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Abstract

The battle over worker classification between state governments, on the one hand, and gig economy companies, on the other, has raged since at least the first time someone ordered an Uber. Nowhere has this battle played out more prominently in recent years than in California. In 2019, the state legislature passed AB 5, a bill which adopted a stringent independent contractor standard and effectively classified all gig economy workers as employees of the companies whose apps they use to find work. AB 5's ripple effects were enormous—the significant popularity of gig economy apps among consumers launched what might have been obscure, legalistic wrangling about worker classification standards to the forefront of the public consciousness. The bill's passage engendered public outcry, legal challenges, media hysterics, and a record-breaking referendum initiative whose outcome is still the subject of litigation. In a sense, strong reactions to a bill like AB 5 are to be expected—worker classification schemes strike at the heart of individuals' ability to earn income and to receive certain protections and benefits reserved only for employees. But largely missing from the fevered debate over AB 5 has been a close examination of the bill's place in the long history of worker

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classification jurisprudence, its effectiveness as reform, and its viability to accomplish its own aims. This Note attempts to do just that and concludes that California AB 5 should not serve as a model for other states seeking to address the challenges the gig economy poses to existing worker classification schemes.

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INTRODUCTION

In 2009, a company developed a smartphone app that offered to connect licensed San Francisco limousine drivers to additional potential clients in their downtime between regularly

scheduled appointments.[1] The company situated itself as a platform facilitating the efficient use of resources—one that would provide on-demand rides to customers while simultaneously supplementing the incomes of full-time professional drivers.[2] Readers may recognize that company as Uber. In short order, Uber expanded its platform to allow virtually anyone with a driver's license and a vehicle to provide rides whenever they felt like logging on.[3] Cheap, seamless rides for passengers and flexible earning opportunities for anyone who could drive and pass a background check[4]—that was the vision Uber sought to achieve.[5] The idea caught on quickly among riders and drivers alike, and by 2011 Uber began to expand to other cities across the globe.[6]

Throughout its expansion, Uber always expressly proclaimed not to have hired any drivers as employees.[7] To casual drivers, Uber might have seemed like a low-stakes opportunity to earn supplemental income. To professional full-time drivers, accepting a trip through the Uber app might have seemed no different than accepting a booking assigned by

1. *See* Avery Hartmans & Paige Leskin, *The History of How Uber Went from the Most Feared Startup in the World to Its Massive IPO*, BUS. INSIDER (May 18, 2019, 2:42 PM), https://perma.cc/6DJD-7EWA ("March 2009: [Garrett] Camp and two graduate school friends . . . build the first version of their black-car service, called UberCab.").

2. *See* Travis Kalanick, *Principled Innovation: Addressing the Regulatory Ambiguity*, UBER TECHS., INC. (Apr. 12, 2013), https://perma.cc/2Y26-NTEB (PDF) ("Uber provides city residents with a convenient and efficient way to request transportation services from existing transportation providers.").

3. *See id.* (stating that Uber chose to compete in the non-professional driver ridesharing space because other companies had begun to do so without regulatory penalty).

4. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015) ("Applicants are required to upload their driver's license information, as well as information about their vehicle's registration and insurance. . . . Applicants must also pass a background check conducted by a third party." (citation omitted)).

5. *See* Kalanick, *supra* note 2 ("In theory, ridesharing is generally good for cities and for society as a whole: cheaper, more reliable transportation for city residents, and more jobs for drivers.").

6. *See* Hartmans & Leskin, *supra* note 1 ("December 2011: Uber begins to expand internationally, starting with Paris, France.").

7. *See id.* ("Although Uber does not own cars and does not employ drivers . . . .").

their primary limousine company employer. But curiously, formerly non-professional drivers who began to drive forty or more hours per week, and who relied on the Uber app—or the Lyft app, a competitor that used the same non-professional driver model—as their sole source of income, would soon come to assert that they were in fact Uber or Lyft employees, and as such that they were entitled to a minimum wage, unemployment insurance, and a host of other benefits typically reserved for individuals so classified.[8]

This narrative is not unique to Uber and Lyft. Technological advancement and the rise of so-called "gig economy" companies have strained twentieth-century understandings of the distinction between employees and independent contractors, raising questions as to whether existing legal standards are robust enough to appropriately maintain that distinction in the twenty-first century.[9] Consequently, some state and local legislatures have undertaken efforts to reform their employment law in response to large numbers of workers contending that they have been wrongfully or "mis-" classified as independent contractors in the modern economy.[10]

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8. *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1136 ("[P]laintiffs . . . drive principally for Uber's 'uberX' service . . . [through which] drivers transport passengers in their own personal vehicles . . . ."); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("The question in this case is whether Lyft drivers are 'employees' or 'independent contractors' under California law.").

9. *See, e.g.*, Robert Sprague, *Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 54 (2015) ("[C]urrent classification tests . . . fail when applied to new, sharing-economy enterprises, specifically Lyft and Uber.").

10. *See Gov. Northam Signs New Laws to Support Virginia Workers*, NBC12 (Apr. 12, 2020, 4:22 PM), https://perma.cc/3PRN-HVY5 ("House Bill 984 . . . creates a private cause of action for a misclassified worker to bring civil action for damages against his or her employer."); Alexia Fernández Campbell, *New York City Passes Nation's First Minimum Pay Rate for Uber and Lyft Drivers*, VOX (Dec. 5, 2018, 2:10 PM), https://perma.cc/Z7HT-A6JS ("[C]ity officials passed the nation's first minimum pay rate for drivers who work for ride-hailing apps, ending a contentious two-year battle to make sure drivers can earn a decent living."); Dara Kerr, *Uber and Lyft Drivers Could Become Employees with This Law: 10 Things to Know*, CNET (Dec. 23, 2019, 5:00 AM), https://perma.cc/JJ8D-K294 ("Other states, like Washington, Oregon, . . . and New Jersey, are looking at similar laws.").

This Note follows the story of California Assembly Bill No. 5[11] (AB 5)—one state's fraught endeavor to correct a perceived employee misclassification problem within its borders. AB 5 was a legislative response to a major judicial development in state employment law.[12] In 2018, the California Supreme Court decided *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*,[13] which narrowly altered the legal standard state courts use to evaluate employment classification.[14] Before *Dynamex*, California courts had applied the more flexible standard articulated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*[15] to all employee classification disputes under state law.[16] *Dynamex* involved a dispute over the meaning of one definition of "employee" in a wage order of the California Industrial Welfare Commission (IWC).[17] Given the remedial purpose of the wage order at issue, the *Dynamex* court saw fit to break with *Borello*[18] and require application of a more stringent standard favoring employee

11. Cal. Assemb. B. No. 5, California 2019–2020 Regular Session (Cal. 2019).

12. *See id.* § 1(d) ("It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in Dynamex and would clarify the decision's application in state law."); *see also* Dynamex Operations W. v. Superior Court, 416 P.3d 1 (Cal. 2018) (the case to which AB 5 refers in this section).

13. 416 P.3d 1 (Cal. 2018).

14. *See id.* at 40 (concluding that a new test should be used in determining whether a worker is an employee or an independent contractor under the "suffer or permit to work standard" in wage orders of the California Industrial Welfare Commission).

15. 769 P.2d 399 (Cal. 1989).

16. *See Dynamex*, 416 P.3d at 6 (noting that the trial court had applied the *Borello* standard because, in most other contexts, *Borello* is the only appropriate standard under California law for distinguishing employees and independent contractors).

17. *See id.* at 5 ("Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders* . . . .").

18. *See id.* at 7 ("[I]n light of its history and purpose, we conclude that the wage order's suffer or permit to work definition must be interpreted broadly to treat as 'employees,' and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*.").

status that had cropped up in other jurisdictions: the so-called "ABC Test."[19]

Meanwhile, public discourse regarding the employment status of gig economy workers had reached a fever pitch.[20] Although *Dynamex* did not involve a gig economy company,[21] and although the court had taken pains to cabin application of the ABC Test only to IWC wage orders,[22] the California legislature swiftly seized upon what it saw as an opportunity to "codify the decision . . . and clarify its application" in passing AB 5.[23] In truth, AB 5 meaningfully broadened *Dynamex*'s reach.[24] AB 5 requires courts to apply the more stringent ABC Test by default in *any* misclassification dispute unless the plaintiff worker is part of a group of excepted occupations.[25] Those excepted occupations continue to receive treatment under

19. *See id.* ("[I]n determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to . . . the 'ABC' test, that is utilized in other jurisdictions . . . .").

20. *See, e.g.*, Abrar Al-Heeti & Andrew Morse, *Uber and Lyft Drivers Protest for Better Working Conditions*, CNET (July 19, 2019, 12:55 PM), https://perma.cc/2BJM-KTAD (noting amid driver protests in California that the issue of gig worker classification had been simmering for years, resulted in several lawsuits against Uber and Lyft, and caused drivers to attempt to organize against the companies to secure employment benefits).

21. *See Dynamex*, 416 P.3d at 5 (describing the factual background of the case).

22. *See id.* at 7 ("At the same time, we conclude that the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass . . . individual workers . . . who have traditionally been viewed as *genuine* independent contractors . . . .").

23. Cal. Assemb. B. No. 5 § 1(d).

24. *See* Cal. Trucking Ass'n v. Becerra, 433 F. Supp. 3d 1154, 1159 (S.D. Cal. 2020) ("California's Assembly-Bill 5 . . . codified the ABC test adopted in *Dynamex* and expanded its reach to contexts beyond Wage Order No. 9, including workers' compensation, unemployment insurance, and disability insurance.").

25. *See* Cal. Assemb. B. No. 5 § 2(a)(1) (requiring application of the ABC Test for the purposes of the Labor Code, the Unemployment Insurance Code, and all wage orders of the Industrial Welfare Commission); *id.* § 2(b) ("Subdivision (a) and [*Dynamex*] do not apply to the following occupations as defined in the paragraphs below . . . .").

the *Borello* test.[26] Gig economy workers do not fall under one of the exceptions.[27]

AB 5's passage attracted fiercely divided national political attention,[28] ignited several high-profile legal battles,[29] and resulted in threats by gig economy companies to shut down

26. *See id.* § 2(b) ("[D]etermination of employee or independent contractor status for individuals in [excepted] occupations shall be governed by Borello.").

27. *See id.* (listing excepted occupations but not listing gig economy workers or any reasonably related equivalent term).

28. *See* Faiz Siddiqui, *California Senate Passes Ride-Hail Bill that Has Divided Democrats over the Future of Uber and Lyft Drivers*, WASH. POST (Sept. 11, 2019, 3:40 PM) [hereinafter Siddiqui, *California Senate*], https://perma.cc/ARG3-YDMV (noting that the bill divided Obama-era officials who joined gig economy companies in advisory roles and newer progressive Democrats, and that Elizabeth Warren, Pete Buttigieg, Julián Castro, and Bernie Sanders all publicly supported the bill while Joe Biden remained silent); *id.* ("Rep. Alexandria Ocasio-Cortez (D-N.Y.) scolded former California Democratic senator Barbara Boxer, who now serves as a Lyft adviser, for penning an opinion piece in the San Francisco Chronicle criticizing some tenets of AB5."); *see also* Barbara Boxer, *Barbara Boxer: AB5 Is Not the Answer for All Workers*, S.F. CHRON. (Aug. 26, 2019, 4:23 PM), https://perma.cc/P9EV-UDLN (arguing, after speaking to a "representative sample" of Lyft drivers, that those drivers shared grave concerns they'll lose critical income if they are forced to become employees under AB 5).

29. *See* Am. Soc'y of Journalists & Authors, Inc. v. Becerra, No. CV 19-10645, 2020 WL 1444909, at *1 (C.D. Cal. Mar. 20, 2020) (denying a preliminary injunction against enforcement of AB 5 with respect to certain independent authors); Olson v. California, No. CV 19-10956, 2020 WL 905572, at *1 (C.D. Cal. Feb. 10, 2020) ("On January 8, 2020, Plaintiffs . . . Postmates Inc. . . . and Uber Technologies, Inc. . . . filed a Motion for Preliminary Injunction requesting that the Court enjoin the enforcement against Plaintiffs . . . of any provision of California Assembly Bill 5 . . . ."); Cal. Trucking Ass'n v. Becerra, 433 F. Supp. 3d 1154, 1160 (S.D. Cal. 2020) (granting a preliminary injunction against enforcement of AB 5 with respect to certain truckers). For a sense of the degree to which the media and the public actively followed these cases, see, for example, Sebastian Herrera & Tim Higgins, *California Sues Uber, Lyft Saying They Misclassified Drivers as Independent Contractors*, WALL ST. J. (May 5, 2020, 4:10 PM), https://perma.cc/2JFS-6BHZ ("California sued Uber Technologies Inc. and Lyft Inc. for allegedly misclassifying their drivers as independent contractors instead of employees, a move that intensifies a battle between the ride-hailing giants and their home state."); *Uber and Lyft Must Comply with Labor Law AB 5, Appeals Court Orders*, L.A. TIMES (Oct. 22, 2020, 7:50 PM), https://perma.cc/8M4R-ZUX7 ("Uber and Lyft . . . appealed an August preliminary injunction by a San Francisco judge.").

completely in the state.[30] Although no shutdowns occurred,[31] hostility toward AB 5 remained, and in November 2020 Californians passed a referendum ballot measure—Proposition 22—exempting Uber, Lyft, and similar companies entirely from treatment under the bill.[32]

Given the salience and rapid growth of the gig economy, it has received substantial treatment among legal scholars, particularly in light of assertions by companies that gig economy workers are independent contractors and not employees.[33] To date, much of the scholarly literature has focused on the question of which category gig workers properly belong to.[34] Some have suggested that the existence of such employment arrangements necessitates the creation of a new classification.[35]

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30. *See* Preetika Rana, *Uber and Lyft Threaten California Shutdown: Here's What's at Stake*, WALL ST. J. (Aug. 19, 2020, 2:55 PM), https://perma.cc/4VZC-9C5F ("Uber Chief Executive Dara Khosrowshahi and Lyft President John Zimmer have said they would rather suspend operations in the state than upend their businesses overnight.").

31. *See* Sara Ashley O'Brien, *Uber and Lyft Get Reprieve from Court, Won't Shut Down in California for Now*, CNN (Aug. 20, 2020, 4:35 PM), https://perma.cc/8NSS-7DWA ("Uber . . . and Lyft . . . narrowly avoided shutting down their ride-hailing services in California after an appellate court granted the companies a temporary reprieve . . . . ").

32. *See* Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 4, 2020), https://perma.cc/HT4B-C5BJ ("California voters carried Uber and Lyft to victory, overwhelmingly approving Proposition 22, a ballot measure that allows gig economy companies to continue treating driver as independent contractors.").

33. A Westlaw search for Uber and "independent contractor" yields 1,802 combined total results in the "Law Reviews & Journals," "Legal Newspapers & Newsletters," and "Texts & Treatises" categories as of March 20, 2022.

34. *See, e.g.*, Ben Z. Steinberger, Note, *Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model*, 23 FORDHAM J. CORP. & FIN. L. 577, 590 (2018) (articulating a new five-factor employee classification test with the goal of classifying Uber drivers as employees); Sprague, *supra* note 9, at 54 ("Thus, if companies in the sharing economy depend on service providers for the company's existence, the service providers should be considered their employees."); Benjamin Powell, *Identity Crisis: The Misclassification of California Uber Drivers*, 50 LOY. L.A. L. REV. 459, 463 (2017) ("Based on the applicable rules, tests, and case law that have developed in California over the last several generations, Uber drivers are most properly classified as employees . . . .").

35. *See, e.g.*, Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 447 (2018) ("This Article is the first to engage with the existing worker-misclassification case-law to outline a new category, the 'independent employee' . . . ."); Andre

Others have argued that any statutory conferral of benefits and protections based on employment classification status is inherently flawed.[36] While some have addressed the legal sufficiency of other jurisdictions' related attempts to modernize labor laws in response to the rise of the gig economy,[37] almost none have commented directly on AB 5 or its merits as employment law reform.[38]

Andoyan, Comment, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the "On-Demand Economy"*, 44 GOLDEN GATE U. L. REV. 153, 168 (2017) (proposing a hybrid classification for gig economy workers); Andrew G. Malik, Note, *Worker Classification and the Gig-Economy*, 69 RUTGERS U. L. REV. 1729, 1732 (2017) ("Ultimately, this Note concludes that the current dichotomy . . . is no longer sufficient and should be reformed or adapted to meet the unique needs of the gig-economy."); Carl Shaffer, Note, *Square Pegs Do Not Fit in Round Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers*, 119 W. VA. L. REV. 1031, 1059 (2017) (suggesting the creation of a third category of worker called the "platform contractor," who would be entitled to minimum wage, liability insurance for actions performed in furtherance of the parties' mutual business objectives, and minimal control from the hiring platform entity); Megan Carboni, Comment, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 1, 16 (2016) ("This comment proposes a third legislative category of worker under the Fair Labor Standards Act—the 'dependent contractor' . . . .").

36. *See* Ethan Rubin, Note, *Independent Contractors or Employees? Why Mediation Should Be Utilized by Uber and Its Drivers to Solve the Mystery of How to Define Working Individuals in a Sharing Economy Business Model*, 19 CARDOZO J. CONFLICT RESOL. 163, 165 (2017) (arguing that dispute resolution under principles of equity is a better solution to the Uber employee-independent contractor conundrum); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301 (2001) ("This article proposes an approach to statutory coverage based on the character of the transactions between the parties instead of the status of the parties.").

37. *See, e.g.*, Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987, 988 (2017) ("This Article . . . provides an in-depth analysis of the federal preemption and antitrust issues raised by collective bargaining laws like Seattle's in order to determine whether state and local attempts to regulate working conditions in the on-demand economy may survive legal challenge.").

38. *See* Abigail S. Rosenfeld, Comment, *ABC to AB 5: The Supreme Court of California Modernizes Common Law Doctrine in* Dynamex Operations West, Inc. v. Superior Court, 61 B.C. L. REV. E-SUPPLEMENT II.-112, II.-114 (2020) (addressing the passage of AB 5 only to acknowledge that it passed and that its scope and effects are still uncertain).

This Note contributes to existing gig economy and employment law scholarship in two ways. First, it serves to update the literature in light of AB 5's recent developments. Second, this Note argues that it is clear in hindsight that AB 5 was ill-equipped to accomplish its desired outcomes from the outset. The bill had a tenuous footing in the California case law it purported to codify, ignored broader calls for employee classification reform, and did not adequately consider detrimental unintended effects. Perhaps most shockingly, nearly three years after its passage, the fate of AB 5's applicability to a major sector of the economy it sought to regulate remains in flux: as of the time of writing, a state constitutional challenge to Proposition 22 is currently pending on appeal before a California appellate court.[39]

Part I contextualizes the problem AB 5 sought to solve by looking to the historical purpose of the distinction between employees and independent contractors in American employment law. It accounts for twenty-first century developments in the nature of employment relationships and gives voice to those who have called for responsive reform. Part II describes what AB 5 purported to do, with consideration for the concerns that gave rise to the bill, the circumstances of its passage, its substance, and the scope of its reach. Part III evaluates the effectiveness of AB 5 as a means of reform in light of relevant California case law, the relative merits of the employee classification standards it codifies, and the unintentional consequences of its unique formulation. This Note concludes by asserting that the statutory employee classification scheme California implemented in AB 5 should not be a model for other states eager to modernize their employment law.

39. *See* Maeve Allsup, *Prop. 22 Backers Appeal Ruling Striking California Gig Work Law (1)*, BLOOMBERG L. (Sept. 22, 2021, 7:57 PM), https://perma.cc/6H25-DJF6 (noting that both the California Department of Justice and a private coalition of Proposition 22 supporters filed a notice of appeal from a lower court order that ruled Proposition 22 unconstitutional).

I. THE TRICKY BUSINESS OF EMPLOYEE CLASSIFICATION

A. *What Is Employee Misclassification?*

The law of agency in the United States recognizes two categories of workers: employees and independent contractors.[40] The distinction carries two significant implications. First, statutory schemes require employers to provide certain benefits and protections to individuals classified as employees.[41] Second, employers can face vicarious liability for the conduct of their employees under the doctrine of respondeat superior.[42] By contrast, neither benefits nor vicarious liability apply in the context of individuals classified as independent contractors.[43] Thus, which of the two categories an individual providing a paid service belongs to is an important and often difficult question for employers, workers, legislatures, and courts.[44] Unfortunately, both terms are poorly defined.[45]

Because companies seeking to make a profit generally try to minimize costs,[46] there are circumstances under which

40. *See* Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 345 (2016) ("Today, America's binary classification system sorts workers into two categories: employee or independent contractor."); *see also* RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 202 cmt. e (AM. L. INST. 1958) (distinguishing between servants—today more naturally called employees—and independent contractors).

41. *See* Pinsof, *supra* note 40, at 367 ("[A] presumption of employee status would, in aggregate, increase the number of workers covered by labor and employment statutes.").

42. *See id.* at 347–48 (stating that the earliest employee classification test developed to resolve liability disputes between workers and employers).

43. *See* John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 9–10 (2018) (discussing the different treatment of employees versus independent contractors in the contexts of vicarious employer liability and statutory protective schemes); Pinsof, *supra* note 40, 348–49 (2016) (same).

44. *See* Pinsof, *supra* note 40, at 350 (describing the importance and difficulty of determining employee classification to courts, government agencies, state legislatures, juries, employers, and workers alike).

45. *See id.* at 345–46 (discussing the lack of clear definitions with respect to the terms "employee" and "independent contractor").

46. *See id.* at 351–52 ("Misclassification is often motivated by incentives to minimize the cost of labor and limit employer liability.").

employers would prefer to engage an independent contractor rather than a true employee.[47] Such a company may avoid the costs associated with employment taxes, health insurance, retirement plans, workers' compensation, overtime, and litigating employment discrimination and vicarious liability claims, among others.[48] In engaging a worker to provide a paid service, an employing entity must determine at the outset of the engagement whether to classify that worker as an employee—and accordingly provide that worker with all benefits and protections guaranteed by relevant statutes—or as an independent contractor.[49] Unsurprisingly, such a determination by an employing entity is not the final word.

The problem of "employee misclassification" arises when a worker asserts she has been denied benefits and protections due to her because her employing entity wrongfully considered her an independent contractor.[50] Because this question usually involves statutory and case law interpretation, employee misclassification questions commonly result in litigation and are answered by courts on a largely individualized basis.[51] To the extent legislatures may be concerned about whether there is systemic misclassification within their jurisdictions, the immense variety of employment relationships complicates their

47. *See id.* at 352 ("[I]ndependent contractors are estimated to cost twenty to thirty percent less per worker.").

48. *See* Pearce & Silva, *supra* note 43, at 2–3 (describing employers' economic motivations for classifying workers as independent contractors); Pinsof, *supra* note 40, at 352 (same).

49. *See* Pearce & Silva, *supra* note 43, at 3 ("The applicable legal rules . . . make it difficult for businesses and workers to assess whether a worker is an independent contractor or an employee.").

50. *See* Pinsof, *supra* note 40, at 349 ("Misclassification, or *the improper classification of workers as independent contractors instead of employees*, greatly contributes to the growing number of people identified as independent contractors today . . . ." (emphasis added)). In theory, misclassification might arise in the converse context of a worker asserting that she has been wrongfully labeled an employee when she is in fact an independent contractor. But that is not how the term is typically understood, and such a situation would not be representative of the term's use. *See id.* at 368 (describing workers being misclassified as employees as "a much rarer occurrence").

51. *See id.* at 368 ("[I]f and when a worker is able to recognize his own misclassification, going to court is often the only way to establish employee status and eligibility for legal protections.").

inquiry.[52] A court's ascertainment of a worker's status is a fact-intensive analysis that generally does not produce broadly applicable principles that can form the basis for an accounting of how many other workers might similarly be misclassified.[53] As a result, a particular worker's status is typically only known once that worker has raised a legal challenge and a court has ruled on the issue.[54]

Courts have developed a wide array of confusing and ambiguous tests to answer the employee classification question.[55] These include the traditional common law control test, the economic realities test, the Internal Revenue Service twenty-factor test, and the ABC Test, among others.[56] A full understanding of the reason for the proliferation of such tests requires examination of the historical origins and subsequent development of the employee-independent contractor dichotomy.

B. *Historical Origins*

The employee-independent contractor distinction is rooted in early common law cases involving workplace injury liability.[57]

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52. *See, e.g.*, ANNETTE BERNHARDT & SARAH THOMASON, U.C. BERKELEY CTR. FOR LAB. RSCH. & EDUC., WHAT DO WE KNOW ABOUT GIG WORK IN CALIFORNIA?: AN ANALYSIS OF INDEPENDENT CONTRACTING 10 (2017), https://perma.cc/D5UB-UNKT (PDF) (noting the numerous challenges associated with counting independent contractors at the state level).

53. *See* Pearce & Silva, *supra* note 43, at 3 ("Contemporary legal challenges have not led to a published judicial opinion that provides a conclusive answer to the question of whether gig-workers are independent contractors or not."); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1146 (N.D. Cal. 2015) (noting that employee classification is a mixed question of law and fact).

54. *See* Pearce & Silva, *supra* note 43, at 3 ("[T]hese cases have either settled or been left for juries to decide, leaving workers, businesses, judges, and scholars insisting on legal reform that provides a bright line distinction between an independent contractor and an employee."); *supra* note 51 and accompanying text.

55. *See* Pinsof, *supra* note 40, at 349 ("The confusing, ambiguous legal tests for employment classification lead employers to misclassify workers both intentionally and unintentionally.").

56. *See id.* at 349–50 (listing commonly applied employee classification tests).

57. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 403 (Cal. 1989) ("The distinction between independent contractors and

The doctrine of respondeat superior—which holds employers liable for the negligence of their *employees* acting within the scope of their employment[58]—required courts in these cases to distinguish between employees and independent contractors because an employer would not face similar liability for the conduct of an independent contractor.[59]

The test courts developed at common law to address this liability question hinged on whether the hiring entity exercised control over the details of the work as opposed to merely its outcome.[60] That test is "remarkably unchanged from its original formulation, despite the fact employment relationships have evolved dramatically since the rule's inception."[61]

However, control was never the exclusive test in respondeat superior determinations.[62] Before the end of the nineteenth century, courts also considered other factors to "take account of the reality and variability of working relationships."[63] While

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employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him."); Pinsof, *supra* note 40, at 344–45 (observing that, even before the Industrial Revolution, the "master-servant" relationship required clear delineation for the determination of rights and responsibilities such as rate of payment, grounds for termination, and the question of a master's vicarious liability); Rosenfeld, *supra* note 38, at II.-112, II.-115–II.-116 ("Prior to the close of the nineteenth century, litigation concerning worker classification primarily concerned whether employers could be held liable for damages resulting from workplace accidents."); *see also, e.g.*, Sproul v. Hemmingway, 31 Mass. (14 Pick.) 1, 3 (1833) (addressing the meaning of "servant" to establish whether a steamboat's operator and crew could be liable for damage they negligently caused to an anchored schooner).

58. *See* Pearce & Silva, *supra* note 43, at 2–3 (noting that the doctrine of respondeat superior renders employers liable for damages their employees incur during the scope of their employment).

59. *See* Pinsof, *supra* note 40, at 347 (discussing the origins of the common law control test).

60. *See id.* at 348 ("Considering its origin, the test's focus on *control* makes perfect sense; to determine whether an employer was liable for the torts of a worker, we would want to know how much control the employer asserted over the working conditions of the employee.").

61. *Id.*

62. *See* Carlson, *supra* note 36, at 310 ("[B]y the end of the nineteenth century the courts had already identified and assembled most of the other basic 'factors' recognized today as evidencing one or the other type of worker status.").

63. *Id.*; *see id.* at 310–11 ("These included the manner of compensation, . . . the exclusivity of the relationship . . . , the worker's control over starting and quitting time, relative contributions of equipment and

consideration of additional factors may have allowed courts greater flexibility, it also "compounded the uncertainty of their tests."[64] Judicial recognition of the need to consider factors beyond mere control began a decades-long shift away from consistency and toward a know-it-when-we-see-it approach.[65]

C. *Post-Industrial Revolution Developments*

In the twentieth century, the employee-independent contractor distinction took on greater meaning in the context of New Deal legislation, which created new protections and benefits for employees, but not independent contractors,[66] and in turn raised the stakes in employee classification litigation.[67] No longer were employee classification disputes restricted merely to a determination of a hiring entity's vicarious liability—the category now included suits by workers asserting individual entitlements.[68] This development further strained the existing common law test because courts faced with such weighty subject matter continued to turn to an increasing number of factors to guide their decisions.[69]

In the twenty-first century, technological advancement has meaningfully altered the nature of work and employment

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resources for the work, . . . and a comparison of the employer's general treatment of the worker in comparison with other workers who were apparently regular employees.").

64. *Id.* at 310.

65. *See id.* (arguing that early deviation from the strict common law control test left courts hoping to know the difference between independent contractors and employees on a largely ad hoc basis).

66. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151–168 (1935) (protecting workers' rights to organize and bargain collectively); Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1938) (mandating a minimum wage and requiring increased payment for overtime hours).

67. *See* Pinsof, *supra* note 40, at 348 ("[T]oday many worker benefits and protections hinge on employment status.").

68. *Id.*

69. *See* Carlson, *supra* note 62, at 311 ("[W]hile control over work was a basic premise of *respondeat superior*, it competed with an increasing number of other factors when the courts turned to the question of coverage under social welfare and protective legislation."); Rosenfeld, *supra* note 38, at II.-118–19 (arguing that the advent of statutory employee protections and benefits was a motivating factor behind the California Supreme Court's decision to alter the common law test).

relationships.[70] Employee misclassification has become a particularly contentious issue in light of the rise of the so-called "gig economy."[71] The gig economy, also variously termed the sharing economy or the on-demand business model, encompasses "peer-to-peer transactions" such as those through Airbnb that connect property owners with short-term renters, as well as "businesses conducting operations through the use of short-term, task-oriented employment facilitated by technology," such as Lyft, Uber, and TaskRabbit.[72] Companies in this space commonly position themselves as middlemen or "platforms," connecting buyers and sellers on two sides of a digital marketplace.[73] Such arrangements are unique because gig economy workers—the "sellers" of the online platform marketplace—often look like *both* employees and independent contractors in crucial ways.[74]

On the one hand, gig economy workers operate with a degree of flexibility employees do not traditionally have.[75] However, as Richard Carlson has observed, gig economy platform companies can also "exert powerful influences over

70. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (noting that Uber's novel sharing economy business model created significant challenges for applying the common law test and suggesting the need for reform); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (discussing the challenges the platform economy presents to existing employment law); Pinsof, *supra* note 40, at 348–49 ("While the common law control test and the employee/contractor distinction may have been adequate to define the scope of labor laws in the twentieth century, they cannot be so easily adapted to twenty-first century employment relationships.").

71. *See* Pearce & Silva, *supra* note 43, at 20 ("The complexity of the legal [employee classification] tests and their shortcomings are even more apparent when applying them in the context of the modern gig economy."); *id.* at 21 ("[T]he gig economy grew ten-fold from 2012 to 2015.").

72. *Id.* at 20–21; *see also The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), https://perma.cc/T7FC-Q27U (articulating the scope of the gig—or "sharing"—economy).

73. *See* Lobel, *supra* note 70, at 94 ("[A] platform company is launched as an online intermediary between buyers and sellers of goods and services—the ancient role of the middleman—enhanced with [] modern [technology].").

74. *See* Carlson, *supra* note 62, at 300 ("In reality, independent contractors frequently resemble employees in ways that make them equally in need of protection [as employees].").

75. *See* Pearce & Silva, *supra* note 43, at 22 ("For example, one Uber driver may occasionally drive a couple hours a week, while another may regularly spend 40 or more hours working for Uber.").

working conditions, including the setting of non-negotiable wage rates and strict behavior codes, while maintaining the ability to hire and fire workers in ways that are reflective of traditional employer-employee relationships."[76] As such, the rise of the gig economy has resulted in a number of misclassification lawsuits by gig workers against gig companies,[77] all of which pit "20th century [employee classification] tests" against "a 21st century problem."[78]

D. *Uber as a Gig Economy Case Study*

Uber presents a helpful example of the challenges gig economy apps pose to traditional conceptions of the employee-independent contractor dichotomy. What started as an idea born of two travelers' 2008 lamentations that rides in Paris are difficult to come by on snowy nights[79] is today a global leader in on-demand transportation, a household name, a verb that defines its sector,[80] and a ticker on the New York Stock

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76. Carlson, *supra* note 62, at 300.

77. *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (involving allegations by plaintiff Uber drivers that they had been misclassified as independent contractors); Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 226 (D.D.C. 2015) (involving a vicarious liability claim against Uber by a passenger for negligent hiring, training, and supervision); *In re* Uber Techs., Inc., Wage & Hour Emp. Pracs., 158 F. Supp. 3d 1372, 1372 (J.P.M.L. 2016) ("This litigation arises from the allegation that defendant[] Uber Technologies, Inc. . . . misclassif[ies] Uber transportation providers as independent contractors instead of employees, fail[s] to provide reimbursement of necessary business expenses, and withhold[s] gratuities."); Lavitman v. Uber Techs., Inc., No. SUCV201204490, 2015 WL 728187, at *1 (Mass. Super. Ct. Jan. 26, 2015) (involving an allegation by driver plaintiffs that Uber improperly retained a portion of the 20 percent fee it charges each rider in addition to that rider's fare); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) ("The question in this case is whether Lyft drivers are 'employees' or 'independent contractors' under California law.").

78. Pearce & Silva, *supra* note 43, at 22.

79. *See The History of Uber*, UBER TECHS., INC., https://perma.cc/4MHZ-XSDN ("On a cold winter evening in Paris, Travis Kalanick and Garrett Camp couldn't get a ride. That's when the idea for Uber was born.").

80. *See, e.g.*, Evie Nagy, *Uber Is a Verb: How a Brand Becomes a Verb—and Why It's Significant* (Sept. 9, 2015), https://perma.cc/47J8-QHEX ("As for Uber, it has become the default action word for technology-facilitated, on-demand transportation.").

Exchange boasting a valuation of nearly $70 billion.[81] Given Uber's ubiquitous global presence, readers are likely to be familiar with its business model generally. However, assuming far fewer readers have used the Uber app to transport passengers and earn income, a basic summary of the driver experience is in order.

An individual who wishes to use the Uber app as a driver begins by creating a driver profile online.[82] This process entails the submission of documents including a valid driver's license, vehicle registration, personal insurance, and a driver photo.[83] Uber contracts with third party companies who then conduct a background check on the individual seeking to drive.[84] Once approved, a driver may open the Uber Driver app at any time and indicate that they are actively willing to accept passenger trip requests.[85] When a passenger indicates through their Uber app that they wish to receive a ride, Uber's matching algorithm sends the request to a nearby active driver, who then has an opportunity to accept or reject the request.[86] After accepting a request, the driver picks up the rider and drives them to their destination.[87] The fare for a particular ride is based on the time and distance of the trip, as well as the relative balance of riders and available drivers at the time of the request.[88] Drivers receive a portion of the fare the rider pays—a transaction Uber facilitates—according to the terms of the service agreement

81. *See NYSE: UBER*, GOOGLE FIN. (Mar. 30, 2022, 10:13 AM), https://perma.cc/ETC7-KQFV (showing a total market capitalization of $67.96 billion).

82. *See Driver: Requirements*, UBER TECHS., INC., https://perma.cc/R7QN-AFUU (detailing the signup process).

83. *See id.* (listing the documents required for signup).

84. *See id.* (indicating that after signing up, a screening process will review the driver's driving record and criminal history).

85. *See* UBER TECHS., INC., THE ROAD TO SUCCESS IS FULL OF AMBITIOUS DRIVERS LIKE YOU, _____ 33 (2020), https://perma.cc/BW3B-VGXT (PDF) ("Once you're online, the app will start connecting you with nearby trip requests that'll appear on your app screen.").

86. *See id.* ("*If* you tap Accept on a request . . . ." (emphasis added)).

87. *See id.* ("[Y]ou'll see an optional route to your rider's pickup location.").

88. *See id.* ("Your trip earnings are calculated based on the time and distance driven and can also include base fares, surge pricing, promotions, wait time, and additional fees.").

drivers acknowledge before they can use the app.[89] After each trip, riders and drivers are asked to rate each other on a scale of one to five stars.[90] A rider or driver with a meaningful number of bad ratings may have their access to the app revoked.[91] A driver may refuse any particular ride request, and may log off the app at any time and for any duration of time without penalty.[92]

Does this look like a conventional employment arrangement? On the one hand, Uber contends it "exercises minimal control over how its transportation providers actually provide transportation services to Uber customers."[93] Drivers decide when, where, and for how long they work, and have no direct supervision in the ordinary sense of the term.[94] Moreover, drivers supply their own vehicles and smartphones.[95] On the other hand, Uber—not drivers—sets the rates for trips conducted via its app.[96] Uber's algorithm also determines when and where rates should elevate in an attempt to better match the supply of drivers to the demand for rides (so-called "surge

89. *See* McGillis v. Dep't of Econ. Opportunity, 210 So. 3d 220, 222 (Fla. Dist. Ct. App. 2017) ("A prospective Uber driver must agree to the terms and conditions of Uber's 'Software Sublicense and Online Agreement.'").

90. *See Drive: Safety*, UBER TECHS., INC., https://perma.cc/5TKT-V47P (characterizing the two-way rating system as a safety measure).

91. *See id.* (indicating that low-rated trips are logged and that users may be removed to protect the Uber community).

92. *See Drive: Driving Basics*, UBER TECHS., INC., https://perma.cc/ZDE8-3MX8 ("If a trip . . . is farther than you want to drive, you can always decline."); *id.* ("Just tap Go Offline on the map when you don't want to get ride requests anymore.").

93. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).

94. *See id.* ("[D]rivers set their own hours and work schedules, . . . and are subject to little direct supervision.").

95. *See id.* ("[D]rivers . . . provide their own vehicles . . . ."). Citing the then-active Uber Transportation Provider Service Agreement, the *O'Connor* court did note that the plaintiff drivers used smartphones Uber provided. *See id.* at 1153 ("Uber supplies the critical tool of the business—smart phone with the Uber application."). This was an early practice of Uber's that no longer exists. *See, e.g.*, Uber Technologies, Inc., Platform Access Agreement (Jan. 6, 2020) (PDF) (on file with author) (containing no reference to Uber's provision of smartphones to drivers).

96. *See O'Connor*, 82 F. Supp. 3d at 1142 ("Uber sets the fares it charges riders unilaterally.").

pricing"),[97] and in some sense can be said to choose which of any number of online drivers receives a particular trip request.[98] Courts have noted that Uber "could no[t] survive without [drivers],"[99] which, under certain employee classification tests would weigh in favor of employee status.[100] Courts have also characterized Uber's driver signup process as "exercis[ing] substantial control over the qualification and selection of its drivers."[101] At least one court has construed Uber's five-star driver rating system as a form of monitoring or supervision by the company, since Uber sometimes disables the accounts of drivers whose average ratings drop below a defined threshold.[102]

With so many factors pulling in opposite directions, it is simply not obvious whether Uber drivers are employees or independent contractors. In fact, the court in *O'Connor v. Uber Technologies, Inc.*[103] ultimately denied Uber's motion for summary judgment on the question in favor of allowing a jury to decide.[104] Of course, Uber is not the only gig economy company whose technology-based business model challenges existing legal standards for employee classification.[105] However, it is

97. *See* Anubhav Pattnaik, *How Does Uber Do Surge Pricing Using Location Data?*, LOCALE.AI (Jan. 22, 2020), https://perma.cc/XGR3-8ANN ("Surge Pricing is an algorithmically fuelled [*sic*] technique that Uber (and now a lot of other on-demand companies) use when there is a demand-supply imbalance.").

98. *See O'Connor*, 82 F. Supp. 3d at 1142 (noting that Uber prohibits drivers from arranging pickups with passengers outside the app).

99. *Id.* at 1144.

100. *See id.* at 1153 (suggesting that a test that takes account of "economic realities" might be a better analytical tool for classifying Uber drivers than the California test the court was bound to apply).

101. *Id.* at 1142.

102. *See id.* at 1143 ("Uber documents further reveal that Uber regularly terminates the accounts of drivers who do not perform up to Uber's standards.").

103. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

104. *See id.* at 1153 ("[T]he [applicable California] test does not yield an unambiguous result. The matter cannot on this record be decided as a matter of law. Uber's motion for summary judgment is therefore denied.").

105. *See* Lobel, *supra* note 70, at 94 (enumerating other gig economy or "platform" companies including Amazon).

certainly one of the most recognizable,[106] and the lines it blurs are representative of the gig economy as a whole.

E. *Calls for Reform*

Twentieth century statutory employee protection schemes and twenty-first century revolutions in the ways people work have resulted in the proliferation of multifactor employee classification tests applied differently across jurisdictions—and even within jurisdictions for different purposes.[107] Scholars and courts alike have long lamented that the inconsistent application of such tests across and within jurisdictions has generated a labyrinthine body of law in need of reform.[108] Meanwhile, reformers have largely focused on reducing the confusion and ambiguity inherent in the nature of multifactor balancing tests and on combating employers' economic motivations to misclassify workers as independent contractors to avoid associated costs.[109] Other reformers have even suggested that the law abandon altogether its attempts to articulate a precise standard for employee classification based on status in light of the complexity and variability of personal services relationships and the difficulties inherent in strictly categorizing employees and independent contractors when the lines between them are so often blurry.[110] Accordingly, it is not

106. *See* Pearce & Silva, *supra* note 43, at 25 (labeling Uber the biggest and one of the more influential companies in the gig economy with 160,000 U.S. drivers as of 2016); Kennedy, *supra* note 37, at 989 (stating the Uber is the undisputed leader of the on-demand economy).

107. *See* Pinsof, *supra* note 40, at 348 n.39 ("The most common legal tests used to determine whether a worker is an employee or independent contractor include the common law right to control test, the economic realities test, the Internal Revenue Service twenty-factor test, and the ABC Test.").

108. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."); Pinsof, *supra* note 40, at 347–50 (arguing that the large number of different classification tests and factors has resulted in confusion and necessitates reform).

109. *See, e.g.*, Pinsof, *supra* note 40, at 349 ("Two related factors drive [worker misclassification]: ambiguity in the law and employers' economic motivations.").

110. Carlson, *supra* note 62, at 301.

surprising that the California state legislature acted in 2019 in an attempt to modernize its employee classification law. What is surprising, however, is the way in which it did so.

II. CALIFORNIA AB 5

A. *What Is California AB 5?*

In 2019, amidst growing pleas from groups of ridesharing drivers and related media reports,[111] the California State Legislature passed AB 5 in an effort to redress what it characterized as the harms resulting from employee misclassification in the state generally: loss of significant workplace protections and benefits for workers, unfairness to employers who must compete with companies that misclassify, loss to the state of needed revenue from companies that use misclassification to avoid tax obligations, erosion of the middle class, and a rise in income inequality.[112]

AB 5 split California's labor economy into two groups, each of which it subjects to a different employee classification test. Purporting to follow the California Supreme Court's approach in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, AB 5 requires by default that "any person providing labor or services for remuneration shall be considered an employee rather than an independent contractor"[113] unless the hiring entity demonstrates three conditions under the so-called "ABC Test": (A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[114]

111. *See, e.g.*, Siddiqui, *California Senate*, *supra* note 28.

112. *See* Cal. Assemb. B. No. 5 § 1(b)–(e), California 2019–20 Regular Session (Cal. 2019) (listing the purposes of the bill).

113. Cal. Assemb. B. No. 5 § 2(a)(1).

114. *See id.* (articulating the elements of the ABC Test).

Under AB 5, some categories of workers are exempt from the ABC Test.[115] Courts assess the employment status of workers in those categories under the control-of-work test articulated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[116] These categories include those licensed by the Department of Insurance, various medical professionals, securities brokers, investment advisors, direct salespersons, commercial fishermen, and professional service providers who meet several additional criteria.[117] The *Borello* test requires courts to consider first whether an employing entity "has all necessary control over the manner and means of accomplishing the result desired," regardless of whether that control is direct or indirect and whether the entity actually exercised it.[118]

That factor alone is not dispositive, however, and courts must further consider a multitude of other factors, including: whether the worker performing services holds themselves out as being engaged in an occupation of business distinct from the employer, whether the work is a regular or integral part of the employer's business, and whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work.[119]

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115. *See id.* § 2(b) ("Subdivision (a) and the holding in [*Dynamex*] . . . do not apply to the following occupations as defined in the paragraphs below . . . .").

116. *See* Cal. Assemb. B. No. 5 § 2(b) ("[D]etermination of employee or independent contractor status for individuals in [excepted] occupations shall be governed by Borello.").

117. *See* Cal. Assemb. B. No. 5 § 2(b) (listing exceptions).

118. *See Independent Contractor Versus Employee*, ST. OF CAL. DEP'T OF INDUS. RELS. (2021), https://perma.cc/W3W2-VAHS (laying out the department's interpretation of the *Borello* factors).

119. *Id.*; *see also* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 404–07 (Cal. 1989) (discussing the factors that courts may consider in addition to control-of-work). In addition to these factors, courts consider: whether the worker has invested in the business, such as in the equipment or materials required by their task; whether the service provided requires a special skill; the kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision; the worker's opportunity for profit or loss depending on their managerial skill; the length of time for which the services are to be performed; the degree of permanence of the working relationship; the method of payment, whether by time or by the job; whether the worker hires their own employees; whether the employer has a right to fire at will or whether a termination gives rise to an

The speed with which the bill passed through both houses of the California state legislature is notable. Only nine months expired between its introduction in December 2018 and its signing by the governor in September 2019.[120] During that time, AB 5 underwent significant change: the vast majority of the bill's final text—including *all* of the excepted occupations it ultimately recognized—came into being via amendments to the originally introduced version.[121] The only operative clause in the short original version of the bill expressed an intent to codify and clarify the application of the *Dynamex* decision in California law.[122] That is to say, the bifurcated approach to employee classification that AB 5 now embodies appears to have been the result of legislative compromises over the course of a handful of months, as opposed to a scheme the bill's author expressly envisioned. Nevertheless, AB 5's sponsor Lorena Gonzales declared upon the bill's passage that "California is now setting the global standard for worker protections for other states and countries to follow."[123] However, the compromises to which AB 5 ultimately acceded would have profound consequences with respect to AB 5's scope and effectiveness as a reform measure.

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action for breach of contract; and whether the worker and the potential employer believe they are creating an employer-employee relationship. *See id.*

120. *See AB-5 Worker Status: Employees and Independent Contractors: Bill History*, CAL. LEGIS. INFO. (Sept. 18, 2019), https://perma.cc/CH5A-F3RY (indicating that the bill was introduced in December 2018 and approved by Governor Gavin Newsome in September 2019).

121. *Compare* Cal. Assemb. B. No. 5, California 2019–2020 Regular Session (Cal. 2019) (introduced) (containing no exceptions), *with* Cal. Assemb B. No. 5, California 2019–2020 Regular Session (Cal. 2019) (chaptered) (containing numerous exceptions). The California state legislature provides an online tool for ease of comparison at https://perma.cc/N3NA-HNAQ.

122. *See* Cal. Assemb. B. No. 5 § 2(a), California 2019–2020 Regular Session (Cal. 2019) (introduced) ("It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in *Dynamex* and would clarify the decision's application in state law.").

123. *Governor Signs Lorena Gonzalez's AB 5 to Stop Misclassification and Protect Millions of Workers*, ASSEMB. WOMAN LORENA GONZALEZ (Sept. 18, 2019), https://perma.cc/KGL4-PKWN [hereinafter *Gonzalez Statement*].

B. *How Much of the Economy Does AB 5 Cover?*

One of the California legislature's motivations for enacting AB 5 was to "restore[] . . . important protections to potentially several million workers who have been denied . . . basic workplace rights that all employees are entitled to under the law,"[124] including "minimum wage, workers' compensation . . . unemployment insurance, paid sick leave, and paid family leave."[125] As such, achieving some sense of the scale of the state's independent contractor economy—as well as the scope of the bill's coverage of that category of individuals—is instructive in assessing AB 5's potential to effect its purported goal.

The U.C. Berkeley Labor Center estimated in 2017 that approximately 8.5 percent of California workers were independent contractors.[126] There is considerable uncertainty as to whether that percentage is growing, and trend data for California specifically are not available.[127] The Berkeley analysis highlighted several difficulties associated with counting independent contractors.[128] First, the field is replete with inconsistent definitions. Due to the popularity of so-called "labor platform" apps like Uber, Lyft, and TaskRabbit, many recent studies have focused only on trying to count these apps' users while overlooking more traditional independent contractors.[129] Accordingly, the possibility arises that counts reporting large and increasing numbers of independent contractors may simply be indexing the rapid growth in

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124. Cal. Assemb. B. No. 5 § 1(e).

125. *Id.*

126. BERNHARDT & THOMASON, *supra* note 52, at 7.

127. *See* Brett Collins et al., *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns*, IRS (Mar. 25, 2019), https://perma.cc/2JKT-HDZ5 (PDF) (finding some increase in independent work since 2007 nationally but questioning whether the increase is due to online platform economy jobs supplanting traditional full-time work).

128. *See* BERNHARDT & THOMASON, *supra* note 52, at 4 (discussing challenges in the study's methodology).

129. *See id.* ("There is currently no consensus definition of the term 'gig work' . . . the singular focus on Uber is impeding our ability to get an accurate understanding of what has (and has not) changed in the workplace . . . .").

popularity of such apps.[130] Whether this constitutes an employee misclassification problem is then a matter of perspective: if one starts from the premise that companies who engage app-based workers *should* classify those workers as employees rather than independent contractors, and if they currently do not, one finds rampant misclassification. However, if one sees the phenomenon of app-based work as necessitating an overhaul of the ancient employee-independent contractor dichotomy,[131] then a count of independent contractors that includes large numbers of app-based workers obscures any underlying misclassification problem that may or may not exist among more traditional occupations.

A second methodological challenge to counting independent contractors is the lack of reliable state-level data.[132] A separate 2015 joint report by the United States Bureau of Labor Statistics and the Government Accountability Office estimated that approximately 12.9 percent of the United States workforce were then classified as independent contractors—representing nearly a twofold increase from 2005.[133] However, the Berkeley study was unable to verify the same trend at the California state level.[134]

Third, the Berkeley study's authors highlighted a tendency of independent contractors to take on independent work as supplemental to a primary source of income, making it difficult to determine precisely who should factor into a count of independent contractors.[135] This has an important bearing on

130. *See id.* at 6 ("Our definition [of gig work] encompasses—but is broader than—the on-demand platform work that is often the focus of gig economy debates.").

131. *See* Jennifer Pinsof, *supra* note 40, at 344–45 ("For over 100 years, America has classified workers into these two categories, yet the law continuously fails to do so in a uniform, predictable, and purposeful way.").

132. *See* BERNHARDT & THOMASON, *supra* note 52, at 10 ("To summarize, we are not able to give a definitive answer as to whether the rate of independent contracting has grown in California.").

133. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNING, AND BENEFITS 16 (2015).

134. *See supra* note 132 and accompanying text.

135. *See* BERNHARDT & THOMASON, *supra* note 52, at 5 ("[T]he distinction between primary jobs and jobs that provide supplemental income becomes critical here. In the popular press as well as some gig economy studies, the two are often conflated . . . .").

whether a misclassification problem truly exists or is as bad as raw numbers suggest.[136] For example, if all Californian independent contractor work were supplemental to a primary job through which individuals already received employee benefits and protections, then even widespread misclassification would not wholly deprive anyone of all employee benefits and protections.[137]

Finally, the Berkeley study pointed to a lack of reliable data on the number of individuals engaged with labor platform apps (e.g., Uber, Lyft, TaskRabbit), although the analysis quoted a study that put this number at 0.5 percent of California workers in 2016.[138] Companies like Uber and Lyft generally do not report this information consistently, which has led some to derive estimates based on speculation and the occasional cryptic remarks of the companies.[139] The companies, for their part, have also struggled to define a reliable standard for counting active drivers, since the fluid nature of app-based work makes it impossible to tell whether an individual who uses the app infrequently has stopped driving altogether or is simply taking time to do something else.[140]

Methodological challenges aside, in 2019, following passage of AB 5, the U.C. Berkeley Labor Center published a new study

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136. *See id.* at 6 ("If we count a W-2 worker who earns $1,500 a year in 1099 income as a gig worker, then she will be falsely counted as part of the gig workforce that doesn't have . . . access to workplace benefits or the safety net—even though she in fact is fully covered . . . .").

137. *See supra* note 136 and accompanying text.

138. *See The Online Platform Economy: Has Growth Peaked?*, J.P. MORGAN CHASE & CO. INST. (Nov. 2016), https://perma.cc/F9MA-VPTT (PDF) (finding that 0.5 percent of American adults nationally participated in the online platform economy in the month before publication, and assuming California follows the national average).

139. *See* Rana, *supra* note 30 ("Uber says fewer than 2% of its more than 200,000 drivers in California use its app for 40 hours or more a week; Lyft says 86% of its more than 300,000 drivers in the state driver fewer than 20 hours a week.").

140. *See* Jonathan Cousar, *How Many Uber Drivers Are There? We Dive in to Find Out*, RIDESTER (Jan. 7, 2021), https://perma.cc/3Q79-Q4UZ ("The nature of the Uber driver gig makes it extremely susceptible to driver churn, which means [Uber] constantly need[s] to recruit drivers."); *see also* Brenton J. Malin & Curry Chandler, *Free to Work Anxiously: Splintering Precarity Among Drivers for Uber and Lyft*, 10 COMMC'N, CULTURE & CRITIQUE 382, 385–91 (2017) (detailing the broad spectrum of motivations drivers have for using and ceasing to use the Uber and Lyft apps).

estimating that the bill's stricter employee classification test will likely apply to 91 percent of independent contractors.[141] In sum, estimating the size of the problem AB 5 purports to solve is a difficult task with uncertain results—which may be why it hedges by referring to "potentially millions"[142] of misclassified workers—but the best available data indicate that independent contractors make up a meaningful portion of the California labor economy, and AB 5's ABC Test likely applies to nearly all of them.

III. AB 5 AS REFORM

A. *The Contours of Employee Classification in California*

The California Supreme Court defined the relevant boundaries of employee classification standards in two seminal cases: *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* and *Dynamex Operations West, Inc. v. Superior Court*. Close examination of these two cases—in particular of the rationale that guided each decision—reveals some discord between the court's application of the ABC Test and the California legislature's attempt, through AB 5, to "codify the decision of the California Supreme Court in *Dynamex*" and "clarify the decision's application in state law."[143]

In *Borello*, cucumber growers sought mandamus review of a Department of Industrial Relations order stating that agricultural laborers engaged to harvest cucumbers were not independent contractors, and accordingly, that they were not exempt from workers' compensation coverage.[144] The California Supreme Court upheld the order, finding that the agricultural laborers were employees within the meaning of the Workers'

141. *See* Sarah Thomason et al., *Estimating the Coverage of California's New AB 5 Law*, U.C. BERKELEY CTR. FOR LAB. RSCH. & EDUC. (Nov. 2019), https://perma.cc/6KTP-WEZN (PDF) (estimating that AB 5 will apply by default to 64 percent of independent contractors in the state and to another 27 percent unless additional criteria are met).

142. Cal. Assemb. B. No. 5 § 1(e).

143. Cal. Assemb. B. No. 5 § 1(d).

144. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 401–03 (Cal. 1989) (summarizing the facts and procedural history of the case).

Compensation Act.[145] First, the court noted that the workers' compensation statute plainly excluded "independent contractors" and explicitly used the common law "control-of-work" test in its definition of the term.[146] However, it acknowledged that the "control" test, "applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements."[147] Accordingly, it determined that even if control is the most important or significant consideration, courts should evaluate employment status in light of the history and remedial purpose of the relevant statute[148] and in conjunction with at least thirteen additional factors drawn from the Restatement Second of Agency and other jurisdictions' jurisprudence, as may be appropriate to the particulars of an individual case.[149] The court characterized its holding in *Borello* as striking a balance between rigid application of the common law control test and a flexible approach that allows for deference to a statute's remedial or protective purpose.[150]

It is entirely plausible to read *Dynamex* as consistent with the balancing approach in *Borello*. In *Dynamex*, a delivery company sought mandamus to compel the Superior Court of Los Angeles County to vacate its order denying class certification for two delivery driver plaintiffs. The plaintiffs had alleged that the company's misclassification of drivers as independent contractors rather than employees violated provisions of a state Industrial Wage Commission (IWC) wage order governing the transportation industry and various sections of the Labor

145. *See id.* at 407 ("By any applicable test, we must dismiss the growers' claims here.").

146. *Id.* at 404.

147. *Id.*

148. *See id.* at 406 ("We agree that under the Act, the 'control-of-work-details' test for determining whether a person rendering service to another is an 'employee' or an excluded 'independent contractor' must be applied with deference to the purposes of the protective legislation.").

149. *See id.* at 404 ("[T]he individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (citation omitted)); *see also supra* note 119 and accompanying text (enumerating the additional factors).

150. *See id.* at 406–07 (discussing the "balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the [Workers' Compensation Act]").

Code.[151] The controversy concerned language in the wage order defining "employee" as any person engaged, suffered, or permitted to work by an employer.[152] The core issue presented was whether the trial court erred in relying upon this "suffer or permit to work" language when determining whether individuals were employees covered by the provisions of the wage order, or instead, excluded independent contractors.[153] The California Supreme Court held that the trial court properly relied on the "suffer or permit to work" language in the wage order.[154] Further, the court announced that the appropriate test for whether an individual meets the "suffer or permit to work" standard for the purposes of a wage order is the ABC Test.[155] According to the court, "the IWC has the authority, in promulgating its wage orders, to define the standard for determining when an entity is to be considered an employer for purposes of the applicable wage order."[156] The IWC, in choosing the "suffer or permit to work" language, adopted a standard that history and California Supreme Court precedent recognize as exceptionally broad.[157] Moreover, the court said *Borello* required it to give deference to the remedial purpose of the work order at issue, which in this case was to secure minimum wages and maximum hours for workers in the transportation industry.[158] However, the court acknowledged that the "suffer or permit to work" standard, if applied literally, would encompass even those

151. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 5–7 (Cal. 2018) (summarizing the facts and procedural history of the case).

152. *See id.* at 13 (quoting the language of the relevant wage order).

153. *See id.* (stating that the court granted the petition for review to consider this question).

154. *See id.* at 30 ("[T]he suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect.").

155. *See id.* at 35 (concluding that the ABC Test is the test most appropriate and consistent with the history and purpose of the suffer or permit to work standard in California's wage orders).

156. *Id.* at 25.

157. *See id.* at 32 ("[T]he suffer or permit to work standard must be interpreted and applied broadly to include within the covered 'employee' category *all* individual workers who can reasonably be viewed as working in the [hiring entity's business]." (quotation omitted)).

158. *See id.* at 29 ("[T]he *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question.").

workers traditionally—and indisputably—classified as independent contractors.[159] Accordingly, it brought in the ABC Test to distinguish those workers who "could not reasonably have been intended by the wage order to be treated as employees of the hiring business."[160]

A comparison of these cases reveals three takeaways. First, nowhere in *Dynamex* did the California Supreme Court indicate that *Borello* was no longer good law, nor that the ABC Test should be applied by default to answer all employment classification questions.[161] To the contrary, the *Dynamex* court looked favorably upon *Borello* and endeavored to give it continued effect by adhering to its admonition that courts should evaluate employment status in light of the history and remedial purpose of the wage order at issue.[162]

Second, the *Dynamex* court's invocation of the ABC Test appears to have been the result of grappling with, on the one hand, the proper amount of deference owed to the IWC wage order's exceedingly broad definition of employee and, on the other, the practical reality that not all workers could possibly be employees.[163] The court reasoned that if the wage order's standard for the definition of employee would unreasonably subsume all conceivable workers, some principled rule was still needed to govern the distinction between employees and independent contractors.[164] The ABC Test thus offered the court an option to strike the balance it sought on the facts in *Dynamex*. In short, the *Dynamex* decision stands for the proposition that, when the language of a remedial statute or regulation demands a stricter employee classification standard, one way to give that standard effect without completely eliminating the category of independent contractors is to apply the ABC Test.[165] For other purposes, there is no reason to read *Dynamex* as requiring

159. *See id.* at 30 ("It is true that, when applied literally and without consideration of its history and purposes in the context of California's wage orders, the suffer or permit to work language . . . does not distinguish . . . traditional independent contractors . . . .").

160. *Id.*

161. *See supra* note 155 and accompanying text.

162. *See supra* note 148 and accompanying text.

163. *See supra* note 159 and accompanying text.

164. *See supra* note 159 and accompanying text.

165. *See supra* note 159 and accompanying text.

application of that test in lieu of the common law control test used in *Borello*.

Finally, nothing in either *Borello* or *Dynamex* suggests that the question of which test to apply should hinge on the industry or occupation of the complaining worker. The *Borello* court, for its part, relied on its observation that worker relationships are many and varied to justify its flexible approach.[166] And the *Dynamex* court diverged from *Borello* only because it interpreted the wage order in question as having necessitated it.[167]

In sum, while it may be tempting to read *Dynamex* as a pure departure from *Borello* insofar as the former introduced an employment classification test theretofore unknown in California jurisprudence—indeed, some scholars have[168]—to do so would be to elide over nuanced factual differences between the two cases and the *Dynamex* court's efforts to cabin its holding narrowly.

B. *Which Test Is Best?*

California AB 5 incorporates both *Borello*'s control-of-work test and *Dynamex*'s ABC Test. The latter applies by default for all employee classification questions under state law,[169] while the former applies in a handful of explicitly excepted industries.[170] This bifurcated classification regime raises new legal and policy questions. The most obvious category of questions is whether one test—or a combination of the two—is better than the other, either objectively or when considered in relation to a specific purpose. A related inquiry is whether AB 5's approach is consistent with or diverges from the California Supreme Court's rationale for introducing the ABC Test in *Dynamex* in the first place. The second major category of

166. *See supra* note 147 and accompanying text.

167. *See supra* notes 154–155 and accompanying text.

168. *See, e.g.*, Rosenfeld, *supra* note 38, at II.-115 ("Part II discusses how the *Dynamex* decision represents a departure from common law precedent and examines possible effects of the change.").

169. *See* Cal. Assemb. B. No. 5 § 2(a)(1) (requiring application of the ABC Test for the purposes of the Labor Code, the Unemployment Insurance Code, and all wage orders of the Industrial Welfare Commission).

170. *See id.* § 2(b) (listing exceptions).

questions pertains to the consequences—intended or otherwise—of the AB 5 regime.

It may seem obvious that asking which of two tests is objectively better in the context of a fact-dependent inquiry like employee classification is frivolous. After all, the ever-changing nature of employment relationships and corresponding demand for responsive approaches have been, in large part, the driving forces behind the proliferation of multifactor common law tests.[171] As such, each new test is only as good as its ability to resolve the unique employee classification challenge presented in the case that gives rise to it. In a sense, a court's decision to introduce a new employee classification test where old ones are insufficient does represent a form of progress. That incremental, case-specific improvement appears to be what one scholar had in mind when she praised the *Dynamex* court for "correctly updat[ing] common law doctrine concerning worker misclassification to address abuses in the modern economy."[172]

However, recognition that courts "can, and should, reform outdated common law doctrine"[173] in response to changing societal norms is not a novel concept,[174] nor is it the same as proclaiming the objective supremacy of the ABC Test over the *Borello* test. In determining the validity of the latter contention, close examination of the California Supreme Court's rationales in both *Borello* and *Dynamex* reveals no clear answer. While it is true the ABC Test is more concise, comprising only three factors[175] to *Borello*'s control-plus-thirteen,[176] the *Dynamex* court adopted and applied the ABC Test only in the context of

171. *See supra* Part I.B–C (discussing the factors that have contributed to the proliferation of such tests).

172. Rosenfeld, *supra* note 38, at II.-115.

173. *Id.* at II.-131.

174. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (Andrew L. Kaufman ed., Quid Pro Law Books 2010) ("[T]he problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle . . . ; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.").

175. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 7 (Cal. 2018) (articulating the three factors of the ABC Test).

176. *See* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399, 404–07 (Cal. 1989) (articulating the factors to be considered in a *Borello* analysis).

wage orders of the IWC and only because, following its own approach in *Borello*, deference to the broad language and remedial purpose of the wage order at issue necessitated doing so.[177] The *Dynamex* court indicated that the disadvantages of a more flexible multifactor test were heightened in the context of a wage order pertaining to minimum wages and maximum hours, but remained silent as to whether the ABC Test was objectively better than the *Borello* approach for all use cases.[178] To the contrary, the *Dynamex* court acknowledged that there could be advantages to using a multifactor test such as the "economic realities" test used in the federal Fair Labor Standards Act context, but declined to adopt it because California case law interpreting the "suffer or permit to work" language of the wage order in question predated the federal adoption of that test.[179] Lastly, the *Dynamex* court did not purport to part with its own acknowledgement in *Borello* that rigid application of a single standard could not adequately capture the variety of work relationships present in the labor market.[180] A close analysis of *Borello* and *Dynamex* thus demonstrates that the California Supreme Court saw the ABC Test not as the best available employee classification test for all applications, but as a useful device through which to marry precedent interpreting the "suffer or permit to work" standard as used in California wage orders with the practical necessity of preserving a meaningful category of independent contractors.[181]

177. *See supra* Part III.A (discussing the *Dynamex* court's rationale).

178. *See Dynamex*, 416 P.3d at 35 ("We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors.").

179. *See id.* at 33 ("A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages.").

180. *See Borello*, 769 P.2d at 404 (acknowledging that the "control" test, "applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements").

181. *See Dynamex*, 416 P.3d at 35 (concluding that it is most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders to interpret that standard as requiring hiring entities to demonstrate each factor of the ABC Test to establish that a worker is an independent contractor).

The California legislature's treatment of the ABC Test in AB 5 is different in character. First, rather than drawing on the history and purpose of certain statutory language as the basis for which to distinguish between employment relationships that warrant application of the ABC Test as opposed to those for which *Borello* suffices, AB 5 makes the distinction at the industry or occupational level.[182] That is to say, AB 5 invokes the ABC Test not to give proper effect to existing statutory language (as the *Dynamex* court did), but rather to declare that whole occupations should be subject to a more stringent employee classification test.[183]

Second, AB 5 explicitly codified the ABC Test used in *Dynamex* "[f]or purposes of the provisions of [the Labor Code] and the Unemployment Insurance Code, and for the wage orders of the Industrial Welfare Commission."[184] The careful reader will find this language to be an expansion of the holding in *Dynamex*. Indeed, *Dynamex* narrowly pertained to a wage order of the IWC whose exceedingly broad definition of "employ" necessitated invocation of an employee classification test that would not unduly include workers traditionally recognized as independent contractors.[185] For that purpose, the *Dynamex* court adopted the ABC Test.[186] Nothing in the opinion suggests that the court intended use of the ABC Test to extend to *all* statutory definitions of "employ," or to situations in which the *Borello* test would suffice without subsuming traditional independent contractors. In fact, AB 5 curiously notes that "[n]othing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term 'employ,' which were not addressed by the holding of *Dynamex*,"[187] suggesting the legislature was duly aware of the narrowness of the *Dynamex* holding. And yet, the bill

182. *See* Cal. Assemb. B. No. 5 § 2(b) (listing occupations that are excepted from application of the ABC Test).

183. *See* Trey Kovacs, *California to Eliminate Independent Work*, COMPETITIVE ENTER. INST. (Sept. 11, 2019), https://perma.cc/2UC9-7VTZ (arguing that the ABC Test would effectively make "employee" the default classification of workers in the state of California).

184. Cal. Assemb. B. No. 5 § 2(a)(1).

185. *See supra* note 181 and accompanying text.

186. *See supra* note 181 and accompanying text.

187. Cal. Assemb. B. No. 5 § 1(f) (emphasis added).

simultaneously expanded use of the ABC Test to all manner of new applications outside the IWC wage order context,[188] thus accomplishing a feat the *Dynamex* court saw no need to take on. That is to say, while the *Dynamex* court appears to have remained true to *Borello*'s spirit of flexibility, the California legislature appears to have decided emphatically that the ABC Test is in some way objectively better than the control-of-work test.

It bears addressing in a discussion of the relative merits of both tests that any attempt to regulate employee misclassification involves an inherently recursive inquiry: whether a state perceives itself to have an employee misclassification problem necessarily depends on how it defines employee misclassification to begin with. If any state proceeds to adopt a new, stricter employee classification test, then the urgency of its employee misclassification "problem" naturally balloons immediately. In that sense, the ABC Test may be better than the control-of-work test for the purpose of opening the California courts' doors to a larger number of plaintiffs the legislature believed had suffered some wrong, but that belief itself is a matter of perspective that says nothing about the objective supremacy of one test over the other.

To be sure, AB 5's expansive application of the ABC Test was an exercise of the legislative prerogative.[189] The California legislature was not bound to produce a bill that perfectly—or even remotely—mirrored the California Supreme Court's holding in *Dynamex*, and indeed, it could have enacted AB 5 in the absence of any new employee classification jurisprudence. What is interesting about AB 5's expansive adoption of the ABC Test is not that it diverges from the narrow *Dynamex* holding, but that it invokes *Dynamex* at all.[190] This is especially true in light of the opinion's extensive treatment of the advantages and

188. *See id.* § 2(a)(1) (stating that the ABC Test should apply for all purposes of the Labor Code and the Unemployment Insurance Code).

189. *See* Rosenfeld, *supra* note 38, at II.-131 (arguing that AB 5 reflects legislative acceptance of the court's responsibility to update common law doctrine to reflect the times).

190. *See* Cal. Assemb. B. No. 5 § 1 (invoking *Dynamex* as a motivating factor behind the bill).

disadvantages of different tests for different purposes,[191] and the fact that the *Dynamex* court's ultimate conclusion as to which test to apply was motivated by a view that it was bound by the history and purpose of the suffer or permit to work standard in California,[192] a restriction to which the legislature—in contrast to the court—was not subject. Nevertheless, AB 5 addresses *Dynamex* as if it had entirely upended employee classification jurisprudence within the state,[193] and as if the legislature had no choice but to clarify—rather than determine outright—its holding's application to state employment law.[194]

The text and structure of AB 5 appear to signal some discomfort on the part of the legislature with the idea of broadly adopting the ABC Test. First, the preamble itself acknowledges the narrowness of the *Dynamex* holding with respect to wage orders of the IWC, noting that nothing in the bill should be interpreted to affect the application of alternative definitions of "employ" in such orders other than the "suffer or permit to work" definition addressed in that case.[195] Second, the bill retains the *Borello* test for a number of excepted industries.[196] The bill does not explain why the legislature selected those occupations to receive special treatment, but there appears to have been a process by which industry groups lobbied for exceptions, some of which were met with denial.[197] It is relatively easy to imagine

191. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 33–36 (Cal. 2018) (discussing the various employee classification tests used in other jurisdictions).

192. *See supra* note 181 and accompanying text.

193. *See* Cal. Assemb. B. No. 5 § 1(a) (citing the California Supreme Court's decision in *Dynamex* as the very first consideration for the bill's enactment).

194. *See id.* § 1(d) ("It is the intent of the Legislature in enacting this act to include provisions that would codify the decision of the California Supreme Court in *Dynamex* and would clarify the decision's application in state law.").

195. *See id.* § 1(f) ("*Dynamex* . . . interpreted . . . the 'suffer or permit' definition, from the wage orders of the [IWC]. Nothing in this act is intended to affect the application of alternative definitions from the IWC wage orders of the term 'employ,' which were not addressed by the holding of *Dynamex*.").

196. *See id.* § 2(b) (listing exceptions).

197. *See* Rosenfeld, *supra* note 38, at II.-128 (discussing lobbying efforts by various industries to secure exceptions); *see also* Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), https://perma.cc/NPJ7-ZCQ9 (stating that Uber and Lyft failed to get an exception under AB 5).

why these groups would have petitioned for excepted status: the three prongs of the ABC Test are exceedingly difficult for hiring entities to prove.[198] One might question whether a test that achieves near uniformity of outcome in a single direction is truly beneficial reform. In any case, the fact that the legislature singled out certain occupations for more lenient treatment under the *Borello* test is evidence that it recognized the need for some degree of flexibility in its employee classification regime.

The question that naturally arises in the presence of this recognition is whether AB 5's employee classification scheme effectively strikes the proper balance between flexibility and the bill's stated purpose of reducing misclassification in the state.[199] It likely does not. First, it is not clear that either the ABC or *Borello* tests are flexible enough to respond adequately to rampant innovation in the labor economy.[200]

Second, AB 5 strips hiring entities in non-excepted industries of the ability to argue in court that the *Borello* factors support independent contractor status.[201] This is odd not only in light of the ever-evolving nature of work and employment relationships, but because neither the *Dynamex* court nor the California legislature found courts wholly incapable of reliably applying *Borello*.[202]

Third, the ABC Test itself "perpetuates a deficiency" in agency and employment law because it "cannot be used to evaluate situations where workers functionally serve as independent contractors but are economically vulnerable because of a dependence on a single employer or single group of

198. *See* Kovacs, *supra* note 183 (arguing that the ABC Test is "nearly impossible to satisfy").

199. *See* Cal. Assemb. B. No. 5 § 1(b)–(e) (citing misclassification of workers as a primary purpose of the bill).

200. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (noting that Uber's novel sharing economy business model created significant challenges for applying the common law test and suggesting the need for reform); Lobel, *supra* note 70, at 94 (discussing the challenges the platform economy presents to existing employment law).

201. *See* Cal. Assemb. B. No. 5 § 2(a)(1) (applying the ABC Test by default to all non-excepted industries).

202. *See id.* § 2(b) (retaining the *Borello* test for at least some applications); *see also id.* § 1 (listing the legislature's purposes for enacting the bill, none of which is failure by the courts to reliably apply the *Borello* test).

employers."[203] Unlike under the *Borello* test, hiring entities seeking to demonstrate independent contractor status under the ABC Test must meet *all* of the test's prongs in order to prevail.[204] Prong "C" in particular is problematic because it requires hiring entities to somehow validate at the outset of a contract for labor or services whether a worker is independently engaged in the kind of work subject to the agreement.[205] It further fails to consider the growing class of entrepreneurs who work as independent contractors only to earn supplemental income.[206] According to a report by the Competitive Enterprise Institute, "[t]hese individuals might choose to work for only one client. Such an individual who operates with complete autonomy . . . could nonetheless fail an ABC test because the individual chooses not to actively market the individual's services to others."[207] In sum, AB 5 amounts to a statutory declaration that workers in industries not explicitly excepted by the bill are employees,[208] leaving hiring entities in those industries no recourse but to lobby for an amendment or challenge their un-excepted status other than through statutory amendment or referendum ballot measure.[209]

Finally, in adopting the ABC Test, AB 5 wholly ignores a central criticism of status-based classification generally. Richard Carlson has argued that the effort and trouble required to draw an effective and fair bright line between employees and

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203. Pearce & Silva, *supra* note 43, at 2.

204. *See* Cal. Assemb. B. No. 5 § 2(a)(1) (using an "and" rather than an "or" operator to relate the three factors of the ABC Test).

205. *See id.* (requiring, as prong "C," that "[t]he person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed"); Kovacs, *supra* note 183 (questioning whether hiring entities have the capacity or should have the responsibility to investigate workers' day-to-day activities beyond their ability to perform the job in question).

206. *See* COMPETITIVE ENTER. INST., THE CASE AGAINST THE PROTECTING THE RIGHT TO ORGANIZE ACT 8 (2019), https://perma.cc/Q9UL-SX9W (PDF) (discussing the disadvantages of prong "C" for hiring entities).

207. *Id.*

208. *See* Kovacs, *supra* note 183 (arguing that the ABC Test effectively makes "employee" the default classification for workers in California).

209. *See* Kerr, *supra* note 10 (stating that Uber, Lyft, Doordash, Postmates, and Instacart invested $110 million in support of Proposition 22, a ballot measure to regulate the online platform economy outside the scope of AB 5).

independent contractors might be worth it in "a simpler world in which 'employees' were naturally equated with persons needing statutory protection, and non-employees equated with persons needing none."[210] However, Carlson says that, because in reality workers often toe the line between designations, a more practical approach would be to afford benefits and protections based on the character of the transactions between the parties instead of their status.[211] He proposes to "regulate compensation for services rather than 'employee' wages, workplaces rather than places where 'employees' work, and discrimination in the selection and retention of individuals to work instead of discrimination against 'employees.'"[212]

On the one hand, it is hard to see how Carlson's approach would contravene *Borello*, *Dynamex*, or the California legislature's stated intentions in passing AB 5. On the other hand, it is easy to see that AB 5 is inconsistent with such an approach. Categorically subjecting entire occupations to the ABC Test—especially given that test's overwhelmingly likely determination that individuals providing any paid service are employees—fundamentally overlooks Carlson's central contention that no court or legislature has successfully articulated a reliable standard by which to classify workers absent some deeper consideration of the character of the transactions between the parties.[213]

C. *What Consequences Result from AB 5's Bifurcated Approach?*

The negative implications of AB 5 are potentially far-ranging, likely unintentional, and currently little understood.[214] The passage of AB 5 engendered immediate

210. Carlson, *supra* note 62, at 299–300.

211. *See id.* at 301 (describing Carlson's proposed better approach).

212. *Id.*

213. *See id.* (describing the failures of courts and legislatures to articulate a workable status-based classification test).

214. *See* Rosenfeld, *supra* note 38, at II.-131 ("[I]t is still too early to tell how AB 5 will impact workers, businesses, and other stakeholders in California and beyond . . . ."); Natalie Kalbakian, *Workers of the Gaming World, Unite! The Uncertain Future of the Video Game Industry in the Aftermath of AB 5*, 40 LOY. L.A. ENT. L. REV. 351, 371 (2020) ("Because of the overlap in employment classification practices between the video game

confusion, outrage, and litigation from industries seeking to clarify or change their excepted status.[215] This subpart addresses the direct consequences of the bill, as well as reactions from non-excepted industry and their effect on the bill's ability to accomplish its stated goals.

1. Direct Consequences

Much has been made in the media of opposition to AB 5 by ridesharing and other gig economy companies, whose business models depend on classifying drivers and delivery workers as independent contractors and who have not offered traditional wage protections or benefits for those workers.[216] This is perhaps unsurprising, as gig economy opportunities have become increasingly popular in recent years,[217] and the history of AB 5 suggests that negative public sentiment toward these companies' business models was a motivating factor behind the bill.[218] But the larger media narrative around AB 5's impact in the context of companies like Uber, Lyft, and DoorDash has obscured its effects on less sophisticated or more fragmented sectors such as non-profit theater, wine-tasting, tourism, independent video game development, translation and interpretation services, freelance writing, and music.[219]

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industry and traditional gig companies, AB 5 may capture a broader swath of the state's economy than the legislature expressly intended."); Gary Quackenbush, *Nonprofit Theater the Latest Industry to Oppose California's New Independent Contractor Law*, N. BAY BUS. J. (Feb. 27, 2020), https://perma.cc/L5VY-6LPQ (discussing nonprofit theater, wine-tasting, and other tourism industry companies' opposition to and confusion about the bill).

215. *See, e.g.*, Faiz Siddiqui, *Uber and Lyft Must Make Their Drivers in California Full Employees, Judge Rules*, WASH. POST (Aug. 10, 2020, 6:24 PM) [hereinafter Siddiqui, *Uber and Lyft*], https://perma.cc/6VNS-T8PE (discussing ridesharing companies' opposition and legal challenges).

216. *See id.* (describing ridesharing companies' reliance on an independent contractor model).

217. *See* Sebastian Herrera, *Uber, Lyft Drivers Torn as California Law Could Reclassify Them*, WALL ST. J. (Sept. 21, 2019, 7:00 AM), https://perma.cc/N4GQ-6PZV (stating that Lyft claims to have 325,000 drivers in California; Uber more than 200,000).

218. *See supra* Part II.A (discussing the motivating factors behind the bill).

219. *See* Quackenbush, *supra* note 214 (discussing AB 5's effects on non-profit theater and other tourism and cultural sectors); Kalbakian, *supra* note 214, at 371 (video game development); AM. TRANSLATORS ASS'N, STATEMENT OF POSITION REGARDING CALIFORNIA ASSEMBLY BILL 5 AND REQUEST

Critiques of AB 5 from these sectors largely focus on the speed with which the bill passed, the arbitrariness of some of its terms, and the likelihood that compliance will result in reduction of available services or increased prices to consumers.[220] California attorneys who specialize in labor and non-profit business law have decried AB 5's complexity, calling it "not workable for many sectors of the economy," "poorly written," and "not well thought through."[221] These critiques are not merely academic. For example, major media outlet Vox severed relationships with hundreds of freelance writers and editors rather than reclassify them as employees.[222] In May 2020, the Lake Tahoe Music Festival announced that it was shutting down after forty years due in part to AB 5.[223] In view of these challenges, Maria Figueroa, Director of Labor and Policy Research at the Worker Institute at Cornell University's School of Industrial Labor Relations, advised other states considering similar legislation to "hold off" until they can "come up with legislation that would be narrow enough in terms of its parameters to cover platform workers . . . [but] would enable these states to avoid these challenges."[224]

FOR EXEMPTION (2020), https://perma.cc/EF4U-WR3J (PDF) (freelance translators and interpreters); Eli Rosenberg, *Can California Rein in Tech's Gig Platforms? A Primer on the Bold State Law that Will Try*, WASH. POST (Jan. 14, 2020, 1:32 PM), https://perma.cc/P8Z3-5X38 (freelance writing); Nate Hertweck, *What California's New Gig Economy Labor Law Means for Music Makers*, RECORDING ACAD. (Sept. 20, 2019, 2:13 PM), https://perma.cc/5UAB-DZ6Y (producers, engineers, studio and live musicians, and publicists).

220. *See* Quackenbush, *supra* note 214 (quoting executive director of Californians for the Arts and California Arts Advocates Julie Baker with reference to AB 5's quick passage and legal ambiguities); *id.* (quoting executive director of Transcendence Theater Company Brad Surosky's suggestions that AB 5 may result in cuts to summer and educational programs).

221. *Id.* (quoting labor law attorney Lisa Ann Hilario with Spaulding, McCullough & Tansil LLP and Daryl Reese with Johnson Thomas, Attorneys at Law, PC).

222. *See* Rosenberg, *supra* note 219 (discussing Vox's decision not to reclassify writers and editors in light of AB 5's passage).

223. *See* Bonnie Dyer, *Update for 2021*, LAKE TAHOE MUSIC FESTIVAL (May 13, 2020), https://perma.cc/SKN7-7ZVA ("Early in 2020, new CA employment law requirements added to the challenge of meeting our financial goals . . . . So we will bring our festival to a close . . . .").

224. Rosenberg, *supra* note 219.

2. Non-Excepted Industry Reactions

Platform companies like Uber and Lyft initially confronted the changing employee classification landscape in California on three fronts. First, both companies formally engaged with the California legislature during the drafting of AB 5 to seek exceptions or alternative classification pathways for gig economy workers.[225] Second, in the immediate aftermath of AB 5's passage, both companies sued to enjoin enforcement of the bill against them.[226] Third, in the background, Uber accelerated development of a set of new features designed to increase driver flexibility while using the app, including adding the ability to see estimated trip fares up front and then reject a trip without penalty.[227]

Uber appears to have based its new feature development on prior litigation outcomes. Analysis of earlier California cases holding that driver plaintiffs were misclassified as independent contractors indicates that those cases may have come down differently if brought today, in a world where drivers benefit from even greater flexibility.[228] As Uber, in particular, has invested in new technologies designed to provide drivers with greater autonomy,[229] many of the factors that contributed to the court's finding in *O'Connor v. Uber Technologies, Inc.*[230] are now irrelevant or greatly diminished in their importance.[231]

Nevertheless, Uber's and Lyft's initial legal and political challenges to AB 5 ultimately failed.[232] Meanwhile, a coalition

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225. *See* Conger & Scheiber, *supra* note 197 (discussing the process by which Uber and Lyft lobbied for an exception under AB 5).

226. *See* Siddiqui, *Uber and Lyft*, *supra* note 215 (detailing Uber's and Lyft's injunction suits).

227. *See* Faiz Siddiqui, *Uber's Secret Project to Bolster Its Case Against AB5, California's Gig-Worker Law*, WASH. POST (Jan. 6, 2020, 7:00 AM) [hereinafter Siddiqui, *Uber's Secret Project*], https://perma.cc/Z4RH-T7PJ (detailing Uber's "Project Luigi").

228. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1141–53 (N.D. Cal. 2015) (discussing numerous factual elements such as the existence of driver handbooks, which are no longer in use by the company).

229. *See* Siddiqui, *Uber's Secret Project*, *supra* note 227 (discussing Uber's efforts to increase driver flexibility through added app features).

230. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

231. *See supra* note 228 and accompanying text.

232. *See Uber and Lyft Must Comply with Labor Law AB 5, Appeals Court Orders*, L.A. TIMES (Oct. 22, 2020, 6:07 PM), https://perma.cc/C94Q-527X ("A

of platform companies including Uber, Lyft, Postmates, Instacart, and DoorDash succeeded in funding a $205 million campaign in support of a referendum ballot measure that carved their industry out of AB 5 altogether.[233] Proposition 22, which passed during the November 2020 election, excludes "app-based drivers" from treatment under any other provision of law—including AB 5—for the purposes of determining employment status.[234] It then categorizes app-based drivers as independent contractors provided that the company whose app they use satisfies four conditions: (a) the company does not unilaterally determine drivers' work schedules; (b) the company does not require drivers to accept any specific trip or delivery request; (c) the company does not restrict drivers from performing rideshare or delivery services through other networks except while engaged on a trip or delivery; and (d) the company does not restrict drivers from working in any other lawful occupation.[235]

Proposition 22 further allows companies to offer certain benefits to app-based drivers without compromising those drivers' statuses as independent contractors.[236] For example, Section 7453 commits companies who contract with app-based drivers to provide an earnings guarantee calculated using the state's minimum wage, Section 7454 provides for a healthcare subsidy, Section 7455 requires companies to ensure certain loss and liability protection for drivers, Section 7456 protects app-based drivers from discrimination, and Section 7457 mandates that companies implement a sexual harassment

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California appeals court on Thursday upheld an order requiring Uber and Lyft to treat their California drivers as employees instead of independent contractors.").

233. *See California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA (2020) [hereinafter *Proposition 22*], https://perma.cc/Q67E-MARZ ("Yes on Proposition 22 received $205.37 million, which was the most funds that an initiative campaign had ever received in California (not adjusted for inflation).").

234. *See id.* § 7451 ("Notwithstanding any other provision of law . . . an app-based driver is an independent contractor and not an employee or agent with respect to his or her relationship with a network company if . . . .").

235. *See id.* (listing conditions).

236. *See id.* § 7453 (providing for a minimum earnings guarantee); *id.* § 7454 (providing healthcare subsidies for certain drivers who use the app for substantial periods of time each week).

policy intended to protect app-based drivers.[237] While the equivalence between these provisions and those already afforded employees under California law is the subject of some debate,[238] it is worth pointing out that the California legislature conceivably could have exercised a greater degree of control over ultimate outcomes for app-based drivers in the state if it had engaged with the companies that run such platforms from the start, instead of forcing the ABC Test upon an industry that decidedly strains traditional notions of the employee-independent contractor dichotomy.[239]

Proposition 22's inclusion of various benefits for app-based drivers whom companies seek to maintain as independent contractors illustrates a larger issue with AB 5. Namely, at least some companies the California legislature perceived as misclassifying employees might want or be willing to offer certain benefits to app users, but simply cannot do so under the current statutory scheme without risking penalties.[240] Uber CEO Dara Khosrowshahi has spoken publicly at length about the need for a "third way" to classify drivers that is neither employee nor independent contractor to avoid precisely this conundrum.[241] The company has also created a position called Head of Marketplace Policy, Fairness, and Research, and hired Alexandra Rosenblat—one of its harshest labor policy critics—to

237. *See id.* §§ 7453–7457 (detailing earnings guarantees and required benefits for app-based drivers).

238. *See, e.g.*, Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees Only $5.64 an Hour*, UC BERKELEY LAB. CTR. (Oct. 31, 2019), https://perma.cc/C89H-275G (concluding that Proposition 22's provision for minimum earnings guarantees is below California's minimum wage).

239. *See supra* note 70 and accompanying text.

240. *See, e.g.*, Lauren Feiner, *Uber CEO Advocates for "Third Way" to Classify Gig Workers While Fighting California Labor Lawsuit*, CNBC (Aug. 10, 2020, 9:11 AM), https://perma.cc/3CSC-XDS9 (stating that Uber's CEO "had urged [then-President] Trump and Congress to consider updating labor laws more broadly to support gig workers who cherish the flexibility of contract work but also desire the protection of employee status").

241. *See* Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better.*, N.Y. TIMES (Aug. 10, 2020), https://perma.cc/CK4M-XXNV ("Our current employment system is outdated and unfair. It forces every worker to choose between being an employee with more benefits but less flexibility, or an independent contractor with more flexibility but almost no safety net.").

fill it.[242] Rosenblat's responsibility in that role is to "get the company to take into consideration the experiences and point of view of drivers, especially at the product level," and Uber said they appointed her specifically because the company wants "people at Uber who care about driver issues and who aren't afraid to challenge our thinking on any given issue."[243] Reasonable minds could disagree as to whether a tech-company-under-fire's decision to hire an out-spoken detractor denotes meaningful progress or public relations posturing, but regardless of what one thinks about Uber's underlying motivations, the creation of such a position demonstrates at least some level of commitment to protecting drivers in ways that do not run afoul of state misclassification regimes.

In fact, Uber's more recent rhetoric appears to envision goals grander than mere compliance with state law—a stark shift from the Uber of 2010.[244] With Khosrowshahi at the helm, Uber's public stance on worker classification has been clear and consistent, centering the unworkability of the existing employment classification dichotomy and indicating an unwavering duty of accountability to bolster worker flexibility, protections, and benefits—if only it is given the chance to do so through public-private cooperation.[245]

Of course, the resulting irony of Proposition 22's success is that it has stripped AB 5 of its ability to regulate an industry whose employee classification practices were a major motivating factor for the bill's passage in the first place,[246] leaving a piece of legislation which is effective against only those less-sophisticated and relatively under-resourced industries the

242. *See* Brody Ford, *Uber Hires Prominent Critic to Focus on Treatment of Drivers*, BLOOMBERG (Feb. 17, 2021, 8:00 AM), https://perma.cc/MK6J-LX7S (describing the role and its responsibilities).

243. *Id.*

244. *See* Kalanick, *supra* note 2, at 7 ("Uber will roll out ridesharing on its existing platform in any market where the regulators have tacitly approved doing so.").

245. *See* Khosrowshahi, *supra* note 241 ("This is the time for Uber to come together with government to raise the standard of work for all. The opportunity is now, and the responsibility is ours. The world has changed, and we must change with it.").

246. *See Gonzalez Statement*, *supra* note 123 ("Some of the many workers who will benefit include . . . delivery and ride-hail drivers.").

legislature may not have intended to sweep into AB 5's scope.[247] In the meantime, Uber, Lyft, and companies like them will continue to operate in California under rules they effectively crafted themselves.

The merits of Proposition 22 as an alternative to AB 5 for app-based drivers are the subject of some debate. In one sense, Proposition 22 may contribute to the problem of proliferating employee classification tests by introducing a new one.[248] Further, there are some arguments that the employment-like benefits it purports to secure for app-based drivers are insufficient compared to those they would receive if they were categorized as employees.[249] Lastly, even if Proposition 22 is a better alternative to AB 5, its viability as a model for addressing employee misclassification broadly is questionable beyond the singular context of app-based work. As a practical matter, Proposition 22's specific attention to employment law issues raised in the gig economy may be difficult to replicate across dozens of other industries on a case-by-case basis, given the cost alone of mounting such a campaign.[250] However, each of these critiques of Proposition 22 is a critique one could fairly level against any legislation by referendum.[251] The broader question the success of Proposition 22 presents in light of the extensive saga of California's AB 5 is whether a statute like AB 5 could ever serve as a viable model for other states ostensibly seeking to reduce employment misclassification. In passing AB 5, did the California legislature solve a real problem, or—in its haste to react to public anti-ridesharing company sentiment—did it ignore the learnings of hundreds of years of worker classification jurisprudence, unintentionally burden non-target industries, and ultimately kick the proverbial can down the road on the question of ridesharing driver worker classification status?

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247. *See supra* notes 213–224 and accompanying text.

248. *See supra* note 70 and accompanying text.

249. *See supra* note 238 and accompanying text.

250. *See* Michael Hiltzik, *Column: Uber and Lyft Just Made Their Campaign to Keep Exploiting Workers the Costliest in History*, L.A. TIMES (Sept. 8, 2020, 12:40 PM), https://perma.cc/XHE4-LAQ7 (noting that industry groups have historically spent tens of millions of dollars on successful California referendum ballot initiatives in the past).

251. *See, e.g.*, Jennifer Steinhauer, *Top Judge Calls Calif. Government 'Dysfunctional'*, N.Y. TIMES (Oct. 10, 2009), https://perma.cc/A3Q4-X8C6 (reporting on a state judge's criticisms of the California referendum process).

3. Later Developments

The saga of AB 5 is far from over. In the year since the original draft of this Note was accepted for publication, a group of ridesharing drivers mounted a nominally-successful state constitutional challenge to Proposition 22 in California state court, *Castellanos v. California*.[252] An industry-backed coalition of Proposition 22 supporters intervened on the side of the California Department of Justice in defense of the initiative.[253] In an unpublished final order, the California Superior Court for the County of Alameda held that Proposition 22 violates the California State Constitution because it "limits the power of a future legislature to define app-based drivers as workers subject to workers' compensation law."[254] Specifically, the court found that, because the California constitution grants plenary authority to the state legislature to create workers' compensation laws unlimited by any provision of the state constitution,[255] and because Proposition 22 was a *statutory* referendum—itself a creature of constitutional creation—which limited the legislature's power to make workers' compensation laws respecting app-based drivers,[256] the referendum was in

252. *See* Order Granting Petition for Writ of Mandate at 11–12, Castellanos v. California, No. RG21088725 (Cal. Sup. Ct. Aug. 20, 2021) [hereinafter Castellanos Order], https://perma.cc/Q7XZ-L67K (PDF) (summarizing the court's reasons for finding Proposition 22 unconstitutional); Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional.*, NAT'L EMP. L. PROJECT (Sept. 16, 2021), https://perma.cc/L7Q3-W5CJ (summarizing the timeline of Proposition 22's passage and legal challenges to Proposition 22).

253. *See* Daniel Wiessner, *Group Moves to Revive Gig-Driver Exemption from Calif. Law*, REUTERS (Sept. 23, 2021, 7:08 PM), https://perma.cc/6XJV-25KA ("[Protect App-Based Drivers and Services] was permitted to intervene in the lawsuit challenging Prop 22, which was filed by the Service Employees International Union and several gig drivers.").

254. Castellanos Order, *supra* note 252, at 11.

255. *See* CAL. CONST. art. XIV, § 4 (providing that the legislature shall have the power to create workers' compensation laws "unlimited by any provision of this Constitution.").

256. *See Proposition 22*, *supra* note 233, § 7451 ("Notwithstanding any other provision of law, including, but not limited to, the Labor Code . . . , an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if [certain] conditions are met."); Castellanos Order, *supra* note 252, at 2–3 ("As a result, app-based drivers have been removed from participation in the

conflict with the state constitution.[257] Further, because the text of Proposition 22 explicitly made the section at issue non-severable, the court found the entire initiative to be unconstitutional.[258] Finally, the court added that Section 7465(c)(4) of Proposition 22 is unconstitutional because it "defines unrelated legislation as an 'amendment' and is not germane to Proposition 22's stated 'theme, purpose, or subject.'"[259]

Following the decision of the California Superior Court in *Castellanos*, supporters and intervenors in the case immediately filed notices of appeal.[260] Although their reasons for appealing are different—the DOJ seeks to protect the integrity of the state's referendum initiative system, while the industry-backed coalition is mainly focused on the constitutionality of Proposition 22[261]—it is difficult to ignore the irony that *Castellanos* ultimately aligns the state's and the ridesharing companies' interests against AB 5 as originally enacted. Time will tell what the future holds for Proposition 22. But even if Proposition 22's advocates ultimately fail to save it, the central critique of this Note remains intact: a protracted legal battle over the constitutionality of a referendum initiative intended to

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worker's [sic] compensation system, as presently codified, because it protects only employees, not independent contractors.").

257. *See* Castellanos Order, *supra* note 252, at 4 ("In short, if the People wish to use their initiative power to restrict or qualify a 'plenary' and 'unlimited' power granted to the Legislature, they must first do so by initiative constitutional amendment, not by initiative statute.").

258. *See id.* at 4–5, 12 ("When the People adopted Proposition 22, they expressed their intention that its provisions be severable, except that, if Section 7451 is held to be unconstitutional, the whole Act should be stricken.").

259. *Id.* at 12; *see also Proposition 22*, *supra* note 233, § 7465 (defining amendments to Proposition 22).

260. *See* Allsup, *supra* note 39 ("The Protect App-based Drivers & Services Coalition, a group supporting Prop. 22, said it will appeal the ruling to a state appellate court. Its filing follows a Sept. 17 notice from the California Department of Justice about the state's plan to appeal.").

261. *See* Catherine Thorbecke, *Ruling that California's Prop. 22 Is Unconstitutional Prompts Dueling Reactions from Gig Workers and Rideshare Companies*, ABCNEWS (Aug. 23, 2021, 4:42 PM), https://perma.cc/YN76-F7YJ ("This ruling ignores the will of the overwhelming majority of California voters and defies both logic and the law. You don't have to take our word for it: California's Attorney General strongly defended Proposition 22's constitutionality in this very case . . . ." (quoting Noah Edwardsen, Uber Spokesperson)).

overturn a statute with which the people of California disagreed is simply further evidence of AB 5's broader failure. Further, the subject matter of the pending Proposition 22 litigation—namely, whether the initiative is constitutional—is now several steps removed from the fundamental issue that initially gave rise to AB 5. That distancing supports a contention that AB 5 was only ever a hastily-crafted legislative overcompensation for a perceived problem that in fact did not exist and with respect to which relevant industry players were and are willing to build a cooperative solution.

CONCLUSION

In some ways, the story of AB 5 merely emphasizes a lesson courts began to appreciate long ago: as working relationships evolve, simply not all of them will be susceptible of a rigid, binary classification framework.[262] Of course, this has been true since at least the nineteenth century, when courts first diverged from a pure control test for employee classification to tests that considered additional factors.[263] Although AB 5 reflects some attempt on the part of the California legislature to take account of the need for flexibility in employee classification determinations,[264] its dual-test regime in fact rigidly fixes worker status by industry for a large portion of the economy. AB 5's adoption of the ABC Test by default favors consistency of results over flexibility.[265] For those occupations that have received exceptions under the bill—in seemingly arbitrary, piecemeal fashion[266]—nothing has changed. Any criticisms one might have levied against the *Borello* test before AB 5's passage remain in force in those contexts.

But AB 5's shortcomings run deeper than long-understood critiques of the American legal system's tools for distinguishing between employees and independent contractors. Californians did not receive the bill as an assurance that workers would be

262. *See supra* Part I.B (discussing the historical origins of the employee-independent contractor dichotomy and addressing the challenges courts faced even before the advent of New Deal-era employee protections).

263. *See supra* notes 62–65 and accompanying text.

264. *See supra* notes 196–199 and accompanying text.

265. *See supra* notes 198–213 and accompanying text.

266. *See supra* notes 196–197 and accompanying text.

adequately protected.[267] Rather, its passage fostered tremendous economic uncertainty.[268] Some individuals lost existing work as a result.[269] Others, fearing the impact AB 5 would have on their industries, spent substantial time and funds litigating their excepted status in court.[270] Many organizations without the resources to do so worry about their financial viability in an AB 5 world, and some of them have shut down completely as a result.[271]

Moreover, the California legislature underestimated how much capital gig economy giants would be willing to invest in support of non-legislative pathways to achieve what is effectively self-regulation.[272] It did so in spite of demonstrated willingness on the part of such companies to compromise on a third classification for gig workers.[273] What's left of AB 5 now operates only to sow confusion and apprehension among companies and workers that were never the central driving force behind the bill in the first place.

The tricky problem of employee classification is one that necessarily requires extensive deliberation and individualized attention to the variety of working relationships that have and continue to evolve.[274] The proliferation of employee classification tests in the last 130 years is a testament to that observation.[275] Employee classification has become an even thornier issue in light of the development of the gig economy.[276] Accordingly, any legislation that aims to redefine the employee classification standard across an entire jurisdiction should immediately arouse suspicion. Insofar as states may have concerns about the benefits and protections afforded to gig workers—or any other specific industry, for that matter—they should tailor legislative approaches to the realities and characteristics of that industry.

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267. *See supra* notes 220–221 and accompanying text.

268. *See supra* Part III.C.1 (discussing AB 5's direct consequences on industry).

269. *See supra* Part III.C.1.

270. *See* cases cited *supra* note 29 and accompanying text.

271. *See supra* Part III.C.1.

272. *See supra* notes 232–234 and accompanying text.

273. *See supra* notes 240–243 and accompanying text.

274. *See supra* Parts I.C–E.

275. *See supra* notes 62–65 and accompanying text.

276. *See supra* Parts I.D–E.

As the story of AB 5 makes clear, it is all but impossible to devise a single employee classification scheme that strikes the perfect balance between flexibility and worker protections in every industry at the exact same time. In conclusion—and in contrast to the grandiose claims of the bill's author—AB 5 is not "the global standard for worker protections for other states and countries to follow."[277]

277. *Gonzalez Statement*, *supra* note 123.