A STRUCTURAL ANALYSIS OF TEXAS LAW AND POLICY PROCESSES RELATING TO COLLEGE AND CAREER READINESS WITH EMPHASIS ON HISPANICS

by

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ABSTRACT

This study is a structural analysis of Texas law and policy processes relating to college and career readiness with emphasis on Hispanics and implications for educators. The study is presented in two separate, but related articles. The first article (chapter two) reports on the structural limitations of crafting Texas statutes that created college and career readiness standards with a focus on the impact to Hispanic students and the implication for Texas educators. Archival data from the Texas Constitution and Texas statues were analyzed using Bolman and Deal's structural framework to identify these limitations. The study reveals part-time legislators and restrictions on legislative sessions yield incremental, mediocre solutions. Recommendations for structural adjustments and increased educator input for state lawmaking are made. The second article (chapter three) reports on the structural limitations of crafting Texas administrative rules that implement college and career readiness standards with a focus on the impact to Hispanic students and the implications for Texas educators and residents. Archival data from the state's education code, the Texas Government Code, the Texas Administrative Code (TAC), the Texas Register, publications of the Texas Education Agency (TEA), the State Board of Education (SBOE), and the Texas Higher Education Board (THECB), as well as relevant case law were analyzed using structural and normative administrative law principles to identify these

limitations. The study reveals that education policy rules, though they impact a vast statewide population, carry no major rule status; that these rules are crafted under strict time constraints; and, that the rules are generally considered substantially compliant when judicially reviewed. Recommendations for structural adjustments and increased educator input for state rulemaking are made.

I. INTRODUCTION

Background

High school diplomas are no longer sufficient for individuals to enter the workforce and earn a livable wage. An individual's access to higher education and persistence to degree completion is essential to gain marketable skills that will ensure their competitiveness when transitioning from school to career. The Education Commission of the States notes, "By 2020, 65 percent of all jobs in the United States will require a postsecondary credential" (Glancy et al. 2014, p. 26). The findings of Achieve and the Society for Human Resource Management's study of cross-industry hiring practices revealed a troublesome trend – low-skill job opportunities are declining. Their findings, published in "The Future of the U.S. Workforce," concluded that the cause of the phenomena is two-fold: 1) companies are posting positions that require a college degree, and 2) companies actively favor candidates with higher education credentials even in instances when a job posting requires a high school degree or equivalent (Achieve, 2012, p. 3-8).

The advantages of a post-secondary degree are numerous. Many researchers have found that workers with a higher education typically perform better and live a fuller life (Davenport, 2013; Medoff and Abraham, 1981; Hartog, 2000). Anthony Carnevale and Stephen Rose from Georgetown University note that "[p]ostsecondary education has historically been one of the safest long-term investments we can make in our economic future" (2011, p. 1). In addition to improving economic outcomes in society in general, the need for an educated populace is an essential component of a healthy democratic system that depends on robust political discourse.

"The primary reason why U.S. schools exist," argues Carl Glickman (1998) "[is to enable] all persons to take their rightful place as valued and valuable citizens of a democracy" (p. 16). Nel Noddings (2007), explicating the philosophy of John Dewey, points out that "school cannot prepare students for democratic life by simply giving them masses of information to be used at some later time. Instead, it prepares students for democratic life by involving them in forms of democratic living" (p. 36). For Glickman (1998), as it was for Dewey, education that allows for free expression and an open, deliberate exchange of ideas is crucial to democratic society.

According to Glickman (1998) "citizens are capable of learning for themselves when provided with a rich, interactive, and information-based environment" (p. 17). This type of "democratic pedagogy," writes Glickman (1998) involves creating "purposeful activities, always building toward increasing student activity, choice, participation, connection and contribution" (p. 17). Studies have shown that there is a significant and positive correlation between student participation in the classroom and increased critical thinking and problem-solving ability (Nunn, 1996, p. 246). In addition, post-secondary participatory classroom structures encourage communication across gender, race, ethnic, and socio-economic lines. These skills and experiences are fundamental to producing residents who can adapt to our ever-changing pluralistic democratic society (Elmborg, 2006; Beachboard & Beachboard, 2010; Nagda, Gurin, and Lopez, 2003, p. 166).

In Texas, however, a majority of its minority residents, of which 39.1% are Hispanic[1], are effectively disadvantaged in society without the skills acquired in higher

[1] The term Hispanic is used interchangeably with Latino for consistency in reporting demographic data provided by the U.S. Census. Hispanic/Latino refers to a person of any race, ethnic origin, gender, or self-identification from a traditionally Spanish speaking household. See https://www.census.gov/quickfacts/TX#qf-headnote-b

education and ill prepared to participate fully in the democratic process. Voting rates among this underrepresented population illustrate the problem. Voter turnout has been directly linked to the level and the quality of education provided to students (Milligan, Moretti, and Oreopoulos, 2004). Studies show the underlying socioeconomic difficulties Hispanics face, particularly in terms of quality primary and secondary education, as well as access to and preparedness for post-secondary education, are the principle causes for this disturbing statistic (THECB, 2000a).

As one of the most basic and fundamental ways residents participate in a democracy, voting provides a critical lens to study the impact of education and education policy more broadly. In the United States voting in presidential elections, for example, remains relatively low compared to other major industrialized democracies like Belgium and Sweden (Desilver, 2018, para. 4). Within the U.S., Hispanics vote at lower rates across the board compared to White and Black residents even though Hispanics make up the second largest ethnic group in the country (Krogstad and Lopez, 2017). During the 2016 presidential race, for example, when comparing percentage of eligible voters to the percentage of voting population, Hispanics had a much lower ratio (2018, para. 4). Statistics show Hispanics are less participatory than other groups which poses the problem of underrepresentation.

In the United States, most entry-level college students are ill-prepared and lack the foundational knowledge necessary to engage successfully in post-secondary education (Greene & Forster, 2003, para. 3). In Texas, this phenomenon is especially disconcerting given the broad socioeconomic disadvantages Hispanics, a large percentage

of the population, face.[2] The National Student Clearinghouse Research Center reported in 2013 that, in Texas, only 56.15% of first-time college students who begin at 4-Year public university graduate within six years (Shapiro et al., 2013), the majority of those were White students. Hispanic students, on the other hand, tend to graduate at a lower rate, more than "15 percentage points below their White classmates" (Warwick et al., 2011, p. 12).

College completion rates are a cause for concern in Texas since high school graduates will increasingly be from groups that have been underrepresented in college. Demographic estimates suggest substantial increases in Hispanic high school graduates in the coming decade (Center for Demographic and Socioeconomic Research and Education [CDSRE], 2002). The Texas Education Agency reports that for the graduating class of 2012, 88% of all Texas high school students received their diploma. Table 1.1 shows the ethnic/racial breakdown of that percentage.

Table 1.1 High School Graduation Rates for the Class of 2012

Class of 2012	TEXAS	UNITED STATES
All Students	88%	80%
White	93%	86%
Hispanic	84%	73%
African-American	84%	69%
Economically Disadvantaged	85%	72%
Students with Disabilities	77%	61%

(Texas Education Agency, 2014)

On average, then, Texas is graduating more high school students than the rest of the nation and, in particular, more students from underrepresented groups.

[2] According to the 2017 US Census, the Texas population is roughly: 39.1% Hispanic, 12.6% Black, 42.6% White. See https://www.census.gov/quickfacts/TX. This in comparison to the national population: 17.1% Hispanic, 13.2% Black, 62.6% White. See http://quickfacts.census.gov/qfd/states/48000.html

Access to post-secondary education for Hispanics, however, is fraught with pitfalls. Many Hispanic youth are economically disadvantaged and less than one-half of this group has a parent who attended college. A recent study conducted by Pew identified several factors that inhibit Hispanics from entering college and account for poor completion rates. These factors include delayed college entry, being unprepared for entry-level courses, part-time attendance, financially independent status, single parent status, having dependents, and poor language skills (Lopez, 2009). Whatever the cause, access to higher education and low degree completion rates for Hispanics in Texas pose a significant public policy dilemma.

College and Career Readiness

As increasing numbers of under-prepared students enter college, the need to address college readiness became apparent. According to David Conley of the Education Policy Improvement Center, college and career readiness (CCR) means that students must be able to "think, know, act and go" (Conley, 2011). Students

> should have developed cognitive strategies (e.g. problem solving, inquisitiveness, precision/accuracy, interpretation, reasoning, research and intellectual openness), content knowledge (e.g. writing and algebraic concepts and key content knowledge from core subjects), academic behaviors (e.g. self-monitoring and studying skills) and contextual skills and awareness (e.g. awareness of college admissions processes and culture, college-level academic expectations, tuition and financial aid) while in high school. (National High School Center, 2012)

One of the first major reports on college readiness and the problem of mismatched high school graduation and college entrance rates was the Understanding University Success project undertaken by the Association of American Universities and Pew Charitable Trusts released in 2003. The study, led by Conley, gathered college faculty to establish a set of standards that identified critical skills and content required for success

in entry-level college courses. Later, the Educational Policy Improvement Center and the Bill and Melinda Gates Foundation sponsored a study in 2007 that relied on a group of faculty to discuss concepts and skills necessary for successful entry into college. This report highlighted the need for student "self-awareness and monitoring, as well as on study skills" (Wiley, Wyatt, and Camara, 2011, p. 5).

On the matter of college and career, Achieve, Inc. initiated the American Diploma Project in 2001 that devised "a series of benchmarks of English and mathematics performance that students should attain in order to be ready for college and workplace success" (p. 6). This project was completed using the work of several commissioned groups comprised of both employers and faculty. First, employers identified what constitutes a good job such as adequate pay to support an average family and opportunities for advancement. Second, competencies evidenced by job holders were mapped back to their high school course work and content experts then "identified the essential knowledge and skills associated with these courses" (p. 6). Last, college faculty collaborated to create a set of standards for comparable entry-level college courses. The State of Texas was a leading participant in this project (Vasinda et al., 2013, p. 81).

At the state and regional level, the Southern Regional Education Board (SREB), established the College Readiness Policy Connections Initiative in which three states, Georgia, Texas, and West Virginia, created a policy framework to address the lack of "college preparedness" among their states' students. This effort identified 24 points of interest that fell into 6 major theme groups: curriculum standards, assessment and accountability, educational support systems, qualified professional staff, community and parental partnerships, and facilities, equipment and instructional materials (Lord, 2002).

Within Texas itself, the Texas Education Agency (TEA) worked on assessments to measure this growing list of standards, particularly in response to the work of the American Diploma Project (Vasinda et al., 2013, p. 81-2). The TEA compared the Texas Assessment of Knowledge and Skills (TAKS), the state's standardized test in use since 2002, to the Scholastic Aptitude Test (SAT) and the American College Testing (ACT). The purpose was to determine if there was sufficient alignment between these standardized assessments to ensure the TAKS was a relatively accurate measurement of potential college success (Wiley et al., 2011, p. 7).

As a result of analysis completed by the TEA and the Texas Higher Education Coordinating Board (THECB), the state selected a CCR framework based around four levels - key content, organizing components, performance expectations, and performance indicators - in the major disciplines of english/language arts, mathematics, social studies and cross-disciplinary studies (Vasinda et al., 2013, p. 81-2). This framework was formally adopted into law as expressed in House Bill 1 (HB 1).

Since the initial HB 1 CCR framework, the state has altered how standards are deployed as well as the methods by which the state measures success. While initial indicators included TAKS, "AP/IB exam results, SAT/ACT results," among others, the state added college and career readiness indicators to the Texas Academic Performance Report (TAPR) in 2015 (Martinez et al., 2016, p. 8). The TAPR is a comprehensive review compiled by the TEA for each academic year. It shows performance data on students in elementary, middle and high school, and breaks down data by demographics, school districts, and programs.

The evaluation of college and career readiness indicators required by House Bill 2804 in 2015 was one of several changes. Most importantly, in terms of measurement, it added several measures to the state accountability system. According to the TEA website,

> It creates five domains of indicators that will be used to evaluate districts and campuses regarding three goals:
> - Preparing students for postsecondary success
> - Reducing achievement gaps among students from different racial and ethnic groups and socioeconomic backgrounds
> - Informing parents and the community about district and campus performance (TEA, n.d.)

In practice, the state's annual TAPR, created from the accountability system, included a domain specifically for postsecondary readiness. That domain (officially number 4 in the new report) includes CCR indicators for elementary, middle, and high school students. For elementary students, it is measured by absenteeism calculated per student group (TEA, 2016, p. 8). For middle school students, it is measured by absenteeism and drop-out rates for grades 7 and 8 (p. 8). For high school students, several indicators must be reported. First, high schools must report graduation rates "based on the best result of the four- or five-year longitudinal graduation rate" (p. 8). Second, schools must report a graduation plan score in two percentages: 1) the percent of students in the Recommended High School Program/Distinguished Achievement Program, and 2) the percent of students in those programs who have an endorsement and/or distinguished achievement (p. 8). Third, schools must report a college and career readiness indicator score in four percentages: 1) the percent of graduates who meet Texas Success Initiative (TSI) criteria in English/language arts and mathematics, 2) the percent of graduates who successfully complete AP/IB courses, 3) the percent of graduates who earn 12+ hours of dual credit/college credit, and 4) the percent of graduates who "complete a coherent set of

CTE courses (including courses in a tech prep program)" (p. 8). According to Martinez et al., as a consequence of these requirements and the growth of the accountability system, more programs have been created by the TEA and others to help improve outcomes (p. 10).

Legislative Action to Address College and Career Readiness in Texas

Legislative attempts to address this issue arose in the 75th legislative session in 1997 and remain on the legislative agenda. Table 1.2 shows the successive legislative efforts to address college admission criteria and preparedness for all student populations in Texas. In particular, H.B. 1, H.B. 3 and H.B. 5 along with those that later modify § 28.008 of Education Code are discussed in greater detail in chapter two of this study.

Table 1.2 College Readiness legislation, 1997 - 2017

Session	Bill	Main Objective
75th (1997)	H.B. 588	"mandated uniform undergraduate admissions criteria for colleges and universities in the state to guarantee that the top 10% of students graduating from high schools across the state were automatically admitted to public institutions of higher education" (Oliva, 2004, p. 220)
75th (1997)	H.B. 2146	"directed the THECB to study minority population in higher education as well as the impact of the recent court rulings on enrollment targets by student group" (p. 220)

Table 1.2 cont.		
75th (1997)	S.B. 148	"enacted a process to handle transfer disputes that occur when students move between institution" (p. 220)
76th (1999)	S.B. 1	"directed the THECB to report on alternative admission criteria, their possible use, and their impact" (p. 221)
76th (1999)	H.B. 510	"required school districts and their high schools to post information on automatic admissions to state colleges and universities provided for by HB 588 so that more students could learn about their, in some cases, new eligibility for access to public higher education institutions, including flagship institutions" (p. 221)
76th (1999)	H.B. 1678	"required the THECB to develop a uniform strategy to identify, attract, retain, and enroll students that reflect the population of the state" (p. 221)
76th (1999)	H.B. 713	"created a new major grant program with two components to assist economically disadvantaged (and presumably minority) college students" (p. 221)
77th (2001)	H.B. 400	"mandated that high schools in the lowest decile of schools sending graduates to college work with local postsecondary education institutions to increase the number of their students who attend college" (p. 221)

Table 1.2 cont.		
77th (2001)	H.B. 1144	"made the Recommended High School Curriculum the default curriculum to minimize misinformation about how to adequately prepare for college…. also mandated that THECB and TEA create a P-16 record database to facilitate accountability across the L-16 and K-20 educational pipeline" (p. 221)
77th (2001)	S.B. 82	"extended the dual enrollment option through which high school students get both college and high school credit for the same class" (p. 221)
77th (2001)	S.B. 158	"required school counselors at elementary, middle, and high school levels to provide students and their families with information about college and the way to get there" (p. 221)
77th (2001)	S.B. 573	"required the THECB to initiate a statewide public awareness campaign about college, the benefits of attending, and the ways to apply for admissions and financial aid" (p. 221)

Table 1.2 cont.		
78th (2003)	S.B. 286	"THECB governance was streamlined by cutting the number of board members in half; in addition, staff members were charged to closely monitor the Close the Gaps plan, institutional performance data (including enrollment by ethnicity) were required to be made…" (p. 223)
79th (2005)	H.B. 1	"Sec. 5.01. Vertical Teams. Requires that the Commissioner of Education and the Commissioner of Higher Education establish vertical teams of faculty from public education and higher education" (THECB, 2006, p. 54). Created § 28.008 of Education Code.
81st (2009)	H.B. 3	"defines 'college readiness' – as required to be measured on EOCs and TAKS – as the level of preparation a student must obtain in ELA and mathematics courses to enroll and succeed, without remediation, in an entry-level general course for credit in that same content area at a state university or a community college or another institution offering baccalaureate degrees, associate's degrees, or certificates or credentials other than baccalaureate or advanced degrees" (TEA, 2009a, p. 89)

Table 1.2 cont.		
83rd (2013)	H.B. 5	THECB "and the Commissioner of Higher Education must jointly adopt rules to establish eligibility requirements for high school graduation for students participating in the minimum, recommended, or advanced high school program so that admission requirements for those students are not more stringent than the admission requirements for students participating in the foundation high school program" (TEA, 2013, p. 137)
83rd (2013)	H.B. 2549	"Vertical teams established under TEC §28.008 will be required to periodically review and revise the college readiness standards and recommend revised standards for approval by the Commissioner of Education and the Texas Higher Education Coordinating Board (THECB)." (TEA, 2013, p. 59)
84th (2015)	H.B. 2628	"The THECB, with the assistance of institutions of higher education, career and technical education (CTE) experts, and college and career readiness experts, must establish alignment between the College and Career Readiness Standards (CCRS) and the knowledge, skills, and abilities students are expected to demonstrate in CTE." (TEA, 2015, p. 113)

Table 1.2 cont.		
84th (2015)	H.B. 1613	"Requires the SBOE, by January 1, 2016, to develop and adopt by rule, a chart that clearly indicates the alignment of the college readiness standards and expectations with the TEKS." (Texas Association of School Administrators [TASA], 2015)
85th (2017)	H.B. 264	"extends, until September 1, 2020, existing statutory requirements that school district provide parents and students information regarding: the career and college readiness components of each curriculum endorsement; the curriculum requirements to gain automatic admissions to an institution; and the course and endorsement requirements to be eligible for state financial aid." (THECB, 2017, p. 44)

(Oliva, 2004, p. 220-3; THECB and TEA reports as indicated)

The legislative history shown in Table 1.2 reveals that Texas lawmakers have been working on addressing the issue of underrepresented groups succeeding in post-secondary education due to a lack of college readiness for nearly two decades. The challenge for legislators is complicated by the process of transferring laws to agencies of jurisdiction for rulemaking and implementation that include "how" these laws will be administered.

Lawmaking and rulemaking are two separate processes performed by different governmental entities. State government in Texas, like any other state, is divided into

three branches – the legislature enacts law, the executive enforces law, and the judicial branch interprets law. Lawmaking is the responsibility of state legislators that follow the rules prescribed in the Texas Constitution. Rulemaking is the duty of administrative state agencies that follow the guideline set forth in the Texas Administrative Procedures Act. The formal structure and processes for both passing law and administering law yields outcomes that may be less than desirable and often fail to remediate the problems legislative actions were designed to resolve.

Problem Definition

Hispanics are the second largest and fastest growing racial-ethnic group in the State of Texas. High school graduation rates for this group are increasing in Texas and a larger percentage of these students are entering college. The degree completion rate for Hispanics in post-secondary education, however, is nearly one-half that of white students. The Texas Legislature has attempted to resolve this disparity for nearly two decades without much success. The problem and central focus of the present study are the structural limitations in Texas lawmaking and rulemaking related to College and Career Readiness Standards that have produced unsatisfactory results in education policy for the state's residents, particularly Hispanics who have been disproportionately affected.

A Matter of Importance for Educators

Access to higher education and low completion rates pose a significant risk to all racial-ethnic groups, but in Texas the risk is greater for Hispanics as the fastest growing portion of the state's population. The outcome of ineffective education policy includes persistent underemployment and underrepresentation that deprive individuals of their rightful place in society as fully engaged residents of a participatory democracy.

The importance of this study is its relevance to people working in education, especially educators. This group of individuals are on the frontlines, so to speak, of educating Texas residents. All educators and administrators are required to comply with state law and policy, but too few have any real understanding of the processes that put these laws and policies into place. Very few education professionals at large are involved in the process that produce these legal requirements (chapter two and chapter three includes a broader discussion of these phenomena). Fewer still understand that lawmaking and rulemaking are two separate and distinct processes that are structurally limited and often lead to unsatisfactory outcomes (see chapters two and three for in-depth discussion).

Many studies have focused extensively on college readiness. Barnes and Slate (2013) argue that a "one-size-fits-all" approach is insufficient to ensure college readiness. Welch and Dunbar (2011) and Camara (2013) challenge validity and measurement standards for college readiness. Wiley, Wyatt, and Camara (2011) propose a multidimensional index to predict college success. Yamamura, Martinez, and Saenz (2010) explore multiple stakeholder's responsibility for increasing college readiness for Hispanic students. Hayes and Lillenstein (2015) investigate multi-tiered systems of support and educator effectiveness as a framework for coherence in college and career readiness standards. These previous studies, while extremely valuable, do not consider the process, both in lawmaking and rulemaking, that brought college and career readiness into being. By focusing on how to manage the mandate to ensure college readiness, the attention of scholars, educators, school administrators, and concerned members of the public is diverted from learning how to effectively engage in the actual creation of

education law and policy making. This study aims to remedy this deficiency by providing these groups, particularly educators as education policy experts, with the information needed to effectively engage in the process to positively affect policy.

A Role for Adult Education

Adult education is concerned with, among other things, workforce development and tends to focus on individuals, programs, or organizations. Nordic adult education scholars Rubenson and Desjardins note that "adult learning can be seen to promote competencies that help individuals adapt to the demands of the new economy and enable full participation in economic and social life" (2009, p. 188). Their 2009 international comparative study explores nation-states' structural barriers to participation in adult education pointing out national differences and found that the U.S. and other countries of "Anglo-Saxon origin" like the United Kingdom have participation rates in adult education below 50% while Nordic countries, like Demark and Sweden for example, have rates at 50% or more (Rubenson, 2009). Rubenson and Desjardins attribute this statistic to the type of regime under which these countries operate (2009). Applying the descriptive categories developed by Esping-Andersen in 1989, Nordic countries employ a "social-democratic" regime type that establishes a high level of equity in regards to standards of living, whereas the U.S. employs a "liberal welfare state regime" that centers on minimum standards of living (2009, p.194).

Nordic countries seem to get it right in terms of government structures and policies that align to promote adult learning (Rubenson, 2009). Rubenson and Desjardins found several factors including, extensive government funded training to attain full employment, centrally coordinated industrial relations that promote "negotiations among

the state, employers, and unions," "publically supported sector of adult popular education," and ample, sustained state funding for "disadvantaged groups" accounted for social-democratic regime successes. (2009, p.198).

In the United States, on the other hand, adult learners have not fared as well. Adult education scholar Ann K. Brooks notes "unlike the European Union and several Asian nations, the U.S. has no cohesive national policy focused on assuring an adequately prepared and dynamic workforce that is fairly compensated" (A.K. Brooks, personal communication, July 2, 2018). Moreover, posits Brooks, "the field of adult education has minimal institutional presence and economic support in the U.S. government (2018). The consequence, argues Brooks, is "that adult educators in the U.S. concerned with workforce development are tightly coupled with the corporate sector" (2018). Without sustained state funding and absent conscious efforts to establish centralized policies on adult education, the status of the field in the United States is not likely to change.

The National Commission on Adult Literacy (2008) warns that continued neglect of adult education in the United States, particularly in terms of workforce readiness, will result in a crisis that will decrease the nation's standard of living. For those residents who are already socio-economically disadvantaged the consequences would be dire. The Commission's report, *Reach Higher, America: Overcoming Crisis in the U.S. Workforce*, notes this staggering statistic – "Among the 30 OECD free-market countries, the U.S. is the only nation where young adults are less educated than the previous generation" (2008, v). While the U.S. still ranks high among other OECD nations with highly educated residents, the nation also ranks high in numbers of residents with lower levels of educational completion. In the nation as a whole, the Commission finds that Hispanics

are among those with the lowest levels of educational attainment (2008). Given the demographics of the State of Texas, our Hispanic population is disproportionately affected by this inequity.

Reach Higher, America extols the actions of Singapore's founding father and first Prime Minister, the late Lee Kwan Yew, as the architect of that nation's economic success (2008). One of the key principles underpinning Yew's policies over three decades of service between 1959 to 1990 included a well-educated, trained workforce. The report holds Yew's dictum on workforce capacity as a necessary foundation for America's economic well-being and sets a bold path forward for U.S. legislators at the federal and state level to make adult education a policy priority. It challenges other stakeholders including business leaders, philanthropic organizations, and nonprofits to partner with government to achieve the goal of transforming our fragmented adult education system into a vibrant system "with the capacity to effectively serve 20 million adults annually by the year 2020" (2008, p.15).

Adult educators and scholars can play an important role in crafting policies aimed at improving the education and workforce readiness of adults. A review of literature in the field show efforts in a variety of areas related to these topics. Researchers are arguing for broader goals for adult learners in federally backed programs (Belzer and Kim, 2018), state and regional boards of education are calling educators to action (Spence, et al, 2010), and institutions of higher education are developing programs to prepare individuals for workforce readiness (University of Tennessee, 2011), just to name a few. Despite these efforts, the challenge for the field of adult education is the lack of sustained, effective intervention by adult educators in federal and state policy-making. To

resolve this dilemma, this study aims to provide knowledge to teachers, school administrators, education policy advocates, parents, and community members about how to positively impact education law and policy.

Selecting a Framework

A Review of Relevant Literature. There have been many frameworks applied to the study of higher education policy. The organizational theories from sociology and public administration and the policy process model from political science have become increasingly utilized in today's research landscape (Bastedo, 2007, p. 295-6).

Early institutional models were apolitical, coming from a Weberian bureaucratic paradigm, and did not account for "the essential elements of the processes by which policies are formulated and decisions are enacted" (Hines and Hartmark 1980, p. 34). In response, Baldrige "drew upon Easton's theory of political systems in examining the political processes within the university," particularly at the moment of policy formulation (p. 35). Baldrige outlined a set of assumptions – in particular, the existence of an elite group of decision makers, the fluidity of individual participation, the existence and influence of interest groups, and the normality of conflict (p. 35).

Later, studying institutional choice, John Kingdon took garbage can theory created by Michael Cohen, James March, and Johan Olsen and applied it to policy creation, specifically agenda setting. Cohen et. al had argued that not all decision-making is rational – in fact, there is a constant stream of information and problems and choices and opportunities that merge to create "garbage cans" where decision-making processes are messy and do not always result in adequate solutions (Cohen, March and Olsen, 1972). Kingdon applied this model to the political process, noting that "problems, ideas

(or policies), and politics com[e] together to yield similar choice opportunities for political actors" (Bastedo, 2007, p. 297).

In terms of studies on policy process itself, much of the research in the field focused on "a sequential, incremental approach" that was advanced in Charles Lindblom's work (Bastedo, 2007, p. 297; Hayes 2017) and later in Jonathan Bendor's research employing incrementalism in varying organizational environments (Bendor, 1995).

Still other policy process theories, such as punctuated equilibrium (Baumgartner et al., 2006), analyzed the creation of policy monopolies and their disruptions; and advocacy coalition theory (Sabatier, 1998) that described policy change as occurring through shifts in the dominant political coalitions in and between organizations (Bastedo, 2007, p. 297-8).

While these theories improved the ability of researchers to understand the creation of policy within and among organizations, there was still a need for a better understanding of both how policy is created and how it affects the practice of education in the classroom. Critical policy analysis has helped in understanding the inequalities that policy can create and perpetuate in education (Rata, 2014, p. 347). Elizabeth Rata notes that critical policy analysis "does this by asking how the state uses policy to regulate the disjuncture between the ideals that inform the national democratic polity and the inequalities produced by global capitalism" (p. 347-8). This gets us closer to examining the effect of policy on student outcomes, yet, still, when we look for analyses on how education policy affects minorities, we find few examples.

Amaury Nora and Gloria Crisp note that while some states have adopted policies to ostensibly improve education standards and outcomes, "state policies in Texas, California, and Florida have negatively impacted the participation of Latinos in higher education" (2009, p. 340). Studies on high school to college transfer find low rates of cross-over even as the population grows relative to the overall state population and growth. Studies on education policy aimed at Hispanics tend to focus mainly on Latino participation and persistence rates (Santiago and Brown, 2004) as well as the systemic inequalities within our country (Contreras, 2011). In addition, there are studies on the effects of policy changes – such as Wally Barnes and John R. Slate's 3-year statistical study of college readiness rates among major ethnic groups in Texas (2011). These frames, however, do not tell us how and why policies change.

Missing from the literature on education policy is a structural analysis of Texas lawmaking and rulemaking that reveal limitations in the process related to the creation of college and career readiness standards and its impact on minority populations. This study aims to remedy this lack by applying the structural framework developed by Bolman and Deal (2014) to lawmaking and normative administrative law principles to rulemaking.

A Structural Framework for Analyzing Texas Law and Policy. Texas government is simply a form of organization set forth in the state's constitution. In Texas, like other states, government is organized into three branches according to task. The legislative branch enacts law, the executive branch enforces law, and the judicial branch interprets law. Bureaucratic agencies are created by the legislature and are organized by areas of jurisdiction to implement the law. This study focuses on the legislative branch in its lawmaking capacity (discussed in chapter two) and the education agencies, principally

the TEA and THECB, in their rulemaking capacity (discussed in chapter three) to explore the creation of college and career readiness standards and their impact on Hispanics as the second largest racial-ethnic group in the state.

The process of reframing organizations using a proactive approach that encompasses four perspectives, or frames – structural, human resources, political, and symbolic - is the work of Lee Bolman and Terrence Deal (1991). In their book *Reframing Organizations: Artistry, Choice and Leadership*, the authors assert that a holistic view of the organization from these four frames of reference can aid leadership in crafting innovative methods to produce organizations capable of strategically managing complex issues. Each frame is built on a set of assumptions that form the basis for analysis underlying each approach. In addition, Bolman and Deal identified key management functions of leadership, as well as corresponding behaviors that leaders exhibit. Taken as a whole, Bolman and Deal's conceptual framework is useful to identify, analyze, and improve an organization's function and yield better outcomes.

Bolman and Deal's frames have been used in studies to evaluate organizational leadership (Rowland & Parry, 1999), organizational change in schools (Dunlap & Goldman, 1991), school leadership (Bolman & Deal, 2010), roles, tasks, and educational functions (Fryden et al., 2015), and teacher preparation (Whitmyer, 2016), just to name a few. Although the use of Bolman and Deal's frames are not new to the field of education, the use of the structural frame as an approach to analyze the process of lawmaking and rulemaking in education policy is.

The structural frame is particularly well-suited to analyze the formal hierarchical structures embodied in law that give rise to education policy. The assumptions expressed

by Bolman and Deal as the foundation for the structural frame illustrate the applicability of this frame to lawmaking and rulemaking. Table 1.3 shows the alignment between the assumptions that underpin the structural frame and the Texas legislature and its administrative agencies.

Table 1.3 Alignment of Bolman and Deal's Structural Frame Assumptions with the Legislature and its Administrative Agencies

Assumptions	Legislature	Administrative Agencies
A_1 - Organizations exist to achieve established goals and objectives.	The legislature exists to enact law.	Administrative agencies exist to implement law.
A_2 - Organizations increase efficiency and enhance performance through specialization and appropriate division of labor.	The legislature enacts law using a system of committees and subcommittees with specialized areas of jurisdiction.	Administrative agencies are formed in specialized areas of jurisdiction to implement law.
A_3 - Suitable forms of coordination and control ensure that diverse efforts of individuals and units mesh.	The legislature relies on standing committees with specialized areas of jurisdiction to coordinate and control the passage of legislation.	Administrative agencies rely on memorandums of understanding and other forms of inter-agency communication to coordinate and control implementation.
A_4 - Organizations work best when rationality prevails over personal agendas and extraneous pressures.	The process of passing law requires substantial cooperation among legislators who must compromise for the public good.	Administrative agencies are required to implement law consistent with legislative intent.
A_5 - Structures must be designed to fit an organization's current circumstances.	The legislature's structure is designed consistent with current law.	Administrative agencies are designed consistent with current law.
A_6 – Problems arise and performance suffers from structural deficiencies, which can be remedied through analysis and restructuring.	The legislature is limited by current law. (Discussed in chapter two)	Administrative agencies are limited by current law. (Discussed in chapter three)

(Bolman and Deal, 2009, p. 47).

The specificity of these assumptions provides a strong base upon which the structural frame can be applied to analyze Texas lawmaking and rulemaking. To evaluate rulemaking, however, in chapter three, this study employs a structural approach coupled with normative administrative law principles for greater clarity.

Normative Administrative Law Principles: How Should Texas Courts Review Agency Rules. All forms of law, including constitutions and statues, provide the foundation for normative legal principles (Marmor, 2001). Courts apply the "substantial compliance" doctrine to review agency rulemaking in a vigorous way. Substantial compliance means that if the rule is faithful to the legislative intent of the statute under which the rule was created, then the rule is consistent with this normative principle. According to administrative law expert Pieter Schenkkan (2005),

> The courts cannot avoid making decisions on a final set of prudential arguments. The text of section 5 itself demands that the reviewing court determine the agency's "substantial" compliance with "reasonable" opportunity for comment and reasoned-justification requirements. How strict courts should be in applying such evaluative terms is inherently a prudential matter. Texas judges should aim to persuade agencies that they face certain remand if they visibly ignore section 5's requirements, and that they run an appreciable risk of remand if they pay only lip service to those requirements. Such review should be less stringent than current federal court "hard look" review of federal rulemaking. Texas courts should begin with a "pass/fail" approach--as long as they insist that failure is a real possibility and prove it by giving some agency rule makings failing grades. (p. 1012)

In this regard, the failure is not a matter of complying with the letter of the law so much as it is a failure to comply with the spirit of the law defined by the underlying legislative intent.

In addition to the doctrine of "substantial compliance," this study relies on precedent, a legal principle established in a previous case. The case of Hoctor v. U.S.

Dept. of Agriculture (1996) is particularly applicable to college and career readiness rulemaking. The principle set forth in the Hoctor case concerns the importance of notice and comment in rulemaking.

Notice and comment is the process for securing public engagement in rulemaking. The greater number of individuals affected by a rule, the greater potential for participation by affected individuals (Ross-Ackerman, 2015). The application of the normative principle of notice and comment (Hoctor v. U.S. Dept. of Agriculture, 1996) to this study provides the lens to assess the level of participation on college and career readiness rules.

Purpose and Research Questions

The purpose of this research is two-fold: First, to identify and evaluate the structural limitations in Texas law and policy processes in the creation of college and career readiness standards that disproportionately impact Hispanics as the fastest growing portion of the state's population; and second, to inform educators and stakeholders about how to affect these processes. Therefore, the study focuses on two research questions:

1. What are the structural limitations in Texas *lawmaking* that have impacted college and career readiness standards and the residents of the state?
2. What are the structural limitations in Texas *rulemaking* that have impacted college and career readiness standards and the residents of the state?

Design of the Study: An Overview

Frame. This is a qualitative study using archival data. In order to identify structural limitations in Texas lawmaking and rulemaking that have impacted college and career readiness standards and state residents, this study applies the *structural frame* as

described by Bolman and Deal (Bolman and Deal 2014; Clark & Thomas, 2013; Sypawka and McFadden, 2008) and the normative administrative law principles of *substantial compliance* (Schenkkan, 2004) and *notice and comment* (Hoctor, 1996), to analyze archival data.

Sources of Archival Data. Given that the scope of this study includes laws and rules related to college and career readiness, as well as the processes that bring these laws and rules into existence, the sources of archival data include the Texas Constitution that provide the structure of government and define its processes, Texas statues including HB 1, 3, 5, 2549, 2628, 1613, and 264 that relate to secondary and post-secondary education with emphasis on college and career readiness, Texas legislative committees publications with educational jurisdiction including the Senate Higher Education Committee, the Senate Education Committee, the House Higher Education Committee, the House Public Education Committee, and the House Sub-committee on Educator Quality. In addition, sections of the state's education code related to college and career readiness, the Texas Administrative Procedures Act found in Texas Government Code § 2001.001, the Texas Administrative Code (TAC) for rulemaking, the Texas Register's publication of notice and comment on rules related to college and career readiness, publications of the Texas Education Agency (TEA), the State Board of Education (SBOE), and the Texas Higher Education Coordinating Board (THECB) on matters related to college and career readiness provided the archival data for this study. All other laws not directly related to processes involved in college and career readiness were considered to be outside the scope of this study and, therefore, were not considered.

Analysis of Data. The archival data was systematically collected, organized, and reported (Patton, 2002). On the matter of *Qualitative Analysis and Interpretation,* Patton notes that an historical approach "describes what happened chronologically, over time" (p. 439). This study employs an historiographic approach to describe college and career readiness from its conceptualization as matter of concern in education, to its embodiment in law as state statutes, and finally to the rules for implementation formulated by state agencies. This approach was used by Philip Selznick (1949) in his classic study of the Tennessee Valley Authority. In Selznick's study, the objects of analysis were the "structural conditions" embodied in law that emphasized constraints (Selznick, 1949). The present study uses this same approach to assess the structural limitations in Texas law and policy related to college and career readiness.

In the United States federal system, laws are hierarchical. This hierarchy includes, the U.S. Constitution at its apex, followed by, in descending order, Congressional laws, state Constitutions, state statutes, local ordinances, and special district rules and regulations. It is a well-established legal doctrine that lower level laws must be consistent with laws enacted at higher levels. The present study is concerned with the Texas Constitution as the source for all state legislative action, as well as the state's laws on college and career readiness and the resulting state agencies' rules created to implement them. Thus, each piece of archival data in this study was reviewed in descending order employing standardized reading and note-taking. Courts employ this practice when evaluating the validity of law under interpretation.

Validity. The validity of law is assessed by courts within the hierarchy of law. In other words, laws passed by the state must be consistent with the state's constitution, and

rules created by state agencies must be consistent with the statute under which the rule was enacted. Thus, by reviewing the legislative structures and processes established in the Texas Constitution and the resulting laws as a court would, we can be reasonably certain that this procedure is logical or valid, on its face, and provide an effective measure of any structural limitations.

Reliability. Courts utilize normative legal principles within the hierarchical structure of law to interpret government's actions. Ideally for lawmakers, a court's interpretation of a statute would find it to be valid and consistent with higher law. This study employs the same type of procedure to assure validity in evaluating Texas law and rules related to college and career readiness. By employing the same procedures as a court of law, the likelihood that other studies utilizing the same data would yield the same result is increased. Simply put, the extent to which the same or nearly the same outcomes would be obtained is a strong indicator of this study's reliability.

Researcher Assumptions and Limitations of the Study. This researcher makes the following assumptions: 1) that the Texas Constitution was legally proposed and ratified; 2) that the legislature is constructed consistent with the state constitution; 3) that the processes employed by the state legislature to enact law are consistent with the state constitution; and 4) that all laws and rules under consideration for this study are valid and not currently under interpretation by any court of law.

Thus, this study is limited in its legal scope as follows: 1) only Article III of the Texas Constitution as it applies to the legislature is considered; 2) only laws relating to college and career readiness are considered; 3) only rules relating to college and career

readiness are considered; and 4) only publications of the state's bureaucracy related to education policy in general and college and career readiness in particular are considered.

Further, this study is limited to a structural analysis of law and rulemaking consistent with normative legal principles. Although many internal and external factors influence the passage of legislation and rules of implementation, these factors are not considered in this study. Notably absent from consideration is the issue of *power* in all its forms as related to the passage of legislation. However, this study does point out that there is a disparity between those included in the process of lawmaking and rulemaking and those who are not and suggests that greater participation by those not currently engaged would improve policy outcomes.

The Present Study

This dissertation is organized into four chapters consisting of an introduction, two related articles, and a conclusion. Both articles use a structural framework and normative legal principles to analyze archival data to evaluate structural limitations in lawmaking and rulemaking related to education policy in Texas. Chapter 1 provides information on the importance of access to high education and degree completion for Hispanics in Texas, as well establishing the framework for the study as a whole. Chapter 2 identifies the legislative response to underprepared students entering post-secondary education and provides a structural analysis of the lawmaking process that explains why well-intentioned legislation often fails to produce the desired outcome. Chapter 3 examines the rulemaking process that implements law through a prescribed set of procedures that impact the public, particularly Hispanics, in an arbitrary and capricious manner. Chapter 4 summarizes the findings of both articles, posits some reasonable adjustments in the

structure of lawmaking and rulemaking to improve outcomes that include educator intervention and provides suggestions for further research.

II. A STRUCTURAL ANALYSIS OF TEXAS LAW ON COLLEGE AND CAREER READINESS STANDARDS: HOW GOOD INTENTIONS FAIL TO ADDRESS HISPANIC STUDENTS' COLLEGE PREPAREDNESS AND DEGREE COMPLETION

Abstract

This article reports on the structural limitations of crafting Texas statutes that created college and career readiness standards with a focus on the impact to Hispanic students and the implication for Texas educators. Archival data from the Texas Constitution and Texas statues were analyzed using Bolman and Deal's structural framework to identify these limitations. The study reveals part-time legislators and restrictions on legislative sessions yield incremental, mediocre solutions. Recommendations for structural adjustments and increased educator input for state lawmaking are made.

Background on Access to Higher Education

Texas has a history of segregation, both de facto and de jure, that directly affected college acceptance patterns. Academically qualified students who moved on to post-secondary education were typically white and had better educational opportunities as children. Systemic and institutional barriers to higher education were deeply ingrained.

The demographics of the State of Texas have shifted in the last several decades. The white population began to decline while minority populations, especially Hispanics, grew more rapidly. Immigration from Mexico made up a huge portion of the influx of people into the state in the 1990s. This demographic shift led to declining enrollments in higher education. These conditions posed challenges for colleges that depend on student enrollment in order to survive.

Texas lawmakers have recognized the need for educated workers in the state's economy. Hispanics comprise a large tax base for the state, but also have a median wage significantly lower than their white counterparts. As recently as 2017, the median annual wage for a Hispanic male was around $35,000 compared to the annual wage for a white male at over $60,000. This marked wage disparity has had a huge impact on the state's economy and the well-begin of its Hispanic residents (Carnevale and Fasules, 2017, p. 21).

Identifying, Defining, and Measuring College and Career Readiness

The lack of college readiness among high school graduates, particularly minorities, is well-known. Academic and former state higher education administrator, Maricela Oliva (2004) notes, the Hispanic population in the State of Texas has been steadily growing while college entrance and completion rates fall behind those of whites. In the late 1990s and early 2000s, this trend became a matter of concern for state government. As the White population began to shrink in comparison to minorities, collages needed more bodies in seats (Oliva, 2004).

As increasing numbers of under-prepared students enter college, the need to address college readiness became apparent. David Conley of the Education Policy Improvement Center defines college and career readiness (CCR) as student success in four broad areas. Specifically, he asserts that students should have developed cognitive strategies (e.g. problem solving, inquisitiveness, precision/accuracy, interpretation, reasoning, research and intellectual openness), content knowledge (e.g. writing and algebraic concepts and key content knowledge from core subjects), academic behaviors (e.g. self-monitoring and studying skills) and contextual skills and awareness (e.g.

awareness of college admissions processes and culture, college-level academic expectations, tuition and financial aid) while in high school (National High School Center, 2012).

In 2003, Conley, along with the Association of American Universities and Pew Charitable Trusts, undertook the Understanding University Success project to address the problem of mismatched high school graduation rates and college entrance rates. This study brought together higher education faculty to establish a set of standards that identified critical skills and content required for success in entry-level college courses. Subsequently, in 2007, the Educational Policy Improvement Center and the Bill and Melinda Gates Foundation sponsored a study that also relied on a group of higher education faculty to discuss concepts and skills necessary for successful entry into college. This study's resulting report argued for student "self-awareness and monitoring, as well as on study skills" (Wiley et al., 2011, p. 5).

Moving on from strictly college entrance matters, Achieve, Inc., in 2001, created the American Diploma Project which developed "a series of benchmarks of English and mathematics performance that students should attain in order to be ready for college and workplace success" (p. 6). First, employers identified what constitutes a good job (i.e. adequate pay to support an average family and opportunities for advancement). Second, competencies evidenced by job holders were mapped back to their high school course work and content experts then "identified the essential knowledge and skills associated with these courses" (p. 6). Third, higher education faculty collaborated to create a set of standards for comparable entry-level college courses. The State of Texas took a leading role in this endeavor (Vasinda et al., 2013, p. 81).

The Southern Regional Education Board (SREB), at the subnational level, established the College Readiness Policy Connections Initiative in which three states, Georgia, Texas, and West Virginia, created a policy framework to address the lack of "college preparedness" among their states' students. This initiative identified 24 points that fell into 6 major theme groups: curriculum standards, assessment and accountability, educational support systems, qualified professional staff, community and parental partnerships, and facilities, equipment and instructional materials (Lord, 2002).

At the state level, the Texas Education Agency (TEA) developed assessments to measure the growing list of standards, particularly those from the American Diploma Project (Vasinda et al., 2013, p. 81-2). The TEA compared the Texas Assessment of Knowledge and Skills (TAKS), the state's standardized test in use since 2002, to the Scholastic Aptitude Test (SAT) and the American College Testing (ACT). The purpose was to determine if there was sufficient alignment between the national standardized assessments and TAKS to ensure that the assessment was a relatively accurate measurement of college success (Wiley et al. 2011, p. 7).

After that study was completed, the state selected a CCR framework based around four levels - key content, organizing components, performance expectations, and performance indicators - in the major disciplines of english/language arts, mathematics, social studies and cross-disciplinary studies (Vasinda et al., 2011, p. 81-2). This framework was formally adopted into law as expressed in House Bill 1 (HB 1).

Since that initial HB 1 CCR framework, however, the state has altered how standards are deployed as well as the methods by which the state measures success. While initial indicators included TAKS, "AP/IB exam results, SAT/ACT results," among

others, the state added college and career readiness indicators to the Texas Academic Performance Report (TAPR) in 2015 (Martinez et al., 2016, p. 8). The TAPR is a comprehensive review compiled by the TEA for each academic year. It shows performance data on students in elementary, middle and high school, and breaks down data by program, school districts, and demographics and is publicly available.

In addition, House Bill 2804 in 2015 added several measures to the state accountability system. The TEA notes on its website that,

> It creates five domains of indicators that will be used to evaluate districts and campuses regarding three goals:
> - Preparing students for postsecondary success
> - Reducing achievement gaps among students from different racial and ethnic groups and socioeconomic backgrounds
> - Informing parents and the community about district and campus performance (TEA, n.d.)

As a result, TAPR was altered to include a domain specifically for postsecondary readiness. That domain (officially number 4) includes CCR indicators for elementary, middle, and high school students. For elementary students, it is measured by absenteeism calculated per student group (TEA, 2016, p. 8). For middle school students, it is measured by absenteeism and drop-out rates for grades 7 and 8 (p. 8). For high school students, there are a wider variety of indicators that must be reported. First, high schools must report graduation rates "based on the best result of the four- or five-year longitudinal graduation rate" (p. 8). Second, schools must report a graduation plan score in two percentages: 1) the percent of students in the Recommended High School Program/Distinguished Achievement Program, and 2) the percent of students in those programs who have an endorsement and/or distinguished achievement (p. 8). Third, schools must report a college and career readiness indicator score in four percentages: 1)

the percent of graduates who meet Texas Success Initiative (TSI) criteria in English/language arts and mathematics, 2) the percent of graduates who successfully complete AP/IB courses, 3) the percent of graduates who earn 12+ hours of dual credit/college credit, and 4) the percent of graduates who "complete a coherent set of CTE courses (including courses in a tech prep program)" (p. 8). This increased level of granularity in student ccr data has, according to Martinez et al., led to more programs being created by the TEA and others to help improve outcomes (p. 10).

Measuring outcomes and program effectiveness has long been a focus of education research and has inspired much debate. Most studies focus on analyzing what was manifested rather than the structures that gave rise to the manifestation. These studies were undertaken from a variety of theoretical frames.

Research Frameworks: Studies in Higher Education Policy

Higher education policy has been studied in many ways; however, in recent years, organizational theories from sociology and public administration and the policy process model from political science have become increasingly utilized (Bastedo, 2007, p. 295-6).

The Weberian bureaucratic paradigm informed early institutional models. They were apolitical and did not account for "the essential elements of the processes by which policies are formulated and decisions are enacted" (Hines and Hartmark 1980, p. 34). In response, Baldrige "drew upon Easton's theory of political systems in examining the political processes within the university," namely at the moment of policy formulation (p. 35). Baldrige outlined a set of assumptions – in particular, the existence of an elite group

of decision makers, the fluidity of individual participation, the existence and influence of interest groups, and the normality of conflict (p. 35).

John Kindon, while studying institutional choice, took *garbage can theory* created by Michael Cohen, James March, and Johan Olsen and applied it to policy creation, specifically agenda setting. Cohen et. al had argued that not all decision-making is rational – in fact, there is a constant stream of information and problems and choices and opportunities that merge to create "garbage cans" where decision-making processes are messy and do not always result in adequate solutions (Cohen et al., 1972). Kingdon applied this model to the political process, noting that "problems, ideas (or policies), and politics com[e] together to yield similar choice opportunities for political actors" (Bastedo, 2007, p. 297).

Regarding studies on the policy process itself, much of the research in the field focused on "a sequential, incremental approach" that was advanced in Charles Lindblom's work (Bastedo, 2007, p. 297; Hayes, 2017) and later in Jonathan Bendor's research employing incrementalism in differing organizational environments (Bendor, 1995). Other policy process theories, such as punctuated equilibrium (Baumgartner et al., 2006), analyzed the creation of policy monopolies and their disruptions; and advocacy coalition theory (Sabatier, 1998) that described policy change as occurring through shifts in the dominant political coalitions in and between organizations (Bastedo, 2007, p. 297-8).

Still, there remained a need for a better understanding of how policy is created and how it affects what happens in the classroom. Critical policy analysis has allowed for research in this area by helping researchers understand the inequalities that policy can

create and perpetuate in education (Rata, 2014, p. 347). Elizabeth Rata notes that critical policy analysis "does this by asking how the state uses policy to regulate the disjuncture between the ideals that inform the national democratic polity and the inequalities produced by global capitalism" (p. 347-8). Yet, while this gets us closer to examining the effect of policy on student outcomes, we still find few examples when we look for analyses on how education policy affects minorities.

Amaury Nora and Gloria Crisp (2009) note that "state policies in Texas, California, and Florida have negatively impacted the participation of Latinos in higher education" even as some states have adopted policies to ostensibly improve education standards and outcomes (p. 340). Studies on high school to college transfer find low rates of cross-over even as the population grows relative to the overall state population and growth. Studies on education policy aimed at Hispanics tend to focus mainly on Latino participation and persistence rates (Santiago and Brown, 2004) as well as the systemic inequalities within our country (Contreras, 2011). In addition, there are studies on the effects of policy changes – such as Wally Barnes and John R. Slate's 3-year statistical study of college readiness rates among major ethnic groups in Texas (2011). But these don't tell us how and why policies change.

Missing in the literature on education policy is a structural analysis of lawmaking to reveal limitations in the process related to the creation of core standards and its impact on minority populations. This study applies the structural frame (Bolman and Deal 2014; Clark & Thomas, 2013; Sypawka & McFadden, 2008) to analyze limitations in the policy process that yield less than desirable outcomes.

Applying Bolman and Deal's Structural Frame to the Texas Legislature

At the most basic level, government – federal, state, and local – is a form of organization. The process of reframing organizations using a proactive approach that encompasses four perspectives, or frames – structural, human resources, political, and symbolic - is the work of Lee Bolman and Terrence Deal (1991). In their book *Reframing Organizations: Artistry, Choice and Leadership*, the authors assert that a holistic view of the organization from these four frames of reference can aid leadership in crafting innovative methods to produce organizations capable of strategically managing complex issues. Each frame is built on a set of assumptions that form the basis for analysis underlying each approach. In addition, Bolman and Deal identified key management functions of leadership, as well as corresponding behaviors that leaders exhibit. Taken as a whole, Bolman and Deal's conceptual framework is useful to identify, analyze, and improve an organization's function and yield better outcomes.

The structural frame is particularly well-suited to analyze the formal hierarchical structures embodied in law that give rise to education policy. The assumptions expressed by Bolman and Deal as the foundation for the structural frame illustrate the applicability of this frame to lawmaking. Table 2.1 shows the alignment between the assumptions that underpin the structural frame and the Texas legislature that provides the basis for analyzing legislative outcomes.

Table 2.1 Alignment of Bolman and Deal's Structural Frame Assumptions with the Texas Legislature

Assumptions	Legislature
A_1 - Organizations exist to achieve established goals and objectives.	The legislature exists to enact law.
A_2 - Organizations increase efficiency and enhance performance through specialization and appropriate division of labor.	The legislature enacts law using a system of committees and subcommittees with specialized areas of jurisdiction.
A_3 - Suitable forms of coordination and control ensure that diverse efforts of individuals and units mesh.	The legislature relies on standing committees with specialized areas of jurisdiction to coordinate and control the passage of legislation.
A_4 - Organizations work best when rationality prevails over personal agendas and extraneous pressures.	The process of passing law requires substantial cooperation among legislators who must compromise for the public good.
A_5 - Structures must be designed to fit an organization's current circumstances.	The legislature's structure is designed consistent with current law.
A_6 – Problems arise and performance suffers from structural deficiencies, which can be remedied through analysis and restructuring.	The legislature is limited by current law.

(Bolman and Deal, 2009, p. 47).

It is the application of the sixth assumption that forms the basis for identifying the limitations of Texas CCRS lawmaking.

Legislative Actions: Creating College and Career Readiness

In an effort to address the alarming statics concerning Hispanics and the lack of college and career readiness, the THECB initiated a collaborative effort in 1997 to craft a plan designed to close the gaps between secondary and post-secondary education. A

committee of educators, business leaders, and community representatives met to discuss goals and a means for achieving them (THECB,2000a). The resulting plan, "Closing the Gaps in Higher Education by 2015," took into account a Rand Corporation analysis of all Texas current college programs.[3] This plan was disseminated to multiple stakeholders in the state[4] requesting feedback and recommendation for moving forward. The THECB acted on the guidance of stakeholder responses, modified the plan and formally approved it in October 2000 (THECB, History of the Plan).

"Closing the Gaps" outlined four main goals to be achieved by 2015 (THECB, Closing the Gaps; Benjamin et al., 2000). As noted in the Rand report, the first two goals are student-oriented and the second two, institution-oriented (Benjamin et al., 2000). Goal one addressed the need to increase student participation in Higher Education. In particular, the goal outlined a desire to improve secondary exit standards and align them with post-secondary admission requirements. Similarly, the creation of P-16 programs

[3] "The Council for Aid to Education [CAE]/RAND Corporation was awarded a contract to perform a priority and efficiency analysis of higher education programs and services in Texas" (THECB, History of the Plan). The report, Achieving the Texas Higher Education Vision, was published in June 2000 and discussed how Texas might meet "the twin demands placed on it by economic growth and by the increasing problems of access to higher education that many Texans experience" (Benjamin et al. 2000, preface). It should be noted that, at the time, Texas was experiencing an economic growth rate higher than many other states in the nation (Texas Comptroller 2000). Rand/CAE narrowed down the top questions important to all sectors of stakeholders in Texas (political, business, education, community) through the Delphi method, a qualitative survey-based forecasting methodology utilizing panels of experts. Subsequently, RAND/CAE identified two priority goals that cut across the board: one, "reducing disparities among Texans in higher education participation and success, particularly by increasing the participation and success in higher education of Hispanics and African Americans," and, two, "reducing job deficits, or the number of jobs for which there are not enough adequately trained workers" (Benjamin et al. 2000, p. 6-7).

[4] The THECB identified the stakeholders as follows: "the Governor, Lieutenant Governor, Speaker, Comptroller, Legislative committee members, public higher education governing board members, public and independent higher education chancellors and presidents, chambers of commerce, the State Board of Education, the Texas Education Agency, faculty associations, student associations, the Texas Parent Teacher Association, the Texas Association of School Boards, the Texas Association of Community Colleges, the Texas Association of Partners in Education, the Texas Association of School Principals, the Texas Association of Student Councils, the Texas Association of School Administrators, the Texas Association of Secondary School Principals, the Texas Council on Workforce and Economic Development, the Texas Workforce Commission, and others." (THECB, 2000a)

was identified as a means to assist secondary students by making the Recommended High School Program mandatory statewide (THECB, 2000a, p. 1). Goal two acknowledged the need to increase graduation rates among all post-secondary programs at 4-year institutions, community colleges, and training institutes. It also reiterated the need to implement the "Uniform Recruitment and Retention Strategy'" mandated by the Texas Legislature in the 1999 (p. 2). The legislature required the THECB to "'develop and annually update a uniform strategy to identify, attract, enroll, and retain students that reflect the population of the state'" (THECB, 2000b, p.1). This particular provision is significant because it addresses the issue of a growing minority population within the state that is not prepared to enter college. Goal three cited a desire for greater accountability within Texas public institutions; goals to achieve accountability included creating a ladder ranking system for universities and identifying peer programs with national recognition. Finally, Goal four identified the need to increase Science, Technology, Engineering, and Mathematics (STEM) funding using a system of competitive grants.

Much earlier in 1993, provisions of the Recommended High School Program required 24 credit hours instead of 22 and compelled "students take specific courses for graduation including credits in the core subject areas: English, language arts and reading, mathematics, science, and social studies. Credits in languages other than English and other courses are also required" (TEA, Texas State Board for Educator Certification 2001, p. 5).

Reflection on that initiative culminated with a 2001 report in which the TEA and Texas State Board for Educator Certification noted that years after the initial

implementation of the "Recommended" plan, the number of students graduating under the more rigorous requirements increased (p. 5). Moreover, a report by the Texas Comptroller, titled "The Impact of the State Higher Education System on the Texas Economy," helped firm support for modifying legislation by noting a potential $18.4 billion net gain through increasing student enrollment and retention in higher education (Texas Comptroller, 2000). These reports highlighting student success incentivized the Texas legislature to fully embrace the increased standards of the "Recommended" plan. Policy was restructured to align with these findings and in 2001 House Bill 1144 passes making the "Recommended" plan the new standard for high school graduation requirements.

Meanwhile, on a national level during this period, there were growing concerns about the ability of the American workforce to maintain its global competiveness. In 2004, the Council on Competiveness held a conference of business and education leaders to discuss a way forward. One of the primary concerns was creating a "National Innovation Education Strategy for a diverse, innovative and technically well-trained workforce". The agenda discussed a means for improving, expanding, and aligning high school curricula, college programs (particularly graduate opportunities in STEM), and industry employment standards in an effort to bolster American economic prowess (Council on Competitiveness, 2005).

In response to the prominence of this issue and the acceleration of calls at the national level for a renewed commitment to American innovation and competitiveness, the Department of Labor (DOL) introduced the Workforce Innovation in Regional Economic Development (WIRED) in 2005 to focus on "the role of talent development in

driving regional economic competitiveness, increased job growth and new opportunities for American workers." (Texas Workforce Investment Council, 2006, p. 2)

Among the states, there were several programs proffered by public and private organizations coming together simultaneously to affect a redesign of high school curricula (Jennings, et al,. 2007). Private entities including Microsoft and the Ford Foundation joined the Partnership for 21st Century Skills, aimed at providing minority students and teacher support. In the public sector, Jennings (2007) noted that "in 2003 at the High School Summit in Washington DC, the United States Department of Education (USDE) launched the Preparing American's Future High School Initiative, which was designed to support educators, policymakers, and leaders" (p. 11). Moreover, in a public – private sector collaborative, the National Governors Association (NGA) and Achieve Inc. hosted a summit of "all 55 governors, top business executives, and prominent K-12 and higher education leaders" to discuss high school curricula and the knowledge and skills a diploma ought to signify[5] (NGA, 2004). The collaborative culminated in a blueprint for "Redesigning the American High School Project" (NGA, 2005).

In Texas, Governor Rick Perry issued Executive Order RP53 on December 16, 2005, "directing the TEA and THECB to work together to enhance college readiness standards and programs for Texas' public schools" (Texas Workforce Investment Council, 2006, p. 5). The order required the creation of STEM Academies that would be both publicly and privately funded; "a system of college readiness indicators, including the reporting of higher education recommendation rates on public high school report cards;" "voluntary end-of-course assessments" in core subjects and initiated the creation

[5] This was a response to a 2004 report from the American Diploma Project which noted that "for far too many graduates, the American high school diploma represents a 'broken promise'" (Achieve, Inc. 2005).

of an alternative to TAKS; "summer residential programs;" and "a pilot financial assistance program" for poor students who take college entrance exams (Perry, 2005). In addition, the order initiated the Texas High School project, "a $261 million public-private initiative designed to increase graduation and college enrollment rates in every Texas community" (Texas Workforce Investment Council, p. 5). The culmination of these local, state, and national report findings and program initiatives set the stage for legislative intervention.

College readiness has long been of interest to the Texas legislature. Decades before the consideration of CCRS, the Legislature passed the Texas Academic Skills Program (TASP) in 1987 that required entry-level college students to take proficiency exams in mathematics, reading, and writing. Developmental education programs were created on public college campuses statewide to carry out the mandate using standardized assessment for placement purposes. Those students that failed were required to enroll in remedial classes (TEA & THECB, 1988).

In successive legislative sessions, given stakeholder feedback and recommendations from THECB, the statute and program rules have been amended. In 2003 the 78th Texas legislature replaced the TASP with the Texas Success Initiative Program (TSIP), once again focusing on assessing college readiness and mandating remediation for those students deemed unprepared for entry-level university courses (THECB, 2010).

Faced with rising numbers of under-prepared students and the likelihood of increasing numbers of minority students requiring remediation in Texas, the state legislature began exploring the disconnect between high school graduation standards and

college readiness. As a result, the 3rd called special session of the 79th Texas legislature enacted House Bill 1 (HB 1) to "ensure that students are able to perform college-level work at institutions of higher education" (HB 1, 2006, Art. 5, Sect 28.008 [a]). The bill, in part, required the creation of vertical teams composed of secondary and post-secondary faculty to identify "college readiness standards" that focus on key knowledge and skills that facilitate academic success. These standards, now called CCRS, were to enhance "the statewide curriculum for Texas public education" (THECB, 2014a, p. 6).

To address the issue of accountability, the 81st Texas legislature passed House Bill 3 (HB 3) that changed high school graduation criteria and requires the THECB and TEA to set performance standards for admission to public institutions of higher education. Performance standards are defined as the level of proficiency required for a student to succeed in entry-level college courses. End of course (EOC) exams are used to assess proficiency levels for high school students. Students passing EOCs would, therefore, be deemed college ready and exempt from any developmental education requirements (TEA, 2009b).

Additionally, HB 3 called for the implementation of the State of Texas Assessments and Academic Readiness (STAAR) program that would replace TAKS as the assessment measure of elementary, middle school, and high school students. The STAAR program works much like the old TAKS (with additional stipulations and finer tuned standards) but for high school students, the tests are separated out into four broad categories: English Language Arts, Mathematics, Science, and Social Studies.

According to the Texas Education Agency, this new assessment program provided more rigor and aligned with the newly developed college readiness standards

called for in HB 1. Additionally, the results of student's STAAR EOCs formed the basis of school performance rankings, thereby increasing the accountability of schools and their districts.

Even though HB 3 reformed student assessment and took steps to improve district accountability at the primary and secondary levels, feedback from stakeholders called for more and better change. As Dr. Sandra West Moody[6] noted, there were three major groups pushing for new legislation: parents arguing there were "too many high stakes tests;" business leaders calling for higher skilled entrants into the workforce; and, superintendents of both large and small ISDs calling for greater flexibility (Moody, 2014, p. 4-5). Building on the momentum of the previous session and with increasing pressure from stakeholders, the 83rd Texas Legislature passed House Bill 5 (HB 5).

Simply put, the new legislation altered graduation requirements; fundamentally changed the way high schools operate, and modified school assessment. In terms of graduation requirements, the Foundation School Program replaced the Recommended High School Program, along with the Minimum High School Program, and the Distinguished Achievement Program. The new 22-credit program, required specific advanced coursework, such as Algebra II, advanced sciences, and advanced English language arts, be made available in the 2014-2015 school year. The stated goal of the program was to "prepare students to enter the workforce successfully or post-secondary education without remediation" (TASA, 2013b, p. 1).

Moreover, the legislation established 'endorsements;' a set of five circumscribed curriculum tracks, STEM, Business and Industry, Public Services, Arts and Humanities,

[6] Dr. Moody is an Associate Professor of Biology at Texas State University and has been an active participant in the creation of CCRS in the science curriculum, as well as stakeholder in STEM education.

and Multidisciplinary, from which students must choose one in 9th grade. Each track has a different emphasis: STEM focuses on mathematics, the hard sciences, engineering, and computer science; Business and Industry places emphasis on "database management, information technology, communications, accounting, finance, marketing, graphic design, architecture, construction, welding, logistics, auto technology, agricultural science and HVAC" (Moody, 2014, p. 6); Public Service curriculum stresses "health sciences and occupations, education and training, law enforcement, and culinary arts and hospitality" (p. 6); Arts and Humanities focuses on the social sciences and fine arts; and the multidisciplinary track allows students to take any advanced courses. The practical application of this portion of the legislation would not be viable for each district; therefore, districts are not compelled to offer all tracks. Nevertheless, each district must report the tracks they offer and are obligated to provide all courses required in those tracks.

On the matter of learning assessment, secondary students are required to take five STAAR EOCs in "Algebra I, English I (combined reading/writing), English II (combined reading/writing), Biology, and U.S. history" (TEA, 2013b). These new EOCs assess content that is fully aligned with TEKS-CCRS standards (Texas Classroom Teachers Association [TCTA], 2013). The impact of these measures has streamlined student secondary education with a related post-secondary program or an industrial employment focus.

"Performance acknowledgements," placed on student report cards, were designed to showcase student achievements. (TASA, 2013b, p. 3). In summarizing HB 5, the Texas Association of School Administrators note

> a performance acknowledgement can be earned for (1) outstanding performance in a dual credit course, in bilingualism and bi-literacy, on a college AP test or IB exam; or on the PSAT, the ACT-Plan, the SAT, or the ACT; or (2) for earning a nationally or internationally recognized business or industry certification or license (TASA 2013b, p. 3).

In this regard, the legislation targets student accountability and mandates greater standardized recognition of individual achievement.

On the institutional side, the HB 5 targeted greater district and campus accountability. Specifically, the legislation outlined a new index system for schools based on "four indices: Student Achievement, Student Progress, Closing Performance Gaps and Post-Secondary Readiness," all measured by state tests, graduation rates, and percent of advanced program students (TCTA, 2013; TASA, 2013b). Much like a student report card, HB 5 also created new performance labels, based on the index, which rank schools and districts on a scale of A to F, wherein A, B, and C are acceptable and D or F are unacceptable. In addition, taking notice of the feedback from local stakeholders, the law called for the creation of a local accountability category to be determined by each district (TCTA, 2013; TASA, 2013b).

In that same legislative session (2013), HB 2549 re-established the vertical teams first put together in HB 1 (28.008 of the Education Code). These teams are required to periodically review and revise the college readiness standards and recommend revised standards for approval by the Commissioner of Education and the Texas Higher Education Coordinating Board (TEA, 2013a, p. 59). While the outcomes of the original vertical teams can be seen in the development of standards as published by ERIC, the outcomes of these subsequent teams are less visible.

Later in the next session, the 84th (2015), House Bill 2628 added 61.823(e) and 61.8235 to the Education Code. These required the THECB to 1) align the previously defined College and Career Readiness Standards with CTE standards; and 2) create courses of study that result in industry-accepted skills. CTE standards, career and technical standards, are those geared toward industry and generating graduates (AA, BA, certificate or otherwise) with skills already proven in the workplace. Similar to the creation of vertical teams, this bill requires teams of both professionals and academics to review the curriculum and make sure it is properly aligned (TEA, 2015, p. 113).

In the 85th session (2017), House Bill 264 simply extends the deadline for the TEA to create materials that advertise the various program and curriculum changes that have been ongoing throughout the last several years (THECB, 2017, p. 185).

It is evident that reform and restructuring in secondary and post-secondary education policy has been robust throughout the last nine biennial legislative sessions in Texas. The policy adoption process that has legitimized policy formulation for CCRS and many other provisions including high school curriculum, assessment, accountability, and acknowledgement have all been informed by feedback, intermediate decisions, and modification of action. Nevertheless, looking at these policies through a structural lens reveals limitations in the process.

Texas Lawmaking: Using Structure to Explain Function

Constitutional Beginnings – 1876. Constitutions structure government, assign power, and limit government's power. The current Texas Constitution, ratified in 1876, is an example of severe limitations on the power of state government. Delegates assembled in the Texas constitutional convention of 1875 limited the power of state government,

due in large part to the heavy-handed governing of Radical Republican Governor Edmund J. Davis during the Reconstruction period that began in 1869. Actions of Radical Republicans in the U.S. Congress and in Texas during this period likely galvanized delegates to 1875 constitutional convention to weaken and limit government. These goals were accomplished by providing limited terms of office, establishing statewide and local elected offices, and restricting the government's authority to act, particularly in terms of the legislative and executive branches (Book of States, 2015).

All state constitutions embrace the idea of separation of powers embodied in the U.S. Constitution. Power is divided among three elected branches - executive, legislative, and judicial. The separation of powers provides a system of checks and balance on the actions of government. The framers of the current Texas Constitution sought to distribute powers broadly among the branches of Texas government (TX Const. art. II). Table 2.2 illustrate the separation of powers in Texas government.

Table 2.2 Separation of Powers in Texas Government

The Legislature	**The Governor**	**The Judiciary**
Propose and pass laws	Limited appointment power of some executive officials and judges in cases of vacancies	Interpret the law
Power to propose constitutional amendments	Veto and line-item veto	Settles all disputes in matters of criminal and civil law
Power to tax and set the budget	Submit budget proposal to legislature	Popularly elected
Oversight power of state agencies and departments	Serve on boards, such as the Legislative Budget Board	
Impeachment power of judges and executive branch officials	Can call special session agenda	

(TX Constitution, arts. III, IV, V)

Structuring the Legislature. The Texas legislature is bicameral, consisting of two houses. The Texas Senate has 31 members, each elected for a four-year term. Like the U.S. Senate, the elections of state senators are staggered every two years. The Texas House consists of 150 members elected for two-year terms. There are no term limits, so it common for incumbents to be re-elected. Some estimate the incumbent advantage that measures the likelihood that the member will be re-elected to be as high as 95%.

Given the population of the State of Texas, the legislature is a relatively small body. Based on the 2010 census, each Texas House member serves approximately 811,000 residents and each Senate member serves approximately 167,000 residents (TX Constitution, art. III). Given that Texas has one of fastest growing populations in the U.S., the number of residents represented by each member will increase.

The Texas legislature convenes biennially for 140 days (TX Constitution, art. III). With the exception of four states including Texas, all other U.S. states have annual legislative sessions. Among the state legislatures meeting biennially, Texas is ranked 2nd in the U.S. in terms of population, whereas the other states with biennial sessions – Montana, Nevada, and North Dakota – have populations ranking in the bottom third. At the end of the session the Texas legislature must adjourn sine die and cannot call itself into special session. The Texas legislature's inability to call itself into special session differs from other states.

Formal requirements are minimal - age, citizenship, and residency – and generally do not hinder those seeking to hold office. More important, however, are the informal qualifications that do impact who is elected. These informal factors include wealth, education, and occupation. As a consequence, the legislative body is less diverse than the

population of the state. According to a recent study of state legislatures across the country, legislators tend to be older, white, well-educated males employed in law and business (Kurtz, 2015).

Each member serves their constituents in single-member districts. Drawing district lines within the state for the purpose of representation is a controversial political process that must occur once every10 years consistent with the census but may occur more often. To gain political advantage, political parties use the process of drawing district lines within the state. The majority party in the House and Senate work to maintain, or increase, their numeric superiority. In addition, incumbents, those who hold the seat and seek reelection use this process to their advantage. Even interest groups operating within the state try to gain leverage in redistricting. The problems raised by redistricting center on equal representation and disadvantaged minority populations (Baker, 1966)). Although minority voters became better represented by 2015 with 41 Hispanics and 19 Blacks serving in the Texas legislature, those numbers are paltry as a percentage share of the legislature (23% and 10% respectively) when compared to those groups' share of the state's population (39% and 13% respectively) (Ura, 2015).

The Process of Passing Legislation. ***The Role of Committees.*** The primary function of the legislature is to enact law. Most of the work of the legislature is accomplished using a system of committees. Standing committees are semi-permanent committees in the House and Senate that exist from one legislative session to the next with particular areas of jurisdiction. The first stop for a piece of legislation is a standing committee. The leadership in the House and Senate appoint members to committees, assign bills to committee, and control the process of debate and passage of legislation. As

a result, most bills die within the committee structure and few bills can pass the legislature without the support of legislative leadership (TX Senate, 2015; TX House, 2015).

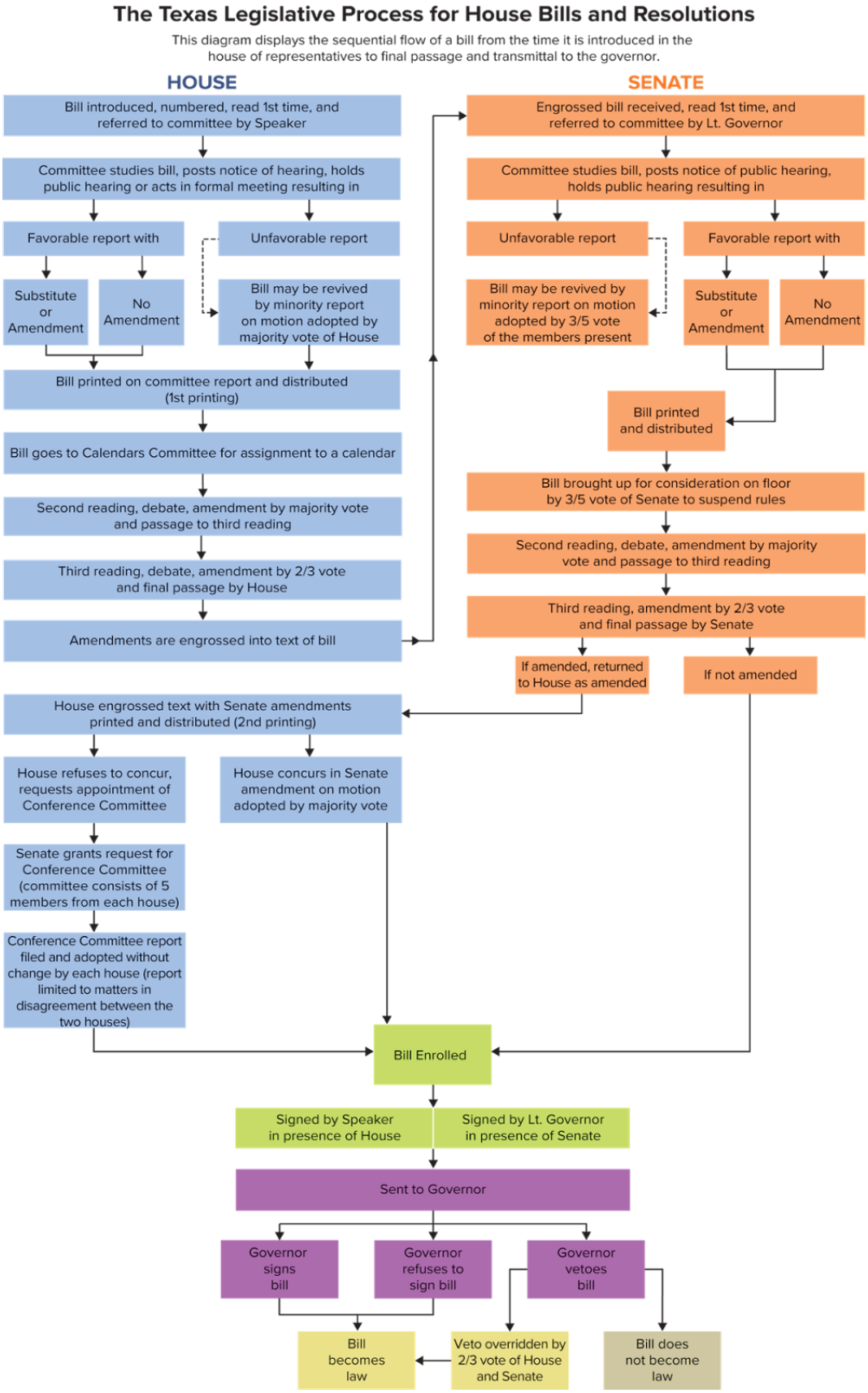

Figure 2.1 Texas Legislative Process. (Mora & Ruger, 2017, p. 106)

Formal Procedures Control the Process. Formal rules of procedure prescribe how bills are passed into law. Figure 2.1 illustrates the process of passing a law in Texas. At each stage of the process outlined in Figure 2.1, bills are either moved forward or die. Thus, most bills introduced in a legislative session fail to pass. Though there are many ways to kill a bill, there is only one way to pass and it involves succeeding at every level along the process. To become law, a bill must pass in both the House and Senate by majority vote, then be signed into law by the governor. Because legislative sessions are limited, major bills, those affecting the statewide population, rarely pass in any given session. Instead, bills on major issues are passed in an incremental fashion making only minor changes to the law over multiple legislative sessions (TX Leg. Council, 2015).

Getting on the Calendar: The Difference between Major Bills and Minor Bills. Harvey Tucker, a noted political scientist, argues in his study of calendars and bills that "the major criterion distinguishing major from minor bills is political: the level of conflict the bill is expected to generate within the Legislature" (Tucker, 1989, p. 51). Using different calendars facilitates the legislative process.

In Texas, according to House rules, there are four different types of calendars, and bills must meet certain criteria to be assigned to each of these calendars. There are two calendars for minor, non-controversial bills – 1) the Local, Consent, and Resolutions Calendar used for local or uncontested bills, and 2) the Congratulatory and Memorial Calendar used for congratulatory and memorial resolutions.

For major bills, the Supplemental House Calendar is the primary one used during House deliberations. Daily House Calendar is included in the Supplemental House Calendar and is used for new bills and resolutions. Both of these calendars are prepared

by the Committee on Calendars, a standing committee of the House that decides which bills will be considered for floor debate by the full house and to which committee they will be assigned. This committee wields significant influence over what legislation will pass, especially toward the end of session when time is very limited (TX House, 2015).

Structural Analysis

Why These Structures and Procedures Fail to Deliver Sound Education Policy.

Evaluating Texas education policy in the structural framework reveals 4 limitations that affect the quality of law and interfere with producing the desired outcome.

Structural Limitation Number 1: Biennial Legislative Sessions. This article pointed out that the current Texas Constitution ratified in 1876 resulted from a political culture that was deeply distrustful of government and sought to limits its ability to exert power, in the form of law, over the state's residents. As a result, Article III of the state constitution established a bicameral legislature that meets biennially. The consequence for elected members of both the House and the Senate is that they are not full-time legislators and, thus, do not report "legislator" as their full-time occupation.

The percentage of attorneys in the Texas legislature is much higher than the national average. According to a recent study, 14 percent of legislators nationwide were lawyers, whereas roughly one-third of Texas legislators were engaged in legal practice. Similarly, a higher-than-average percentage of business people serve in the Texas legislature.

Of particular importance to education policy, a lower-than-average percentage of schoolteachers serve as legislators in Texas. This is because in Texas, unlike some other

states, a state legislator may not hold other compensated public employment. Texas teachers can be paid to teach while also being paid to serve on the "governing body of a school district, city, town, or local governmental district," but they cannot be paid to serve in the state legislature.

This structural limitation adversely impacts legislative outcomes because part-time legislators must direct their primary focus on their full-time profession. Since a large proportion of legislators are engaged in law and business occupations, their legislative attention is directed to their areas of expertise, not necessarily to the wide array of policy issues in which public education plays a large role.

Structural Limitation Number 2: 140 Sessions that Adjourn Sine Die. This article noted that the Texas legislature is limited to 140-day sessions after which they must adjourn sine die, without continuing to meet. The legislature in Texas, unlike many other state legislatures cannot call itself into special session. Special sessions are called by the governor. These sessions are limited to 30 days, are very costly to the state, and the legislators are limited to the agenda set forth by the Governor. Due to limited time, most laws are passed in the latter days of the legislative session.

The consequence of this structural limitation is that few bills are given adequate consideration and most are passed into law without opportunity for public comment. In the area of public education where laws passed impact an exceedingly large proportion of the population, the need for open public discourse is important for careful consideration of whether or not the legislation will yield desired outcomes.

Further, laws passed related to education disproportionately impact Hispanics as the largest segment of the majority minority population in Texas. If outcomes are not

desirable and do not resolve the problem as the legislature intended, the impact falls on these individuals who are already disadvantaged as an underrepresented group in both secondary and post-secondary education.

Structural Limitation Number 3: Incrementalism at Best. This article pointed out that the Texas legislature is bound by a formal set of procedural rules. The procedure for passing legislation moves bills through a system of committees. At each stage of the process, bills are subject to favorable or unfavorable action. Legislative leadership in general, and committee leadership in particular, influence the likelihood of a bill becoming law. In the end, most bills fail and do not become law.

Consequently, most bills make only minor changes to existing law. This article documented the history of legislative efforts to affect education policy over the last nine legislative sessions. The passage of HB 1, HB 3, and HB 5 that address college and career readiness, clearly illustrate that the current formal procedural rules yield incremental policy changes that do not necessarily bring about the desired outcome.

It has been more than 18 years since the state recognized the demographic shift to a majority minority population, and subsequently the underrepresentation of Hispanics in higher education as the largest portion of that minority. The piecemeal legislative efforts revealed in this article have failed to produce the desired result of improving college readiness and increasing access and degree completion for Hispanics in the State of Texas.

Structural Limitation Number 4: Major and Minor Bills – How Classification and Calendaring Impact Legislative Success. This article makes clear that, by definition, bills related to education are classified as major bills because they are likely to

generate conflict and will be sent to the Committee on Calendars for committee assignment and scheduling because they will have statewide impact on the population. Due to this classification, these bills are more likely to be introduced earlier in the session, thereby simulating great deliberation.

As a consequence, however, more time devoted to deliberation may increase the likelihood of unfavorable action terminating the bill. Recall that in order for a bill to become law, it must pass very step in the process. Prolonging the process when the legislature faces structural time constraints, jeopardizes successful outcomes. This structural limitation, therefore, incentivizes legislators to author, propose, and support legislation that is mediocre seeking to minimize conflict and increase the likelihood of successful passage.

Conclusion and Recommendations

Structural Change. Any recommendations this article makes to improve the lawmaking process in Texas regarding educational policy are hypothetical. Actual change would require a change in law, both constitutional and statutory. The magnitude of this type of change would require the participation of many parties and institutions: input from residents at large, special interests, governmental agencies, administrators, and legislators, just to name a few. However hypothetical, the following recommendations would go a long way to improve the lawmaking process.

Constitutional Changes. Amending the Texas Constitution would be required to remediate the structural limitations of a biennial legislature that operates with strict time limitations. The rationale for a part-time legislature may have worked in 1876, but those conditions no longer exist in Texas today. Texas is the second most populous state in the

nation and is home to 10.5 million Hispanics, the fasting growing segment of the U.S. population. In order for Texas to thrive and remain competitive in the national and international arena, it must do a better job of educating its population. Engaging in far-reaching policy change in this area requires uninterrupted legislative efforts. Texas is the only state of its size, both in terms of area and population, to meet in biennial legislative sessions. These sessions are not sufficient to produce effective law. Moreover, while it is not uncommon to limit the time of legislative sessions, it is unusual that the state's constitution prohibits the legislature from calling itself into special session. Removing the requirement for the legislature to adjourn sine die and engage in special sessions for its own agenda would remove this structural limitation. Amending the Texas Constitution to create an annual legislature and removing the restrictions on legislative sessions would to a long way to maintaining continuity in legislation that is likely to produce the desired outcome.

Statutory Changes. The Texas legislature is currently bound by formal rules and procedures that govern its activities. Given that the legislature's primary function to enact law, any rule or procedure that impedes the process should be carefully considered for revision. This article has shown that the formal rules embodied largely in statute hinder successful legislation. Altering the procedure in both the House and the Senate is within the legislature's scope. Streamlining the process without jeopardizing careful consideration and deliberation of legislation would improve the likelihood of success.

Implications for Educators and Others. There are several key points of entry into the lawmaking process that were revealed by this structural analysis. A brief restatement of the most prominent structural limitations presented herein provide access

points for educators, school administrators, education policy analysts, parents, students, or any concerned stakeholder to effectively engage in crafting or modifying existing policies.

Legislative Structures: Who is outside and who is inside? It was noted that the Texas legislature meets biennially for 140 days in odd numbered years. Due to the infrequency of legislative sessions and minimal remuneration, members are part-time legislators. As a result, House and Senate members must be financially secure or engaged in other full-time endeavors. Thus, we find that majority of Texas legislators are engaged in business or legal professions.

In addition, although age, residency, and citizenship are the only formal qualifications required for serving as a member of the Texas House or Senate, informal qualifications, particularly wealth or access to substantial financial resources, are equally important for individuals seeking successful election. A recent article in the Texas Tribune revealed the cost of running for a seat in the Texas House or Senate is upwards of $100,000 and, in some cases, much more.

Moreover, Texas has specific prohibitions against other public employees, like public school teachers, serving in the legislature. So, individuals on the frontlines of delivering education who likely have valuable insights to offer are forbidden from participating in process of crafting education policy.

Professional organizations such as the National Education Agency, Texas State Teachers Association, and Texas Faculty Association, just to name a few, may provide "need to know" information and track relevant legislation for their members, but the cost

of joining and maintaining active membership by paying annual dues is often cost prohibitive.

So, who are the individuals taking part in crafting Texas education policy that impacts, directly or indirectly, all residents of the second most populous state in the nation? Demographic data provides an answer. As noted, the Texas legislature is composed of 181 members, 150 in the House and 31 in the Senate. Of this number, there are only 41 Hispanics serving. So, although Hispanics, as the second largest racial-ethnic group constitute 39% of the state's population, they account for only 23% of the state's legislators. More troubling is the composition of House and Senate legislative committees with jurisdiction on education. Hispanics constitute only 14% of membership on these critical committees.

It is important to note here, however, that the Senate Hispanic Caucus and the Mexican American Legislative Caucus (MALC) have been and currently are working toward improving outcomes for Hispanic students. MALC began in 1973 and has grown to include 41 current House members with Representative Rafael Anchia serving as Chairman. The Senate Hispanic Caucus began in 1987 and is now composed of 11 members with Senator Sylvia R. Garcia serving as chair. These caucuses represent important organizational efforts at targeted policy reform. Though they have experienced a measure of success, most recently in the 81st legislative session when the caucus advanced and passed House Bills 51 and 2504, they continue to fight an uphill battle as a small minority of the legislative majority.

Practical Pathways for Educator Action. Given the formal structures that limit access to legislative service for educators and residents of average means and Hispanics

more specifically, what are alternative pathways for action? 16th century English philosopher, Sir Francis Bacon wrote "knowledge is power." With this quote in mind, there are several possible pathways for action that could serve to disseminate critical information in a timely manner that would allow educators or other stakeholders to effectively engage in the process. First, school districts, colleges, and universities could dedicate a portion of their limited resources to track and report on the status of education policy as it proceeds through the legislative process. In addition to providing this valuable information, guidelines that inform educators "how" to get involved could be provided. Second, community organizations could collaborate with these institutions to collect and disseminate this type of information. Third, professional organizations could make this information available free of charge to non-members via their websites. These are but a few possible pathways to inspire open discussion among educators and other interested individuals. The goal of this study was to reveal current limitations in lawmaking that yield less than desirable outcomes in education policy. It is the author's hope that the dissemination of this knowledge will inspire action.

Further Research

The issue of power, who holds it and how it is wielded, was not considered in this study to maintain focus on structure. Future research could incorporate this dynamic and flesh out its implications. In addition, how secondary and post-secondary institutions respond to legislative mandates and agency rules to implement college and career readiness would be prove informative. More specifically, this author intends to investigate how Texas Institutions of Higher Education with Hispanic Serving Institution status have responded to college and career readiness using a case study approach. Given

a nearly twenty-year history of legislative efforts and the rapidly growing Hispanic population in the state, there will ample opportunities for continued research.

III. ARBITRARY AND CAPRICIOUSE BY DESIGN: NORMATIVE ADMINISTRATIVE LAW PRINCIPLES AS A MEANS TO EVALUATE TEXAS COLLEGE AND CAREER READINESS RULES WITH AN EMPHASIS ON HISPANICS AND IMPLICATIONS FOR EDUCATORS[7]

Abstract

This article reports on the structural limitations of crafting Texas administrative rules that implement college and career readiness standards with a focus on the impact to Hispanic students and the implications for Texas educators and residents. Archival data from the state's education code, the Texas Government Code, the Texas Administrative Code (TAC), the Texas Register, publications of the Texas Education Agency (TEA), the State Board of Education (SBOE), and the Texas Higher Education Board (THECB), as well as relevant case law were analyzed using normative administrative law principles to identify these limitations. The study reveals that education policy rules, though they impact a vast statewide population, carry no major rule status; that these rules are crafted under strict time constraints; and, that the rules are generally considered substantially compliant when judicially reviewed. Recommendations for structural adjustments and increased educator input for state rulemaking are made.

Overview

In 2017, Latinos[8] comprised approximately 52% of all secondary school children in Texas (Ross, 2015). Moreover, Latinos are the largest and fastest growing minority group in the United States. Nevertheless, Hispanic postsecondary degree attainment lags far behind the general population. In 2007 only 11% of all U.S. Hispanics aged 25 to 29

[7] For the purpose of this chapter, standard legal citation is used.

[8] The term Hispanic is used interchangeably with Latino for consistency in reporting demographic data provided by the U.S. Census. Hispanic/Latino refers to a person of any race, ethnic origin, gender, or self-identification from a traditionally Spanish speaking household. See https://www.census.gov/quickfacts/TX#qf-headnote-b

held a college degree versus 28% of all young adults in the United States (Provasnik, 2007). If Latino college graduation rates don't improve significantly, the negative economic consequences will ultimately be felt across the nation.

Traditionally, Hispanic college access and participation have received more attention in policy circles than persistence and completion (Santiago & Reindl, 2009); however, on a national basis Latino high school graduates enroll in college at rates similar to non-Hispanic Whites and other ethnic groups (Fry, 2002). Therefore, improving the college graduation rates of Latinos already enrolled is the fastest and most efficient way to increase the population of Latino college graduates, yet few studies have focused on how public policies can influence college completion for Latinos and the examination of policy effects on undergraduate learning is in general understudied (Hearn & Holdsworth, 2002). Moreover, the subject is of increasing importance as state budgets tighten and as the US attempts to regain worldwide leadership in the percentage of its population holding a postsecondary degree, while at the same time the postsecondary demographic make-up continues to shift toward larger Latino populations (Snyder, Dillow, Hoffman, & National Center for Education, 2009).

Among the obstacles to increased Latino college enrollment and graduation rates, educators recognize that secondary students' readiness upon leaving high school is critical. This article explores how Texas agencies ---the Texas Education Agency (TEA), with the State Board of Education (SBOE) at its helm and the Texas Higher Education Coordinating Board (THECB)—have implemented statutes intended to improve readiness among Texas secondary school students. The rules these agencies enact to effectuate readiness-related statutes will determine to a significant degree whether the

Texas Legislature's efforts to improve student readiness, especially among Latino students as the second largest and fastest growing racial-ethnic group in the state. The ongoing process of enacting rules to carry out readiness legislation is already well underway, as this article suggests.

Method: Applying Normative Administrative Law Principles to Structure

Very little statistical information, however, exists to assess whether readiness legislation and rules in Texas promise to be effective. In the absence of such data, this article employs concepts from Texas administrative law to provide insight into the process Texas educational agencies used to create rules in response to the legislature's readiness legislation. Further, this article assesses the likelihood that some of the key readiness rules will be effective in the same way a Texas court would: by applying standards of review Texas courts would use if one or more of these rules were challenged in court. Such standards of review require courts to assess agency rules to answer the same kinds of questions the education community would raise: 1) whether some of the key readiness rules have a sound factual and legal basis, 2) whether they resulted from effective interaction with large segments of the people and institutions who will have to abide by the rules, and 3) whether the agencies responded to the questions the regulated community raised and crafted rules that responded so such questions. The same processes that Texas administrative law requires agencies to use when formulating rules – and courts to use when evaluating whether rules comply with legislative intent and due process – provide useful tools for educators who seek to evaluate the quality of agency rules enacted to carry out readiness legislation.

Introduction to College and Career Readiness

Among the urgent issues confronting the state's public education system in the last two decades, none has received more sustained attention from the Texas legislature than college and career readiness: the attempt to align high school curriculum, testing, and teaching with the expectations of employers, technical schools, community colleges, or universities awaiting students after high school. (The advent of community college courses taken for credit during high school also means that "readiness" includes adequate preparation for college courses that will build on basic college-level concepts a student should learn while still in high school). Statistics paint a sobering picture of the readiness issues that Texas secondary students confront on a variety of fronts, including especially a host of language-related problems that Latino students face. [9]

The most important legislation that the Texas legislature has passed to address readiness issues are HB 1 (79th Legislature), HB 3 (81st Legislature), HB 5 (which legislature?), 2549 (83rd Legislature) and HB 2628 (84th Legislature), collectively referred to as "College and Career Readiness Standards." Subsequent sections of this article explain how this legislation became codified in the Texas Education Code.

This article seeks to reach beyond the statutes that sought to create readiness measures for Texas schools, however. At issue here are the rules that the Texas Education Agency and the Texas Higher Education Coordinating Board have enacted in response to the legislative mandates these agencies received in the readiness statutes. Although the

[9] Natalie Gross, "A Push for More Latino College Graduates in Texas, But Not by Business As Usual," Blog: Latino Beat, Education Writers Association, October 27, 2016. https://www.ewa.org/blog-latino-ed-beat/push-more-latino-college-graduates-texas-not-business-usual. See also "Latino Population Growing at Texas Colleges, White Population Falling," San Antonio Express News, August 4, 2017. https://www.expressnews.com/news/local/article/Fewer-white-students-enrolling-in-Texas-s-largest-11733923.ph.

agencies have not yet completed the rulemaking process, the rules enacted to date provide a more specific, concrete picture of the changes Texas will make to address the challenges that readiness presents for the educators and students of our state. This article will apply some of the central principles that Texas courts would use to evaluate the legitimacy of agency rules.

One may question the wisdom of delving into the Texas Administrative Code to evaluate educational readiness policy as forfeiting the forest in favor of the trees. To understand the relevance of the agency rulemaking process to this area of public policy, however, one needs to consider the relationship between legislation and the rules that Texas agencies research and enact in response to the mandates the legislature imposes on them. Cornelius Kerwin, a leading authority on the federal rulemaking process, refers to this legislative mandate as the "legislative hammer," [10] and describes the threshold importance of agency rules as follows:

> Rules provide specific, authoritative statements of the obligations the government has assumed and the benefits it must provide. It is to rules, not to statutes or other containers of the law, that we turn most often for an understanding of what is expected of us and what we can expect from government. [11]

Administrative Rulemaking

Like the Federal Level, but More So: Texas Lawmakers' Incentives to Wield the "Legislative Hammer." Subsequent sections of this article will explain in more detail the agency rulemaking process in Texas. Even without a more complete understanding of the rulemaking process, however, some of its fundamental advantages

[10] Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy*, Fourth Edition, CQ Press, 2011, p. xi (Preface)
[11] Kerwin, supra, p. 76

are apparent. By empowering agencies with technical expertise to engage in fact finding and then draft rules that apply equally to all members of a regulated community, the legislature is able to assign problems to agencies with the technical expertise that legislators do not possess. The law governing agency rulemaking requires public notice at each phase of the rulemaking process, public comments to which the agency must respond, legislative approval of the proposed rules, and judicial challenges to rules once finalized. In principle, at least, these procedural safeguards mean that the legislature can assign an agency the responsibility for creating a rule with public, legislative, and judicial scrutiny safeguards against arbitrary agency decision making.

But the advantages that agency rulemaking offers to lawmakers extend beyond institutional competence and procedural safeguards against arbitrary decisions. Kerwin argues:

> By resorting to widespread delegation of legislative power to the rulemaking process, Congress both frees and indemnifies itself. Rather than spending all their available time in drafting, debating, and refining statutes, members of Congress are free to engage in other activities, like getting reelected.[12]

What Kerwin observes on the federal level applies with even greater force in Texas, where the legislature meets once every two years and must confront hundreds of bills in a session that lasts just a few months. Texas legislators who often warn against the evils of bureaucracy actually rely heavily on state agencies to govern. Kerwin points out a second practical advantage to rulemaking:

> [M]embers of Congress realize that their votes on very specific legislative proposals that clearly identify winners and losers can erode support or foster outright opposition. As others have noted, *this provides powerful incentives for Congress to*

[12] Kerwin pp. 32-33:

> *remain vague, leaving the specific, painful, and politically dangerous decisions to the agencies.*[13] (Emphasis added).

Kerwin tempers this observation by noting that legislators remain free "to intervene in ongoing rulemakings and to review completed rules,"[14] so that they retain some responsibility even after directing agencies draft them. But the fundamental problem remains, whether at the federal or state level: if the legislature can assign agencies the task of drafting specific, contentious rules, legislators have less incentive to write clear, specific statutes.

The result of these incentives to rely on agency rulemaking is clear in Texas: agency rules play a pervasive role in the day-to-day function of state government. Over 200 Texas administrative agencies render daily decisions that affect the public.[15] As long ago as 2001, agencies proposed or adopted 17,927 rules totaling 11,116 pages in the Texas Register alone.[16] Administrative agencies receive less attention than the other three branches of government, but in Texas they have the greatest impact on the lives of average residents.[17]

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[13] Kerwin pp. 32-33.
[14] Ibid.
[15] James Hannagan, *Judicial Review of an Agency Decision: The Implications of the Texas Supreme Court's Landmark Mega Child Care, Inc. Decision*, 7 TEXAS TECH ADMINISTRATIVE LAW JOURNAL 369, 370 (Summer, 2006 Comment).
[16] Estimate based on Texas Register and Texas Administrative Code by Dan Procter, Director, Texas Register (Mar. 29, 2002), cited in James Hannagan, *Judicial Review of an Agency Decision: The Implications of the Texas Supreme Court's Landmark Mega Child Care, Inc. Decision*, 7 TEXAS TECH ADMINISTRATIVE LAW JOURNAL 369, 370 (2006) A legislative rule adoption includes formal adoption of a new rule or an amendment to an existing rule. *Id.* Of the 17,927 rules, 6,143 were legislative rule adoptions. *Id.*
[17] Franklin S. Spears & Jeb C. Sanford, *Standing to Appeal Administrative Decisions in Texas*, 33 Baylor L. Rev. 215, 215 (1981). "'The rise of administrative bodies probably has been the most significant legal trend of the past century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." Id. (quoting F.T.C. v. Ruberoid Co., 343 U.S. 470, 487 (1952)); see also Curtis P. Cote, Note, *Continental Casualty Insurance Co. v. Functional Restoration Associates: Stop Sign or Signpost for Receiving Judicial Review in a Medical Benefits Dispute*, 52 Baylor L. Rev. 1017, 1018 (2000) (cited in Hannagan, supra at 370).

The rules that the Texas Education Agency (TEA) and the Higher Education Coordinating Board (THECB) ("education agencies") have promulgated thus far to effectuate the new readiness provisions in the Texas Education Code are many. For 21 new or amended statutory provisions, Texas education agencies have enacted approximately 126 rules codified in the Texas Administrative Code. The number of readiness-related rules may increase. The disparity between the number of broadly-worded readiness provisions the Legislature enacted and the more concrete, specific agency rules underscores the fundamental reality: Texas agencies use their rulemaking authority to implement statutes and prescribe specific standards parties must satisfy in order to comply with the law.

For purposes of this article, the large number of agency rules enacted to implement the Legislature's readiness measures makes it necessary to select specific rules that provide the most helpful insights into the role rulemaking has played thus far in carrying out this educational policy. Subsequent sections of this article will address specific issues of special importance. In order to analyze some of the rules most critical to readiness policy, however, one needs to understand the rulemaking process that Texas law requires agencies to follow.

The Federal Administrative Procedure Act and its Texas Descendant. Texans are quick to point out that the state did not adopt its system of administrative law from federal law.[18] However, the conceptual basis for Texas administrative law does in fact find its origin in the federal Administrative Procedure Act (federal APA), which

[18] *See, e.g.*, Pieter Schenkkan, "The Trials and Triumphs of Texas Administrative Law," Advanced Administrative Law Conference, State Bar of Texas, September 22-23, 2005, pp. 6-8 ("The Texas APA looks nothing like the federal APA"). Like many other aspects of Texas culture, a bold but unsupportable claim.

Congress enacted in 1946 in response to a thorough study of federal agency practices that President Roosevelt commissioned before the second world war. [19]

The authors of the federal APA sought to create a consistent, legally binding system for all federal agencies to follow in conducting their core functions: rulemaking, permitting, adjudication, and enforcement.[20] With respect to each of these agency functions, the federal APA tried to increase transparency, predictability, and opportunities for participation in almost every aspect of agency decision making.[21] If an agency decision regarding a rule, permit, dispute resolution, or law enforcement could remove a benefit or impose a burden on regulated entities, the authors of the federal APA devised mechanisms to provide due process for those potentially affected.[22] The federal APA sought further to create a uniform system of judicial review to enable parties aggrieved by an agency decision to appeal in federal court on the basis of standards of review that challenged the legal or factual basis of an agency's action.[23]These fundamental principles – predictability, transparency, extensive opportunities for public participation, and due process for affected parties—form the basis of Texas administrative law as well, despite some differences between the federal and Texas statutes.

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[19] William H. Allen, *The Durability of the Administrative Procedure Act,* 72 VA. L. REV. 235, 235-52 (1986).
See also M. McNollgast, "The Political Origins of the the Administrative Procedure Act," *The Journal of Law, Economics, and Organization,* Volume 15, Issue I, March 1, 1999, pages 180-217, https://academic.oup.com/jleo/article-abstract/15/1/180/827395.
[20] 5 U.S.C. sections 551-706.
[21] Laws: Administrative, "Facts About the the Administrative Procedure Act,"https://administrative.laws.com/administrative-procedure-act.
[22] Laws: Administrative, "Facts About the the Administrative Procedure Act,"https://administrative.laws.com/administrative-procedure-act.
[23] Federal APA articles

Legal experts reach different conclusions when asked to what extent the federal APA achieved the objectives just outlined. There is widespread agreement, however, that the emphasis on public participation, transparency, and due process for the general public and regulated parties sought to achieve a number of objectives. Beginning with Roosevelt's commission of a study by the Department of Justice, those who reformed administrative law sought to make agency practice conform to democratic principles. Regardless of how requirements like transparency, public participation, and due process affected the ability of agencies to conduct business, the framers of the federal APA believed such practices were necessary if agencies were to assume increasing responsibility for governing the country. In addition, many federal courts that subsequently interpreted the APA's requirements tended to believe something else: rigorous public participation in agency process would not just produce a more democratic government, but would also improve the quality of agency decision making itself. Better process would yield a better result. [24] Subsequent sections of this article will apply this second assumption to evaluate some of the rules that Texas education agencies have produced to effectuate readiness statutes.

From the Federal to the Texas Administrative Procedure Act. Texas first enacted a uniform system of administrative law nearly 30 years after Congress enacted the federal APA and almost 15 years after an organization of states had already drafted two different versions of a so-called "model administrative procedure act "intended as

[24] One of the most famous articulations of the belief that faithful adherence to notice and comment procedures --and maximum interaction between the agency and the public --will produce the best result can be found in *Natural Resources Defense Council, et al. v. United States Regulatory Commission, et al.*, 547 F.2d 633 (D.C. Cir. 1977) (Bazelon, J., concurring).

a guide for states to use when devising their own statutes.[25] Texas adopted its first version of such a law in 1975: the Administrative Procedure and Texas Register Act (APTRA). Pieter Schenkkan, a Texas administrative law expert, describes the changes this statute brought to Texas agency practice as follows:

> The [Texas] APA [or APTRA] transformed Texas government. The Texas APA brought law – written uniform standards and processes – to Texas agency adjudications, agency rulemaking, and judicial review. The Texas APA changed government more fundamentally than any amendment to the Texas constitution.[26]

In 1993, the Texas Legislature codified the APTRA into the Texas Government Code and renamed it the Texas Administrative Procedure Act. The Texas Legislature intended chiefly to codify the law; very few substantive changes appear in this second version.

The Texas Rulemaking Process. Both the federal and Texas administrative procedure acts impose standard procedures on core agency functions: rulemaking, permitting, adjudication, and enforcement. Because this article focuses on rulemaking by the TEA and THECB, this discussion focuses on the legal requirements Texas agencies must satisfy to research, draft, and enact rules.

Requirement One: Statutory Authorization. Because the legislature creates agencies to carry out the purposes expressed in its statutes, agencies only have the powers that statutes (called "enabling acts") confer on them. There is no such thing as an inherent, discretionary agency power. If a court concludes that an agency has exceeded its statutory powers when enacting or enforcing rules, the agency has committed a so-called *ultra vires* act: illegal and void at its inception.[27]

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[25] Schenkkan, *The Trials and Triumphs of Texas Administrative Law, supra.*
[26] Schenkkan, *supra.*
[27] *See, inter alia, Director of Dep't of Agric. & Environment v. Printing Industry Ass'n*, 600 S.W.2d 264, 265-266 (Texas 1980).

Texas courts are more likely than federal courts to conclude that agencies can construe general statutory language to authorize a specific rule.[28] Texas courts also adhere to the statutory construction principle that, if a statute grants an agency the power to achieve a broad objective, the statute also grants the powers implicitly necessary to achieve the objective: this conclusion derives from the principle that the legislature is never presumed to do useless or foolish things, and also from the principle that the legislature is not required to predict in the statute every possible power that that may be necessary to carry out the legislative objective.[29] Such interpretive approaches to enabling acts translate into a broader range authority for Texas agencies. The rules that the TEA and the THECB have enacted under recent readiness amendments to the Texas Education Code provide an example of this broad authority.

Requirement Two: Only State Agencies Enact Statewide Rules. A state agency includes a public regulatory entity with the power to regulate state wide through rulemaking, licensing, contested case hearings. Regardless of its size or the scope of its powers, a governmental entity without uniform statewide regulatory power cannot enact rules under the Texas Administrative Procedure Act. Universities, counties, cities, school districts, special purpose districts, or state agencies without rulemaking authority possess no Texas APA rulemaking authority, although they may enact rules under other legal

[28] Texas courts have concluded, for example, that the general grant of authority to the TCEQ in Texas Water Code section 5.012 authorizes the TCEQ to enact very specific rules governing water quality. The statute reads. The statute simply provides that the TCEQ "is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment."
Texas Water Code §5.012

[29] Ronald L. Beal, "The Art of Statutory Construction, Texas Style", 64 BAYLOR LAW REVIEW 340, 360-376 (2012). For the impossibility of foreseeing every possible power needed to carry out a legislative objective, see RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE sections 2.1, 2.4 (14th Ed. 2011)

provisions that apply inside their political boundaries. In the context of education, the Texas Education Agency (TEA) the State Board of Education (part of the same organizational structure as the TEA) and the Higher Education Coordinating Board (THECB) meet the definition of a state agency under the Texas Government Code.

The simple fact that the Texas Legislature conferred rulemaking authority on its readiness provisions to state-level agencies raises possible questions. If the statewide agencies are in the process of implementing rules that impose requirements on local school districts, officials, teachers, and students, to what extent did the agencies solicit of these regulated parties to achieve the best outcome? This article seeks to address the so-called "notice and comment" process that Texas administrative law requires agencies to gather information and criticism from regulated parties and then tries to evaluate how effective this notice and comment process proved when certain key readiness rules were enacted.

Requirement Three: "Legislative" and "Non-Legislative" Rules Follow Different Statutory Procedures.

Texas' Definition of a Rule. The Texas Government Code defines a "rule" subject to the requirements of the Texas Administrative Act as an "agency statement of general applicability that... implements, interprets, or prescribes law or policy; or…describes agency practice or procedure" and which "includes [a] rule amendment or repeal." [30]This definition would appear to encompass almost any official statement from a Texas agency, especially when compared to the federal definition.[31] In reality, however, both federal

[30] Texas Government Code Section 2001.003(6)(A)-(C)

[31] Federal law excludes "interpretive" rules and statements of agency policy from the categories of rules that must comply with federal Administrative Procedure Act requirements.

and state law impose different procedural requirements on an agency seeking to enact a rule based on how a rule will affect regulated parties.

Legislative Rules. In order to appreciate the statutory definition of an agency rule in Texas and whether an agency must follow the "notice and comment" procedure when enacting it, one first needs to understand how Texas differentiates between "legislative" and non-legislative" rules.

In the vocabulary of administrative law, a "legislative rule" implements a statutory requirement and has a present, concrete, binding effect on a regulated party: maybe such a rule increases a fine for noncompliance, or imposes a larger number of prerequisites before a student can take a course, or require teachers to acquire a new kind of certification, or requires school districts to adopt new security measures in light of recent threats to students. In each case, the regulated person or entity must comply with the rule, --which requires additional time, money, employees, or procedures—and the failure to comply with the rule results in some of kind of penalty. Such rules are called "legislative" because they most closely resemble an agency's function as a legislature. Creating rules with a present, binding effect is referred to as the agency's "quasi-legislative" function. [32]

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[32] "Through legislative rules, administrative agencies provide new law, rights, or duties which bring a change in existing laws. Legislative rules also impose fresh rights and obligations on public.[i] Administrative rulemaking in the form of legislative rules creates a substantial impact on the people to whom the rules apply. Therefore, legislative rules are also known as substantive rules.[ii] Legislative rules are generally implementary rules to existing laws.
"Legislative rules are binding on all individuals and courts. These rules have the effect of law and can be enforced accordingly. The primary criterion to distinguish a legislative rule from the other rules is its binding effect on courts and individuals. A legislative rule does not leave the agency and its decision makers free to exercise discretionary power."
U.S. Legal, "Legislative Rules," https://administrativelaw.uslegal.com/administrative-agency-rulemaking/legislative-rules/, citing *Citizens for Better Forestry v. United States Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007), *Williams v. Van Buren*, 117 Fed. Appx. 985 (5th Cir. Tex. 2004), and *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987). Texas law adheres to these principles governing legislative rules.

By contrast, a "non-legislative" rule also implements a statute in some way, but such a rule does not impose a new requirement on regulated parties. In principle, a non-legislative rule simply provides internal guidelines for the management of an agency or interpret the meaning of a statutory provision, for example, but results in no additional expenditure of resources, or training, or fees, or some other present, concrete, binding effect on regulated parties external to the agency.

Determining whether a rule is legislative or non-legislative can be more difficult than one would imagine. If an agency adopts a rule that simply interprets a statute, but the new interpretation effectively results in an added burden on a regulated party, a court may conclude that the agency should have acknowledged the interpretive rule as having a present, binding, concrete effect: that is, the rule may be interpretive, but is legislative in nature and requires the agency to follow legal procedures spelled out in statute to protect the due process rights of all concerned.

The distinction between a legislative and non-legislative rule reflects the concern of the administrative law to protect regulated parties from burdens imposed by unelected officials in executive branch agencies. The due process protections imposed on administrative rules result in added time, expense, and possible defeat in agency adjudication or in court for state agencies. One observer notes:

> Even though expensive and time-consuming, most agencies dutifully observe the notice and comment process because (1) they are legally required to, (2) participation by all affected parties is essential to democratic government, (3) the rules are generally applicable, which promotes uniformity and predictability, (4) the alternative to rulemaking, case-by-case adjudicating, is even more expensive and time-intensive, and (5) a reviewing court may invalidate a rule that was improperly promulgated. The products of the notice and comment process are "legislative" rules [which] "have the 'force and effect of law"' and are legally

binding on the public [citations omitted].[33]

A survey of the rules Texas agencies have enacted thus far to implement the legislature's readiness legislation reveals that they followed the notice and comment procedure required by statute for legislative rules. For purposes of this article, the rules can be evaluated to determine whether they satisfy legal requirements designed to protect due process interests but also whether the substance of the rules satisfy a court's scrutiny of their legal and factual substance. This article posits that following the steps a court would take in evaluating key rules pertaining to readiness will help to reveal their prospects for success in carrying out legislative objectives.

Requirement Four: Legislative Rules Require Notice and Comment

Overview of Notice and Comment Rulemaking. Before the public has access to a draft, legislative agency rule in the Texas Register, rulemaking goes through an elaborate in-house process. Agency leadership must authorize the rulemaking; the legislative committee overseeing the particular agency must approve it; agency staff must conduct scientific and legal research and solicit preliminary input from the affected parties; agency staff must draft the rule and obtain the blessing of technical and management staff of the draft in much the same way as they obtained authorization to draft the rule to begin with.[34]

When the agency publishes its first notice of a proposed rule in the Texas Register, it essentially invites the public to scrutinize the scientific and legal basis of the draft rule. For example: through the course of notice and comment, the public examines

[33] Justin Lannen, "Nonlegislative rulemaking: Is Texas Moving Toward the Federal Courts' Perspective on Agency Policy Statements and Interpretive Rules?" 4 TEXAS TECH J. ADMIN. LAW 11, 116-119 (2003).
[34] Kerwin, supra, pp. 75-86.

whether a statutory provision authorizes the proposed rule, whether the policy problem the rule seeks to solve really is a problem, whether the specific solution the agency chose to address the problem was the best approach among those available. The public submits written comments to the agency and speaks at public meetings on issues like these.

The agency, in turn, evaluates the comments it receives and provides a written response in the Texas Register. The agency may also make corrections or amendments to the rule to a limited extent. Participants in the notice and comment process who are dissatisfied with the agency's response to comments or the final version of the adopted rule --also published in the Texas Register-- may request a contested case hearing, an administrative hearing conducted at the State Office of Administrative Hearings, or SOAH.

A more detailed explanation of some aspects of notice and comment especially pertinent to educational readiness rules follows.

Preliminary notice. The first notice that an agency like TEA or the HECB must publish in the Texas Register should contain, at a minimum, the following elements:

(1) the text of the proposed rule, with the agency's initial edits.
(2) The statutory provision authorizing the proposed rule;
(3) If an existing rule is to be affected, it should identify:
    (a) the statement of basis and purpose;
    (b) a concise statement of the statutory or other authority and certification that the proposed rule has been reviewed by legal counsel and found to be within the state agency's authority to adopt;
    (c) a fiscal note stating for each year of the first five years that the rule will be in effect:
        (i) the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule;
        (ii) the estimated reductions in costs to the state and to local governments.
        (iii) a note about public benefits and costs for the first five years of rule's existence….

(4) The agency must notify other governmental entities of the proposed rule, including the Legislature and Lieutenant Governor.
(5) a request for comments on the proposed rule from any interested person; and
(6) any other statement required by law….
(7) In the notice of a proposed rule that amends any part of an existing rule: an explanation of any deletions or additions. [35]

These requirements provide some indication of elements one would look for in an educational readiness rule and the information necessary to encourage public participation in deliberating what the rule should include. The preliminary notice rule serves education rules well by providing the affected members of the public with a detailed explanation of a proposed rule, its statutory basis, and the agency's reasons for proposing it.

However, the contents of the preliminary notice and perhaps some insight into why the state's administrative rulemaking requirements may be less than ideal as a vehicle for reforming state education policy. A conspicuous issue concerns the assessment of "costs" and "benefits." How can the agency balance the immediate sunk and marginal financial costs of implementing an educational program with the long-term benefits of improving the educational achievements of Texas students? What initially appears to be a logical, five-year cost-benefit analysis in reality compares inapposite "costs" and "benefits." Simply put, this analysis is not feasible.

The five-year analysis requirement in the preliminary notice raises another difficulty in the context of readiness education rules. As a subsequent section of the article explains, a set of rules seeks to enact the legislature's desire for vertical teams of educators and administrators to set readiness standards and implement them. In order to assess whether these vertical teams have enacted effective rules, one would need the

[35] Texas Government Code Sections 2001.023, .024, and .025.

teams to evaluate the rules on an ongoing basis. Yet the rules that created vertical teams and defined their duties contemplated one process, discrete in time, with the dissolution of the teams once the readiness rules were created. One is left with no means to evaluate the readiness rules on the basis of ongoing real-world data. The agency undertakes a hypothetical five-year assessment of vertical team educational standards that do not yet exist at the point in time when the agency issued its rules creating vertical teams, particularly sections 4.172 and 4.175 of the Texas Administrative Code. This article will assess this peculiar framework in the context of the "arbitrary and capricious" standard of judicial review.

Another potentially problematic issue in the administrative rulemaking process appears in a different section of the Government Code than the preliminary notice requirements. From the date that an agency first publishes a proposed rule in the Texas Register, the agency has 180 days to enact the final rule or else withdraw it from the notice and comment process. As section 2001.027 of the Government Code provides:

> WITHDRAWAL OF PROPOSED RULE. A proposed rule is withdrawn six months after the date of publication of notice of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. [36]

This provision essentially means that all of the legislative rules documented in the table attached to this article came into existence in six months. Without more, this fact does not have to indicate a problem with the process. However, when one reads the administrative history of all the readiness rules documented in the attachment to this article, one immediately realizes that, while the agencies considered public input, it was limited. The agency's responses were limited as well. Given the gravity and scope of the policies the

[36] Texas Government Code Section 2001.027.

legislature sough to implement with its readiness legislation, serious questions arise as to whether meaningful agency consideration of widespread public comment ever happened before these rules were enacted. This article will reiterate this question with regard to two particular rules: the assessment provisions in section 4.54 and the vertical team rules in sections 4.172 and 4.175 of the Texas Administrative Code.

Public Comment, Final Notice. Texas agencies have flexibility in the notice and comment process. Mindful of the 180-day limit for adopting a rule, an agency may nevertheless decide that more than one period of public comment is necessary given the complexity of the issues the rule addresses. The agency may also limit itself to one comment period but make it longer in order to "give all interested persons a reasonable opportunity to submit data, views, or arguments…"[37] The Government Code may also require the agency to conduct one or more public meetings on a proposed rule depending on the number of people who request one: "[A] [s] tate agency shall grant an opportunity for a public hearing before it adopts a substantive rule if a public hearing is requested by… at least 25 persons; …a governmental subdivision or agency; or … an association having at least 25 members."[38]

The agency is required to respond to all public comment, whether written or recorded at a public meeting. Agencies can group comments according to subject matter and answer these groupings, but the substance of all comments must be addressed in the agency's response to comments. Responses appear either in a notice published in the Texas Register prior to the final notice adopting the rule or in the final notice itself.

[37] Texas Government Code Section 2001.029(a)
[38] Texas Government Code Section 2001.029(b)

The Government Code contains specific requirements for the contents final notice, which contains the final version of the rule as the agency adopted it. For an education agency, the elements that would apply are as follows:

> (1) The full text of the final version
> (2) The "reasoned justification" and "statement of basis and purpose," which together consist of the following:
>
> (a) a summary of all public comments, along with the agency's responses;
> (b) a summary of the factual basis supporting the rule;
> (c) the agency's rationale for rejecting the opposing public comments based on the facts and other considerations;
> (d) a concise statement of the statute authorizing the rule and why agency believes it applies; and,
> (e) a certificate that the agency's legal counsel reviewed rule. [39]

If an agency publishes a final notice adopting a legislative rule that contains the elements outlined here, the rule becomes effective and enforceable when it appears with a table of contents in the Secretary of State's Office.

Forms of Appeal and Possible Remedies for Opponents of the Rule. Opponents of the rule may believe the rule is invalid for evidentiary reasons: the facts the agency considered fail to support the conclusions the agency reached in devising the rule. Objections to the rule based on the sufficiency of the factual basis for the decision fall under one of two possible so-called standards of review: the "substantial evidence" or "arbitrary and capricious" rule, discussed below.

Opponents of a newly enacted rule may also object on the basis that it violates the law: the agency failed to follow the procedural requirements the law imposes on rulemaking or exceeded the legal authority the legislature conferred on the agency.

[39] Texas Government Code Section 2001.033.

Opponents of the rule may also allege that the substance of the rule actually violates a statute or the state or federal constitution.

Strictly legal objections to a rule fall into two possible categories: "validity" or "applicability" challenges. A validity challenge alleges that the words contained on the face of the rule demonstrate that it is legally invalid as to anyone the agency would apply the rule. Without examining the facts of any specific regulated party, one can see from the face of the rule that it would be invalid applied to anyone. A rule that forbade regulated parties from making negative comments about the agency in public would violate the first Amendment rights of anyone doing business with the agency, for example. Applicability alleges that, whether or the rule is invalid on its face as to anyone, it would violate the legal rights of a specific individual or group of individuals. A specific type of business that would have to violated a statute governing its manufacturing process in order to comply with the agency's rule could argue applicability, for example.

A person who alleges a procedural, statutory, or constitutional limitation, whether in terms of validity or applicability, may seek a remedy in Texas district court immediately after the rulemaking is complete: declaratory judgment. The Texas Declaratory Judgment Act and Administrative Procedure Act[40] enable someone to request from a district court a declaratory judgment that the rule is illegal. This remedy enables the court to define the rights of the parties—in this case the agency and the opponent of the rule—without regard to the factual basis of the new rule. The parties stipulate to the facts and focus solely on the legal basis of the rule.

[40] TEXAS CIV. PRAC. & REM. CODE chapter 37; TEXAS GOVERNMENT CODE section 2001.038.

If the opponents of a new rule challenge it not only on the basis of a legal issues but also the agency's assessment of the facts supporting the rule, opponents can take an additional step at the administrative level before seeking to file in court: a quasi-judicial administrative proceeding—called a contested case hearing – either before a designated hearing officer inside the agency or at a separate agency called the State Office of Administrative Hearings (SOAH). The education agencies made the subject of this article forward some of their contested case hearings to in-house hearings examiners and some to SOAH depending on the subject matter.[41]

Further, the agency that enacted a rule - whether on education or some other policy - is not required to grant a request for a contested case hearing, whether in-house or at SOAH, but will likely do so if certain circumstances are present: for example, if the rule has never been issued before or generates widespread public concerns about cost or safety.

Administrative law judges (ALJs), preside over contested case hearings at SOAH.[42] ALJs enjoy broad range of powers that enable them to review the agency's legal and factual basis for the decision to adopt the rule. ALJs can administer oaths to live witnesses and receive live testimony that becomes part of an evidentiary record transcribed by a stenographer. ALJs can consider motions the parties file and issue orders granting or denying them, and can evaluate the agency's record. ALJs conduct hearings based on the same principles of civil procedure and rules of evidence that govern court

[41] Compare, e.g., 19 Tex. Admin. Code section 157.1071(a) ("All requests for hearing in which the Texas Education Agency is a petitioner or respondent shall be heard by the State Office of Administrative Hearings (SOAH)" with 19 Tex.Admin. Code section 157.1072, "Hearings Brought Under Texas Education Code Ch. 21 subchapter G (Hearings before in-house hearings examiner)

[42] For the provisions governing contested case hearings at SOAF, *see* Tex. Gov't Code sections 2001.081 through 2001.147.

proceedings. In essence, a contested case hearing provides the parties with due process to challenge any legal or factual basis upon which the agency based its rule. At the contested case hearing phase, the parties supporting the agency's decision bear the burden of proof to demonstrate that the rule has an adequate factual and legal basis. After the ALJ considers the arguments and renders her decision, she makes a recommendation to the head of the agency—usually a three-member commission in Texas—either to affirm the rule or reverse it for further proceedings at the agency.[43]

If the ALJ at SOAH recommends that the agency affirm the rule[44] -- or if the agency adopts the rule despite a negative finding from a contested case hearing at SOAH – parties opposed to the rule who lost at the administrative hearing may seek review in a district court; in turn, a Texas Court of Appeals and ultimately the Texas Supreme Court can review the legal objections to the rule. The standard of review that applies to a particular rule depends on the agency and the statute under which the rule was enacted. "De novo" review requires the court to consider the facts and the law supporting the rule as if no administrative hearing had ever taken place. The court hears the witnesses, evaluates the evidence, and determines the legality of the rule on a blank slate.[45]

"Substantial evidence" review, by contrast, requires the court to evaluate the record that the agency has already created in the rulemaking and contested case hearing processes. The court defers to the agency's decision making if it "substantially complied" with the law, which means the agency acted in good faith and produced a rule consistent with the legislative intent. The court must confine its review of the rule to the

[43] Tex.Gov't Code sections 2001.058 and 2001.062 (Texas Government Code procedure for the ALJ to make a recommendation to the agency after she renders a decision on the contested case hearing).
[44] *See* TEX.GOV'T CODE section 2001.058 and .062.
[45] Texas Government Code Section 2001.173.

evidence in the agency record absent specific exceptions. Only if a rule clearly violated a procedural or substantive law or the constitution, or if the factual basis of the rule indicates that the agency lacked substantial evidence or acted arbitrarily and capriciously when it enacted the rule, will the court reverse the agency's decision. The Texas Government Code summarizes these circumstances under which a court may reverse an agency's rulemaking decision and remand it for further consideration as follows. A court can reverse a rule that is:

> (1) In violation of a constitutional or statutory provision;
> (2) In excess of the agency's statutory authority;
> (3) Made through unlawful procedure;
> (4) Affected by other error of law;
> (5) Not reasonable supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[46]

Further explanation of these last two standards of review may prove helpful given that they will inform this article's evaluation of educational readiness rules. This article relies in part on insights from federal courts regarding administrative standards of review when they provide helpful guidance regarding Texas education law.

The Substantial Evidence Standard. Substantial evidence review can refer broadly to any review of an agency decision, whether by an administrative law judge or a reviewing court on appeal, that evaluates the agency's assessment of the evidence in the record that caused it to formulate the rule. Substantial evidence can also mean the specific standard of review that an ALJ or reviewing court employs to evaluate the adequacy of the evidence supporting the rule. This more specific meaning of substantial review simply asks whether a reasonable person could conclude there is "more than a

[46] TEX. GOV'T CODE sections 2001.174 and .175.

scintilla" of evidence to support each element of the rule. [47] The substantial evidence rule provides a strong indication of the deference reviewing courts show to administrative decision making. The issue is not whether the agency reached the best possible answer based on a preponderance of the evidence; the question is simply whether a reasonable person could conclude that more than the statutory minimum of evidence required to support the rule exists.

The Arbitrary and Capricious Standard. The arbitrary and capricious standard of review also examines the adequacy of the evidence upon which the agency rested its decision, but focuses on how the agency analyzed the evidence in the record to reach its conclusions. The arbitrary and capricious standard does not simply ask whether the agency has complied with the legal requirements for enacting a rule. Instead, it asks specific questions about how the agency has gathered facts and assessed expert opinions based on those facts. For example: assume that, based on the factual record and competing expert testimony, the agency may conclude that four different approaches to a proposed rule exist.

The factual record and expert assessments may indicate that two of the four possible outcomes have evidentiary support and are within the spectrum of accepted scientific opinion. By contrast, the court may conclude that the third and fourth possible rules that would result from the record and expert assessments lack the minimum necessary factual support or rest on scientific opinions outside the mainstream. If the agency adopted a rule based on the third or fourth assessment of the facts that the court considered an outlier, the agency acted in an arbitrary and capricious fashion.

[47] A "scintilla" is "a little bit." See legal sufficiency discussion in *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

In *Motor Vehicles Mfg. Ass'n v. State Farm Mutual Automobile Insurance Co.*,[48]the United States Supreme Court provided an excellent explanation of the arbitrary and capricious standard and provided examples that help make the standard more concrete. This explanation is consistent with Texas law:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.[49]

The Supreme Court enumerated several factual situations in which a court would conclude that an agency had acted arbitrarily and capriciously:

> Normally, an agency rule would be arbitrary and capricious if the agency (1) *has relied on factors which Congress has not intended it to consider*, (2) *entirely failed to consider an important aspect of the problem,* (3) *offered an explanation for its decision that runs counter to the evidence before the agency,* or (4) *is so implausible that it could not be ascribed to a difference in view or the product of agency expertise* ... We may not supply a reasoned basis for the agency's action that the agency itself has not given. (Emphasis and numbers added). [50]

The Texas Administrative Procedure Act (Chapter 2001 of the Texas Government Code) contains a similar outline of agency decisions that our state courts consider to be arbitrary and capricious.[51]

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[48] 463 U.S. 29, 42-43 (1983).
[49] State Farm, 463 U.S. at 42-43.
[50] Ibid.
[51] Courts evaluate substantial compliance under the Texas version of the arbitrary and capricious standard. There is no substantial compliance if:
(a) Agency omitted from its consideration a factor the legislature required; (b)agency included an irrelevant factor in its consideration; (c) agency reached a completely unreasonable result after weighing the relevant factors; (d) agency acted without regard to guiding principles such as other existing rules, statute, or the constitution.

State Farm's questions outlined above speak not only to whether the rule passed legal muster, but also whether the rule resulted from a comprehensive evaluation of the facts by the agency that will affect the success or failure of the rule. As a result, the questions a court asks when it subjects an agency's rule to the arbitrary and capricious standard parallel the questions one would ask to determine if the rule has a sound basis that will allow it to succeed as policy. In the context of the education readiness rules this article addresses, the arbitrary and capricious standard provides a useful vehicle to assess the possible utility of rules that have not yet received an empirical evaluation, whether in the form of statistical studies or otherwise.

In *State Farm,* one of the factors the Supreme Court identified that could cause an agency to act arbitrarily and capriciously when it adopts a rule is the complete "failure to consider an important aspect of the problem." This category of arbitrary and capricious decision making suggests not only that an agency may have overlooked an entire category of information that would affect how an agency approached a rule. It also suggests that the agency's blind spot could have resulted from faulty procedure that led to inadequate fact gathering methods. In other words, the agency's *procedural* errors in gathering and assessing information may have resulted in *substantive* errors. Ordinarily, an agency's failure to follow the procedural requirements outlined in the federal or state administrative code would be considered a legal error by the agency. If a court concludes that an arbitrary and capricious decision on the substance of a rule resulted from a procedural failure to gather evidence rigorously, the substantive and procedural errors dovetail. The lackluster procedure an agency uses to gather information upon which to formulate a rule can itself become evidence of arbitrary and capricious judgment.

Further complicating matters is the ambiguity inherent in the phrase "adequate procedure." Has an agency used adequate procedures to formulate a rule if it fulfills the legal minimum spelled out in the federal or state administrative procedure act? Or does a court determine an agency used adequate procedures by evaluating whether the agency communicated with constituencies affected by the rule and genuinely considered their input. Finally, to what extent should a court measure the adequacy of the rulemaking procedures evaluating the effectiveness of the resulting rule? How a court defines "adequate procedure" determines the extent to which agency rulemaking procedure can contribute to a court's conclusion that the resulting rule itself is arbitrary and capricious.

In *Natural Resources Defense Council, et al. v. United States Nuclear Regulatory Commission, et al*., 547 F.2d 633 (D.C. Cir. 1977) (Bazelon, J., concurring) (*NRC*), the United States Court of Appeals for the District of Columbia evaluated an appeal from the Nuclear Regulatory Commission concerning the extent to which licenses to construct nuclear power plants should include requirements for the handling and storage of the nuclear waste the plants produced. *NRC* is one of the most decisions to evaluate what constitutes "adequate procedure" in the rulemaking context and how faulty procedure can result in a rule that is substantively arbitrary and capricious.

The analysis in *NRC* begins with the procedural requirements for legislative rulemaking spelled out in 5 U.S.C. section 553 of the federal Administrative Procedure Act (APA). Unlike the Texas Administrative Procedure Act –which requires agencies to conduct public meetings on legislative rules public demand requires them—the federal statute confers upon agencies the discretion to decide whether public meetings are

warranted.[52] Given the high level of public concern regarding nuclear waste disposal, the Nuclear Regulatory Commission (NRC) held several public meetings on the rule that would define the waste disposal requirements for companies that sought licenses to construct nuclear power plants. In this sense the agency exceeded the informal rulemaking procedural requirements of the federal APA.

In the course of *NRC*'s public meetings on the proposed rule governing nuclear waste storage, it became clear that the agency's decision on the type of waste storage facility required for a license derived from the work of one expert named Pittman. Residents who attended the public meetings examined Pittman's report and were concerned that it failed to consider a number of the prominent methods of nuclear waste storage before recommending one type of facility. Further, Pittman's study offered little documentation to support the one type of waste storage facility it recommended.

When residents sought to cross examine Pittman at the public meetings concerning his study, agency officials cut off public questioning. The agency did not amend its existing rule or initiate a new rulemaking after it receiving public comments that pointed out the shortcomings in Pittman's study.

On appeal, the Court of Appeals for District of Columbia Circuit faced a unique opportunity to address the interplay between the adequacy of agency rulemaking procedure and the resulting substantive rule. Appellants urged essentially that, in the words of *State Farm*, the agency had wholly failed to consider important aspects of problem by relying on a study that completely overlooked important alternative methods to store nuclear waste and failed to consider in depth even the one storage system it

[52] 5 U.S.C. section 553.

adopted. But the appeal also addressed the procedural action that arguably produced the arbitrary and capricious result: by refusing to allow residents to question Pittman on the blind spots in its study, the agency excluded from its record information that would have alerted it to the arbitrary and capricious exclusion of storage alternatives from the agency's rule. The agency also failed to respond adequately to written comments on this same issue of storage alternatives.

NRC's plurality acknowledged that the NRC had met and exceeded the APA's procedural rulemaking requirements.[53] The plurality concluded, however, that this compliance represented a minimum but insufficient condition to survive the claim that the agency's skewed fact gathering produced an arbitrary and capricious rule.[54] Interestingly, the court concluded that the extent of an agency's fact gathering procedure depended not so much on statutory requirements but instead on the complexity of the issues and the extent of the impact on the public.[55] The agency should examine a proposed rule for it complexity and adopt procedures that will allow it to explain the issues thoroughly to the public. Only if the agency succeeds in conveying the concepts underlying the rule will the public be able to offer intelligent responses to comments. In the NRC case, the agency had failed to

meet this standard:

> Even given that society and agencies must rely heavily on expert opinion and deference therefore exists, in this case, the expert testimony was so conclusory without concrete justifications that --even given the popular participation allowed -- questions arose that should have caused further agency scrutiny. [56]

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[53] *Natural Resources Defense Council, et al. v. United States Nuclear Regulatory Commission, et al*., 547 F.2d 633, 643 (NRC).
[54] 547 F.2d at 644.
[55] 547 F.2d at 644-645.
[56] 547 F.2d at 644.

On the specific issue of the public questions posed to Pittman, the Court concluded that the agency's decision to cut off inquiry contributed to its arbitrary and capricious decision making: "Cutting off questioning on nuclear waste issue was arbitrary and capricious and no satisfactory answers to [the public's] questions raised appear in the record."[57] To subsequent courts faced with the challenge of ascertaining whether an agency fulfilled NRC's heightened standards for adequate procedure and effective interaction with the public, the Court offered the following advice, which gave rise to the so-called "hard look doctrine":

> What a reviewing court can do…is scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided and that the agency has taken a good, hard look at the major questions before it.[58]

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[59] the United States Supreme Court ultimately reversed NRC's holding on the elevated procedural requirements for technically complex issues of importance to the public. The Supreme Court reasoned that NRC's reasoning forced agencies into an ad hoc process of fashioning procedural protections over and above statutory requirements in order to avoid subsequent reversal on the basis of the arbitrary and capricious standard. The Supreme Court concluded such an ad hoc process was unworkable and would result in the adoption of unnecessary procedures as prophylactic measures to prevent subsequent reversal. *Vermont Yankee* concluded as a matter of legislative intent and practical necessity that, if an agency complied with APA rulemaking requirements, a

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[57] 547 F.2d at 645.
[58] 547 F.2d at 644. *See also International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). International Harvester is credited as the first D.C. Circuit decision to formulate and apply the "hard look" doctrine.
[59] 435 U.S. 519 (1978)

court could not reverse the resulting rule on the basis of inadequate fact-finding procedures. The Court added, however, that an agency could certainly adopt additional procedures in light of a complex rule at its own discretion, without fear of being reversed if it failed to do so.[60]

Despite its reversal in *Vermont Yankee*, *NRC* exercised a profound impact on federal and state agencies throughout the country. Different iterations of the "hard look" doctrine became part of federal and state agency procedures.[61] Regardless of whether a jurisdiction considers inadequate fact finding procedures to constitute a basis for reversal under the arbitrary and capricious standard, *NRC* has created an enduring normative belief in an agency's duty to convey complex proposed rules to the public in a comprehensible form and to energetically solicit opinion from the sectors of the public whom the rule will affect. *Vermont Yankee* acknowledges these as laudable agency objectives; it simply states that agencies should not be legally required to exceed statutory rulemaking requirements and insulates agencies from reversal for failing to exceed minimum procedural requirements.

Analysis

For purposes of evaluating Texas education rules to effectuate readiness legislation, this article accepts the fundamental premise articulated in *NRC*: that robust agency fact gathering procedures and genuine interaction with the public affected by the

[60] *Vermont Yankee*, 435 U.S. at 522-526.

[61] *See for example Bicentennial Celebration of the District of Columbia Circuit*, 204 F.R.D. 499, 584 (2001) (discussion of federal judges employing the hard look doctrine as of 2001). See also footnotes 80 and 82, *Frack Attacks: Government Compliance –or Lack Thereof—with Federal Regulations on Tribal Lands*, 23 J. Envtl. And Sustainability Law 106, Fall 2016 (state agencies as of 2016 employ the hard look doctrine to examine state environmental agency review of permit applications for fracking).

rule are necessary to produce effective rules. These basic principles survived *Vermont Yankee* and persist as normative principles of rulemaking.

In the context of readiness rulemaking by Texas agencies, these concepts from *NRC* assume acute significance. *NRC* seems to suggest that an agency seeking to produce an effective rule cannot rely on the federal or state administrative procedure act alone for guidance in creating procedures for fact finding. Under Texas law this is almost certainly true. In fact, the Texas administrative law outlined earlier in this article creates structural *barriers* to effective rule making. Stated bluntly: Even if a Texas education agency complies with the rulemaking procedures that Texas Administrative Procedure Act[62] requires, there is no guarantee that the resulting rule will effectuate legislative intent. At least some of the rules adopted thus far in the readiness context exhibit the structural limitations in the Texas rulemaking process.

Structural Limitation Number One: No "Major Rule Review" for Education Rules. This article focuses on rules that the Texas Education Agency and Texas Higher Education Coordinating Board have enacted to effectuate Texas legislation intended to improve college readiness, particularly with respect to Latino students. Any rule pertaining to this subject is "major," whether one defines that term by geography or size of affected population.

Consider the "major rule" designation in light of the number of "Hispanic Serving Institutions" in Texas. According to the National Center for Education Statistics (NCES), a "Hispanic Serving Institution" (HSI) is an eligible institution that "has an enrollment of undergraduate-eligible full-time equivalent students that is at least 25 percent Hispanic

[62] Chapter 2001 of the Texas Government Code.

students at the end of the award year immediately preceding the date of application." [63] Sixty four such community colleges and universities currently carry this designation in Texas and span from far west to far east and from far south to far north Texas.[64] Any agency rule that affects the manner of instruction at these institutions alone would affect millions of people in the entire state.[65]

Nevertheless, agency rules on education do not receive the additional scrutiny afforded a "major rule" that pertains to the economy, environmental quality, or public safety. Section 2001.0225 of the Texas Government Code provides for major rule review of a rule with the "specific intent… to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state".[66] Educational standards are not included as rules with a major impact on the economy.

Although it is unclear whether the additional scrutiny afforded such major rules is actually intended to make them more effective or to limit them,[67] the state forgoes whatever benefit that might result from added scrutiny of education rules. In the context of readiness education rules, however, a closer analysis of the issues mentioned in the section 2001.0225 -- local and regional economic impacts, or how educational

[63] NCES, ww.ed.gov, United States Department of Education.
[64] https://www.hacu.net/hacu/US_Members.asp
[65] https://www.hacu.net/hacu/US_Members.asp
[66] Texas Government Code Section 2001.0225.
[67] The rule appears to limit the ability of Teas agencies to enact rules more protective of the environment than the feral minimum standard: "If a rule is a major rule under this definition and meets one of the following requirements, then a draft impact analysis must accompany the preliminary notice: (1) Proposed rule exceeds a federal standard unless specifically required by federal law; (2) exceeds an express requirement of state law, unless rule specifically required by federal law; (3) exceeds a requirement in a delegation agreement with feds unless federal law requires it; (4) rule is adopted under the general power of the agency instead of under specific state law.

institutions will comply with the new rule, for example—would likely result in more effective measures to improve Latino readiness and graduation rates.

Structural Limitation Number Two: The "Six Month or Die" Rule. The time limit that the Texas administrative procedure act imposes on agencies to enact a rule actually *discourages* intensive fact finding and interaction with the affected public. Section 2001.027 of the Government Code provides:

> WITHDRAWAL OF PROPOSED RULE. A proposed rule is withdrawn six months after the date of publication of notice of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. [68]

The bare fact that the Texas Education Agency (TEA) or Texas Higher Education Coordinating Board (THECB) must enact any rule intended to implement the Texas legislature's readiness legislation in six months or less does not mean the agencies will reach an arbitrary and capricious result. However, the six-month limit runs at odds with the fundamental principles articulated in *NRC.*

Without even addressing the specific rules enacted thus far under these statutes, one can foresee problems in reaching the affected communities effectively soliciting their input. For example: 68 colleges and universities with education programs are located in Texas, a figure that includes both community colleges and four-year universities that offer four year degrees in education.[69] If the TEA or THECB sought to enact rules that changed the curriculum for dual-credit courses offered at community colleges, for example, community college and university faculty in education departments would need to receive news of the change and have an opportunity for input, according to *NRC.* The

[68] TEXAS GOVERNMENT CODE section 2001.027.
[69] https://nces.ed.gov/ipeds

administrative records for the rules reviewed for this article fail to indicate any systematic effort to contact colleges with education departments or that the agencies received written comments from more than a *de minimis* number of education students or faculty.

A statistic of more acute significance to this article is the number of Hispanic Serving Institutions in Texas. According to the principles outlined in *NRC*, a TEA or THECB rule intended to effectuate Texas legislation to improve the readiness or graduation rates of Hispanic students would reach the educators at these 64 institutions, and the agencies would receive and respond to educators' and students' comments in a comprehensive fashion.[70] The rules reviewed for this article designed to have an impact on the Hispanic population reveal very little contact with or comments from Hispanic Serving Institutions.

Structural Limitation Three: The Substantial Compliance Rule. When a Texas court receives an administrative record to review an agency rulemaking under one or more standards of review, the court starts its analysis with presumptions that favor the agency's actions: (1) the rule is constitutional; (2) the rule is rational; (3) the facts agency stated for supporting the rule are true. The party challenging rule must overcome these presumptions.

This much is also largely true in federal court. However, the Texas legislature has created an additional principle that shields an agency's rulemaking from reversal: the substantial compliance rule. Unless the court concludes that the agency acted arbitrarily and capriciously as discussed earlier in this article, the court can affirm the agency's rule making despite technical limitations if the record reveals a good faith effort to carry out

[70] https://nces.ed.gov/ipeds, statistics on Hispanic serving institutions

the purposes of the statute: "A state agency complies with the requirements of section 2001.033 [establishing the substantial compliance rule] if the agency's reasoned justification demonstrates in a relatively clear, logical fashion that the ruleis a reasonable means to a legitimate objective." [71] The substantial compliance of the rule is to be evaluated based on the agency's own statements in agency documents regarding its reasons for adopting the rule in the way that it did. In situations where the administrative record before the court lacks documentation to support some portion of the agency's justification for the rule, the court can reach down into the agency's file to supplement the record in order to ocate documents that substantiate the agency's articulated reasons for its actions.

In practical terms, the substantial compliance rule means that the reviewing court tends to minimize possible mistakes in a rule hat resulted from agency errors. The substantial compliance rule bolsters the court's already strong presumption that the agency acted in good faith.

In Texas, agencies must enact rules large or small in six months and the legislature exercises less oversight of agency activity than in other states because it convenes for a limited time every two years. The substantial compliance rule ensures that the one remaining institution with the power to scrutinize agency actions—the courts—do so in a manner that heavily favors agency legitimacy. As the next section of this article suggests, the state's agencies charged with enacting education rules comply with the state's administrative law requirements in a pro forma fashion, but not much

[71] TEX GOV'T CODE ANN. Section 2001.035.

more. The substantial compliance rule ensures that the courts will bless the agencies' minimal observance of legal requirements as long as the agencies acted in "good faith."

Afterword: Due Process and Education Rulemaking

Assuming for the sake of argument that the TEA or THECB formulated readiness rules that were effective to carry out the Legislature's intent regarding educational readiness, a fundamental problem remains: due process.

Earlier, this article explained the administrative law concept of a "legislative rule." To carry out the intent of a statute, an agency can exercise its quasi-legislative function by enacting rules that will have a present, binding effect on regulated parties. Because a "legislative rule" imposes new burdens and benefits regulated parties, courts have concluded that the procedures used to enact of such rules should afford regulated parties basic due process rights: notice and an opportunity to be heard.

From a formalistic standpoint, publication of notices in the Texas Register might be considered sufficient due process protection. After all, the Texas Administrative Procedure Act requires publication of a preliminary notice and final notice in the Texas Register. The notices provide the public with an explanation of the problem that prompted the agency to propose a rulemaking, a text of the proposed and final versions of the rule, the statutory provisions that authorized the rule, the agency's responses to public comments on the rule, and explains why the agency concluded the rule was superior to alternative proposals.

A realistic assessment of educational readiness rulemaking suggests that minimal compliance with such procedural requirements fails to satisfy the spirit, if not the letter, of due process. TEA and THECB received a minimum number of responses from

affected parties, especially in relation to the number of Hispanic-serving institutions in the state. The agencies provided responses to these comments in the Texas Register that provided little or no indication of what the comments were or why the agency dismissed them.

The more one looks at the procedure our state's education agencies use to enact educational readiness rules, the more one realizes they are completely alien to NRC's vision of rulemaking. This includes NRC's concern for providing the public with adequate due process: notice and an opportunity to heard. If NRC's logic is correct, the failure to provide rigorous due process also translates into poor quality rules. In the relative absence of qualitative or quantitative evaluations of Texas readiness rulemaking, this article evaluated these rules through the same lens as a Texas court: administrative law.

Conclusion and Recommendations for Action

Any recommendations this article makes to improve the Texas rulemaking process with regard to educational readiness are hypothetical. Actual change to improve education rules would require the participation of many parties and institutions: input from the people such rules affect, more rigorous rulemaking procedure in Texas education agencies, and more thoughtful review of education rules by Texas courts. However hypothetical, the following recommendations would go a long way to improve the rulemaking process.

Changes to the Culture of Commenting on Proposed Education Rules: Opportunities for Educators and Other to Act. This article has pointed out the vast and still growing Latino population in Texas, which is already home to 64 Hispanic

Serving Institutions. There is simply no greater educational priority in Texas than preparing our Latino youth for college, ensuring our college courses align across institutions, and devising every rule possible to increase the graduation rates of Latino college students as the fastest growing segment of the state's population.

Increased Participation. Nevertheless, the administrative record of TEA and THECB rules pertaining to these issues fail to demonstrate a level of participation in notice and comment curriculum commensurate with the policy importance of these issues. Tens of thousands of teachers, administrators, education specialists, and students form the affected population of legislative rules on educational readiness. Nevertheless, relatively few concerned residents, education professionals, and institutions have commented thus far on these vastly important rules.

If the framers of federal and Texas administrative law were correct, effective rules depend on vigorous participation in the notice and comment rulemaking process by those who will have to comply with the rules. This is an argument that requires some faith to accept, and seems to create a necessary but insufficient condition. Without question, though, our administrative law relies on a healthy notice and comment system to ensure due process to the regulated and to make sure that regulators do not enact rules in a vacuum. If the *NRC* decision often cited in this article was correct, notice and comment is so important that agencies have the responsibility to devise means of communicating with the regulated public in a manner commensurate with the importance of the public policy at issue. *NRC* suggests that the TEA and THECB have a long way to go in reaching the educators, administrators, and students who will depend on educational readiness rules.

The notice and comment process on educational readiness rules needs improvement on the agency end and commenter end alike.

The TEA and THECB need to devise curriculum to educate Latino college students, educators, and administrators on the importance of rulemaking on education issues and critical role that participation in the comment process plays.

In addition to teaching the importance of rulemaking and participating in it, parties potentially affected by agency rules should learn that they can formulate and propose resident petitions to the TEA and THECB Board to adopt rules under section 2001.021 of the Texas Administrative Procedures Act. This is a lesser known provision that enables groups of residents to propose rules under specific Texas statutes. The agency has 60 days either to initiate rulemaking or issue a written explanation of why it has declined to act on the petition. In the environmental context, residents have already used this provision to petition for a TCEQ rule that would acknowledge greenhouse gases as pollutants subsect to regulation under state air quality laws. (See Texas Commission on Environmental Quality v. Bonser-Lain, et al., No. 03-12-00555-CV (Tex. App.—Austin Jul. 23, 2014).

Improve Notification. The TEA and THECB need to enact rules that expand these agencies' process of notifying the public concerning proposed rules. Given that educators may not follow education-related notices in the Texas Register –and college students almost certainly do not—additional notice, public comment periods, and public meetings should be incorporated into agency rules so that the agencies can supplement the default notice and comment in the Texas Register.

For example: The Texas Commission on Environmental Quality has created procedures for notifying members of the public who will be directly affected by a decision to issue a permit to build a new facility that will pollute. (30 Texas Administrative Code Chapter 39). Within a certain distance of the proposed facility, the agency issues certified letters that notify all residents of the proposed permit. The TEC and THECB could adopt a similar procedure for students, educators, and administrators at Hispanic Serving Institutions, a practice that could increase interest in a proposed rule.

Changes to Judicial Review of Agency Rulemaking Practice. This article has suggested that Texas administrative law favors agency decision making, including especially rulemaking, even when the record reflects the agency has committed errors in the rulemaking process. Some examples: The law requires no "major rulemaking" scrutiny for education rules that affect the entire state. A court that reviews an agency rule for arbitrary and capricious decisions can conclude such errors are harmless if the agency "substantially complied" with the law, meaning that challenged rule is faithful to the legislative intent of the statute under which the rule was created.

"Substantial compliance" relies on circular reasoning: as already discussed, the Texas Administrative Procedures Act states that a court cannot uphold a rule on the basis of substantial compliance if it finds that the agency has made arbitrary and capricious decisions in enacting the rule. But the kinds of errors that a court might find harmless in the name of "substantial compliance" may themselves indicate that the agency has acted arbitrarily and capriciously. In any event, this doctrine predisposes the court to approving the agency's actions before the court has ever analyzed the rule.

Whatever the reasons for rules that waive objections to defective rules, the result is clear: Texas courts may affirm the validity of rules that lacked any real input from the regulated public. As already explained, several educational readiness rules reviewed for this article elicited a tiny number of comments given their importance. Even given the paucity of comments, the agency failed to provide even a summary of comments, and the responses to comments stated simply that the agency disagreed with the commenters without any explanation.[72] Table 3.1 illustrates that magnitude of this deficiency.

Table 3.1 Comments and Response Period

Community	**One Teacher**	**Two Teachers**	**34 Teachers**	**Community Members**	**Out-of-State Residents**
Comments	**339**	**52**	**15**	**628**	**348**
SBOE	**Agreed, Modified**	**Disagreed, No Discussion**	**Determined "outside the scope"**	**Requested Clarification**	**Total**
Responses	**318**	**899**	**223**	**1**	**1,441**

As this article indicated - especially in the *NRC* discussion - the cursory approach to notice and comment on Teas educational readiness rules entirely fails to fulfill the whole purpose of notice and comment. If the reviewing court cannot discern from the public comments whether the agency's proposed rule contained flaws, the court cannot decide whether the agency acted in an arbitrary and capricious manner. In other words, a complete administrative record is necessary for the court to conduct judicial review.

[72] H.B. 2549 resulted in the modification of the Texas Education Code in §§7.102(c)(4), 28.002, 28.008, and 28.025 which in turn resulted in §§113.41-113.48 in the Texas Administrative Code.

The result is clear: Texas agencies that regulate education must do a better job of developing the administrative record on rules they enact, and Texas courts must be able rely on those records to conclude whether an agency rule is valid.

IV. CONCLUSION

Relevance of Study

A Matter of Significance for the State. The importance of crafting good education policy to improve college and career readiness is paramount in today's society, but especially in Texas where the population is expanding faster than any other state. According to U.S. Census estimates, 39% of the state's population is Hispanic. Within this growing segment of the population, it is expected that overall school enrollment will more than double in the next 20 years. College enrollment has increased appreciably for this group during the last decade, but degree completion continues to lag behind other Non-Hispanic groups. More importantly, the proportion of Hispanics age 18 to 24 not in school is higher compared to Whites and other ethnic and racial groups. Notably, enrollment in graduate or professional programs is less than one-half that of Non-Hispanics. Simply put, Hispanics in Texas are underrepresented in the elite class of degree holders which puts them at greater risk for underemployment and being unprepared to engage fully in democratic living.

The educational disparity between Hispanics and other groups in Texas is dire. Professor, former State of Texas Demographer, and former U.S. Census Bureau Chief, Steve Murdock has argued for decades that improving educational outcomes for Hispanics is a matter of critical importance. In his recent book, "Changing Texas: Implications of Addressing or Ignoring the Texas Challenge" Murdock, et al predict increasing numbers of Hispanics will experience declining family incomes and rising rates of unsuccessful degree completion.

The impact of this data will affect Texas in many ways. Economic stability requires a well-trained, well-educated workforce to remain regionally, nationally, and globally competitive. Therefore, it is imperative that we do more to ensure the college and career preparedness of Hispanics in this state.

A Matter of Significance for Education. The importance of this study is its relevance to people working in education, especially educators. This group of individuals are on the frontlines, so to speak, of educating Texas residents. All educators and administrators are required to comply with state law and policy, but too few have any real understanding of the processes that put these laws and policies into place. Very few education professionals at large are involved in the process that produce these legal requirements. Fewer still understand that lawmaking and rulemaking are two separate and distinct processes that are structurally limited and often lead to unsatisfactory outcomes.

Important Findings

Education policy in Texas represents one of the largest portions of public policy and its impact is statewide affecting a vast number of the state's residents – students, parents, educators, administrators, just to name a few. The study of structural limitations in Texas lawmaking that created college and career readiness (the subject of chapter two) found that part-time legislators and restrictions on legislative sessions yield incremental, mediocre solutions. The study on structural limitations of crafting Texas administrative rules that implement college and career readiness standards with a focus on the impact to Hispanic students and the implications for Texas educators and residents (the subject of chapter three) found that education policy rules, though they impact a vast statewide population, carry no major rule status; that these rules are crafted under strict time

constraints; and, that the rules are generally considered substantially compliant when judicially reviewed.

Implications for Educators

It is critical for individuals working in education to recognize that lawmaking and rulemaking are two separate and distinct processes that impact policy outcomes. Structural limitations in lawmaking originate in the Texas Constitution that was ratified in 1876. The Constitution may have met the needs of Texans at that time, but is wholly inadequate to meet the needs of Texans today or in the future. The use of biennial legislative sessions, essentially a part-time legislature, is insufficient to ensure good laws result. Moreover, constitutional provisions that restrict the legislature's control over the amount of time spent in session and its inability to call special sessions should be critically reviewed and revised.

The formal procedures employed by the Texas legislature further impede their ability to pass effective laws. This study illustrated how the formal process of passing legislation has been co-opted by elites in government and, due to the overrepresentation of legal and business professionals in the legislature, the true public interest in terms of education policy is not served.

Once laws are passed, state agencies with jurisdiction in the policy area are charged with executing rules that determine how the law will be implemented. In the case of education policy, the Texas Education Agency has jurisdiction over PK-12 and the Higher Education Coordinating Board has jurisdiction over higher education in the state. This study revealed that the rulemaking process is structurally flawed and yields rules that are arbitrary and capricious. The public notice and comment process is especially

troubling given that education policy impacts such a large portion of the statewide population. Stronger efforts to adequately inform the public, solicit public comment, and provide thoughtful and thorough responses by the TEA, THECB, and the State Board of Education is required.

Given the structures that limit access for educators and residents in general, and Hispanics more specifically, to lawmaking and rulemaking processes, several possible pathways emerge. First, school districts, colleges, and universities could dedicate a portion of their limited resources to track and report on the status of education policy as it proceeds through the legislative process. In addition to providing this valuable information, guidelines that inform educators "how" to get involved could be provided. Second, community organizations could collaborate with these institutions to collect and disseminate this type of information. Third, professional organizations could make this information available free of charge to non-members via their websites. These are but a few possible pathways to inspire open discussion among educators and other interested individuals. The goal of this study was to reveal current limitations in law and policy that yield less than desirable outcomes in education policy. It is the author's hope that the dissemination of this knowledge will inspire action.

Further Study

Using a structural frame to evaluate education policy and applying normative administrative law principles has proven fruitful. Further studies on discrete aspects of education policy employing this framework would likely be beneficial. Two areas that have not been addressed in this study are 1) overlapping jurisdictional issues between the

TEA and THECB; and 2) the response to rulemaking by Hispanic Serving Institutions (HSIs) in the state.

The problem of overlapping jurisdiction between the TEA and THECB has not been adequately studied. This point is particularly important on matters of college and career readiness that require sustained collaborative efforts between high school and college teachers and administrators.

The issue of power, who holds it and how it is wielded, was not considered in this study to maintain focus on structure. Future research could incorporate this dynamic and flesh out its implications. In addition, how secondary and post-secondary institutions respond to legislative mandates and agency rules to implement college and career readiness would be prove informative. More specifically, this author intends to investigate how Texas Institutions of Higher Education with Hispanic Serving Institution status have responded to college and career readiness using a case study approach. Given a nearly twenty-year history of legislative efforts and the rapidly growing Hispanic population in the state, there will ample opportunities for continued research.

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