of free speech, it was determined that Chapter 391 and 43 TAC 21: I are strongly in alignment with the framework and no recommendation is made for their revision in this regard. Chapter 394 and 43 TAC 21: K, however, are not aligned with the framework and are likely unconstitutional in this respect. It is recommended that

Chapter 394 and 43 TAC 21: K be revised to address this problematic issue. Continuing, Chapter 391 addresses the protection of aesthetics in the purpose and the rules in 43 TAC 21: I are aligned to the statute in this respect. However, this important issue is omitted from the purpose within the rules. It is therefore recommended that the purpose of 43 TAC 21: I be revised to more adequately address the protection of aesthetics. Chapter 394 makes no mention of aesthetics within the statute however, 43 TAC 21: K mimics the language found in 43 TAC 21: I and likely achieves a degree of aesthetic control. Here it is recommended that the purpose of both the Chapter 394 and 43 TAC 21: K be revised to include language concerning the protection of aesthetics. Last but not least, is the protection of safety. This category is poorly represented in the documents analyzed. While Chapter 391 does mention safety in the purpose of the legislation, no additional measures are present. No mention of safety is made within the purpose of Chapter 394, 43 TAC 21: I, 43 TAC 21: K. It is recommended that reference to this important police power be made in the purpose statement to support the rules where safety is concerned. While the purposes are weakly drafted, the rules are generally written in a manner that does appear to protect the safety of the public. It is recommended that the rules be reviewed in this respect to possibly increase the element of safety where necessary.

The legislations alignment to the framework is mixed regarding the category of Societal Implications. The recommendations put forth would serve to strengthen the legislation, making it more effective and more conscientious of the impacts on society that this industry may create. Table 5.3 summarizes the findings and recommendations for category three of the framework.

Table 5.3 Summary of Findings and Recommendations for Societal Implications

Societal Implications					
Sub-Category	Findings				Recommendations
Document	Ch. 391	Ch. 394	43 TAC 21: I	43 TAC 21: K	
Protection of Free Speech	Strong Alignment	Not Aligned	Strong Alignment	Not Aligned	Chapter 394 and 43 TAC 21: K are likely unconstitutional and should be revised to address this problematic issue
Protection of Aesthetics	Strongly Aligned	Not Aligned	Strongly Aligned	Strongly Aligned	<p>The purpose of 43 TAC 21: I should be revised to more adequately address the protection of aesthetics</p> <p>The purpose of Chapter 394 and 43 TAC 21: K should be revised to include language concerning the protection of aesthetics</p>
Protection of Safety	Mostly Aligned	Not Aligned	Moderately Aligned	Moderately Aligned	<p>Chapter 394, 43 TAC 21: I, 43 TAC 21: K. I should be revised to include safety in the purpose statement</p> <p>43 TAC 21: I and 43 TAC 21: K should be reviewed to possibly increase the element of safety where necessary</p>

Category 4 – Program Administration

Agency design is the last category of the framework. The inclusion of this category in the framework is based on the findings of the literature review conducted in chapter two. The findings there clearly demonstrate that it is important to include elements of agency design within the legislation and rules that serve to increase the agency's responsiveness and accountability to the public. To that end, the documents were analyzed to determine their alignment to the framework.

First the documents were analyzed regarding agency design. Chapter 391 was determined to have a clearly defined mandate and jurisdiction. 43 TAC 21: I does not have the same clear mandate due to a poorly drafted purpose statement. It is recommended that the purpose statement be revised to align the rules more closely to the statute in this regard. Chapter 394 and associated rules, 43 TAC 21: K, do not have a clear mandate due to the lack of a purpose statement in the statute and a poorly drafted purpose statement in the rules. It is recommended that the statute and rules be revised to ensure that the legislation has a clear mandate. Despite these shortcomings, all documents analyzed clearly define the agency's jurisdiction. Second, concerning administrative structure, the documents were on the far end of the spectrum in terms of their alignment with the framework. All documents were found to have enough administrative guidelines however, the jurisdiction is very narrow in scope and regulates a single industry. Therefore, it is recommended that consideration be given to combining the regulation of signs under a different regulatory agency to minimize industry influence over the agency. This may not be practical as the regulation dictates strong coordination with the department of transportation, however the present arrangement allows for the industry to exert strong influence over the agency. Lastly, the documents were found to exhibit little alignment to the program evaluation category. It is recommended that all of the documents be reviewed and where necessary revised to include elements of program evaluation such as budgeting requirements, and metrics that increase the responsiveness and accountability of the agency.

The legislations alignment to the framework again is mixed regarding the category of Agency Design. The documents were found to be seriously deficient with regards to program evaluation. The recommendations offered will ensure that the legislation more effective and that

the agency is more responsive and accountable to the public. Table 5.4 summarizes the findings and recommendations for category four of the framework.

Table 5.4 Summary of Findings and Recommendations for Program Administration

Program Administration					
Sub-Category	Findings				Recommendations
Document	Ch. 391	Ch. 394	43 TAC 21: I	43 TAC 21: K	
Agency Design	Strong Alignment	Moderately Aligned	Moderately Aligned	Moderately Aligned	43 TAC 21: I should be revised to align the rules more closely Chapter 391 Chapter 394 and 43 TAC 21: K should be revised to ensure that the legislation has a clear mandate
Administrative Structure	Moderately Aligned	Moderately Aligned	Moderately Aligned	Moderately Aligned	Consideration should be given to combining the regulation of signs under a different regulatory agency to minimize industry influence over the agency
Program Evaluation	Not Aligned	Not Aligned	Weakly Aligned	Weakly Aligned	All documents should be reviewed and where possible, revised to include elements of program evaluation such as budgeting requirements, and metrics

Utility and Reliability of the Framework

The framework created for the purposes of this study is functional for analyzing commercial sign legislation enacted to comport with the Highway Beautification Act of 1965. The nature of the framework allows for some subjectivity when evaluating documents for the presence and quality of the established categories. It is therefore acknowledged that a somewhat different result may be reached were a similar study to be performed utilizing the framework. However, the use of the framework in this instance has produced valuable insights that could serve to better commercial sign legislation in the State of Texas.

To improve upon the framework and increase its utility, it may be best to research more broadly the elements of well-drafted sign regulation across the board, without regard to federal requirements to allow the framework to be used not only for state programs, but also at the municipal level. An important observation developed from the use of the framework is the frequent disconnect between a statute and the administrative rules. With this disconnect in mind, it may be useful to perform separate evaluations of the statute and rules. However, several times within the present study, the simultaneous examination helped to highlight significant disparities between the statute and associated administrative rules.

Overall the framework provides a sound method of analysis to determine the strength of sign legislation as it relates to the categories. The methodology utilized here can be replicated to customize the framework to specific needs such as those in other states or different levels of government.

Suggestions for Future Research

The comprehensive nature of the methodology used in this research creates results that are useful and recommendations that are actionable. While this research has likely answered some questions, it has also created a foundation upon which future research can be conducted.

Suggestions for Future Research

- ❖ Utilize the established framework to analyze commercial sign legislation in other states.
- ❖ Compare the results of several analyses to develop and refine the framework based on discovered best practices concerning commercial signs regulation
- ❖ Develop a framework to be utilized by municipalities that does not focus on the law's alignment to federal guidelines

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Figures

Figure 1.1

http://www.austinchronicle.com/binary/7ad4/pols_feature35.jpg

Figure 2.1

<http://www.lbjlibrary.org/assets/uploads/lbj/Press/786-8.jpg>

Figure 2.2

<http://media.zenfs.com/en-US/blogs/compass/lossy-pageCurve in highway with assorted billboards - NARA.jpg>

Figure 2.3

<https://www.roundrocktexas.gov/departments/planning-and-development-services/historic-preservation/historic-round-rock-collection/chronological-history/>