

Greg Abbott's We the People Plan

DNA Rights

Recommendation 1: Recognize a private property right in one's own DNA.

"[Mapping the human genome] seems to me to be an epochal moment, because we're going to get depths of insight into the nature of human nature that we never could have imagined, and that will dwarf anything that philosophers and indeed scientists have managed to produce in the last two millennia. That's not to denigrate what's gone before, but the genome changes everything."

- The Genome Changes Everything: A Talk with Matt Ridley¹

Both the United States and the State of Texas have long recognized a right to property. The Fifth Amendment to the U.S. Constitution provides that a person may not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Similarly, Texas Constitution Article 1, Section 19 of the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Texas Constitution Article 1, Section 17 provides in part that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person...."

The rights to life, liberty, and property are all intrinsically connected to an individual's rights in his or her own genetic material. This is a property consideration that neither the Framers of the U.S. nor Texas Constitutions could have considered. Nevertheless, the writings of our foundational thinkers on liberty lay a philosophical foundation for property rights in DNA. As John Locke wrote in *Two Treatises on Government*:

...[E]very Man has a *Property* in his own *Person*. This [nobody] has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.²

At its core, the right to property in the West has always been predicated on an individual's right to enjoy, use, or distribute personal possessions as the individual best sees fit. Although human beings have always been in literal possession of their own genetic code, there has been no true ability to make use of or even understand this ownership right until very recent decades. In the modern period, however, this emerging technological field could potentially bestow property advantages - including the creation of wealth - on the owner of genetic material and those who are permitted to utilize and study it. In a recent article entitled "Who Owns the Code of Life?," Peter W. Huber discusses how reinforcing private ownership of genetic material would not only protect peoples' privacy and private information, but also how "well-crafted property rights promote the broad and economically efficient distribution of know-know."³ Huber states:

¹ See: http://www.edge.org/3rd_culture/ridley03/ridley_print.html

² "Two Treatises on Government," John Locke, 1689. <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html>

³ "Who Owns the Code of Life," Peter W. Huber, *City Journal*, Autumn 2013.

Conspicuous by its frequent absence in debates about who owns biological know-how is the patient's right not to disclose information about his or her innards to anyone—the corollary of which should be a right to give it away, share it, sell it outright, or license it selectively, at whatever price the market will bear. The individual patient won't often be interested in haggling over what a clinical record might be worth to a hospital or an insurance company. But emphatically reaffirming the private ownership of private information is the first, essential step in creating markets for those who would help collect and analyze the data.⁴

DNA is unique to a particular individual.⁵ No two people's DNA is the same; even identical twins may have slight differences in their genetic code.⁶ It follows that one particular DNA sample might be more suited for a particular purpose, e.g. cancer research, than another, which in turn suggests that DNA has an intrinsic value. Texas law is silent on ownership of one's own DNA.

In explaining the increasing need for a legal system establishing an ownership right in DNA, an analysis in the Suffolk University Law Review stated:

The average human loses between forty and one hundred strands of hair every day. Humans make one liter of saliva each day. In a lifetime, the average human sheds about forty pounds of skin. Hair, skin, and saliva are just a few ways in which individuals leave behind traces of their identity in the form of deoxyribonucleic acid (DNA). DNA has become an irrefutable method for identifying a person. In essence, humans are constantly leaving traces of their identity everywhere they go...

Access to a person's DNA provides a dangerously intimate blueprint of a person's body... Easy access to DNA exposes an individual's most private and intimate information to the world. As genetic information becomes increasingly easy to obtain, it renews the timeless debate over precisely which circumstances trigger an individual's right to privacy.⁷

⁴ *Id.*

⁵ "DNA Is a Structure that Encodes Biological Information," <http://www.nature.com/scitable/topicpage/dna-is-a-structure-that-encodes-biological-6493050>

⁶ "Identical Twins' Genes are not identical," Anne Casselman, *Scientific American*, Apr 3, 2008. <http://www.scientificamerican.com/article.cfm?id=identical-twins-genes-are-not-identical>

⁷ "Massachusetts Genetic Bill of Rights: Chipping Away at Genetic Privacy," Jaclyn G. Ambrose, *Suffolk University Law Review*, 2012. 45 *Suffolk U. L. Rev.* 1177.

The story of Henrietta Lacks indicates the need for establishing an ownership interest in DNA. Ms. Lacks was 31 years-old when she died of cervical cancer. Doctors removing her tumor cells discovered that the cells were capable of thriving in a laboratory setting. In the 62 years since her death, Henrietta Lacks' cells have been studied more than 74,000 times and have yielded countless scientific discoveries.⁸ It was not until 1973, 22 years after Ms. Lacks' death, that her family learned her DNA was being studied all over the world. The family objected to the use of Henrietta's DNA genome without their consent and struggled for years to reach an accord with the scientific community. Finally, in August 2013, the National Institute of Health (NIH) worked out an agreement with Henrietta's surviving family, which gives the Lacks family some say as to how the DNA data is used for research.⁹ Officials at the NIH now admit they should have contacted the Lacks family when researchers first applied for the grant to sequence the genome.

In 1990, the California Supreme Court issued the landmark decision in *Moore v. Regents of University of California*, 51 Cal. 3d 120, in which the court held that an individual has no right to the profits from the commercialization of a cell line produced from his discarded body parts. Mr. Moore was found not to be entitled to any of the profits from the commercialized cell line because he had failed to exercise any vested property rights in his cells prior to ceding them to the laboratory. However, in regards to this case, a *Stanford Law Review* article, *Whose Body Is It Anyway?*, states:

“Cells separated from the human body are tangible property that must, as an initial matter, belong to someone. They cannot simply spring forth as tangible property of a lab or a researcher without having been the property of anyone else prior to that point. The logical person for initial ownership of cells is the person from whose body the cells originated.”¹⁰

The Federal Government and state governments have begun inching towards tacit recognition of genetic property rights. Federal law has recognized the importance of creating rights relating to genetic information. The Genetic Information Nondiscrimination Act (GINA)¹¹ was enacted by Congress in 2008. This act prohibits discrimination based on genetic information in health coverage and in employment.

Many Texas statutes already acknowledge the confidential nature of genetic information. Examples of this confidential acknowledgment can be found in the Texas Insurance Code, the Texas Occupations Code, and the Texas Labor Code. Additionally, the Texas Family Code includes an implicit recognition of a person's property right in regards to his or her genetic material, acknowledging that individuals may donate their genetic material for the purpose of assisted reproduction.¹²

⁸ “A Family Consents to a Medical Gift, 62 Years Later,” Carl Zimmer, *The New York Times*, Aug 7, 2013. <http://www.nytimes.com/2013/08/08/science/after-decades-of-research-henrietta-lacks-family-is-asked-for-consent.html>

⁹ “NIH, Lacks family reach understand to share genomic data of HeLa cells,” Aug 7, 2013 <http://www.nih.gov/news/health/aug2013/nih-07.htm>

¹⁰ “Whose Body Is It Anyway?,” Robin Feldman, *Stanford Law Review*, June 2011, 63 *Stan. L. Rev.* 1377. <http://www.stanfordlawreview.org/sites/default/files/articles/Feldman-63-Stan-L-Rev-1377.pdf>

¹¹ 42 U.S.C. §§ 2000ff-2000ff11

¹² Texas Family Code §160.102(6)

Federal courts have also protected genetic material in Texas. For example, a 2009 lawsuit filed in federal court resulted in a settlement with the Texas Department of State Health Services (DSHS). That case was filed after the discovery that legally collected blood samples of more than five million newborn babies were retained for research without parental consent.¹³ Although legislation allowing DNA sample retention for research eventually passed, all samples collected before the law was passed were destroyed, unless parental consent was later obtained, in accordance with the settlement.¹⁴ While the case was settled and, therefore, has no precedential value, it demonstrates the importance of updating Texas' law to provide explicit rights in genetic material.

It is increasingly critical for states to take action to defend an individual property right in citizens' own genetic code. As the *Stanford Law Review* notes:

[W]e are fast approaching the point at which just about anyone can have property rights in your cells, except you. In addition, with some alteration, anyone can have intellectual property rights in innovations related to the information contained therein, but you do not.¹⁵

Some states have taken legislative action to define DNA ownership. Alaska, Colorado, Florida, Georgia, and Louisiana are but a few examples of states that have passed laws declaring some form of property ownership in one's own DNA.¹⁶ The protections range from providing a personal property right in DNA to protecting genetic material in the context of samples collected by insurers:

1. Alaska: "[A] DNA sample and the results of a DNA analysis performed on the sample are the exclusive property of the person sampled or analyzed." Alaska Stat. § 18.13.010(a)(2).
2. Colorado: "Genetic information is the unique property of the individual to whom the information pertains." Colo. Rev. Stat. Ann. § 10-3-1104.7(1)(a).
3. Florida: "[T]he results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested." Fla. Stat. Ann. §760.40(2)(a).
4. Georgia: "Genetic information is the unique property of the individual tested." Ga. Code Ann. § 33-54-1(1).

The statutes listed above are generally narrow in scope. Only Alaska's statute expressly includes DNA samples as personal property. Alaska passed this law without a single vote against in either legislative chamber (34-0 in the House, and 20-0 in the Senate).¹⁷ In explaining the need to pass such a law, Alaska's Senate submitted a letter of intent explaining that:

¹³ "State to Destroy Newborns' Blood samples," Peggy Fikac. <http://www.chron.com/news/houston-texas/article/State-to-destroy-newborns-blood-samples-1599212.php>

¹⁴ *Id.*

¹⁵ "Whose Body Is It Anyway?," Robin Feldman, *Stanford Law Review*, June 2011, 63 *Stan. L. Rev.* 1377. <http://www.stanfordlawreview.org/sites/default/files/articles/Feldman-63-Stan-L-Rev-1377.pdf>

¹⁶ "State Statutes Declaring Genetic Information to be Personal Property," Seth Axelrad. http://www.aslme.org/dna_04/reports/axelrad4.pdf

¹⁷ See: Alaska State Legislature, online at: <http://w3.legis.state.ak.us/>

The Legislature finds that recent scientific breakthroughs in decoding DNA samples have the potential of disclosing the probable medical future of individual families' bloodline when samples are collected, retained and disclosed without consent. The Legislature has determined that such disclosure may lead to harm of an individual and their blood relatives, including discrimination in areas such as employment, education, healthcare and insurance. Concern exists that the current laws regarding collection, retention or disclosure of DNA information are inadequate and steps should be taken to protect genetic privacy, property interests and information derived from samples.¹⁸

Texas could be on the vanguard of DNA property rights, including the right to control the purposes for which ones' DNA is used. It is clear that updates are necessary, as the biotechnology industry has been steadily expanding across the United States. As of 2010, there were 1,605,533 biotech jobs in the country, growing by 6.4% in the preceding decade.¹⁹ Texas alone has 89,610 jobs within 3,556 firms.²⁰ It has also been ranked recently among the top five states as one of the country's leaders in biotechnology employment.²¹ DNA is used in multiple ways throughout the biotech industry. For example, DNA is sequenced in biomedical labs, and even used by environmental technology companies to test for pathogens in food and water.²²

The Legislature should pass legislation that clearly recognizes an individual's property right in his or her DNA by adding Chapter 45, Property Interests in Biological Material, to the Texas Property Code. This would be consistent with the subsequent recommendations protecting the use of personal information and data by state agencies and private corporations.

¹⁸ Alaska Senate Journal, March 4, 2004.

http://www.legis.state.ak.us/basis/get_jrn_page.asp?session=23&jrn=2404&hse=S&bill=SB217

¹⁹ "Battelle/Bio State Bioscience Industry Development 2012." http://www.bio.org/sites/default/files/v3battelle-bio_2012_industry_development.pdf

²⁰ "The Texas Biotechnology Industry Report 2013." http://www.governor.state.tx.us/files/ecodev/Biotech_Report.pdf

²¹ "Top Biotech States Ranked," George Goodno, Sept 3, 2013. <http://www.biotech-now.org/business-and-investments/business-of-biotech/2013/09/top-biotech-states-ranked#>

²² "The Texas Biotechnology Industry Report 2013." http://www.governor.state.tx.us/files/ecodev/Biotech_Report.pdf

Data Collection

Recommendation 2: Make state agencies, before selling database information, acquire the consent of any individual whose data is to be released.

Many state agencies have the authority to collect data on Texas residents. In some instances, state agencies with data on Texas residents sell the information to private businesses for a profitable return without requiring consent or providing affected individuals a means of opting-out. The most visible example of data collection is the Department of Motor Vehicles (DMV), which maintains records on 22 million registered vehicles and their drivers.²³ These records are all stored in the DMV database. The database is supposed to be protected by the Driver Privacy Protection Act, which limits who can buy the DMV's information and what they can do with it.²⁴ Yet in practice there are weak restrictions on who can purchase the information, as evidenced by the fact that the DMV sold to more than 2,500 clients in 2012 ranging from collection agencies and banks to towing companies and private investigators.²⁵ In 2012, the DMV collected \$2.1 million by selling information on Texas drivers from its database.²⁶

DSHS also sells "private" data. One report revealed that between 1999 and 2010, data pertaining to more than 27 million hospital visits was sold to private parties. Unlike the DMV database, information to hospital visits contains data of a heightened sensitivity, including tests and medications received.²⁷ DSHS makes the data available through its website for the Texas Healthcare Information Collection Center for Health Statistics. A report detailed the frequency with which data is purchased:

According to DSHS spokesman Van Deusen, between January 2009 and July 2010, buyers paid to download 916 quarter-years of the hospital-patient Public Use Data Files years 2004 to 2009. They paid \$4,600 per year, or \$1,400 per quarter, for the years 2007–2009, according to the data order form. For years 2004–2006, buyers paid \$525 per quarter. All buyers also paid DSHS a processing fee of \$100 per quarter-year of data. (Hospitals receive discounts.)²⁸

Numerous other state agencies and departments are collecting data at an increasing rate. House Bill 2103 (83R), passed and signed by the Governor, is only one example. HB 2103 increases sharing of data among education resource centers. As data collection and sharing becomes more commonplace, protections should be implemented to ensure that private information is protected and that data is not being used for offensive and invasive purposes.

²³ "State Sells Personal Information & You Can't Opt Out," Mireya Villareal, *CBS DFW*, Feb 11, 2013. <http://dfw.cbslocal.com/2013/02/11/cbs-11-investigates-your-personal-information-for-sale-you-cant-opt-out/>

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ "Hospital patient privacy sacrificed as state agency sells or gives away data," Suzanne Batchelor. *Austin Bulldog*. Sept 30, 2010. www.reportingonhealth.org/fellowships/projects/hospital-patient-privacy-sacrificed-state-agency-sells-or-gives-away-data

²⁸ *Id.*

Texans should be informed that their data is being offered for sale to third parties, and sale of such data should be contingent on individual consent. One way to encourage individual consent is to offer a discount on services in exchange for consenting to release at any state agencies where data is provided, such as the DMV. If the state is profiting from the sale of data, there should be a corresponding benefit to the data source.

The Government Code should be amended with a new chapter governing personal information. It should require all state agencies, before selling database information, to acquire the consent of any individual whose data is included. Requiring state agencies to obtain consent before data may be sold has the potential to reduce revenue collections. However, this consequence should not take precedence over requiring consent for the sale of personal data that is compelled to be furnished by force of law.

Recommendation 3: Prohibit data resale and anonymous purchasing by third parties.

Data collection is not only likely to continue, but to proliferate. When data is sold from state agencies to private parties, often times the data is then sold to third parties that repackage and resell the data again. Moving forward, legislation should be passed to protect Texans' data. In addition to "opt-in" provisions, the state should explore prohibiting resale by third party purchasers and prohibiting anonymous purchasing. This provision should be included as a section within the new chapter of Government Code proposed in Recommendation 2, as it pertains to personal information and data management.

The benefits of this recommendation are primarily to provide a clear understanding of who holds private data. If data is permitted to be resold, there is no control over which parties finally acquire possession of that personal information.

Recommendation 4: Prohibit the use of cross-referencing techniques to identify individuals whose data is used as a larger set of information in an online database.

Both public and private sources keep personal information data online. Although this data is typically "de-identified" by removing or withholding personal information in order to maintain anonymity, many experts believe that re-identification, which involves identifying real people from anonymous databases by cross-referencing information in the data tables, is not particularly difficult.²⁹ Currently, Texas Health and Safety Code Section 181.151 prohibits re-identification or attempted re-identification of protected health information. This regulation from the Texas Medical Privacy Act is even more expansive than the prohibitions laid out in the federal Health Insurance Portability and Accountability Act (HIPAA), which allows re-identification of protected health information in some circumstances.³⁰ Texas takes the privacy of medical records seriously, and the same provisions should be extended to non-medical records. Establishing such a prohibition is a common-sense strategy that will bolster the protection of private information maintained in online databases.

²⁹ See e.g. "Robust De-anonymization of Large Sparse Datasets," Arvind Narayanan and Vitaly Shmatikov. http://www.cs.utexas.edu/~shmat/shmat_oak08netflix.pdf

³⁰ "Texas Medical Privacy Act Adopts and Expands the HIPAA Privacy Regulations," Jessica Luna, Aug 30, 2001. <http://www.law.uh.edu/healthlaw/perspectives/Privacy/010830Texas.html>

Examples of re-identification are growing. For instance, Netflix released movie rankings from their subscribers in 2006. Names of users were removed, but researchers from the University of Texas were able to re-identify those users simply by cross-referencing profiles of public rankings on Internet Movie Database (IMDb).³¹ However, even more sensitive data is at stake than Netflix profiles. In a discussion of patient privacy in the context of HIPAA, Peter W. Huber explains that re-identification poses a serious threat to HIPAA protected data. Although HIPAA requires that medical records be redacted before they shared for research, Huber describes Washington’s guidelines on de-identification of private health care data “naively optimistic about what [re-identification] would require.”³² He continues:

In a paper published in *Science* last January, an MIT research team described how easily it had used a genealogy website and publicly available records to extract patients’ identities from ostensibly anonymous DNA data. Genetic profiles reveal gender, race, family connections, ethnic identity, and facial features; they correlate quite well with surnames. DNA fingerprinting following an arrest is now routine, and a close match with a relative’s DNA can provide an excellent lead to your identity. Further, state-run clinics and hospitals are exempt from the federal requirements, and some are already selling patient records to outsiders, sometimes neglecting to remove information, such as age, zip codes, and admission and discharge dates.³³

The Texas Penal Code should be amended with a new chapter governing the re-identification of personal data, which is intended to remain anonymous. The benefit of this recommendation is to provide a clear, codified, prohibition on improperly identifying individuals whose data is used as a larger set of information. It places a heightened emphasis on protecting privacy.

Ethics Reform

Recommendation 5: Require disclosure by all legislators, statewide elected officials, and gubernatorial appointees of any contract, subcontract, or paid relationship with a public entity, including the state and political subdivisions, held by those individuals or their spouses. Violation of this requirement would be a Class A Misdemeanor.

State officers, candidates for certain elective offices, and state party chairs, in filing a personal financial statement with the Texas Ethics Commission, are not required to disclose certain contracts or subcontracts with governmental entities. This interferes with the ability of voters to judge whether a public servant may benefit from his or her contracts with public entities. There is a valid concern that public officials may be in a position to obtain private benefit from their public official contacts. This may be a particular concern with legislators, almost all of whom are employed in some capacity other than their public office. This issue should be addressed by amending Chapter 254 of the Election Code (Political Reporting) to implement this recommendation.

Recommendation 6: Prohibit legislators from voting on legislation from which they may financially benefit by closing loopholes in the Texas Government Code, and providing options for both criminal and civil suit to ensure the enforcement of these provisions.

³¹ “Why Anonymous Data Sometimes Isn’t,” Bruce Schneier, *Wired*, Dec 13, 2007.
http://www.wired.com/politics/security/commentary/securitymatters/2007/12/securitymatters_1213

³² “Who Owns the Code of Life,” Peter W. Huber, *City Journal*, Autumn 2013.

³³ *Id.*

TGC 572.053(a) provides:

A member of the legislature may not vote on a measure or a bill, other than a measure that will affect an entire class of business entities that will directly benefit a specific business transaction of a business entity in which the member has a controlling interest.

There are three problems with this language. First, Texas legislators interpret the provision to mean that they do not have a conflict of interest if they vote on legislation that affects an entire industry, and not just their own specific businesses.³⁴ Indeed, the House Rules comments provide that the disclosure and non-voting for personal business requirement is one “which each member is left to comply according to his or her own judgment as to what constitutes a personal or private interest.”³⁵ Second, the language does not cover many instances in which a legislator may gain financially because the language only restricts voting on matters in which the member may have a “controlling interest” in a business. Finally, the language does not provide a sufficient enforcement mechanism to ensure that legislators who have a conflict are deterred from improperly voting on issues that implicate them directly.

In order to foreclose any opportunity for financial gain through official governmental business, Texas Government Code Chapter 572.053 should be amended to include any pecuniary gain through employment, contracts, subcontracts, contingency fees, referral fees, or agreements in order to close legislative interpretation loopholes. Expanding this provision allows for greater transparency and serves to limit potential conflicts of interest.

Finally, when legislators violate these provisions, there must be a viable method for the citizens of Texas to hold their representatives accountable. Under current law, any individual may file a sworn complaint with the Texas Ethics Commission alleging a violation of certain laws, including those provided in Texas Government Code Chapter 572, which governs the provisions of this recommendation. This does not provide a sufficient disincentive to discourage legislators from voting on matters of personal interest. Enforcement on the issue should be expanded by providing an option for private citizens to bring civil suit against any alleged violation of this law.

Amend Texas Government Code Section 572.053 to prohibit legislators from voting on a measure or bill in which the member or member’s spouse has a controlling interest, or through which the member or spouse would derive a pecuniary gain through employment, contract, subcontract, contingency fee arrangement, referral fee, or agreement.

In addition, amend Texas Government Code Section 572.0531(a) to require members to file a notice before introducing or sponsoring a measure or bill if a person related to the member within the first degree of consanguinity or the member’s spouse is a registered lobbyist with respect to the subject matter of the measure or bill, or if the member has a controlling interest in an entity effected by the measure or bill, or derives a pecuniary gain through employment, contract, subcontract, contingency fee arrangement, referral fee, or agreement.

³⁴ “Conflicts of interest a way of life in Texas Legislature,” Patricia Kilday Hart, Houston Chronicle. <http://www.houstonchronicle.com/news/kilday-hart/article/Conflicts-of-interest-a-way-of-life-in-Texas-4170345.php>

³⁵ Texas House Rules, 83rd Legislature. Online at: http://www.house.state.tx.us/_media/pdf/hrrules.pdf (last checked August 13, 2013).

Finally, add Texas Government Code Section 572.0532 to provide that violations of the previous sections shall be a Class A Misdemeanor, and may be prosecuted by the Travis County District Attorney's Office; and to provide that any individual may file civil suit against a legislator in any District Court in Travis County, Texas. In such a civil suit, provide that the individual bringing the suit shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. The remainder of the award should be kept by the state for indigent defense under Government Code Chapter 79. The party that prevails in the suit shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs.

These changes to the Texas Government Code will ensure a more responsible government for Texas. Disclosure of state contracts, along with the recommended amendment within the Texas Government Code will result in a more transparent government without loopholes for public officials.

Recommendation 7: Prohibit the use of tax dollars for the purpose of engaging a registered lobbyist to lobby on the behalf of a school district or the board or association thereof.

School districts should directly represent the needs of their communities before the legislature, and not waste taxpayer resources on lobbyists. School district leadership must not rely on lobbyists to do the work voters elected them to do. These leaders are elected or appointed in part to vigorously represent and defend their constituents – the hiring of lobbyists to meet this same goal is superfluous. School districts are funded by the state through the school finance formulas. By contrast, Teachers Associations are funded by dues. Utilizing state tax dollars to hire private lobbyists to influence the state (and its budgetary priorities) is an abuse of the public trust.

The Texas Ethics Commission notes that several school districts and associations thereof spent a significant amount on lobbyists during the 83rd Legislative Session.³⁶ These include:

- Texas Association of School Boards spent as much as \$400,000.
- Houston Independent School District spent as much as \$245,000.
- Texas Association of School Administrators spent as much as \$175,000.

It is, in part, the legality of lobbyists for the entrenched interests of school districts that makes meaningful reform of Texas' public education system so difficult. These expenditures of taxpayer funds to hire private lobbyists to influence taxpayer-funded government officials should be prohibited.

³⁶ Texas' Top Lobbyists, Texans for Public Justice. <https://www.documentcloud.org/documents/713536-top-texas-lobbyists-2013.html>

Recommendation 8: Prohibit legislators and statewide elected officials who are licensed by the State Bar of Texas from earning referral fees or receiving any benefit from legal referral. Violation of this requirement would be a Class A Misdemeanor.

Texas Government Code Sec. 572.0252 requires a state officer who is an attorney to report on the financial statement making or receiving any referral for compensation for legal services and the amount of any fee accepted for making a referral for legal services. The Texas Disciplinary Rules of Professional Conduct, which establishes the ethical guidelines for Texas attorneys, allows (Rule 1.04) for referral fees under certain circumstances. However, in the context of Texas' part time Legislature, a legislator who is also an attorney may have opportunities to use the access and prestige of his office to generate revenue via referral fees without doing any real legal work for the client. This practice is unethical, and should be disallowed by prohibiting legislators who are also attorneys from earning legal referral fees or receiving any benefit from legal referral.

Recommendation 9: Amend the Texas Election Code to require quarterly reporting of campaign financial data by legislators, statewide elected officials, candidates, and political action committees.

Current financial reporting requirements for political candidates are insufficient. Reports are required only semi-annually, as well as a few final reports in the last few days before an election. (See: Texas Election Code Chapter 254). After a candidate has filed a form appointing a campaign treasurer, the candidate is responsible for filing periodic reports of contributions and expenditures. Generally, candidates and officeholders are required to file reports of contributions and expenditures by January 15 and July 15 of each year. The reports filed on these dates are known as semiannual reports. An *opposed* candidate in an upcoming election must file reports of contributions and expenditures 30 days and 8 days before the election. In addition, a final report is required after the conclusion of a campaign – whether the candidate wins, loses, or withdraws from the contest.

Until the last month of an election campaign reporting is only semiannual, leaving voters poorly informed as to what parties are financing a campaign – a major indicator of the interests that a candidate is likely to take seriously if elected to office. In contrast, committees filing with the FEC generally submit reports on a quarterly or monthly schedule.³⁷ Texas should adopt these more reliable ethical standards, and require campaign finance reports to be submitted quarterly.

³⁷ Federal Elections Commission; available online at: http://www.fec.gov/ans/answers_filing.shtml#whendue

Recommendation 10: Within the last 30 days before an election, impose a requirement that no funds received from a single person or entity above \$5,000 may be expended by a campaign or political action committee until those funds have been reported to the Texas Ethics Commission and posted on the campaign or political action committee website.

In the last few days before an election, candidates should not be allowed to expend any funds that have not already been disclosed to the public online. Requiring reporting data in the final 30 days of a campaign of any funds collected (before those funds are contributed) ensures that voters are much more aware of campaign operations in the final stretch, allowing them to make a more informed choice. Implementation of this recommendation would require an amendment to Chapter 254 of the Election Code (Political Reporting).

Red Light Cameras

Recommendation 11: Allow voters in counties and municipalities the option to repeal red light camera ordinances and operations by voter-initiated referendum.

Currently, Chapter 707 of the Texas Transportation Code authorizes counties and municipalities to set up “red light” cameras at intersections. While popular with government officials because of significant increases in revenue, Texas has exhibited increasing local opposition to red light cameras. College Station repealed its red light camera law in 2009 after residents signed a petition to place the referendum on the ballot. Houston also repealed its red light camera ordinance in 2011 in a 14-1 vote of the city council.³⁸ Baytown, Dayton, and League City have also voted to repeal their red light camera ordinances.³⁹

Not every city has been successful in its efforts to remove its red light cameras. Earlier in 2013, citizens of Sugar Land gathered more than 3,000 signatures to put the issue on an upcoming ballot. The city council, however, threw out their petition on a technicality.

The Legislature should pass a law amending Chapter 707 of the Transportation Code to include a provision allowing residents of counties and municipalities an option to repeal city government installation and operation of red light cameras. Currently, many local governments provide a means of petitioning for laws and presenting referendum votes. College Station, for instance, provides in Article 10 of its city charter a method of proposing changes to local code. If a petition is joined by at least 25 percent of the electorate--as measured by voters in the last municipal election--and is presented to the city council, the city council must consider the proposal.⁴⁰ When residents of College Station presented their petition to the City Council, the red light camera ordinance was repealed via unanimous vote.⁴¹

³⁸ “Houston, Texas Pulls Plug on Red Light Camera Program.” <http://www.thenewspaper.com/news/35/3568.asp>

³⁹ “More Texas Cities Could See Red Light Camera Referendum.” <http://www.thenewspaper.com/news/37/3704.asp>

⁴⁰ Article X: Initiative, Referendum, and Recall, College Station City Charter.
<http://www.cstx.gov/Modules/ShowDocument.aspx?documentid=15838>

⁴¹ “CS Council Repeals Law Allowing Red Light Cameras.” <http://www.kbtx.com/home/headlines/79024502.html?site=mobile>

The problem, however, is that not all cities have a clear path to repealing certain laws. Hypothetically, if Austin voters ever wanted to repeal a red light camera ordinance, the Austin City Charter requires a "a petition signed by qualified voters of the city equal in number to the number of signatures required by state law to initiate an amendment to [its] Charter."⁴² State law, under Article 11 of the Texas Constitution, would require a majority vote of all qualified voters in the city to propose such a change, a much higher burden than the process in College Station.

This recommendation would provide all counties and municipalities in Texas a defined path to petition for repeal of red light camera ordinances. The bill should provide a clear method to present the issue to voters: a petition signed at least ten percent of the number participating in the most recent presidential or gubernatorial election, whichever is more recent. This recommendation respects local governance, while at the same time empowering residents to act on an important issue

The Right to Bear Arms

Recommendation 12: Allow CHL holders to openly carry handguns.

Since 1995, Texans have been permitted to carry "concealed" handguns so long as the holder of the weapon obtained a Concealed Handgun License (CHL) from the Department of Public Safety (DPS). The statute defines "concealed handgun" as a handgun, the presence of which is not openly discernible to the ordinary observation of a reasonable person. A person is potentially eligible for a CHL under Texas Government Code Chapter 411, Subchapter H if the person:

- (1) Has been a legal Texas resident for at least six months before the application;
- (2) Is at least 21 years of age;
- (3) Has not been convicted of a felony or certain other offenses,
- (4) Is not a chemically dependent person;
- (5) Is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun;
- (6) Is fully qualified under applicable federal and state law to purchase a handgun;
- (7) Has not been finally determined to be delinquent in making a child support payment or various state and local taxes;
- (8) Is not currently restricted under certain court restraining or protective orders; and,
- (9) Has not made any material misrepresentation, or failed to disclose any material fact, in submitting his CHL application.

DPS establishes by rule the process of obtaining a CHL, subject to fairly detailed requirements provided in statute. Notably, DPS conducts a criminal history record check of the applicant through its computerized criminal history system. DPS may issue a license at its limited discretion, but must conduct the process in good faith. Denials of CHL's may not be arbitrary or capricious.

⁴² Article IV. Initiative, Referendum, and Recall. Austin City Charter.
[http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:austin_tx\\$anc=](http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates$fn=default.htm$3.0$vid=amlegal:austin_tx$anc=)

It is important to view background checks in context: a CHL applicant is voluntarily choosing to waive some of their expectation to privacy, in exchange for a set of privileges. This is similar to waiving a certain expectation of privacy in order to register to vote, acquire a driver's license, obtain credit, travel by commercial aircraft, etc. The burden placed on the purchaser is light, given the interests of the public, which the state must safeguard. A bill to allow CHL holders to carry holstered handguns in plain view would, textually, be quite simple – providing in every location where preexisting CHL statute referred to “concealed” firearms, the allowance of either “concealed or unconcealed” weapons.

Six states--including Texas--and the District of Columbia prohibit open carry of handguns outright.⁴³ Thirteen states require a permit in order to openly carry a handgun. An additional nine states do not require a license or permit but otherwise restrict the manner by which a handgun may be carried openly. The remaining 32 states do not require a license or permit for the open carry of a handgun.

An openly carried weapon is no more dangerous than one carried in a concealed manner. Indeed, it is those with bad intent who are most likely to prefer to conceal weapons on their person. Anyone wishing to use a firearm as a deterrent and, in the last resort, for self-defense, would prefer to openly display the weapon.

A handgun that is carried within a holster at someone's hip – which most people would consider a reasonable form of concealment – in Texas is not permitted even with a CHL. This broad definition of “concealment” indicates that Texas law needs an update. At the bare minimum, a CHL should permit a licensee to carry a holstered weapon.

Recommendation 13: Allow CHL holders to carry weapons on campus at institutions of higher education, subject to appropriate limits, at the option of the boards of regents of public institutions of higher education, and the internal decision-making of private institutions of higher education.

As of July, 2013, Texas is one of only 22 U.S. states that currently prohibits the carrying of concealed weapons on college campuses.⁴⁴ Under current law, carrying a concealed handgun on the campus of an institution of higher education is a third degree felony. Enacting open carry laws would not address this problem, since the carrying of weapons on the grounds of educational institutions continues to be restricted by other law (e.g., Texas Penal Code 46.03(a)(1)), as well as by rules adopted at individual public and private educational institutions.

Legislation proposed in 2013,⁴⁵ would have authorized public or private institutions of higher education to determine whether to allow individuals who hold CHLs to carry handguns on premises owned or leased by the institution. The bill would have allowed the institutions to develop policies related to storage of handguns in dormitories and the carrying of such guns at collegiate sporting events. The bill also excluded hospitals, primary, and secondary schools located on the premises of higher education institutions from its provisions, and establishes that an employee of a higher education institution, a peace officer, or a handgun instructor may not be held liable for damages under the provisions of the bill.

⁴³ "Open Carrying Policy Summary," May 21, 2012. <http://smartgunlaws.org/open-carrying-policy-summary/>

⁴⁴ "Guns on Campus: Overview," National Conference of State Legislatures, July 2013. <http://www.ncsl.org/research/education/guns-on-campus-overview.aspx>

⁴⁵ HB 972 (83R, Fletcher et al.)

The Second Amendment rights of college students, professors, and employees should be strengthened by allowing institutions of higher education to permit CHL holders to carry handguns on campus. The final decision could be left up to the individual institutions, thereby allowing for local control and a dialogue between college leadership, students, and other interested parties.

Note that Senate Bill 1907 (Hegar), allowing weapons to be stored in private vehicles on the campuses of public or private institutions of higher education, was passed by both houses of the 83rd Legislature and has been enrolled as law. However, this first step does not fully realize campus carry.

Allowing CHL carriers to carry weapons on campuses would make any person with nefarious intent aware that his intended victims might be equipped to respond in kind. Allowing institutions of higher education to determine for themselves whether to adopt such a policy (by allowing public institutions to opt out of campus carry requirements, and by imposing no requirement on private institutions but allowing them to opt in) removes any fear of top-down interference by the state government. A strong campus carry policy should be enacted.

Federalism Proposals

Recommendation 14: Texas should prohibit the state government from enacting a “healthcare exchange” under the Patient Protection and Affordable Care Act (PPACA).

In addition to declining Medicaid expansion, Texas should affirmatively decline to set up a healthcare “exchange.” As with the Medicaid expansion, Texas is under no obligation to create a healthcare exchange under the PPACA.⁴⁶ The law was written in such a way that its drafters thought there would be sufficient incentive for states to create exchanges on their own. That has turned out to be untrue, and Texas is currently one of 32 states that have refused to do so.⁴⁷ Indeed, Texas has already affirmatively acted to reject healthcare exchanges in both the 82nd and 83rd Legislatures, by refusing to pass bills that would have created a state-level exchange.⁴⁸

The fight before the courts is ongoing. A federal lawsuit is currently proceeding in Oklahoma arguing that Obamacare only provides federal subsidies for exchanges set up by the states, as opposed to the federal government. The subsidies allow the federal government to enforce the employer mandate in states that refused to set up their own exchange. Indeed, as Jonathan H. Adler and Michael F. Cannon explain in “Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA,”

[T]he PPACA cannot function without state buy-in. The Obama administration’s response to state push-back has been to rewrite the statute by imposing, on both employers and individuals, taxes that Congress never authorized... Supporters and opponents agree the PPACA’s “entire structure” depends on the IRS’s interpretation of the statute, and that this dispute “could be a fatal blow to Obamacare.”⁴⁹

⁴⁶ See Patient Protection and Affordable Care Act, Sec. 1311, 1321 (2010)

⁴⁷ “Most Governors Refuse to Set Up Health Exchanges,” Robert Pear, *The New York Times*, Dec 14, 2012. http://www.nytimes.com/2012/12/15/us/most-states-miss-deadline-to-set-up-health-exchanges.html?_r=0

⁴⁸ See, e.g., House Bill 636 82(R), left pending in House Committee.

⁴⁹ “Could Oklahoma’s New Lawsuit Strike a Fatal Blow to Obamacare?,” Cato Institute, Capitol Hill Briefing, Oct 17, 2012. <http://www.cato.org/events/could-oklahomas-new-lawsuit-strike-fatal-blow-obamacare>

This lawsuit could therefore have the effect of cancelling out parts of Obamacare in those states, like Texas, that have courageously refused to set up healthcare exchanges. This is yet another reason for Texas to ensure that it does not enact a state-level exchange.

Even though the federal government may set up an exchange for Texas residents to access, many of the PPACA's worst provisions might not apply to federally created exchanges. Depending on the outcome of the Oklahoma lawsuit, refusing to set up an exchange may shield many Texas businesses from an employer mandate, which amounts to a tax of more than \$2,000 per worker.⁵⁰ It could also protect millions of Texans from the individual mandate, which amounts to a tax potentially as high as \$2,085 for a family of four earning \$24,000.⁵¹ However, Texas may prevent the application of such provisions by affirmatively rejecting the expansion and the exchanges specifically through a legislative action.

Texas should amend Subtitle G, Title 8, Insurance Code, to prohibit the establishment of a healthcare exchange.

Recommendation 15: Pass a state law providing that state resources shall not be expended and state personnel shall not be employed in enforcing or implementing the Patient Protection and Affordable Care Act.

The Tenth Amendment to the U.S. Constitution clearly delineates the powers of the state and federal government. While the state may not impede the federal enforcement of federal laws, in the 1997 case *Printz v. U.S.*, the U.S. Supreme Court held that “the Federal Government may not compel the States to enact or administer a federal regulatory program.”⁵² According to one legal scholar:

Every state should pass a law making it illegal for any state or local official to cooperate with a federal program unless specifically authorized in state statute. This way, the people would know when their state officials were merely serving as deputies of the federal government instead of doing their jobs as *officials of the state*. Such “noncompliance” bills would go far in restoring the crucial separation of state and federal functions that the Constitution intended.⁵³

Texas must not allow the federal government to abridge our federal system and commandeer state resources in order to impose restrictions on the healthcare choices of Texans.

Texas should amend Subtitle G, Title 8, Insurance Code, to restrict the use of state resources in enforcing Obamacare.

⁴⁹ Citing to: “Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPAC,” Jonathan Adler and Michael Cannon, *Health Matrix: Journal of Law-Medicine*, Spring 2013.

<http://object.cato.org/sites/cato.org/files/articles/cannon-adler-health-matrix-23.pdf>

⁵⁰ “The Budget and Economic Outlook: An Update,” p. 49, *Congressional Budget Office*, Aug 2010.

<http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/117xx/doc11705/08-18-update.pdf>.

⁵¹ Paul R. Houchens, “Measuring the Strength of the Individual Mandate,” *Milliman Research Report*, Mar 2012.

<http://publications.milliman.com/publications/health-published/pdfs/measuring-strength-individual-mandate.pdf>

⁵² 521 U.S. 898 (1997)

⁵³ “Do it Yourself, Washington,” Mario Loyola, *National Review*, Nov 6, 2013.

<http://www.nationalreview.com/article/363180/do-it-yourself-washington-mario-loyola>