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### Defining Who Is an Employee after A.B.5: Trading Uniformity and Simplicity for Expanded Coverage

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# DEFINING WHO IS AN EMPLOYEE AFTER A.B.5: TRADING UNIFORMITY AND SIMPLICITY FOR EXPANDED COVERAGE

*Edward A. Zelinsky*<sup>+</sup>

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We are today engaged in a vigorous national debate about who is an “employee.” The popular media regularly report on the employee status of “gig” economy workers, such as Uber and Lyft drivers.<sup>1</sup> The companies shaping the

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1. See, e.g., Daniel Wiessner, *Uber Drivers are Contractors, not Employees, U.S. Labor Agency Says*, REUTERS (May 14, 2019, 4:04 PM), <https://www.reuters.com/article/us-uber-contractors/uber-drivers-are-contractors-not-employees-us-labor-agency-says-idUSKCN1SK2FY> (discussing opinion of NLRB general counsel that Uber drivers are independent contractors, not employees).

gig economy insist that the individuals affiliated with their service platforms are independent contractors.<sup>2</sup> Some—though not all<sup>3</sup>—of the advocates for these workers counter that these workers are, or should be treated as, employees.<sup>4</sup> As employees, these individuals receive the protection of federal and state statutes regulating the terms and conditions of employment.

Parallel to, and overlapping with, this popular discussion is a body of scholarship largely critical of the current legal definition of employee status.<sup>5</sup> Current law, many critics maintain, is unclear, unprincipled, and overly complex. Other critics emphasize that denying employee status to workers improperly deprives them of the coverage of state and federal laws, such as minimum wage statutes, workers compensation laws, and unemployment insurance legislation.

The enactment into law of California Assembly Bill 5, commonly referred to as “A.B.5,” is an important event in this debate.<sup>6</sup> My assessment of A.B.5 differs

2. *Id.* (“San Francisco-based Uber in a statement said it is ‘focused on improving the quality and security of independent work, while preserving the flexibility drivers and couriers tell us they value.’”). See also Complaint at 2, *Olson v. California*, No. 2:19-cv-10956 (C.D. Cal. Dec. 30, 2019) [hereinafter *Olson Complaint*] (commenting that Uber drivers are “independent service providers [who] have enjoyed opportunities to earn money when and where they want, with unprecedented independence and flexibility”).

3. See, e.g., Shirin Ghaffary & Alexia F. Campbell, *A Landmark Law Disrupted the Gig Economy in California. But What Comes Next for Uber Drivers?*, VOX: RECODE (Oct. 4, 2019, 2:30 PM), <https://www.vox.com/recode/2019/10/4/20898940/uber-lyft-drivers-ab5-law-california-minimum-wage-benefits-gig-economy-disrupted> (“But so far, drivers’ working conditions haven’t improved. Although many were excited about AB 5’s passing, dozens say they’re anxious about what’s ahead, and they shared concerns about losing flexibility and continued issues over pay in online driver groups and interviews with Recode. . . . Many drivers are worried that because of AB 5, Uber and Lyft will limit workers’ flexibility.”); Gabrielle Canon, *California’s Controversial Labor Bill Has Passed the Senate. Experts Forecast More Worker Rights, Higher Prices for Services*, USA TODAY (Sept. 13, 2019, 5:43 PM), <https://www.usatoday.com/story/news/politics/2019/09/10/what-californias-ab-5-means-apps-like-uber-lyft/2278936001/> (“Drivers against the legislation have raised concerns about whether the workforce will be cut, as the companies face higher costs to come into compliance.”); Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> (“The bill was not universally supported by drivers. Some opposed it because they worried it would make it hard to keep a flexible schedule.”).

4. See, e.g., The Am. Fed’n of Lab. and Cong. of Indus. Orgs., *AFL-CIO Asserts that Gig Economy Workers Are Employees* (Mar. 1, 2016), <https://aflcio.org/press/releases/afl-cio-asserts-gig-economy-workers-are-employees>.

5. See *infra* Section II.

6. See, e.g., Gabrielle Canon, *California’s Lorena Gonzalez: AB 5 Champion and ‘Black Widow of Public Policy’*, USA TODAY (Oct. 4, 2019, 12:33 PM), <https://www.usatoday.com/story/news/politics/2019/10/04/lorena-gonzalez-ab-5-champion-black-widow-of-public-policy/2423465001/>; Tony Marks, *How Do You Spell Trouble? California AB5*, FORBES (Sept. 11, 2019, 11:52 PM), <https://www.forbes.com/sites/tonymarks/2019/09/11/how-do-you-spell-trouble-california-ab-5/#42ae7fed7e29>; Megan R. Dickey, *Gig Worker Bill, AB-5, Passes California State Senate*, TECHCRUNCH (Sept. 11, 2019, 1:34 AM), <https://techcrunch.com/2019/09/10/gig-worker-bill-ab-5-passes-in-California/>.

from the evaluation advanced by the advocates and opponents of this legislation: I conclude that A.B.5 made a significant but limited expansion of the coverage of California labor law, but at a notable cost. Even as A.B.5 broadened the reach of the Golden State's labor protections, A.B.5 also made the definition of "employee" more complex and less uniform. Those seeking federal or state legislation like A.B.5 confront the same trade-off under which greater coverage is achieved at the expense of more complexity and less uniformity in the definition of who is an employee. The same political forces and policy considerations that molded A.B.5 in California will have similar effects in other states and in the halls of Congress.

Those who advocate expanding the coverage of laws protecting workers herald A.B.5 as the dawn of a new day.<sup>7</sup> By codifying the "ABC" test for employment status, these advocates contend that A.B.5 properly extends legal protections to the workers of the modern economy. In contrast, opponents of A.B.5 argue that it will cripple important sectors of the U.S. economy.<sup>8</sup>

A review of A.B.5 and the background from which it emerged leads to a more nuanced story than either of these simple narratives. For those who assert that current law is uncertain and too complex, A.B.5 makes matters worse. A.B.5 is replete with exceptions, exemptions, and interpretive challenges, which make the law of employee status even more complicated and more unclear than it was before. For those who seek expanded employment-based protection for workers in the modern economy, the myriad exceptions and exemptions of A.B.5 are a sober warning of the practical and political realities standing in the way of such expansion. For those defending the status quo, A.B.5 is an equally sober warning of considerable dissatisfaction with this status quo.

A.B.5 is thus an important data point, which indicates that those who seek to reform the law of employee status face a trade-off: efforts to expand the coverage of employment-based protection laws will make the law more complex and less uniform—as did A.B.5. Given the relevant political forces and policy considerations, legislators can broaden the reach of employment-based regulatory laws to cover more workers in the modern economy, or they can simplify and unify the legal definition of employee status. They cannot do both.

The first section of this Article outlines the legal background against which A.B.5 was adopted. Whether an individual is an employee or an independent

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7. See, e.g., Conger & Scheiber, *supra* note 3 ("Ride-hailing drivers hailed the bill's passage.").

8. See *id.* ("Uber and Lyft have repeatedly warned that they will have to start scheduling drivers in advance if they are employees, reducing drivers' ability to work when and where they want. . . . That could lead to a reduced need for drivers over all."); see also Olson Complaint, *supra* note 2, at 7 (stating that the goal of the A.B.5 sponsors "is to deprive workers of the flexibility and freedom of their current independent status"); Ghaffary & Campbell, *supra* note 3 ("Uber and Lyft have responded that more expensive and restrictive labor standards would force them to make these kinds of changes [such as requiring drivers to schedule shifts] to effectively run their businesses."); Canon, *supra* note 6 (quoting Ryan Vet as saying that A.B.5 will "implode the gig economy as we know it today"); Marks, *supra* note 6 ("This is a potential neutron bomb under AB-5.").

contractor plays critical, though different, roles in various areas of the law. In this first section, I explore and contrast these roles in three important legal arenas: taxes, torts, and regulatory protection. As part of this discussion, I identify the law's four basic definitions of employee status: the common law control test; the increasingly popular ABC test, which was incorporated into A.B.5; the standard of "economic realities"; and the concept of statutory purpose.

The second section of this Article explores the legal literature in this area. Central to this literature are the critiques of the current law of employee status as too complicated, too opaque, and too limited. Against this background, the third section describes A.B.5 as enacted into law. Central to A.B.5 are the many exemptions and exceptions embodied in this statute and the interpretive challenges raised by those exemptions and exceptions as well as by the ABC test itself.

The third section of this Article evaluates A.B.5 in light of the background against which A.B.5 was adopted. A.B.5 is neither the panacea some of its advocates maintain nor the tragedy its opponents bemoan. This section emphasizes four features of A.B.5, which cumulatively make the law of employee status even more complex and less uniform than it was before. First, A.B.5 incorporates the ABC test, which has its interpretive challenges. These ambiguities include the "control" standard,<sup>9</sup> which the ABC inquiry borrows from the common law, as well as such contestable notions as whether a worker is "customarily engaged in an independently established trade, occupation, or business"<sup>10</sup> and "the usual course of the hiring entity's business."<sup>11</sup>

Second, A.B.5 is replete with exemptions and exceptions, the boundaries of which are often opaque. Third, the drafters of A.B.5 made the unfortunate choice of incorporating by reference an important decision of the California Supreme Court—*S.G. Borello & Sons, Inc. v. Department of Industrial Relations*—rather than stating in explicit statutory terms the rule the drafters believe *Borello* embodies.<sup>12</sup> Fourth, A.B.5 has no impact on an individual's status as an employee for tort purposes and has an inconsistent impact on an individual's status as an employee for state income tax purposes. It is thus possible, for example, for an individual to be deemed to be an employee under A.B.5 for purposes of the Golden State's employment-based protection laws while remaining an independent contractor for the tort rule of *respondeat superior*.

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9. Cal. Assemb. B. 5 § 2, 2019–20 Leg. Reg. Sess. (Cal. 2019) (adding § 2750.3(a)(1)(A) to the California Labor Code).

10. *Id.* (adding § 2750.3(a)(1)(C) to the California Labor Code).

11. *Id.* (adding § 2750.3(a)(1)(B) to the California Labor Code).

12. A.B.5: Cal. Assemb. B. 5 § 2 (adding § 2750(a)(3), incorporating *S.G. Borello & Sons* by reference); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399 (Cal. 1989).

Those seeking to expand the coverage of employment-based protective legislation can count A.B.5 as a significant, but limited, victory. Those seeking to simplify, clarify, and unify the law cannot.

The last section of this Article discusses the ongoing debate about employee status going forward from A.B.5. The political forces and policy considerations that molded A.B.5 will be the same in other states and in Congress as they grapple in the years ahead with the legal definition of employment. A.B.5 makes clear that state and federal legislators will confront a trade-off. They can expand the coverage of employment-based regulatory laws to cover more workers in the modern economy, or they can simplify and unify the legal definition of employee status. They cannot do both. Indeed, efforts to enlarge the coverage of protective legislation will make the law of employee status more complex and less uniform—as did A.B.5. The political forces and policy considerations that shaped A.B.5 in the California legislature will be at play on Capitol Hill and in the legislatures of the other forty-nine states.

A.B.5 might suggest to some the need to scrap altogether the distinction between employees and independent contractors. For others, A.B.5 and its complexities might suggest that the prospect of simplification of the law in this area was always a chimera.

Two generations ago, Professor Charles E. Lindblom famously catalogued the benefits of “muddling through.”<sup>13</sup> Some problems do not lend themselves to neat and comprehensive solutions. A.B.5 confirms that the legal definition of employment is one of these. It would be attractive if the legal definition of who is an employee could be simplified and made more uniform. But as A.B.5 demonstrates, this is not in the cards nor should it be, given the various functions that employee status plays in different areas of the law and the contending policy and political pressures molding the law in this area.

Whatever the merits of A.B.5 might be, uniformity, simplicity, and certainty are not among these. Those who seek to emulate A.B.5 will confront the same trade-off as did the legislators of the Golden State. The definition of “employee” can be made simpler and more uniform, or it can be broadened to include more workers in the modern economy. But A.B.5 indicates the trade-off between these two prescriptions for the legal definition of employment. “Muddling through” was the past and is the future of the law of employee status, given the political influences and policy concerns that will mold federal and state legislation in this area.

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13. Charles E. Lindblom, *The Science of “Muddling Through”*, 19 PUB. ADMIN. REV. 79 (1959).

## I. WHO IS AN EMPLOYEE? COMPARING THE CONTEXTS AND THE TESTS

### A. Overview

This section introduces and compares the four basic tests for determining an individual's status as an employee rather than an independent contractor: the common law control test; the ABC test; the "economic realities" standard; and inquiry into statutory purpose. This section explores these tests in the context of three important areas of law in which status as an employee carries significant legal consequences: taxes, torts, and protective legislation. In the tax context, status as an employee shifts tax-withholding obligations to the employer, and it also makes available certain benefits limited to taxpayers in their respective capacities as employees. In the tort setting, classifying an individual as an employee extends liability to her employer under the doctrine of *respondeat superior*. In the context of employment-based protective legislation, a characterization of an individual as an employee triggers the coverage of such legislation while classifying that person as an independent contractor places her beyond such protection.<sup>14</sup>

### B. Federal Taxes and the Common Law Definition of Employment

In the federal tax context, whether an individual is classified as an "employee" is determined under what is today often designated as the common law test of employment. For purposes of payroll (FICA) taxation, the Internal Revenue Code defines an "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . ."<sup>15</sup> The Treasury Regulations implementing this statute emphasize that the touchstone for determining status as a common law employee is control, namely, whether "the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished."<sup>16</sup>

The Treasury Regulations define employee status for wage withholding purposes in essentially identical, control-oriented terms,<sup>17</sup> adding the caveat that

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14. There are many other areas of the law where the concept of being an "employee" is crucial. For example, in copyright law, the status of a worker as an employee *vel non* may determine whether the worker's creation belongs to the worker or to the employer who hired her. *See* 17 U.S.C. § 101 (defining "work made for hire" as "a work prepared by an employee within the scope of his or her employment"); *see also* *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989) ("[T]he term 'employee' should be understood in light of the general common law of agency."). Nevertheless, for purposes of analyzing the background against which A.B.5 was adopted, the most useful areas of the law to examine are taxes, torts, and protective regulation.

15. I.R.C. § 3121(d)(2). The Code also incorporates this definition under the Federal Unemployment Tax Act (FUTA). *See* I.R.C. § 3306(i).

16. *Treas. Reg.* § 31.3121(d)-1(c)(2) (as amended in 1980).

17. *Treas. Reg.* § 31.3401(c)-1(b) (as amended in 1970).

“[g]enerally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.”<sup>18</sup>

In Revenue Ruling 87-41, the IRS identifies twenty factors to be considered when assessing the existence vel non of control for purposes of classifying workers as employees or independent contractors under the common law test.<sup>19</sup> This administrative ruling and its twenty-factor test reveal the fact-specific nature of the common law control test. The ruling itself acknowledges the uncertainties of the twenty-factor standard:

The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement . . . .<sup>20</sup>

After acknowledging that the twenty-factor test is fact—and context—dependent, Revenue Ruling 87-41 enumerates these factors: (1) whether a worker must comply with “instructions about when, where, and how he or she is to work”; (2) whether a worker is required to undergo training; (3) whether a worker is “[i]ntegrat[ed] . . . into the business operations” for which he or she works; (4) whether the services to be performed by an individual “must be rendered personally” by that individual; (5) whether the individual whose employment status is being determined “hires, supervises, and pays” others; (6) whether there is “[a] continuing relationship between the worker and the person or persons for whom the services are performed”; (7) whether the person whose status as an employee vel non is being determined has “set hours of work” established for him or her; (8) whether the work is full-time or not; (9) whether the work is performed on the employee’s premises or “on the premises of the person or persons for whom the services are performed”; (10) whether “a worker must perform services in the order or sequence set by the person or persons for whom the services are performed”; (11) whether “the worker [must] submit regular or written reports to the person or persons for whom the services are performed”; (12) whether the person whose employment status is being determined is paid “by the hour, week, or month” or is instead paid “a lump sum agreed upon as the cost of a job”; (13) whether the worker or the service purchaser “pay[s] the worker’s business and/or traveling expenses”; (14) whether the worker furnishes his or her own “tools, materials, and other equipment”; (15) whether “the worker invests in facilities that are used by the

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18. *Id.* § 31.3401(c)-1(c).

19. Rev. Rul. 87-41, 1987-1 C.B. 296, at 10–18.

20. *Id.* at 10–11.



worker in performing services”; (16) whether the individual whose employment status is being determined “can realize a profit or suffer a loss as a result of the worker’s services (in addition to the profit or loss ordinarily realized by employees)”; (17) whether an individual works “for [m]ore [t]han [o]ne [f]irm at a [t]ime”; (18) whether “a worker makes his or her services available to the general public on a regular and consistent basis”; (19) whether the service purchaser has “(t)he right to discharge a worker . . . indicating that the worker is an employee and the person possessing the right is an employer”; and (20) whether “the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability.”<sup>21</sup>

In addition to triggering an employer’s obligation to withhold taxes from an employee, employee status also determines whether an individual is eligible for the many tax benefits tied to this status. Most prominently, the Internal Revenue Code’s exclusion of health insurance premiums from the gross income of the insured depends upon the insured being an employee of the entity paying the premiums.<sup>22</sup>

Critics of the common law control test of employee status disparaged this fact-based, multifaceted standard as indeterminate even before the rise of the so-called “gig” economy.<sup>23</sup> That indeterminacy is compounded by the emergence of newer economic relationships driven by such contemporary phenomenon as internet platforms and telecommuting.<sup>24</sup>

### C. Nationwide Mutual Insurance Company v. Darden: *The U.S. Supreme Court Embraces the Common Law Control Test*

*Nationwide Mutual Insurance Company v. Darden* is the U.S. Supreme Court’s most recent decision on the definition of an employee.<sup>25</sup> For purposes of the Employee Retirement Income Security Act of 1974 (ERISA),<sup>26</sup> the Court embraced the common law control test as reflecting congressional intent, even as the Court acknowledged the imprecision of that test.<sup>27</sup>

Mr. Darden had been an exclusive insurance agent for Nationwide.<sup>28</sup> As such an agent, he participated in Nationwide’s “Agent’s Security Compensation

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21. *Id.* at 11–18.

22. I.R.C. § 106(a). *See also* I.R.C. § 132 (conditioning a variety of exclusions from gross income upon the taxpayer’s status as an employee).

23. *See, e.g.*, Marc Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 L. & INEQ. 155, 158 (1989).

24. *See* discussion *infra* Section IV.B.

25. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–25 (1992).

26. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 § 3(6) (codified as amended in scattered sections of 29 U.S.C.).

27. *Darden*, 503 U.S. at 323–25.

28. *Id.* at 320.

Plan.”<sup>29</sup> After Nationwide terminated its relationship with Mr. Darden, he sold insurance policies for Nationwide’s competitors.<sup>30</sup> Nationwide thereupon claimed that Mr. Darden’s activities on behalf of Nationwide’s competitors caused Mr. Darden to forfeit his deferred compensation benefits under this retirement plan.<sup>31</sup> Mr. Darden responded that such forfeiture violated his rights under ERISA.<sup>32</sup> As a statutory matter, Mr. Darden could assert rights under ERISA only if he had been an employee of Nationwide.<sup>33</sup> Nationwide argued that he was not.<sup>34</sup>

The U.S. Court of Appeals for the Fourth Circuit held that Mr. Darden might have been an employee for ERISA purposes.<sup>35</sup> The appeals court observed that ERISA’s statutory definition of an “employee”—“any individual employed by an employer”—“provides little guidance.”<sup>36</sup> Moreover, under “the traditional common-law standard,” Mr. Darden “most probably would not qualify as an employee” of Nationwide.<sup>37</sup> That common law standard examines “[m]any factors” to determine whether the putative employer, Nationwide, has the “right to direct and control the performance of” the alleged employee, that is, Mr. Darden.<sup>38</sup>

However, the appeals court reasoned, the multifactor common law test of control was “not the appropriate standard” for determining employee status under ERISA.<sup>39</sup> Instead, “the definition of ‘employee’ should be tailored to the purposes of the statute being construed.”<sup>40</sup> On remand, the appeals court held that Mr. Darden should be allowed to present evidence that classifying him as

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 321. To invoke ERISA’s civil remedies provision, an individual must be a “participant” in a plan. Being a “participant,” in turn, requires that the individual be an “employee” of the firm establishing the plan. *See* 29 U.S.C. § 1002(6) (defining “employee” for ERISA purposes); 29 U.S.C. § 1002(7) (defining “participant” for ERISA purposes); 29 U.S.C. § 1132(a)(1)(B) (establishing a “participant[’s]” cause of action). For further discussion, see JOHN H. LANGBEIN ET. AL., PENSION AND EMPLOYEE BENEFIT LAW 99–103, 712, 714–16 (6th ed. 2015) (discussing ERISA’s definitions of “employee” and “participant,” as well as the participant’s right to sue under ERISA § 502); LAWRENCE A. FROLIK & KATHRYN L. MOORE, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 66–81, 415–29 (3d ed. 2010) (discussing ERISA’s definition of “employee” and the participant’s right to sue under ERISA § 502).

34. *Darden*, 503 U.S. at 320.

35. *Darden v. Nationwide Mutual Insurance Company*, 796 F.2d 701, 709 (4th Cir. 1986).

36. *Id.* at 704. *See also* 29 U.S.C. § 1002(6).

37. *Id.* at 704–05.

38. *Id.* at 705.

39. *Id.* at 706.

40. *Id.*

an employee, rather than an independent contractor, would advance “the objectives and purposes of ERISA.”<sup>41</sup>

The U.S. Supreme Court reversed, holding that the common law test of control informed by principles of agency law was the appropriate standard for determining employee status under ERISA.<sup>42</sup> ERISA’s statutory definition of an “employee” as ‘any individual employed by an employer’ is completely circular and explains nothing.”<sup>43</sup> Under these circumstances, “a common law test” of employee status is proper for ERISA purposes.<sup>44</sup> That test, animated by “traditional agency law principles,” is a multifaceted inquiry focused upon the alleged employer’s right to control the asserted employee.<sup>45</sup> Among other authorities, the Supreme Court cited Revenue Ruling 87-41 as “setting forth 20 factors as guides in determining whether an individual qualifies as a common-law ‘employee’ in various tax law contexts.”<sup>46</sup>

ERISA’s “circular” definition of “employee,” the Court observed, contrasts with the broader language of the Fair Labor Standards Act (FLSA).<sup>47</sup> The FLSA defines “employ” as meaning “to suffer or permit to work.”<sup>48</sup> This statutory language is of “striking breadth” and “stretches the [FLSA’s] meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>49</sup>

“To be sure,” the *Darden* court acknowledged with considerable understatement, “the traditional agency law criteria offer no paradigm of determinacy.”<sup>50</sup> However, such a fact-intensive, common law approach to employee status should prevail for ERISA purposes.

Central to the high court’s analysis was its perception of congressional intent. In concluding that the definition of an employee for ERISA purposes should be gleaned from ERISA’s statutory purposes, the Court of Appeals cited the high court’s opinions in *NLRB v. Hearst Publications, Inc.*, in which the Court defined the term “employee” under the National Labor Relations Act,<sup>51</sup> and *United States v. Silk*, where the Court defined “employee” under the Social

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41. *Id.* at 707, 709. This purpose-based approach to employee status has venerable roots. *See, e.g.,* *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552–53 (2d Cir. 1914) (stating in a majority opinion by Judge Learned Hand that employee status “must be understood with reference to the purpose of the act”).

42. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–25 (1992).

43. *Darden*, 503 U.S. at 323. *See also* 29 U.S.C. § 1002(6).

44. *Darden*, 503 U.S. at 323.

45. *Id.* at 323–24.

46. *Id.* at 324.

47. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

48. 29 U.S.C. §§ 203(e)(1), (g).

49. *Darden*, 503 U.S. at 326.

50. *Id.* at 327.

51. *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 120–29 (1944); *see also* *Darden v. Nationwide Mutual Insurance Company*, 796 F.2d 701, 706 (4th Cir. 1986) (citing to *Hearst Publ’ns*).

Security Act.<sup>52</sup> Both of these decisions defined the term “employee” more “broad[ly] than the common-law definition.”<sup>53</sup> Congress responded to these two opinions by amending the statutes in question to endorse, in lieu of a broader definition of “employee” geared toward statutory purpose, “the usual common-law principles” defining who is an employee based on a multifactor control test.<sup>54</sup>

We see in *Darden* several of the themes that govern the discussion in this area of the law. None of the possible tests for employee status is a “paradigm of determinacy.”<sup>55</sup> Multifactor tests never are, but neither are inquiries into statutory purpose or “control.” Focusing on “control” for employment purposes requires determination of how much control is necessary to shift an individual’s status from an independent contractor to an employee. Another formulation of employee status—“economic realities” under the “suffer or permit” standard—is understood to be broader than the common law test, but it is no model of determinacy either. Indeed, applied literally, the “suffer or permit” test could include the universe of independent contractor relationships—a result no one thinks is sensible under the FLSA or under other laws regulating employment that use the “suffer or permit” test to define who is an employee.<sup>56</sup>

*D. S.G. Borello & Sons, Inc. v. Department of Industrial Relations: Control and Statutory Purpose as Touchstones of Employee Status*

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,<sup>57</sup> the California Supreme Court, over dissent,<sup>58</sup> held that “sharefarmers,” who harvested cucumbers for a grower, were the grower’s employees rather than independent contractors for purposes of California’s Workers’ Compensation Act (“the Act”).<sup>59</sup> Central to the *Borello* court’s holding was the control exercised by the grower over the sharefarmers and the court’s perception of the purposes of the Act.<sup>60</sup>

The *Borello* court observed that the common law rule tying employee status to the control exercised over the employee originally arose in the tort context of

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52. *United States v. Silk*, 331 U.S. 704, 713–14 (1947); *see also Darden*, 796 F.2d at 706 (citing to *Silk*).

53. *Darden*, 503 U.S. at 324–25.

54. *Id.* New York’s Court of Appeals has recently taken a similar approach in determining that a delivery courier working through a digital platform was an “employee” for unemployment insurance purposes. *See Matter of Vega*, 149 N.E.3d 401, 405–06 (N.Y. 2020).

55. *Darden*, 503 U.S. at 327.

56. For examples of other laws, *see, e.g.*, N.M. STAT. ANN. § 50-4-21(A) (“[E]mploy’ includes suffer or permit to work . . . .”); TENN. CODE ANN. §50-2-201(2) (LexisNexis 2020) (“[E]mploy’ includes to suffer or permit to work . . . .”).

57. *S.G. Borello & Sons, Inc. v. Dep’t Indus. Rels.*, 769 P.2d 399 (Cal. 1989).

58. *Id.* at 410–11 (Kaufman, J., dissenting).

59. *Id.* at 346; *see also* CAL. LAB. CODE §§ 3200–4386 (Deering 2020).

60. *Borello*, 769 P.2d at 404, 406–08.

“vicarious liability.”<sup>61</sup> If a person has the “right to control” the “activities” performed for him by another, it is compelling for tort purposes to designate the controlling person as the “employer,” liable for “the misconduct of [the] person rendering service to” the employer.<sup>62</sup> Protective legislation, such as unemployment-compensation laws and workers’ compensation statutes, subsequently incorporated the distinction between employees controlled by others (covered by such legislation) and independent contractors (not so covered). In light of this history, “the right to control work details is the ‘most important’ or ‘most significant’ consideration” when determining whether or not service providers are employees protected as such by employment-based laws.<sup>63</sup>

But, according to *Borello*, this “right to control work” is not the only consideration. In determining whether or not a service provider is an employee for purposes of protective legislation, the existence vel non of control must be supplemented by other “‘secondary’ indicia” as well as by “the ‘history and fundamental purposes’ of the statute” in question.<sup>64</sup> Accordingly, “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.”<sup>65</sup>

Utilizing this two-part test based on control and statutory purpose, the *Borello* court concluded that the sharefarmers working for the cucumber grower were employees of the grower for purposes of the Act rather than independent contractors. The grower in *Borello* “retains all *necessary* control over the harvest option of its operations.”<sup>66</sup> In addition, coverage of the sharefarmers as employees under the Act facilitates the “public purpose” of the Act of “recogni[zing] that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury.”<sup>67</sup>

*E. Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County: California’s Supreme Court Adopts the ABC Test*

The California Supreme Court’s subsequent decision in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* contrasts with *Borello* and reflects the growth at the state level of what has come to be called the “ABC test” for employee status.<sup>68</sup>

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61. *Id.* at 403.

62. *Id.*

63. *Id.* at 404.

64. *Id.* at 404–05.

65. *Id.* at 406.

66. *Id.* at 408.

67. *Id.* at 409.

68. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 35 (Cal. 2018).

Dynamex operates a one-day delivery service throughout the nation, including in California.<sup>69</sup> While Dynamex previously treated its drivers as employees, since 2004 Dynamex has characterized its drivers as “independent contractors . . . requir[ing them] to provide their own vehicles and pay for all of their transportation expenses . . . .”<sup>70</sup> Dynamex drivers can hire their own personnel to deliver Dynamex packages.<sup>71</sup> When not delivering for Dynamex, drivers can work for competitive services or can operate their own personal delivery services.<sup>72</sup>

Ultimately, the plaintiff class in *Dynamex* was limited to those drivers who worked exclusively for Dynamex by themselves.<sup>73</sup> This limitation excluded from the plaintiff class those Dynamex drivers who hired their own personnel or who also made deliveries for a Dynamex competitor or for their own account. The substantive issue posed was whether Dynamex drivers who exclusively worked by themselves for Dynamex were, as Dynamex contended, independent contractors, or whether for purposes of the California “wage order” governing the transportation industry,<sup>74</sup> such drivers were instead Dynamex employees.<sup>75</sup>

The California wage order governs employees in the transportation industry and prescribes for them such working conditions as minimum wages and maximum hours.<sup>76</sup> The wage order, in language similar to the federal FLSA,<sup>77</sup> defines the term “employ” to “mean[] to engage, suffer, or permit to work.”<sup>78</sup> Rather than the “economic realities” test, which the courts have developed under FLSA,<sup>79</sup> the California court in *Dynamex* decreed that the “suffer or permit to work” standard should be understood as incorporating what has come to be called the “‘ABC’ test” for employee status.<sup>80</sup>

Under this test, individuals are presumed to be employees (rather than independent contractors) of the person for whom they are hired to work.<sup>81</sup> To overcome that presumption, and thereby establish the legal status of independent contractor, all prongs of a three-part ABC test must be satisfied.<sup>82</sup> Prong A of

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69. *Id.* at 8.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 9.

74. CAL. CODE REGS. tit. 8 § 11090 (2020).

75. *Dynamex*, 416 P.3d at 5.

76. CAL. CODE REGS. tit. 8, § 11090(3)–(4).

77. 29 U.S.C. § 203(g).

78. CAL. CODE REGS. tit. 8, § 11090.2(D).

79. *See, e.g., Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1160 (10th Cir. 2018).

80. *Dynamex*, 416 P.3d at 34–35. The states have adapted the ABC test even as they have embraced it. *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 64–74 (2015).

81. *See* Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1) to the California Labor Code).

82. *Dynamex*, 416 P.3d at 34.

this three-part test to avoid an employer-employee relationship is that the person for whom work is performed has neither legal nor practical control of the person performing such work.<sup>83</sup> The second component, denoted as prong B, that must be proved to establish an independent contractor relationship is “that the worker performs work that is outside the usual course of the hiring entity’s business.”<sup>84</sup> Prong C of the ABC test is that the individual claiming to be an independent contractor must be “customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed” by that individual for the person who hired her.<sup>85</sup> Because of the presumption of employee status, all three elements of the ABC test must affirmatively be satisfied to overcome such presumption and thereby establish an independent contractor relationship.<sup>86</sup>

The term ABC test is something of a misnomer. In important respects, the most important component of this standard is the preliminary point that might be designated as element “D”: Under the ABC rubric, there is a presumption of employee status—a presumption that is overcome only if all facets of the three-part ABC test are affirmatively proven. A more accurate, if less catchy, label for the ABC test would be “strong presumption of employee status.”

A major challenge for the *Dynamex* court was distinguishing its embrace of the ABC test for employee status in light of *Borello*’s two-part standard for such status, control, and statutory purpose. *Dynamex* met this challenge by focusing upon *Borello*’s discussion of statutory purpose to the exclusion of *Borello*’s comments about control:

[A]lthough we have sometimes characterized *Borello* as embodying the common law control test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard . . .<sup>87</sup>

This retrospective realignment<sup>88</sup> of *Borello* enabled the *Dynamex* Court to embrace the ABC test for employee status under the California wage order as a better implementation of “the history and purpose” of that order.<sup>89</sup>

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 35.

87. *Id.* at 19 (citation omitted).

88. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING vii, 7–8 (1948) (ebook) (discussing the manner in which courts “realign” their precedents to modify legal doctrine while simultaneously executing “the duty of the American judge to view the law as a fairly consistent whole.”).

89. *Dynamex*, 416 P.3d at 35.

*F. The Restatement of Agency: Respondeat Superior and the Common Law Control Test*

For purposes of the tort rule of *respondeat superior*, the Restatement of Agency endorses the common law control test for status as an employee: “an employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work . . . .”<sup>90</sup>

The Restatement justifies this traditional control-based definition of employment in efficiency terms: “[a]n employer’s ability to exercise control over its employees’ work-related conduct enables the employer to take measures to reduce the incidence of tortious conduct.”<sup>91</sup> The Restatement, like Revenue Ruling 87-41, lists many factors relevant to determining whether an individual is an employee or not. Unsurprisingly, this nonexclusive list overlaps with Revenue Ruling’s 87-41’s multifactor test for common law employment status:

[T]he extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal’s direction or without supervision; the skill required in the agent’s occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent’s work is part of the principal’s regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. Also relevant is the extent of control that the principal has exercised in practice over the details of the agent’s work.<sup>92</sup>

Further reflecting the overlap in this area, the Reporter’s Notes cite both the Internal Revenue Code and *Darden* as authorities for the fact-intensive common law control test of employment.<sup>93</sup>

*G. Conclusion*

*Darden*, *Borello*, and *Dynamex*, as well as the relevant provisions of the tax law and of the Restatement of Agency, provide important background for discussion of the law of employee status and, ultimately, the adoption of A.B.5. As these materials indicate, the concept of employee status plays a different role in different contexts. In the tax setting, classification of an individual as an employee shifts tax-withholding responsibilities to the employer hiring that individual and makes available certain tax benefits tied to employee status. For

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90. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. LAW INST. 2006).

91. *Id.* § 7.07 cmt. b.

92. *Id.* § 7.07 cmt. f.

93. *Id.* § 7.07 rep.’s notes f.



tort law purposes, an individual's status as an employee extends liability for the individual's actions to her employer under the heading of *respondeat superior*.

In the regulatory context, characterizing an individual as an employee triggers the protections of the law. In *Darden*, Mr. Darden's ability to invoke the protections of ERISA depended on whether he was an employee of Nationwide. In *Borello*, employee status caused sharefarmers to be covered by California's Workers' Compensation Act. In *Dynamex*, the California wage order covering conditions in the transportation industry applied to selected Dynamex personnel because they were classified as employees and were thus covered by the wage order.

Four major tests have evolved to determine whether an individual is an employee rather than an independent contractor: the common law control test, the "ABC" standard, the "economic realities" test, and inquiry into statutory purposes. As we shall see in the next section of this Article, commentators have largely been critical of the law in this area.

## II. COMMENTARY

In this section, I explore the commentary in this area. The relevant literature advances a variety of themes and proposals, largely critical of the current law of employee status. Among these criticisms are the imprecise nature of the multifactor common law control test, particularly in the context of the modern "gig economy," the alleged failure of contemporary law to extend employment-based protection to individuals who need such protection, the desirability of adopting a third category to stand midway between status as an employee and status as an independent contractor, the creation of a presumption of employee status, the alleged need to increase penalties for employers that misclassify employees as independent contractors, and the need for definitions of employee status that are more simple and more uniform. As I argue *infra*, A.B.5 indicates the tension among these concerns: expanding the coverage of employment-based protection will make the law more complex and less uniform—as did A.B.5.

Professor Marc Linder attacks current law as both imprecise and failing to protect workers who deserve the protection of laws regulating the workplace.<sup>94</sup> Statutes governing "unemployment compensation, workers compensation, collective bargaining rights, minimum wages and maximum hours, social security, pensions, occupational safety and health, and anti-discrimination protection" only cover "employees," not independent contractors.<sup>95</sup> "What an employee *is*, however, has often been left vague," leaving current law, according to Professor Linder, a "hodgepodge" with "[n]o sound theoretical or empirical" justification.<sup>96</sup>

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94. Linder, *supra* note 23, at 158.

95. *Id.*

96. *Id.*

Professor Linder focuses upon “[t]wo rival tests” for defining whether “the employment relationship” exists: “the more restrictive control test and the more expansive economic reality of dependence test.”<sup>97</sup> However, he concludes neither test generates “a principled position to distinguish between employers and independent contractors.”<sup>98</sup> In the interest of greater legal uniformity and protection, Professor Linder suggests borrowing from certain foreign legal systems a third category for workers, “dependent contractors.”<sup>99</sup>

Professors Seth D. Harris and Alan B. Krueger, writing under the auspices of *The Hamilton Project*, similarly support a third category for participants in the gig economy to be denoted as “independent worker.”<sup>100</sup> Uber and Lyft drivers would be the prototypical “independent workers,”<sup>101</sup> participants in the online economy who occupy “a middle ground” between employee and independent contractor status.<sup>102</sup> Professors Harris and Krueger tell us that the problematic legal situation of gig economy workers stems from the unsettled nature of current law that consists of “collections of factors for consideration rather than clear thresholds or required elements.”<sup>103</sup> Moreover, the emerging economic relationships of the modern economy do not fit the either/or choice of employment v. independent contracting: “the existing employee-independent contractor dichotomy does not offer a satisfying or reliable path in these new and emerging circumstances.”<sup>104</sup>

To address these novel conditions, Professors Harris and Krueger call for federal and state legislation to create a new category of “independent worker.”<sup>105</sup> Independent workers, like employees, would have the legal right to organize and bargain collectively<sup>106</sup> and would be protected by anti-discrimination laws.<sup>107</sup> For income tax and FICA purposes, independent workers would be treated in the same way as employees, that is, subject to withholding and employer contributions.<sup>108</sup> However, such an independent worker would not receive “other protections and benefits, such as overtime protection or unemployment insurance.”<sup>109</sup>

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97. *Id.* at 172.

98. *Id.* at 175.

99. *Id.* at 185–86.

100. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”*, BROOKINGS: THE HAMILTON PROJECT 5 (2015) [https://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf).

101. *Id.* at 5, 9.

102. *Id.* at 9.

103. *Id.* at 6.

104. *Id.* at 8.

105. *Id.* at 5.

106. *Id.* at 15–17.

107. *Id.* at 17–18.

108. *Id.* at 18–19.

109. *Id.* at 19.

In contrast, Professor Miriam A. Cherry and Doctor Antonio Aloisi are skeptical of such third categories as “dependent contractors.”<sup>110</sup> After exploring the experiences with such third categories in Canada, Spain, and Italy, they conclude that “fairness for workers” instead requires a “default rule” of “employee status or something that, at the very least, resembles it closely.”<sup>111</sup>

Professor Cherry and Doctor Aloisi also highlight the status of workers “in the ‘gig,’ ‘on-demand,’ ‘platform,’ or ‘sharing’ economy.”<sup>112</sup> For these and other workers, employee status is necessary for them to receive the protection of minimum wage laws, anti-discrimination statutes, state unemployment compensation systems, and worker’s compensation laws.<sup>113</sup> The common law control test as well as the economic realities standard, they argue, “are notoriously malleable, difficult, and fact-dependent,”<sup>114</sup> leading to “indeterminate legal outcome[s].”<sup>115</sup>

However, based on the Canadian, Spanish, and Italian experiences with intermediate categories between “employee” and “independent contractor,” Professor Cherry and Doctor Aloisi conclude that such categories entail their own “potential for misclassification, arbitrage, and confusion.”<sup>116</sup> They instead suggest creating a general presumption of employee status: “above a minimum threshold of hours worked, the default classification would be an employment relationship.”<sup>117</sup>

In a similar vein, Professor Christopher Buscaglia calls for substantive and procedural legislation to force more workers to be treated as employees.<sup>118</sup> From his perspective, the core problem stems from the “common law factors” for employee status as reflected in “the IRS 20-factor test.”<sup>119</sup> He calls for laws providing “a clear and unambiguous definition of ‘independent contractor[,]’” as well as legislation which “directly punishes acts of misclassification by employers.”<sup>120</sup>

Citing studies indicating that many employees are misclassified as independent contractors,<sup>121</sup> Professor Buscaglia calls for legislation providing a

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110. Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U.L. REV. 635, 637, 640 (2017).

111. *Id.* at 693–40.

112. *Id.* at 641.

113. *Id.* at 642.

114. *Id.* at 642–43.

115. *Id.* at 645.

116. *Id.* at 681.

117. *Id.* at 683.

118. Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 113 (2009).

119. *Id.*

120. *Id.*

121. *Id.* at 114–19.

“uniform” definition of “independent contractor . . . for all purposes.”<sup>122</sup> This definition would eschew “multi-factor tests like the ‘right to control’ or the IRS test, which are difficult to apply and do not lead to consistent and predictable outcomes.”<sup>123</sup>

Instead, under Professor Buscaglia’s uniform definition of “independent contractor,” an individual would, as a substantive matter, be deemed to be an independent contractor only if each of nine criteria are satisfied.<sup>124</sup> Under this proposal, an individual would be an independent contractor only if she: “(i) maintains a separate business with the individual’s own business location, equipment, materials, and other facilities”;<sup>125</sup> “(ii) holds or has applied for a federal employer identification number or has filed business or self-employment tax returns with the Internal Revenue Service”;<sup>126</sup> “(iii) operates under contracts to perform specific services for specific amounts of money”;<sup>127</sup> “(iv) incurs the expenses related to the service performed under the contract”;<sup>128</sup> “(v) is personally liable for the failure to complete the service”;<sup>129</sup> “(vi) receives compensation for services performed under a contract on a commission or per-job basis and not on any other basis”;<sup>130</sup> “(vii) may realize a profit or suffer a loss under a contract to perform service”;<sup>131</sup> “(viii) has continuing and/or recurrent business liabilities and obligations”;<sup>132</sup> and “(ix) the success or failure of the individual’s business depends on the relationship of business receipts to expenditures.”<sup>133</sup> Under this proposed test, “[i]f proof of any one factor is deficient, the worker is deemed an employee.”<sup>134</sup>

Procedurally under Professor Buscaglia’s proposed regime, a hiring entity must seek certification in advance that a person to be hired as an independent contractor satisfies all nine of these criteria.<sup>135</sup> Professor Buscaglia would bolster his regime with personal liability similar to the “responsible person”

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122. *Id.* at 130.

123. *Id.*

124. *Id.* at 130–31.

125. *Id.* at 130.

126. *Id.* at 131.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

provisions that impose payroll tax<sup>136</sup> and sales tax<sup>137</sup> responsibilities upon corporate officers and individuals.<sup>138</sup> If an employer flouts the rules pertaining to alleged individual contractors, strict civil liability and potential criminal penalties would be imposed upon the responsible corporate officer or LLC manager.<sup>139</sup>

The presumption of employee status and harsher penalties for misclassification are echoed in a student note that compares Indiana's treatment of employees and independent contractors with the laws of other states.<sup>140</sup> Like other critiques of current law, this note criticizes the "lack of uniformity" in the law's various tests of employee status and "the complexity of the tests."<sup>141</sup> Among its remedies, this note proposes a private right of action under which an individual misclassified as an independent contractor could recover the "wages, salary, employment benefits, or other compensation denied or lost" as a result of such misclassification.<sup>142</sup> In addition, this note proposes that civil penalties be imposed on employers who misclassify employees as independent contractors<sup>143</sup> and that the states establish a presumption of employee status.<sup>144</sup>

Dean David Weil describes what he calls the "fissured workplace."<sup>145</sup> In an earlier era, most workers had a "direct employment relationship"<sup>146</sup> "with a single, well-defined employer with direct responsibility in hiring and firing, managing, training, compensation, and development of its workforce."<sup>147</sup> Today, in contrast, functions and relationships previously conducted by a single,

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136. I.R.C. § 6672 (providing statutory basis for responsible person liability). *See also* Slodov v. United States, 436 U.S. 238, 247 (1978) ("Sections 6672 and 7202 were designed to assure compliance by the employer with its obligation to withhold and pay the sums withheld, by subjecting the employer's officials responsible for the employer's decisions regarding withholding and payment to civil and criminal penalties for the employer's delinquency."); United States v. Hartman, 896 F.3d 759, 761 (6th Cir. 2018) (discussing responsible person liability).

137. *See, e.g.*, CONN. GEN. STAT. § 12-414a (2020) (imposing personal sales tax liability upon "any officer or employee of any corporation . . . and a member or employee of any partnership or limited liability company who, as such officer, employee or member, is under a duty" to collect and pay sales tax); TENN. CODE ANN. § 67-1-1443 (2020) (imposing personal sales tax liability upon "an officer or employee of a corporation who, as such officer or employee, is under a duty" to collect and pay sales taxes); *Yik C. Lo v. Comm'r of Revenue*, Nos. 8359-R, 8454-R, 2016 Minn. Tax LEXIS 17, at \*24-25 (Minn. T.C., Apr. 7, 2016) (discussing responsible person liability for state sales taxes).

138. Buscaglia, *supra* note 118, at 131-32.

139. *Id.*

140. *See* John DeRoss, Jr., Note, *Misclassification of Employees as Independent Contractors in Indiana: A State Legislative Solution*, 50 IND. L. REV. 673, 674 (2017).

141. *Id.* at 675.

142. *Id.* at 692-93 (quoting 820 ILL. COMP. STAT. ANN. 185/60 (LexisNexis 2016)).

143. *Id.* at 694.

144. *Id.* at 694-95.

145. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 7 (2014).

146. *Id.* at 9.

147. *Id.* at 180.

all-encompassing employer are divided among and subcontracted to “multiple organizations.”<sup>148</sup> This causes the contemporary workplace to be “fissured” among different employing entities.<sup>149</sup>

To take a simple case, consider the Dynamex driver who hires and pays her own workers. These second-tier drivers are employed by the first-tier driver who has a direct relationship with Dynamex. These second-tier drivers, while not immediately employed by Dynamex, are nevertheless part of the broader Dynamex enterprise and are regulated by the policies Dynamex imposes upon the first-tier driver with which Dynamex has a direct relationship. These second-tier drivers may wear Dynamex uniforms<sup>150</sup> and may place the Dynamex logo on their delivery trucks<sup>151</sup> even though their paychecks come not from Dynamex itself, but from the first-tier driver who receives her payments from Dynamex.

Or consider the employees of a fast-food franchisee. These employees receive their paychecks and direct supervision from the franchisee who operates the restaurant at which these employees work.<sup>152</sup> But these employees wear the franchisor’s uniforms and implement policies that the franchisor imposes upon the franchisee.<sup>153</sup>

Many situations in the fissured workplace are more complex than these cases. Frequently, corporations, which in an earlier age directly employed individuals to perform a variety of functions, today subcontract those functions to “multiple organizations.”<sup>154</sup> Customers and other members of the public are typically unaware that persons with whom they interact are actually employed by these entities with subcontracts because these persons appear to the public to be employees of the corporation that has outsourced its staffing function. The rise of the fissured workplace has placed new pressure on the concept of “joint employment”<sup>155</sup> under which two related entities, e.g., franchisor and franchisee, might both be deemed to be employers of the persons who are controlled by the franchisee subject to the overriding supervision of the franchisor.

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148. *Id.* at 7.

149. *Id.*

150. *See* Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1, 8 (Cal. 2018).

151. *Id.*

152. Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Toward a New “Intermediary” Theory of Joint Employment*, 94 WASH. L. REV. 171, 173, 179, 213 (2019).

153. *See id.* at 190–91.

154. *See* WEIL, *supra* note 145, at 7.

155. *See, e.g.*, Browning-Ferris Indus. of Cal. v. NLRB, 911 F.3d 1195, 1199–200 (D.C. Cir. 2018) (considering the appropriate analysis in determining “joint-employer status”); 29 C.F.R. § 791.1 (2019). *See also* Ben Penn, *States Can Advance Challenge Over DOL Joint Employer Rule: Judge*, BLOOMBERG LAW NEWS (June 2, 2020, 5:25 PM), <https://news.bloomberglaw.com/daily-labor-report/states-can-advance-challenge-over-dol-joint-employer-rule-judge>.

As part of his program for “mending”<sup>156</sup> the fissured workplace, Dean Weil highlights a variety of legislative proposals<sup>157</sup> and enforcement practices.<sup>158</sup> Among these are the ABC definition of employment.<sup>159</sup>

In a similar fashion, Attorneys Anna Deknatel and Lauren Hoff-Downing consider a variety of state responses to the “rampant culture of misclassification” in which employees are erroneously characterized as independent contractors.<sup>160</sup> They support the ABC test along with enhanced penalties for worker misclassification.<sup>161</sup>

Attorneys Deknatel and Hoff-Downing catalogue the different ways in which various states have formulated the ABC test.<sup>162</sup> After reviewing these varied versions of the ABC formula, they endorse “[r]evising statutes towards [the ABC] test [as] a particularly effective measure when it creates a set of laws that provide one independent contracting definition across all workers.”<sup>163</sup>

Professor Katherine V.W. Stone characterizes the evolution of the contemporary workplace as “the decline of [the] standard contract of employment.”<sup>164</sup> According to Professor Stone, “[t]he employment relationship is being transformed from a long-term stable relationship between an employee and a firm to one in which the employee is a free agent operating in a boundaryless workplace.”<sup>165</sup> Central to this transformation has been the legal characterization of workers as independent contractors: “[t]he test for independent contractor status is broad, so many who depend on a particular employer for their livelihood are classified as independent contractors and deprived of all employment law protections.”<sup>166</sup>

The Government Accountability Office (GAO) shares the consensus belief that “[t]he common law rules for classifying workers are unclear and subject to conflicting interpretations,”<sup>167</sup> in part because “the tests used to determine

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156. WEIL, *supra* note 145, at 20–23.

157. *Id.* at 203–213.

158. *Id.* at 221–242.

159. *Id.* at 204–05.

160. Deknatel & Hoff-Downing, *supra* note 80, at 55.

161. *Id.* at 61.

162. *Id.* at 67–73.

163. *Id.* at 101.

164. Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 58 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

165. *Id.*

166. *Id.* at 74.

167. U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-GGD-96-130, *TAX ADMINISTRATION: ISSUES IN CLASSIFYING WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS* 1 (1996), <https://www.gao.gov/assets/110/106546.pdf>.

whether a worker is an independent contractor or an employee are complex and differ from law to law.”<sup>168</sup>

In short, the commentary is largely critical of the current law of employee status, characterizing the law as too complex, too imprecise, and too limited, particularly in the context of the modern “gig economy.” The legal commentators call for definitions of employee status that are simpler, more uniform, and more comprehensive. As I discuss *infra*, A.B.5 demonstrates the tensions among these concerns.

### III. DESCRIBING A.B.5

Against this background, California adopted A.B.5. This statute purports to codify *Dynamex* and the ABC test for the purposes of the California Labor and Unemployment Insurance Codes and for all wage orders of the California Industrial Welfare Commission.<sup>169</sup> However, A.B.5 creates so many exceptions to *Dynamex* and the ABC standard that A.B.5 can just as plausibly be characterized as a partial codification of *Borello* and its test for employee status. Moreover, A.B.5 does not address the issue of employee status in the tort context and has inconsistent implications for employee status in the state tax setting.

Section 2 of A.B.5<sup>170</sup> declares, as a general rule, that employee status is to be determined under the ABC test for purposes of California’s Labor and Unemployment Insurance Codes and for the wage orders of California’s Industrial Welfare Commission.<sup>171</sup> Consequently for these purposes, any “person providing labor or services for remuneration shall” presumptively “be

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168. U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 3 (2009), <https://www.gao.gov/assets/300/293679.pdf>.

169. Cal. Assemb. B. 5, Leg. Couns. Dig. A.B.5 also amended the provisions of the California Labor Code pertaining to Workers’ Compensation and Insurance as well as provisions of the California Unemployment Insurance Code. See *id.* §§ 3–5. A.B.5 also authorized the California attorney general, as well as city attorneys and prosecutors, to pursue injunctive relief “to prevent the continued misclassification of employees as independent contractors . . . .” *Id.* § 2 (adding § 2750.3(j) to the California Labor Code).

170. *Id.* (adding § 2750.3 to the California Labor Code). A ballot measure to repeal A.B.5 will be voted upon by the California electorate this November. Hannah Wiley, *Uber, Lyft and DoorDash Initiative Seeking Labor Law Exemption Heads to California Voters*, THE SACRAMENTO BEE (May 22, 2020, 6:54 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article242948676.html>. In the meanwhile, California is suing Uber and Lyft about the employee status of their drivers. See Paul Jones, *California Seeks Injunction Against Uber, Lyft Over Worker Status, Taxes*, TAX NOTES (June 26, 2020), <https://www.taxnotes.com/tax-notes-today-state/litigation-and-appeals/california-seeks-injunction-against-uber-lyft-over-worker-status-taxes/2020/06/26/2nm0>. The California Superior Court has ruled for California, but the trial court’s injunction has been suspended by the Court of Appeals. See *People v. Uber Techs., Inc.*, No. CGC-20-584402 at 32 (Cal. Super. Ct. Aug. 10, 2020) (order granting preliminary injunction). See also Joel Rosenblatt, *Uber, Lyft Win Delay on Converting Drivers to Employees*, BLOOMBERG LAW NEWS (Aug. 20, 2020, 4:59 PM), <https://news.bloomberglaw.com/daily-labor-report/uber-lyft-win-delay-on-order-converting-drivers-to-employees>.

171. Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1) to the California Labor Code).



considered an employee rather than an independent contractor unless the hiring entity demonstrates” compliance with all three factors of the ABC test<sup>172</sup>:

(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.

(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.<sup>173</sup>

However, having made this broad statement, A.B.5 then exempts numerous professions and occupations from the ABC test, thereby leaving these professions and occupations subject to *Borello*.<sup>174</sup>

The exemptions of A.B.5 are detailed and daunting. The exempted professions and occupations (subject to *Borello* rather than the ABC test for employee status) include licensed insurance personnel;<sup>175</sup> licensed “physician[s], dentist[s], podiatrist[s], psychologist[s], and] veterinarian[s]”;<sup>176</sup> licensed “lawyer[s], architect[s], engineer[s], private investigator[s], and] accountant[s]”;<sup>177</sup> registered broker-dealers and investment advisors;<sup>178</sup> certain “direct sales salesperson[s]”<sup>179</sup> and commercial fishers;<sup>180</sup> specific providers of marketing;<sup>181</sup> human resources services;<sup>182</sup> certain travel agents;<sup>183</sup> graphic designers;<sup>184</sup> “[g]rant writer[s]”;<sup>185</sup> “[f]ine artist[s]”;<sup>186</sup> “enrolled agent[s]” authorized to practice before the IRS;<sup>187</sup> a “[p]ayment processing agent through

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172. *Id.* (adding § 2750.3(a)(1) to the California Labor Code).

173. *Id.* (adding § 2750.3(a)(1)(A)–(C) to the California Labor Code).

174. *Id.* (adding §§ 2750.3(b) through 2750.3(h), inclusive, to the California Labor Code). In an unfortunate drafting decision, A.B.5 incorporates *Borello* by reference. *See id.* As I observe *infra* pp.42–43, this decision is problematic since it is unclear whether this statutory reference is intended to incorporate the two-part test enunciated in *Borello* (control plus statutory purpose) or whether this reference is intended to reflect *Dyanmex*’s subsequent gloss on *Borello* (which emphasizes statutory purpose).

175. *Id.* § 2 (adding § 2750.3(b)(1) to the California Labor Code).

176. *Id.* (adding § 2750.3(b)(2) to the California Labor Code).

177. *Id.* (adding § 2750.3(b)(3) to the California Labor Code).

178. *Id.* (adding § 2750.3(b)(4) to the California Labor Code).

179. *Id.* (adding § 2750.3(b)(5) to the California Labor Code).

180. *Id.* (adding § 2750.3(b)(6) to the California Labor Code).

181. *Id.* (adding § 2750.3(c)(2)(B)(i) to the California Labor Code).

182. *Id.* (adding § 2750.3(c)(2)(B)(ii) to the California Labor Code).

183. *Id.* (adding § 2750.3(c)(2)(B)(iii) to the California Labor Code).

184. *Id.* (adding § 2750.3(c)(2)(B)(iv) to the California Labor Code).

185. *Id.* (adding § 2750.3(c)(2)(B)(v) to the California Labor Code).

186. *Id.* (adding § 2750.3(c)(2)(B)(vi) to the California Labor Code).

187. *Id.* (adding § 2750.3(c)(2)(B)(vii) to the California Labor Code).

an independent sales organization”;<sup>188</sup> certain photographers and photojournalists;<sup>189</sup> specified “freelance writer[s], editor[s] or newspaper cartoonist[s]”;<sup>190</sup> licensed estheticians, electrologists, manicurists, barbers and cosmetologists who meet detailed requirements;<sup>191</sup> licensed real estate agents;<sup>192</sup> licensed repossession agents;<sup>193</sup> “bona fide business-to-business contracting relationship[s]” meeting certain standards;<sup>194</sup> specified construction subcontractors;<sup>195</sup> a “referral agency” and a “service provider” receiving a referral if the referral agency meets certain standards and connects clients with providers of “graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, web design, picture hanging, pool cleaning, or yard cleanup” services;<sup>196</sup> and motor clubs, along with certain of their service providers.<sup>197</sup> As I note below, many of these statutory exceptions are intricate with unclear boundaries.<sup>198</sup>

A.B.5 has no impact on an individual’s status as an employee *vel non* in the tort context. Thus, it is possible for an individual to be an employee for purposes of the ABC test embodied in A.B.5, but simultaneously be an independent contractor for tort law purposes under the common law control test.

A.B.5’s impact in the state tax context is uneven. On the one hand, A.B.5 applies the ABC test for purposes of determining whether an individual is an employee for state wage withholding purposes.<sup>199</sup> On the other hand, A.B.5 does not apply more generally to the California tax code. Hence, it is possible for a worker to be an employee for purposes of state wage withholding under the ABC test while being an independent contractor for other state income tax purposes.

Suppose, for example, that a California business provides health care coverage for an individual who qualifies as an employee under the ABC test but not under the common law control standard. In this case, the business must withhold California income tax from the compensation it pays this individual

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188. *Id.* (adding § 2750.3(c)(2)(B)(viii) to the California Labor Code).

189. *Id.* (adding § 2750.3(c)(2)(B)(ix) to the California Labor Code).

190. *Id.* (adding § 2750.3(c)(2)(B)(x) to the California Labor Code).

191. *Id.* (adding § 2750.3(c)(2)(B)(xi) to the California Labor Code).

192. *Id.* (adding § 2750.3(d)(1) to the California Labor Code).

193. *Id.* (adding § 2750.3(d)(2) to the California Labor Code).

194. *Id.* (adding § 2750.3(e) to the California Labor Code).

195. *Id.* (adding § 2750.3(f) to the California Labor Code).

196. *Id.* (adding § 2750.3(g) to the California Labor Code).

197. *Id.* (adding § 2750.3(h) to the California Labor Code).

198. *See infra* Section V.C.

199. A.B.5 does not apply to the California Revenue & Tax Code. However, California’s statute requiring employers to undertake personal income tax withholding on the wages they pay is codified in Unemployment Insurance Code § 13020. A.B.5 does apply the ABC test to the Unemployment Insurance Code and hence to the income tax withholding obligation codified therein. *See* Cal. Assemb. B. 5 § 2 (adding to the Labor Code § 27503.3(a)(1), which applies the ABC test to the Unemployment Insurance Code).

because she is an employee under the wage withholding provisions of the Unemployment Insurance Code as modified by A.B.5. However, this individual cannot exclude the cost of her health care coverage from state gross income as she remains an independent contractor for general income tax purposes.<sup>200</sup>

#### IV. EVALUATING A.B.5

##### A. Overview

A.B.5 is neither the panacea some of its advocates maintain nor the tragedy its opponents bemoan. This section emphasizes four features of A.B.5. First, the ABC test incorporated into A.B.5 has its own interpretative challenges. These ambiguities include the “control” standard,<sup>201</sup> which the ABC inquiry borrows from the common law test of employee status, as well as such contestable notions as whether a worker “is customarily engaged in an independently established trade, occupation, or business”<sup>202</sup> or “performs work that is outside the usual course of the hiring entity’s business.”<sup>203</sup>

Second, as we have just seen, A.B.5 is replete with exemptions and exceptions. The boundaries of these exemptions and exceptions are often opaque. Third, it was an unfortunate drafting choice to repeatedly incorporate by reference *Borello* rather than stating in explicit statutory terms the rule the drafters of A.B.5 believe that *Borello* embodies.<sup>204</sup> Fourth, A.B.5 has no impact on an individual’s status as an employee for tort purposes and an uneven impact on an individual’s status as an employee for state tax purposes. It is thus possible, for example, for an individual to be an employee under A.B.5 for purposes of the Golden State’s employment-based protection laws while being an independent contractor for the tort rule of *respondeat superior*. Whatever the merits of A.B.5 might be, simplicity, clarity, and uniformity are not among these.

##### B. The Ambiguities of the ABC Test

Critics of the common law control test bemoan the uncertainties of that fact-intensive, multifactor test.<sup>205</sup> However, the ABC test is no model of clarity either. Most obviously, the ABC test incorporates as prong A the standard of control. That standard entails the same uncertainties and imprecisions under the ABC test as it does under the common law inquiry: how much authority must

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200. See I.R.C. § 106(a) (excluding employer-based health coverage from an employee’s gross income, incorporated for California personal income tax purposes by CAL. REV. & TAX. CODE § 17131 (Deering 2020)).

201. Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1)(A) to the California Labor Code).

202. *Id.* (adding § 2750.3(a)(1)(C) to the California Labor Code).

203. *Id.* (adding § 2750.3(a)(1)(B) to the California Labor Code).

204. *Id.* (adding §§ 2750.3(b), 2750.3(c)(1), 2750.3(d)(1), 2750.3(e)(1), 2750.3(f), 2750.3(g)(1) and 2750.3(h) to the California Labor Code).

205. See *supra* Section II.

the hiring person have and exercise to constitute “control” over the person hired? How are multifactor tests for control to be applied in particular cases?

Sometimes, “control” is easily determined but often it is not, particularly in the modern economy of the “fissured” workplace where multiple persons and entities may each possess and exercise some authority over the worker whose status as an employee *vel non* is being determined.<sup>206</sup> Consider, for example, an individual hired by a Dynamex driver. Is this second-tier driver controlled by Dynamex via the quality standards Dynamex imposes directly upon its first-tier drivers; or is this second-tier driver controlled by the first-tier driver who stands between Dynamex and the second-tier driver? If both Dynamex and the first-tier driver “control” the second-tier driver, is that driver an employee of both Dynamex and the first-tier driver? The answers to these questions under the ABC test are no more apparent than they are under the common law control test for employee status. The presumption of employee status under the ABC test shifts the burden of overcoming these uncertainties onto the hiring person, who must prove the absence of legal and practical control to establish independent contractor status of the person hired. But the uncertainties of the multifactor control test remain.

In these and other situations, “control” for purposes of the ABC standard will be governed by the same kinds of multifactor tests promulgated under Rev. Rul. 87-41<sup>207</sup> and the Restatement of Agency.<sup>208</sup> Those multifactor inquiries will yield no more certainty as part of the ABC rubric than they do under the common law control test.

Similar ambiguities arise under prong B of the ABC test. Prong B requires determination of the hiring entity’s business: to be an independent contractor rather than an employee, the service provider must “perform[] work that is outside the usual course of the hiring entity’s business.”<sup>209</sup> Often it is easy to determine that entity’s business, but, again, in the modern economy, matters can frequently be more complex.

Consider, for example, an online platform that matches persons who want to perform janitorial services with persons who need janitorial services. Is that platform in the janitorial services business for purposes of prong B or is the platform’s business online matching? That characterization is critical under prong B of the ABC test because, to satisfy that prong, the worker to be classified as an independent contractor must provide services “outside the usual course of the hiring entity’s business.”<sup>210</sup>

If the online platform is deemed to be in the janitorial services business, then the worker providing such services falls within “the hiring entity’s business.” If,

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206. WEIL, *supra* note 145, at 20–22.

207. Rev. Rul. 87-41, 1987-1 C.B. 296, at 10–18.

208. RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a), cmt. b, cmt. f (AM. LAW INST. 2006).

209. Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1)(B) to the California Labor Code).

210. *Id.*

on the other hand, the online platform is characterized as conducting an internet matching business, then the worker providing janitorial services is, for purposes of prong B, “outside” the platform’s business because the worker is a janitor, not a computer matching service.

Consider in this context the decision under prong B in *Q.D.-A., Inc. v. Indiana Department of Workforce Development*.<sup>211</sup> In *Q.D.-A, Inc.*, the hiring entity was a company which “matches drivers with customers who need large vehicles driven to them.”<sup>212</sup> Indiana’s Supreme Court concluded that for purposes of the ABC test, the company and the drivers conduct different businesses because the company matching drivers and customers does not itself “provide drive-away services.”<sup>213</sup>

This construction of prong B stands in contrast to the position of those who contend that A.B.5’s codification of the ABC test classifies Uber and Lyft drivers as employees.<sup>214</sup> *Q.D.-A, Inc.*’s business model is similar to Uber’s and Lyft’s, that is, computer-based matching of transportation service providers and transportation customers. The Indiana court found that for purposes of prong B such customer-matching is a different business than is conducted by the drivers themselves.

Prong C of the ABC test is, depending on one’s perspective, intuitive or tautological: to be an independent contractor, a person providing services must be “engaged in an independently established trade, occupation, profession or business[.]”<sup>215</sup> This comes close to saying that an independent contractor is a contractor who conducts independent activity. Again, over time case law will emerge, but, in the meanwhile, the concept of an independent business will be contested for purposes of prong C. There is, moreover, no assurance that, for the long run, different state courts will construe the concept of an independent business in the same way. Indeed, there is a good chance that they will not.

Consider again in this context the facts of *Dynamex*.<sup>216</sup> In light of the interpretive ambiguities of the ABC test as codified in A.B.5, California courts could construe the ABC test in a way that classifies all *Dynamex* drivers as employees, including those drivers who engage other persons to work for them and those drivers who also work for other delivery services or for their own account. If under prong A, *Dynamex* is deemed to exercise control over every driver who is delivering for *Dynamex*, then no driver overcomes the presumption of employee status because *Dynamex* exercises such control even if a driver also employs others. *Dynamex* exercises such control while the driver

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211. *Q.D.-A., Inc. v. Ind. Dep’t Workforce Dev.*, 114 N.E.3d 840, 845 (Ind. 2019).

212. *Id.* at 842.

213. *Id.* at 848.

214. See e.g., Ghaffary & Campbell, *supra* note 3; Canon, *supra* note 3; Conger & Scheiber, *supra* note 3 (“The bill was not universally supported by drivers. Some opposed it because they worried it would make it hard to keep a flexible schedule.”).

215. Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1)(C) to the California Labor Code).

216. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

works for Dynamex, even though she works for other delivery companies on her own time. The upshot under this scenario is that all Dynamex drivers are employees because Dynamex exercises control as to all of them.

In yet another scenario, California's courts could apply the ABC test, now codified in A.B.5, in a way that classifies Dynamex drivers as employees when they work full-time for Dynamex by themselves, but which classifies the remaining Dynamex drivers as independent contractors. In this setting, Dynamex is deemed to exercise no control over any drivers. Full-time Dynamex drivers would nevertheless be Dynamex employees because they do not have any independent business for purposes of prong C. Thus, under this scenario, full-time drivers are Dynamex employees because, lacking any independent business, the statutory presumption of employee status remains intact. On the other hand, drivers who deliver for other companies or for their own account would under this approach satisfy prong C and would thus be independent contractors because they have independent businesses.

A situation in which some Dynamex drivers are employees and some are not would pose administrability challenges for Dynamex and other similarly situated California employers. Such a situation would also be confusing for the drivers themselves and for those charged with the enforcement of California labor law. As different drivers shift their work patterns—from full-time to part-time, sometimes engaging other workers and sometimes not, at times working for other delivery services and at other times not—Dynamex (and any employer with a similar business model) would be expected to monitor and assess these changes as drivers would continually shift from employee status to independent contractor status and back again.

In short, those hoping for greater clarity and simplicity in the law cannot take comfort from A.B.5's adoption of the ABC test. Whatever the merits of the ABC test may be, that test does not eliminate interpretive challenges in determining employee status. Rather, the ABC standard introduces new interpretative challenges to the determination of employee status.

### *C. The Ambiguous Boundaries of A.B.5's Exemptions*

As we have seen, A.B.5 is replete with exemptions and exceptions.<sup>217</sup> The boundaries of these statutory exemptions and exceptions are often opaque.

To take one example, consider A.B.5's exemption from the ABC test for certain persons who perform "[m]arketing" services.<sup>218</sup> To satisfy this exemption, an individual performing marketing services must, *inter alia*, undertake "work [that] is original and creative in character and the result of which depends primarily on the invention, imagination, or talent of the

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217. *See* Cal. Assemb. B. 5 § 2 (adding §§ 2750.3(b)(1)-(6), 2750.3(c)(2)(B)(i)-(xi), 2750.3(d)(1)-(2), 2750.3(e), 2750.3(f), 2750.3(g), 2750.3(g)(2)(C), and 2750.3(h) to the California Labor Code).

218. *Id.* (adding § 2750.3(c)(2)(B)(i) to the California Labor Code).

[individual] . . . .”<sup>219</sup> Over time, a body of case law may emerge that provides guidance under this fact-specific standard. But in the short-run, more likely for the long-run, it will often be unclear whether marketing activity is “creative” enough or “imaginative” enough to qualify a marketer as an independent contractor for purposes of this A.B.5 exemption.

A.B.5’s exemption from the ABC test for specified persons performing marketing services is part of a broader statutory exemption for a variety of “professional services” providers.<sup>220</sup> Among the criteria for this broader exemption is that the professional service provider “customarily and regularly exercises discretion and independent judgment in the performance of the services.”<sup>221</sup> This statutory language derives from the U.S. Department of Labor (DOL) regulations under FLSA. Under the DOL regulations, one factor determining whether an individual is an administrative employee exempt from FLSA’s overtime pay requirements is whether the employee “exercise[s] . . . discretion and independent judgment with respect to matters of significance.”<sup>222</sup> In 2001, California’s Industrial Welfare Commission incorporated this standard into its Wage Order 4-2001.<sup>223</sup> In light of this history, when California courts construe A.B.5’s statutory exemption for certain professional service providers, they can logically look to the federal regulations defining “discretion and independent judgment” for FLSA purposes,<sup>224</sup> as well as to the decisions of the federal<sup>225</sup> and California<sup>226</sup> courts applying this standard under the FLSA and Wage Order 4-2001.

However, the courts caution that their decisions applying the “discretion and independent judgment” test are “fact-intensive,”<sup>227</sup> focusing upon the “totality-of-the-circumstances.”<sup>228</sup> Even with interpretive guidance from the DOL’s overtime regulations and the existing federal and state case law, the standard of “discretion and independent judgment” is open-ended. It will take much time for definitive signposts to emerge for purposes of A.B.5’s “discretion and judgment standard”—if such signposts ever emerge.

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219. *Id.*

220. *Id.* (adding § 2750.3(c) to the California Labor Code).

221. *Id.* (adding § 2750.3(c)(1)(F) to the California Labor Code).

222. 29 C.F.R. § 541.200(a)(3) (2020).

223. *See* CAL. CODE REGS. tit. 8, § 11040.1(A)(2)(b) (2020) (defining an administrative employee as one “[w]ho customarily and regularly exercises discretion and independent judgment”).

224. 29 C.F.R. § 541.202 (2019).

225. *See, e.g.*, *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191, 196–97 (6th Cir. 2017).

226. *See, e.g.*, *Combs v. Skyriver Commc’ns, Inc.*, 72 Cal. Rptr. 3d 171, 1251–52, 1254, 1256–57 (Cal. Ct. App. 2008).

227. *Perry*, 876 F.3d at 200.

228. *Id.* at 208.

Take a third example: A.B.5's exemption from the ABC test for "freelance writer[s], editor[s and] newspaper cartoonist[s]." <sup>229</sup> This exemption only applies if the writer, editor, or cartoonist "provide[s] content submissions to the putative employer . . . 35 times" or fewer per year. <sup>230</sup> For purposes of this test, "[i]tems of content produced on a recurring basis related to a general topic shall be considered separate submissions for purposes of calculating the 35 times per year." <sup>231</sup>

The drafters of A.B.5 could plausibly have decided that these and other ambiguities <sup>232</sup> were necessary as a matter of policy or politics or both. However, that drafting decision disappoints the expectations of those commentators seeking enhanced clarity and simplicity as to the legal definition of employment status. Challenging interpretive issues arise under A.B.5's exemptions from the ABC test. Those who criticize current law as unclear, overly complex, and lacking uniformity can take no solace from A.B.5.

#### D. Incorporating *Borello* <sup>233</sup>

A.B.5 repeatedly and explicitly incorporates by reference *Borello*. <sup>234</sup> This drafting decision is problematic since it is unclear whether this statutory reference is intended to incorporate the original two-part test of *Borello* (control plus statutory purpose) or whether this reference is intended to reflect *Dyanmex*'s subsequent gloss on *Borello* (which emphasizes more heavily statutory purpose when determining an individual's status vel non as an employee). <sup>235</sup>

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229. Cal. Assemb. B. 5 § 2 (adding § 2750.3(c)(2)(B)(x) to the California Labor Code). A.B.5's treatment of freelance writers has proved particularly contentious. See, e.g., Philip Garrity, *We Polled 573 Freelancers About AB5. They're Not Happy*, THE FREELANCER (Jan. 30, 2020), <https://contently.net/2020/01/30/resources/we-polled-573-freelancers-about-ab5-theyre-not-happy/>; Matt Charnock, *California, Leave Freelance Journalists Alone*, THE BOLD ITALIC (Jan. 7, 2020), <https://thebolditalic.com/ab-5-threatens-the-future-of-journalism-in-california-and-my-career-6c4321b6db05>; Katie Kilkenny "Everybody Is Freaking Out": *Freelance Writers Scramble to Make Sense of New California Law*, THE HOLLYWOOD REP. (Oct. 17, 2019, 10:34 AM), <https://www.hollywoodreporter.com/news/everybody-is-freaking-freelance-writers-scramble-make-sense-new-california-law-1248195>. See also William Hays Weissman, *A.B.5 Versus Corporate Form*, 95 TAX NOTES 955 (2020), <https://www.taxnotes.com/tax-notes-state/employment-taxes/ab-5-versus-corporate-form/2020/03/16/2c7nf?highlight=william%20hays%20weissman>.

230. Cal. Assemb. B. 5 § 2 (adding § 2750.3(c)(2)(B)(x) to the California Labor Code).

231. *Id.*

232. See, e.g., *id.* (adding § 2750.3(c)(2)(B)(ii) to the California Labor Code) (exempting an "[a]dministrator of human resources" if "the contracted work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time").

233. *S.G. Borello & Sons, Inc. v. Dep't of Indus. Rel.*, 769 P.2d 399 (Cal. 1989).

234. See Cal. Assemb. B. 5, Leg. Couns. Dig. § 2.

235. See discussion *supra* Sections I.D., I.E.



In particular cases, the two interpretations of *Borello* can point to contrasting conclusions. Consider, for example, a situation in which a court concludes that, on the facts of the case, there is a weak argument for employee status under the common law control test, but there is a strong argument for employee status in light of statutory purpose. The original text of *Borello* is unclear as to what the court should do in this situation because in this hypothetical example the two relevant factors—control and statutory purpose—pull in opposite directions.

On the other hand, *Dynamex*'s realignment of *Borello* indicates that statutory purpose should be the dominant consideration in determining employee status.<sup>236</sup> Hence, adhering to this interpretation of *Borello*, the outcome in this hypothetical situation is employee, rather than independent contractor, status because statutory purpose predominates. Unfortunately, the drafting decision to incorporate *Borello* by name provides no guidance as to which version of *Borello* applies.

Incorporating *Borello* by name into A.B.5 may have been a drafting glitch. Alternatively, incorporating *Borello* into the statute in this fashion could have implemented a political compromise, explicit or implicit, necessary to secure the law's passage. If the potential supporters of A.B.5 could not agree among themselves which version of *Borello* to endorse—control plus statutory purpose or just statutory purpose by itself—citing to *Borello* enabled both sides to support the resulting legislation in the hope of prevailing in the subsequent regulatory and judicial processes.

Whether citing *Borello* by name was a poor drafting choice or “a child born of the silent union of legislative compromise,”<sup>237</sup> the result is more uncertainty as to the contours of A.B.5 since the statute leaves it unclear which version of *Borello* controls under A.B.5.

#### E. Tort and Tax Status

Another salient aspect of A.B.5 is the dog that didn't bark:<sup>238</sup> A.B.5 is silent on the subject of employee status in the context of torts. A.B.5 thus disappoints those seeking greater uniformity in the legal definition of employment because an individual can be an employee for purposes of A.B.5 and California labor law while that same individual is still an independent contractor for tort purposes.

Suppose, for example, that a freelance writer provides thirty-six annual submissions to a publisher, which does not control this writer, in the provision of his writing services. Suppose further that furnishing these thirty-six submissions is a full-time occupation for the writer who works exclusively for this publisher.

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236. *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 19–20 (Cal. 2018).

237. *Rosado v. Wyman*, 397 U.S. 397, 412 (1970).

238. ARTHUR CONAN DOYLE, *The Adventure of Silver Blaze*, in THE MEMOIRS OF SHERLOCK HOLMES 10, 34 (Elecbook 2000) (1894) (ebook) (“[Gregory:] ‘The dog did nothing in the night-time.’ [Holmes:] ‘That was the curious incident.’”).

On these facts, the writer is an employee for purposes of the ABC test, and the California Labor Code because the writer has no “independently established trade, occupation, or business[.]”<sup>239</sup> He works full-time for one publisher and is not available for work for others. This writer does not qualify for A.B.5’s exemption for freelance writers because he completes too many articles each year.<sup>240</sup> Hence, for purposes of A.B.5, the statutory presumption of employee status prevails as to this writer.

However, for tort purposes, this writer is an independent contractor because, in the tort setting, the common law control test remains in effect, and the publisher exercises no control over this writer. If, for example, this writer libels someone in a column, the publisher has no *respondeat superior* liability for this tort—even though the publisher may have its own liability as publisher and even though the publisher is this writer’s employer for purposes of California labor law.

This outcome may, as a matter of policy, be plausible because the tort law uses employee status for different purposes than that status serves in the context of protective legislation. However, this outcome frustrates the expectations of those seeking uniformity across the law in defining who is an employee.

Similar observations apply in the tax context. As noted earlier, the impact of A.B.5 in the California tax context is uneven.<sup>241</sup> A.B.5 controls for wage withholding purposes but not for other tax purposes. Thus, this writer is an employee for state wage withholding but not for other purposes of the Golden State’s income tax statute. Again, supporters of A.B.5 can claim victory by extending employee status for certain purposes of California law. They cannot claim to have brought greater unity or simplicity to the definition of who is an employee.

#### F. Conclusion

Whatever the merits of A.B.5 might be, uniformity, simplicity, and certainty are not among these. The ABC test incorporated into A.B.5 has its own interpretative challenges. Moreover, A.B.5 is replete with exemptions and exceptions, the boundaries of which are often opaque. In addition, it was an unfortunate choice to incorporate by reference *Borello*, rather than stating in explicit statutory terms which interpretation of *Borello* A.B.5 embodies. Whether that reference was a drafting mistake or a political compromise, it now leaves an important ambiguity to be resolved by judicial and administrative interpretation. Finally, A.B.5 has no impact on an individual’s status as an employee for tort purposes and has an uneven impact in the tax context. This leads to the possibility that an individual will be classified differently under

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239. Cal. Assemb. B. 5 § 2 (adding § 2750.3(a)(1)(C) to the California Labor Code).

240. *Id.* (adding § 2750.3(c)(2)(B)(x) to the California Labor Code).

241. *See supra* notes 170, 199–200 and accompanying text; *see also* discussion *supra* Section III.

A.B.5's ABC test than she will be classified for tax or tort purposes under the common law control test.

#### V. GOING FORWARD FROM A.B.5: MUDDLING THROUGH THE TRADE-OFF

A.B.5 represents a significant, but limited, extension of employment-based protection to certain California workers. However, A.B.5 does not make the law of employee status clearer, simpler, or more uniform. Indeed, A.B.5 makes the law more complex and less uniform than it was before. In this final section, I argue that the policy considerations and political realities that led to this outcome in California will recur in other states and in Congress. "Muddling through" in this area is inevitable and is the best the law can do.

Consider the many exceptions of A.B.5. These may be understood as political accommodations for particular industries, which, by means of such exceptions, avoid the ABC test for their respective employees. These exceptions may also be understood in policy terms as fine-tuning employee status in light of compelling, industry-specific concerns. Both explanations may contain part of the truth. These political realities and policy considerations, which molded the extensive exceptions of A.B.5, will recur in other states and in Congress. Thus, in those other states and on Capitol Hill, the outcomes will be similar to the results in California: broadened labor protection purchased at the cost of more complexity and less uniformity in the definition of who is an employee.

Consider in this context A.B.5's exceptions from the ABC test for lawyers, architects, engineers, and accountants.<sup>242</sup> Those exceptions are straightforward: all workers in these professions are automatically exempted from the ABC test and are instead subject to the *Borello* standard for employee status.<sup>243</sup> These exceptions may reflect the political heft of the firms and individuals that practice these professions. These firms may prefer to denominate as independent contractors some of the professionals with whom they engage. Such firms' political voices might have been significant in the legislative process resulting in the adoption of A.B.5.

There is as well a policy rationale for A.B.5 extending less employment-based protection to the members of these professions. Lawyers, engineers, architects, and accountants may be deemed, by virtue of their educations and professional statuses, to have greater bargaining power in the marketplace than do other, less advantaged service providers. Because these professionals have greater ability to protect themselves, the argument would go, they have less need of statutory succor. Whether the political or the policy-based explanation is correct—and they may both be—the same political realities and policy concerns that molded A.B.5 will also influence legislative outcomes in other states and in Congress.

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242. Cal. Assemb. B. 5 § 2 (adding § 2750.3(b)(3) to the California Labor Code).

243. As observed previously, this statutory reference leaves unclear which version of the *Borello* test applies. See discussion *supra* Section IV.D.

Contrast A.B.5's straightforward exceptions from the ABC test for lawyers, accountants, engineers, and architects with that statute's narrower, more detailed exceptions for manicurists, barbers, and cosmetologists.<sup>244</sup> These service providers are excepted from the ABC test, and thus governed by *Borello* only if they can prove that they meet detailed standards including that the service provider maintain a "separate" "business location,"<sup>245</sup> "holds [herself] out to other potential customers as available to perform the same type of work[,]"<sup>246</sup> and "has the ability to set [her] own hours" of work<sup>247</sup> and rate of compensation.<sup>248</sup>

Both a political narrative and a policy saga may explain why A.B.5 gives these service providers a more qualified exemption from the ABC test than that legislation affords to lawyers, accountants, engineers, and architects. In political terms, manicure, barber, and cosmetology businesses may have had less lobbying weight in Sacramento than law, accounting, engineering, and architectural firms. Thus, businesses engaging manicurists, barbers, and cosmetologists achieved for themselves less relief from the burdens of the ABC test. From a policy perspective, manicurists, barbers, and cosmetologists may be perceived as having less bargaining power in the marketplace, and thus be in greater need of legislative protection. Hence, the California legislature removed these workers from the protection of the ABC test under more limited circumstances. Both explanations may entail part of the story. In any event, the outcome is more complexity and less uniformity in the definition of who is an employee.

The trade-off reflected in A.B.5—more labor law protection for some workers purchased at the price of greater complexity and less uniformity in the legal definition of who is an employee—will occur in other states and in Congress if and when they consider similar legislation to address the definition of who is an employee. The same political forces and policy considerations that framed A.B.5 will also be at work in those states and in Congress, resulting in similar legislative choices and compromises.

There is, moreover, a compelling policy argument against uniformity in the definition of an employee. The concept of "employee" plays diverse roles in different legal settings. In the tax context, the category of "employee" determines whether a payer or the corresponding payee is the proper party on which to place withholding obligations and whether certain benefits extend to taxpayers denominated for tax purposes as "employees." In the tort setting, the concept of "employee" identifies if there is a person to whom liability should be

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244. Cal. Assemb. B. 5 § 2 (adding §§ 2750.3(b)(3) and 2750.3(c)(2)(B)(xi) to the California Labor Code).

245. *Id.* (adding § 2750.3(c)(1)(A) to the California Labor Code). These criteria also apply to the other service providers specified by this part of the statute.

246. *Id.* (adding § 2750.3(c)(1)(E) to the California Labor Code).

247. *Id.* (adding § 2750.3(c)(1)(D) to the California Labor Code).

248. *Id.* (adding § 2750.3(c)(1)(C) to the California Labor Code).

extended under the doctrine of *respondeat superior*. In the regulatory context, the term “employee” determines whether protective legislation should or should not govern a person’s economic relationships. Given this diversity of purposes,<sup>249</sup> it may be sensible that some individuals are deemed to be employees in one of these contexts but not in another.

Judge Frank observed tongue-in-cheek that, because the term “gift” has varied meaning in different tax contexts, the law should distinguish “gift[s]” from “gaft[s]” and “geft[s].”<sup>250</sup> Judge Frank’s observation illuminates the choices the law confronts when defining the term “employee.” There is important overlap, but there are also important differences in the purpose of the term “employee” in varied contexts. If we were starting from scratch today, we might use different terms in each of these various settings to describe the relevant relationships. But we are not starting from scratch.

Despite the strong scholarly emphasis on the need to simplify and unify the definition of employee status,<sup>251</sup> the prospect of greater uniformity and greater simplicity in this area is a chimera. Given the different roles that the term “employee” serves in different legal settings such as taxes, torts, and regulatory protection, one size does not easily fit all when defining who is an employee. The employee/independent contractor dichotomy reflects a deeply held intuition, which, despite its foundational status, can be implemented in the modern world only with great and detailed difficulty. A “hodgepodge”<sup>252</sup> in this area is the best the law can do, given how much work we now expect the concept of “employee” to do.

A.B.5 emerged from the legislative process in the bluest of blue states. It is hard to imagine that in other states, employer interests will have less influence than they apparently had in California as A.B.5 was written. Legislation emulating A.B.5 in other states and in Congress may well have more, rather than fewer, industry-driven exceptions than those embedded in A.B.5.

Others might point to the difficulties manifested in A.B.5 and suggest that the distinction between employees and independent contractors has outlived its usefulness. Perhaps, for example, the time has come to impose tax withholding obligations to include payments to persons today classified as independent contractors. Similarly, from this vantage, protections against discrimination now only applicable in the employment-based workplace should extend to a broader set of economic transactions and relationships.

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249. And, as previously noted, the concept of “employee” plays yet more roles in other areas of the law such as copyright. See 17 U.S.C. § 101 (2018) (defining “work made for hire”); see also discussion *supra* Part II.

250. *Comm’r v. Beck’s Est.*, 129 F.2d 243, 246 (2d Cir. 1942).

251. See *supra* Section II.

252. Linder, *supra* note 23, at 158.

Those favoring this future can cite as a model New York City's recent—and controversial—regulation of the ride-sharing industry.<sup>253</sup> The N.Y.C. Taxi and Limousine Commission (TLC) did not decide whether Uber and Lyft drivers should be classified as drivers. Instead, it imposed regulations on the ride-sharing industry without engaging in that debate. For those skeptical of the continuing utility of the distinction between employees and independent contractors, these TLC regulations are a harbinger of a future legal system, which scraps that distinction or, at least, reduces its role.

Another possible harbinger of a future in which the concept of “employee” plays a reduced role is Congress's decision in response to the COVID-19 crisis to permit states to extend unemployment compensation to independent contractors.<sup>254</sup>

A final observation: A.B.5 leaves me skeptical of proposals for a third category such as “dependent contractors”<sup>255</sup> or “independent workers[.]”<sup>256</sup> These categories will not obviate the need for or the inevitability of the kinds of choices reflected in A.B.5. It is difficult to see how the use of these labels would have made A.B.5 better while these labels would have introduced yet more complexity into the law. More complexity makes the law more difficult to enforce and more manipulable by those seeking to avoid compliance.

Two generations ago, Professor Charles E. Lindblom famously catalogued the benefits of “muddling through.”<sup>257</sup> Some problems do not lend themselves to neat and comprehensive solutions. A.B.5 confirms that the legal definition of employment is one of these. In many respects, it would be attractive if the legal definition of who is an employee could be simplified and be made more uniform, as many commentators urge. But, as A.B.5 demonstrates, this is not in the cards nor should it be, given the various functions that employee status plays in different areas of the law and the contending policy and political pressures

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253. See, e.g., *Important Changes to Driving in New York City*, UBER BLOG (Sept. 12, 2019), <https://www.uber.com/blog/new-york-city/tlc-rule-changes/>; Clayton Guse, *TLC Approves Harsh Regulations On Uber and Lyft, Aims to Reduce Street Congestion in Manhattan*, N.Y. DAILY NEWS (Aug. 7, 2019, 2:43 PM), <https://www.nydailynews.com/new-york/ny-20190807-btuxcy5qkne5tgoamwas3ob7ly-story.html>. See also *Zehn-NY, LLC v. N.Y.C. Taxi & Limousine Comm'n.*, No. 159195/2019, 2019 N.Y. Misc. LEXIS 6789 (N.Y. Sup. Ct. Dec. 23, 2019); *Tri-City, LLC v. N.Y.C. Taxi & Limousine Comm'n.*, No. 159947/2019, 2019 N.Y. Misc. LEXIS 6774 (N.Y. Sup. Ct. Dec. 23, 2019).

254. *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP'T OF LABOR, <https://www.dol.gov/coronavirus/unemployment-insurance> (“The CARES Act signed into law by President Trump on March 27, 2020, gives states the option of extending unemployment compensation to independent contractors and other workers who are ordinarily ineligible for unemployment benefits.”) (last visited Oct. 18, 2020).

255. Linder, *supra* note 23, at 184–85.

256. Harris & Krueger, *supra* note 100, at 5, 9.

257. Lindblom, *supra* note 13.

molding the law in this area. Whatever the merits of A.B.5 might be, uniformity, simplicity, and certainty are not among these.

#### VI. CONCLUSION

A.B.5 is an important data point in the debate about defining who is an employee in the modern economy. A.B.5 made a significant but limited expansion of the coverage of California labor law, but at a notable cost. Even as A.B.5 broadened the reach of the Golden State's labor protections, A.B.5 made the definition of "employee" more complex and less uniform. Those seeking federal or state legislation like A.B.5 will confront the same trade-off under which greater coverage is achieved at the expense of more complexity and less uniformity in the definition of who is an employee. The same political forces and policy considerations, which molded A.B.5 in California, will have similar effects in other states and in the halls of Congress.

For those who contend that the current law of employee status is too complex and uncertain, A.B.5 makes matters worse. A.B.5 is replete with exceptions, exemptions, and interpretive challenges that make the law of employee status even more complicated and unclear. For those who seek expanded, employment-based protection for workers in the modern economy, A.B.5 is an important but limited victory. For these advocates of expanded employment-based protection, the myriad exceptions and exemptions of A.B.5 are a sober warning of the practical and political realities standing in the way of such expanded protection. For those defending the status quo, A.B.5 should be an equally sober warning of considerable dissatisfaction with this status quo.

In sum, the narrative of A.B.5 indicates that, given the political realities and policy considerations, legislators can broaden the reach of employment-based regulatory laws to cover more workers in the modern economy, or they can simplify and unify the legal definition of employee status. They cannot do both.