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RIGHT OF FIRST REFUSAL OPTION CONTRACTS: WHAT THEY ARE, REOCCURRING ISSUES, AND SIMPLE SOLUTIONS

EMILIO R. LONGORIA†

"The young man knows the rules, but the old man knows the exceptions."

— Oliver Wendell Holmes, Valedictory Address, delivered to the Graduating Class of the Bellevue Hospital College, March 2, 1871.

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I. INTRODUCTION

If you have worked in the Texas real estate industry long enough, you have likely run across a right of first refusal ("ROFR") clause. And if you have not, consider yourself lucky. Because they can often act as a barrier to a quick and comprehensive closing, depending on how they were written. To avoid that result, this practitioner note will serve as a short but comprehensive guide through Texas law on ROFR clauses. The hope is that current and future practitioners will be able to use this information to avoid the common pitfalls that arise in this area of the law when designing, fulfilling, and litigating these tricky real estate clauses. For maximum accessibility, this practitioner note is written to benefit both the enthusiastic rookie and the weathered title veteran by taking time to define basic terms and discuss less common but important exceptions to Texas law in this area.

This practitioner note will proceed in three parts. The first part will explain what an ROFR clause is and where they are commonly found. The second part will identify reoccurring issues that arise in the ROFR context, with a particular focus on how these issues can impede a real estate closing. Lastly, the third part will identify solutions for these reoccurring problems, as well as helpful exceptions to ROFR rules under Texas case law.

II. RIGHT OF FIRST REFUSAL CLAUSES, EXPLAINED

Simply put, an ROFR clause is a variation of an option contract, which "empowers its holder" (typically called the "Optionee") "with a preferential right to purchase . . . [a] property on the same terms offered by or to a bona fide [third-party] purchaser."[1] Once the current owner of the property

1. Archer v. Tregellas, 566 S.W.3d 281, 286–87 (Tex. 2018).

(sometimes called the "Optionor") "communicates those terms to the [Optionee], the right 'ripens into an enforceable option.'"[2] The optionee "may then elect to purchase the property according to the terms of the instrument granting the first-refusal right . . . or decline to purchase it and allow the owner to sell to the third party."[3] While ROFR clauses can occur in nearly any type of real estate transaction, they are commonly found in commercial leases, where the desire for unified ownership and commercial stability is typically greatest.[4]

Like most contract terms, Texas law does not require that an ROFR clause contain any particular "magic words" or phrases to become legally effective.[5] Rather, the parties designing the contract have broad freedom to shape its content and form. Both a blessing and a curse, this means that ROFR clauses are often different from transaction to transaction.[6] While this allows ROFR clauses to respond effectively to individual, and perhaps tricky, conditions unique to each real estate deal, it also means that ROFR clauses can present predictability concerns for legal reviewers. Take, for example, the following ROFR clauses used in actual commercial leases in Texas:

> Example 1
>
> If Landlord decides to sell the Leased Premises to a third party, Landlord will give Tenant notice of such decision and afford Tenant a reasonable period of time as specified in such notice, but in no event more than ninety (90) days, in which to attempt to negotiate a mutually satisfactory agreement for purchase of the Leased Premises.[7]
>
> Example 2
>
> If Landlord receives a bona fide third-party offer for the purchase of the Leased Premises, and Landlord desires to accept such offer, Landlord shall first notify Tenant of such offer, and the price and terms offered for the Leased Premises. The notice shall include an offer in writing to sell the Leased Premises to Tenant at a price and upon terms

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2. *Id.* at 287.

3. *Id.*

4. *See, e.g.*, Marquez v. Weadon, No. 05-17-00276-CV, 2018 LEXIS 6328, at *2 (Tex. App.—Dallas Aug. 13, 2018, no pet.) (mem. op.) (providing an example of an ROFR clause in a commercial lease); *see also* Voss Rd. Exxon LLC v. Vlahakos, No. 01-10-00146-CV, 2011 LEXIS 4931, at *17 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.) (mem. op.) (providing the same).

5. *See, e.g.*, Chambers Cnty. v. Pelco Constr. Co., No. 01-18-00832-CV, 2020 LEXIS 10454, at *20 (Tex. App.—Houston [1st Dist.] Dec. 31, 2020, no pet.) (mem. op.) ("Our task is to construe the entire agreement, and that task is not altered by the parties' use of 'magic words' in the contract or the absence of such words.").

6. *See generally Marquez*, 2018 LEXIS 6328, at *2; *see also Vlahakos*, 2011 LEXIS 4931, at *2 n.1 (comparing two different ROFR clauses).

7. HMC Hotel Props. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp., 439 S.W.3d 910, 911–12 (Tex. 2014).

> equal to those offered by the third-party. The Tenant shall have the option to purchase the Leased Premises upon such terms for a period of 30 days after receipt of this written offer.[8]

Notice the stark differences in how these ROFR clauses dictate the terms of notification, negotiation, and termination, should the optionee not wish to execute its right of first refusal. Concerning notification, for instance, the drafters of Example 2 explicitly require that notice take place in writing, whereas Example 1 does not specify how notice must be given. Similarly, Example 2 requires the optionor to offer to sell the property "at a price and upon terms equal to those offered by the third-party,"[9] but Example 1 provides no such clarity—leaving it to the parties to "negotiate a mutually satisfactory agreement for purchase"[10] at an unspecified future time. Finally, but by no means the last difference between the two ROFR clauses, Example 2 identifies a deadline for the optionee to provide its acceptance—without which the right of first refusal will terminate by operation of law. But the drafters of Example 1 provide no such deadline.

III. REOCCURRING ISSUES IN ROFR CLAUSES

Hardly trivial, these drafting decisions and the way ROFR clauses are prepared can significantly affect whether a real estate transaction closes quickly—or even closes at all. Moreover, since an ROFR clause is a contractual term, failure to strictly comply with an ROFR clause's requirements can expose the breaching party to serious legal liability.[11] If an ROFR clause is breached, Texas courts have made it clear that aggrieved parties have a right to monetary damages or specific performance.[12] Additionally, courts have also routinely granted attorney's fees to the winning party in ROFR clause cases.[13] Despite the high stakes and exposure to significant legal liability in this area of property law, several reoccurring issues continue to arise in the ROFR context.

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8. *Marquez*, 2018 LEXIS 6328, at *2.
9. *Id.*
10. *See HMC Hotel Props. II Ltd. P'ship*, 439 S.W.3d at 911–12.
11. *See* Riley v. Campeau Homes (Tex.), Inc., 808 S.W.2d 184, 188 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd) ("A sale or transfer of property burdened by a right of first refusal without making an offer to the holder of the right is a breach of contract for which the remedy of specific performance is available.") (citing Martin v. Lott, 482 S.W.2d 917, 920 (Tex. App.—Dallas 1972, no writ)).
12. *See id.*
13. *See* Archer v. Tregellas, 566 S.W.3d 281, 292 (Tex. 2018).

A. Ignorance of Right of First Refusal Obligations

First, and perhaps most common, is the failure of many optionors to realize that they own property subject to a right of first refusal obligation. Counterintuitively, ROFR clauses are not always conspicuous. This is a recurrent phenomenon, for example, in the purchase and sale of condominiums where sales are made subject to a "declaration of covenants" or a "homeowners' association bylaws,"[14] which are disaggregated from the primary sale documents. In these types of transactions, it is common for a homeowners' association to claim "a right of first refusal in connection with the prospective re-sale of [a] condominium"[15] but fail to identify this important restraint on alienability up front. Rather, the ROFR clause will often be buried in the association's publicly recorded declaration or referenced obliquely in the title policy's exceptions, as opposed to being directly identified in the primary contract for sale.[16]

Under these circumstances, both the optionor and optionee may be completely oblivious to the existence and terms of the ROFR clause, which can become highly problematic. For instance, ignorance of an ROFR clause can put landowners in the unenviable position of being doubly obligated—both to the original optionee in the ROFR clause and to the new potential third-party buyer under contract to purchase the property. Truly a "lose-lose" situation, untangling such a mess is often difficult to accomplish without initiating time-consuming and expensive litigation.[17]

B. Lack of Clear Termination Rules

A second issue that reoccurs in the ROFR clause context is the failure to provide clear terms for the ROFR clause's termination. Ideally, the ROFR clause will identify a date by which the right of first refusal option will terminate should the optionee not respond to the optionor's offer to purchase. Example 2 accomplished this by providing an end date on the optionee's ability to execute its right of first refusal: "The Tenant shall have the option to purchase the Leased Premises upon such terms for a period of 30 days after receipt of this written offer."[18]

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14. STEWART E. STERK, ET AL., LAND USE REGULATION 712–13 (3d ed. 2020) (defining the terms "declarations of covenants" and "bylaws").

15. IQ Holdings, Inc. v. Stewart Title Guar. Co., 451 S.W.3d 861, 865–66 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

16. *Id.* at 866.

17. *See generally id.* (providing an example of such a circumstance).

18. Marquez v. Weadon, No. 05-17-00276-CV, 2018 LEXIS 6328, at *2 (Tex. App.—Dallas Aug. 13, 2018, no pet.).

Under Texas law, "failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual and legally amounts to nothing more than a rejection."[19] Therefore, if the optionee fails to respond with anything other than "unqualified" and "unambiguous" acceptance within the ROFR clause's execution period "in strict compliance with the terms of the agreement," the ROFR clause will terminate by operation of law.[20] However, in circumstances where no deadline is placed on the optionee's right to respond to the ROFR clause, real estate deals can languish perpetually until the optionee provides the optionor with a written waiver of the ROFR clause.[21] This occurs because third-party purchasers are often unwilling to finalize a sale of a property that is potentially encumbered by an ROFR clause obligation due to the potentially large liability that exists.[22]

C. No Waiver Requirement

A closely related and reoccurring issue within the ROFR context involves the failure to require the optionee to provide a written waiver in the event it does not wish to execute the right of first refusal. Perhaps unsurprisingly, even where an ROFR clause rightly identifies a date by which it will self-terminate by operation of law, title companies may still refuse to issue a title policy without a written waiver from the optionee.[23] This is because the risk of legal liability in the ROFR context is considered so high that title companies are not interested in issuing a policy unless it is "clean" of possible, yet highly unlikely, ROFR claims.[24] To ensure this level of security, title companies commonly require a waiver of an optionee's right of first refusal despite Texas law not requiring a waiver to affect the termination of a ROFM clause.[25] Current caselaw does not identify why title companies include this extra security. However, it is likely a result of the high stakes and liability exposure in this area of the law.

To further complicate matters, the Texas Supreme Court recently exacerbated this already convoluted trend of title companies requesting ROFR clause waivers where no waiver is legally required. Specifically, the

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19. Voss Rd. Exxon LLC v. Vlahakos, No. 01-10-00146-CV, 2011 LEXIS 4931, at *17 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.).

20. *Id.*

21. *See* HMC Hotel Prop. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp., 439 S.W.3d 910, 912–13 (Tex. 2014) (providing an example of such a request).

22. *See id*. (providing an example of a real estate sale being canceled, in part, because the optionee refused to deliver an ROFR clause waiver).

23. *See id.* at 914 (providing an example of a real estate transaction falling through because the optionee was unwilling to provide a written waiver of its right of first refusal).

24. *See id.* at 912–14.

25. *Vlahakos*, 2011 LEXIS 4931, at *17.

Texas Supreme Court has recently affirmed that it will not require an optionee to provide an ROFR waiver if a requirement to produce such a waiver is not explicitly stated in the contract between the parties.[26] This puts optionors in an uncomfortable position. They cannot close their real estate transaction without a waiver from the optionee, but they cannot compel such production by statute or common law.

This result is unchanged if the optionee already verbally stated its desire not to exercise its right of first refusal option. The result is also unchanged if the optionee strategically withholds a waiver because it knows that a real estate transaction will likely fall through without the production of such waiver.[27] Despite these very serious concerns, title companies do not appear to be relenting from requiring this added security measure.[28] Instead—and for understandable reasons—our case law has proven that title companies prefer being safe rather than sorry.[29]

D. Failing to Provide Terms for Extension of the Option Period

The last reoccurring issue this practitioner note highlights is the failure to provide adequate terms for extending the ROFR clause, should negotiation extend beyond the pre-designated time for acceptance identified in the ROFR clause itself. Typically contained within a "sale of real estate" or "a lease of real estate for a term longer than one year" provision, ROFR clauses are almost always subject to the statute of frauds.[30] This means that most ROFR clauses cannot be modified without a writing that is signed by the party "to be charged with the [ROFR clause's terms]."[31] The only relevant exception to this written modification rule is when an oral modification to the ROFR clause is made "before the expiration" of the ROFR clause itself.[32] But absent

26. *See HMC Hotel Props. II Ltd. P'ship,* 439 S.W.3d at 914–15 (explaining that the buyer canceled a real estate transaction because the tenant intentionally refused to provide an ROFR waiver, but this was not considered tortious interference or slander of title by the Court because the tenant was "under [no] obligation to provide a waiver").

27. *See id.* at 912–13.

28. *See, e.g.*, *id.* at 914 ("Jennifer Maxwell, Land America's 'closer' for the deal, testified that Land America would not have 'gone it alone' on the transaction, and that 'if Fidelity declined, Land America was going to decline.'").

29. *See id.*

30. *See Statute of Frauds*, INVESTOPEDIA (Nov. 7, 2021), https://www.investopedia.com/terms/s/statute-of-frauds.asp [https://perma.cc/BK7W-WRFJ].

31. TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(4)–(5).

32. *See* Shafer v. Gulliver, No. 14-09-00646-CV, 2010 LEXIS 9021, at *20 (Tex. App.—Houston [14th Dist.] Nov. 12, 2010, no pet.).

this narrow exemption, parol evidence[33] of an ROFR clause modification will not be admissible in court.

Potentially dispositive, should the parties enter into a dispute as to whether the terms of an ROFR clause are still binding, this limit on the ability to modify ROFR clauses without a writing underscores the importance of communication and cooperation between the opposing sides to an ROFR clause. Suppose the respective parties to an ROFR clause fail to communicate, for example. In that case, one may be unpleasantly surprised to find out that a seemingly mutually agreeable "parol agreement to extend the time of an option contract . . . entered into *after* the option has expired" is actually "void and unenforceable."[34] The inevitable consequence of this event is costly and time-consuming litigation.[35]

IV. SOLUTIONS FOR REOCCURRING ROFR ISSUES

In light of the number of reoccurring issues that arise in the ROFR context and the serious consequences they can produce, it is important to address the potential solutions available under Texas law. Notably, these solutions focus on ROFR clause design instead of strategies for litigating unclear ROFR clauses. In focusing on design, however, this practitioner note discusses relevant Texas law concerning ROFR clauses, which will be helpful to those interested in dealing with ROFR clause terms that are difficult to alter.

A. Notice of Exercise

It is often said Sun Tzu once famously wrote that "[t]he greatest victory is that which requires no battle."[36] Although he probably did not have ROFR clauses in mind when he wrote that phrase, it is particularly appropriate to invoke in this setting due to the wide array of legal issues that can be avoided by following a few simple ROFR clause design suggestions.

For example, the first of these suggestions is designing an ROFR clause that requires the optionee to execute a Notice of Exercise. Rather than identifying a period after which the optionee's right of first refusal terminates by operation of law, the parties can design the optionee's acceptance of its

33. *See Parol Evidence*, LEGAL INFO. INST. (Nov. 7, 2021), https://www.law.cornell.edu/wex/parol_evidence_rule [https://perma.cc/TFZ9-C8AD] (providing a primer on parol evidence).

34. *See* V*oss Rd. Exxon LLC v. Vlahakos,* No. 01-10-00146-CV, 2011 LEXIS 4931, at *18 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet.).

35. *See generally id.* (providing an example of this in Texas state court).

36. LEON BROWN, GOING IT ALONE: THE HANDBOOK FOR FREELANCE AND CONTRACT SOFTWARE DEVELOPERS 168 (2016) (ebook).

right of first refusal to be conditioned upon providing the optionor with a "Notice of Exercise."[37] This relatively simple document can significantly reduce the risks involved with an ROFR closing, and it only consists of a signed statement that evidences the optionee's affirmation to exercise its right of first refusal.

By requiring an affirmative act on the part of the optionee to avail itself of its right of first refusal, for example, courts can quickly and conclusively determine if an ROFR has expired. Moreover, requiring a Notice of Exercise meaningfully mitigates the title risks in closings subject to an ROFR clause.[38] A Notice of Exercise is one of the most cost-effective solutions given the relative ease of cheaply transmitting them.

That said, this strategy is by no means without risk. For example, it is always possible that the triggering event for a Notice of Exercise could come at an inopportune time and maybe go unnoticed. In fact, Texas case law has at least one example of this happening.[39] However, these notice issues exist under most ROFR clause designs and therefore do not serve as a meaningful critique against instituting this procedure.[40]

B. Acknowledgment of ROFR Clause

ROFR clauses commonly go unnoticed in real estate transactions, despite their ability to constrain subsequent sales and limit alienability. When this happens, the likelihood of costly and time-consuming litigation increases.[41] To avoid these consequences, it is important to employ procedures in the real estate closing process that both identify and disclose the terms and significance of entering into an ROFR agreement.

An "acknowledgment of ROFR clause" (the "Acknowledgement") is a simple closing measure that is designed to do just that. Nothing more than a written document executed by both parties to the real estate transaction, an Acknowledgment ensures that all parties are on notice of the applicability of an ROFR clause and its legal scope. Acknowledgments also present an efficient and budget-conscious solution for ROFR clause concerns because of the relatively low cost with which they can be utilized. Although Acknowledgments may rightly be criticized as speedbumps that prevent the

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37. *See Vlahakos*, 2011 LEXIS 4931, at *2.

38. *See* HMC Hotel Prop. II Ltd. P'ship v. Keystone-Tex. Prop. Holding Corp., 439 S.W.3d 910, 915 (Tex. 2014).

39. *Vlahakos*, 2011 LEXIS 4931, at *3–5 (providing an example of an optionee failing to submit a Notice of Exercise, because the optionor sent notice of a bona fide offer while the optionee was out of town).

40. *See id.* at *2–12.

41. *See* IQ Holdings, Inc., v. Stewart Title Guar. Co., 451 S.W.3d 861, 865–66 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

quickest possible closings, those criticisms are far outweighed by the liability associated with protracted ROFR litigation.

Moreover, this simple procedure allows the parties to side-step arguments over the accrual date for ROFR clause claims. Since ROFR clauses are contract terms, they are governed by the four-year statute of limitations that applies to breach of contract claims.[42] By requiring an Acknowledgment, parties to a real estate transaction can avoid possible tricky battles over an ROFR claim accrued because it is much harder to deny the existence and applicability of an ROFR clause when forced to specifically acknowledge its existence.[43]

C. ROFR Checklist

ROFR clauses have been around a while,[44] and unfortunately, many lack clear terms for their execution and termination. While not much can be done about these deficient ROFR clauses, new ROFR clauses can learn from the mistakes of the former. An easy way to do this on an institutional level is to draft a checklist that identifies key terms that an ROFR clause should contain to avoid significant litigation exposure. Although the specific contents of an ROFR clause checklist will change based on the type of real estate transaction, the following is an example of how one of these checklists could be structured:

ROFR Clause Checklist Example

Completed?	Important Terms that Should be Included in an ROFR Contract
	Option Termination Date – Have you included a date by which the ROFR clause will terminate by operation of law?
	Notice of Exercise – Is the Optionee required to provide a notice of exercise to execute its right of first refusal under the agreement?
	Timeline for Negotiation – Does the ROFR clause provide deadlines for negotiating the terms of sale

42. *See* TEX. CIV. PRAC. & REM. CODE § 16.004(a)(1) (requiring a suit seeking specific performance of a contract for the conveyance of real property to be brought "not later than four years after the day the cause of action accrues"); *see also* Stine v. Stewart, 80 S.W.3d 586, 592 (Tex. 2002) (noting that a four-year limitations period applies to contract claims).

43. *See* Archer v. Tregellas, 566 S.W.3d 281, 288 (Tex. 2018).

44. *See* Green v. A. R. Clark Inv. Co., 363 S.W.2d 802, 808 (Tex. App.—Fort Worth 1962, writ granted) (containing the earliest mention of an ROFR clause).

	between the Optionee and Optionor?
	Waiver Requirement – Is the Optionee required to provide a waiver of its right of first refusal in the event it declines to exercise its option, or is the right terminated by operation of law?
	Pricing Terms – Have you included the price the property will sell for in the event the Optionee executes its right of first refusal?
	Notification of Sale – Have you included terms concerning when and how the Optionor must notify the Optionee that it has received an acceptable bona fide offer for sale from a third-party?
	Acknowledgment of ROFR – Is the Optionor required to acknowledge both the existence and terms of an ROFR clause at the closing?
	Modification Terms – Does the ROFR clause contain a procedure for modifying its terms?

With a checklist like this, ROFR clause parties can virtually ensure consistency among their ROFR clauses, adding essential terms and avoiding high-dollar court costs. Considering the alternatives to implementing this sort of institutional control, deciding whether to employ an ROFR clause checklist should be an easy choice.

V. CONCLUSION

ROFR clauses are useful additions to any contract, especially in circumstances where ownership stability and unification are particularly importance. That said, they must be carefully drafted because of their ability to constrain alienability and impede real estate transactions. If not, ROFR clauses present legitimate liability concerns. While drafting a workable ROFR clause is not impossible, it takes diligence and systematic protocols. If such protocols are established, it becomes easier to utilize the "exceptions" that exist under Texas law surrounding ROFR clauses to your advantage. [45]

45. Oliver Wendell Holmes, *Valedictory Address Delivered to the Graduating Class of the Bellevue Hospital College*, N.Y. MED. J. 420, 426 (1871) ("The young man knows the rules, but the old man knows the exceptions.").

THE FUTURE OF THE FREEDOM OF RELIGION ON STATE NO-AID PROVISIONS: THE EFFECT OF *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE*

ETHAN SZUMANSKI†

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I. INTRODUCTION

In the United States, approximately thirty-seven to thirty-eight states contain "no-aid" provisions in their constitutions.[1] These state no-aid provisions, commonly known as "Blaine amendments," generally prohibit government aid or support of religious schools or institutions.[2] Over the years, courts across the nation have struggled with whether the United States Constitution prohibits religious options in publicly funded programs.[3] Recently, however, the Supreme Court of the United States addressed a no-aid provision found in Montana's state constitution, which prohibited the government from providing aid to any religious school.[4] In a 5–4 decision, the Court held that the Free Exercise Clause of the United States Constitution prohibited Montana from applying its no-aid provision to exclude religious schools from a scholarship program.[5]

Because of this 5–4 decision, "[l]egal experts see broad ramifications, especially for the [thirty-seven] states with . . . Blaine amendments in their constitutions."[6] Indeed, states that contain the same or similar no-aid

1. James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2146 & n.34 (2012).

2. *Id.* at 2146.

3. *See* Badger Cath., Inc. v. Walsh, 620 F.3d 775, 777–81 (7th Cir. 2010) (holding that the exclusion of "student activity fees" to speech that was "religious in character" violated the Constitution); *see also* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1250 (10th Cir. 2008) (holding that the prohibition of scholarships to accredited colleges that the state deemed "pervasively sectarian" violated the Constitution); *see also* KDM *ex rel.* WJM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–52 (9th Cir. 1999) (holding that a regulation that excluded the government from providing special education services to a sectarian school did not violate the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause); *see also* Strout v. Albanese, 178 F.3d 57, 60–65 (1st Cir. 1999) (holding that the exclusion of subsidies to sectarian schools did not violate the Establishment Clause, the Free Exercise Clause, or the Equal Protection Clause); *see also* Peter v. Wedl, 155 F.3d 992, 996–97 (8th Cir. 1998) (holding that the exclusion of religious private schools from "government-funded special education services" violated the Free Exercise Clause); *see also* Hartman v. Stone, 68 F.3d 973, 975 (6th Cir. 1995) (holding that an Army regulation that prohibited any religious practices during an "on-base day-care program" violated the First Amendment); *see also* Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 72, 728 A.2d 127, 147 (Me. 1999) (holding that the exclusion of religious schools from the state's tuition program did not violate the Free Exercise Clause, the Establishments Clause, or the Equal Protection Clause); *see also* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 563–64 (Vt. 1999) (holding that the prohibition of tuition reimbursement to sectarian schools did not violate the Free Exercise Clause).

4. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020).

5. *See id.* at 2262–63.

6. Erica L. Green, *Private and Religious School Backers See Broad Victory in Supreme Court Decision*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/us/politics/private-religious-schools-supreme-court.html [https://perma.cc/WLC9-WDTG].

provisions now have to decide whether their no-aid provisions are also at risk of invalidation in cases that involve status-based discrimination.

This Comment seeks to address these ramifications by discussing how the Supreme Court's decision in *Espinoza* will alter the future landscape of the freedom of religion and how it will affect the same or similar no-aid provisions found in other states' constitutions. Specifically, Part II explains the historical background of the Blaine amendments and the Religious Clauses. Part III discusses how, before *Espinoza*, Supreme Court precedent left the door open to challenges to Blaine amendments throughout the country. Part IV explains the factual and procedural background of *Espinoza*, and it discusses the majority's approach to Montana's no-aid provision. Part V argues how the majority's opinion in *Espinoza* has effectively rendered the no-aid provisions of states futile. Part VI addresses the Free Exercise Clause and its future constitutionality in cases involving conduct-based discrimination based on no-aid provisions. Finally, Part VII provides a conclusion. We begin our discussion, however, by exploring the background that provides the relevant underpinnings of the Supreme Court's decision in *Espinoza*.

II. BACKGROUND

A. The Backdrop to Blaine: The Origin and History of State Blaine Amendments

The history of the Blaine amendments reveals several forces prompting its conception. One author described the story of the Blaine amendments as "a somewhat peculiar history of a gross (and probably willful) misinterpretation of the terms 'secular' and 'sectarian,' strong anti-Catholic animus, and the political ambitions of one man (James G. Blaine) and one political party (the so-called 'Know-Nothing' party)."[7] These descriptions of the origin of the Blaine amendments provide the relevant hallmarks to the history of the Blaine amendments.

After the Revolutionary War, a primary concern in America was the education system.[8] In addressing the proper education of the public, individual states and churches organized and funded what would eventually become the public education system.[9] But as recognition of the right to public education increased in the states, disorganization lingered in the state school systems, causing school systems to rely "almost exclusively on churches to

7. Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2385–86 (2004).

8. *Id.* at 2380–82.

9. *Id.* at 2382.

implement the ramshackle education system."[10] Horace Mann, known as the "father of public education," slowly generated reform through one of his primary contributions: sponsorship of non-sectarian public education.[11] Specifically, Mann and other reformers advocated the necessity of "secular" or "non-sectarian" education.[12] At that time, however, the terms "secular" and "non-sectarian" had very specific meanings. Indeed, many individuals interpreted "non-sectarian" to mean "Protestant."[13] For example, many public educators and parents engaged in:

> a more pervasively religious version of Mann's "lowest-common-denominator" model, believing that "moral education should be based on the common elements of Christianity to which all Christian sects would agree or to which they would take no exception," including the "reading of the King James Bible as containing the common elements of Christian morals."[14]

This religious landscape, however, soon changed.[15] Around the middle of the nineteenth century, an influx of immigrants and an increase in the Catholic population spurred nativism in the United States.[16] Various religious groups, primarily Catholic immigrants, challenged the system on the grounds that it violated the religious liberty that the Constitution purportedly protected.[17] These groups were concerned with a majority of New York public schools construing "the term 'secular' to mean 'Protestant' and 'sectarian' to mean 'Catholic.'"[18] In response to the increase in immigration and the Catholic population, nativist societies began to form, leading to the birth of the Know-Nothing Party in 1853.[19] The Know-Nothing Party was a political party with anti-foreign and anti-Catholic sentiments.[20] After its inception, the Know-Nothing Party gained momentum as it immediately increased to over one million members across thirty-one states, including seventy-five Know-Nothings in Congress.[21] Eventually, the Know-Nothing Party had effectively converted the meaning of "sectarian" into "Catholic," and it accomplished this task on a national level.[22]

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10. *Id.* at 2382–83.
11. *Id.* at 2383.
12. *Id.* at 2385.
13. *Id.*
14. *Id.* (emphasis omitted).
15. *Id.*
16. *Id.* at 2386; Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 669 (1998).
17. Hanna, *supra* note 7, at 2385.
18. *Id.*
19. *See id.* at 2386-87.
20. *Id.* at 2386 n.73.
21. *Id.* at 2387.
22. *Id.* at 2387–88.

In response to the rising political controversy centered on the common school movement, President Ulysses S. Grant endorsed the growing nativist sentiments in a speech to the Army in Tennessee by openly promising to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school."[23] President Grant then proposed a constitutional amendment to Congress "that would deny public support to religious institutions."[24] The proposed amendment needed a sponsor, and Congressman James G. Blaine, "a Republican and former Speaker of the federal House of Representatives,"[25] filled that position.[26] Blaine introduced the proposed amendment on December 14, 1875, and its text read as follows:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[27]

The predominant purpose of the proposed Blaine amendment "was to control the development of [state] government involvement in religious issues in two critical ways."[28] First, because the Supreme Court had not yet applied the incorporation doctrine to the states, the proposed Blaine amendment would have applied the religion clauses to the states.[29] Second, the Blaine amendment would "prohibit state governments from supporting private religious schools with funds from the public treasury."[30] Blaine's proposed amendment garnered strong support from both the House of Representatives and the Senate.[31] However, "[the amendment] fell four votes short of the required two-thirds majority in the Senate to pass."[32]

While Blaine's proposed amendment failed at the federal level, it "left a lasting mark on American constitutional discourse concerning church-state issues."[33] In fact, Blaine's proposed amendment experienced "a resurrection

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23. *Id.* at 2388; *see* Viteritti, *supra* note 16, at 670. (alteration in original).
24. Viteritti, *supra* note 15, at 670.
25. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 557 (2003).
26. Viteritti, *supra* note 16, at 670.
27. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875) (statement of Rep. Blaine).
28. DeForrest, *supra* note 25, at 556-57.
29. *Id.* at 557.
30. *Id.*
31. Viteritti, *supra* note 16, at 672.
32. *Id.*
33. *Id.* at 671.

in the states."[34] After its failure on the national level, many states began adopting the language of the Blaine amendment as part of their legislation, state constitutions, or state charters—mostly "without pressure from the federal government."[35] But the federal government did force some states to adopt Blaine provisions "as a condition of entering the Union."[36] Nevertheless, it is clear that these Blaine provisions, whether forced or not, "took on a new life in the states."[37]

For example, Montana resurrected the Blaine amendment by including it in its state constitution. Montana's state Blaine amendment includes the following language:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.[38]

While Montana brought the Blaine amendment back to life via an amendment to its state constitution, this provision eventually lost its vitality when the Supreme Court addressed it in *Espinoza v. Montana Department of Revenue*. In *Espinoza*, the Supreme Court destroyed any remaining life in Montana's Blaine provision when it determined that the provision's plain language invoked strict scrutiny by barring "religious schools from [receiving] public benefits" and parents from choosing schools of their preference "solely because of the [school's] religious character[.]"[39]

Therefore, while states like Montana attempted to raise the dead Blaine amendment by volitionally incorporating versions of it into their respective state constitutions, the Supreme Court's analysis in *Espinoza* exhibits the potential and inevitable fatality of the many other Blaine amendments found in state constitutions across the country. But to understand how the Supreme Court invoked strict scrutiny and invalidated Montana's Blaine amendment, along with every other Blaine amendment, one must first take a look at the historical journey the Supreme Court has taken in addressing the constitutional issues arising from the Religion Clauses.

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34. DeForrest, *supra* note 25, at 573.
35. *Id.*
36. *Id.* at 576.
37. *Id.* at 573.
38. MONT. CONST. art. X, § 6(1).
39. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255 & 2257 (2020).

B. The Relevant History of the Religion Clauses

The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[40] Because the Supreme Court has recognized a "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels[,]"[41] the relevant history of each clause is initially instructive in helping us understand the conceptual boundaries to this "play in the joints" between the Religion Clauses. But the relevant history is primarily instructive in demonstrating how the Supreme Court metaphorically pulled the plug on the Blaine amendment's constitutional life support. We thus begin this historical journey with the Free Exercise Clause.

1. The Free Exercise Clause

At the foundation of the Free Exercise Clause is the distinction between religious beliefs and religious exercises. According to the Supreme Court, "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*."[42] But the Supreme Court has sometimes allowed the government to regulate "certain overt *acts* prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.'"[43] One example of this distinction between actions and beliefs is the Supreme Court case of *Sherbert v. Verner*.

In *Sherbert v. Verner*, a South Carolina employer discharged an adherent of the Seventh-day Adventist Church because the adherent would not work on Saturday, her faith's Sabbath Day.[44] After she was unable to acquire another job, the adherent filed for "unemployment compensation benefits under the South Carolina Unemployment Compensation Act[,]" but in an administrative proceeding, the Employment Security Commission found that the adherent's "restriction upon her availability for Saturday work brought her within the provision disqualifying [her] for benefits."[45] The adherent challenged the disqualifying provisions of the South Carolina statute as a violation of the Free Exercise Clause.[46] The Supreme Court held

40. U.S. CONST. amend. I.

41. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting Locke v. Davey, 540 U.S. 712, 719 (2004)).

42. Sherbert v. Verner, 374 U.S. 398, 402 (1963) (emphasis added) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

43. *Id.* (emphasis added) (alteration in original).

44. *Id.* at 399.

45. *Id.* at 399–401.

46. *Id.* at 401.

that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[47]

In reaching this holding, the Court determined that the disqualification from unemployment benefits burdened the adherent's free exercise of religion because her ineligibility under the provision forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[48] And "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[49] Under this approach, the Court considered whether a compelling state interest justified the substantial infringement on the adherent's free exercise of religion, and it determined that no such interest existed.[50] The Court then reaffirmed the principle that no state can "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[51]

After *Sherbert*, the Supreme Court revisited the Free Exercise Clause in the unemployment context. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court addressed whether the Free Exercise Clause permitted Oregon to criminalize the religious use of peyote and to deny unemployment benefits to individuals that were dismissed from their job because of such religious use.[52] According to the Court, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[53] Based on this principle, the Court held that Oregon's criminal prohibition of the use of peyote was constitutional under the First Amendment, so Oregon could deny unemployment benefits to individuals that use peyote for religious reasons.[54]

47. *Id.* at 410.
48. *Id.* at 404.
49. *Id.* (alteration in original) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
50. *Id.* at 406–07.
51. *Id.* at 410 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).
52. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).
53. *Id.* at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).
54. *Id.* at 890.

The Supreme Court then continued to address challenges to specific religious practices that were illegal under the laws of a state. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court decided whether the City of Hialeah violated the Church of the Lukumi Babalu Aye, Inc.'s Free Exercise rights when the city's ordinances prohibited animal sacrifices, which was one of the religious practices of the church.[55] Relying on *Smith*, the Court held that the ordinances were unconstitutional because they were not neutral and because they were not generally applicable.[56]

According to the Court in *Church of the Lukumi Babalu Aye, Inc.*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[57] Specifically, "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[58]

In determining whether a law satisfies neutrality, the Court in *Church of the Lukumi Babalu Aye, Inc.* explained that it would begin with the statute's text and determine "if the object of a law is to infringe upon or restrict practices because of their religious motivation."[59] According to the Court, if the object of a law is to restrict religious practices, the law is not neutral because "the minimum requirement of neutrality is that a law not discriminate on its face."[60] In addition, a statute "lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."[61] But the Court in *Church of the Lukumi Babalu Aye, Inc.* specified that "[f]acial neutrality is not determinative" because "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[62] Thus, "the effect of a law in its real operation is strong evidence of its object."[63]

Neutrality is not the only consideration, however. The Court in *Church of the Lukumi Babalu Aye, Inc.* also addressed the additional requirement of general applicability and explained that, while all laws have some degree of selectiveness, "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[64] This paramount

55. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 526 (1993).
56. *See id.* at 542–43.
57. *Id.* at 531.
58. *Id.*
59. Id. at 533.
60. *Id.*
61. *Id.*
62. *Id.* at 534.
63. *Id.* at 535.
64. *Id.* at 542.

concern provided the groundwork for the bedrock principle that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" and that "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[65] Indeed, the fact that the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[66] Thus, if either the neutrality requirement or general applicability requirement is not satisfied, the Court in *Church of the Lukumi Babalu Aye, Inc.* recognized that the law "must undergo the most rigorous of scrutiny"[67] and "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[68]

But the Supreme Court did not stop with *Church of the Lukumi Babalu Aye, Inc*. Instead, the Supreme Court continued to contour the parameters of the Free Exercise Clause through subsequent cases. One such case was *Locke v. Davey*. In *Locke*, Washington instituted a scholarship program that provided "assist[ance to] academically gifted students with postsecondary education expenses."[69] While eligible students could use the scholarships at both religious and non-religious schools, they could not "use the scholarship at an institution where they are pursuing a degree in devotional theology" because that use would conflict with Washington's state constitution.[70] For example, Joshua Davey did not receive the scholarship award because he pursued a devotional theology degree.[71] As a result, he challenged the scholarship program on the ground that it violated, among other things, his rights under the Free Exercise Clause.[72]

The Court in *Locke* determined that "the denial of funding for vocational religious instruction alone is [not] inherently constitutionally suspect[,]" and "[w]ithout a presumption of unconstitutionality, Davey's claim must fail."[73] The Court distinguished *Church of the Lukumi Babalu Aye, Inc.* on the ground that nothing suggested animus towards religion in *Locke* and that the state in *Locke* "ha[d] merely chosen not to fund a distinct category of

65. *Id.* at 542–43. (alterations in original).
66. *Id.* at 543.
67. *Id.* at 546.
68. *Id.* at 531–32.
69. Locke v. Davey, 540 U.S. 712, 715 (2004).
70. *Id.*
71. *Id.* at 717.
72. *Id.* at 718.
73. *Id.* at 725.

instruction."[74] Then, the Court stated, "If any room exists between the two Religion Clauses, it must be here."[75]

Several years after *Locke*, the Supreme Court again addressed the scope of the Free Exercise Clause in *Trinity Lutheran Church of Columbia, Inc. v. Comer*. In that case, the Missouri Department of Natural Resources would offer grants to public and private schools, non-profit daycare centers, and other non-profit organizations.[76] The Department offered these grants to assist the schools and "non-profit entities purchase rubber playground surfaces."[77] Trinity Lutheran Church applied for a grant, but the Department had a strict and express policy that categorically excluded Trinity Lutheran Church from receiving grants because it denied grants to any applicant that was owned or controlled by a church, sect, or other religious entity.[78] The Department justified this policy on the grounds that Missouri's constitution compelled such a policy.[79] Missouri's constitution stated that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such[.]"[80] The Supreme Court, therefore, had to determine if the policy violated Trinity Lutheran's rights under the Free Exercise Clause.[81]

The Court began its analysis by confirming the principles that "[t]he Free Exercise Clause 'protects religious observers against unequal treatment'" and invokes the strictest scrutiny for laws that "target the religious for 'special disabilities' based on their 'religious status.'"[82] Based on these principles, the Court concluded that "[the] policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[83] Therefore, the Court held that the Department's policy violated the Free Exercise Clause.[84]

In total, the most recent Supreme Court cases have upheld the rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of

74. *Id.* at 720–21.
75. *Id.* at 725.
76. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 2019 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 & 542 (1993)).
83. *Id.* at 2021, 2025.
84. *Id.* at 2024.

burdening a particular religious practice."[85] The most recent cases have also confirmed that the law "must undergo the most rigorous of scrutiny" if either the neutral or general applicability requirement is not satisfied.[86] Indeed, the Supreme Court applied strict scrutiny in *Espinoza* after determining that Montana's constitutional provision barred religious institutions from public benefits solely because of their religious status or character.[87] In *Espinoza*, the Court relied on the distillation of past precedent that the Court employed in *Trinity Lutheran Church of Columbia, Inc*. That distillation resulted in the "'unremarkable' conclusion that disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[88] Therefore, the modern framework for Free Exercise Clause jurisprudence that the Supreme Court addressed in *Espinoza* relied on neutrality, general applicability, and strict scrutiny principles. But the Free Exercise Clause is not the only Religious Clause in the United States Constitution. The First Amendment to the United States Constitution also contains the Establishment Clause, so we examine the history of this clause next.

2. The Establishment Clause

In the many years immediately before and during the colonization of America, a significant amount of the early settlers came to America to avoid laws that compelled the support and attendance of government-favored churches through the use of fines, incarceration, torture, and killing.[89] Under the laws of Europe at the time, the government would use these punishments in several instances, including "speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them."[90]

However, these laws did not completely fade away when the colonies were in their infancy.[91] Instead, the then-existing laws required and compelled all individuals to support and attend government-sponsored churches by having individuals pay tithes and taxes for the ministers and for

85. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp. Div., Dep't of Hum. Res. of the State of Or. v. Smith, 485 U.S. 660 (1988)).

86. *Id.* at 546.

87. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2255 (2020).

88. *Id.* (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

89. Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947).

90. *Id.* at 9.

91. *See id.*

the building and maintenance of churches.[92] One of the original purposes of the Establishment Clause, therefore, was to prohibit the establishment of a state church or religion because this was an area historically filled with peril.[93] Indeed, Thomas Jefferson famously penned that the Establishment Clause was drafted to construct "a wall of separation between Church and State."[94] Later, the Supreme Court in *Everson v. Board of Education* acknowledged the incorporation of the Establishment Clause under the Fourteenth Amendment,[95] and it explained that this "wall" referenced in Jefferson's famous writing "must be kept high and impregnable."[96]

But this "wall" metaphor proved ineffective. In *Lemon v. Kurtzman*, the Court revealed that "total separation is not possible in an absolute sense[,]" and "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[97] In *Lemon*, the Court addressed a Pennsylvania statutory program that supported private elementary and secondary schools through "reimbursement[s] for the cost of teachers' salaries, textbooks, and instructional materials."[98] The Court also addressed a Rhode Island statute that directly paid teachers at private elementary schools a supplement of fifteen percent of their yearly salary.[99] Under these two statutory programs, church-related schools also received aid.[100]

In addressing these programs, the Court recognized that it "must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity."[101] Then, to synthesize previous Establishment cases, the Court formulated three "tests" to determine whether statutes are valid under the Establishment Clause: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster 'an excessive government entanglement with religion.'"[102] Under this newly created test, the Court determined that both

92. *Id.* at 9–11.
93. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
94. *Everson*, 330 U.S. at 16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
95. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion).
96. *Everson*, 330 U.S. at 518.
97. *Lemon*, 403 U.S. at 614.
98. *Id.* at 606–07.
99. *Id.* at 607.
100. *Id.*
101. *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
102. *Id.* at 612–13.

statutes were unconstitutional because they "foster[ed] an impermissible degree of entanglement."[103]

Notably, however, the tests from *Lemon* currently suffer the potential demise of being overruled. While the modern Court has recognized *Lemon*'s aspiring attempt to synthesize years of Establishment Clause precedent into a rule that would provide order, it has also expressed that *Lemon* has been ignored, harshly criticized, lamented, and questioned.[104] Therefore, instead of applying *Lemon*, the modern Court has generally divided Establishment Clause cases into six rough categories: (1) religion in "public monuments, symbols, mottos, displays, and ceremonies"; (2) "religious accommodations and exemptions"; (3) governmental financial aid to religion through subsidies and tax exemptions; (4) religion in public schools; (5) "regulation of private religious speech"; and (6) "state interference with internal church affairs[.]"[105]

Out of these six categories, the state Blaine amendments or no-aid provisions, such as the one that the Court analyzed in *Espinoza*, would most likely fall within the government financial aid category, given that the Blaine amendments are concerned with the allowance or denial of public benefits to religious and non-religious institutions.[106] Therefore, while a specific test accompanies each category, this Comment will only discuss the test that the Supreme Court has used to address the second category: governmental aid to religious entities.

Generally, Supreme Court precedent addressing governmental financial aid to religion concerns independent choice. For example, in *Zelman v. Simmons-Harris*, the State of Ohio established a pilot program to provide educational choices to families residing in the Cleveland City School District because Cleveland's public schools were some of the worst-performing schools in the Nation.[107] Under the program, any religious or non-religious school within a covered district that satisfied the statewide educational standards could participate in the program and accept program students.[108] Subsequently, a group of Ohio taxpayers challenged the program as a violation of the Establishment Clause of the First Amendment.[109]

The Supreme Court addressed the challenged program by first explaining that the Establishment Clause "prevents a State from enacting

103. *Id.* at 615; *see id.* at 609.
104. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) (plurality opinion).
105. *Id.* at 2081 n.16.
106. *See* Cauthen, *supra* note 1, at 2146.
107. Zelman v. Simmons-Harris, 536 U.S. 639, 643–44 (2002).
108. *Id.* at 645.
109. *Id.* at 648.

laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[110] The Court concluded that the program had a valid secular purpose, so it proceeded to determine whether the program had a valid effect.[111] In making this determination, the Court indicated that its decisions have consistently distinguished "between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[112] Particularly, the Court determined:

> where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[113]

Under these principles, the Court held that the program was constitutional because it was one of true private choice.[114]

The Supreme Court reiterated this independent choice principle in *Espinoza*. In fact, after the Supreme Court recognized that parties did not dispute the validity of Montana's no-aid provision or scholarship program under the Establishment Clause, it determined, in dicta, that Montana's scholarship program and no-aid provision would not violate the Establishment Clause because the aid "makes its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[115]

Overall, the modern Court has started moving towards a categorical approach to Establishment Clause cases. Depending on the applicable category, the Supreme Court will apply the relevant test to the appropriate category. One example is the Supreme Court's analysis of the second category of government financial aid to religious entities in *Espinoza*: a category that directly deals with the vitality of state Blaine amendments after the Court in *Locke* opened the proverbial door to subsequent challenges.

III. THE BATTLE OF THE BLAINE AMENDMENTS: *LOCKE* AND THE OPEN DOOR

As discussed in further detail above, the Supreme Court's opinion in *Locke* arose because students were not permitted to use funding at a place

110. *Id.* at 648–49 (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).
111. *Id.* at 649.
112. *Id.*
113. *Id.* at 652.
114. *Id.* at 653.
115. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020).

where they were pursuing a devotional theology degree.[116] The Supreme Court held that this exclusion did not violate the Free Exercise Clause.[117] Significantly, however, the Court did not deal with state Blaine amendments. Instead, the Court explicitly held that "the Blaine Amendment's history is simply not before us."[118] Because the Court avoided any discussion of the Blaine amendments, its opinion in *Locke* did not "shed any new light on the State Constitutional issues."[119] Thus, America awaited an answer from the Supreme Court—an answer that would not arrive until *Espinoza*. But to understand the Court's avoidance and America's expectancy, we first must specifically understand how *Locke* opened the door to future attacks on state no-aid provisions.

In *Locke*, the Court considered whether Washington's constitution, which prohibited even indirect aid of religious instruction, violated the Free Exercise Clause.[120] Several amici contended that Washington's constitution was a Blaine amendment, linked to religious bigotry and anti-Catholicism.[121] But the Court determined that the provision of the state constitution at issue in *Locke* was not a Blaine amendment.[122] According to the Court, the Blaine amendment portion of Washington's constitution was not an issue because it was in a different part of the constitution.[123] The Court further declared that the parties did not establish "a credible connection between the Blaine Amendment and . . . the relevant constitutional provision."[124] Accordingly, the Blaine amendment's history was simply not at issue.

But this seemingly simple decision from the Supreme Court unleashed the door to a hallway of conflicting cases. Specifically, "the Court's refusal to deal with the Blaine Amendment question [in *Locke*] le[ft] open the door to impending lower court challenges to Blaine Amendments throughout the country."[125] As a result of *Locke*'s avoidance, courts across the nation struggled with whether the United States Constitution prohibited religious options in publicly funded programs.[126] Nevertheless, the Supreme Court

116. Locke v. Davey, 540 U.S. 712, 715 (2004).
117. *See id.*
118. *Id.* at 723 n.7.
119. Hanna, *supra* note 7, at 2451. Prior to *Espinoza*, the country still awaited an answer from the Supreme Court.
120. *See Locke*, 540 U.S. at 719.
121. *Id.* at 723 n.7.
122. *Id.*
123. *See id.*
124. *Id.*
125. Hanna, *supra* note 7, at 2451.
126. *See* Badger Cath., Inc. v. Walsh, 620 F.3d 775, 777–81 (7th Cir. 2010) (holding that the exclusion of "student activity fees" to speech that was "religious in character" violated the Constitution); *see also* Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1250 (10th Cir. 2008) (holding that the prohibition of scholarships to accredited colleges that the state deemed

continued to sidestep any final resolutions or direct discussions of state Blaine amendments in its opinions—even after *Locke*.

For example, the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc.* failed to completely resolve the problems that the state Blaine amendments posed for lower courts. In *Trinity Lutheran Church of Columbia, Inc.*, the Missouri Department of Natural Resources would offer grants to schools, non-profit daycare centers, and other non-profit organizations to help them purchase rubber playground surfaces.[127] But the Department had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.[128] The Department justified this policy on the grounds that the Missouri Constitution compelled such a policy.[129] However, the Court concluded that the "policy expressly discriminat[ed] against otherwise eligible recipients by disqualifying them from a public benefit soley because of their religious character[,]" and therefore, the policy cannot stand.[130]

Importantly though, the Court did not address Missouri's constitutional provisions that supposedly justified the Department's policy. Instead, the Court specified that "[t]he Department's *policy* violate[d] the Free Exercise Clause."[131] Thus, lower courts did not receive definite guidance on the future applicability of state Blaine amendments because the Court did not even address Blaine amendments in its decision.

And even if the Court in *Trinity Lutheran Church of Columbia, Inc.* had addressed Blaine amendments in its decision, it nevertheless determined that *Locke* was not controlling on the case before it by further distinguishing

"pervasively sectarian" violated the Constitution); *see also* KDM *ex rel.* WJM v. Reedsport Sch. Dist., 196 F.3d 1046, 1050–52 (9th Cir. 1999) (holding that a regulation that excluded the government from providing special education services to a sectarian school did not violate the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause); *see also* Strout v. Albanese, 178 F.3d 57, 60–65 (1st Cir. 1999) (holding that the exclusion of subsidies to sectarian schools did not violate the Establishment Clause, the Free Exercise Clause, or the Equal Protection Clause); *see also* Peter v. Wedl, 155 F.3d 992, 996–97 (8th Cir. 1998) (holding that the exclusion of religious private schools from "government-funded special education services" violated the Free Exercise Clause); *see also* Hartman v. Stone, 68 F.3d 973, 975 (6th Cir. 1995) (holding that an Army regulation that prohibited any religious practices during an "on-base day-care program" violated the First Amendment); *see also* Bagley v. Raymond Sch. Dep't, 1999 ME 60, ¶ 72, 728 A.2d 127, 147 (Me. 1999) (holding that the exclusion of religious schools from the state's tuition program did not violate the Free Exercise Clause, the Establishments Clause, or the Equal Protection Clause); *see also* Chittenden Town Sch. Dist. v. Dep't of Educ., 738 A.2d 539, 563–64 (Vt. 1999) (holding that the prohibition of tuition reimbursement to sectarian schools did not violate the Free Exercise Clause).

127. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

128. *Id.*

129. *Id.*

130. *Id.* at 2021; *see id.* at 2025.

131. *Id.* at 2024 (emphasis added).

between religious status and religious use.[132] Specifically, unlike *Locke*, where the program denied aid because of what Davey proposed to do with the aid, the Court in *Trinity Lutheran Church of Columbia, Inc.* explained that the Department denied aid to Trinity Lutheran Church because of what it was.[133] Notably, however, a plurality of the Court clarified, "We do not address religious *uses* of funding or other forms of discrimination."[134] By not addressing religious uses, however, the Court in *Trinity Lutheran Church of Columbia, Inc.* further failed to resolve the lingering questions because, even if the Court directly addressed Blaine amendments for religious status cases, lower courts would still have to determine whether state Blaine amendments remained valid in cases dealing with religious uses.

Thus, while the Court in *Locke* and *Trinity Lutheran Church of Columbia, Inc.* provided some guidance on the vitality and future applicability of state Blaine amendments, both decisions did not close the door to conflicting cases that challenged state Blaine amendments. That answer would have to wait until the Supreme Court directly addressed state Blaine amendments in the momentous case of *Espinoza*.

IV. THE BACKGROUND OF ESPINOZA V. MONTANA DEPARTMENT OF REVENUE

In *Espinoza*, the Supreme Court closed the door to the remaining questions on the longevity and vitality of Blaine amendments across the country. To understand the effects of *Espinoza* in changing the legal landscape of the freedom of religion, we now discuss the facts and the background of *Espinoza* that brought about this change.

A. Factual and Procedural Background

In *Espinoza*, the Montana Legislature established a scholarship program that granted a tax credit to anyone that donates to specified organizations that, in turn, award scholarships to students attending a private school of their choice.[135] Montana's scholarship program provided parents with tuition assistance so they could send their children to private schools.[136] When a family received a scholarship, they would designate their preferred school, and "the scholarship organization [would] send[] the scholarship funds directly to the school."[137] Importantly though, the Montana Legislature

132. *See id.* at 2022–23.
133. *Id.* at 2023.
134. *Id.* at 2024 n.3 (emphasis added).
135. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020).
136. *Id.*
137. *Id.*

instructed that this scholarship program be controlled in accordance with the no-aid provision found in the state constitution.[138] As a result, the Montana Department of Revenue established "Rule 1," an administrative rule that barred families from using these scholarship funds at religious schools.[139]

Because Rule 1 barred families from sending their children to a religious private school, the families sued the Montana Department of Revenue for violations of their religious freedom.[140] At the trial level, the court enjoined Rule 1 based on a mistake of law and the trial court's distinction between "appropriations" and "tax credits."[141] The Montana Supreme Court, however, invalidated the entire scholarship program on the grounds that it violated the state's no-aid provision.[142] The Supreme Court then granted certiorari.[143]

B. The Majority Opinion

In the Supreme Court's majority opinion in *Espinoza*, the Court first addressed the Establishment Clause.[144] After the Supreme Court recognized that the parties did not dispute the inapplicability of an Establishment Clause cause of action, the Court determined that the scholarship program did not (and could not) violate the Establishment Clause.[145] According to the Supreme Court, the scholarship program was a neutral government program that allowed government support to "make[] its way to religious schools only as a result of Montanans independently choosing to spend their scholarships at such schools."[146]

Then, however, the Court reiterated that "[t]he question . . . is whether the Free Exercise Clause precludes the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[147] The Court answered this question in the affirmative.[148] Specifically, the Court invalidated Montana's no-aid provision because it discriminated against schools and families based on religious status and was, therefore, subject to strict scrutiny, which requires that the

138. *Id.* at 2252.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 2253.
143. *Id.* at 2254.
144. *See id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *See id.*

"government action 'must advance "interests of the highest order" and must be narrowly tailored in pursuit of those interests.'"[149]

Applying these principles, the Supreme Court determined that Montana's scholarship program did not satisfy strict scrutiny. The Court specifically disagreed with Montana's argument that it had a compelling interest in a more vigorous separation of church and state than the United States Constitution.[150] According to the Court, Montana's anti-establishment interest did not qualify as a compelling interest when the case involved a free exercise infringement.[151] Further, the Court explained that the no-aid provision burdened more than religious schools: it also burdened the families and children that wanted to attend those religious schools.[152] As a result, the Supreme Court invalidated Montana's no-aid provision on the ground that it violated the Free Exercise Clause of the First Amendment.[153] With this invalidation, the Supreme Court finally gave the nation an answer and closed the door on the future vitality of state Blaine amendments across the country.

V. THE ANNULMENT OF NO-AID PROVISIONS THROUGH *ESPINOZA*

The majority's opinion in *Espinoza* has caused legal experts to "see broad ramifications, especially for the [thirty-seven] states with . . . Blaine amendments in their constitutions."[154] One of *Espinoza's* broad ramifications is the invalidation of state Blaine amendments. *Espinoza* achieved this invalidation of no-aid provisions by requiring status-based neutrality in state constitutional provisions that address governmental financial aid to religious institutions, regardless of how restrictive the no-aid provision may be.

A. Status-Based Neutrality in No-Aid Provisions

In *Espinoza*, the Court stated, "The Free Exercise Clause . . . 'protects religious observers against unequal treatment.'"[155] The Court further explained that non-neutral laws that disqualify "otherwise eligible recipients . . . 'solely because of their religious character'" are subject to strict scrutiny.[156] Based on the Court's recitation of, and reliance on, the principles

149. *Id.* (quoting Church of Lukumi Babalu Aye v. City of Haileah, 508 U.S. 520, 546 (1993).
150. *Id.*
151. *Id.*
152. *Id.* at 2261.
153. *See id.* at 2260–63.
154. Green, *supra* note 6.
155. *Espinoza*, 140 S. Ct. at 2254 (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)).
156. *See id.* at 2255 (citing Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017)).

of *Trinity Lutheran Church of Columbia, Inc.* and *Church of the Lukumi Babalu Aye*, *Espinoza* effectively nullified all state no-aid provisions.

Indeed, common language in the state Blaine amendments includes "prohibiting public funding for the 'aid' or 'benefit' of sectarian schools, sometimes both directly and indirectly."[157] Specifically, "[t]he overall effect of these Blaine-style provisions, by their express wording or through later judicial interpretations, was usually to preclude both the direct or indirect transfer of state funds to religious or sectarian schools and institutions."[158] Based on this common theme of state no-aid provisions, the majority's opinion in *Espinoza* renders all no-aid provisions practically useless.

According to the Supreme Court, "[t]he Free Exercise Clause protects against even 'indirect coercion,' and a State 'punishe[s] the free exercise of religion' by disqualifying the religious from government aid."[159] In *Espinoza*, the Court determined that the "no-aid provision bar[red] religious schools from public benefits solely because of the religious character of the schools."[160] Further, even though Montana concluded that the scholarship program at issue contravened the state constitutional no-aid provision, the Court held that Montana still violated the Free Exercise Clause by engaging in status-based discrimination.[161]

Additionally, the Court determined in *Espinoza* that publicly funded programs based on state no-aid provisions must either be neutral concerning religious status or be subject to strict scrutiny. Consequently, no-aid provisions in state constitutions are futile because they necessarily require some level of unequal treatment between religious and non-religious recipients.[162] Indeed, one author stated that "Montana's no-aid clause . . . and similar clauses across states have become impotent as a result of the Court's decision, and the other constitutional provisions limiting sectarian use of public funds are likely in jeopardy as well."[163]

Recognizing the Tenth Amendment's federalism principle of providing deference to state decisions, one author declared that "the majority and concurring opinions have now tainted all no-aid provisions . . . with the aura of discrimination."[164] Nonetheless, the majority in *Espinoza* attempted to

157. Clint Bolick, *The Dimming of Blaine's Legacy*, 2019–2020 CATO SUP. CT. REV. 287, 288 (2020).

158. DeForrest, *supra* note 25, at 602.

159. *Espinoza*, 140 S. Ct. at 2256 (alteration in original).

160. *Id.* at 2255.

161. *See id.* at 2255–63.

162. *See id.* at 2254–55.

163. Martha McCarthy, *Espinoza v. Montana Department of Revenue: The Demise of State No-Aid Clauses*, 378 ED. LAW REP. 598, 606 (2020).

164. Steven Green, *Symposium: RIP State "Blaine Amendments" – Espinoza and the "no-aid" Principle,* SCOTUSBLOG (Jun. 30, 2020, 3:47 PM),

respond to this concern by acknowledging that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[165] Thus, *Espinoza* did implicate federalism concerns because, in subjecting no-aid provisions to status-based neutrality principles, it essentially invalidated the state no-aid provisions in all cases involving status-based discrimination, regardless of how restrictive the no-aid provision may be.

B. Irrelevance of the Restrictiveness of No-Aid Provisions

While Blaine amendments may have a common origin or effect, state Blaine amendments vary widely in their scope and language.[166] One author has conceptualized state Blaine amendments on a spectrum and has categorized them into three classifications: less restrictive Blaine amendments, moderate Blaine amendments, and most restrictive Blaine amendments.[167]

On one end of the spectrum are the least restrictive Blaine amendments.[168] These amendments "place the narrowest restrictions on state government actions to provide some indirect assistance or aid to private religious or sectarian education."[169] The two concerns these amendments present include "ensur[ing] that primary and secondary public education remains free of sectarian instruction" and that the government does not directly support private religious schools through public educational funds.[170] Generally, these less restrictive Blaine amendments "allow some very limited government assistance either with basic transportation or higher education."[171]

Under the category of moderate Blaine provisions, most states proscribe the direct funding of religious institutions, but they "leave open . . . the question of whether or not indirect state funding, such as vouchers, are permissible."[172] The language used in these types of Blaine amendments varies significantly between states.[173] Despite this variance, these amendments enforce the same foundational principle of prohibiting direct

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https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/ [http://perma.cc/3JJF-W55H].

165. *Espinoza*, 140 S. Ct. at 2261.
166. DeForrest, *supra* note 25, at 576.
167. *See id.* at 576–88.
168. *Id.* at 577.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 578.
173. *Id.*

government aid for expressly sectarian education and sectarian influence in public education programs.[174]

The final category of Blaine amendments encompasses the most restrictive Blaine amendments. These most restrictive Blaine amendments go one step further than the moderate Blaine amendments by prohibiting both direct and indirect aid.[175] These amendments also extend the prohibition to any religious or sectarian institution.[176]

Regardless of which category applies, however, the government can preclude religious entities from receiving certain benefits because even the least restrictive Blaine amendments would violate the standards outlined in *Espinoza*. Specifically, while the least restrictive Blaine amendments still permit the government to create a program that provides some aid to religious institutions,[177] such a program would still violate the commands of the majority's opinion in *Espinoza* because "[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."[178] Moreover, the majority in *Espinoza* specified that "[t]he Free Exercise Clause protects against even 'indirect coercion[.]'"[179] Thus, while state Blaine amendments are diverse in language and scope, the varied language and scope will not influence the result under the majority's opinion in *Espinoza*.

Consequently, the protection against unequal treatment remains at the forefront of a Free Exercise Clause analysis. According to one author, "[t]he majority opinion effectively says [no-aid provisions] cannot be enforced, at least when they are directed at preventing aid based on the character or status of the recipient."[180] Therefore, the level of restrictiveness of a particular state's Blaine amendment is irrelevant since any disfavored treatment would trigger strict scrutiny review under *Espinoza*. And for the reasons discussed below, this strict scrutiny standard confirmed under *Espinoza* further applies to conduct-based discrimination, not only status-based discrimination.

VI. THE FREE EXERCISE CLAUSE AND CONDUCT-BASED DISCRIMINATION THROUGH NO-AID PROVISIONS.

In *Espinoza*, the Supreme Court finally addressed Blaine amendments, and its decision nullified state Blaine amendments regarding status-based

174. *Id.* at 581.
175. *Id.* at 586.
176. *Id.*
177. *Id.* at 577.
178. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020).
179. *Id.*
180. Green, *supra* note 164.

discrimination.[181] But the majority in *Espinoza* did not specifically address the constitutionality of conduct-based discrimination regarding no-aid provisions.[182]

In fact, the majority "acknowledge[d] the point" but stated that it "need not examine it."[183] Even though the majority refused to address conduct-based discrimination, several reasons indicate that the same principles should govern conduct-based discrimination.

For instance, in *Espinoza*, the majority clarified that the case "turn[ed] expressly on religious status and not religious use."[184] According to the majority, status-based discrimination was sufficient in this case.[185] But the majority later clarified that a lesser standard does not apply for discrimination based on religious uses, thereby implying that the same (or possibly greater) standard would apply in such instances.[186] Specifically, in refusing to apply a lesser standard to conduct-based discrimination, the majority demonstrated a potential willingness to apply the same standard of status-based discrimination in cases involving conduct-based discrimination.

And as further support, the majority acknowledged how several Justices had deemed the status-use distinction meaningless.[187] Indeed, Justice Gorsuch's concurrence in *Espinoza* specifically discussed the status-use distinction. According to Justice Gorsuch, the status-use distinction is irrelevant because "[i]t is a violation of the right to free exercise either way, unless the State can show its law serves some compelling and narrowly tailored governmental interest[.]"[188] Justice Gorsuch explained that the Free Exercise Clause "protects not just the right to *be* a religious person, holding beliefs inwardly and secretly; it also protects the right to *act* on those beliefs outwardly and publicly."[189] And because the Framers spoke of a right to free "exercise," rather than a right of "conscience," the "Constitution extended [to] the broader freedom of action."[190] Thus, Justice Gorsuch indicated that the implementing a status-use distinction would "yield more questions than answers."[191]

Indeed, the majority's application of the status-use distinction may open the floodgates to more litigation about the viability of that distinction, given

181. *See supra* Part IV.
182. *See Espinoza*, 140 S. Ct. at 2257.
183. *Id.*
184. *Id.* at 2256.
185. *Id.*
186. *See id.* at 2257.
187. *Id.*
188. *Id.* at 2276 (Gorsuch, J., concurring).
189. *Id.*
190. *Id.*
191. *Id.* at 2275.

some inconsistencies with *Locke* and *Espinoza*. Notably, however, the Court in *Espinoza* was careful not to overturn *Locke*. Instead, the Court distinguished *Locke* on two grounds.[192] First, the Court in *Espinoza* explained that *Locke* involved the funding of a distinct category of instruction, which was the "'essentially religious endeavor' of training [ministers.]"[193] And unlike the no-aid provision in Montana, the program in *Locke* did not put the recipient at the choice of following their religious beliefs or receiving benefits.[194]

But these first distinctions seem inaccurate. While the Court in *Espinoza* agreed that *Locke* was different in that it funded a distinct category of instruction, neither *Locke* nor *Espinoza* explained how that fact was determinative. Specifically, if funding a distinct instruction category was a true concern, the state should have precluded recipients from even taking theological courses. And contrary to the majority's characterization, the program in *Locke* arguably does place the recipient at a choice between pursuing their religious beliefs or obtaining a much-needed scholarship.

Second, the majority in *Espinoza* distinguished *Locke* on the ground that "a 'historic[al] and substantial' state interest [existed] in not funding the training of the clergy[.]"[195] But in *Locke*, Justice Scalia indicated that the majority's historical references were misplaced.[196] According to Justice Scalia, the historical references did not include "religious ministers in public benefits programs . . . but [rather] laws that singled them out for financial aid."[197] This second distinction put forth by the majority in *Espinoza* thus appears inaccurate. Therefore, despite *Espinoza*'s attempts to synthesize *Locke* with other Supreme Court cases, uncertainties remain.

Overall, the implications of the majority's opinion in *Espinoza* and the concerns addressed in several of the Court's recent cases demonstrate that conduct-based discrimination under the Free Exercise Clause should follow the same standards and principles applicable to status-based discrimination. Subsequent cases from lower courts, however, do indicate that conduct-based discrimination invokes a different standard and outcome than cases only involving discrimination based on religious status.[198] Nonetheless, in applying the same standard for conduct-based and status-based discrimination, the Court will reconcile the seemingly inconsistent

192. *See id.* at 2257.
193. *Id.*
194. *See id.*
195. *See id.* at 2257–58.
196. Locke v. Davey, 540 U.S. 712, 727 (2004) (Scalia, J., dissenting).
197. *Id.*
198. *See, e.g.*, Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 35 (1st Cir. 2020) ("[I]n the wake of *Espinoza*, the use/status distinction is clearly potentially relevant to the determination of the level of scrutiny that must be applied . . . .").

precedents, affirm the Framer's choice in guaranteeing a right to free "exercise," and prevent a floodgate of litigation.

VII. CONCLUSION

In conclusion, the majority's opinion in *Espinoza* has charted a new path for the numerous no-aid provisions located within many states' constitutions across the country. The path leading up to *Espinoza* began when *Locke* refused to consider state Blaine amendments, and it continued even after the Supreme Court's decision in *Trinity Lutheran*. Because both of these cases did not completely address the viability of state no-aid provisions, the country had to wait until *Espinoza* provided that answer. In *Espinoza*, the Court nullified all state no-aid provisions in status-based discrimination cases, regardless of their varying restrictiveness, because such cases are now subject to status-based neutrality principles.

Importantly, however, the Supreme Court in *Espinoza* did not address discrimination of religious uses. Nevertheless, several reasons show that conduct-based discrimination should be subject to the same principles as status-based discrimination. Specifically, conduct-based discrimination should follow the same standards and principles of status-based discrimination because of (1) the Court's refusal to apply a lesser standard for conduct-based discrimination, (2) the notable concern among several Justices that the distinction between religious status and religious use is meaningless, and (3) the seemingly inaccurate distinctions between Espinoza and *Locke* employed by the majority in *Espinoza*. Indeed, the justice system will have to accommodate for the potential uncertainties and possible floodgates of litigation that might arise from the Court's momentous decision in *Espinoza* if a significant distinction between status-based and conduct-based discrimination continues to exist.

Accordingly, legislatures across the nation must modify or omit portions of the various state constitutions to comply with the recent proclamations of the Supreme Court. Instead of language that prohibits any direct or indirect aid to religious institutions, legislatures must now treat religious institutions and secular institutions equally. But if states or legislatures want to differentiate between religious instruction and secular instruction under circumstances that mirror *Locke*, uncertainty still remains as to whether legislatures can modify state Blaine amendments to prohibit aid or funding that goes to religious instruction. Nonetheless, because many beliefs may be characterized as "religious," including the belief that no higher power exists, language that treats all categories of instruction equally might shut the floodgates of litigation and solidify the nation's understanding of the Religion Clauses.

PROPOSALS FOR INCENTIVIZING THE RESCUE OF LIFE AT SEA

MARTIN COHICK†

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I. INTRODUCTION

The *Titanic* disaster was full of human error, technological failure, and bad luck. Of the 2,223 persons aboard, only 706 were saved.[1] Part of the reason for such a high death rate was the speed with which the ship sank, the frigid temperatures of the water, and the fact that there were not enough

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1. S. REP. NO. 62-806, at 6 (1912).

lifeboats for all the passengers and crew.[2] But another reason may have been the lackluster response from a nearby ship.

Two ships were (relatively) near the *Titanic* that night: the *Californian* and the *Carpathia*. The *Californian*, wisely, stopped for the night due to the iceberg risk.[3] The crew sent a warning about the ice to nearby ships (including the *Titanic*), turned off their wireless set, and, except for a skeleton crew of junior mariners, went to sleep.[4] Though they were within visual range, the night shift *failed to understand the meaning of the Titanic's fireworks fired in distress*.[5] *They only learned of the disaster via wireless message* in the morning and failed to arrive in time to rescue anyone.[6] A U.S. Senate Report said, "The committee is forced to the inevitable conclusion that the *Californian* . . . failed to respond to [the distress signals of the *Titanic*] in accordance with the dictates of humanity, international usage, and the requirements of law."[7] A later report by the United Kingdom Marine Accident Investigation Branch concluded less harshly, "the [rescue] attempt should have been made."[8]

In contrast, the *Carpathia* immediately diverted at full speed toward the *Titanic* upon hearing its wireless distress signal.[9] In almost complete darkness and despite the iceberg threat, the *Carpathia* rescued all passengers and crew who were still alive.[10]

If we apply the law as it is today, under 46 U.S.C. § 2304, the captain of the *Californian* could be subject to a criminal penalty of two years in prison and a $1,000 fine.[11] Likewise, the captain and crew of the *Carpathia* could sue White Star Line (the *Titanic's* owner) and receive what is called a

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2. *See* M.R. Shetty, *Cause of Death Among Passengers on the Titanic* (Feb. 1, 2003), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(03)12423-3/fulltext [https://perma.cc/5C8G-55BC].

3. S. REP. NO. 62-806, at 7.

4. *Id.* The *Californian's* wireless operator sent, "We are stopped and surrounded by ice." The *Titanic's* wireless operator responded, "Shut up. I am busy" (famous last words).

5. *Id.* at 11. The captain of the *Californian* testified the distance was nineteen miles. It is difficult to reconstruct the exact positions of the ships involved given the technological limitations of the time. The primary navigational techniques at the time involved dead reckoning with compasses, and astronomy. For hypothetical reconstructions of the positions of the ships involved *see* U.K. MARINE ACCIDENT INVESTIGATIVE BRANCH, DEPARTMENT OF TRANSPORTATION, REPRAISAL OF THE EVIDENCE RELATING TO "SS CALIFORNIAN" 7–11 (1992).

6. S. REP. NO. 62-806, at 11.

7. *Id.*

8. U.K. MARINE ACCIDENT INVESTIGATION BRANCH, *supra* note 5, at 18.

9. S. REP. NO. 62-806, at 14.

10. *Id.* at 10. The *Carpathia* was originally fifty-eight miles away. In total, six ships diverted toward the *Titanic* that night upon receiving the wireless distress signal. All were much farther away than the *Californian*. *Id.*

11. *See* 46 U.S.C. § 2304 (formerly § 728) (requiring a master of a vessel to render assistance to any person found at sea in danger of being lost).

"salvage award" for the rescue.[12] However, this award might only be given if they also saved some property from the *Titanic* (this type of award is discussed in detail below).[13] Research by the author did not reveal any criminal sanction for any crew of the *Californian* nor any salvage award ordered for the captain and crew of the *Carpathia*.[14]

Maritime law should responsibly incentivize the crew of the next *Californian* to make a better rescue attempt when the next *Titanic* is in need. This article makes its recommendations assuming that the best way to incentivize rescue is with both a carrot-and-stick approach. We should compensate sailors who complete a rescue, given the potential risks and costs they face during rescue attempts.

First, this article begins by discussing the background of this topic. The discussion starts with why we impose a duty to rescue at all. Imposing this duty is not as obvious as it might seem. Next, the article will examine the legal and economic background behind rescue at sea. The article will then discuss why an award for rescue is necessary, focusing on the costs rescuers often incur when they attempt rescue. For the last part of the background, the article will discuss the elements of a salvage award and how, traditionally, it is not given in cases when only lives are saved, but no property is recovered.

Second, this article offers a proposal for incentivizing rescue of people at sea: give rescuers at sea an income tax credit. The article will then discuss three other changes that will make rescue law more humane and reasonable. These include the following:

- Modify existing salvage award doctrine by replacing the requirement that a rescuer be under no pre-existing duty with a requirement that the rescuer not be performing professional rescue services or be in a special relationship with the victim;
- Make it illegal for insurance underwriters to void insurance contracts when commercial shippers take reasonable steps to rescue people; and
- Do not impose any criminal sanctions on ships with sufficiently important cargo or sufficiently important missions.

12. *See infra* Part II.C.E (discussing salvage awards).

13. *See* 46 U.S.C. § 80107 (modifying common law salvage doctrine).

14. Laura Harbold, *BEYOND Unsinkable*, HUMANITIES (May/June 2007), https://www.neh.gov/humanities/2007/mayjune/feature/beyond-unsinkable [https://perma.cc/HF4L-8S2P]. The "Unsinkable" Molly Brown did later present a trophy to the captain of the *Carpathia* on behalf of those rescued.

This article will use the term "salvor" and "rescuer" synonymously and interchangeably.[15]

II. THE DUTY TO RESCUE UNDER EXISTING MARITIME AND COMMON LAW

A. Why Impose a Duty to Rescue at All?

Before diving into the issue of rewards for rescue, we should cover the basics. The general rule in the common law is actually that there is no duty to rescue.[16] The basis for the reluctance to impose a duty to rescue comes from the moral distinction between action and inaction (also called "misfeasance" and "nonfeasance" in some sources).[17] When a person endangers another, courts have felt morally justified in imposing a duty on that person to aid the victim.[18] However, when a passerby has done nothing to a victim, courts are typically reluctant to impose any duty because the passerby has no responsibility for the danger.[19] This reticence to impose a duty can lead to harsh results in some cases where it seems like an able-bodied passerby should attempt rescue, even if the passerby was not the cause of the dangerous situation. In some of those cases, courts have identified what are called "special relationships" that may give rise to a duty to rescue.[20] These include relationships like employer-employee, host-social guest, or teacher-pupil.[21] Authority figures like these often have a duty to rescue imposed on them, whether or not they are responsible for the danger. However, absent misfeasance or a special relationship, a random person is typically not required to be a Good Samaritan in emergencies.[22]

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15. A salvor is "[s]omeone who saves; esp., one who saves a vessel or its cargo from danger or loss . . . [s]omeone who rescues a person from drowning." BLACK'S LAW DICTIONARY 1607 (11th ed. 2019); *see* 68 AM. JUR. 2D *Salvage* § 1, at 229–30 (2020):

> A 'salvor' is a person who, without any particular relation to a ship in distress, proffers a useful service and gives it as a volunteer adventurer without any preexisting covenant that connects him or her with the duty of employing himself or herself for the preservation of the ship. To be a salvor, one must have the intention and the capacity to save the distressed property involved but need not have an intent to acquire it.

16. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 375 (5th ed. 1984).
17. *Id.* at 373.
18. *Id.*
19. *Id.*
20. *Id.* at 376.
21. *Id.* at 376–77.
22. For an argument against imposing any general duty to rescue, *see* Frank E. Denton, *The Case Against a Duty to Rescue*, 4 CAN. J. L. & JURIS. 101, 124–32 (1991). For an argument against imposing a general duty to rescue at sea, *see* Patrick J. Long, Comment, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFF. L. REV. 591, 627 (2000).

However, this general tendency not to impose a duty to rescue should not apply at sea because the physical situation at sea is vastly different. Professors Prosser and Keeton identify situations where the case law has typically deemed it appropriate to impose a duty to rescue:

1) the would-be rescuer has knowledge of serious peril that threatens death or great bodily harm to the victim; and
2) the would-be rescuer can mitigate the peril with little inconvenience.[23]

Practically speaking, the first element describes the physical situation of every rescue at sea. A stranded person's chance of death from dehydration, exhaustion, exposure, and/or starvation absent rescue by a passing vessel is nearly certain, and every sensible person knows this. However, on land, there is (usually) a much denser network of professional rescue services and random passersby both willing and able to help.[24] The disproportionate average peril a victim faces at sea, combined with the small chance of encountering a passerby, seems great enough to overcome the action-inaction concern that courts have for victims on land.

Another possible factor edging courts and lawmakers toward imposing a duty to rescue at sea is the status that courts, at least U.S. federal courts, have given sailors.[25] Courts have often referred to sailors as "wards of the admiralty," which means that they take a deferential attitude and protective stance toward sailors.[26] This concept functions like an equitable principle that sailors can use in a contract dispute, labor dispute, or workplace injury against their ship masters and employers.[27] The logic of giving deferential status to sailors is that sailors have a very difficult job that is vital to the Nation's commerce and defense.[28] No source explicitly states this as a reason why courts are more likely to impose a duty at sea, but it is likely an additional factor explaining why.

As far as the second element goes, that is more complicated. As discussed below, it may not always be the case that a rescue can be achieved

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23. KEETON ET AL., *supra* note 16, at 377.

24. William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 118–19 (1978).

25. *See, e.g.*, Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6,407).

26. *See, e.g.*, *Harden*, 11 F. Cas. at 485. The court explained:

> Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty . . . . *Id.*

27. 2 MARTIN J. NORRIS & ROBERT FORCE, THE LAW OF SEAMEN §§ 24:2–3 (5th ed. 2003).

28. *Id.*

with little inconvenience, which is why the concept of a salvage award developed to incentivize rescue.

A related economic rationale exists for imposing a different standard. At sea, there is a high chance of a total loss for ships, cargo, and passengers who are stranded or in danger.[29] Thus, the net loss to society in terms of people and resources is likely to be much higher at sea.[30] This same dynamic is not necessarily present on land (except possibly in the case of a fire).[31] In actuality, property lost on land does not face the same set of harsh elements that will completely destroy its usefulness.[32] Theoretically, once an emergency is over, we can recover people and property on land more easily. People and property are more likely to be found, returned, reused, etc., on land, and thus reduce the net loss to the overall wealth of society. If we leave people at sea, they will die. If we leave property, it may be impossible to find. Even if eventually found, chances are the property will be completely unusable. Since the net cost to society is likely higher for emergencies at sea, as compared to the relatively small cost to the passing ship, it could make sense to impose the rescue duty at sea where it would not on land.

Whether or not these theoretical reasons are what motivated Congress to impose a duty to rescue and create a criminal sanction for failing to rescue is unclear.[33] Unfortunately, the available legislative history is sparse.[34] The only Senate document on the bill is a perfunctory two-page report prepared by the Committee on Foreign Relations on March 30 (before the *Titanic* disaster on April 14).[35] It is hard to imagine that many Senators or Representatives cared much for this philosophical debate when the vote for

29. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 772 (6th ed. 2019).

30. *Id.*

31. *See id.*; *see also* Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 266 (1804) (noting that even though loss due to fire on land is similar to loss at sea, courts have not used that similarity to create any fire rescue reward. Perhaps this makes sense, lest we incentivize arson and officious intermeddling).

32. SCHOENBAUM, *supra* note 29.

33. *See* 46 U.S.C. § 2304.

34. This may be because some online databases do not have information for the 62nd Congress. The author also searched the microfilm stored at the Fred Parks Law Library and could not find any other legislative history besides Senate Report 477 *infra* note 35.

35. S. REP. NO. 62-477, at 2 (1912). The two-page report only briefly references the duty to rescue and criminal sanction in one paragraph:

> Section 2 of the bill makes it the duty of the master of a vessel to render assistance to persons found at sea in danger, if he can do so without serious danger to his own vessel, crew, or passengers, and failure to render such assistance subjects him to fine or imprisonment. This section conforms to article 11 of the [International Salvage] convention. Since September 4, 1890, our laws have required a master to stay by in case of collision (chapter 875 of the laws of 1890), but the present bill extends the obligation to render assistance in all cases. *Id.*

this bill took place after a catastrophe where only a small proportion of passengers and crew were rescued.

B. The Legal and Economic Background of Rescue at Sea.

The International Salvage Convention[36] was proposed and signed in 1910 and then ratified by the Senate in 1912.[37] The modern version of the international convention states:

> 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
> 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1.
> 3. The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph 1.[38]

In compliance with the treaty, Congress imposed a criminal sanction:

> A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board . . . . A master or individual violating this section shall be fined not more than $1,000, imprisoned for not more than 2 years, or both.[39]

Courts have sometimes recognized a civil cause of action based on § 2304, public policy and prudential concerns, and historical tort law considerations.[40] Other cases apply negligence per se principles.[41] Some commentators have criticized the usefulness of using § 2304 as a civil remedy.[42] For example, Professor Davies predicts a civil remedy is not likely to work because, in order for a victim of a failure to rescue to be able to sue, they need to 1) survive, 2) be able to identify the passing ship that ignored

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36. Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, Sept. 23, 1910, 1 Bevans 780.

37. Salvage Act of 1912, Pub. L. No. 62-249, 37 Stat. 242 (1912).

38. International Convention on Salvage, Apr. 28, 1989, S. TREATY DOC. NO. 102-12 (1989). The 1989 version of this treaty is substantially similar to the 1910 version.

39. 46 U.S.C. § 2304.

40. *See, e.g.*, Martinez v. P.R. Marine Mgmt., Inc., 755 F. Supp. 1001, 1006 (S.D. Ala. 1990) (holding that shipowner could be liable under § 2304 among other statutes for a negligently executed rescue attempt).

41. *See* Lemma Ins. Co. v. Rumrunner Sport Fishing Charters, Inc., No. 8:11-cv-2110-T-33TBM, 2012 U.S. Dist. LEXIS 9634, at *4-5 (M.D. Fla. 2012) (recognizing that violation of the shipping statutes can be negligence per se); *see also* Robert D. Peltz, *Adrift at Sea—The Duty of Passing Ships to Rescue Stranded Seafarers*, 38 TUL. MAR. L.J. 363, 372–73 (2014).

42. Martin Davies, *Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea*, 12 PAC. RIM L. & POL'Y J. 109, 115 (2003).

them, and 3) get a court to agree to assert jurisdiction.[43] Therefore, criminal law, combined with enforcement, is the better way to ensure ships rescue when they ought to.[44] However, even Professor Davies grants that, absent additional enforcement, even the criminal sanction's usefulness is questionable.[45]

The criminal sanction alone is just as unlikely to be effective. The fine is only $1,000 in the statute, which is not a significant sanction. Research by other commentators has not found a single prosecution under § 2304.[46] The same issues that Professor Davies identifies as limiting the civil remedy also apply to the criminal sanction. It is unlikely that a prosecutor will know there has been a failure to rescue. One commentator explained why:

> Cases examining 46 U.S.C. §2304 are rarely reported. Dead men tell no tales. Nor do they sue. Only those castaways who survive, and who can identify a passing ship, would be able to sue the ship's captain for leaving them behind. A decedent's family would have little means of discovering which ships may have passed by a loved one.[47]

The victim will need to identify the passing ship or at least the time and date that the ship passed by. Expecting a stranded victim to remember the time, date, and relative location is a tall order. Given these evidentiary problems, § 2304 is difficult to enforce either as a criminal or civil remedy, even if governments funded additional enforcement efforts, which would likely be extremely expensive.

Indeed, it may be hard to enforce a rule requiring the rescue of stranded people at sea. But one might counter that surely the moral sense of sailors would make this point moot. Of course, people will feel a sense of solidarity with stranded victims and go to the rescue. Echoing this sentiment, one judge wrote, "The sea is a hard master and those who sail her are united in a common struggle. It is their tradition to answer calls of distress regardless of cost or peril."[48]

On the contrary, the "cost or peril" to the rescuer can create a powerful incentive to look the other way if one encounters a stranded person at sea. As one commentator puts it, "With the vastness of the sea, it is all too easy to turn one's head and proceed on course rather than go to the assistance of

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43. *Id.*

44. *Id.*

45. *See id.* at 140–41.

46. Wilbur Holmes Smith II, *The Duty to Render Assistance at Sea: Is It Effective or Adrift?*, 2 CAL. W. INT'L L.J. 146, 154 (1971). The author could not find any prosecutions since the time of these sources. This might be partially explained by prosecutors using other statutes like murder or manslaughter to prosecute in those situations.

47. Long, *supra* note 22, at 610.

48. Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, 418 F. Supp. 656, 656 (S.D. N.Y. 1976).

someone in danger of being lost."[49] As discussed in greater detail below, many courts have long recognized that the cost and peril involved in sea rescue can create a powerful incentive to look the other way.[50] Adding a punishment may help reduce this incentive, but then again, it may actually increase the likelihood of willful blindness.[51] The prospect of costs associated with rescue *and* potential punishment may lead sailors, especially commercial shippers, to avoid areas where rescue is more likely. Judge Posner and Professor Landes predicted that savvy commercial shippers would avoid areas with higher probabilities of rescue events:

> One must also consider the effect of liability on the behavior of profit-maximizing firms. If shipowners engaged in the business of transporting goods were made liable for failing to rescue pleasure boats in danger, this would increase the expected costs of shipping and induce substitution toward other business activities or less hazardous sea routes (*i.e.*, where there was less likelihood of encountering a ship in peril). The incentive to substitute would be positively related to the probability of encountering a victim, the magnitude of the rescue costs, the proportion of these costs to total costs, and the elasticity of the industry demand curve. [52]

Sure enough, we see this occur in the real world. For example, the New York Times discovered that Japanese commercial shipping companies intentionally avoided areas near Vietnam in the late 1970s to avoid encountering refugees fleeing the communist takeover of South Vietnam.[53] The report explained that direct callousness was not necessarily the issue, but instead, "[Japanese ships] stay[ed] well away from trouble by navigating . . . through empty waters."[54] The reporter anonymously interviewed a shipping executive for his side of the story:

> "The infested areas are not too hard to avoid," a shipping executive said. "All we have to do is steer a bit further off the coast of Vietnam["] . . . . "That could add 200 miles to a ship's voyage," he said, "but it is also a lot cheaper than stopping to pick up refugees. On the whole we

49. Smith II, *supra* note 46, at 162.

50. *See, e.g.*, The Missouri, 17 F. Cas. 484, 488 (D. Mass. 1854) (No. 9,654) ("[P]ublic policy requires that . . . [a] reward should be held out . . . [so that a sailor] competent to render relief, shall be eager to do so . . . [and] shall not be tempted to pass her by . . . . ").

51. *See* MARTIN J. NORRIS, THE LAW OF SALVAGE 371 (1958) (noting that even with the creation of criminal sanctions, it is still wise to retain a monetary reward to incentivize rescue).

52. Landes & Posner, *supra* note 24, at 122.

53. Henry Scott Stokes, *Ships Bound for Japan Avoiding Seas Traversed by 'Boat People'*, N.Y. TIMES, (July 15, 1979), https://www.nytimes.com/1979/07/15/archives/ships-bound-for-japan-avoiding-seas-traversed-by-boat-people.html [https://perma.cc/9ABN-NV2K].

54. *Id.*

> don't feel that they deserve [our help]; they are never grateful in the way that we expect."[55]

The reporter also interviewed a sailor working as a First Officer:

> The seaman smiled when asked if his company had given orders not to pick up [Vietnamese refugees]. "No, there has been absolutely no such order," he said, "but it's possible that our skippers have been quietly told — or encouraged — not to actively take the initiative to rescue [Vietnamese refugees] . . . I know this may sound weak," he said, "but the problem is too heavy a one for private shipping firms alone. Are we supposed to set aside our tight sailing schedules?"[56]

In precisely the areas where we need more ships in order save desperate and stranded people, the incentives align for shipping to go elsewhere.

This unfortunate reality is similar to the "shoot-shovel-shut-up" phenomenon that sometimes exists concerning the Endangered Species Act.[57] In a process called "preemptive habitat destruction," some landowners were found deliberately making their land unsuitable for habitation by endangered species to avoid the application of the Act to their land.[58] An empirical study conducted on this issue noted that:

> With the possibility of preemptive habitat destruction, the ESA might actually cause a long-run reduction in the habitat and population of a listed species. This possibility has led many, including economists, environmentalists, landowners, and lawyers to criticize the so-called perverse incentives inherent in the ESA. Economic and legal scholars, in particular, have pointed out that these preemption incentives arise because the ESA *does not provide compensation* to landowners whose land uses are restricted.[59]

A science correspondent writing about the issue suggested analogizing the application of the ESA to a constitutional taking.[60] If the program's goal is laudable, then the Nation should help pay for it.[61] Rather than forcing a private party to bear the burden alone, we ought to compensate them.[62]

Sharing burdens in support of laudable goals is part of the logic underlying the Fifth Amendment Takings Clause. It was designed "to bar [the] Government from forcing some people alone to bear public burdens

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55. *Id.*
56. *Id.*
57. Ronald Bailey, *"Shoot, Shovel, and Shut Up"*, REASON MAGAZINE, (Dec. 31, 2003), https://reason.com/2003/12/31/shoot-shovel-and-shut-up/ [https://perma.cc/4ABK-CGBE].
58. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 29–30 (2003).
59. *Id.* at 30 (emphasis added).
60. Bailey, *supra* note 57.
61. *Id.*
62. *Id.*

which, in all fairness and justice, should be borne by the public as a whole."[63] This article is not arguing that a rescue should be treated as a constitutional taking, only that the underlying logic is similar. Since we are imposing a duty to rescue in § 2304 (a "public burden[]"), we should soften the duty's burden with a benefit (ensure that the burden is "borne by the public as a whole").[64]

C. The Reason for Salvage Awards.

Rather than taking a solely punitive approach with § 2304, perhaps we use a carrot to get sailors working with us rather than against us on the problem of rescue. Courts have long recognized the benefits of incentivizing rescue for this reason; "[c]ompensation . . . is not viewed by the admiralty courts merely as pay, on the principle of a *quantum meruit*[65] . . . but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property."[66] Commentators generally agree, "Since the duty [to rescue] promotes benevolent conduct, a positive stimulus might effectively counterbalance the negative aspect of the duty's sanctions."[67] This type of compensation to sailors is called "salvage."[68] Salvage is a compensatory award to someone who successfully rescues property and persons from loss at sea.[69] The concept of salvage goes as far back as ancient Rhodes in 900 B.C.[70] Rhodian law awarded the salvor one-fifth of the value of the property saved.[71]

Rescuing people at sea can entail much more cost than one might think. Large ships, especially commercial shippers, can incur serious material, financial, and opportunity costs during rescue attempts. The daily operating cost for some commercial ships can reach as high as $20,000 per day.[72] In *Varzin*, Judge Learned Hand determined that the delay costs incurred by a rescuer for the thirty-six hours it took to accomplish a rescue amounted to $3,000 (in 1910 dollars).[73] Adjusted for inflation, that is over $79,000. In a more recent case, a ship equipped with an onboard medical facility, the

63. Armstrong v. United States, 364 U.S. 40, 49 (1960).
64. *Id.*; *see* Smith II, *supra* note 46, at 162.
65. Shafer Elec. & Const. v. Mantia, 96 A.3d 989, 993 (Pa. 2014) ("[*Q*]*uantum meruit* is essentially a claim for unjust enrichment, which 'implies a contract [and] requires the defendant to pay to the plaintiff the value of the benefit conferred.'").
66. The Blackwall, 77 U.S. 1, 14 (1869).
67. Smith II, *supra* note 46, at 162.
68. *See The Blackwall*, 77 U.S. at 12.
69. *Id.*
70. NORRIS, *supra* note 51, at 4.
71. *Id.*
72. Davies, *supra* note 42, at 134.
73. The Varzin*,* 180 F. 892, 895–96 (S.D. N.Y. 1910).

Canberra, came to the aid of a nearby ship after receiving its distress call.[74] During this rescue event (which turned out to be a relatively simple transfer of a sick person from one ship to the other), the *Canberra* incurred an additional $12,108.95 in fuel costs and $500 worth of medical equipment consumed.[75] Someone must eat that cost.

Consequential damages can be a particularly hard problem for shippers. While courts may increase the salvage award for the time it takes to affect the rescue (as Judge Hand did in *Varzin*), they have been reluctant to award it for less certain follow-on costs like a disrupted schedule.[76] If a commercial ship containing significant amounts of cargo delays for rescue, someone has to eat the costs associated with the follow-on disruption in schedules. Those disruptions could be massive depending on the type and amount of cargo.

Marine insurance may help here, but many insurance underwriters will not cover certain costs associated with rescue,[77] especially those consequential damages associated with deviating from the original route.[78] Professors Gilmore and Black explain that "the assurer is deemed to have intended to accept only that risk that inheres in the expeditious prosecution of the voyage by the usual commercial route. Where the vessel without excuse departs from this route, or delays unreasonably in pursuing the voyage, the policy is ousted."[79]

This type of situation falls under "protection and indemnity insurance" (P&I) which covers miscellaneous liabilities not covered under the more standard types of marine insurance policies (which usually only cover the vessel and crew).[80] Some P&I policies may cover some costs for life salvage.[81] However, many types of consequential damages and deviation expenses may not be covered, especially more open-ended costs.[82] For example, the costs the *Canberra* incurred probably would not be covered by a P&I policy.[83]

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74. Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, 553 F.2d 830, 832 (2d Cir. 1977) One of the passengers had a heart attack, and the ship did not have medical personnel capable of treating it.

75. *Id.* at 833.

76. *The Varzin*, 180 F. at 896. Judge Hand explained, "I consider the loss involved in the supposed disarrangement of the [rescuer's] schedule too remote to be the basis of damages." *Id.*

77. Peltz, *supra* note 41, at 382.

78. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 66 (2d ed. 1975).

79. Delphi-Delco Elects. Sys. v. M/V Nedlloyd Europa, 324 F. Supp. 2s 403, 410 (S.D. N.Y. 2004) (quoting GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 66 (2d ed. 1975).

80. LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386 (3d ed. 1991).

81. *See id.*

82. *Id.* at 395.

83. *See id.*

All this talk of money is important, but one might counter, "We should be more concerned with saving lives and not worry about money." However, not only can rescue be costly, but it can be dangerous too. We need to account for the risk to the rescuer as well. One study estimated that the number of rescuers who die outnumbers the deaths of victims due to non-rescue by as high as 70:1 (albeit in all rescue situations, not just at sea).[84] The *Titanic* incident is a prime example of this danger. The *Californian*, after it finally heard that the *Titanic* was sinking, still needed four-and-a-half more hours to traverse the ice fields and arrive on the scene.[85] The *Carpathia* received the *Titanic's* distress signal at approximately 12:30 am and arrived at 4:10 am, also dodging icebergs on the way there.[86] The Senate Report noted:

> Captain Rostron [the *Carpathia's* captain] fully realized the risk involved [with attempting rescue]. He doubled his lookouts, doubled his fireroom force, and notwithstanding such risk pushed his ship at her very highest limit of speed through the many dangers of the night to the relief of the stricken vessel . . . . The precautions he adopted enabled him to steer his course between and around icebergs until he [arrived].[87]

The bottom line is that, whether because of financial cost or danger to the crew, rescue at sea is hard. We need to counterbalance that with a benefit: salvage awards.

D. The Salvage Award.

The elements required for a salvage award are:

1) a ship or other property at sea is in peril;
2) the salvor (the person attempting rescue) must be acting voluntarily and under no pre-existing duty; and
3) the salvor is successful.[88]

If multiple parties assist in the rescue, they are each entitled to a share in proportion to the nature, duration, risk, and value of the service rendered.[89] Traditionally, salvage awards were primarily for property.[90] A rescuer received compensation for rescuing property, or property and people, but not

84. David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 668 (2006). This ratio might not be so drastic if the phenomenon of people turning a blind eye to people in need of rescue is real.

85. S. REP. NO. 62-806, at 11, 15 (1912).

86. *Id.* at 9.

87. *Id.* at 15.

88. GILMORE & BLACK, *supra* note 78, at 534–35.

89. *See id.* at 556, 559.

90. GUSTAVUS H. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 709 (1939).

people alone.[91] Congress tried to correct that anomaly with § 80107 (formerly § 729), which allows a portion of a salvage award granted for property to be set aside for any salvors who only rescued people during a salvage event.[92] This matches Article 9 of the Salvage Convention.[93] Unfortunately, there is still some doubt as to whether rescuing people alone, but not any other physical property, can be the basis of a salvage award.[94] This idea is "universally condemned,"[95] but courts will still apply it.[96]

The *Canberra* incident exemplifies this old property-centric doctrine rearing its ugly head. On appeal, the court awarded compensation of $8,500 on a quasi-contract theory because this situation was not a rescue or salvage in the court's opinion.[97] Instead, the court explained that what was really happening was a transfer of an injured patient from one boat to another to use professional medical services.[98] This seems like a strained interpretation of what happened. The court was very likely trying to avoid the defendant's argument that this was a pure life salvage, and therefore, the *Canberra* could not qualify for an award because no property was also saved.

This seems to violate basic moral sense. The sticky issue is finding a source for the reward money in a situation where only people are saved. For cargo or other property that is saved, the award can come from a portion of the value of that property. The only other source of the funds is the rescued victim. Seeking contribution from the victim is possible but raises a whole different set of moral and incentive issues. Historically, courts were probably reluctant to demand payment from a rescued victim who had no property. One commentator explained:

> [A] salvor could hardly be allowed to detain the body of the person whom he had saved from the sea until salvage was paid for his release . . . . Of course, if money or jewelry were found on the person saved,

91. The Emblem, 8 F. Cas. 611, 612 (D. Me. 1840) (No. 4,434) ("Now a court of admiralty has no authority to allow a reward merely for the saving of life.").

92. 46 U.S.C. § 80107.

93. Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, *supra* note 36 ("Salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage or assistance, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories.").

94. Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, 553 F.2d 830, 835–36 ("Yet it seems to have been admiralty law that rescuing lives at sea, rather than property, merited moral approbation, but no pecuniary reward.").

95. *Id.* at 836.

96. Saint Paul Marine Transp. Corp. v. Cerro Sales Corp., 313 F. Supp. 377, 379 (D. Haw. 1970).

97. *Peninsular & Oriental Steam Navigation Co*., 553 F.2d at 836–37.

98. *Id.* at 836.

such valuables were subject to libel for salvage as property but the person went free.[99]

E. How is a Salvage Award Calculated?

The focus of this paper is not on exactly how the award is calculated, although that is an interesting topic that could use further development. The circumstances of each salvage are unique, and no specific formula exists.[100] Often judges find themselves in honest disagreement about it.[101] As one 19th-century jurist put it, "Questions of salvage are always questions of the most disagreeable kind. In vain the mind looks for relief in its anxiety to do justice by seeking the aid of fixed rules and principles."[102] The usual criteria courts use to determine the amount include the following:

- The time and labor expended;
- The promptness, skill, and energy displayed in saving the property;
- The value of the property risked, and the degree of danger the property was exposed;
- The risk incurred by the salvors; and
- The degree of danger from which lives and property are rescued.[103]

In one interesting case, the courts applied these factors to determine the salvage award when a shipper saved a NASA shuttle fuel tank lost during a storm.[104] According to Professor Schoenbaum, this was the highest salvage award ever ordered at over $4 million.[105]

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99. Arnold W. Knauth*, Aviation and Salvage: The Application of Salvage Principles to Aircraft*, 36 COLUM. L. REV. 224, 228 (1936). Other nations have required property-less victims to compensate their rescuers; *see* Steven F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1222 n.13 (1979).

100. SCHOENBAUM, *supra* note 29, at 779.

101. *See, e.g.,* Bond v. The Cora, 3 F. Cas. 838, 840 (C.C.D. Pa. 1807) (No. 1,621) ("[Judges] possessing equal liberality and minds equally intelligent, would vary very [considerably] from each other [in fixing] the quantum of this reward.").

102. The Maria Josepha, 16 F. Cas. 733, 733 (C.C.D. S.C. 1819) (No. 9,078); *see* The Rescue v. The George B. Roberts, 64 F. 139, 140 (E.D. Pa. 1894) ("There is no rule by which the value of the services in such cases can be accurately measured. At best the award must be the result of an intelligent guess.").

103. Margate Shipping Co. v. M/V J.A. Orgeron, 143 F.3d 976, 984 (5th Cir. 1998); *see* SCHOENBAUM, *supra* note 29, at 779–80.

104. *Margate Shipping Co.*, 143 F.3d at 994–95.

105. SCHOENBAUM, *supra* note 29, at 781 n.74.

III. RESPONSIBLY INCENTIVIZING RESCUE OF LIFE AT SEA: PROPOSALS

This section of the article discusses the following central thesis: we should give rescuers at sea an income tax credit to incentivize rescue and make it less costly to the rescuer. First, this section discusses alternatives proposed by other commentators, which include a national licensing fund and a Coast Guard fund. Although these proposals solve the incentive problem, they have a few drawbacks that arguably make the income tax credit more practical.

Next, this section will discuss the three other changes to rescue law we should make. First, we should modify the existing doctrine, which requires that a rescuer be acting under no pre-existing duty with a requirement that the rescuer not be performing professional rescue services or in a special relationship with the victim. Second, we should make it illegal for insurance underwriters to void insurance contracts when commercial shippers take reasonable steps to rescue people. Lastly, we should not impose the criminal sanctions in § 2304 on ships with sufficiently important cargo or sufficiently important missions.

A. Other Proposals for Funding Life Only Awards.

Before discussing the tax credit idea, we will briefly discuss alternative proposals. The British tried to solve the funding problem by creating the "Mercantile Marine Fund," which allows successful life-only rescuers to reap a financial reward.[106] One commentator proposed a similar fund in the United States, paid for by licensing fees from all operators of vessels on navigable waters.[107]

Another commentator proposed funding salvage awards by having the Coast Guard charge for salvage efforts.[108] The Coast Guard is authorized to perform rescue and salvage.[109] Generally, they do this gratuitously.[110] However, if the Coast Guard did require compensation for saving property at sea, we could use that money to fund life salvage awards in private rescue cases.[111]

If founded, these programs would certainly help alleviate the problems identified above with the criminal sanction and civil remedy. They also have

106. ROBINSON, *supra* note 90, at 718 n.28.

107. Smith II, *supra* note 46, at 159–60; *see* James Z. Pugash, *The Dilemma of the Sea Refugee: Rescue without Refuge*, 18 HARV. INT'L. L.J. 577, 602 (1977) (recommending the same idea to compensate shipowners and crew for rescuing international refugees who get stranded at sea).

108. Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 789 (1954).

109. 14 U.S.C. § 521.

110. Jarett, *supra* note 108.

111. *Id.*

the added benefit of removing the need for an adversarial hearing in these life salvage cases. As we saw in the *Canberra* case, the defendant used older salvage doctrine to argue against any award. When we say "award" in that case, we really mean monetary damages for which the defendant-victim is liable and will need to hire lawyers to defend against. If we had an independent source of funds for a life salvage, the defendant would not care about the size of the award. There need not be an adversarial process and all the acrimony associated with it. Instead, we can do an ex parte style hearing where the judge can determine the award amount based on the facts of the case provided by the rescuer. We can leave the victim out of it, saving them the time, effort, and money of defending the suit.

The issue with these programs is, firstly, the problems of politics and practical implementation associated with all new programs. Secondly, the funding sources still make a discrete, identifiable minority bear the burden of a laudable national goal. In the case of the national licensing fund, this money is paid by the very same ships most likely to be performing the rescues. All other things equal, commercial shippers and licensed vessels are likely to be encountering and rescuing the persons in need of aid. The effect of the program would just be shippers reimbursing themselves with their own licensing fees. Granted, this would soften the blow and spread the cost across all large shippers rather than one individual.

In the case of the Coast Guard fund, not enough money will be recovered. According to the Coast Guard's estimates from 1985 to 2013, it prevented the loss of over $22.5 billion in property.[112] Although the figures vary drastically year by year, that averages to $903 million annually.[113] If we use the Rhodian salvage award theory of 1/5th the value, then the fund will have $180 million available per year to spend on awards. Courts are unlikely to award the Coast Guard twenty percent salvage in every case. Professor Jarett proposed awarding the Coast Guard a one percent salvage.[114] That would give us a little over nine million dollars per year. It is not likely that nine million dollars is enough to fund a pure life salvage award program. It is better than zero, true, but it hardly seems sufficient to justify a change to the Coast Guard's proud and longstanding tradition of gratuitously helping those in need. This program would, at least at the margin, disincentivize people from calling the Coast Guard when needed. Given that alternatives exist, this is not the best solution.

112. Bureau of Transp. Stat., *U.S. Coast Guard Search and Rescue Statistics, Fiscal Year,* U.S. DEP'T OF TRANSP., https://www.bts.gov/content/us-coast-guard-search-and-rescue-statistics-fiscal-year [https://perma.cc/9JTK-85ZD].

113. *Id.*

114. Jarett, *supra* note 108.

B. Fund Life Only Rescues via an Income Tax Credit.

The idea of this article is to allow the rescuer to take their court-ordered salvage award and claim it as a refundable income tax credit. A tax credit solves the problem of lack of funds in a life salvage situation, as the licensing and Coast Guard programs both do. It improves the licensing program proposal because it does not require the creation and administration of any new federal program. The IRS already deals with refundable tax credits all the time.[115] Additionally, this idea spreads the cost of the imposed rescue duty across all the taxpayers rather than concentrating it on commercial shippers and other licensed vessels. The tax credit idea improves on the Coast Guard fund proposal because the source of the funds is not dependent on how much property salvage the Coast Guard can conduct that year, and it does not change the Coast Guard's long tradition of doing it for free.

An example of an income tax credit is the foreign tax credit, which allows taxpayers to subtract the amount of any foreign income taxes they paid from their U.S. tax liability.[116] An example of a refundable tax credit is the first-time homebuyer tax credit.[117] If the amount the taxpayer is allowed to claim from buying their first home exceeds their tax liability, then Uncle Sam will send a check to the taxpayer for the remainder.[118]

We can look at a real example to show how this would work. In *Falgout Bros. v. S/V Pangaea*, a tugboat saved an abandoned ship and pulled it into shore.[119] The court ordered that the boat be sold off and the money distributed as an award in the following manner:

- Tugboat owner: $5,861.94.
- Tugboat master/captain: $859.75.
- Tug mate $234.48.
- Tug deckhand $390.79.
- Tug deckhand $234.48.
- Tug deckhand $234.48.[120]

For the sake of argument, assume the abandoned ship sank, and the tugboat crew arrived in the nick of time to save the ill-fated ship's occupants. The tugboat crew would file a complaint with a federal court invoking its admiralty jurisdiction and specially plead that they seek an ex parte life-only salvage award.[121] The rescued victim would not be required to join the suit

115. *See generally* 26 U.S.C. §§ 21–53 (2021) (noting all income tax credits).
116. *Id.* § 27.
117. *Id.* § 36.
118. *See id.*
119. Falgout Bros. v. S/V Pangaea, No. 96-0805-RV-C In Adm., 1997 U.S. Dist. LEXIS 12618, at *4 (S.D. Ala. Aug. 8, 1997).
120. *Id.* at *8.
121. *See* 28 U.S.C. § 1333; *see also* FED. R. CIV. P. 9(h).

as a defendant. Instead, the court would order the monetary award based on existing salvage doctrine. There would be no boat to sell off and fund the award, so the crew would take the court order and include it in their income tax filing. If the amount awarded exceeds their tax liability, then they would get a refund from the IRS.

C. No Awards for Professional Rescue Services, or Those in a Special Relationship with the Victim.

There is logical inconsistency in providing salvage awards when § 2304 is the law.[122] Under existing salvage doctrine, the rescuer must not act under a pre-existing duty in order to receive a salvage award.[123] At the same time, we impose a criminal sanction with § 2304 if one fails to rescue.[124] If there is a criminal statute imposing a duty to rescue at sea, it follows that nobody should be able to satisfy the second element of the salvage doctrine. One-way courts get around this conundrum is by ignoring that the duty exists. For example, some courts still say things like, "[a] private party has no affirmative duty to rescue a vessel or person in distress" despite the existence of § 2304.[125]

Congress should reaffirm that there is indeed an affirmative duty to rescue imposed on a master or individual in charge of a vessel, as is stated in § 2304. For the sake of logical consistency, Congress should then direct courts to change the second element of salvage awards, which generally requires that the rescuer have acted voluntarily and under no pre-existing duty. Instead, the second element should require that the rescuer not be either 1) in a special relationship with the victim or 2) a professional rescuer. That would mean that a captain is required to save his crewmember, a captain is required to save his passenger, a tour guide on a vessel is required to save a tourist, etc., without expecting an award. Excluding these special relationships from salvage awards is necessary to prevent fraud. If we did not exclude them, the temptation to stage fake rescue events and then provide the "victim" a cut of the award would be too great. Those in a special relationship are close in proximity, making conspiracy to defraud the salvage award process easy for them and difficult for the courts to identify (especially if we make the process ex parte).

The underlying rationale of salvage awards, inducing rescue, does not apply to paid rescue services. They are already providing the rescue service because they are contracted precisely to do so. A salvage award to induce

122. 46 U.S.C. § 2304.
123. GILMORE & BLACK, *supra* note 78, at 541.
124. 46 U.S.C. § 2304.
125. Korpi v. United States, 961 F. Supp. 1335, 1346 (N.D. Cal. 1997).

them into providing rescue is not necessary. They are already getting paid. Additionally, the temptation to commit fraud with their customers is present. The author is not aware of the existence of a gratuitous private, professional sea rescue service. However, if one were to exist (presumably as a charitable enterprise funded by wealthy donors), this logic would not apply. The gratuitous rescue service should be eligible to receive the awards because the awards would, at the margins, induce and enable them to provide more of that gratuitous service. While the possibility of fraud is not gone, a charitable service is more likely to rescue random victims where there is less temptation and opportunity for conspiracy.

D. Insurance Underwriters Must Payout for Reasonable Deviations. Award Costs to the Insured.

We should make it explicitly illegal for insurers to void contracts when commercial shippers are delayed or deviate after taking reasonable steps to affect a rescue. In some cases, courts have already held that reasonable deviations are not grounds for refusing to reimburse the rescuer. For example, in *Bond v. Cora*, the freighter (the party that chartered the ship to carry its goods) tried to argue that it was entitled to part of a salvage award given to the captain and crew.[126] Its justification was that the captain's rescue would be a "deviation" under an insurance policy.[127] Insurance companies do not pay out for deviations. Thus, like the captain and crew, the freighter was also exposed to risk and was entitled to an award because its goods onboard lost their coverage during the rescue. On appeal, the court balked at this argument, holding that: "[i]f the object of the deviation be to save the life of a man, I will not be the first judge to exclude such a case from the exceptions to the [rules requiring insurance payouts]. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence[.]"[128] The freighter was not entitled to a share of the reward because, among other reasons, the captain's deviation was reasonable, so the freighter was exposed to no risk from its insurer.[129]

Deviation was recently defined as "[a] voluntary departure, without necessity or justifiable cause, from the regular and usual course of the voyage."[130] A deviation of this kind will discharge the insurer of any responsibility.[131] Other courts have used a sort of balancing test weighing the

126. Bond v. The Cora, 3 F. Cas. 838, 840 (C.C.D. Pa. 1807) (No. 1,621).
127. *Id.*
128. *Id.*
129. *Id.* at 840–41.
130. The Conn. Indem. Co. v. Palivoda, No. 8:04CV1044T-24MSS, 2004 U.S. Dist. LEXIS 28709, at *7 (M.D. Fla. Aug. 23, 2004).
131. *Id.*

risk of death or suffering possible on the one hand versus the increased length of the voyage.[132]

A classic example of a deviation that relieved the insurer was a case where a commercial fisherman left its authorized route because it failed to bring enough bait for its entire voyage.[133] The insurer is not responsible if the fishing crew represents that they will use one route and then leaves it for an avoidable reason, like failure to properly prepare and bring enough bait.[134] On the other hand, departing from the insured route to provide care for sick and wounded sailors would be a departure that the insurer is required to cover.[135]

Congress should codify these old holdings in a single statute. Courts must force insurance to cover reasonable deviations, especially ones necessary to affect a rescue or save a life. If the insurer contests that a deviation was reasonable and loses, the court must award attorney's fees and costs to the insured. Shifting this cost burden to the insurers should help prevent them from contesting valid deviations, like the deviation in the case of the *Canberra*. If insurers are more likely to pay out in that type of situation, we will marginally decrease the cost of rescue and encourage more Good Samaritan behavior. Obviously, this marginal increase in cost to the insurers will be borne by the entire shipping industry in the form of higher premiums. Those higher premiums are likely to be passed on, in part, to consumers. This matches the public policy maxim that all of us should bear the burdens of laudable national goals rather than imposing that burden on a few unfortunate parties who happen to be in the wrong place at the wrong time.

E. Do Not Impose the Duty to Rescue in § 2304 on Ships with Sufficiently Important Cargo or Sufficiently Important Missions.

The imposition of a duty should not be absolute. In tort law, the question of when the law imposes a duty is not always clear.[136] Professors Prosser and Keeton noted, "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists."[137] Section 2304 recognizes that duties must have limits. For example, the section imposes a duty to rescue only "so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board."[138] The basic thesis of this

132. Perkins v. Augusta Ins. & Banking Co., 76 Mass. 312, 316–17 (Mass. 1858).
133. Burgess v. Equitable Marine Ins. Co., 126 Mass. 70, 78–79 (Mass. 1878).
134. *Id.* at 79.
135. The Iroquois, 118 F. 1003, 1005 (9th Cir. 1902).
136. KEETON ET AL., *supra* note 16, at 358.
137. *Id.* at 359.
138. 46 U.S.C. § 2304.

subsection is that, as reasonable people, we cannot make ships with sufficiently important cargo or sufficiently important missions stop to rescue people.

An example of an exception to this duty occurred during World War II. This real-life trolley problem contained two undesirable choices. On track one, you stop an Allied supply convoy and rescue stranded sailors in the water but drastically increase the risk of being attacked by German U-boats. Your convoy contains hundreds of lives and is urgently needed in New York to ferry more desperately needed supplies to Britain. On track two, you pass by the stranded sailors, sealing their fates, but increase the chances that your convoy avoids the U-boat menace.

In 1942, a small sailboat, the *Lillian E. Kerr*, collided with a larger ship, the *Alcoa Pilot*, which was part of a convoy escorted by four Canadian warships returning to New York from across the Atlantic.[139] The *Lillian E. Kerr* was not part of any convoy and sailed off the coast of Cape Cod for personal reasons of the crew.[140] To avoid detection by U-boats, the *Alcoa Pilot's* convoy sailed without lights at night, as required by Navy regulations.[141] The *Alcoa Pilot's* watch officer on duty saw the *Lillian E. Kerr* approaching and waited.[142] Only at the very last possible moment when he knew that a collision was imminent did the watch officer take action.[143] He turned on red and green lights and tried to turn the ship.[144] Unfortunately, they still collided, and the *Lillian E. Kerr* broke in half, sending its occupants into the Atlantic. The trial court in this case called the *Alcoa Pilot's* failure to avoid the collision "inexcusable" and held that it amounted to negligence.[145]

Relevant to this subsection's topic, the trial court then turned its attention to the duty to rescue. In an attempt to spread the damages to the other ships in the convoy, the *Alcoa Pilot* impleaded the convoy's rear ship, the *Rita*, making a crossclaim because of the *Rita's* failure to rescue the crew of the *Lillian E. Kerr*.[146] Navy rules required that ships in convoys keep sailing and not stop except for a specially designated ship at the rear of the column:

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139. The Lillian E. Kerr v. Publicover, 71 F. Supp. 184, 186 (S.D. N.Y. 1947), *aff'd sub nom*. Publicover v. Alcoa S.S. Co., 168 F.2d 672, 674 (2d Cir. 1948).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 187.

144. *Id.* at 185, 187.

145. *Id.* at 187.

146. *Id.* at 186, 190.

> (a) Unless special vessels are available for the purpose, the rear ships of column are to act as rescue ships should the necessity arise.
>
> (b) Throughout the voyage[,] rescue ships, unless they receive orders to the contrary, are to proceed to the assistance of any vessel *in their respective columns* which may be damaged by normal marine risk, such as collision or man overboard. They are not, however, to stop in order to save life from ships damaged by enemy action, unless a Local Escort is in company with the convoy or it can be done without undue risk. [147]

The phrase "in their respective columns" meant that the rear rescue ship would only rescue stranded sailors originating from that specific column, not even sailors from other columns, especially not from random ships not part of the convoy.[148] The *Rita* heard screaming coming from the water but followed the rules and kept sailing.[149] Dismissing the claim against *Rita*, the trial court held that the *Rita* had no duty to rescue the *Lillian E. Kerr's* crew because they were acting under convoy orders designed to mitigate the U-boat threat.[150]

The *Lillian E. Kerr* incident is certainly tragic and highlights the tightrope balancing act that people sometimes face in life-or-death situations. In the Atlantic during 1942, it was simply too dangerous for Allied merchant

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147. *Id.* at 189 n.1 (emphasis added); HEADQUARTERS OF THE COMMANDER IN CHIEF, WARTIME INSTRUCTIONS FOR UNITED STATES MERCHANT VESSELS, 26–27 (1942), https://www.ibiblio.org/hyperwar/NHC/NewPDFs/USN/Wartime%20Instructions%20Merchant%20Ships.pdf.

> 2501. Any vessel meeting with boats containing shipwrecked crews must approach them with caution, keeping a good lookout and taking every precaution to render a surprise torpedo attack impossible. Before approaching such boats, courses should be steered to permit scouting of the water on all sides of them.
>
> 2502. Empty boats may sometimes be used as decoys by enemy submarines. If objects judged to be decoys are sighted, the precaution should be taken to zigzag and alter course frequently.
>
> 2503. If the master then considers it safe to render assistance, he may do so; the survivors from the boats must be removed as rapidly as possible. If the weather permits, the ship should not be stopped dead, but should steam slowly ahead, constantly turning under rudder.
>
> 2504. A report of mariners rescued must be made as soon as possible to any naval vessel sighted and full details given immediately upon arrival in port. If the shipwrecked mariners are rescued in an area recently free from enemy operations, and if unable to make the above visual report promptly, a report should be made by radio to the nearest naval station as soon as safe to do so.

148. *The Lillian E. Kerr*, 71 F. Supp. at 189.

149. *Id.*

150. *Id.* at 189–90.

ships to stop and pick up survivors of shipwrecks without protection by warships. "Reasonable persons" did not feel it proper to recognize a duty to rescue in that situation.[151] Although we may not see this exact type of situation today, other moral dilemmas may occur. The law must reflect this reality. Although § 2304 does impose the duty to rescue, only if rescue can be accomplished without danger, this language may not cover other moral dilemmas. For example, a container ship carrying fifty million dollars worth of desperately needed and perishable emergency medical supplies comes across a pleasure craft that is now stranded through the gross negligence of the pleasure craft's master. If the master of the container ship stops, he wastes the expensive supplies and causes untold harm to the patients who need them. Under this article's proposed regime, the insurer is then liable for fifty million dollars plus whatever damages any affected patients (or their estates) incur. Under § 2304, if the master of the container ship does not stop, he may be subject to prison time because he could have rescued the grossly negligent pleasure craft occupants without any serious danger.

This does not make sense. Section 2304 should be amended to include an exception clause. Specifically, ships with sufficiently important missions or sufficiently important cargo should not have the duty to rescue imposed on them. Instead, ships falling under the exception should merely have a duty to report. A failure to report would still subject the master of the ship to the same criminal penalty. The duty to report should include acknowledgment of the report from a ship or sailors in distress by either 1) the U.S. Coast Guard or its functional equivalent near other countries or 2) a nearby vessel. The ship falling under the exception may continue course but must continue making attempts to report until they receive an acknowledgment.

Plainly, defining the exact limits of "sufficiently important" will be a difficult task and a hotly debated topic. There are at least two strategies for defining it: a case law approach or a legislative approach. The case law approach would involve punting the task of precise definition to the courts. This has the advantage of giving more flexibility to courts to apply the phrase appropriately to the realities of an individual case. The problem is that we might get disparate outcomes. The legislative approach would give courts more guidance and avoid disparate outcomes. It would also allow masters of vessels to know more clearly what the law expects of them beforehand. However, short of trying to list out every possible exception, it would be impossible to craft a precise definition now that gives us a fair outcome in every case. Perhaps this topic could use more analysis in a future article.

151. KEETON ET AL., *supra* note 16.

IV. CONCLUSION

As with all things involving human beings, problems will persist, especially in expensive endeavors involving life and death. However, these proposals would likely make a dent in the problem. Clarifying that the courts are in fact allowed to award pure life rescue awards is vitally necessary. Providing a source of funding for that reward via an income tax credit is necessary to induce sailors to help solve this problem and avoid the morally dubious requirement that the victim pay to be saved. Modifying the old salvage doctrine elements to clarify that the rescuer not be in a special relationship nor a paid professional rescuer would remove logical contradictions from the doctrine and stop the courts from straining to do what is right, like with the *Canberra*. Insurance underwriters need to do what they are meant to do: insure against rare and expensive events. They should no longer be allowed to avoid paying for the costs of reasonable deviations during rescue events. Finally, we should not impose the duty to rescue in § 2304 on ships with sufficiently important cargo or sufficiently important missions. Section 2304 should be amended to include a duty to report for ships with sufficiently important missions or cargo, not a duty to rescue.

THE UDDERLY PROBLEMATIC BEEF BETWEEN STATES: WHETHER EMPLOYEES ARE COVERED UNDER EQUINE AND FARM ANIMAL LIABILITY ACTS

FARYN FORT[†]

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I. INTRODUCTION

Over the past three decades, forty-eight states passed legislation providing varying immunity to equine and farm animal owners from personal injury and wrongful death liability.[1] These statutes, commonly known as "Equine Animal Liability Acts" ("EALAs") or "Farm Animal Liability Acts" ("FALAs"), protect equine and farm animal owners from liability by limiting personal injury lawsuits arising out of the inherent risks associated with equine and farm animals.[2] While similar in function, EALAs only protect

1. *See Map of Equine Activity Liability Statutes*, ANIMAL LEGAL & HIST. CTR., https://www.animallaw.info/content/map-equine-activity-liability-statutes#google-search [https://perma.cc/KJN8-PV45].

2. *See* WASH. REV. CODE ANN. § 4.24.540(1) (2022); *see also* IOWA CODE ANN. § 673.1 (West 2021); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

equine owners, whereas FALAs protect farm animal and equine owners.[3] EALAs and FALAs prevent "participants" from recovering for their injuries that occurred during equine and farm animal activities (i.e., horseback riding) because the participants knowingly assumed the risk of injuries due to the inherent risks associated with these animals.[4] These statutes were passed to benefit the equine and farm animal industries by making the industries more profitable and insurable through diminishing liability.[5] Despite being effective for thirty years, the question of whether equine and farm animal owners are protected from employee injury-related suits is still a contentious issue.[6] In other words, the issue of whether an employee is a "participant" or "person" and is thus barred from bringing a cause of action under these statutes remains in forty-six states.

EALAs arose from the decline of courts' allowance of assumption of risk defenses against personal injury suits.[7] In the mid-2000s, the United States saw an increase in amendments to EALAs as states began to include farm animal owners.[8] Despite numerous amendments and case law surrounding these statutes, the current issue is whether employees are barred from recovering from injuries on the job while working with equine and farm animals. The statutes are wholly ambiguous on this issue, as only Iowa and Texas have amended their FALAs to clear up confusion on whether employees are precluded from recovery.[9] This Comment proposes the forty-six remaining states adopt one of the proposed model EALAs or FALAs in Part V to reflect the state's stance on workers' rights.

Part II will address why the decline of assumption of risk in strict liability actions led to state legislatures enacting EALAs and FALAs. Part III will compare EALAs and FALAs across the nation and present the ambiguities contained in the text of each statute. Part IV will discuss all available case law on whether employees and independent contractors are barred from recovering under the statutes. Finally, Part V will propose new language for possible amendments to decrease confusion surrounding whether employees are included.

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3. *See* WASH. REV. CODE ANN. § 4.24.540(1) (2022); *see also* IOWA CODE ANN. § 673.1 (West 2021); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

4. *See* WASH. REV. CODE ANN. § 4.24.540(1) (2022); *see also* IOWA CODE ANN. § 673.1 (West 2021); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

5. Waak v. Rodriguez, 603 S.W.3d 103, 106 (Tex. 2020).

6. *See* Baker v. Shields, 767 N.W.2d 404, 409 (Iowa 2009); *see also Waak*, 603 S.W.3d at 110.

7. *Waak*, 603 S.W.3d at 109.

8. *See* IOWA CODE ANN. § 673.1 (West 2021); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

9. *See* IOWA CODE ANN. § 673.1 (West 2021); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

II. COMMON LAW LIABILITY ISSUES LEADING TO THE ADOPTION OF THE ACTS

A. The Decline of the Assumption of Risk Defense in Strict Liability Actions

Historically, assumption of risk was available as a complete defense to defendants in negligence actions.[10] Assumption of risk worked to completely remove any liability from defendants in situations where plaintiffs had knowingly anticipated the risk of injury, and despite anticipating these potential injuries, the plaintiffs went ahead with the injury-causing act.[11] Courts and scholars endorsed this defense as a way to promote fairness and reduce the harshness of negligence and strict liability because plaintiffs knowingly took on the risks of injury.[12] Under this theory, the equine and farm animal industries were largely protected from lawsuits because participants in equine and farm animal activities were intentionally interacting with these animals who, as most people know, may cause injuries.

By 1959, despite the almost unanimous endorsement of the assumption of risk defense during the nineteenth century, the United States began to see a rapid decline in the use of assumption of risk defenses.[13] By the 1980s, it was virtually extinct.[14]

The decline of assumption of risk resulted in courts adopting comparative fault and contributory negligence systems.[15] Comparative fault is used when both the plaintiff and defendant were negligent.[16] The court determines each party's fault—usually as a percentage (i.e., finding the plaintiff 20% at fault and the defendant 80% at fault).[17] In other jurisdictions, courts adopted the use of contributory negligence. Contributory negligence completely prevented the plaintiff from recovering if the plaintiff was

10. 3 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 12:46 (2021).

11. *Assumption of Risk,* MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/assumption%20of%20risk [https://perma.cc/NMD2-Q8LP].

12. 3 SPEISER ET AL., *supra* note 10.

13. *See Assumption of Risk,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/assumption_of_risk [https://perma.cc/LUJ9-Y7R2].

14. SPEISER ET. AL., *supra* note 10, § 12:51 (noting in 1959 New Jersey first suggested the elimination of assumption of risk and, in 1963, officially declared it would no longer be recognized in the state); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 671 (1992).

15. SPEISER ET. AL., *supra* note 10, § 12:51 (noting in 1959 New Jersey first suggested the elimination of assumption of risk and, in 1963, officially declared it would no longer be recognized in the state); Schwartz, *supra* note 14.

16. *See Comparative Negligence,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/comparative_negligence [https://perma.cc/Y4H6-KZE2].

17. *Id.*

negligent in any way.[18] Under contributory negligence, if the plaintiff was 5% negligent and the defendant was 95% negligent, the plaintiff could not recover *any* damages, even though the defendant was overwhelmingly at fault.[19] Currently, most jurisdictions no longer use contributory negligence.[20]

When compared to the formerly popular assumption of risk defense, it is clear the comparative fault system did not provide the same level of protection that assumption of risk afforded to equine and farm animal owners. Assumption of risk completely prevented any recovery by plaintiffs who knew the risk of injury, whereas comparative fault still allowed plaintiffs to recover *even if* they knew the risk of injury. Instead of a complete defense, comparative fault only provided limited, partial protection by reducing damages.

B. How the Acts Filled in the Gaps Left by the Demise of Assumption of Risk

After the shift away from assumption of risk occurred, the United States naturally saw an increase in equine and livestock injury-related litigation.[21] The unavailability of the assumption of risk defense proved to be detrimental to the equine and livestock industries. Courts across the nation experienced an uptick in cases involving equine-related injuries. These cases would not have survived long in the judicial system if complete defenses were readily available to the equine owners.[22]

These industries became less profitable and insurable due to increases in litigation costs.[23] Increased litigation was not the only issue with equine injury cases in the court system. There was also an issue of inconsistent approaches to these cases that varied greatly between states and within each state's judicial system. One state tried equine participant injury suits under strict liability statutes,[24] while others relied purely on precedent to analyze recovery.[25] These varied approaches led to many different results across the states.

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18. *See Contributory Negligence,* CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/contributory_negligence [https://perma.cc/9EVP-Z2FA].

19. *Id.*

20. *Id.*

21. Waak v. Rodriguez, 603 S.W.3d 103, 106 (Tex. 2020).

22. *See, e.g.*, Dotson v. Matthews, 480 So.2d 860, 864 (La. Ct. App. 1985) (holding a horse owner liable under Louisiana's strict liability statute without any defenses available to the owner).

23. *Waak*, 603 S.W.3d at 106.

24. *Id.* at 865.

25. *See* Ewing v. Prince, 425 S.W.2d 732, 733 (Ky. 1968) (using Louisiana and California precedent to hold plaintiffs must demonstrate the horse had dangerous or vicious propensities, the animal was inclined to commit such injuries, and the owner had knowledge of the dangerous or vicious propensities).

Most states quickly realized that the equine and farm animal industries were valuable to the economy and warranted legal protection. To remedy the increased litigation, inconsistencies, and protect the industry's value, Washington took the first step and enacted the United States' first EALA.[26] Throughout the 1990s, forty-seven states followed Washington's lead. Since 1989, every state except California and Maryland has adopted some form of an EALA.[27]

EALAs helped to decrease equine litigation by protecting equine owners. EALAs decreased liability by essentially codifying a nearly absolute assumption of risk defense for equine owners.[28] Most of these EALAs included a "limitation on liability" section, which precluded participants of equine activities from recovering for damages that arose out of the participant's equine activities due to the inherent risks associated with equine animals.[29]

However, EALAs do allow for recovery in two areas. Recovery is allowed in cases of intentional or negligent conduct by the equine owner.[30] Additionally, EALAs only apply to inherent risks of equine activities.[31] Thus, injuries involving vicious propensities of an animal are not covered by these statutes. This codified absolute defense turned the trend back to a more profitable equine industry.

EALAs were received positively in the industry. The EALAs' protection likely helped decrease equine insurance costs.[32] Reducing insurance claims aids in lowering premiums—something every insured likes to see.[33] Yet, farm animal owners were still left in the dust.

C. The Shift to Include Farm Animals

In 2011, the Iowa and Texas legislatures amended their EALAs to include farm animals.[34] The Iowa Legislature amended its EALA because the Iowa Supreme Court ruled that farm animal employees were covered under

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26. *See* WASH. REV. CODE ANN. § 4.24.530 (1989).

27. *See Map of Equine Activity Liability Statutes*, *supra* note 1; *see also Waak*, 603 S.W.3d at 108.

28. *See, e.g.*, WASH. REV. CODE ANN. § 4.24.540(1) (2022).

29. *Id.*

30. *Id.* § 4.24.540(2)(b)(iii)–(iv).

31. *See, e.g.*, GA. CODE ANN. § 4-12-7 (West 2020).

32. *See* Krystyna M. Carmel, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 186 (1995) (discussing potential impacts on insurability in the equine industry).

33. *Id.*

34. IOWA CODE ANN. § 673.1 (West 2021); TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

the Domesticated Animal Activities Act.[35] Taking Iowa's lead, the Texas Legislature broadened the coverage under its own EALA to include other farm animals.[36] As of 2020, twelve states amended EALAs to extend to farm animals.[37]

D. Current Problems with EALAs and FALAs Efficiency

Recently, there has been an increase in cases regarding whether employees of farm animal or equine-related businesses are barred from recovery under these statutes.[38] The current ambiguous definition of participant in most states is unclear as to whether employees are considered participants. While a small distinction, this is a crucial ambiguity to clear up because it directly impacts both equine and farm animal industries' profitability, insurability, and Workers' Compensation requirements. This affects not only farms and ranches but also tourist enterprises.

The equine and farm animal industries have a significant economic impact in America. According to a 2017 economic impact study, 988,394 people were directly employed in the United States horse industry.[39] As of 2021, in the United States, 779,386 people were employed in the beef cattle production industry,[40] 54,236 employed in the hog and pig farming industry,[41] 53,878 employed in the chicken egg production industry,[42] and 50,285 employed in the chicken and turkey meat production industry.[43]

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35. *See* Baker v. Shields, 767 N.W.2d 404, 409 (Iowa 2009); *see also* Waak v. Rodriguez, 603 S.W.3d 103, 110 (Tex. 2020).

36. *Waak*, 603 S.W.3d at 109.

37. ALASKA STAT. ANN. § 09.65.145 (West 2021); ARK. CODE ANN. § 16-120-201 (West 2021); IOWA CODE ANN. § 673.1 (West 2021); KAN. STAT. ANN. § 60-4001 (West 2021); KY. REV. STAT. ANN. § 247.4015 (West 2021); LA. STAT. ANN. § 9:2795.1 (2021); MINN. STAT. ANN. § 604A.12 (West 2021); MISS. CODE ANN. § 95-11-1–7 (West 2021); N.C. GEN. STAT. ANN. § 99E-1 (West 2021); OKLA. STAT. tit. 76, § 50.2 (2021); TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021); UTAH CODE ANN. § 78B-4-201 (West 2021).

38. *See, e.g.*, *Waak*, 603 S.W.3d at 108.

39. *Economic Impact of the United States Horse Industry*, AM. HORSE COUNCIL, https://www.horsecouncil.org/resources/economics/ [https://perma.cc/D2MF-XZ9J].

40. *Beef Cattle Production in the US – Employment Statistics 2003–2027*, IBISWORLD (May 27, 2021), https://www.ibisworld.com/industry-statistics/employment/beef-cattle-production-united-states/ [https://perma.cc/3KTM-U2GM].

41. *Hog & Pig Farming in the US – Employment Statistics 2005–2027*, IBISWORLD (July 19, 2021), https://www.ibisworld.com/industry-statistics/employment/hog-pig-farming-united-states/ [https://perma.cc/62Q6-4BS5].

42. *Chicken Egg Production in the US – Employment Statistics 2003–2027*, IBISWORLD (May 26, 2021), https://www.ibisworld.com/industry-statistics/employment/chicken-egg-production-united-states/ [https://perma.cc/75WN-WYYL].

43. *Chicken & Tukey Meat Production in the US – Employment Statistics 2005–2027*, IBISWORLD (March 29, 2021), https://www.ibisworld.com/industry-statistics/employment/chicken-turkey-meat-production-united-states/ [https://perma.cc/NZN9-2GDY].

The current ambiguities in forty-six EALAs and FALAs as to whether employees are precluded from recovery present a potentially dangerous economic issue due to the large number of individuals employed in these industries. To protect these industries, states must be proactive and amend their current EALAs and FALAs to definitively decide whether employees are precluded from recovery. If states do not amend their statutes, it could result in rising litigation and insurance costs while decreasing profitability for these industries because battles in the courtroom will ensue over whether employees are participants. This could eventually directly impact consumers, especially if food-producing farm animal businesses pass the increased costs and decreased profitability down the supply chain. Legislatures across America now have the chance to be proactive and prevent significant negative impact on these economically important industries.

III. COMPARING THE ACTS ACROSS THE STATES

A. Acts that define "professional" and "participant" include "whether amateur or professional" and "whether or not a fee is paid."

Thirty states share a nearly identical definition of participant.[44] The average definition of participant states the following: "any person, whether amateur or professional, who engages in an equine[/farm or animal] activity, whether or not a fee is paid to participate in the equine[/farm or animal] activity."[45]

Many of these states also have similar definitions for equine, farm animal, livestock, or llama professionals. Each state differs with what is specifically enumerated under the list of professional services. However, the average equine, farm animal, livestock, or llama professional definition in this category includes: "a person engaged in compensation in: (1)

44. ALA. CODE 1975 § 6-5-337 (2020); ALASKA STAT. ANN. § 09.65.145 (West 2020); COLO. REV. STAT. ANN. § 13-21-119 (West 2020); DEL. CODE ANN. tit. 10, § 8140 (West 2019); FLA. STAT. ANN. § 773.01 (West 2020); GA. CODE ANN. § 4-12-2 (West 2020); HAW. REV. STAT. ANN. § 663B-1 (West 2020); IDAHO CODE ANN. § 6-1801 (West 2020); 745 ILL. COMP. STAT. ANN. 47/10 (West 2020); KY. REV. STAT. ANN. § 247.4015 (West 2020); LA. STAT. ANN. § 9:2795.1 (2020); ME. STAT. tit. 7, § 4101 (2019); MASS. GEN. LAWS ANN. ch. 128, § 2D (West 2020); MICH. COMP. LAWS ANN. § 691.1662 (West 2020); MISS. CODE ANN. § 95-11-3 (West 2020); MO. ANN. STAT. § 537.325 (West 2020); MONT. CODE ANN. § 27-1-726 (West 2020); NEB. REV. STAT. ANN. § 25-21,250 (West 2020); N.H. REV. STAT. ANN. § 508:19 (2020); N.C. GEN. STAT. ANN. § 99E-1 (West 2020); N.D. CENT. CODE ANN. § 53-10-01 (West 2019); OHIO REV. CODE ANN. § 2305.321 (West 2020); OKLA. STAT. tit. 76, § 50.2 (2020); OR. REV. STAT. ANN. § 30.687 (West 2020); 4 R.I. GEN. LAWS ANN. § 4-21-1 (West 2020); S.C. CODE ANN. § 47-9-710 (2020); TENN. CODE ANN. § 44-20-102 (West 2020); UTAH CODE ANN. § 78B-4-201 (West 2020); VA. CODE ANN. § 3.2-6200 (West 2020); WASH. REV. CODE ANN. § 4.24.530 (West 2020).

45. *E.g.,* ALA. CODE 1975 § 6-5-337 (2020).

[i]nstructing a participant or renting to a participant a(n) [equine/farm] animal for the purpose of riding, driving, or being a passenger on the [equine/farm] animal; or (2) [r]enting equipment or tack to a participant."[46] Some states also include services such as: "(1) [e]xamining or administering medical treatment to a(n) [equine/farm] animal; (2) [t]raining a(n) [equine/farm] animal; (3) [p]roviding daily care of [equine/farm] animals boarded at a [equine/farm] animal facility; (4) [f]arrier services; (5) [s]hearing services; and (6) [b]reeding services."[47] Virginia includes professionals and their agents in its definition.[48]

The definition of participants suggests animal professionals are considered participants because of the language "*any person*, whether amateur or professional." "Amateur" is not defined in any of these statutes. Using the definition for professionals, it logically follows that amateur likely means a person who is *not* engaged for compensation in an animal activity. However, this remains ambiguous and is up to judicial interpretation since these states have failed to provide a clear definition.

B. Act that defines "professional," but "participant" does not include "whether amateur or professional."

Nevada defined *participant* as "a person who engages in an equine activity, regardless of whether a fee is paid to engage in that activity."[49] Nevada's participant definition specifically included people who assist a participant in an equine activity and spectators of an equine activity in an unauthorized area.[50] Despite specifically including assistants and some spectators, Nevada did not include the typical language of "whether amateur or professional."[51] Nevada provided a definition for an equine professional, but it is ambiguous as to whether equine *professionals* are considered equine

46. ALASKA STAT. ANN. § 09.65.145 (West 2021); IOWA CODE ANN. § 673.1 (West 2021); KAN. STAT. ANN. § 60-4001 (West 2021); KY. REV. STAT. ANN. § 247.4015 (West 2021); LA. STAT. ANN. § 9:2795.1 (2021); MISS. CODE ANN. § 95-11-1–7 (West 2021); N.C. GEN. STAT. ANN. § 99E-1 (West 2021); OKLA. STAT. tit. 76, § 50.2 (2021); TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021); UTAH CODE ANN. § 78B-4-201 (West 2021).

47. ALA. CODE 1975 § 6-5-337 (2020); FLA. STAT. ANN. § 773.01 (West 2020); GA. CODE ANN. § 4-12-2 (West 2020); KY. REV. STAT. ANN. § 247.4015 (West 2020); LA. STAT. ANN. § 9:2795.1 (2020); ME. STAT. tit. 7, § 4101 (2019); MASS. GEN. LAWS ANN. ch. 128, § 2D (West 2020); MICH. COMP. LAWS ANN. § 691.1662 (West 2020); MISS. CODE ANN. § 95-11-3 (West 2020); MONT. CODE ANN. § 27-1-726 (West 2020); N.H. REV. STAT. ANN. § 508:19 (2020); N.C. GEN. STAT. ANN. § 99E-1 (West 2020); OHIO REV. CODE ANN. § 2305.321 (West 2020); OR. REV. STAT. ANN. § 30.687 (West 2020); 4 R.I. GEN. LAWS ANN. § 4-21-1 (West 2020); S.C. CODE ANN. § 47-9-710 (2020).

48. VA. CODE ANN. § 3.2-6200 (West 2020).

49. NEV. REV. STAT. ANN. § 41.519(e) (West 2020).

50. *Id.*

51. *Id.*

participants since they are not mentioned in the participant definition.[52] This could be interpreted in two ways. Since Nevada included "regardless of whether a fee is paid to engage in that activity," it could be interpreted to include paid professionals.[53] However, it could likewise be interpreted to exclude professionals and only include people who paid to be around an animal and who are not being paid by the animal's owner (*e.g.*, riding a friend's horse for free). Even though Nevada took a different approach to *participant*, its ambiguity presents the same issues as the other state statutes.

C. Acts that do not define "professional", but "participant" includes "whether amateur or professional" and "whether or not a fee is paid."

Arkansas, New Jersey, and Vermont define *participant* as "a person, whether amateur or professional, who engages in an [equine/livestock] activity regardless of whether a fee is paid to participate in the [equine/livestock] activity."[54] Despite including "whether amateur or professional," these states did not define *professional*. This lacking definition results in great ambiguity regarding what these states consider an amateur or professional. A professional may be interpreted as someone who is compensated for their services. However, a professional could also be interpreted as only encompassing professional or amateur competitors, such as rodeo contestants. Definitions for *amateur* and *professional* are crucial to clear up the legislative intent on who is precluded from recovery under EALAs and FALAs.

D. Acts that define "participant" as "any person."

Kansas, Minnesota, and West Virginia enacted the broadest definition of participant.[55] Kansas defines *participant* as "any person who engages in a domestic animal activity."[56] Minnesota defines *participant* as "a person who directly and intentionally engages in a livestock activity," not including spectators in "authorized areas."[57] West Virginia defines *participant* as "any person using the services or facilities of a horseman so as to be directly involved in an equestrian activity."[58]

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52. *Id.*
53. *Id.*
54. ARK. CODE. ANN. § 16-120-201(9) (West 2020); N.J. STAT. ANN. § 5:15-2 (West 2020); VT. STAT. ANN. tit. 12, § 1039(a)(4) (West 2020).
55. KAN. STAT. ANN. § 60-4001 (West 2020); MINN. STAT. ANN. § 604A.12 (West 2020); W. VA. CODE ANN. § 20-4-2 (West 2020).
56. KAN. STAT. ANN. § 60-4001(g) (West 2020).
57. MINN. STAT. ANN. § 604A.12(f) (West 2020).
58. W. VA. CODE ANN. § 20-4-2(4) (West 2020).

These definitions do not specify whether compensation or paying a fee matters when determining if a person is a participant. These broad definitions seemingly include any person involved in an equine, domestic animal, or livestock activity, regardless of compensation or fees. The Minnesota and West Virginia addition of the term *directly* adds another layer of review by requiring the courts to determine whether the participant's actions were direct and intentional. This broad statutory language, coupled with additional hurdles, leaves ample unnecessary room for judicial interpretation.

E. Acts that do not use "participant" and instead use "persons."

Connecticut, New Mexico, Wisconsin, and Wyoming do not use the typical *participant* term and instead simply use *person(s)*.[59] These states combined EALAs into recreational activity statutes, which include other recreational activities such as skiing or snowboarding.[60] The lack of definitions and the use of the term *person(s)* leads to significant ambiguity and an overbroad encompassing of any person. Since these states combined their EALAs with recreational activity statutes, it could be determined that the lawmakers only intended for recreational participants to be covered under these acts. Yet, the lack of guidance within the statutes leaves ample room for judicial interpretation regarding exactly who is covered under these statutes. At this rate, the judiciary will be the branch to determine who is precluded from recovery.

F. Acts that do not provide definitions or have very limited definitions.

Arizona, Indiana, and Pennsylvania provide very limited definitions for their statutes.[61] Arizona only defines *equine* and *release*.[62] Indiana provides no definitions.[63] Pennsylvania simply defines *equine activities*.[64] The limited and lacking definitions provide little guidance on the legislative intent behind these statutes. Unless the legislatures provide further meaning through amendments, it will be left for the courts to decide who is limited from liability under these statutes, with extremely little guidance from the legislatures.

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59. CONN. GEN. STAT. ANN. § 52-557p (West 2020); N.M. STAT. ANN. § 42-13-2 (West 2020); WIS. STAT. ANN. § 895.481 (West 2020); WYO. STAT. ANN. § 1-1-123 (West 2020).

60. *See* CONN. GEN. STAT. ANN. § 52-557p (West 2020); *see also* N.M. STAT. ANN. § 42-13-2 (West 2020); *see also* WIS. STAT. ANN. § 895.481 (West 2020); *see also* WYO. STAT. ANN. § 1-1-123 (West 2020).

61. ARIZ. REV. STAT. ANN. § 12-553 (2020); IND. CODE ANN. § 34-31-5-1–5 (West 2020); 4 PA. STAT. AND CONS. STAT. ANN. §§ 601–606 (West 2020).

62. ARIZ. REV. STAT. ANN. § 12-553(E) (2020).

63. IND. CODE ANN. § 34-31-5-1–5 (West 2020).

64. 4 PA. STAT. AND CONS. STAT. ANN. § 602 (West 2020).

G. Acts that include compensated people in the definition of "participants."

Before September 2021, Iowa was the only state that included "regardless of whether or not the person receives compensation" in its definition of a participant.[65] Iowa defines *participant* as "a person who engages in a domesticated animal activity, regardless of whether the person receives compensation."[66] This statutory language clearly states the legislature intented to include *any person*, including employees and independent contractors, engaged in a domestic activity, regardless of whether they were paid to participate.

In September 2021, Texas amended its FALA participant definition to include employees and independent contractors.[67] Texas defines *participant* as the following: "with respect to a farm animal activity, a person who engages in the activity, without regard to whether the person: (i) is an amateur or professional; (ii) pays for the activity or participates in the activity for free; or (iii) is an independent contractor or employee."[68]

Iowa chose a broader definition of "regardless of whether the person receives compensation,"[69] while Texas chose a narrower approach. Under Iowa's definition, the courts will not have to analyze whether the injured plaintiff was an employee or an independent contractor.[70] Yet, under Texas's definition, its FALA amendment will require the courts to determine whether the injured plaintiff was an independent contractor or employee at the time of the incident.[71] This requires yet another layer of analysis; it leaves the question of what happens if the court decides the plaintiff fell somewhere between the cracks left in the definition of participant.[72] While a step in the right direction, Texas could have taken Iowa's broader approach to further eliminate existing ambiguities and simplify the required judicial analysis.

65. IOWA CODE ANN. § 673.1(12) (West 2020).
66. *Id.*
67. TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2021).
68. *Id.*
69. IOWA CODE ANN. § 673.1(12) (West 2020).
70. *See id.*
71. TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2021).
72. *See id.*

IV. JUDICIAL INTERPRETATION OF WHO IS COVERED UNDER THE ACT

A. Independent Contractors

1. Georgia

The Georgia Court of Appeals held a professional trainer, acting as an independent contractor, fell within the meaning of participant under the Georgia EALA in *Adams v. Hare*.[73] Hare hired Adams, a professional horse trainer, to prep her horse for sale.[74] Adams entered the horse's stall where he was repeatedly kicked by the horse and sustained injuries.[75] Adams sued Hare to recover for his injuries.[76]

Georgia's former EALA stated that "an equine activity sponsor, an equine professional . . . *or any other person* . . . shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities."[77] Inherent risks are dangers or conditions resulting from an animal's tendency to behave in an expected way that may result in injury to a participant.[78] Georgia's inclusion of the "or any person" language persuaded the court to find Adams was a participant and her injuries "resulted from the inherent risks of equine activities."[79] Accordingly, Adams was a participant, and Hare was not liable for Adams' injuries.[80] As a result, in Georgia, independent contractors are considered participants and precluded from recovery.

2. Kentucky

The Kentucky Court of Appeals found an independent contractor, a horse trainer, was included as a participant under the Kentucky FALA in *Biesty v. Flynn*.[81] The defendant hired the trainer to break the defendant's horse.[82] While riding the horse, it spooked and bucked the trainer off, injuring him.[83] The court found the trainer was a farm animal participant under

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73. Adams v. Hare, 536 S.E.2d 284, 288 (Ga. Ct. App. 2000); GA. CODE ANN. § 4-12-1–7 (West 2020).

74. *Adams,* 536 S.E.2d 284 at 286.

75. *Id.*

76. *Id.*

77. *Id.* at 287 (citing GA. CODE ANN. § 4-12-3(a) (West 2000)) (emphasis added).

78. *See* GA. CODE ANN. § 4-12-7 (West 2020).

79. *Adams*, 536 S.E.2d at 288.

80. *Id.*

81. Biesty v. Flynn, No. 2011-CA-000084-MR, 2012 LEXIS 87, at *9 (Ky. Ct. App. 2012); KY. REV. STAT. ANN. § 247.4015 (West 2020).

82. *Biesty,* 2012 LEXIS 87, at *1.

83. *Id.* at *3.

Kentucky law because it was an undisputed element between the parties.[84] The court held that the trainer's claim fell within Kentucky law, and the trainer could not recover.[85] Thus, independent contractors are precluded from recovery under the Kentucky FALA.[86]

3. Texas

Texas's Thirteenth Court of Appeals held that an independent contractor was covered as a participant under the former Texas EALA in *Johnson v. Smith*.[87] The plaintiff bred racehorses and occasionally worked at the defendant's horse breeding facility.[88] While working at the defendant's facility with a stallion, the horse bit the plaintiff in the face.[89] At the time of this case, the Texas EALA defined *participant* as "anyone who engaged in an equine activity."[90] The court found that "engages in an equine activity" included "handling" equine animals.[91] The court also found that the plaintiff was a participant under the EALA because he engaged in an equine activity—"leading the stallion back to his paddock."[92] This began the trend of precluding recovery for independent contractors under the Texas EALA.

After *Johnson*, Texas's Fourteenth Court of Appeals adopted the Thirteenth Court's interpretation of the FALA (previously known as the Equine Activity Act, Texas's former EALA). In *Young v. McKim*, the court held that independent contractors are included under the FALA definition of participants.[93] In *Young*, a horse caretaker filed suit against the horse's owner after the caretaker was kicked and injured by the defendant's horse.[94] The court expanded the meaning of participant by explaining that the Act was not limited to only consumer activities.[95] The court explained:

> We find nothing in the language of the statute mandating that its limitation of liability applies only to consumer-oriented equine

84. *Id.* at *10.
85. *Id.* at *15–16.
86. *See id.* at *16.
87. *See* Johnson v. Smith, 88 S.W.3d 729, 731 (Tex. App.—Corpus Christi 2002, no pet.); TEX. CIV. PRAC. & REM. CODE ANN. § 87.003 (Vernon Supp. 2002) (This Act was amended in 2011 to become the Texas Farm Animal Activity Act.).
88. *Johnson*, 88 S.W.3d at 730.
89. *Id.*
90. *Id.* at 731 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 87.001 (West 2002)).
91. Carmel, *supra* note 32, at 187.
92. *Johnson*, 88 S.W.3d. at 731 (explaining leading the stallion after breeding fell under the "equine activity" definition of handling, training, and assisting with medical treatment).
93. Young v. McKim, 373 S.W.3d 776, 781 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2019).
94. *Young*, 373 S.W.3d at 778–79.
95. *Id.* at 781; *contra* Dodge v. Durdin, 187 S.W.3d 523, 530 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding "participant" predominantly applies to consumers).

> activities. For example, the statute specifically includes as a category "assisting in the medical treatment of" an equine animal. This activity does not involve tourists or other consumers of equine activities. In addition, the Corpus Christi court of appeals has determined that an independent contractor leading a horse to a paddock was a participant in an equine activity covered by section 87.003 of the Equine Act.[96]

Because of *Johnson* and *Young*, independent contractors are precluded from recovery under the Texas FALA.

B. Employees

1. Iowa

The Supreme Court of Iowa held that the Iowa Domesticated Animal Activities Act barred injured employees from recovering against their employer when injured by a domestic animal.[97] In *Baker v. Shields*, the defendant's horse bucked off a farm hand, injuring him.[98] The court found the use of "person" in the Act's definition of "participant" had to be broadly interpreted.[99] The court concluded "participant" included *all* persons involved in a domesticated animal activity, including farm and ranch employees.[100] As a result, this interpretation included employees under the Iowa law and barred the plaintiff's recovery.[101]

2. Kentucky

The Kentucky Court of Appeals found a temporary employee was a participant under the Kentucky FALA, and his activities fell within the scope of immunity in *Garcia v. HCF, Inc*.[102] The defendant's horse injured Garcia, a temporary employee, while he was loading the horse into a trailer for the defendant—his employer.[103] The court held that the process of loading a horse into a trailer was an inherent risk, and Garcia was aware of that risk as a participant.[104] The facts indicated that Garcia grew up around horses and fully knew about the unpredictable behavior and inherent risks associated

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96. *Young*, 373 S.W.3d at 781 (citing Johnson v. Smith, 88 S.W.3d 729, 732 (Tex. App.—Corpus Christi 2002, no pet.)) (citation omitted).

97. Baker v. Shields, 767 N.W.2d 404, 409 (Iowa 2009); *see* IOWA CODE ANN. § 673.1(1) (West 2020).

98. IOWA CODE ANN. § 673.1(8) (West 2020); *see Baker,* 767 N.W.2d at 405.

99. *Baker,* 767 N.W.2d at 408.

100. *Id.* at 409 (emphasis added).

101. *Id.*

102. Garcia v. HCF, Inc., No. 2017-CA-001271-MR, 2019 LEXIS 317, at *4–5 (Ky. Ct. App. 2019); KY. REV. STAT. ANN. § 247.4015 (West 2020).

103. *Garcia*, 2019 LEXIS 317, at *4–5.

104. *Id.* at *6.

with them.[105] As a result, Garcia could not recover for his injuries, despite his temporary employee status.[106] Thus, employees are precluded from recovery in Kentucky.

3. Ohio

The Ohio Court of Appeals ruled that an employee was an equine-activity participant within the meaning of Ohio's EALA in *Cornett v. Red Stone Group, Inc*.[107] The plaintiff was an employee who cared for horses boarded at a stable owned and ran by the defendant.[108] Cornett alleged she was injured when she was trampled by horses who escaped from a defective gate and fence.[109] The court concluded Cornett was a participant because she "voluntarily placed herself in the vicinity of the horses" and "sought to restore control of them."[110] This holding followed existing Ohio precedent that created the following test to determine whether someone was a participant under its EALA: "a person must deliberately put himself or herself in a position of exposure to the "inherent risk" of proximity to horses before immunity can apply."[111]

As directed by the test, the court held Cornett "engaged in an equine activity" at the time of the injury and was aware of the inherent risks associated with such activities.[112] As a result of *Cornett*, employees are precluded from recovery for their equine activities according to the Ohio EALA.[113]

4. Texas

Despite finding that independent contractors are barred from recovery under the former Texas EALA,[114] the Texas Court of Appeals reversed the trial court's decision regarding employees under the Equine Act. The court held employees are not participants and recovery is not precluded.[115] In *Dodge v. Durdin*, a horse injured a stable employee when the horse kicked

105. *Id.*
106. *Id.* at 6–7.
107. Cornett v. Red Stone Grp., 2015-Ohio-3376, ¶ 9, 41 N.E.3d 155, at ¶ 30 (Ohio Ct. App. 2015); *see* OHIO REV. CODE ANN. § 2305.321 (West 2020).
108. *Cornett,* 41 N.E.3d at 156.
109. *Id.*
110. *Id.* at 167; *see* Smith v. Landfair, 135 Ohio St.3d 89, 2012-Ohio-5692, 984 N.E.2d 1016, at ¶ 27 (Ohio 2012) ("[O]ne who purposely places themselves in a location where equine activities are occurring and who sees such an activity is a 'spectator' and hence an 'equine activity participant'[.]").
111. *Smith,* 984 N.E.2d at 1023–24.
112. *Cornett*, 41 N.E.3d at 167.
113. *Id*.
114. Johnson v. Smith, 88 S.W.3d 729, 730–31 (Tex. App.—Corpus Christi 2002, no pet.).
115. Dodge v. Durdin, 187 S.W.3d 523, 530 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

her in the stomach while she was giving medication to the animal.[116] The court acknowledged the definition of participant did not expressly exclude employees. As a result, the court interpreted the term to only apply to those who either paid to partake or who participated for free in an activity involving horses.[117] The court concluded employees are not covered as participants under Texas's version of the Equine Act because employees' involvement in the industry does not involve payments to participate.[118]

The *Dodge* court was also persuaded by the possible consequences if it construed the EALA otherwise.[119] The court explained the following:

> If we were to conclude that the Equine Act limits liability of employers to employees, the effect of the Equine Act would be to abrogate well-settled employer duties in Texas under the Labor Code. Employers owe certain nondelegable and continuous duties to employees acting in the course and scope of their duties, including the duties to warn about the hazards of employment, to supervise activities, to furnish a reasonably safe workplace, and to furnish reasonably safe instrumentalities with which to work.[120]

The court feared a contrary holding would restrict employees' rights found in other Texas employment laws.[121] Since the Texas legislature did not codify "an intent to abrogate the [Texas] Workers' Compensation Act" and other existing policies protecting employees, the court held that its decision in *Dodge* must have supported the true underlying legislative intent.[122]

Fifteen years later, in a 6–2 decision, the Texas Supreme Court relied upon *Dodge* and upheld *Dodge*, finding ranch employees were not covered under the Texas FALA, which was an expansion of the EALA.[123] This case spurred the 2021 Texas FALA amendment.[124]

In *Waak v. Rodriguez*, a ranch hand died while attempting to load cattle into a trailer alone.[125] The FALA, in effect at the time, described "participant" as "a person who engages in [a farm animal] activity, without regard to whether the person is an amateur or professional or whether the person pays

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116. *Id.* at 525.

117. *Id.* at 527, 530; *contra Johnson*, 88 S.W.3d at 732–33 (holding independent contractors who do not participate for free or pay to participate are included in the Act's definition of "participant").

118. *Dodge*, 187 S.W.3d at 530.

119. *Id.* at 529.

120. *Id.* (citing Farley v. M M Cattle Co., 529 S.W.2d 751, 754 (Tex. 1975); Southerland v. Kroger Co., 961 S.W.2d 471, 472 (Tex. App.—Houston [1st Dist.] 1997, no pet.)).

121. *See id.*

122. *Id.* at 530.

123. Waak v. Rodriguez, 603 S.W.3d 103, 109–10 (Tex. 2020).

124. *See* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021).

125. *Waak,* 603 S.W.3d at 105 (noting that the actual cause of death could not be determined, but it is speculated that the cattle trampled the ranch hand to death).

for the activity or participates in the activity for free."[126] The court found this definition of "participant" could not include ranch hands because they are never classified as amateur or professional, nor do they pay to participate in the activity or work for free.[127] The court used legislative history to determine that the intent was to exclude employees since the FALA was "detailed and specific."[128] According to the court, since the FALA, as drafted, was not general or vague, the Texas legislature would have expressly included employees if that was its intent.[129]

Two justices declined to follow the majority's analysis of whether employees are covered under the FALA.[130] Justices Blacklock and Boyd dissented and found ranch employees did fall under the FALAs coverage.[131] The majority's use of legislative intent and history in its decision did not persuade the dissent because, as stated by the dissenting justices, a court's statutory analysis should always start with the common usage and grammar contained in the act.[132] Following this analysis, the dissent found the ranch hand was a participant because he is included in the definition of "any person."[133] Further, the ranch hand was engaged in a farm animal activity because he was "loading . . . a farm animal belonging to another."[134] The dissent urged the majority to apply the law as written even if the outcome may not be ideal.[135]

In addition to erroneously using legislative history, the *Waak* court misinterpreted the legislative findings. In 2011, the Texas Legislature amended its EALA to include all farm animals.[136] Texas amended the Act to include farm animals "to protect property owners from exposure to liability for injuries caused by non-equine animals."[137] Texas changed its former EALA to protect equine and non-equine animal owners.[138] Yet, the *Waak* court decided that, despite the legislature's desire to protect property owners,

126. TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2019).
127. *Waak*, 603 S.W.3d at 109.
128. *Id.* at 107.
129. *Id.* at 108.
130. *Id.* at 112 (Blacklock, J. & Boyd, J., dissenting).
131. *Id.*
132. *Id.* (quoting Brazos Elec. Power Coop, Inc. v. Tex. Comm'n on Envtl. Quality, 576 S.W.3d 374, 384 (Tex. 2019)).
133. *Id.*
134. *Id.*; TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2019).
135. *Waak*, 603 S.W.3d at 119.
136. *See* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2019).
137. Senate Judiciary & Civ. Juris. Comm., Bill Analysis, Tex. S.B. 479, 82nd Leg., R.S. (2011).
138. *See* TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2019).

there could not have been an intent to protect property owners who are also employers.[139]

The *Waak* analysis left ranch owners with the risk of strict liability due to the nearly diminished availability of defenses to equine and farm animal owners. Texas Workers' Compensation is used as an incentive, not a requirement for most businesses.[140] If employers enroll in Workers' Compensation, certain defenses are available during litigation.[141] But, because of *Waak*, if Texas employers were not enrolled in Workers' Compensation, the court's decision essentially acted as a strict liability death sentence for these employers. The creation of a strict liability offense was the exact opposite of the original intention of EALAs and FALAs.[142]

The ambiguity and disconnect between the legislative and judicial branches are not uncommon, but the disconnect can be avoided. In September 2021, the Texas Legislature took steps to remedy the holding in *Waak v. Rodriguez*.[143] The *Waak* court found the Texas Legislature did not intend for employees to recover.[144] In response, the Texas Legislature quickly corrected this erroneous assumption and amended the Texas FALA to preclude farm and ranch employees from bringing a cause of action.[145] The new definition of "participant" now includes "without regard to whether the person . . . is an independent contractor or employee."[146]

V. PROPOSED AMENDMENTS AND COMMENTS

A. Introduction

The current statutory language among EALAs and FALAs varies greatly, yet the majority share the same issue of overwhelming uncertainty. Amending existing EALAs and FALAs based on whether the legislature

139. *See Waak*, 603 S.W.3d at 110.

140. *Information for Workers' Compensation Non-subscribers*, TEX. DEP'T OF INS. (June 14, 2022), https://www.tdi.texas.gov/wc/employer/cb007.html [https://perma.cc/W656-QP9A] ("Texas does not require most private employers to have workers' compensation insurance coverage.").

141. *Id.* ("Non-subscribers [to Workers' Compensation] also lose certain common-law defenses, including: The injured employee's negligence caused the injury; the negligence of fellow employees caused the injury; or the injured employee knew of the danger and voluntarily accepted it.").

142. *See supra* Part II.B (noting the original intention of EALAs and FALAs was to remedy the increased litigation, inconsistencies, and protect the industry's value).

143. *Id.*; TEX. CIV. PRAC. & REM. CODE § 87 (West 2021).

144. *Waak*, 603 S.W.3d at 108–09.

145. *Compare* TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2021), *with* TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2010).

146. *Compare* TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2021), *with* TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2010).

intended to limit employee's recovery will resolve the current issues by promoting uniformity and clarity. Part IV.B proposes a Model EALA or FALA that limits employee recovery under the definition of "participant." Part IV.C proposes a Model EALA or FALA that does not limit an employee's recovery under the definition of "participant." Both sections include proposed language that decreases ambiguity throughout the Act's entirety. The proposed models include explanations of how each section will increase clarity. It is up to the state, based on current employment and workers' compensation laws, to decide whether employees are limited from recovery.

B. The Proposed Model Equine or Farm Animal Liability Act Including Employees

This section presents a proposed Model EALA or FALA with explanations following each section of the proposed Model. The Model EALA or FALA is similar to Iowa and Texas's FALAs, but it contains modifications using other states' statutes.[147]

Currently, Texas and Iowa are the only states which have amended their Acts to address whether an employee is a "participant" or "person" and barred from bringing a cause of action. The remaining forty-six states must amend their Acts to prevent increased litigation and the obscuring of legislative intent. The proposed models are designed to remedy this problem.

1. Legislative Intent

> (1) The Legislature recognizes that [equine/farm] animals are unpredictable and inherently dangerous, and people who participate in [equine/farm] animal activities may incur injuries or death as a result. The Legislature finds that the state and its citizens derive numerous economic and personal benefits from [equine/farm] animal activities. It is the purpose of this Act to define the areas for which [equine/farm] animal activity sponsors, professionals, and participants shall not be liable for, to specify risks of injury for which activity sponsors, professionals, and participants shall not be liable, and to specify areas of responsibility of [equine/farm animal participants]. It is, therefore, the intent of the Legislature to encourage [equine/farm] animal activities by

147. *See generally* IOWA CODE ANN. § 673.1 (West 2020) (defining similar terms to other FALAs, such as "animal activity sponsor" and "participant").

limiting the civil liability of those involved in such activities.

Explanation: This section combines legislative intent statements from twelve states.[148] Many states do not have a legislative intent statement in their statutes.[149] The purpose of this section is to allow states to codify their legislative reasoning behind enacting the statute. This will help courts decipher the purpose of the statute instead of relying upon guesswork and inferences as to what the legislature intended. This simple addition to existing EALAs and FALAs would have a significant positive impact.

2. Definitions

(2) As used in this section, the following words shall have the following meaning, unless the context clearly indicates otherwise:

Option 1: (A) "Equine animal" means a horse, pony, mule, donkey, or hinny;

Option 2: (A) "Farm animal" means one or more of the following domesticated animals: bovine, sheep, swine, goats, horses, ponies, mules, donkeys, hinnies, ratites (ostrich, rhea, emu), camelids (alpaca, camel, llama), and poultry.

Explanation: This section is based on the standard definitions of "equine animal" and "farm animal" that are used in most statutes. Each state may choose whether equine and/or farm animals are included. Equine species are

148. ALA. CODE 1975 § 6-5-337 (2020); ALASKA STAT. ANN. § 09.65.145 (West 2020); GA. CODE ANN. § 4-12-1 (West 2020); 745 ILL. COMP. STAT. ANN. 47/5 (West 2020); KY. REV. STAT. ANN. § 247.401 (West 2020); MISS. CODE ANN. § 95-11-3 (West 2020); NEB. REV. STAT. ANN. § 25-21,249 (West 2020); N.J. STAT. ANN. § 5:15-1 (West 2020); N.M. STAT. ANN. § 42-13-2 (West 2020); OKLA. STAT. tit. 76, § 50.1 (2020); TENN. CODE ANN. § 44-20-101 (West 2020); W. VA. CODE ANN. § 20-4-1 (West 2020).

149. ARK. CODE. ANN. § 16-120-201 (West 2020); CONN. GEN. STAT. ANN. § 52-557p (West 2020); DEL. CODE ANN. tit. 10, § 8140 (West 2019); FLA. STAT. ANN. § 773.01 (West 2020); HAW. REV. STAT. ANN. § 663B-1 (West 2020); IDAHO CODE ANN. § 6-1801 (West 2020); IOWA CODE ANN. § 673.1 (West 2020); KAN. STAT. ANN. § 60-4001 (West 2020); LA. STAT. ANN. § 9:2795.1 (2020); ME. STAT. tit. 7, § 4101 (2019); MASS. GEN. LAWS ANN. ch. 128, § 2D (West 2020); MICH. COMP. LAWS ANN. § 691.1662 (West 2020); MINN. STAT. ANN. § 604A.12 (West 2020); MO. ANN. STAT. § 537.325 (West 2020); NEV. REV. STAT. ANN. § 41.519 (West 2020); N.H. REV. STAT. ANN. § 508:19 (2020), N.C. GEN. STAT. ANN. § 99E-1 (West 2020); N.D. CENT. CODE ANN. § 53-10-01 (West 2019); OHIO REV. CODE ANN. § 2305.321 (West 2020); 4 R.I. GEN. LAWS ANN. § 4-21-1 (West 2020); S.C. CODE ANN. § 47-9-710 (2020); TEX. CIV. PRAC. & REM. CODE § 87.001 (West 2021); UTAH CODE ANN. § 78B-4-201 (West 2020); VA. CODE ANN. § 3.2-6200 (West 2020); VT. STAT. ANN. tit. 12, § 1039 (West 2020); WASH. REV. CODE ANN. § 4.24.530 (West 2020); WIS. STAT. ANN. § 895.481 (West 2020); WYO. STAT. ANN. § 1-1-123 (West 2020).

encapsulated within the "farm animal" definition. Species may be added or deleted as states see fit.

> (B) "Farm" means any real estate, land area, facility, or ranch used wholly or partly for raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, agricultural, apicultural, or aquacultural operation.[150]

Explanation: This section is based on the 2021 Texas FALA amendment, which included a "farm" definition in response to the *Waak* decision. Under this definition, "farm" and "ranch" may be used interchangeably. This prevents litigating the subtle nuances between the two terms.

> (C) "Engages in a(n) [equine/farm] animal activity" means riding, handling, showing, training, driving, loading, unloading, feeding, breeding, grooming, exercising, transporting, boarding, teaching, corralling, branding, dehorning, or assisting in or providing health management activities for, being a passenger on, assisting a participant or sponsor with an [equine/farm] animal, providing hoof care, or providing or assisting in veterinary care. This term includes management and engagement in routine or customary activities in handling and managing [equine/farm animals]. This term does not include being a spectator at a [equine/farm] animal activity unless the spectator is in an unauthorized area and in immediate proximity to the [equine/farm] animal activity.

Explanation: This section is based on the standard definitions of "engages in a(n) [equine/farm] animal activity" and a recent amendment to Texas's FALA.[151] Breeding, boarding, training, farrier services, and veterinary services are included in this definition based upon numerous state definitions and case law that limited liability for independent contractors.[152] Due to the scope of possible activities within the equine and farm animal industries, the list is not intended to be an exhaustive list, nor could it possibly be. This definition is intentionally broad to allow for easy interpretation by the judiciary if needed. The broad definition mitigates the tendency for courts

150. TEX. CIV. PRAC. & REM. CODE § 87.001(2-a) (West 2021).

151. *See id.* § 87.001.

152. *See* Adams v. Hare, 536 S.E.2d 284, 287–88 (Ga. Ct. App. 2000) (holding the state's EALA precluded a horse trainer's recovery); *see also* Biesty v. Flynn, No. 2011-CA-000084-MR, 2012 LEXIS 87, at *9 (Ky. Ct. App. 2012) (holding the state's FALA precluded a horse trainer's recovery); *see also* Johnson v. Smith, 88 S.W.3d 729, 731 (Tex. App.—Corpus Christi 2002, no pet.) (holding the state's EALA precluded a horse breeder's recovery); *see also* Young v. McKim, 373 S.W.3d 776, 781 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (holding the state's EALA precluded a horse caretaker's recovery).

to take a very narrow and limited view when definitions are detailed and exhaustive.[153]

(D) "[Equine/Farm] animal activity" means:

(i) a(n) [equine/farm] animal show, fair, competition, performance, rodeo, event, or parade that involves a(n) [equine/farm] animal;

(ii) training or teaching activities involving a(n) [equine/farm] animal;

(iii) owning, raising, boarding, or pasturing a(n) [equine/farm] animal, including daily care;

(iv) riding, handling, transporting, loading, unloading, feeding, grooming, or exercising a(n) [equine/farm] animal belonging to another, without regard to whether the owner or participant receives monetary consideration or other thing of value for the use or care of the [equine/farm] animal or permits a prospective purchaser of the [equine/farm] animal to ride, inspect, evaluate, handle, load, or unload the [equine/farm] animal.

(v) breeding a(n) [equine/farm] animal, including any medical treatment, daily care, and customary tasks concerning breeding a(n) [equine/farm] animal;

(vi) a ride, trip, or hunt that is sponsored by a(n) [equine/farm] animal activity sponsor, farm owner, or farm lessee;

(vii) providing farrier services on a(n) [equine/farm] animal;

(viii) examining or administrating medical treatment to a(n) [equine/farm] animal by a veterinarian;

(ix) assisting in or providing animal health management activities;

153. *See* Waak v. Rodriguez, 603 S.W.3d 103, 108 (Tex. 2020) (interpreting Texas's FALA in a narrow manner because of the detailed definitions provided in the statute that tended to show the Legislature would have specifically included employees if it intended for their liability to be precluded under the FALA).

(x) assisting in or conducting customary tasks concerning the care of a(n) [equine/farm] animal;

(xi) transporting or moving a(n) [equine/farm] animal; or

(xii) without regard to whether the participants are compensated, rodeo and single event competitions.

Explanation: This term is based on the standard definition of "[equine/farm] animal activity." This definition is meant to complement the term "engages in a(n) [equine/farm] animal activity." Much like the definition for "engages in a(n) [equine/farm] animal activity," this definition is intended to be broad and non-exhaustive due to the scope of activities within the equine and farm animal industries.

(E) "[Equine/Farm] animal activity sponsor" means an individual, group, club, partnership, corporation, or other legally constituted entity, without regards to whether the sponsor is operating for profit or nonprofit, who owns, organizes, manages, or provides the facilities for a(n) [equine/farm] animal activity, including, but not limited to, any of the following:

(i) clubs involving riding, hunting, competing, or performing;

(ii) youth clubs, including 4-H clubs;

(iii) owners, operators, instructors, and promoters of a domesticated animal event or domesticated animal facility, including, but not limited to, stables, boarding facilities, clubhouses, rides, fairs, and arenas;

(iv) breeding facilities;

(v) [equine/farm] animal training facilities; or

(vi) fairs, rodeos, expositions, shows, competitions, 4-H or FFA events, sporting events, events involving driving, pulling, cutting, or hunting.

Explanation: This definition serves to complement the terms "[equine/farm] animal activity" and "engages in a(n) [equine/farm] animal

activity. This definition is based on the Iowa and Kentucky FALAs, as well as Texas' FALA amendment.[154]

> (F) "[Equine/Farm] animal professional" means a person who receives compensation for engaging in a domesticated activity by doing one or more of the following:
>
> (i) instructing a participant;
>
> (ii) renting the use of a(n) [equine/farm] animal to a participant for the purposes of riding, driving, showing, or being a passenger on a(n) [equine/farm] animal or a vehicle powered by a(n) [equine/farm] animal;
>
> (iii) renting equipment or tack to a participant;
>
> (iv) providing farrier services to a(n) [equine/farm] animal;
>
> (v) examining or administrating medical treatment to a(n) [equine/farm] animal by a veterinarian;
>
> (vi) providing daily care to [equine/farm] animals at a(n) [equine/farm] animal facility;
>
> (vii) training a(n) [equine/farm] animal;
>
> (viii) providing grooming services to a(n) [equine/farm] animal; or
>
> (iv) transporting a(n) [equine/farm] animal.

Explanation: This definition serves to complement the terms "[equine/farm] animal activity" and "engages in a(n) [equine/farm] animal activity." As mentioned above, this definition is intended to be broad and non-exhaustive due to the scope of activities within the equine and farm animal industries.

> Option 1: (G) "Participant" means, with respect to a(n) [equine/farm] animal activity, a person who engages in the activity, without regard to whether the person:

154. *See* IOWA CODE ANN. § 673.1(4) (West 2020); *see also* KY. REV. STAT. ANN. § 247.4015(4) (West 2020); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001(5) (West 2021).

(i) is an amateur or a(n) [equine/farm] animal professional;

(a) "Amateur" means every participant who is not a(n) [equine/farm] animal professional

(ii) pays to participate in the activity, participates in the activity for free, or is compensated for participating in the activity; or

(iii) is an independent contractor, or a full-time, part-time, temporary, or seasonal employee.

Explanation: This definition is based on case law, Iowa's Act, and the 2021 Texas FALA amendment.[155] Case law indicates the definition of participant has been a great contention for the judiciary and is a source of major ambiguity in EALAs and FALAs.[156] This definition provides clarity on who is and is not a participant under the Model. In this version of the Model EALA or FALA, independent contractors and employees are precluded from recovery and liability is limited. The definition of amateur has been added because the lack of definition in all states has been a major contributor to the ambiguity of *participant*.[157] This definition of participant seeks to clarify any possible questions regarding who is and is not a participant.

(H) "Inherent risks of [equine/farm] animal activities" means dangers or conditions which are an integral part of [equine/farm] animal activities including, but not limited to:

(i) the propensity of a(n) [equine/farm] animal to behave in ways that may result in injury, harm, or death to persons around them;

155. *See Adams*, 605 S.E.2d at 608 (holding independent contractors are included under the definition of "participant"); *see also Biesty*, 2012 LEXIS 87, at *10 (holding the same); *see also Johnson*, 88 S.W.3d at 731 (holding the same); *see also Young*, 373 S.W.3d at 781 (holding the same); *see also Waak*, 603 S.W.3d at 110 (holding that employees were not included under the definition of "participant" despite other Texas case law stating independent contractors are "participants"); *see also* IOWA CODE ANN. § 673.1(8) (West 2020); *see also* TEX. CIV. PRAC. & REM. CODE § 87.001(9) (West 2021).

156. *See Waak*, 603 S.W.3d at 109.

157. *See id.* at 109–10 (noting that the term "amateur" included in Texas' FALA was ambiguous).

> (ii) the unpredictability of the reaction of a [equine/farm] animal to sounds, sudden movement, and unfamiliar objects, persons, other animals, and its surroundings;
>
> (iii) certain hazards such as surface and subsurface conditions;
>
> (iv) collisions with other animals or objects; and
>
> (v) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over a farm animal or not acting within his or her ability.

Explanation: This term is based on the standard definition of "inherent risks of [equine/farm] animal activities." Including this term is essential because it will aid courts in interpreting if the action complained of was an "inherent risk" by including examples of what the legislature understood inherent risks to mean. By adding this definition, courts will no longer need to look to prior case law to determine the inherent risks of certain animals. This definition also prevents courts from making their own findings of what inherent risks are, if prior case law is unavailable.

3. Immunity from Liability

> (3) The inherent risks of [equine/farm] animal activities are deemed to be beyond the reasonable control of [equine/farm] animal activity sponsors, [equine/farm] animal professionals, or other persons. Therefore, a person, including a(n) [equine/farm] animal profession, [equine/farm] animal activity sponsor, the owner of a(n) [equine/farm] animal, or a person exhibiting the [equine/farm] animal, is not liable for the damages, injury, or death suffered by a participant or spectator resulting from the inherent risks of a(n) [equine/farm] animal activity, including, but not limited to:
>
> (i) the propensity of a(n) [equine/farm] animal to behave in ways that may result in personal injury or death to the participant;
>
> (ii) the unpredictability of the reaction of a [equine/farm] animal to sounds, sudden movement, and unfamiliar objects, persons, other animals, and its surroundings;
>
> (iii) certain hazards such as surface and subsurface conditions;
>
> (iv) collisions with other animals or objects; and

> (v) the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over a farm animal or not acting within his or her ability.
>
> (4) Participant's Responsibility: A(n) [equine/farm] animal activity participant shall act in a safe and responsible manner at all times to avoid injury to the participant and others and to be aware of inherent risks in [equine/farm] animal activities to the best of the participant's ability.

Explanation: This term is based on the standard language detailing when the immunity from liability applies under EALAs or FALAs. Examples of actions that are covered under the Model are included to provide more guidance and clarity to the courts regarding legislative intent of what is immunized from liability. This section includes the participant's responsibility to clarify the purpose behind the Acts—participants are equally responsible for maintaining their safety while participating in an equine or farm animal activity.

4. Exceptions to Immunity from Liability

> (5) Immunity from liability shall not apply to the extent that the claim for damages, injury, or death is caused by any of the following:
>
> (i) the injury or death was caused by faulty equipment or tack used in the [equine/farm] animal activity, the person provided the equipment or tack, and the [equine/farm] activity sponsor or [equine/farm] animal professional knew or reasonably should have known that the equipment or tack was faulty;
>
> (ii) the person provided the [equine/farm] animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the [equine/farm] animal activity, including activities compensated for, and determine the ability of the participant to safely manage the [equine/farm] animal, taking into account the participant's representations of ability;
>
> (iii) the injury or death was caused by the failure to notify the participant of a dangerous latent condition of land, which the person knew or reasonably should have known about. The notice may be made by posting a clearly visible warning sign on the property, as stated in section (6);

> (iv) the person committed an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission caused the injury;
>
> (v) the person intentionally caused the participant's property damage, injury, or death;
>
> (vi) the person's negligence caused the participant's property damage, injury, or death; or
>
> (vii) at the time of the damage, injury or death, the warning proscribed in section (5) was not posted by the [equine/farm] animal professional was not posted in accordance with that section.

Explanation: This section combined the standard exceptions to immunity under EALAs and FALAs. Under § 5(ii), the language "including activities compensated for" was included to clarify that the legislative intent was to include employees and independent contractors, and the same exceptions apply to them and all other participants.[158]

5. Warning Notices

> (5) For the purposes of limitation of liability, [equine/farm] animal professionals must post and maintain a sign in a clearly visible location on or near the premises on which an [equine/farm] animal activity is conducted. The sign must contain the following language:
>
> Option 1:
>
> "WARNING
>
> UNDER [STATE LAW], A(N) [EQUINE/FARM] ANIMAL PROFESSIONAL IS NOT LIABLE FOR PROPERTY DAMAGE, AN INJURY TO OR THE DEATH OF A PARTICIPANT IN [EQUINE/FARM] ANIMAL ACTIVITIES, INCLUDING AN EMPLOYEE OR INDEPENDENT CONTRACTOR, RESULTING FROM THE INHERENT RISKS OF [EQUINE/FARM] ANIMAL ACTIVITIES. THERE ARE INHERENT RISKS OF INJURY OR

158. *See* Tex. H.B. 365, 87th Leg., R.S. (2021) (amending the statute to state "including work activities" under the exceptions section in Texas 2021 FALA amendments).

DEATH THAT YOU VOLUNTARILY ACCEPT IF YOU PARTICIPATE IN [EQUINE/FARM] ANIMAL ACTIVITIES."

Explanation: This section has been reformatted to clearly require only equine or farm animal professionals to post the required warning notice if the professional wants to be covered under the EALA or FALA. Only equine or farm animal professionals should be required to post warning notices. Many often operate as a business entity and will need to warn more participants with less experience with equine or farm animals of the risk they are potentially taking.

If the state does not want to require professionals to post warning notices, this section may be omitted. Likewise, if the state wants all equine or farm animal owners to post warning notices, the state may require the following warning notice:

Option 2:

"WARNING

UNDER [STATE LAW], A(N) [EQUINE/FARM] ANIMAL PROFESSIONAL OR [EQUINE/FARM ANIMAL] OWNER IS NOT LIABLE FOR PROPERTY DAMAGE, AN INJURY TO OR THE DEATH OF A PARTICIPANT IN [EQUINE/FARM] ANIMAL ACTIVITIES, INCLUDING AN EMPLOYEE OR INDEPENDENT CONTRACTOR, RESULTING FROM THE INHERENT RISKS OF [EQUINE/FARM] ANIMAL ACTIVITIES. THERE ARE INHERENT RISKS OF INJURY OR DEATH THAT YOU VOLUNTARILY ACCEPT IF YOU PARTICIPATE IN [EQUINE/FARM] ANIMAL ACTIVITES."[159]

This version is not suggested to prevent equine and farm animal owners who are unaware of this requirement from being liable due to a missing sign. This would defeat the purpose of EALAs and FALAs. Option 1 is the recommended version.

C. The Proposed Model Equine or Farm Animal Liability Act Excluding Employees

This section presents a proposed Model EALA or FALA that does not preclude employees from recovering, with explanations following each

159. TEX. CIV. PRAC. & REM. CODE § 87.005 (West 2021).

section of the proposed model. Every definition proposed under part (IV)(B) is included in this proposed model that excludes employees. The sections that differ are the following:

1. Definitions

> (F) "Participant" means, with respect to a(n) [equine/farm] animal activity, a person who engages in the activity, without regard to whether the person:
>
> (i) is an amateur or a(n) [equine/farm] animal professional;
>
> (a) "Amateur" means every participant who is not a(n) [equine/farm animal] professional.
>
> (ii) pays to participate in the activity or participates in the activity for free; or
>
> (iii) is an independent contractor, and is not considered to be a full-time, part-time, temporary, or seasonal employee.[160]

Explanation: This definition is based on case law. Case law indicates the definition of participant has been a great contention for the judiciary and is a source of major ambiguity in states' EALAs and FALAs.[161] This definition clarifies that employees are not barred from recovery under the statute. Independent contractors are included under the definition of participant due to all deciding-states' case law holding that independent contractors were considered participants, even when employees were not deemed participants in the same jurisdiction.[162]

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160. *See Johnson*, 88 S.W.3d at 731 (Tex. App.—Corpus Christi 2002, no pet.) (including independent contractors as "participants," but not employees will require courts to take an additional step in deciding whether the injured party constituted an independent contractor or employee); Young, 373 S.W.3d at 781 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *contra Waak*, 603 S.W.3d at 110 (Tex. 2020) (holding "participant" does not include employees despite Texas precedent holding "participant" includes independent contractors).

161. *See Waak*, 603 S.W.3d at 109.

162. *See* Adams v. Hare, 536 S.E.2d 284, 288 (Ga. Ct. App. 2000) (holding independent contractors are included under the definition of "participant"); *see also* Biesty v. Flynn, No. 2011-CA-000084-MR, 2012 LEXIS 87, at *10 (Ky. Ct. App. 2012) (holding independent contractors are included under the definition of "participant"); *see also Johnson*, 88 S.W.3d at 731 (holding the same); *see also Young*, 373 S.W.3d at 781 (holding the same); *see also Waak*, 603 S.W.3d at 110 (holding that employees were not included under the definition of "participant" despite other Texas case law stating independent contractors are "participants").

2. Exceptions to Immunity from Liability

(5) Immunity from liability shall not apply to the extent that the claim for damages, injury, or death is caused by any of the following:

(i) the injury or death was caused by faulty equipment or tack used in the [equine/farm] animal activity, the person provided the equipment or tack, and the [equine/farm] activity sponsor or [equine/farm] animal professional knew or reasonably should have known that the equipment or tack was faulty;

(ii) the person provided the [equine/farm] animal and the person did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the [equine/farm] animal activity, not including activities compensated for, and determine the ability of the participant to safely manage the [equine/farm] animal, taking into account the participant's representations of ability;

(iii) the injury or death was caused by the failure to notify the participant of a dangerous latent condition of land, which the person knew or reasonably should have known about. The notice may be made by posting a clearly visible warning sign on the property, as stated in section (6);

(iv) the person committed an act or omission with wilful or wanton disregard for the safety of the participant and that act or omission caused the injury;

(v) the person intentionally caused the participant's property damage, injury, or death;

(vi) the person's negligence caused the participant's property damage, injury, or death; or

(vii) at the time of the damage, injury or death, the warning proscribed in section (5) was not posted by the [equine/farm] animal professional was not posted in accordance with that section.

Explanation: This section combined the standard exceptions to immunity under EALAs and FALAs. Under 5(ii), the language "not

including activities compensated for" was included to clarify that the legislative intent was to exclude employees and independent contractors.[163]

3. Warning Notices

> (5) For the purposes of limitation of liability, [equine/farm] animal professionals must post and maintain a sign in a clearly visible location on or near the premises on which an [equine/farm] animal activity is conducted. The sign must contain the following language:
>
> Option 1:
>
> "WARNING
>
> UNDER [STATE LAW], A(N) [EQUINE/FARM] ANIMAL PROFESSIONAL IS NOT LIABLE FOR PROPERTY DAMAGE, AN INJURY TO OR THE DEATH OF A PARTICIPANT IN [EQUINE/FARM] ANIMAL ACTIVITIES, INCLUDING AN INDEPENDENT CONTRACTOR, RESULTING FROM THE INHERENT RISKS OF [EQUINE/FARM] ANIMAL ACTIVITIES. THERE ARE INHERENT RISKS OF INJURY OR DEATH THAT YOU VOLUNTARILY ACCEPT IF YOU PARTICIPATE IN [EQUINE/FARM] ANIMAL ACTIVITIES."

Explanation: This section removed employees from the warning notice language. If the state wants all equine and farm animal owners to be required to post a warning notice, the following language should be used:

> Option 2:
>
> "WARNING
>
> UNDER [STATE LAW], A(N) [EQUINE/FARM] ANIMAL PROFESSIONAL OR [EQUINE/FARM ANIMAL] OWNER IS NOT LIABLE FOR PROPERTY DAMAGE, AN INJURY TO OR THE DEATH OF A PARTICIPANT IN [EQUINE/FARM] ANIMAL ACTIVITIES, RESULTING FROM THE INHERENT RISKS OF [EQUINE/FARM] ANIMAL ACTIVITIES. THERE ARE INHERENT RISKS OF INJURY OR DEATH THAT YOU VOLUNTARILY ACCEPT

163. Tex. H.B. 365, 87th Leg., R.S. § 4, sec. 87.004 (2021) (as enrolled June 4, 2021) (codified at TEX. CIV. PRAC. & REM. CODE § 87.004) (amending the statute to state "including work activities" under the exceptions section in Texas' proposed 2021 FALA amendments).

IF YOU PARTICIPATE IN [EQUINE/FARM] ANIMAL ACTIVITIES."[164]

As mentioned above, this language is not suggested, as it defeats the purpose of EALAs and FALAs by requiring all owners to post a sign—a sign that most will be unaware of.

VI. CONCLUSION

Forty-eight states enacted EALAs and FALAs to reduce litigation, increase insurability and profitability, and protect animal owners by eliminating liability associated with the inherent risks of equine and farm animals. However, the ambiguity, vagueness, and inconsistencies among the statutes caused an uptick in litigation and forced courts to decide whether legislatures intended for employees and independent contractors to be precluded from recovery resulting from a personal injury. As a result, these statutes need amendments to increase clarity and uniformity. State legislatures, not state judiciaries, must now choose whether their EALAs and FALAs preclude employees from recovering. The states may do so by following the Model EALAs or FALAs proposed in this comment. Amendments to these statutes will result in less litigation, lower insurance rates, and greater profits by providing a clear and uniform law for the judiciary to follow and enforce, not interpret.

164. *See* TEX. CIV. PRAC. & REM. CODE § 87.005.