SYMPOSIUM ON "TEXAS GUN LAW AND THE FUTURE": THE FATAL FLAWS IN TEXAS'S CAMPUS CARRY LAW

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"[I]nstitutions of higher education are our nation's intellectual sanctuar[ies]. It should not be defiled by the most recognizable symbol of violence and oppression—a firearm."[1]

I. INTRODUCTION

It is the first day of law school at Thurgood Marshall School of Law after the State of Texas has mandated that anyone with a concealed handgun license recognized by the State may carry a firearm inside public higher educational buildings, including classrooms. In addition to the normal stresses that faculty and students experience at the beginning of the academic year, everyone is looking around and pondering how many of their peers are secretly carrying firearms in classrooms, faculty meetings . . . and corridors . . . for thanks to the Texas Legislature, in addition to preparing for class, students, faculty, and staff are preparing for active shooter drills. This is because on August 1, 2016, legislation forcing all public Texas postsecondary institutions to permit anyone with the appropriate license to carry a concealed firearm into classrooms and almost everywhere else imaginable on campus will take effect,[2] in contravention of the overwhelming majority of the campus community's wishes.[3]

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1. Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 IDAHO L. REV. 1, 28 (2011).

2. *See generally* TEX. GOV'T CODE § 411.2031 (Westlaw, WESTLAW through 2015 Reg. Sess.) (effective Aug. 1, 2016).

3. Joan Neuburger & Ellen Spiro, *Commentary: Campus Carry Wrong for UT Faculty & Students*, MY STATESMAN (Sept. 30, 2015), http://www.mystatesman.com/news/news/opinion/commentary-campus-carry-wrong-for-ut-faculty-stude/nnqxh/ (highlighting that 150 professors at the University of Texas at Austin ("UT"), 5,000 U.T. students, and 2,000 members of the Texas Association of College and University Police Administrators have signed petitions opposing Senate Bill 11, which was the prelude to the Texas Campus Carry Law); *see also* Justin Doubleday, *Students Oppose Concealed-Carry Gun on Policy on Campuses, Survey Finds*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 13, 2013),

This article closely examines this contentious campus carry law and highlights some of its fatal provisions. Part I reiterates how the legislation runs afoul of the U.S. Constitution's First Amendment free expression provision and a derivative right of free speech—academic freedom. Part II espouses the novel proposition that the statute is potentially an invalid use of the State's spending power because it contains a veiled threat to reduce State funding to public higher education institutions who do not comply with its campus carry directive, and the government cannot legally coerce postsecondary schools to enforce a law that is unconstitutional. Part III discusses some of the statutory interpretation problems with the legislation and other implementation concerns raised by the statute. Finally, Part IV concludes that the statute should either be repealed or amended to make campus carry optional for all colleges and universities, which is more constitutionally palatable.

II. TEXAS'S CAMPUS CARRY LAW KILLS FREE SPEECH

The operative language of Texas's Campus Carry Law (hereinafter "TCCL") expressly forbids all Texas higher education institutions from adopting "any rule, regulation, or other provision prohibiting license holders from carrying handguns on the campus of an institution."[4]

The statute creates three exceptions to this rule. First, colleges and universities may adopt rules pertaining to the *storage* of firearms in dormitories.[5] Notably, by limiting the creation of rules to storage presupposes that firearms will be permitted in dorm rooms.[6] Second, higher education institutions may create reasonable rules and regulations concerning the carrying of handguns by Concealed Handgun License (hereinafter "CHL" or "CHL's") after "consulting with students, staff, and faculty of the institution regarding the nature of the student population, specific safety considerations,

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http://chronicle.com/article/Students-Oppose/141543/ (describing a survey by Ball State University which found that 78% of college students at fifteen Midwestern colleges were against the carrying of guns on campuses and four out of five indicated they would feel unsafe if faculty members or visitors were permitted to carry on campus). In a survey conducted by Professor Shaundra Lewis at Thurgood Marshall School of Law at Texas Southern, 100% of the faculty surveyed and 70% of the students indicated they desired the entire law school to remain gun-free.

4. TEX. GOV'T CODE ANN. § 411.2031(c) (1997).
5. TEX. GOV'T CODE ANN. § 411.2031(d) (emphasis supplied).
6. ATTY. GEN. OP. KP-0051, 2015 WL 9435001, at *3 (Tex. Dec. 21, 2015).

and the uniqueness of the campus environment."[7] The legislature intended this provision to permit the President or chief executive officer to designate some areas on campus as gun-free zones, such as laboratories with explosives, sporting arenas, and campus daycare centers with young children.[8] If a Texas college or university designates an area as being gun-free, it has to submit its justifications for doing so to the Texas Legislature.[9] Third, private higher education institutions may opt out of the campus carry law altogether.[10]

Thus, these provisions read *in pari materia* have the effect of forcing *public* higher education institutions to permit CHL's to carry firearms generally on campus, including the majority of classrooms, whether or not the institutions themselves desire to do so.[11] To the extent that this legislation compels higher education institutions who want to remain gun-free to arm their campuses, it violates those institutions' constitutional right to academic freedom and individual professors', administrators', staff members', and students' right to free speech.[12]

Regarding the institutions' academic freedom right to be free from guns, academic freedom is "generally conceptualized as insulating certain aspects

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7. TEX. GOV'T CODE ANN. § 411.2031(d-1) (1997).

8. ATTY. GEN. OP., *supra* note 6, at * 1 (opining that "certain types of classrooms may pose heightened safety concerns" if guns were present, such as grade school classrooms, and thus, firearms may be banned in these areas but not in a "substantial number of classrooms."); SB 11, 84th Leg. Reg. Sess. (Tex. 2015) (explaining that some gun-free zones can be designated on campus if they would be "off-limits" to CHL's off campus in the public like churches, bars, sporting venues); Tom Benning, *Texas Courts Could Land in Court Over Designated "Gun-Free" Classes*, THE DALLAS MORNING NEWS (Nov. 15, 2015), http://www.dallasnews.com/news/state/headlines/20151101-designated-gun-free-classes-could-land-colleges-in-court.ece.

9. Tom Benning, *Texas Senate approves campus carry, but with some flexibility for colleges*, THE DALLAS MORNING NEWS (last updated May 31, 2015), http://www.dallasnews.com/news/state/headlines/20150530-texas-senate-approves-campus-carry-but-with-some-flexibility-for-colleges.ece.

10. TEX. GOV'T CODE ANN. § 411.2031(e) (1997).

11. The Texas Attorney General has opined that generally banning firearms from classrooms would violate Texas's Campus Carry Law, except for classrooms where the presence of guns would cause "heightened safety concerns" such as classrooms with young children. ATTY. GEN. OP., *supra* note 6, at *1. Accordingly, every public Texas higher education institution that has posted its campus carry rules is permitting the carrying of firearms into classrooms. Lauren McGaughy, Tom Benning, & Andrew Chavez, *Campus Carry Tracker*, THE DALLAS MORNING NEWS (Mar. 30, 2016, updated Apr. 27, 2016), http://interactives.dallasnews.com/2016/campus-carry-tracker/.

12. Lewis, *supra* note 1, at 12-17 (explaining in depth how compulsory campus carry laws violate educational institutions' academic freedom if they desire to remain gun-free).

of the academy from government intrusion."[13] The U.S. Supreme Court has repeatedly made clear that academic freedom is a "special concern of the First Amendment"[14] that affords higher education institutions the freedom to teach, which naturally encompasses the academic decisions of "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[15] Embedded in the academic decision of how to teach is the decision of how to create an atmosphere that is most conducive to a robust exchange of ideas; obviously, for one to feel free to vigorously debate ideas, they must feel they are in a safe environment.[16] The majority of college students across the country have unequivocally stated that firearms on campus make them feel unsafe, believing it will increase the number of homicides and suicides on campus.[17] Notably, thus far, all of Texas's private universities and colleges have opted out of Texas's campus carry law and have elected to remain gun-free.[18] Should not *public* colleges and universities have the same opportunity to opt out? This article postulates that the First Amendment of the federal constitution gives public higher education institutions this opportunity under the academic freedom doctrine, which confers a right for education institutions to decide how to create an "atmosphere which is most conducive to speculation, experiment, and creation,"[19] including the right to ban firearms on campus.

As to the argument that the presence of guns violates individual administrators', professors', and students' First Amendment right to free speech, both students and faculty have made it abundantly clear that the presence of concealed firearms quells free speech because there is no symbol

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13. Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 217 (2011).

14. Fisher v. Univ. of Tex., 123 S. Ct. 2411, 2418 (2013) (reiterating "[t]he academic mission of a university is "a special concern of the First Amendment"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

15. Lewis, *supra* note 1, at 11, 13 (citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965) & Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

16. *Id.*; J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L. J. 251, 339-40 (1989).

17. Lynn O'Shaugnessy, *Do College Students Want Concealed Weapons on Campus?* CBS NEWS (Sept. 12, 2013), http://www.cbsnews.com/news/do-college-students-want-concealed-weapons-on-campus/ (pointing out that in a study of students attending 15 Midwestern colleges and universities, 79% of the students stated that they would not feel safe if faculty, students, and visitors carried concealed handguns on campus).

18. Tom Dart, *Texas Academics Told to Avoid "Sensitive Topics if Gun Law Goes into Effect*, THE GUARDIAN (Feb. 24, 2016), http://www.theguardian.com/us-news/2016/feb/24/university-of-houston-faculty-campus-carry-law-texas-guns.

19. Byrne, *supra* note 16, at 339-40.

that suppresses speech more than a firearm. For instance, the University of Houston's faculty senate has advised its faculty to avoid discussing sensitive topics, drop controversial topics from their curriculum, "not go there" if they perceive students are getting angry, limit their accessibility to students by adopting an appointment-only-office-hours-policy, and meet students in controlled circumstances.[20] Thus, the mere presence of firearms has already affected the way that some University of Houston professors teach.[21] In a survey that one of the co-authors of this article, Professor Lewis conducted at Thurgood Marshall School of Law in Texas, most of the students who opposed Texas's Campus Carry Law going into effect repeatedly indicated that they were concerned about firearms being introduced into an already "stressful environment." Another student who was accepted into the University of Texas—a top tier school—declined admission because of the school's "Campus Carry Guidelines."[22]

Additionally, the University of Texas has reported that quality faculty candidates have declined offers to teach at their school because of the campus carry law,[23] and one Dean has resigned because of it.[24] Undoubtedly, knowing that their classmates, professors, or administrators are "packing" will make students more reluctant to debate controversial and sensitive topics or to challenge a professor over a grade. Professors will be less inclined to give students failing grades who earned them and more inclined to succumb to grade change requests out of fear that a student may confront them with a

20. Dart, *supra* note 18.

21. Additionally, in July of this year, University of Texas professors filed a lawsuit seeking to enjoin Texas's Campus Carry Law, arguing in part that the law is unconstitutional because the presence of firearms will stifle discussion on emotional social issues, and thus, violate academic freedom. Lauren Camera, *University of Texas Professors Sue to Block Campus Carry Law*, U.S. NEWS & WORLD REPORT (July 8, 2016), http://www.usnews.com/news/articles/2016-07-08/university-of-texas-professors-sue-to-block-campus-carry-law. A district court recently denied their request for a preliminary injunction on academic freedom grounds, reasoning that the plaintiffs could not meet one of the requirements for an emergency injunction at this stage of the litigation—the likelihood of success on the merits. Scott Jashick, *Judge: Academic Freedom Doesn't Bar Campus Carry*, INSIDE HIGHER ED. (Aug. 23, 2016), https://www.insidehighered.com/news/2016/08/23/federal-judge-rejects-academic-freedom-challenge-campus-carry-law#.V76yD3zBM40.mailto. Notably, the court did not address the university's academic freedom right to establish its own firearm policies and the professor's individual academic freedom claims survived. *Id.*

22. *Id.*

23. *Id.*

24. Liam Stack, *Dean at the Univ. of Tex. Resigns in Part Over Handgun Law*, N.Y. TIMES (Feb. 27, 2016), http://www.nytimes.com/2016/02/27/us/dean-at-university-of-texas-resigns-in-part-over-handgun-law.html?_r=0.

gun if they are not compliant.[25] Last, but not least, the presence of firearms will negatively affect the faculty governance of institutions; faculty members may be unwilling to make rank and tenure and other difficult decisions out of concern that a disgruntled employee carrying a concealed firearm may open fire, as one University of Alabama professor did back in 2010.[26] In sum, this law negatively impacts the quality of higher education students will receive, which not only violates the First Amendment of the U.S. Constitution but Texas's freedom of speech provision providing that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject . . . and no law shall ever be passed curtailing the liberty of speech."[27]

It is a basic canon of statutory construction that statutes should be read to avoid constitutional issues.[28] Therefore, § 411.2031(c) should be read to make the campus carry law discretionary and not mandatory, just as is already the case for private institutions.

A. TCCL Tacitly Coerces Public Higher Education Institutions to Violate the First Amendment

Although nowhere in the Texas statute does it explicitly provide that the state government will eliminate or reduce state funding to public colleges and universities who do not comply with its edict to permit CHL's to carry on campus, it is strongly implied. For instance, under the statute higher education institutions are required to "prominently publish" its campus carry rules and regulations on its website and submit a report to the Texas

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25. Lewis, *supra* note 1, at 14.

26. Sarah Wheaton & Shalia Dewan, *Professor Said to Be Charged After 3 Are Killed in Alabama*, N.Y. TIMES (Feb. 12, 2010), http://www.nytimes.com/2010/02/13/us/ 13alabama.html; *see also* Scott Jashick, *Police: Dean Shot By Fired Professor,* INSIDE HIGHER ED. (Aug. 31, 2016), https://www.insidehighered.com/news/2016/08/30/dean-allegedly-shot-fired-professor?utm_source=Inside+Higher+Ed&utm_campaign=907eb6a579-DNU20160830&utm_medium=email&utm_term=0_1fcbc04421-907eb6a579-197353333&mc_cid=907eb6a579&mc_eid=e9a6de9c2f (describing how a disgruntled former assistant professor shot the Dean of Mount Sinai School of Medicine after being dismissed and losing a lawsuit challenging the school's employment decision).

27. TEX. CONST. art. I, § 8 (2015).

28. Clark v. Martinez, 543 U.S. 371, 385 (2005) (explaining "[t]he cannon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of *choosing between them*.") (emphasis in original); Barshop v. Medina Cty. Underground Water Conserv. Dist., 925 S.W.2d 618, 629 (Tex. 1995) (noting "[w]hen possible, we are to interpret legislative enactments in a manner to avoid constitutional infirmities.").

legislature biennially concerning its implementation and continuation of the campus carry legislation.[29] The statutory message is clear—the Texas Legislature will be watching to make sure public colleges and universities are complying with its arming-campuses-mandate, causing public higher education presidents and institutions to fear that if they are non-compliant, they could lose some state funding or otherwise be financially penalized since the state legislature holds the purse strings.[30]

If a court were to agree that the First Amendment academic freedom doctrine gives colleges and universities the right to decide how to teach its students, including how to keep them secure, and that the mere presence of firearms makes campuses less secure and suppresses the free speech of those on campus, then the Texas legislature cannot lawfully usurp higher education institutions' power to make security decisions by inducing them with state appropriations to arm their campuses.

For example, in *South Dakota v. Dole*, the Court held that the U.S. Congress could not use its spending power to induce states to engage in activities that would themselves be unconstitutional.[31] In *Dole*, South Dakota challenged a federal law calling for the withholding of a percentage of federal highway funds to states that did not have a minimum drinking age of 21.[32] South Dakota, who desired to maintain its 19-year-old minimum drinking age requirement, argued the federal law was an unconstitutional exercise of the federal government's spending power because the Twenty-first Amendment to the U.S. Constitution grants the states the exclusive power to regulate the sale of liquor.[33]

The Supreme Court held that it was unnecessary to decide whether the Twenty-first Amendment precluded the U.S. Congress from directly legislating the minimum drinking age, since Congress had *indirectly* legislated the drinking age through its spending power.[34] The Court went on to explain that the federal government's use of the spending power and conditional grant of federal funds was constitutionally permissible because it

29. TEX. GOV'T CODE ANN. § 411.2031(d-3) – (d-4) (1997).

30. The Texas Constitution confers authority upon the state legislature to appropriate money to the public higher education institutions in the state for, among other things, the institutions' building improvement projects, library materials, and general "educational and general activities." TEX. CONST., art. VII, § 17. Obviously, the legislature has some discretion in determining the amount of funding.

31. South Dakota v. Dole, 483 U.S. 203, 210-11 (1987).

32. *Id.* at 205.

33. *Id.*

34. *Id.* at 206.

satisfied the four-prong test for proper use of the spending power: (1) the spending power must be in pursuit of "the general welfare"; (2) Congress must unambiguously condition the States' receipt of funds so that States can "exercise their choice knowingly, cognizant of the consequences of their participation; (3) the conditions must be related to the federal interest, particularly national projects or programs, and (4) there can be no independent bar to the constitutional grant of funds.[35] It was undisputed that the federal law satisfied the first three criteria, however, the parties disagreed about whether the Twenty-First Amendment presented a constitutional bar.[36] The Supreme Court held that the law in question was a valid use of federal spending power.[37] In so holding, the Court explained that the "independent constitutional bar" requirement did not mean that Congress cannot indirectly achieve objectives that it could not accomplish directly.[38] Rather, the "independent constitutional bar" requirement means that Congress cannot use its spending power to induce states to engage in unconstitutional activities, such as conditioning receipt of federal funds on the infliction of cruel or unusual punishment.[39]

One could argue by analogy that the Texas Legislature is implicitly threatening to use its spending power to coerce public higher education institutions to violate the First Amendment free speech provision. Admittedly, *Dole* involved a federal statute encouraging compliance with a federal directive over subject matter that was reserved for the states to regulate, and here, Texas has the power to perform functions related to the running of schools under its general "police power."[40] In exercising this power, however, it cannot infringe upon individuals' First Amendment free speech rights and institutions' constitutional academic freedom, as the Supreme Court has long recognized that "[n]either students [n]or teachers lose their constitutional rights to freedom of speech or expression at the schoolhouse gate."[41] As alluded to earlier, academic decisions, such as how

35. *Id.* at 207-208.
36. *Id.* at 208-09.
37. *Id.* at 212.
38. *Id.* at 210.
39. South Dakota v. Dole, 483 U.S. 203, 210-11 (1987).
40. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577-78 (2012) (citing the U.S. Const., amend. X) (reiterating the well-established principle that the federal government possesses only limited powers—those expressly enumerated in the federal Constitution and all other powers are retained by the States and the people; the general power retained by the States is known as "police power").
41. Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 506 (1969).

to teach and how to create an atmosphere most conducive to learning, have traditionally been left up to individual education institutions and not to the state government. Thus, using state funding to coerce state post-secondary institutions to do something against what they traditionally have been left to decide, is an invalid use of Texas's spending power.

Additionally, financially penalizing a higher education institution that does not fully act in accordance with the Texas Legislature's intent is an invalid use of the state's spending power because TCCL does not unambiguously state that public school funding is contingent upon fully compliance with the gun law, as required. Rather, it is strongly intimated by its reporting provisions in subsections (d-3) and (d-4) of section 411.2031.

In conclusion, the Texas legislature cannot coerce higher education institutions to comply with TCCL by threatening to reduce public higher education funding because the law itself is unconstitutional to the extent that it forces institutions, professors, administrators, and students to alter their speech out of fear of being shot due to the increased presence of firearms, in violation of the free speech and academic freedom rights stemming from the First Amendment.

III. TCCL IS AMBIGUOUS, INHERENTLY INCONSISTENT, FLAWED, AND DIFFICULT TO IMPLEMENT

In addition to the constitutional issues raised by TCCL, the statute also has a few statutory interpretation infirmities. Also, as explained later in this Part, it will be difficult to execute.

A. Parts of the Law Are Susceptible to More Than One Interpretation and Contradictory

An interesting portion of the controversial TCCL is the language of subsection (d-1) of section 411.2013. That provision provides that the "president or other chief executive officer" of the postsecondary institution must consult with those most affected by this law—the students, faculty, and staff—regarding the "nature of the student population, specific safety considerations, and the uniqueness of the campus environment" to "establish reasonable regulations" for carrying a concealed firearm on campus.[42]

42. TEX. GOV'T CODE ANN. § 411.2031(d-1) (1997).

Suppose that after consulting the student body, faculty and staff about these matters, the President or other chief executive officer determines that the only reasonable regulation is to prohibit the possession of guns on campus with the exception of the campus police. Yet, the following sentence in subsection (d-1) expressly prohibits him or her from creating regulations that are the equivalent of generally prohibiting license holders from carrying concealed handguns on campus.[43] The language in the statute is inconsistent, confusing, and paradoxical because it creates a situation where the "specific safety considerations" and the "uniqueness of the campus environment" could result in a finding that a general prohibition is the best way to create a safe environment for its student population. For instance, what if there was a high incidence of shootings on that campus or suicides in the preceding year? What if the campus is located in a high crime area? What if the campus environment is unusually stressful and a significant portion of the student body suffers from mental illness? Forcing institutions to adopt a concealed carry policy on their campuses could have deadly consequences, which is why the legislation literally is fatal.

Moreover, what is the point in consulting the students, faculty, and staff if their points of view and recommendations will not be taken into consideration? As explained earlier in this article, the overwhelming majority of students, faculty, and staff have indicated they believe that concealed firearms on campus make them less safe and they prefer a gun-free campus. If a president or chief executive officer of a higher education institution does not take their viewpoints into account, the statutory language mandating that they be consulted is merely perfunctory.

Adding to the confusion in subsection (d-1) is the next line that states the President or chief executive officer *may* amend their regulations as needed for safety.[44] Does this mean that after a post-secondary institution implements the law generally permitting concealed firearms on campus, the institution can later ban firearms if it later determines it is necessary for safety reasons? For example, say the implementation of the law actually led to a significant increase of gun violence on campus. Does this provision allow a college or university to re-instate a gun ban?

The only reasonable interpretation of (d-1) is to read it so that it gives the President or chief office of a public college or university the option of banning firearms if "the nature of the student population, specific safety

43. *Id.*
44. *Id.*

considerations, and the uniqueness of the campus environment" dictate this is the only reasonable regulation.

Significantly, this interpretation is consistent with subsection (e) of the same statute that has similar language. Specifically, that provision provides that "[a] private or independent institution of higher education in this state, *after consulting with students, staff, and faculty of the institution*, may establish rules, regulations or other provisions prohibiting license holders from carrying handguns on the campus of the institution. . . ."[45] If private colleges and universities can ban firearms on campus after consulting with the campus body, then public colleges and universities should be afforded the same consideration.

Texas's statutory interpretation law is consistent with this conclusion. A basic precept of statutory analysis is that to "determine and give effect to the Legislature's intent" by first looking at the "plain and common meaning of the statute's words."[46] If the language of the statute is "unambiguous," the court will then "interpret the statute according to its plain meaning"[47] unless it would lead to "absurd consequences that the Legislature could not have possibly intended."[48] In doing this, the court will not give an "undefined statutory term" a meaning that is "out of harmony or inconsistent" with other provisions within the statute.[49] Additionally, a statute is ambiguous when the statutory language is susceptible to two or more interpretations.[50]

Here, the statutory language in subsection (d-1) requiring consultation with faculty, students and staff concerning reasonable regulations regarding the carrying of concealed firearms but precluding any regulation generally prohibiting firearms leads to two or more different interpretations. One reasonable interpretation is that public campuses must allow the carrying of concealed firearms in most areas of the institution, irrespective of (1) how the faculty, students and staff on that campus feel; (2) the "nature of the student population"; (3) "specific safety considerations"; and (4) "the uniqueness of the campus environment." Another interpretation is that campuses should be allowed to prohibit firearms if after consulting those on

45. TEX. GOV'T CODE ANN. § 411.2031(e) (1997) (emphasis added).
46. McIntyre v. Ramirez, 109 S.W.3d 741, 745 (Tex. 2003).
47. *Id.*
48. Price v. State, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014).
49. *McIntyre*, 109 S.W.3d at 745.
50. *Price*, 434 S.W.3d at 605 (explaining "[a] statue is ambiguous when the statutory language may be understood by reasonably well-informed persons in two or more different senses; conversely, a statute is unambiguous when it permits only one reasonably understanding.").

campus, these considerations indicate a complete ban is necessary to create a safer environment. Thus, the Texas statute is ambiguous.

B. Another Flaw in the TCCL is Its Fallacy of Immunity

Texas Government Code Section 411.208 purports to grant immunity to all higher education institutions, as well as its officers and employees, for damages caused by implementing TCCL, failing to perform a duty imposed by the TCCL, or the actions of any concealed handgun license holder or applicant in "a court."[51] Apparently, this section was created to prevent a college/university from being sued for actions committed by a CHL hero, who during a mass shooting, accidentally shoots and injures or kills an innocent bystander.

Significantly, the statute does not provide immunity from damages caused by non-CHL's. Suppose a non-CHL is rooming in a dormitory with a CHL holder and he or she steals the CHL's gun and kills another. Additionally, the statute expressly waives immunity for CHL's in cases where a higher education institutions' or its employees' actions or failures to act were "arbitrary or capricious."[52] Thus, the plain language of the statute suggests that immunity cannot be invoked in a situation where the plaintiff alleges that the institution or one of its officers or employees acted unreasonably and negligently by not terminating an employee or dismissing a student who is known to be violent and dangerous, and that employee or student later commits a rampage shooting on campus.

Also, this "arbitrary and capricious" waiver of immunity could allow negligence per se cases brought pursuant to the Clery Act. The Clery Act requires all colleges and universities receiving federal funding to "immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus . . ., unless issuing a notification will compromise efforts to contain the emergency."[53]

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51. TEX. GOV'T CODE ANN. § 411.208 (1997); *see also* S.B. 11, 84th Leg., Reg. Sess. (Tex. 2015) (explaining this provision was intended to immune Texas colleges and universities from CHL's actions on campus; no immunity is granted to private institutions who opted out of campus carry, however).

52. TEX. GOV'T CODE ANN. § 411.208(d) (1997).

53. 20 U.S.C. § 1092(f)(1)(J)(i); *see also* S. Daniel Carter, et. al., THE CLERY ACT: CRIME REPORTING REQUIREMENTS UNDER FEDERAL LAW AND HOW YOU CAN USE THIS SWORD AS ANOTHER WEAPON AGAINST DEFENDANT SCHOOLS, Ann. 2007 AAJ-CLE 2463 (explaining "[a]ll institutions of postsecondary education, both public and private, eligible to participate

Failing to comply with the timely notice requirement of the Clery Act could amount to negligence per se if the postsecondary institution fails to notify the campus community of an ongoing shooting and someone is injured as a result.[54]

Moreover, the plain language of the statute does not prevent someone from suing a non-state-employee CHL personally, like a student. For instance, a student could be sued for permitting his or her roommate who is suicidal to access his or her gun, allowing his or her weapon to accidentally discharge, or otherwise injuring or killing an individual on campus.

Additionally, the statute does not preclude suits against the State of Texas or State higher education institutions, challenging the constitutionality of the campus carry law in either federal or state court. It is well settled that Eleventh Amendment of the U.S. Constitution,[55] embodying the principle that a State cannot be sued by citizens of another State or a foreign state in federal court without the State's consent, cannot be invoked to shield States from claims that it has acted unconstitutionality.[56] This is because the Fourteenth Amendment permits Congress to authorize a suit to enforce the substantive provisions of the Fourteenth Amendment, which limits a State's power to violate an individual's constitutional rights.[57]

In sum, because a postsecondary institution can still be sued for the actions of non-CHL members of the campus-carry-community, its own gross negligence, and the actions of CHL holders acting arbitrary or capricious,

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in any federal student aid program under Title IV of the Higher Education Act of 1965 are subject to the reporting requirements stipulated in the law, which is known simply as the Clery Act.").

54. *See, e.g.,* West v. Mache of Cochran, Inc., 370 S.E.2d 169 (Ga. App. 1988) (holding violation of 18 U.S.C. § 922(d)(4), making it unlawful for a licensed dealer to sell a firearm to a person who had been adjudicated mentally ill, was negligence per se, as (1) the injured persons fell within the class of persons the statute was intended to protect and (2) the harm complained of was the harm it was intended to guard against). Here, students, faculty, and staff are within the class of persons the Clery Act was intended to protect, and being injured and killed due to an unreported emergency on campus is precisely the harm the Clearly Act was intended to guard against. Thus, violating the Clery Act could be considered negligence per se.

55. This Amendment provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend. XI.

56. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense, 527 U.S. 666, 669-70 (1999).

57. Fitzpatrick v. Bitzer, 427 U.S. 445, 453-54 (1976).

should it not have the right to decide whether to adopt campus carry on its campus?

C. Implementation and Enforcement Concerns

Finally, it is unclear from the plain language of the statute how far postsecondary institutions can go with designating gun-free zones pursuant to subsection (d-1), leaving the limits to be tested by litigation later in court and to little uniformity among colleges and universities.[58] For instance, out of the forty-four Texas postsecondary institutions that have dorms, eight plan on banning or restricting the carrying of firearms into dormitories when TCCL becomes effective.[59] For example, Texas Tech University is permitting concealed guns in one of its apartment-style dormitories that will be individually assigned; in other words, no roommates.[60] Prairie View A&M University plans on completely banning firearms on its campus, on the ground that the third-party vendor who operates the campus housing prohibits firearms.[61] The University of Texas at Austin permits the carrying of concealed guns in common areas and in apartment buildings, unless the CHL is a parent or faculty member.[62] Seventeen colleges and universities have designated gyms as gun-free zones, and six have denoted that labs are gun-free areas.[63] What about libraries, student and faculty lounges, and places where students air grievances? If one thinks long enough, a justification for precluding firearms in these areas can be found.

Additionally, the question remains, can entire buildings be designated as gun-free, such as law schools, given its extremely stressful environment? The prohibitory language in (d-1) stating that "[t]he president or officer may not establish provisions that generally prohibit or have the effect of generally prohibiting license holders from carrying a concealed handguns on the campus of the institution," suggest that it cannot.[64]

The legislative history, however, indicates this is permissible. Specifically, in the context of praising amendments that had been made to Senate Bill 11 (which is now TCCL) that would allow the creation of gun-

58. Benning, *supra* note 8.
59. McGaughy, *supra* note 11.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. TEX. GOV'T CODE ANN. § 411.2031(d-1) (1997).

free zones on campus, Texas Democratic Senator Jose Rodriguez from El Paso expressed he had "concerns about introducing guns into a university environment already fraught with stress and often fragile emotions."[65] Thus, it stands to reason that if a postsecondary school has a uniquely stressful environment, the entire building or at least the classrooms where sensitive and controversial issues are hotly debated, could conceivably be a gun-free area.

Additionally, TCCL raises a myriad of enforcement concerns. How are colleges and universities supposed to know who is a CHL and who is not? Are they allowed to compile a list? It seems a list would be necessary, as some students may be legally prohibited from living with a CHL, such as in the case of a student who is a convicted felon. Other non-firearm students may prefer not to room with a CHL. If a list is compiled, would not this defeat the purpose of having a concealed weapon?

What about situations where a CHL starts to display bizarre and erratic behavior on campus, suggesting he or she may be mentally unstable, but has not actually threatened violence against anyone. Could a college or university preclude this person from carrying a firearm on campus? Given the reasonable fear that such a person could harm themselves or others, higher education institutions may be more aggressive about dismissing these type of students, potentially leading to the stigmatization or unwarranted dismissal of a non-dangerous, mentally ill individual.

IV. CONCLUSION

In conclusion, TCCL is fatal to the campus community's freedom of speech; postsecondary institution's constitutional academic freedom to decide how to best keep its campus safe in order to carry out its educational mission; and to the very spirit of those faculty, students and staff who are dreading having to teach, learn and exist in an academic atmosphere polluted with firearms.[66] The Texas Legislature can easily ameliorate these fatal

65. Benning, *supra* note 8.

66. One might argue that the presence of firearms will not be as great at undergraduate institutions where the majority of students are under 21 and too young to acquire a concealed handgun license in Texas. However, military persons under 21 years of age can apply for concealed handgun license. Also, most of the campus community at graduate schools like law schools are over the age of 21, so at these post-graduate schools the presence of guns will be greater than at undergraduate institutions.

provisions by amending the statute to make the campus carry mandate optional, as it has done for private higher education institutions.

Firearms have a place in our society—in the hunting fields, in the military, and in our home. They have absolutely no place in our classrooms. This is especially true since, to date, there has not been a single instance of a concealed handgun licensee stopping an active shooting at any school, including a higher education institution.[67] Therefore, not only is TCCL fatal because of its unconstitutional provisions, but it is fatal because it falsely presumes to save more lives, when in reality it further endangers those present during a mass shooting as the concealed handgun licensee can accidentally shoot innocent bystanders while trying to take down the active shooter, draw the school shooter's attention to his or her area where innocent bystanders are trying to hide, and confuse the police when they respond to the deadly rampage.

The question then becomes what will those in opposition to this legislation do when August 1, 2016 rolls around. Some professors have promised civil disobedience, vowing that notwithstanding state law or university rules, they will preclude firearms in their classrooms.[68] Some of the campus community may come adorned in their bullet proof vests and concealed firearms. A few individuals may decide not to attend, or work at, Texas postsecondary institutions with guns. Some may challenge the law in court. Others may reluctantly follow the law and register their opposition at the voting booth. One thing remains clear—this law must either be repealed or amended to allow each individual postsecondary institution to decide whether to permit campus carry on their campus, in order to honor ensure everyone in Texas receives a quality higher education.

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67. J. Pete Blair & Katherine W. Schweit, *A Study of Active Shooter Incidents, 2000-2013*, at 16-17, TEX. STATE UNIV. & FBI, U.S. DEP'T OF JUST. (2014) (describing how rampage shootings at higher education institutions ended, none of which included the gunman being stopped by an armed, non-law-enforcement individual); Mark Follman, *Do Armed Civilians Stop Mass Shooters? Actually, No.* (Dec. 12, 2012), http://www.motherjones.com/politics/2012/12/armed-civilians-do-not-stop-mass-shootings (debunking the myth that armed citizens thwart mass shootings by contradicting the five most commonly cited cases gun advocates cite for this proposition).

68. Unknown Author, *Defying the Law, Steven Weinburg Plans to Ban Guns in His Classroom*, WHY EVOLUTION IS TRUE, https://whyevolutionistrue.wordpress.com/2016/01/28/defying-the-law-steven-weinberg-plans-to-ban-guns-in-his-texas-classroom/