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THE AB5 EXPERIMENT — SHOULD STATES ADOPT CALIFORNIA'S WORKER CLASSIFICATION LAW?

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A worker's classification as either independent contractor or employee drives whether a worker is entitled to minimum wage, overtime, worker's compensation, unemployment compensation, anti-discrimination protection, National Labor Relations Act protections, and many other safety-net protections. During the COVID-19 pandemic, unemployment protections were extended to independent contractors, but this is not the norm and is not slated to continue post-pandemic. Classifying certain workers, particularly those who work in the app-based economy, is challenging, so states are looking for an answer — either through their own innovation or through that of other states. California's answer was AB5.

AB5's goals were to correct misclassification issues for app-based drivers and other workers. A plethora of workers including court reporters, freelance writers and photographers, coaches, truckers, performing artists (mimes, magicians, comedians, etc.), and musicians rebuked AB5. AB5 is well known beyond California's borders as it received, and continues to receive, nationwide attention predominantly because it reclassified app-based drivers (such as Uber, Lyft, DoorDash, etc.) as employees.

As Justice Brandeis said, one of the benefits of federalism is that

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states can act as "laboratories of democracy." Experimental federalism can provide for collective learning across the states if they are all experimenting, but often states look to one another for innovative solutions so that they can free-ride instead of experiment. Some states that are looking for an improved worker classification law seek to learn from, and potentially free-ride on, California's AB5 "experiment." In considering whether to adopt AB5 or a similar statute, states should consider, at a minimum, three factors: relevancy of the law to their state, ease in obtaining information about the law, and the costs to adopt, implement, and enforce the law. This Article assists policymakers and interest groups by providing a detailed look at the AB5 experiment. It applies the aforementioned three factors and determines that California's law, while well-intentioned is likely not valuable for, or adoptable by, other states or the federal government partly because it contains 109 exemptions.

Ultimately, this Article concludes that to maximize the benefits of experimental federalism, a group of states, both homogenous and heterogenous to California, should experiment with more novel approaches to reach an optimal solution to worker (mis)classification. Adopting California's worker classification law will result in states following a sub-optimal law and in premature convergence delaying states from reaching a better solution. Workers need protections, but California's worker classification law does not sufficiently satisfy this need. Further experimentation is required.

I. INTRODUCTION

> *"Among the potential benefits of American federalism is the ability of states to serve as policy laboratories, adopting novel policies to address their needs, abandoning unsuccessful attempts, and learning from the success of similar states."*[1]

State policymakers are like scientists. Scientists see a problem and seek to create a solution. Policymakers see a problem and seek to create a solution, too. Both experiment in isolation — scientists in a physical laboratory; policymakers within their borders. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[2]

Both scientists and policymakers provide the results of their experiments so that others can learn from them. States in which policymakers create novel policies to address problems serve as policy laboratories — they experiment. A goal of experimental federalism is to reach an optimal policy through multiple states experimenting. When legislative experiments are successful, other policymakers will be more prone to adopt (or free-ride on) the legislation being tested.[3] But if free-riding occurs before an optimal solution is reached, then the result is premature convergence — getting stuck in using a sub-optimal statute. Additionally, if policymakers adopt a statute

1. Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 AM. J. POL. SCI. 294, 294 (2006).

2. Justice Louis Dembitz Brandeis is well known for this quote from his lengthy dissenting opinion in a case about a law Oklahoma created to regulate the sale of ice. New State Ice Co. v. Liebmann, 285 U.S 262, 311 (1932) (Brandeis, J., dissenting).

3. Volden, *supra* note 1, at 294.

without considering the experiment's results, the benefit of experimenting within that closed universe of a particular state is untapped.

California has long been regarded as one of the most legally innovative states.[4] And California serves as a "first-mover" when tackling many salient issues such as environmental, social, and data privacy policies.

In 2019, California policymakers set out to solve another problem — the wage and labor inequities that California app-based workers and others face when their statuses are misclassified as independent contractors.[5] Workers classified as "independent contractors" suffer a lack of minimum wage and overtime pay, and the absence of safety-net protections like workers' compensation and unemployment insurance.[6] As a solution, the California legislature enacted Assembly Bill 5, known as AB5.[7] And so the experiment began.

This Article begins by walking you through the AB5 experiment and California workers' reaction to AB5. It then outlines the results thus far and the next phase in the experiment. It concludes by describing how state policymakers can utilize the results, and what state policymakers (and

4. Melissa Maynard, *Which States are Most Innovative?*, PEW CHARITABLE TR. (Nov. 19, 2012), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/11/19/which-states-are-most-innovative ("'California was always a fairly innovative state, but it has become even more so,' Boehmke says. 'It's not only first but it's first by a large margin. It's 50 percent more innovative than the second most innovative state.'"); Frederick J. Boehmke & Paul Skinner, *State Policy Innovativeness Revisited*, 12 STATE POL. & POL'Y Q., 303, 320 (2012) (displaying a chart mapping the innovation of States); *see* Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174, 1184 (1973) (listing California and New York as most innovative); *see also* Jack L. Walker, *The Diffusion of Innovations among the American States*, 63 AM. POL. SCI. REV. 880, 883 (1969) (ranking California as the third most innovative state).

5. Worker misclassification is an issue that continues to plague the United States' workforce. See discussion *infra* Part II.A for the effects of classifying workers as employees versus independent contractors.

6. The COVID-19 crisis brought to light the importance of providing unemployment insurance to all workers, not just employees. As well as showing that it can be done. One prominent example is the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which expanded states' ability to provide unemployment insurance for workers impacted by the COVID-19 pandemic, including independent contractors. Pub. L. No. 116-136, 134 Stat. 281 (2020). "'If we think unemployment insurance is a good idea, why would you be excluding work that's now characteristic of so many jobs?' asked Erica Groshen, a senior labor economics advisor at Cornell University and former commissioner of the Bureau of Labor Statistics." Greg Iacurci, *13 Million Gig Workers Getting Unemployment Benefits, 41% of the Total*, CNBC, https://www.cnbc.com/2020/07/06/pua-unemployment-benefits-being-paid-to-about-13-million-americans.html (last updated July 7, 2020).

7. Assemb. B. No. 5, § 2 (Cal. 2020) (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).

Congress) should consider when deciding to adopt legislation like AB5, thus highlighting that state and federal legislators are still talking about AB5.[8]

Part II starts with a discussion of the problem that California was trying to solve — worker misclassification and the uncertainty surrounding the *Dynamex v. Superior Court of Los Angeles*[9] decision. This Part sets forth the various ways that worker classification impacts a worker's life and livelihood, as well as the economy. Part II then provides an overview of the current state of California's (and most states') changing workforce to include non-traditional work like app-based work.

Through AB5, California codified presumptive employee status for workers in an effort to fix misclassification issues. Part III explains the creation of AB5 and how it works. This Part presents reactions from workers, some of whom do not want to be reclassified as employees. While not all will be represented herein, workers who spoke out regarding AB5 included court reporters, freelance writers and photographers, coaches, truckers, performing artists (mimes, magicians, comedians, etc.), and musicians. As more industry representatives spoke up, additional exemptions to AB5 were codified into California's worker classification law ("WCL")[10] — 109 exemptions in total.[11] More and more, California's WCL has started to look like grandma's patchwork quilt and less like a solution that other states will want, or be able, to adopt. This Part concludes with a review of the minimization of the WCL's goals due to this patchwork, carved-up approach and the passing of Proposition 22 ("Prop 22").

Part IV discusses the benefits of experimental federalism and ways to predict whether a statute or policy will diffuse using California's WCL as a case study. Then, this Part explains two different mechanisms through which legislation diffuses among states: learning and imitation. This Part explains factors helpful to policymakers contemplating free-riding on another state's legislation: relevancy of the policy to the contemplating state, the ease of obtaining credible information from another state, and the costs of adopting,

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8. *See, e.g.*, John Lopez, *Senate Majority Leader Chuck Schumer Addresses ABC Questions on PRO Act*, MCHENRY CNTY. BLOG (Feb. 26, 2021), http://mchenrycountyblog.com/2021/02/26/schumer020621/ (reporting Schumer assured Freelancers Union that the U.S. Congress in the PRO Act will not make the same mistakes made in California with AB5); *see also* 166 CONG. REC. H898 (daily ed. Feb. 6, 2020) (statement of Rep. Virginia Foxx) ("[T]his . . . is little more than an attempt to protect the few well-connected interests that received a carveout from the California Democrats' disastrous Assembly Bill 5 . . . .")

9. 416 P.3d 1 (2018).

10. The focus of this Article expands from the AB5 experiment into the California worker classification law generally to include AB2257 where applicable. It will refer to California's current worker classification law as the WCL.

11. Assemb. B. No. 2257 § 2 (Cal. 2020) (adding Article 1.5 and repealing LAB. CODE § 2750.3; effective Sept. 4, 2020). *See* Appendix A.

implementing, and executing the statute. Part IV identifies that policymakers from various states have admitted to waiting for the results of the AB5 experiment before deciding to free-ride by adopting it. It then analyzes whether states are likely to free-ride on the WCL and shows that free-riding will be detrimental to achieving optimal worker classification laws.

Finally, this Article concludes that though the AB5 experiment provides state policymakers with valuable information to consider, it should not be adopted by other states or the federal government in its current iteration. The continued experimentation through repeated amendments, while well-intentioned, is unlikely to provide an optimal solution in the near term, if at all, and therefore fails to provide an adoptable statute for other states. I contend that to maximize the benefits of experimental federalism, states, both heterogenous and homogenous to California, should consider California's experience and then start their own experiments. We have so much more to learn and will be best poised to do so if states are willing to experiment and share, rather than free-ride on California's law.

II. BACKGROUND

Work is changing.[12] And the change is being brought on by both hiring entities and workers. Hiring entities are taking steps to change work. Consider automation.[13] More specifically, consider receptionists, and how most businesses now have auto attendants or if they do have individuals who answer, those individuals are often not in an office. Amazon utilized a heavily automated Human Resources department during the pandemic in place of their usual human staff.[14] Also, consider that hiring entities know that under current law it is economically cheaper to hire independent contractors than employees, and so they gravitate toward a business model or practice that utilizes more independent contractors.[15]

Some workers are also gravitating toward a preference for independence.[16]

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12. *See The Future of Work: Preserving Worker Protections in the Modern Economy: Before the Subcomm. on Health, Emp., Lab., and Pensions and the Subcomm. on Workforce Prots.*, 116th Cong. 1 (2019); *see also*, Robert Sprague, *Updating Legal Norms for a Precarious Workforce*, 35 A.B.A. J. LAB. & EMP. L. 86–91 (2020).

13. Sprague, *supra* note 12 at 87–88, 88 n.16; *see also*, Kathryn Kisska-Schulze & Karie Davis-Nozemack, *Humans vs. Robots: Rethinking Tax Policy for a More Sustainable Future*, 79 MD. L. REV. 1009, 1009 n.2, 1018–21 (2020).

14. Jodi Kantor, Karen Weise, & Grace Ashford, *Power and Peril: 5 Takeaways on Amazon's Employment Machine*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2021/06/15/us/politics/amazon-warehouse-workers.html.

15. *See infra* Part II.A.

16. *See*, André Dua, Kweilin Ellingrud, Michael Lazar, Ryan Luby, Matthew Petric, Alex Ulyett, & Tucker Van Aken, *Unequal America: Ten Insights on the State of Economic Opportunity*, MCKINSEY & COMPANY (May 26, 2021), https://www.mckinsey.com/about-us/covid-response-center/inclusive-economy/unequal-america-ten-insights-

Whether it is freelancing ("swing[ing] from project to project"[17]), starting their own business, or working for app-based companies, the opportunities are abundant.[18] Many people who work traditional jobs are doing something on the side to supplement their income.[19] Furthermore, some people have family obligations and need work flexibility.[20] Regardless of the reason, many workers need and want flexibility; thus, they are driving, delivering, repairing, cleaning, taking care of others' loved ones, and the like.

While our economy and work have been changing, our legislatures and governmental agencies are struggling with how to balance protecting all workers and preserving the desired independence of those who want and need it. At the heart of this struggle is classifying workers. This Part discusses why worker classification matters, and the modern workforce.

A. The Problem — Why Worker Classification Matters

The United States has been classifying workers as either "employees" or "independent contractors" since 1857.[21] A worker's classification has

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on-the-state-of-economic-opportunity. The McKinsey report admits that it is difficult to quantify how many people are working in contract, freelance, or temporary positions but shows that of those polled, one-third of the workers prefer being independent while two-thirds would prefer to be employed.

17. Dua, Ellingrud, Lazar, Luby, Petric, Ulyett, & Van Aken, *supra* note 16, at 36 n.25; *see also*, Dan Kedmey, *1 in 3 Americans Work on a Freelance Basis*, TIME (Sept. 4, 2014, 2:05 PM), https://time.com/3268440/americans-freelance/.

18. *See* Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 352 n.63–64 (2016) (citing to a 2015 GAO study "estimat[ing] that the non-traditional workforce . . . comprised of 35.3 percent of all employed workers in 2006 [rising to] 40.4 percent in 2010" and further noting the "significant increase from a 1999 DOL study, which found that [non-traditional employment] comprised only 9.3 percent of America's workforce").

19. Martha C. White, *Who's Got a Side Hustle? Postgrad and People Earning $80,000 or More*, NBC, https://www.nbcnews.com/business/business-news/who-s-got-side-hustle-postgrads-people-earning-80-000-n1013621 (last updated June 5, 2019) (finding approximately half of Americans supplement their income with a secondary source).

20. Liya Palagashvili, Comment Letter on Department of Labor's Proposed Rule Change, "Independent Contractor Status under the Fair Labor Standards Act" (Oct. 26, 2020), https://www.mercatus.org/system/files/palagashvili_-_pic_-_dol_proposed_rule_change_on_employee_v._independent_contractor_economic_realities_test_pic_-_v1.pdf.

21. The common law distinction between employees and independent contractors originated in England and was originally an agency law question. It was first transplanted into the United States via *Boswell v. Laird*, 8 Cal. 469, 489–90 (1857). *See also* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302–03 (2001) (discussing pre-industrial worker classifications); Gerard M. Stevens, *The Test of the Employment Relation*, 38 MICH. L. REV. 188 (1939) (discussing the control test used to determine employment relationships).

economic, social, and legal importance. Those who are considered employees qualify for benefits and have certain legal protections that independent contractors do not.[22] The effects of being classified as an employee include, among other things, discrimination protection, tax, economic, and labor rights (e.g., right to class certification, right to organize, wage/hour benefits, workers' compensation, unemployment compensation), fiduciary duties, and tort liability.[23] For instance, employees are protected from discrimination but independent contractors are not.[24] Moreover, employees have taxes withheld from their paycheck[25] and their employer pays half of their social security and Medicare taxes,[26] but since independent contractors do not have "employers," they must remit their own taxes and pay their social security and Medicare taxes in their entirety.[27] Employees also have a right to organize and be part of a class in court cases, whereas independent contractors do not.[28] Additionally, employees, unless they are exempt, are protected by minimum wage and hour laws — independent contractors do not have these protections.[29] Where legal duties are concerned, employees owe their employers fiduciary duties while independent contractors do not;[30] and an employee's tortious acts can cause

22. *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666–67 (2013).

23. *Id.*; *see also* V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 74–75 (2017).

24. *See* 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by an employer because of an employee's "race, color, religion, sex, or national origin"); 29 U.S.C. § 623(a)(1) (prohibiting discrimination by an employer because of an employee's age); 42 U.S.C. § 12112(a) (prohibiting discrimination by an employer because of an employee's disability). *Contra* Orly Lobel, *Coase & the Platform Economy*, *in* THE CAMBRIDGE HANDBOOK OF THE LAW AND SHARING ECONOMY 67, 75 (Nestor M. Davidson, Michèle Finck, & John J. Infranca eds., 2018) (arguing that some policies, such as anti-discrimination laws, should apply to all who provide labor regardless of their employee status).

25. *See* I.R.C. §§ 3401(c), 3402 (requiring that employers withhold taxes for employees).

26. *See id.* §§ 3101, 3121(d).

27. Independent contractors remit their social security and Medicare taxes on Schedule SE when filing their Form 1040. *See Self-Employment Tax (Social Security and Medicare Taxes)*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes (last updated Mar. 14, 2022).

28. *See* 29 U.S.C. §§ 152(3), 157.

29. *See id.* §§ 206–07 (providing minimum wage and overtime protection for employees).

30. RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958); Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 685 (1993) ("All employees owe a fiduciary duty of loyalty to their employer . . . .").

their employer to be vicariously liable through *respondeat superior* for those acts, but this is not true for independent contractors (save for some select circumstances).[31] Also, employment-related benefits such as participation in an employer's 401(k) plan and health insurance exist for employees (often on a tax-free basis), but if independent contractors want those benefits, they have to acquire them themselves. Finally, independent contractors are not covered by an employer's workers' compensation insurance and are not generally entitled to unemployment compensation.[32]

One would expect that since workers have to be classified as one or the other, that there is an easy way to determine that status. Unfortunately, that could not be further from the truth.[33] For some workers, the determination is, in fact, easier than others, but for many non-traditional workers it is complex.[34] There are numerous distinct factor-based tests from common

31. *Compare* RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006) (assigning liability to employers for the "torts committed by employees while acting within the scope of their employment"), *with* RESTATEMENT (SECOND) OF TORTS § 409 (AM. L. INST. 1965) ("Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.").

32. During the Coronavirus Pandemic, the Federal Government enacted the CARES Act to provide states with the ability to open unemployment compensation to independent contractors, including app-based workers. *See* Assemb. B. No. 5 § 2 (Cal. 2020) (adding LAB. CODE § 2750.3; effective Jan. 1, 2020). Although this legislation would seem to recognize the importance of all workers to having unemployment insurance, the current state of affairs in the United States is to only provide it for employees.

33. Misclassifying workers is a rampant problem. For some hiring entities, the misclassification of workers is unintentional and happens as a result of confusion. There are other hiring entities that deliberately misclassify workers because it is economically advantageous. *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, 79–81 (2015) (describing how employers may strategize to misclassify workers); *see also* Orly Lobel, *The Gig Economy & The Future of Employment and Labor Law*, 51 U. S. FLA. L. REV. 51, 59 (2017) ("Misclassification cases are difficult because the legal test used to determine employee status is notoriously messy. Like a good law school hypothetical, the facts of each of these cases lend themselves to a cluttered balancing test.")

34. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 493–96 (2016) (arguing that applying factors will yield over- or under-inclusiveness, making results unpredictable and difficult to discern, and using an example of a difficult determination: "Uber and Lyft drivers are neither clearly employees nor clearly independent contractors under existing tests, as typically understood," but as a normative matter, drivers should be classified as employees); *see also* Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 260–68 (2017) (arguing that exotic dancers should be classified as employees and reporting that out of "seventy-five federal and state court rulings on wage and hour claims by dancers who work for strip clubs, . . . only three courts ruled that dancers were independent contractors," however, "thirty-eight rulings determined that dancers were employees,"

law, regulatory agencies, and legislation, and they all apply the facts and circumstances to draw their conclusion on the appropriate classification, yielding inconsistent and thus confusing results.[35] These tests primarily consider control in some way, but because the factors used for each test vary, a worker can be classified as an employee under state labor laws but as an independent contractor under state or federal tax laws. Differing standards across numerous statutes "ha[ve] created a situation where the assignment of responsibility has become opaque and less predictable for workers and business organizations."[36]

This causes great uncertainty, and complexity in our workforce. Workers do not know what they are legally entitled to and hiring entities do not know what their obligations are. However, workers deserve to be more equally protected.[37] The next section discusses the modern workforce and why change is needed in worker classification laws.

B. The Modern Workforce

"The modern workplace has been profoundly transformed."[38]

More and more, workers are gravitating toward different ways to earn money. Many people who work traditional jobs are supplementing their income with side jobs.[39] Some workers, like parents, need more flexibility than a traditional job can provide, so they have turned toward making their own way, or working within the app-based economy.[40]

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and the rest did not determine employment status).

35. *E.g.*, Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 UNIV. MEM. L. REV. 101, 134–35 (2022); *see* Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace* 28 (Inst. for New Econ. Thinking, Working Paper No. 114, 2020).

36. Goldman & Weil, *supra* note 35 at 59; *see* Lobel, *supra* note 33, at 68 (noting that the digital platform poses a variety of regulatory challenges, such as worker classification).

37. *See* Symposium, Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What are the Options?*, 28 ECON. & LAB. L. REL. REV. 420, 422 (2017).

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

39. In fact, according to Brett Collins et al., the exponential growth in work in the online platform economy "is driven by individuals whose primary annual income derives from traditional jobs and who supplement that income with platform-mediated work." Brett Collins, Andrew, Garin, Emilie Jackson, Dmitri Koustas, & Mark Payne, Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns 3 (Mar. 25, 2019) (unpublished manuscript), https://www.irs.gov/pub/irs-soi/19 rpgigworkreplacingtraditionalemployment.pdf.

40. Dani Blum & Laura Vanderkam, *The Gig Economy Offers Parents Options and Obstacles*, N.Y. TIMES (Feb. 18, 2020), https://www.nytimes.com/2020/02/18/parenting/gig-economy-part-time-work.html (noting the number of parents working in the gig

"Gig," "platform," or "app-based" businesses are internet marketplaces that connect producers or service providers with consumers, as opposed to creating a product and dealing directly with the consumer.[41] One UK governmental study used a working definition to characterize the gig or app-based economy as, the "exchange of [labor] for money between individuals or companies via digital platforms that actively facilitate matching between providers and customers, on a short-term and payment by task basis."[42] Said another way, the gig economy is a popular online business model by which: individuals with "underutilized assets" — whether they be "time, particular skills, vehicles, household goods, spare bedrooms, or even home-cooked meals — connect with other people or businesses seeking those assets."[43] Probably the most well-known app-based businesses include: Uber, Lyft, Postmates, DoorDash, Instacart, goPuff, Handy, Washio, Caviar, Fiverr, GrubHub, Amazon Flex, TaskRabbit, Thumbtack, Upwork, Freelancer, YourMechanic, and Amazon Mechanical Turk. So many platforms exist that it is easy to imagine a point at which any type of work — no matter how complicated or how dependent on others — could be ordered with the click of an app.[44]

As Dean Weil has acknowledged, "[e]mployment is no longer the clear relationship between a well-defined employer and a worker."[45] Workers that are classified as independent contractors are no longer primarily those who are entrepreneurs with bargaining power.[46] This is particularly true in the non-traditional, app-based world. In considering this shift from traditional employer/employee relationships to app-based work, we can see a

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economy is increasing).

41. *See* Marshall W. Van Alstyne, Geoffrey G. Parker & Sangeet Pau Choudary, *Pipelines, Platforms, and the New Rules of Strategy*, HARV. BUS. REV. (Apr. 2016), https://hbr.org/2016/04/pipelines-platforms-and-the-new-rules-of-strategy; *see also* Marina Lao, *Workers in the "Gig" Economy: The Case for Extending the Antitrust Labor Exemption*, 51 U.C. DAVIS L. REV. 1543, 1572–73 (2018); Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. Rev. 379, 386 (2019).

42. Katriina Lepanjuuri, Robert Wishart & Peter Cornick, *The Characteristics of those in the Gig Economy*, DEP'T BUS., ENERGY & INDUS. STRATEGY 9 (Feb. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687553/The_characteristics_of_those_in_the_gig_economy.pdf.

43. Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round* Holes, 31 A.B.A. J. LAB. & EMP. L. 53, 54 (2015).

44. *The Future of Gig Work is Female: A Study on the Behaviors and Career Aspirations of Women in the Gig Economy* HYPERWALLET (2017), https://www.hyperwallet.com/app/uploads/HW_The_Future_of_Gig_Work_is_Female.pdf (noting gig work can also be divided into three categories, only one of which is app-based: professional freelancers, direct sales (like Mary Kay), and app-based platforms).

45. *See* WEIL, *supra* note 38, at 7.

46. *See id.* at 23–25.

"downward pressure on wages and benefits, murkiness about who bears responsibility for work conditions, and increased likelihood that basic labor standards will be violated."[47] In just a few words, Dean Weil's statement says a lot. It sets forth an important reason why policymakers are concerned with classification of their workers, particularly app-based workers, and one reason why the California legislature enacted AB5. Part III addresses California's unique approach to classifying workers and the commencement of what I refer to as its "experiment."

III. CALIFORNIA'S APPROACH: AB5

In addressing its labor and wage issues, California seemingly had three choices: 1) keep the status quo (using the *Borello* test);[48] 2) adopt a law from another state — that was utilized by its Supreme Court in *Dynamex*[49] — and customize it to California's unique and large workforce; or 3) create a novel approach. Ultimately, California implemented a unique combination of the first two options.

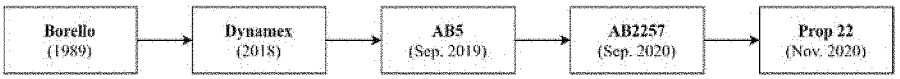

Fig. 1 Depiction of the life and composition of California's WCL.

47. *Id.* at 8. This in turn leads to a "rise in profitability for the lead companies who operate at the top of industries and increasingly precarious working conditions for workers at lower levels." *Id.*; *see also* Dubal, *supra* note 23, at 103. *See generally* Peter Gibbins, *Extending Employee Protections to Gig-Economy Workers Through the Entrepreneurial Opportunity Test of Fedex Home Delivery*, 57 WASH. U. J. L. & POL'Y 183, 194–95 (2018) (noting that modern supply chains, outsourcing and franchise networks which exert "'downward pressure on wages,' and the growing gig economy are all examples of" this clear shift away from traditional employer/employee relationships).

48. S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399 (Cal. 1989). In 1989, the California Supreme Court reviewed numerous tests for determining worker classification and determined that the "control-of-work details" factor test should be used. *See infra* Part III.B.ii. The case involved workers' compensation coverage for cucumber harvesting workers. The court ultimately decided when applying the factors that the workers were employees, not independent contractors. This factor test is what is referred to as the "*Borello* test" throughout this Article.

49. In 2018, the California Supreme Court first utilized the ABC test in the worker classification case *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*. 416 P.3d 1 (Cal. 2018). The court decided that Dynamex's one-day delivery service drivers are employees for purposes of the California wage order governing the transportation industry. *Id.* at 7. In CAL. CODE REGS. tit. 8 § 11090.2(D), the wage order defines "employ" to mean "to engage, suffer or permit to work." *See id.* at 13. The court implemented that standard by incorporating the ABC test for the first time in California. *Id.* at 7, 34.

On September 18, 2019, California enacted Assembly Bill 5.[50] AB5 codified the ABC test from a similar Massachusetts statute[51] after it was used by the California Supreme Court in *Dynamex*.[52] Because the *Dynamex* court's use of the ABC test confused businesses and workers, the California legislature was compelled to "act fast" to provide clarity.[53] AB5, which includes the ABC test, was created to fix the misclassification problem by purportedly making it "easier" for hiring entities to know how to classify workers. It does this by presuming that certain workers are employees unless the three elements of the ABC test are met.[54] If the elements are proven, then a worker is classified as an independent contractor. That sounds straightforward enough, but in application it is not.

AB5 and its use of the ABC test codified important protections for workers who come within the presumptive employee status. However, there was significant outcry from businesses, workers, and organizations with respect to the default employee classification.[55] And, some workers have said that AB5 will destroy their industries.[56] The California legislature continues to amend the statute to address vocalized concerns through carve-outs from the ABC test portion of AB5.

This Part discusses the goals of AB5 by setting forth the statute and its carve-outs. It then details how Prop 22 minimized AB5's mission to protect app-based drivers by continuing to characterize them as independent contractors and providing fewer benefits than they would receive as employees.

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50. *See supra* notes 7–8 and accompanying text. California's AB5 statute was enacted to give more workers in its labor force certain state labor law protections. App-based and other workers are being misclassified as independent contractors and are thereby being exploited through lack of employment law protections: minimum wage, overtime, workers' compensation coverage, and unemployment compensation coverage.

51. MASS. GEN. LAWS ch. 149, § 148B (2020). Nearly two-thirds of states use the ABC test to determine unemployment insurance eligibility, but California's use of it goes well beyond how other states have used the ABC test. *See* U.S. DEP'T OF LABOR, COVERAGE 1-4–1-6 (2014), http://www.ows.doleta.gov/unemploy/pdf/uilawcompar/2014/coverage.pdf.

52. *Dynamex*, 416 P.3d at 35–42.

53. Lorena Gonzalez, *Understanding AB2257, Follow Up Legislation to AB5, and Its Impact on the Arts Sector*, CALIFORNIANS FOR THE ARTS (Oct. 7, 2020), https://www.californiansforthearts.org/calendar/2020/10/7/understanding-ab-2257-the-follow-up-legislation-to-ab-5-and-its-impact-on-the-arts-sector.

54. *See infra* Part III.B.i; *see also* Deknatel & Hoff-Downing, *supra* note 33, at 98.

55. *E.g.*, 166 Cong. Rec. H894 (daily ed. Feb. 6, 2020) (Statement of Rep. Ryan) (entering into the Record a copy of a letter written by an employee explaining the negative public reaction to the default employee classification and referencing the effects of AB5 in California); *see also id.* (statement of Rep. Wright).

56. *Id.* at H890 (statement of Rep. Foxx) (recounting the experience of an American Sign Language interpreter who, after the implementation of AB5, lost all three of his agencies).

A. The Goals of AB5

California Assemblywoman Lorena Gonzalez set forth the goals of AB5 when she addressed the California Assembly while proposing amendments to the newly enacted AB5:

> In 2019, I authored AB 5 to provide clarity for workers, businesses and taxpayers in the wake of the California Supreme Court's unanimous 2018 *Dynamex* ruling that established a three-part ABC test for determining employment status. The stricter test makes it clear that workers who have been historically misclassified and kept off payroll as employees — including janitorial workers, construction workers, port truck drivers, home health aides, hotel and hospitality workers, delivery and rideshare drivers — are entitled to basic employment rights under all of the state's labor laws, such as the right to minimum wage, overtime, unemployment insurance, workers' compensation, paid sick days, paid family leave, workplace protections against discrimination and retaliation, and the right to form or join a union.[57]

California's inclusion of the ABC test in AB5 is well-intentioned and can produce some good results for some workers. "[T]he ABC [t]est is a shield by which workers may protect themselves from the coercion, undue pressure, and unequal bargaining power of [hiring entities] wishing to minimize labor costs while exploiting the unfortunate situation of the unemployed worker."[58] It provides that currently misclassified workers be reclassified as employees so that they will be entitled to minimum wage, overtime, workers' compensation, and unemployment insurance.[59] While this applies to more than gig/app-based work, many considered AB5 a "gig worker law."

> After eight years of looking the other way, California officials are finally enforcing the rule of law against . . . so-called gig companies . . . . Because regulators chose not to enforce existing labor laws against the companies, they were allowed to grow precarious work — not just in this state, but all over the world.[60]

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57. *Hearing on AB 1850 Before the Cal. Assemb. Comm. on Appropriations* 2020 Leg. Sess. 2 (June 2, 2020) (statement of Chair Lorena Gonzalez), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB1850.

58. Christopher J. Cotnoir, *Employees or Independent Contractors: A Call for Revision of Maine's Unemployment Compensation "ABC Test"*, 46 ME. L. REV. 325, 344 (1994).

59. *See* Assemb. B. No. 5, § 2 (Cal. 2020) (adding LAB. CODE § 2750.3; effective Jan. 1, 2020).

60. Michael Hiltzik, *Pressure Builds on Uber and Lyft under California's Gig Worker Law*, L.A. TIMES (July 3, 2020, 6:00 AM), https://www.latimes.com/business/story/2020-07-03/uber-lyft-ab5-contractor (quoting Professor Veena Dubal, labor law expert at UC's Hastings School of Law).

Thus, the statute is a "step in the right direction" toward protecting app-based workers around the country.[61]

AB5 and other presumption-of-employee laws are designed to eliminate or reduce worker misclassification. This is not a unique phenomenon; rebuttable presumptions favoring a default employee status have been implemented in numerous countries, most recently as part of the European Union Commission's Proposed Directive to establish minimum labor standards for app-based workers in its member states.[62] Having a default status can minimize uncertainty for both hiring entities and workers.[63]

B. The Tests of AB5

To clarify the *Dynamex* decision's applicability, California enacted AB5 and its initial iteration became effective January 1, 2020.[64] AB5 incorporated the ABC test but added an extensive list of occupational exceptions[65] that will be tested under California's previously established *Borello* test[66] instead of the ABC test.[67]

i. The ABC Test

The ABC test portion of AB5 reads:

> [A] person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: (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

61. Brian A. Brown II, *Your Uber Driver is Here, but Their Benefits Are Not: The ABC Test, Assembly Bill 5 and Regulating Gig Economy Employers*, 15 BROOK. J. CORP. FIN. & COM. L. 183, 208 (2020).

62. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker,"* HAMILTON PROJECT 6 (2015) (citing ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), NON REGULAR EMPLOYMENT, JOB SECURITY AND THE LABOUR MARKET DIVIDE (2014)), http://www.oecd.org/els/emp/emo2014-annex-chapter4.pdf. ("(e.g., Czech Republic, Estonia, France [in selected circumstances], Mexico, The Netherlands, [and] Portugal)."); *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, at 3 COM (2021) 762 final (Dec. 9, 2021); *see also* Prince, *supra* note 35, at Part III.A.

63. *See* Harris & Krueger, *supra* note 62, at 6.

64. Assemb. B. No. 5, § 2 (Cal. 2020) (adding LAB. CODE § 2750.3; effective Jan. 1, 2020).

65. *See infra* Appendix A.

66. *See infra* Part III.B.ii.

67. *Id.*

> trade, occupation, or business of the same nature as that involved in the work performed.[68]

California's version of the ABC test very closely mimics that of Massachusetts.[69] The ABC test presumes employee status unless the hiring entity satisfies all elements of the test, in which case the worker will be classified as an independent contractor.[70] If the worker is deemed an employee under the test, they are entitled to coverage under the California labor laws: minimum wage, overtime pay, workers' compensation, and unemployment. This application of the ABC test is broader than in other states and provides uniformity across California's labor code.[71]

Numerous states and commenters favor the presumption of employment because it challenges employers who may have been trying to utilize certain business models to evade the law.[72] The presumption puts employers on notice that "they must observe the independent contracting boundaries."[73]

Ron Herrera, Teamsters International Vice President and Director of the Port Division, lauded the new statute by stating, "[t]he ABC test [contained within AB5] . . . streamlines the process of establishing employee status . . . [which is] even more pressing during this current public health and humanitarian crisis where port truck drivers are suffering disproportionally from the impacts of the coronavirus pandemic due to rampant and systemic misclassification . . . ."[74]

Since the ABC test part of AB5 has only three elements, it is simpler and should conceivably improve predictability, thereby reducing uncertainty.[75] Thus, it is heralded by worker spokespersons as the "most objective" test and "the most difficult for employers to manipulate."[76] Because hiring entities

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68. CAL. LAB. CODE § 2750.3(a) (West 2020).

69. *See supra* note 44 and accompanying text. "Massachusetts did not create the ABC test," but rather, Maine did in 1935. Deknatel & Hoff-Downing, *supra* note 33, at 65, 65 n.66.

70. *ABC Test*, CORNELL L. SCHL. LEGAL INFO. INST., https://www.law.cornell.edu/wex/abc_test (last visited Jan. 8, 2022).

71. *See* Deknatel & Hoff-Downing, *supra* note 33 at 64–71 (describing various states' application of the ABC test).

72. *Id.* at 71–72.

73. *Id.* at 72. *But see* Karen R. Harned, Georgine M. Kryda, & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 102 (2010) ("[B]y creating the presumption of employment, the ABC Test makes it harder for employers to create unconventional employment relationships with workers.").

74. Press Release, Teamsters Port Division Director Comments on AB5 (Mar. 21, 2020), https://teamster.org/2020/03/teamsters-port-division-director-comments-ab5/.

75. Prince, *supra* note 35, at 154.

76. Deknatel & Hoff-Downing, *supra* note 33, at 67 (citing CATHERINE K. RUCKELSHAUS & SARAH LEBERSTEIN, NELP SUMMARY OF INDEPENDENT CONTRACTOR REFORMS 5 (2011), https://www.nelp.org/wp-content/uploads/2015/03/2011Independen

financially benefit from classifying workers as independent contractors, it seems appropriate that they be forced to overcome the presumption. However, scholars have pointed out that "the ABC test is no panacea with respect to employee/independent contractor classification,"[77] that it is "no model of clarity,"[78] that it "may result in both over- and under-inclusiveness,"[79] and that it "introduces new interpretative challenges to the determination of employee status."[80] The carve-outs provided for in AB5 (and subsequently AB2257) appear to be California's way of dealing with the over-inclusiveness;[81] however, one can posit that it has gone too far with its law — many workers are now back to where they started, making the law under-inclusive (again).

ii. The Borello Test

The next statutory section in AB5 provides that the ABC test, and correspondingly its presumptive employee status, does not apply to certain occupations as codified. Instead, classification as an employee or independent contractor for those delineated occupations shall be governed by *Borello*.[82] The *Borello* test has been used by California since 1989 and is still retained for certain occupations that are deemed exempt from the ABC test.[83] Like the ABC test, the *Borello* test analyzes the extent of the hiring entity's control over the alleged employee. But unlike the ABC test, the *Borello* test employs a multi-factor test to determine a worker's classification. These factors have evolved to become:[84]

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tContractorReformUpdate.pdf.

77. Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 767 (2020).

78. Edward A. Zelinsky, *Defining Who is an Employee After A.B.5: Trading Uniformity and Simplicity for Expanded Coverage*, 70 CATHOLIC U. L. REV. 1, 26 (2020).

79. Goldman & Weil, *supra* note 35, at 46.

80. Zelinsky, *supra* note 78, at 29; *see also* Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L. J. 111, 129 (2008).

81. Other states provide carve-outs as well but none as many as California. For example, see Cotnoir, *supra* note 58, at 332–34 (stating that — at the time of their writing — Maine's Employment Security Law contained thirty-seven carve-outs from the ABC test.)

82. CAL. LAB. CODE § 2750.3(b) (West 2020); *see* S.G. Borello & Sons, Inc. v. Dep't of Indus. Rels., 769 P.2d 399 (1989). *See generally* Benjamin Powell, *Identity Crisis: The Misclassification of California Uber Drivers*, 50 LOY. L.A. L. REV. 459 (2017) (discussing the *Borello* Framework and its application to Uber).

83. There are currently 109 such exemptions. *See* Appendix A.

84. The most up-to-date list of factors used under the *Borello* test is provided by California Department of Industrial Relations. *Independent Contractor Versus Employee*, CAL. DEP'T INDUS. RELS., https://www.dir.ca.gov/dlse/faq_indepen

> (a) Whether the potential employer has all necessary control over the manner and means of accomplishing the result desired (although such control need not be direct, actually exercised or detailed);
> (b) Whether the worker performing services holds themselves out as being engaged in an occupation or business distinct from that of the employer;
> (c) Whether the work is a regular or integral part of the employer's business;
> (d) Whether the employer or the worker supplies the instrumentalities, tools, and the place for the worker doing the work;
> (e) Whether the worker has invested in the business, such as in the equipment or materials required by their task;
> (f) Whether the service provided requires a special skill;
> (g) The kind of occupation, and whether the work is usually done under the direction of the employer or by a specialist without supervision;
> (h) The worker's opportunity for profit or loss depending on their managerial skill;
> (i) The length of time for which the services are to be performed;
> (j) The degree of permanence of the working relationship;
> (k) The method of payment, whether by time or by the job;
> (l) Whether the worker hires their own employees;
> (m) Whether the employer has a right to fire at will or whether a termination gives rise to an action for breach of contract; and
> (n) Whether or not the worker and the potential employer believe they are creating an employer-employee relationship (this may be relevant, but the legal determination of employment status is not based on whether the parties believe they have an employer-employee relationship).

The *Borello* test is generally used when the ABC test does not apply (*see* Appendix A for the ABC test exemptions). However, for some workers, the *Borello* test will not apply instead of the ABC test unless the hiring entity satisfies other requirements first.[85] AB5 is quite complex and likely difficult for the public to understand and comply with.[86]

C. The Issues Created by AB5

> *"California's A.B. 5, is an obsolete artifact of an American economy in which labor markets were defined primarily by factories and traditional trades."*[87]

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dentcontractor.htm (last updated Jan. 2022).

85. *Id.*

86. *See* Zelinsky, *supra* note 78, at 26–34.

87. Henry H. Perritt, Jr. Comment Letter to the Department of Labor's Wage & Hour Division's Notice of Proposed Rulemaking 1 (Oct. 2020) (on file with author). Professor Perritt, former Deputy Under Secretary of Labor (Ford administration), continues: "Legal categories of work must evolve to reflect how new technologies have changed the way workers interact with those that pay for their services."

While AB5 was created to provide clarity from the *Dynamex* opinion, using the ABC test's elements does not necessarily accomplish this goal.[88] For example, for purposes of the second element, how does one define the term "usual course of business," and what is deemed to be "outside" of it? The California courts will be left to decide how to define such ambiguities, and this can lead to uncertainty.[89] "Leaving this task up to the judicial branch will potentially take years to get a clear determination of how the test is to be applied and also may not follow exactly the legislative intent."[90]

AB5 was designed to protect workers, but it also serves to protect employers "who compete with companies that misclassify, and to shield California from the loss of revenue from companies using misclassification to avoid payment obligations such as payroll taxes, premiums for workers' compensation, Social Security, unemployment, and disability insurance."[91] Despite these important goals, AB5 was not embraced with open arms by all.

Problematically, not all workers want to, or can, give up their independent working relationships.[92] Under the current U.S. binary worker classification regime — employee or independent contractor — when hiring entities control their workers, those workers are more likely to be considered employees.[93] Many American workers who are currently classified as

88. Zelinsky, *supra* note 78, at 33 ("Whatever the merits of A.B.5 might be, uniformity, simplicity, and certainty are not among these.").

89. *See* Brown II, *supra* note 61, at 204 (advocating for defined terms in the statute to reduce uncertainty and showing that there were varying interpretations of the ABC test in Massachusetts).

90. *Id.* at 205.

91. Chris Carosa, *Will California's AB5 Law Gag Your Gig Retirement*, FORBES (Feb. 27, 2020), https://www.forbes.com/sites/chriscarosa/2020/02/27/will-californias-ab5-law-gag-your-gig-retirement/?sh=4609a43b6518 (quoting Paul Kramer, Director of Compliance at WorkForce in the greater Detroit Area).

92. Kevin Kiley, *AB 5 Stories: Testimonials of Californians Who Have Lost Their Livelihoods*, https://ad06.asmrc.org/sites/default/files/districts/ad06/files/AB5%20Booklet_0.pdf (quoting Marlene, "AB 5 has impacted my life. I am self employed by choice. I do not want to be an employee nor do I want to lose my tax exemptions as a company. I should not be forced into employment relationships with my clients, most of which will not hire me anymore if they are forced to become my employers. This law will destroy my business.").

93. "The control test holds that a worker is an employee if the hiring entity 'controlled or had the right to control the manner and means' of the worker's work." SAMANTHA J. PRINCE, ENTREPRENEURSHIP LAW: COMPANY CREATION, https://psu.pb.unizin.org/expsk909/chapter/tests/.

> [S]everal federal statutes and their corresponding administrative agencies use the control test to determine a worker's classification for reasons other than tort liability: Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Employee Retirement Income Security Act (ERISA), Federal Unemployment Tax Act (FUTA), Federal Insurance Contributions Act (FICA), Internal Revenue Code (IRC), National Labor Relations Act (NLRA), Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act of

independent contractors and enjoy their autonomy to work when they want and for how many hours they want, view laws that will reclassify them as laws that will strip them of their freedoms.[94] They do not want to relinquish their "freedom from non-interference" (no supervisory intervention, no one setting their schedule, no one capping their earning potential) or their "freedom from non-domination" (no one with power to discipline and restrict choices and no one to put workers in a state of uncertainty that will constrain their autonomy).[95] Workers assume that if the law requires them to be employees, that the hiring entity who is now an employer, will impose more control over them or strip them of their freedoms. This does not have to be the case, but in practicality, it likely is.[96]

Some independent contractors find AB5 insulting as they feel they can adequately negotiate their own contracts.[97] As Americans, we live in a "society and culture [that] values personal autonomy, rugged individualism, self-determination, and self-reliance."[98] Americans appreciate and sometimes insist upon autonomy.[99] This insistence or preference for autonomy aligns with our modern workforce that seeks flexibility to do other things and to spend less time in a particular job; i.e., "how to manage their livelihood."[100] However, not all workers have bargaining power and this

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1964, and the Worker Adjustment and Retraining Notification Act (WARN). *Id.*; *see also* Bodie, *supra* note 22, at 679; Michael W. Fox, *Whos' an Employee, Who's the Employer? It's Not as Easy as You Might Think*, 2016 TXCLE ADV. BUS. L. 1, appendix 25 (2016).

94. Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 797 (2018).

95. *Id.* at 808–25.

96. *See generally* Dynamex Operations W. Inc. v. Super. Ct. L.A. Cnty., 416 P.3d 1, 38 n.28 (Cal. 2018) ("[I]f a business concludes that it improves the morale and/or productivity of a category of workers to afford them the freedom to set their own hours or to accept or decline a particular assignment, the business may do so while still treating the workers as employees . . . .").

97. "One artistic director at last week's rally summed it up for the Chico Enterprise-Record: 'We are not stupid. We do not need to be saved from ourselves. We can negotiate our own contracts. AB5 is insulting.'" 166 CONG. REC. H891 (daily ed. Feb. 6, 2020).

98. Peter H. Huang & Kelly J. Poore, *Can You Hear Me Later and Believe Me Now? Behavioral Law and Economics of Chronic Repeated Ambient Acoustic Pollution Causing Noise-Induced (Hidden) Hearing Loss*, 29 S. CAL. REV. L. & SOC. JUST. 193, 209 (2020).

99. *See* Kiley, *supra* note 92 (quoting Amy, "Having this AB 5 in place will completely change how I work and when I work. I am a notary public, commissioned by the State of California. I perform notary acts for the general public and loan signings for title companies. I choose when and where I work. With these uncertain times set before us today, people like me need the flexibility to be there for our children, assisting with their distance learning and working around their schedule. I choose when I work, I choose how much I work! Why are our choices being taken away?").

100. *See* Jennifer Wright, *Why California's AB-5 is a Threat to the American Way of*

should be a consideration when determining an optimal worker classification law.[101]

Additionally, AB5 has been criticized as legislation that is detrimental to women who rely on alternative, flexible work arrangements.[102] Caregivers, who are disproportionately women, require flexible hours and may rely on flexible work for their primary job as well as a supplemental job.[103] When it comes to the app-based economy, if one removes ridesharing drivers (predominately men) from the calculation, women constitute a larger share of platform workers.[104] Women who are unable to satisfy the requirements of traditional work arrangements and yet will be classified as employees under AB5, will suffer great harm by having difficulty in getting/keeping these work relationships.[105] Take Rona Prestler talking about her work

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Life, N.Y. POST (Oct. 26, 2019, 12:28 PM), https://nypost.com/2019/10/26/why-californias-ab-5-is-a-threat-to-the-american-way-of-life/.

101. *See* Rogers, *supra* note 34, at 494 (noting that there exists "unequal bargaining power" between some workers and hiring entities, signaling a "democratic deficit and/or inequality"); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279, 282–83 (2011); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 377–87 (2002). *But see* Goldman & Weil, *supra* note 35, at 59.

102. *See* Palagashvili, *supra* note 20 (detailing how AB5 may be harmful to women).

103. *See* JAMES MANYIKA, SUSAN LUND, JACQUES BUGHIN, KELSEY ROBINSON, JAN MISCHKE & DEEPA MAHAJAN, INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 76 (2016). "Women were significantly more likely to note that flexibility was a more important motivator for independent work than men (74 percent vs. 59 percent)." Palagashvili, *supra* note 20, at 3 (quoting MBO PARTNERS, THE STATE OF INDEPENDENCE IN AMERICA: RISING CONFIDENCE AMID A MATURING MARKET 5 (2017)); *see also* Linda N. Edwards & Elizabeth Field-Hendrey, *Home-Based Work and Women's Labor Force Decisions*, 20 J. LAB. ECON. 170 (2002).

104. *See* DIANA FARRELL, FIONA GREIG & AMAR HAMOUDI, THE ONLINE PLATFORM ECONOMY IN 2018: DRIVERS, WORKERS, SELLERS, AND LESSORS 18, 22 (2018); *see also* HYPERWALLET, *supra* note 44; Lawrence F. Katz & Alan B. Krueger, *Understanding Trends in Alternative Work Arrangements in the United States* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25425, 2019); Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States*, 1995-2015 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22667, 2018).

105. Palagashvili, *supra* note 20, at 5 ("Proponents of policies such as California's AB 5 overlook the consequences of such policies for the types of independent jobs that attract women. [] [T]o the extent that specific platform companies such as Etsy and Care.com provide flexibility of work for those who need it and extend work opportunities to women who would otherwise be unable to take on traditional employment, challenges to the legal classification of independent contractors could disproportionately hinder women's participation on those platforms. In fact, when debating the legislation, California did not compare the potential benefits and the potential harms of AB 5 *specifically to women*."); *see also* Elaine Pofeldt, *California's AB5 Leaves Women Business Owners Reeling*, FORBES (Jan. 19, 2020, 8:23 PM), https://www.forbes.com/sites/elainepofeldt/2020/01/19/californias-ab5-leaves-women-business-owners-reeling/?sh=d9cf6385ef36.

through HireMyMom.com:

> I would work before [my kids] woke up. I had a nanny come in the morning. I'd hang out with the kids during the afternoon and get back to work at night. I got in a good number of hours with minimal childcare. It was just perfect.[106]

AB5 can change a worker's classification by law, but it cannot require hiring entities to continue to use California workers who have been reclassified as employees.

> I've been a freelance writer and editor for 25 years. Working freelance has allowed me to raise my daughter from the day she came home from the hospital to the present (she's 10), pick and choose both the work I do and the hours and days I do it, and work with incredible employers who have (with very few exceptions) ALWAYS had my best interests at heart. AB5 will force me to leave jobs that I've held for over a decade and join a growing pool of other freelancers who are grabbing at the few freelance jobs that will be left for us.[107]

This comment highlights the issue of availability — that there will be fewer employee jobs than there are freelancers that need to work.

As a result of either confusion or being forced to reclassify workers as employees, some hiring entities are rebuffing California workers and using out-of-state workers who are not covered by California's AB5 or an ABC test-like statute.[108] Take for example, Vox Media's announcement that in

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106. Pofeldt, *supra* note 105; *see also*, Kiley, *supra* note 92 (quoting Jessica, "As a freelance court reporter, I choose when to work, what jobs to take . . . I do not want to be an employee. As a new mom I can tell agencies that I only want afternoon work . . . or that I only want to work on Tuesdays and Thursdays. As an employee, I would not get to pick a schedule that works for me.").

107. *See* Kiley, *supra* note 92 (quoting Paul).

108. *See, e.g.*, *id.* (quoting Janet, "There is no way my clients are going to hire me as an employee to work on sporadic projects during the year, so I will lose the ability to augment my social security and I'm not eligible for SNAP benefits. I'm 67 years old, on Social Secutity [sic] and if I can't find a full time job at this point, I can't pay the rent and eat."); *id.* (quoting Deborah, "I'm a 67-year-old grandmother living on Social Security. Up until Jan 1st I was also an online transcriptionist earning approx $200 a month in much needed additional income. I love the work and it is a perfect fit for work-from-home situations, however due to AB 5, California residents were dropped by the world-wide company I was working for."); *id.* (quoting Sarah, "I have been a full time small business owner and artist for 10 years and this law is hurting small businesses. This law makes it difficult for small businesses to hire independent writers, graphic designers, virtual assistants, marketing reps, and other necessary Gig work that helps small businesses to be able to grow. It's going to take the arts, music, literature, and culture out of our lives by forcing artists to either incorporate, which is extremely cost prohibitive in California, or to stop producing art, meaning that the patrons of the arts will lose access to art programming that enriches the lives of the people in our communities. People who choose to work as Freelance workers have chosen this path because they want the flexibility to set their own hours and rates and work when they want and they will no longer be able to excel in their creative fields under AB5. This law hurts the lower and middle class people who have side gigs, creative gigs, or are

order to comply with AB5, it will cease using all California freelance writers that report on the California sports teams for its SB Nation blogs.[109] Instead, it reported that it will hire 20 full-time and part-time employees to replace those 200 'low-paid' freelancers.[110] Hiring 20 employees at the expense of replacing 200 other workers is likely an unintended result of AB5's presumption and the larger scale good it attempts to accomplish. Another example was put forth by Rona Prestler, the HireMyMom.com worker noted above. One client of hers let her go because they could not afford to pay her salary, and an out-of-state client let her go "concerned that a lack of clarity in the language of [AB5] might lead to a risk of fines later on."[111]

Because of AB5's sweeping reclassification of some workers, numerous businesses and workers have expressed their concerns, frustration, and sometimes anger.[112] Thus, organizations representing industries spoke out. In February 2020, the Sacramento Bee reported that the California legislature had "nearly three dozen bills" to consider as to how "to clean up or repeal the landmark gig economy law."[113] In response to organizational pleas, in September 2020, the California legislature passed AB2257, a law that replaced AB5 with more exemptions (now, 109 in total).[114] Because the legislature and Uber could not reach an agreement for an app-based driver

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trying to launch their own small business.").

109. Susanna Hussain, *Vox Media Cuts Hundreds of Freelance Journalists as AB5 Changes Loom*, L.A. TIMES (Dec. 17, 2019, 3:00 AM), https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5.

110. *Id.* This was Vox Media's stance prior to the enactment of AB2257, and it may have changed now that AB2257 eliminated the thirty-five pieces per year requirement that brought freelance writers within the purview of AB5's ABC test.

111. Pofeldt, *supra* note 105; *see* Cotnoir, *supra* note 58, at 344 ("[The ABC Test] creates a burden for truly 'independent contractors' who might not find work due to employers' fear of unemployment contribution liability determined long after the services have been fully performed . . . .").

112.

> The debates over AB5 in California, however, resulted in the legislature excluding a number of occupations from the ABC test, including, for example, licensed insurance agents, . . . doctors and dentists, lawyers, architects, engineers, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, and workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.

Goldman & Weil, *supra* note 35, at 49.

113. "Democrats say the law needs fine-tuning; Republicans want to overhaul it." Hannah Wiley, *California's New Labor Law is a Work in Progress. Here's How Lawmakers Could Change It*, SACRAMENTO BEE (Feb. 24, 2020, 10:02 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article240264901.html#storylink=cpy.

114. *See infra* Part III.D.

exemption, well-known driving app-based companies went to the people and successfully gained exemption (albeit temporarily) from AB5's reach by winning a California November 2020 ballot initiative, Prop 22.[115] Prop 22 has been working its way through the California court system and currently has been found unconstitutional.[116]

D. Carving out Exemptions from the ABC Test

> *"[AB5] is replete with exceptions, exemptions and interpretive challenges which make the law of employee status even more complicated and unclear than it was before."*[117]

The ABC test in the WCL was designed to catch hiring entities who misclassify workers as independent contractors. However, because some workers are legitimately independent contractors or the industries in which they operate cannot function by over-inclusively reclassifying workers to employee status, the California legislature included carve-outs or exemptions in AB5 and even more in AB2257. Seemingly, this is necessary to accommodate business models that are not misclassifying workers. But sometimes, "legislatures will . . . include carve-outs, which often reflect *political* will and power rather than a need to re-balance power in a working relationship."[118] This is not a new concept when it comes to the ABC test.[119]

Initially, there were over 50 exemptions from the ABC test to be considered under *Borello*. These carve-outs can be viewed as a product of politics and industries coming forward to criticize using the ABC test for select occupations.[120] However, the carve-outs also represent California's customization of the ABC test to fit the needs of its residents and an attempt to avoid over-inclusiveness. While some commentators criticize the carve-outs, others laud them.[121]

Freelancers of many kinds, particularly freelance writers, photojournalists, and photographers, expressed their concerns over AB5 as enacted in

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115. *See infra* Part III.E.

116. *See id.*

117. Zelinsky, *supra* note 78, at 3–4 ("A.B.5 . . . make[s] the law of employee status even more complex and less uniform than it was before.").

118. Goldman & Weil, *supra* note 35, at 50.

119. *See* Cotnoir, *supra* note 58, at 332–34.

120. *See supra* note 112.

121. *See* Zelinsky, *supra* note 78, at 34–38 (noting criticisms of the carve-outs). *See generally* Letter from Sean P. Redmond, Exec. Dir., Lab. Pol'y Emp. Pol'y Div., U.S. Chamber of Com. to Sen. Stephen M. Sweeney (Nov. 13, 2019), https://www.uschamber.com/comment/letter-opposing-new-jersey-senate-bill-s-4204 (supporting the carve-outs).

September 2019.[122] Initially, under AB5, if these workers submitted items to one hiring entity more than thirty-five times per year, they would be tested under the ABC test and classified as an employee. However, these workers are now on the list of ABC test exemptions and will therefore be tested under the *Borello* test.[123] And the initial thirty-five times per year submission threshold was repealed by AB2257.[124] Further, meetings between groups representing freelancers of various professions and Assemblywoman Lorena Gonzalez yielded additional amendments to AB5 outside of the exemptions that would "strike a balance and protect employment opportunities in these professions . . . [by] specify[ing] that a contractor cannot replace an employee position."[125]

Another industry that was initially disrupted by AB5 was the music industry. It is markedly freelanced and music professionals collaborate throughout the year with different employers on one or more projects.[126] Once AB5 was signed into law, the California music and performing arts workers overwhelmingly said that the law was going to hurt their careers and the industry as a whole.[127] In April 2020, California Assemblywoman Lorena Gonzalez announced, that she had been working with individuals in the music industry to understand AB5's impact on their profession.[128] As a result, AB2257 provided for an extensive list of carve-outs for the music industry.[129]

AB5's initial carve-outs have been subsequently supplemented by those in AB2257 in an effort to accommodate workers in several industries. One of the WCL's goals continues to be to clarify the business-to-business

122. *See* Greg Dool, *CA Freelance Writers "Encouraged" By Latest AB 5 Development*, FOLIO (Feb. 28, 2020), https://www.foliomag.com/ab5-update-freelance-writers-encouraged-proposed-amendment-text/ (speaking to freelance writers who were worried about the effects the original AB5 may have on their careers).

123. *See infra* Appendix A.

124. *See* Richard Reibstein, *AB2257: Not Much Better Than AB5 for Most Industries in California Using Independent Contractors*, JD SUPRA (Sept. 8, 2020), https://www.jdsupra.com/legalnews/ab2257-not-much-better-than-ab5-for-35040/.

125. *See* Dool, *supra* note 122.

126. Andrea Domanick, *The Music Industry Gets Relief From California's AB5 Gig Economy Law*, KCRW MUSIC NEWS (Apr. 21, 2020), https://www.kcrw.com/music/articles/musicians-ab-5-gig-economy-law.

127. *See* Makeda Easter, *The AB5 Backlash: Singers, Actors, Dancers, Theaters Sound Off on Freelance Law*, L.A. TIMES (Feb. 12, 2020, 2:16 PM), https://www.latimes.com/entertainment-arts/story/2020-02-12/how-ab5-is-impacting-california-readers-in-the-performing-arts.

128. *See* Press Release, Lorena Gonzalez, Lorena Gonzalez Announces Pending Changes to How AB 5 Applies to the Music Industry (Apr. 17, 2020), https://www.californiansforthearts.org/ab-5-in-the-news/2020/4/17/lorena-gonzalez-announces-changes-to-how-ab-5-applies-to-freelancer-writers-and-journalists.

129. *See infra* Appendix A.

contracting relationships exemption and referral agency relationships exemption.[130] Including the foregoing, there are 109 exemptions from the ABC test in the WCL.[131] Accordingly, AB2257 does not simplify or clarify a worker's classification but rather creates "rigid exemptions" with detailed conditions.[132]

While there are numerous exemptions, AB2257 fails to carve out exemptions for the numerous independent contractors that are similarly situated to those who have lobbied and achieved exemption but could not or did not lobby.[133] This provides for disparity among certain workers and makes one wonder if more carve-outs are or should be forthcoming. Additionally, California truckers, movie and television employees, and app-based companies are notably excluded from the new exemptions.[134] Can the WCL meet its goal of expanding employment under the ABC test when so

130. *See* Chris Micheli, *AB 5 'Fix:' New Exemptions Added to California's Independent Contractor Law*, CAL. GLOBE (Sept. 14, 2020, 2:20 PM), https://californiaglobe.com/section-2/ab-5-fix-new-exemptions-added-to-californias-independent-contractor-law/.

131. *See id.*; *see also infra* Appendix A (providing a list of exemptions from AB5 and AB2257).

132. *See* Reibstein, *supra* note 124 (discussing the shortcomings of both AB5 and AB2257, specifically noting key deficiencies in AB2257's exemptions).

133. *See id.*

134. *See* Aaron H. Cole, *AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors*, NAT'L L. REV. (Oct. 13, 2020), https://www.natlawreview.com/article/ab-2257-enacts-significant-changes-to-ab-5-classification-workers-independent; Micheli, *supra* note 130. For example, the trucking industry expressed its dissatisfaction early on with the WCL's ABC test (then AB5) by bringing a series of suits in the California courts seeking exemption or preemption through the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). People v. Super. Ct. of L.A. Cnty, 57 Cal. App. 5th 619, 630 (Cal. Ct. App. 2020) (holding that the ABC test is not preempted by the FAAAA because it is a "generally applicable employment law that does not prohibit the use of independent contractors, and therefore does not have an impermissible effect on prices, routes, or services"); People v. Cal Cartage Transp. Exp., LLC, No. BC689320, 2020 WL 497132, at *10 (L.A. Super. Ct. Jan. 8, 2020) (holding that "the ABC Test has an impermissible effect on motor carriers' 'price[s], route[s], [and] service[s]' and is preempted by the FAAAA"); Cal. Trucking Ass'n v. Becerra, 433 F. Supp. 3d 1154 (S.D. Cal. 2020) (granting a preliminary injunction based on trucker plaintiff's questions of whether AB 5 would be preempted by FAAAA). The Ninth Circuit held that the application of AB5 to truckers (motor carriers) is not preempted by the FAAAA, and therefore, truckers will be tested under the WCL. Cal. Trucking Ass'n v. Bonta, 996 F.3d 644 (9th Cir. 2021). On June 21, 2021, the Ninth Circuit denied the California Trucking Association's petition for rehearing *en banc*, but the Ninth Circuit did grant the Association's motion to stay the issuance of the mandate so that the Association can file a writ of certiorari with the Supreme Court. Cal. Trucking Ass'n v. Bonta, Nos. 20-55106, 20-55107, 2021 U.S. App. LEXIS 18434 (9th Cir. June 21, 2021); Cal. Trucking Ass'n v. Bonta, Nos. 20-55106, 20-55107, 2021 U.S. App. LEXIS 18752 (9th Cir. June 23, 2021).

many occupations and industries are exempt from it and still tested under the same test they've been tested under for over thirty years?

E. Prop 22 — Exempting Rideshare and Delivery App Drivers

AB5 was painted as a law focused on correcting worker misclassification in the gig economy, particularly for app-based drivers. As shown above, its coverage extends well beyond what many consider the "gig economy," including those workers not involved in app-based companies. But some app-based companies may no longer have to worry about California's WCL (depending on future outcomes of constitutionality challenges), particularly the large ones, thanks to Prop 22.

In October 2020, the California Court of Appeal held that Uber drivers were employees under AB5.[135] Uber, Lyft, and Doordash successfully added Prop 22 to the November 2020 ballot.[136] Prop 22 asked California residents to vote yes to define their "app-based transportation (rideshare) and delivery drivers as independent contractors and adopt labor and wage policies specific to app-based drivers and companies."[137] A "yes" vote meant that the WCL's ABC test would not apply to their app-based drivers, rendering the result in *People v. Uber* moot.[138] Conversely, a "no" vote would have meant that the WCL would be used to decide whether app-based drivers were employees or independent contractors and would have allowed the court decision to remain applicable.[139]

Rideshare and delivery app companies invested $205 million[140] into campaigns for the California voters to vote "yes" — that the WCL does not apply to app-based drivers.[141] Prop 22 passed with 9,958,425 votes (58.63%).[142] Therefore, so long as Prop 22 is upheld constitutionally,[143] the

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135. *See* People v. Uber Tech., Inc., 56 Cal. App. 5th 266, 313–14 (Cal. Ct. App. 2020).

136. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) (last visited Jan. 12, 2022).

137. *Id.*

138. *See id.*

139. *Id.*

140. *Id.* Corporate supporters of Prop 22 were DoorDash, Instacart, Lyft, Postmates, and Uber.

141. *Id.*; *see also* Meredith Whittaker, *'Those in Power Won't Give Up Willingly': Veena Dubal and Meredith Whittaker on the Future of Organizing Under Prop 22*, ONEZERO (Nov. 5, 2020), https://onezero.medium.com/prop-22-where-do-gig-workers-go-from-here-e6eaa3ee2324.

142. *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, *supra* note 136.

143. *See id.* (outlining a constitutional challenge to Prop 22).

WCL cannot be applied to rideshare and delivery app drivers — i.e., such workers will be deemed independent contractors and cannot be considered employees under the WCL.[144] Though Prop 22 bars the drivers from being considered employees, thus disqualifying them from receiving all of the protections that the WCL grants, it did require that they receive certain pay and benefits, just not the level of protection they would receive if covered by the WCL.[145] As such, the passing of Prop 22 is already causing a downward spiral, exacerbating the disaggregation of employment. At least one company in California is firing driver-employees in favor of using DoorDash workers who are cheaper labor because they are independent contractors and now exempt from California employment laws.[146] This causes unfair competition and puts workers who were fired, so their employer could use unprotected drivers, either on the unemployment line or partaking in app-based work with less protections and benefits than they were previously entitled to. We can do better.

Part IV discusses experimental federalism and diffusion at the state level. It also addresses the diffusion mechanisms, learning and imitation, and applies the Galle and Leahy diffusion factors of relevancy, information, and costs. Part IV then provides an analysis of the potential diffusion of the WCL to other states.

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144. *See, e.g.*, Castellanos v. California, No. S266551, 2021 Cal. LEXIS 833 (Cal. Feb. 3, 2021) (granting judicial notice). *But see* Castellanos v. California, No. RG21088725, 2021 Cal. Super. LEXIS 7285, at *18 (Super. Ct. Cal. Cnty. Alameda Aug. 20, 2021) (ruling that Prop 22 was unconstitutional because it "limits the power of the future legislature to define app-based drivers as workers subject to workers' compensation law"). Uber et al. are expected to appeal the ruling.

145. Under Prop 22, drivers are to be paid 120% of California's minimum wage. The wages will be paid during times that drivers have a passenger in their vehicle. If a driver works at least fifteen hours per week, they will be entitled to a health care stipend. Prop 22 also mandates that drivers receive safety training and entitlement to breaks if they drive more than twelve hours in a twenty-four-hour period. Prop 22 also requires that drivers be enrolled in injury protection insurance. Both Uber and Lyft have responded differently to these requirements. *See* Kim Lyons, *Uber and Lyft Roll Out New Benefits for California Drivers under Prop 22*, THE VERGE (Dec. 14, 2020), https://www.theverge.com/2020/12/14/22174600/uber-lyft-new-benefits-california-drivers-prop-22-gig-economy. *But see* Veronica Irwin, *Rideshare Drivers Report Being Short Changed*, SF WEEKLY (July 19, 2021), https://www.sfweekly.com/top stories/rideshare-drivers-report-being-short-changed/ (discussing the amounts Lyft and Uber collect from passengers' total payment to drivers).

146. "In California hundreds of Albertsons employees are being swapped for DoorDash Inc. workers . . . ." Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG BUSINESSWEEK (Feb. 17, 2021, 4:00 AM), https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote.

IV. EXPERIMENT OR FREE-RIDE — WHAT TO DO?

"[T]he ability of states to serve as policy laboratories is a strength of federalism."[147]

Experimental federalism is the process by which states serve as laboratories and experiment with new policies and laws.[148] Through this experimentation, states can share information that can lead to collective learning,[149] yielding a better picture of what was effective.[150] Consequently, states can build on one another's successes and failures, "generat[ing] more effective and efficient policy approaches."[151] Former President Bill Clinton used Brandeis' term "laboratories of democracy" to describe how state officials "learn from one another, borrowing, adapting, and improving on each other's best efforts."[152]

It is generally believed that state governments are more adept at creating innovative laws or policies than the federal government because they are more flexible and responsive to an ever-changing electorate.[153]

147. Srinivas C. Parinandi, *Policy Inventing and Borrowing among State Legislatures*, 64 AM. J. POL. SCI. 852, 866 (2020).

148. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 279–80 (1932); Doni Gewirtzman, *Complex Experimental Federalism*, 63 BUFFALO L. REV. 241, 242 (2015); Symposium, Richard H. Fallon, Jr., *The Future of Federalism: Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 973 (2017); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 430–31 (1998).

149. *See* Jenna Bednar, *Nudging Federalism Towards Productive Experimentation*, 21 REG'L & FED. STUDS. 503, 507–08 (2011). The collective learning can occur both horizontally across states and vertically to the federal government. *See* Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1369–70 (2014).

150. *See* J. William Futrell, *Law of Sustainable Development*, ENV'T. F., Mar.–Apr. 1994, at 16, 20 ("The prospects for early innovation and experimentation on the state level are better than in Washington."); *see also* Steele & Tsoflias, *supra* note 149, at 1369–70.

151. Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1666 (2014); *see also* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211–12 (1992).

152. ANDREW KARCH, DEMOCRATIC LABORATORIES 145 (2010) (quoting Bill Clinton in DAVID OSBORNE, LABORATORIES OF DEMOCRACY xii (1990)).

153. *See* David L. Markell, *States as Innovators: It's Time for a New Look to our "Laboratories of Democracy" In the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 356 (1994); *see also* Paulette L. Stenzel, *Right To Act: Advancing the Common Interests of Labor and Environmentalists*, 57 ALB. L. REV. 1, 37 (1993) ("Individual states can choose varying mechanisms as the tools for achieving their goals. Then, those laws can be examined to see which options have proven to be the most effective."); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 371 (2008) ("[L]ocal governments may prove even more fruitful agents for social change

"[F]ederalism allows state governments, equipped with knowledge of their unique and very different communities, to make better policy choices than a 'one size fits all' approach imposed by a national government."[154] Former President George H.W. Bush referred to the movement of power and decision-making to the states as being "closer to the people."[155] Similarly, Ralph Nader has said, "Progressive groups and low and moderate income families and minorities are often finding state legislatures — and city councils — more responsive to their needs than the lawmakers in Washington."[156] In addition to states, other subnational governments such as cities, localities, and Native American tribes also serve as laboratories and innovators of change.[157]

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and policy innovation than the state or federal levels of government."). Additionally, tribes are also sovereigns and are well-placed to experiment. Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857, 857 (2015) ("[G]iven their unique connection to the land and the intensified thread of some modern environmental challenges, many tribes are already engaged in regulatory innovation related to environmental law.").

154. Gewirtzman, *supra* note 148, at 256–57; *see also* Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120 (1999).

155. President George Herbert Walker Bush, State of the Union Address (Jan. 29, 1991); *see also* Gregory v. Ashcroft, 501 U.S. 452, 457–59 (1991); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1336 (2009); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 21 (2006); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1768 (2006); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV'T. L. REV. 293, 293 (2016). The federal government has encouraged and respected the States' ability to innovate through their own lawmaking. An example lies in the "State Innovation Waivers" of the Patient Protection and Affordable Care Act ("PPACA"). State Relief and Empowerment Waivers, 83 Fed. Reg. 53,575 (Oct. 24, 2018) (to be codified at 31 C.F.R. pt. 33 and 45 C.F.R. pt. 155). The U.S. Secretary of Health and Human Services and the Secretary of the Treasury stated in guidance that they were "committed to empowering the states to innovate in ways that will strengthen their health insurance markets, expand choices of coverage, target public resources to those most in need, and meet the unique circumstances of each state." *Id.* "States are better positioned than the federal government to assess and respond to the needs of their citizens with innovative solutions. We encourage states to craft solutions that meet the needs of their consumers and markets and innovate to the maximum extent possible under the law." *Id.* at 53,577.

156. Ralph Nader, *State Legislatures as "Laboratories of Democracy"*, COMMON DREAMS (May 31, 2004), https://web.archive.org/web/20080924115109/http:/www.commondreams.org/cgi-bin/print.cgi?file=%2Fviews04%2F0531-12.htm. Mr. Nader also quotes Tim McFeeley, who was the Executive Director of the Center for Policy Alternatives, as saying, "[t]oday, it is state legislators who are proposing the nation's most far-reaching, proactive measures. They are making legislatures a testing ground for the newest political debates. For progressives, the action is in the states." *Id.*

157. In seeking to protect app-based drivers, two cities recently enacted ordinances to provide for minimum pay for app-based drivers. *See* NEW YORK, N.Y., LOCAL LAW NO. 2018/150 (Aug. 14, 2018); SEATTLE, WASH., ORDINANCE 126,189 (Sept. 29, 2020); *see also* Kronk Warner, *supra* note 153, at 857; David A. Dana & Hannah J. Wiseman, *A Market Approach to Regulating the Energy Revolution: Assurance Bonds, Insurance,*

Subnational governments have not only been innovating in numerous areas of the law by choice,[158] but also by force.

"When federal inaction creates a policy vacuum, state policy experimentation may be the *only* available solution for solving difficult social problems."[159] Inaction or ineffectual action at the federal level will ideally prompt state policymakers to experiment and endeavor to create optimal solutions. Accordingly, one would think that having fifty state legislatures that are essentially potential "innovation centers"[160] should provide opportunities to test a variety of approaches simultaneously or within a short amount of time.[161] And this could be true if all or even a multitude of states were willing to engage in experimentation. However, not all states want, or have the resources, to experiment. Instead, these states may forgo conducting their own experiments, opting to free-ride on an experimenting state's law or a pre-existing common law test, leading to under-experimentation and information deficits.[162] Ultimately, free-riding can result "in a sub-optimal level of experimentation," thereby reducing our chances of achieving the best policy.[163] Regardless, free riding occurs, and because some states are more prone to being first-movers than others, a free-

and the Certain and Uncertain Risks of Hydraulic Fracturing, 99 IOWA L. REV. 1523, 1587–88 (2014).

158. *See* Markell, *supra* note 153, at 355; *see also* Joel Eisen, Emily Hammond, Jim Rossi, David Spence, Jacqueline Weaver, & Hannah Wiseman, *Introduction: Themes in Energy Law* 1, 20 (Geo. Wash. Univ. L. School, Pub. L. & Legal Theory Paper No. 2014-38, 2014).

159. Gewirtzman, *supra* note 148, at 244; *see* KARCH, *supra* note 152, at 15 ("When national lawmakers could not agree on legislation or did not address specific topics, state officials sometimes developed innovated policy solutions on their own."); *see also* Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990).

160. While Professor Markell spoke specifically to environmental law innovation, his comments equally resonate in the employment law setting. *See* David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENV'T. L. 1, 73 (1993).

161. *See* Markell, *supra* note 153, at 355; Gewirtzman, *supra* note 148, at 243; *see also* Rachael K. Hinkle & Michael J. Nelson, *The Transmission of Legal Precedent among State Supreme Courts in the Twenty-First Century*, 16 ST. POL. & POL'Y Q. 391 (2016); Michael C. Dorf, *The Supreme Court 1997 Term — Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60–61 (1998); Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENV'T L.J. 397, 434–36 (2008). *But see* Daniel Treisman, THE ARCHITECTURE OF GOVERNMENT: RETHINKING POLITICAL DECENTRALIZATION 229–35 (2007) (arguing that states acting as innovators does not necessarily lead to innovation); Hongbin Cai & Daniel Treisman, *Political Decentralization and Policy Experimentation*, 4 Q. J. POL. SCI. 35, 53 (2009) (noting that experimentation and innovation are not a foregone conclusion).

162. Gewirtzman, *supra* note 148, at 267.

163. *Id.* at 266.

riding state has one to follow.[164] California is one such recognized first-mover.

A. California — A Recognized First-Mover

California is a proven "first-mover" state in many instances.[165] For example, when former President Donald Trump announced that the United States was withdrawing from the 2015 Paris Agreement, California co-founded a 15-state alliance committed to upholding the Agreement's objectives.[166] Further, when California increased its minimum wage, many states followed.[167]

Gender diversity on public company boards is another example of California being first. On September 30, 2018, California passed a law that required public company boards to have a minimum number of women directors.[168] This policy diffused to Washington within eighteen months of

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164. Some states are risk-seeking first movers or early adopters of innovative policies, whereas some are more risk-averse or late adopters (which can be the free riders). *See id.* at 270.

165. *See, e.g.*, David E. Adelman & Kirsten H. Engel, *Reorienting State Climate Change Policies to Induce Technological Change*, 50 ARIZ. L. REV. 835, 870 (2008) (noting California as a first mover in the area of solar technology research); Lauren Baron, *How to Avoid Constitutional Challenges to State Based Climate Change Initiatives: A Case Study of Rocky Mountain Farmers Union v. Corey and New York State Programs*, 32 PACE ENV'T. L. REV. 564, 565 (2015) (noting California as a first mover in reducing emissions from the transportation sector); Sharon B. Jacobs, *Bypassing Federalism and the Administrative Law of Negawatts*, 100 IOWA L. REV. 885, 905 (2015) (recognizing California as a first mover in the energy and environmental space by setting "a baseline calculation methodology for demand response by regulation"); Spencer Keller, *How Small Cannabis Businesses Can Survive the Hurdles of IP Protection*, 8 TEX. A&M L. REV. 199, 200 (2020) (finding California as a first-mover because it gave doctors the option to recommend medicinal marijuana to patients); Holning Lau, *Human Rights and Globalization: Putting the Race to the Top in Perspective*, 102 NW. U. L. REV. COLLOQUY 319, 327 (2008) (observing California as the first mover in same-sex marriage rights to non-residents); J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 558 (2016) (identifying California as the first to depart from the Model Benefit Corporation Legislation and expressly require dissenter's rights); Chiara Pappalardo, *What a Difference a State Makes: California's Authority to Regulate Motor Vehicle Emissions Under the Clean Air Act and the Future of State Autonomy*, 10 MICH. J. OF ENV'T. & ADMIN. L. 169, 169 (2021) (noting California as a first mover and serving as a laboratory for the testing of "technological solutions and regulatory approaches to improve air quality"); Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2741 (2019) (mentioning that first mover states like California need to continue to lead in the area of climate change mitigation).

166. Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid, & Steven Davidoff Soloman, *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-economic Values* 1, 20 (ECGI Finance Working Paper No. 785/2021, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798.

167. *Id.* at 6, 21–22.

168. *See* CAL. CORP. CODE §2115.5 (West 2019); *see also id.* §301.3. California was

California's adoption; Washington enacted a bill that requires either a gender-diverse board or specific disclosures to shareholders essentially as to why they did not meet the minimum number of women requirement.[169] While Norway was the true first to establish a corporate board quota,[170] California was the first-mover in the United States.[171]

Many political science scholars have investigated and attempted to rank which states are the most innovative and conducting more experiments.[172] Regardless of what methodology is used to rank the states, California has consistently been on or near the top.[173]

> Probably every one of the fifty states can point to a few areas of law in which it developed new doctrine accepted by other states. But California has a record, probably unique in the number and subject-matter range, of legal innovations — instituted by the Legislature and the courts alike — that have broken new paths.[174]

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the first state to enact a law requiring gender-diversity. It was also the first state to act when it comes to non-binding resolutions, having adopted theirs in 2013. S. Con. Res. 62, 2013 Leg., 2013-2014 Sess. (Cal. 2013). The non-binding resolution, which was designed to encourage public company participation, diffused to other states: S. 1007, 2015 Leg., 189th Sess. (Mass. 2015); H.R. 0439, 2015 Leg., 99th Sess. (Ill. 2015); H.R. 273, 2017 Leg., 2017-2018 Sess. (Pa. 2017); H.R.J. Res. 17-1017, 2017 Leg., 2017 Sess. (Colo. 2017).

169. S. 6037, 66th Leg., Reg. Sess. (Wash. 2020). The Washington law requires companies who do not meet the minimum requirements to provide a "board diversity discussion and analysis" that discloses the company's approach to creating board diversity. *Id.* Some answers that the company would provide in said discussion and analysis would include: how the board "considered the representation of any diverse groups in identifying and nominating" board candidates, or the reasons that diversity was not considered; any policies adopted to identify and nominate members of any diverse groups as board candidates, or the reasons for not adopting such a policy; and "mechanisms of refresh[ing] the board, such as term limits and mandatory retirement" of board members. *Id.*

170. *See* Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKLEY BUS. L.J. 55, 62–63 (2009); *see also*, Gwladys Fouche, *Exclusive: Norway Wealth Fund Tells Firms: Put More Women on Your Boards*, REUTERS (Feb. 15, 2021, 5:56 AM), https://www.reuters.com/article/us-norway-swf-exclusive/exclusive-norway-wealth-fund-tells-firms-put-more-women-on-your-boards-idUSKBN2AF0TX ("Norway's $1.3 trillion sovereign wealth fund, the world's largest, wants the companies it invests in globally to boost the number of women on their boards and to consider setting targets if fewer than 30% of their directors are female . . . .").

171. *See* Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435 (2019) (arguing that California's board diversity law may actually be successful and encourage other states to act).

172. *See, e.g.*, Walker, *supra* note 4.

173. *See id.* at 883. *But see* Robert L. Savage, *Policy Innovativeness as a Trait of American States*, 40 J. POLITICS 212, 212 (1978) ("American political folklore is rich in suggesting that some states are innovators while others are laggards.").

174. Harry N. Scheiber, *California — Laboratory of Legal Innovation*, 11 EXPERIENCE 4, 5 (2001).

What motivates California and other states to innovate or experiment? Other than simply trying to come up with the best solution to a problem, policy evangelism is posited as a reason that a state may be motivated to be more innovative. Elected officials are likely to "evangelize — to want to see their own ideas of the 'best' outcome enacted not only for themselves, but everywhere"[175] — because they believe they have the best idea how to tackle a problem — that their innovation improves society and should be as widely implemented as possible.[176] Additionally, politicians may be seeking nationwide attention and notoriety.[177] Aside from political reasons, higher levels of state innovation can be attributable to the availability of financial resources,[178] a larger population — particularly those residing in urban areas, and a higher percentage of the population being college graduates.[179]

Not all states have the financial resources to experiment. "In a world where states have scarce resources, piggybacking on the efforts and insights of [others] seems sensible and even economically desirable."[180] State policy innovation and experimentation is risky and costly.[181] As such, states with more financial resources are more likely to experiment.[182] "More populous

175. Galle & Leahy, *supra* note 155, at 1356; *see also* Steven Kelman, *Why Public Ideas Matter*, *in* THE POWER OF PUBLIC IDEAS 31, 46 (Robert B. Reich ed., 1988) (reporting surveys of officials).

176. Galle & Leahy, *supra* note 155, at 1363; *see* Cai & Treisman, *supra* note 161, at 53.

177. *See* Gewirtzman, *supra* note 148, at 268; *see also* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014); Galle & Leahy, *supra* note 155, at 1386–89.

178. *See* Thad Kousser, TERM LIMITS AND DISMANTLING OF THE LEGISLATIVE PROFESSIONALISM 177–79 (2005); Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 843 (Oct. 2008) ("Innovative leaders were found to be larger, wealthier and more cosmopolitan."); *see also* Robert L. Crain, *Fluoridation: Diffusion of an Innovation among Cities*, 44 SOCIAL FORCES 467, 472 (1966); Fred W. Grupp, Jr. & Alan R. Richards, *Variations in Elite Perceptions of American States as Referents for Public Policy Making*, 69 AM. POL. SCI. REV. 850, 851 (1975); Walker, *supra* note 4, at 880.

179. *See* Andrew Karch, Sean C. Nicholson-Crotty, Neal D. Woods, & Ann O'M. Bowman, *Policy Diffusion and the Pro-innovation Bias*, 69 POL. RSCH. Q., Apr. 2016, at 83, 86.

180. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PENN. L. REV. 703, 730 (2016). Dodson's focus was on piggybacking on federal laws, but the premise is equally applicable to states.

181. *See* Galle & Leahy, *supra* note 155, at 1342; *see also* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

182. *See* Karch, Nicholdson-Crotty, Woods & Bowman, *supra* note 179, at 83 (2016); Boehmke & Skinner, *supra* note 4, at 303; Gray, *supra* note 4, at 1174; Walker, *supra* note 4, at 880; *see also* Dodson, *supra* note 180, at 732; John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1426 (1986).

states with ample resources are better able to absorb the costs of experimen[tation] in one or two budget areas and can more easily diversify against the risk of failure."[183] As the fifth-largest economy in the world, California is well poised to experiment and provide solutions to big problems.[184]

B. Diffusion Mechanisms

"Diffusion is the process by which an innovation spreads."[185] It transpires when state policymakers observe other states and implement the same solution.[186] Said another way, while some states serve as laboratories and experiment with new policies and laws, policymakers in states that are less likely to experiment can free-ride on an experimenting state's law.

Some state legislatures will immediately adopt another state's law because they want to *imitate* that state. Others will seek to *learn* from the first-moving state's experiment's results. Regardless, the decision to free-ride does not come easily. While political science scholars focus on four main mechanisms or ways that a policy or law can spread from one state to another: imitation, learning, economic competition, and coercion,[187] this Article focuses on the imitation and learning mechanisms because they are the most applicable here.

i. Mechanism: Imitation

Imitation as a mechanism focuses directly on emulating another state.[188] States that imitate often hope to "raise their profile and make them[selves] more attractive places to live,"[189] like the state they are choosing to emulate.

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183. Galle & Leahy, *supra* note 155, at 1367 (citing Ken Kollman et al., *Decentralization and the Search for Policy Solutions*, 16 J. L. ECON. & ORG. 102, 102 (2000)); *see also* Koleman S. Strumpf, *Does Government Decentralization Increase Policy Innovation?*, 4 J. PUB. ECON. THEORY 207, 231 (2002).

184. *See* Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, *in* THEORIES OF THE POLICY PROCESS 169, 170, 176–77 (Paul A. Sabatier ed., 1999); Volden, *supra* note 1, at 301, 304; Shipan & Volden, *supra* note 178, at 843 (stating how large states are the primary sources of innovation).

185. EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 13 (1962).

186. GRAEME BOUSHEY, POLICY DIFFUSION DYNAMICS IN AMERICA 26 (2010).

187. *See* Shipan & Volden, *supra* note 178, at 840. "Economic diffusion forces occur on policies that involve competition between states over residents, payments, or revenues. Such competition is usually most acute between states with common borders because this facilitates less costly movement by individuals or capital across borders." Boehmke & Skinner, *supra* note 4, at 320.

188. Shipan & Volden, *supra* note 178, at 842.

189. *Id.* at 843; *see also* KARCH, *supra* note 152, at 148; Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147, 149 (1983).

Another way that imitation can fuel diffusion is through homogeneity or institutional isomorphism.[190] In other words, states that are homogeneous (resemble one another) are likely to imitate a state they are similar to by adopting its policy. While imitation often occurs based on close geographical proximity, the similarity can go beyond pure geography. For instance, states that are ideologically or politically homogenous are more likely to adopt one another's laws through imitation.[191]

A free-riding imitating state trusts, or seeks to emulate, the experimenting state regardless of the experiment's outcome.[192] For some policymakers, the decision to imitate can be based in saving resources, luring new residents to their state, or alternatively, preventing the loss of their current residents to the experimenting state. Perhaps they want to appear united with the first-moving experimenting state.[193] Or perhaps the policy is one that most states can agree on, such as sex offender registries or the AMBER Alert system.[194] There could be numerous reasons that policymakers may find it valuable to imitate. However, there are drawbacks to imitation. Problematically, when policymakers imitate, they may not consider the unique preferences of their residents,[195] thus creating asymmetry between state law and the electorate.[196] Another problem is that free-riding imitating states are unlikely to undertake the investigations or develop and maintain the records commonly associated with experimentation, such as the debates and legislative or rulemaking history that courts use when interpreting the law.[197]

If a state policymaker's impulse is to emulate a specific state, imitation as a process takes virtually no time at all. It can be essentially immediate. For example, recall Washington's adoption of California's gender-diverse board quota law within eighteen months.[198] While the Washington law's language is not verbatim, it is very similar and can still be considered as having imitated California's as it is common for a state to customize a law to fit its

190. KARCH, *supra* note 152, at 148; DiMaggio & Powell, *supra* note 189, at 149.

191. Daniel M. Butler, Craig Volden, Adam M. Dynes, & Boris Shor, *Ideology, Learning, and Policy Diffusion: Experimental Evidence*, 61 AM. J. POL. SCI. 37, 37 (2017); *see also* BOUSHEY, *supra* note 186, at 25 ("Rather than taking a comprehensive solution search for each . . . problem, governments borrow heavily from their neighbors or ideological peers."); Gewirtzman, *supra* note 148, at 293 (describing the idea of "homophily").

192. *See* Dodson, *supra* note 180, at 730 ("It is cognitively easier and simpler for states to follow a trodden path . . . than to blaze a new trail.").

193. *Id.* at 736.

194. BOUSHEY, *supra* note 186, at 1.

195. *See* Dodson, *supra* note 180, at 747.

196. *Id.* at 706.

197. *Id.* at 730.

198. *See supra* notes 168–69 and accompanying text.

jurisdiction.[199] Imitative adoption can happen quickly because there is no experimentation to wait for.

Lastly, consider the American proverb, "where California goes, so goes the nation" and how it applies to the imitation mechanism.[200] "California has often been a leader in introducing new regulation, which is subsequently adopted by other states."[201] As a matter of fact, California is a known bellwether in environmental, labor, privacy, and other causes.[202] Some states may want to imitate California because of its large economy, population, and innovative reputation, particularly in the labor law space. Are those attributes enough to promote adoption of the WCL by other states, or would other state policymakers prefer to learn from California's experiment first?

ii. Mechanism: Learning

When states experiment with different policies, they can provide results of success and failure that other states can learn from.[203] It is just as important to observe and analyze unsuccessful state laws and programs as it is the successful ones. The learning mechanism inherent in this scrutiny is crucial to a state's decision on whether and when to adopt others' laws.[204] "When confronted with a problem, decision makers simplify the task of finding a solution by choosing an alternative that has proven successful elsewhere."[205] As such, learning as a diffusion mechanism depends upon the success, or perhaps the perceived success, of a policy or law. If a state's policymakers determine or perceive that the experimenting state's legal

199. KARCH, *supra* note 152, at 149. Perhaps Washington's changes to California's law helps to achieve a more optimal solution. *See* Dodson, *supra* note 180, at 746 ("For those convinced by the virtues of homogeneity, allowing temporary, controlled, and collaborative variation may help achieve uniformity in a better form."). One can certainly view California's carve-outs as modifications to a statute it adopted. *See* KARCH, *supra* note 152, at 149.

200. Meyerinck, Niessen-Ruenzi, Schmid, & Solomon, *supra* note 166, at 19 (stating that California led the nation in board gender quotas through imitation mechanism).

201. *Id.*

202. *Id.* at 20–22.

203. Gewirtzman, *supra* note 148, at 266 (noting that some states choose to do nothing and wait while other states undertake risky experiments that will produce information and results); *see also* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1464–67 (2011).

204. Markell, *supra* note 153, at 355–56, 355 n.23; *see also* Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 801 (1994); Galle & Leahy, *supra* note 155, at 1354.

205. William D. Berry & Brady Baybeck, *Using Geographic Information Systems to Study Interstate Competition*, 99 AM. POL. SCI. REV. 505, 505 (2005); *see* Shipan & Volden, *supra* note 178, at 841; *see also* Boehmke & Skinner, *supra* note 4, at 320 ("Social learning describes a process whereby states look to the policies of other states, whether as a solution to a common problem or merely as a way to keep up with their peers.").

experiment was a success, they are more likely to adopt it.[206] While this makes sense in a vacuum, policymakers do not operate in such a space. State policymakers who are ideologically or politically against certain policies may be reluctant or unwilling to learn due to their own biases.[207] Therefore, even if a law or policy is statistically beneficial, politics may prevent it from diffusing.

Learning as a process takes time. Allowing states to implement policy more gradually allows for feedback and improved institutional learning.[208] State policymakers that are interested in knowing the political, economic, and overall consequences of a new law may take months if not years to observe and evaluate the law's effectiveness.[209] This is one way that learning is contrasted with imitation. A state that utilizes the learning process patiently awaits the experiment's results. A state that utilizes the imitation process is not interested in waiting for results but is primarily interested in hopping on the bandwagon.[210]

> In learning, policymakers focus on the policy itself — how was it adopted, was it effective, what were its political consequences? In contrast, imitation involves a focus on the other government — what did that government do and how can we appear to be the same? The crucial distinction is that learning focuses on the *action* . . . while imitation focuses on the *actor*.[211]

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206. Shipan & Volden, *supra* note 178, at 842. It is often difficult to compute the success of a policy or law. Sometimes shortcuts that are consistent with learning occur. By way of example, "policymakers may interpret the broad adoption of a policy without subsequent abandonment over time as evidence of the success of the policy, or at least as evidence of maintained political support." *Id.*; *see also* Gewirtzman, *supra* note 148, at 271.

207. *See* Butler, Volden, Dynes, & Shor, *supra* note 191, at 38–39.

208. Steele & Tsoflias, *supra* note 149, at 1369–70.

209. Shipan & Volden, *supra* note 178, at 844.

210. See BOUSHEY, *supra* note 186, at 2 ("Although the Amber Alert was exceptional in the sheer speed and scope of its implementation, such abrupt patterns of policy adoption are far from unique in American politics. The reenactment of the death penalty, prohibition, term limits, tax revolts, state auto lemon laws, English Only language legislation, 'three strikes' sentencing guidelines, mandatory child auto-restraint requirements, and sex-offender registries stand as prominent examples of policy innovations that moved rapidly and extensively throughout the nation. Most of these innovations were championed by well-organized interest groups, and appealed broadly to voters across the states. In many cases, the innovation was adopted by more than 30 states in fewer than six years.").

211. Shipan & Volden, *supra* note 178, at 842–43 ("[A] classic example of learning is avoiding touching the hot burner after observing someone doing so with bad effects, whereas imitation is jumping off the garage roof after observing your older brother doing so, without regard for the consequences. In the former case, it is the action that matters; in the latter, the actor. In the former, you learn about consequences; in the latter you simply aspire to be like the other actor.").

Brandeis recognized that when a state experiments, risk is minimized because if such an experiment fails, the damage is confined to that single state.[212] This of course assumes that the policy or law does not diffuse rapidly via imitation.[213] If states adopt laws before the results are in, as is often the case with imitation, then Brandeis' hypothesis is not as confined. Conversely, if a state innovation provides a successful outcome, it should lead to diffusion of innovation among states.

Some state policymakers openly admit to waiting for the AB5 experiment to run its course before deciding whether to adopt it or a similar AB5-esque statute.[214]

C. Policymakers Seek to Learn the Experiment's Results Before Free-Riding

> *"[T]here's an incentive for everyone [in New York] that comes up with a proposal that avoids the pitfalls in California — that means we don't have [a] daily running list of . . . exemptions or lawsuits."*[215]

Since California created AB5, states that are seeking to codify a new worker classification law are watching and waiting for the experiment's results. This spectating exemplifies the learning mechanism of diffusion.[216]

Illinois legislator Will Guzzardi openly admits to learning before free-riding on AB5:[217] "When we're not the first state to act, we get to reflect on the lessons of other states."[218] As of January 2020, his plan was to introduce legislation similar to AB5, but not until he spoke with labor advocates and

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212. New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting); *see also* Dodson, *supra* note 180, at 746; Gewirtzman, *supra* note 148, at 243; JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 31 (2009); Bednar, *supra* note 150; Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 276 (1977).

213. *See infra* Part IV.B.i.

214. *See infra* Part IV.D.

215. Anna Gronewold, *Motive for Cuomo's Gig Economy Task Force Leaves Some Confused*, POLITICO (Jan. 22, 2020, 7:15 PM), https://www.politico.com/states/new-york/albany/story/2020/01/22/motive-for-cuomos-gig-economy-task-force-leaves-some-confused-1253683 (quoting Staten Island Sen. Diane Savino). It can also lead to more experimentation if a state decides against adoption.

216. *See supra* Part IV.B.ii. Spectating can also lead to more experimentation if a state decides against adoption.

217. Mr. Guzzardi's comments were made prior to AB5's clarifying AB2257 enactment, but, presumably, his comments are applicable to the WCL and not just the initial iteration via AB5.

218. Eli Rosenberg, *Gig Economy Bills Move Forward in Other Blue States, After California Clears the Way*, WASH. POST (Jan. 17, 2020), https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/.

workers.[219] In speaking to Eli Rosenberg of the Washington Post, Representative Guzzardi did not commit to an AB5-esque bill, stating it could be like AB5 or maybe the bill would create a new class of worker.[220] As such, he is now waiting to see how California's AB5 experiment goes.

New Jersey passed several laws in 2019 to crack down on worker misclassification.[221] As of this writing, New Jersey bill S863 was proposed by Senator Stephen M. Sweeney.[222] Bill S863 would modify New Jersey's ABC test to mimic the version that California uses, as well as broaden its scope.[223] New Jersey uses the ABC test solely for unemployment compensation purposes.[224] If passed, the new law will modify the ABC test to mimic AB5's coverage and expand its application to wage and hour laws, wage payment laws, and wage collection laws in alignment with the New Jersey Supreme Court's 2015 decision in *Hargrove v. Sleepy's, LLC*.[225] However, the legislation does not contain as long of a list of carve-outs, which has been cause for criticism by the U.S. Chamber of Commerce.[226] In November 2019, Sean Redmond, Executive Director, Labor Policy, penned:

> [B]ecause lawmakers in California realized just how sweeping it was, A.B. 5 also included numerous exemptions for employers in certain industries, something that [this bill] fails to do. Moreover, after passing it barely two months ago, the California legislature already realizes that it may need to further amend A.B. 5 in its upcoming session to address the predictably ill effects of the bill.[227]

Redmond also called for further discussions with Sweeney relative to exempting types of workers from the bill.[228] Clarifying what he thinks about the gig economy, Redmond elaborated: "[E]xemptions must also include legitimate independent contractors working for app-based platforms who

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219. *Id.*

220. *Id.*

221. Ryan T. Warden, *New Jersey Resumes Efforts to Amend ABC Test for Independent Contractor Status, Passes Slate of Laws Targeting Misclassification*, NAT'L L. REV. (Jan. 23, 2020), https://www.natlawreview.com/article/new-jersey-resumes-efforts-to-amend-abc-test-independent-contractor-status-passes (outlining the proposed legislation).

222. S. 863, 2019 Leg., Reg. Sess. (N.J. 2020).

223. *See id.*

224. *See* Gronewold, *supra* note 215.

225. 106 A.3d 449 (2015) (expanding the coverage of the ABC test beyond unemployment to purposes of resolving a wage-payment or wage-and-hour claim.); *see* Warden, *supra* note 221.

226. Letter from Sean P. Redmond, *supra* note 121.

227. *Id.*

228. *See id.* ("To the extent that there may have been discussions about exempting many types of workers from S. 4204, the U.S. Chamber is supportive of these discussions.").

provide their services while exercising a great deal of independence."[229]

New York is also on the move. In 2019, numerous workplace protections were put into place.[230] More on point to this Article, in the summer of 2019, a bill to create a new "dependent worker" classification was submitted; however, the bill has languished in committee for over a year and a half.[231] California's adoption of AB5 may have provided more momentum for New York's leaders evidenced by bill sponsors considering bills more like AB5.[232]

While many New Yorkers appreciate the innovation and services offered by a developing app-based economy, their fellow workers are unable to reap these benefits because the law is not aligned with existing economic and

229. *Id.* The question of independence leads back to control and whether app-based workers have sufficient independence to be classified as independent contractors. In *Lowman v. Unemployment Compensation Board of Review*, 235 A.3d 278 (Pa. 2020), the Pennsylvania Supreme Court held that an Uber driver was not free from Uber's control and therefore was not self-employed. *Id.* at 281. The court did a lengthy analysis of all of the ways that Uber does and does not control its drivers. *See id.* at 295–308.

230. N.Y. LAB. LAW § 652 (McKinney 2021) (minimum wage increase); A.B. 10636, 2017-2018 Leg. Sess. (N.Y. 2017) (tip credit increase); N.Y. WORKERS' COMP. LAW § 205 (McKinney 2021) (amending the workers' compensation law to provide benefits for paid family leave); S.B. 6577 2019-2020 Leg. Sess. (N,Y. 2019) (strengthening and reforming the state's anti-harassment and anti-discrimination laws); N.Y. LAB. LAW § 194 (McKinney 2021) (expanding pay equity protection for employees beyond gender-based pay differentials); N.Y.C. ADMIN. CODE § 8-107 (2016) (prohibiting employers from conducting pre-employment drug testing for marijuana; prohibiting employment discrimination based on an individual's reproductive health choices); A.B. 2006 2019-2020 Leg. Sess. (N.Y. 2019) (amendment making discrimination based on gender identity of expression unlawful); N.Y. EXEC. LAW § 292 (McKinney 2021) (prohibiting discrimination based on traits historically associated with race, including hair texture and protective hairstyles, such as braids, locks, and twists); N.Y. EXEC. LAW § 296 (McKinney 2021) (prohibits employers from taking discriminatory action against an employee for wearing clothing, attire or facial hair associated with the requirements of the employee's religion; amendment requiring employers to provide reasonable time off to allow employees who are domestic violence victims to participate in legal proceedings related to the offense or to obtain health or safety services); N.Y. ELEC. LAW § 3-110 (McKinney 2020) (revised election law to provide workers expanded time off to vote); A.B. 5501 2019-2020 Leg. Sess. (N.Y. 2019) (prohibits an employer from threatening to contact immigration authorities about an employee or an employee's family member); WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES § 586.04 (2022) (provides paid safe time leave to employees who are the victims of domestic violence or human trafficking).

231. S.B. 6583, 2019-2020 Leg. Sess. (N.Y. 2019), https://www.nysenate.gov/legislation/bills/2019/s6538 (showing the current status of the bill).

232. Annie McDonough, *Will New York Follow California on Gig Worker Protections?*, CITY & STATE N.Y. (Sept. 11, 2019), https://www.cityandstateny.com/articles/policy/technology/california-passed-ab5-what-does-mean-new-york.html ("'California does what they want,' Savino said. 'Sometimes California and New York are on the same page, and sometimes they're in totally different places. I think New York is going to have the most comprehensive conversation about it. My goal is for us to put forward the best piece of legislation that becomes a model for the nation, regardless of what happens anywhere else.'").

social changes. This asymmetry enables corporations to circumvent what would be considered fair pay and benefits in an app-based economy, thereby sacrificing the employee and taxpayer for increased profits.[233] Former Governor Cuomo is quoted as having said about AB5: "I don't want to lag California in anything, I don't want to lag any other state."[234] In what could have been a step further, New York Senator John Liu considered a bill that is similar to AB5.[235] He has said: "'You know what, California, they are the first, and sometimes it's good to be the second,' he added. 'We'll figure out what has worked there, and we have the benefit of learning from someone with a little bit of experience.'"[236]

Clearly, policymakers are watching California's AB5 and its aftermath to *learn* from California's experiment.[237] Will states adopt a similar approach? What do policymakers need to consider?

D. Applying the Galle and Leahy Diffusion Factors

Policymakers who seek to learn from another state's experiment require focus and guidance to complete their learning process. As stated previously, some policymakers seek to get their name out and evangelize.[238] But while political aspirations and views surely impact decisions to adopt another state's laws,[239] policymakers should look beyond politics and biases to consider laws more objectively, or at a minimum consider their political agenda within a certain scope of factors. More specifically, Professors Galle and Leahy outline three factors that policymakers can weigh when deciding whether to free-ride: "relevancy, information, and costs."[240] Said another way, these factors can help determine whether a policy or law will likely diffuse to another state.

i. Relevancy

The *relevancy* factor addresses whether a policy is useful (or applicable)

233. ANDREW CUOMO, NEW YORK STATE: 2020 STATE OF THE STATE 101 (2020), https://www.governor.ny.gov/sites/default/files/atoms/files/2020StateoftheStateBook.pdf.

234. McDonough, *supra* note 232.

235. Gronewold, *supra* note 215.

236. *Id.* New York uses a version of the ABC test for purposes of workers in the construction industry. N.Y. LAB. L. § 861-c(2) (McKinney 2022); *see* In re Barrier Window Systems, Inc., 53 N.Y.S. 222, 226 (App. Div. 2017).

237. Note also that the U.S. Congress is considering the ABC test part of AB5 for use in determining classification for NLRA purposes under the PRO Act.

238. *See supra* note 175 and accompanying text.

239. *See supra* note 177 and accompanying text.

240. Galle & Leahy, *supra* note 155, at 1346.

to another state.[241] Relevancy is positively related to diffusion. Conversely, if a policy is not relevant to another state, it is negatively related to diffusion. Therefore, diffusion is likely to happen in cases where states are homogeneous with regard to institutional structures, physical resources, and demographics because similar states' laws will be pertinent.[242] States often tailor their policies or laws to their unique characteristics.[243] As such there is a reduced likelihood of diffusion of the tailored policy or law to a state that is heterogeneous to the creating state.[244]

In applying the relevancy factor to potential diffusion of the WCL, policymakers should look beyond the scope of worker classification as a general proposition. Properly classifying workers is relevant to all states; however, the focus should be on the relevancy *of the statutory language itself.* California's WCL could very well fail to diffuse due to the under-inclusiveness created by the extensive number of carve-outs and retained use of the *Borello* test.[245] Potential free-riders may view the WCL as being too customized or tailored to California, and therefore not relevant to their own state. If that is so, relevancy will be lacking, which disfavors diffusion. Conversely, it is possible that portions of California's approach will seem relevant enough for policymakers to consider adoption with some customization, which would favor diffusion.

ii. Information

The *information* factor addresses the ease of obtaining useful data from the first-mover state — whether such state will share information resulting from its experiment.[246] "[G]ood information may often prove elusive. Innovators rarely have incentives to generate their own information, other actors may have limited knowledge about the most useful aspects of an

241. *Id.* at 1347; *see also* Robert L. Savage, *When a Policy's Time Has Come: Cases of Rapid Policy Diffusion, 1983-1984*, 15 PUBLIUS 111, 114 (1985) (stating that sometimes States emulate a policy on the basis of its virtue and adopt it regardless of whether there is a need).

242. Galle & Leahy, *supra* note 155, at 1347; Savage, *supra* note 241, at 114; *see* Volden, *supra* note 1, at 295; *see also* Sharun W. Mukand & Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation and Economic Performance* (John F. Kennedy Sch. Of Gov't, Harv. U., Faculty Rsch. Working Papers Series, Working Paper No. RWP02-027, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=329901.

243. *See* KARCH, *supra* note 152, at 149.

244. *Id.*

245. Consider the Department of Labor's comment in declining to adopt the ABC test to be used for FLSA purposes: "The fact that California recently enacted numerous exemptions to the ABC test highlights the test's limitations . . . ." Independent Contractor Status Under Fair Labor Standards Act, 85 Fed. Reg. 60,600, 60,636 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795).

246. Galle & Leahy, *supra* note 155, at 1351.

experiment, and innovating jurisdictions may actually actively conceal information about their activities from outsiders."[247] Information availability (like an experiment's results) is positively related to diffusion.[248] Some scholars note that first-movers may be more forthright about sharing positive information about success than negative information indicating failure.[249] Such outcome information is important for diffusion, but it may not be readily available or even measured unless the first-mover state benefits from it.[250]

Policymakers considering the adoption of the WCL can learn from the successes and failures associated with the AB5 experiment so long as the information is available to them. When analyzing whether obtaining information from the AB5 experiment will be easy, states can look to various sources. The first source should be California itself as it is in the best position to provide the results from this experiment.[251] However, will California be forthcoming with the data other states need? Does it benefit California to provide such information? While this information may not come from the state agencies directly, it could come from academic institutions or organizations within California such as the UC Berkeley Labor Center ("the Center").[252] Professors from the Center research and report on a variety of labor issues including app-based work and independent contracting.[253] The Center's reports could be helpful to policymakers.

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247. *Id.*; *see* Rose-Ackerman, *supra* note 181, at 611 ("[I]f innovations take time for other states to copy, [the first mover state] expects some net immigration of voters from other communities. Their immigration lowers tax bills and induces more migration."). Some States may deliberately choose to withhold information to prevent other states from free-riding. This is problematic in that it "deprives the system of critical data that could help other states or the federal government identify the best available policy solution." Gewirtzman, *supra* note 148, at 267.

248. *See* ROGERS, *supra* note 185, at 16 ("The easier it is for individuals to see the results of an innovation, the more likely they are to adopt."); David Lazer, *Information and Innovation in a Networked World*, *in* DYNAMIC SOCIAL NETWORK MODELING AND ANALYSIS: WORKSHOP SUMMARY AND PAPERS 101 (Ronald Breiger, Kathleen Carley & Philippa Pattison, eds. 2003) (stating technology has made information gathering easier and cheaper which in turn makes it easier for states to free ride).

249. Galle & Leahy, *supra* note, 155, at 1354; Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1927–39 (1998); *see also* Christopher Hood, *The Risk Game and the Blame Game*, 37 GOV'T & OPPOSITION 15, 33 (2002).

250. *See* Galle & Leahy, *supra* note 155, at 1353.

251. *But see* Wiseman, *supra* note 151, at 1164 (noting states do not always produce accurate or enough information about their experiments).

252. *UC Berkeley Labor Center: About Us*, U.C. BERKLEY LAB. CTR., https://laborcenter.berkeley.edu/about/ (last visited Jan. 17, 2022).

253. *E.g.*, Annette Bernhardt & Sarah Thomason, *What Do We Know About Gig Work in California? An Analysis of Independent Contracting*, UC BERKELEY LAB. CTR. (June 14, 2017), https://laborcenter.berkeley.edu/what-do-we-know-about-gig-work-in-

Depending on the heterogeneity of the states involved, policy goals will vary, and therefore the information state policymakers will gather and analyze will vary.[254]

> [V]ariations in the types of information that states produce can make it difficult to compare the effectiveness of policies from different states, or to aggregate information about policies implemented in multiple states . [P]referential differences can also make it more likely that a state will discount or ignore useful information from other states based on mistrust of its sources.[255]

Policymakers in states that have different goals and values than California's when it comes to worker protections may therefore mistrust California's data or discount it altogether. Their own ideological or political biases can get in the way of analyzing the data accurately.

The private sector — such as companies, interest groups, academics, and policy entrepreneurs — provide information as well, particularly when it comes to nationalized hot issues such as worker classification.[256] But policymakers should be cautioned. Many of the private sector groups are not without motives that can skew data. For example, Uber has publicly provided driver compensation data, but Uber is an interested party, so policymakers should be careful how they read the data and should make efforts to determine its credibility or replicate it when possible.[257] And while organizations and academics can generally be considered neutral researchers, free of conflicts of interest, policymakers should look at whether the research is funded by interested companies and take that into consideration.

Lawsuits emanating from AB5 or the WCL can also provide valuable information to policymakers that are considering adoption. Similarly, the public's reaction obtained via the media and social media can also be invaluable.[258] California's AB5 stirred up a monumental amount of

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california/.

254. Gewirtzman, *supra* note 148, at 274.

255. *Id.*

256. *Id.* at 288–89. Such groups can be considered "the primary providers of interstate linkages, facilitating the transfer of information about policy experiments across state borders and coordinating multi-state political efforts at policy innovation." *Id.*; *see* BOUSHEY, *supra* note 186, at 29–30; Amanda C. Leiter, *Fracking as a Federalism Case Study*, 85 U. COLO. L. REV. 1123, 1126–29 (2014); Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738, 739–41 (1997).

257. *Uber Drive: How Much Drivers Make*, UBER, https://www.uber.com/us/en/drive/how-much-drivers-make/ (last visited Mar. 20, 2022).

258. *See, e.g.*, Scott Rodd, *Uber, Lyft, Postmates Refuse to Comply With California Gig Economy Law*, NPR (Jan. 4, 2020), https://www.npr.org/2020/01/04/793142903/as-california-tries-to-make-contract-workers-employees-industries-push-back (showing the media's representation of how the public feels about AB5 lawsuits); Twitter: #AB5, https://twitter.com/search?q=ab5&src=typed_query (last visited July 24, 2021) (showing

controversy. Prop 22 added fuel to the media reactions and created greater national awareness.[259] Free-riding states have been able to sit back and watch the media reaction unfold. Potential free-riders, in deciding whether to adopt the WCL, could find it helpful to gather data from the explosion of social media attention AB5 received. However, policymakers should exude caution in that some individuals are more vocal than others, particularly those that are solicited by lobbying groups. Other individuals may not be as forthcoming with their preferences or opinions.

Ultimately, policymakers may determine that it is too difficult to obtain information or at least information that is transferrable to their state's interests. The lack of ease of obtaining information or information they trust disfavors diffusion. If, however, policymakers perceive obtaining information as easy, then that could favor diffusion but only if the information is considered favorable.

iii. Costs

The last factor addresses the *costs* of adoption. Conservation of resources, particularly for resource strained states, is a priority, but "[i]f the costs of copying are comparable to, or even higher than, the costs of experiment, the jurisdiction might as well experiment."[260] Costs likely incurred in the diffusion process are associated with adoption, implementation, and enforcement. If putting the infrastructure in place is too complex and therefore costly, the policy is less likely to be adopted.[261] Moreover, costs pose an issue for free-riders who may not be able to afford them or evaluate their credibility. Therefore, high costs and complexity are negatively related to diffusion.

California's WCL is particularly complex and likely costly to administer, particularly when considering enforcement and education. It has been too responsive to pushback, risking chaos and disintegration — a sub-optimal result.[262] California has seen the chaos and disintegration first-hand, but perhaps the disintegration can be viewed as somewhat minimized by the WCL's use of the *Borello* test as a default for the carve-outs.[263] Other states

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the public's reaction on Twitter, one of the most used social media sites).

259. *E.g.*, Tim Ryan, *Lyft, Uber Say Classification Rulings Can't Stand After Prop 22*, LAW360 (Nov. 9, 2021, 9:29 PM), https://www.law360.com/articles/1327367/lyft-uber-say-classification-rulings-can-t-stand-after-prop-22.

260. Galle & Leahy, *supra* note 155, at 1357. In fact, being true to experimental federalism, we want and need more experimentation to achieve the best policies.

261. *See* Rogers, *supra* note 185, at 252.

262. Gewirtzman, *supra* note 148, at 253; *see also* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 508 (2012).

263. *See* Powell, *supra* note 82, at 481–82 (finding that following California's

may not have or want to maintain a pre-existing default test, and the costs associated with such are likely prohibitive. Additionally, some state legislatures may not have the resources (monetary and human time) to spend on carving out exceptions like California continues to do. One of the reasons policymakers prefer to free-ride is to save time and money. Revisiting or amending a law regularly would be costly.[264] As such, it is possible that potential free-rider states will consider the costs of adopting, implementing, and enforcing AB5 as insurmountable.

E. Analyzing the Potential Diffusion of California's WCL

> *"[S]tates with successful policies are more likely to be emulated than are those with failing policies."*[265]

Applying the Galle and Leahy diffusion factors: relevancy, information, and costs, it is questionable whether policymakers will decide that the WCL is relevant enough, that the data about the WCL's successes and failures is credible and readily obtainable, and that the costs justify the adoption of the WCL.[266] After application of the three factors, policymakers will want to consider the successes and failures of the WCL before making the decision of whether to adopt it.

Circling back to experimental federalism and laboratories of democracy: States "can learn more when multiple governments try the policy, and even more when such policies affect larger segments of society."[267] California's overall population is large, as is its independent contractor population.[268] Given that the WCL directly affects (economically and socially) the entire populous of California, its workers and businesses, the WCL qualifies as affecting a "larger segment of society." Still, based on the results of the experiment, is it likely that the WCL could or should diffuse to other states?

Diffusion is more likely to occur when a state's experiment is viewed as

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adoption of the *Borello* test, Uber drivers were classified by the law as employees instead of independent contractors).

264. Dodson, *supra* note 180, at 732.

265. Volden, *supra* note 1, at 294.

266. *See* Galle & Leahy, *supra* note 155, at 1346–60 (discussing the three factors).

267. Shipan & Volden, *supra* note 178, at 842.

268. As of July 1, 2019, California is the most populous state with 39,512,223 residents. *2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing*, U.S. CENSUS BUREAU (Dec. 30, 2019), https://www.census.gov/newsroom/press-releases/2019/popest-nation.html. According to recent data, the ABC Test, which represents the new part of California's worker classification law (AB5), "will apply to [sixty-four] percent of workers who are independent contractors at their main job, [and] will apply except when strict criteria are met to [twenty-seven] percent . . . ." SARAH THOMASON, KEN JACOBS, & SHARON JAN., DATA BRIEF: ESTIMATING THE COVERAGE OF CALIFORNIA'S NEW AB5 LAW 2 (2019).

successful. In measuring success, the positive and negative results must be weighed. Given that the WCL is a merger of the ABC test and California's previous *Borello* test, and that it contains 109 carve-outs, it may be difficult to discern precisely which parts of the WCL are successes and which are failures. Case law and other political occurrences can also cause confusion as to success versus failure. For instance, in the California courts, Uber drivers were deemed employees under AB5 in *People v. Uber Technologies, Inc.*[269] That is a significant success given the goal of protecting app-based drivers via reclassification as employees. However, despite the ruling in *Uber*, the passing of Prop 22 exempted the drivers from the coverage of the WCL and provided the drivers with fewer benefits. Since the goal was to provide safety net protections for the drivers and Prop 22 provides some of these protections, even if marginally, there will likely be mixed reactions as to the failure or success of this aspect of the WCL. In August 2021, a California court found Prop 22 to be unconstitutional,[270] and if that holding is upheld, then the WCL lends itself to being more of a success regarding rideshare and delivery drivers since these workers were previously reclassified as employees entitled to full California labor protections. Ultimately the question becomes, how will the interaction between the WCL and Prop 22 be perceived?[271] Will policymakers in states that do not have broad voter initiative processes[272] like California see the WCL as a success when it comes to reclassifying app-based drivers or will they see it as an overall failure? Will policymakers in heterogenous states determine that the marginal protections the rideshare companies offered their drivers were sufficient and allow them to do so in their states? Only time will tell.

The above stated successes and failures will yield valuable information for states that seek to "learn" from California's AB5 experiment. Policymakers will also be gaining important knowledge from both the public reactions as well as any empirical evidence of what are perceived as the successes and failures. Several industry groups rebuked using the ABC test to reclassify their workers as employees.[273] California acquiesced and provided for carve-

269. People v. Uber Techs., Inc., 56 Cal. App. 5th 266, 328 (Ct. App. 2020).

270. In August 2021, the Superior Court of California determined that Prop 22 was unconstitutional. What ultimately happens as the case makes it through the California court system could impact policymakers' decision making. *See supra* note 144.

271. Ryan, *supra* note 259 (noting that in light of Prop. 22's passage, Uber and Lyft have filed petitions to overturn earlier rulings which prevented them from classifying their gig workers as independent contractors).

272. California's initiative process exists so that Californians do "not have to rely only on lawmakers to make new laws. Propositions can create new laws, change or repeal existing laws, change the state constitution, and approve a bond measure." EASY VOTER GUIDE, FAST FACTS: STATE BALLOT MEASURES (2010), http://www.easyvoterguide.org/wp-content/pdf/FastFacts-BallotMeasures.pdf.

273. *See* JON O. SHIMABUKURO, CONG. RSCH. SERV., R46765, WORKER

outs in the WCL to accommodate these industries. However, hiring entities in non-exempt industries could be motivated to hire independent contractors from outside of California. States that cannot afford to have their workers unemployed, may be reluctant to adopt an AB5-like statute. Additionally, politicians seeking reelection will not want to be responsible for putting workers in the unemployment line.

States seeking to learn from California's AB5 experiment could adopt the ABC test and customize it to fit their needs like California has been doing.[274] Such states can learn from the pushback by certain industries when they consider enacting similar legislation and decide whether to expand or take a more restrictive approach.[275]

California's reputation of being larger and more "cosmopolitan" could also influence states, who aspire to be like it.[276] Some states may feel an urgency now that California has moved in the worker classification space and that may promote diffusion. Or, policymakers may believe that the controversies surrounding the WCL may die down and once all is quiet they may decide it is safe to adopt.[277]

Further, homogenous states may be more inclined to imitate or adopt the WCL. Conversely, ideological and political bias that likely exists in heterogeneous states may foreclose diffusion of the WCL to them.[278] This has possibly already proven true with recent changes in classification laws that could be based on ideological or political bias. Certain heterogenous states have abandoned the use of the ABC test in favor of another test (Arkansas, Oklahoma, Tennessee) or voted to choose a test instead of the ABC test (Virginia). Ideological and political bias aside, potential free-riders may conclude that the WCL is not relevant to their state, the information/results may be too difficult to obtain and verify as credible, and that it will be too costly to adopt, implement, and enforce a statute like the WCL.[279] Such states may determine that there must be a better way to

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CLASSIFICATION: EMPLOYEE STATUS UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, AND THE ABC TEST (2021) (stating that because the ABC test creates an employee-employer relationship that has not previously existed, the test will discourage certain industries from hiring freelance or for contract workers).

274. *See* KARCH, *supra* note 152, at 149 ("Early adopters' experiences . . . may provide administrative lessons that also enable [free-riders] to develop [more] expansive programs.").

275. *Id.* at 150 ("Early adopters' experiences might generate a political backlash that limits the acceptability of an innovation, causing late adopters to take a more cautious approach.").

276. *See* Shipan & Volden, *supra* note 178, at 843.

277. *See* KARCH, *supra* note 152, at 149.

278. Prince, *supra* note 35, at 161–63 (showing that certain politically conservative states are abandoning the ABC test).

279. *See* KARCH, *supra* note 152, at 150.

experiment or innovate on their own, while others may prefer the notoriety that comes with innovation. In either case, diffusion is not likely to occur.

Overall, if the rate of diffusion is low, perhaps another state will be an experimenter in this space by providing a better, more effective worker classification test or approach. Even if the diffusion rate is somewhat high (as it appears to be with the ABC test generally), one should question whether the WCL or the ABC test is the best path forward for classifying workers. When states free-ride, they rob us of the benefits of experimental federalism — the more states that experiment and compare results, the more optimal the resulting policy should be.[280] This holds true particularly for heterogenous states that analyze information differently and bring different values, ideas, and foci to the process.[281] Homogenous states and free-riding in general result in sub-optimal policies because they do not bring different values, ideas, and foci to the process. Instead, they create the problem of premature convergence which can result in a broad adoption of a sub-optimal test or policy.[282] If states latch on to the WCL rather than experiment, we miss out on a potentially better approach to worker classification.[283]

V. CONCLUSION

California's worker classification law is developing. It is a true experiment in that it started with a sort of "idea" (from *Dynamex*) and moved into an experimental phase with the enactment of AB5. AB5 was a merger of new law (the ABC test) and old law (the *Borello* test). Upon receiving industry and worker pushback, within a year AB5 was repealed (or replaced) with AB2257, a law designed to clarify AB5's provisions. AB2257 also expanded the law's exemptions to 109. These changes show that the experiment is still ongoing in that results are analyzed and California's legislature acts on those results. Once the acting (or *reacting*) occurs, the experiment starts again. As such, California's WCL is complicated and continues to evolve, which can be a good thing and aligns with the overarching theory of experimental federalism. But for the purposes of diffusion among states, one may question whether it is adequately meeting its goals.

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280. Gewirtzman, *supra* note 148, at 258 ("[M]any of federalism's experimental benefits are dependent upon states having different policy preferences and approaching problems in materially different ways.").

281. *Id.* at 270.

282. *Id.* at 269–70.

283. Galle & Leahy, *supra* note 155, at 1368. Although, "[i]t is possible that instead of experiments, states [will] all simply pluck what seem to them to be the lowest hanging new fruits, rather than sorting among all of the available alternatives to select the most appealing." *Id.*

Many state policymakers look to California for innovative legislation that they can adopt. Some states imitate other states when it comes to adopting laws, but others prefer to learn from the results of the first-mover state's experiment. As shown, state policymakers in numerous states like New York, New Jersey, and Illinois (and likely others) are awaiting the ultimate results of the AB5 experiment. California's WCL may or may not diffuse to other states depending on whether states determine it is relevant to their residents, the information (results) are easy to obtain and credible, and the costs to adopt, implement and enforce are feasible. In part because of the numerous carve-outs in California's WCL, it is not likely that many states will adopt it as is. The law is too customized to California and the 109 carve-outs will likely be considered unmanageable. Measuring the successes and failures is also difficult.

Overall, it appears that the AB5 experiment should not diffuse to other states or the federal government. The continued experimentation through repeated amendments, while well-intentioned, has gone beyond providing an adoptable statute for other states. To maximize the benefits of experimental federalism, a group of states, both homogenous and heterogenous to California, should experiment and work toward a more optimal solution to worker (mis)classification. This collective learning will benefit not just one state's residents and businesses, but all.

Workers need protections but California's worker classification law does not sufficiently satisfy this need.

APPENDIX A — LIST OF THE 109 EXEMPTIONS FROM THE ABC TEST PORTION OF CALIFORNIA'S WORKER CLASSIFICATION LAW:[284]

[1] Bona fide business-to-business contracting relationship – previously contained in AB 5
[2] Relationship between a referral agency and a service provider
[3] Graphic design [for referrals] – previously contained in AB 5
[4] Web design – previously contained in AB 5
[5] Photography – previously contained in AB 5
[6] Tutoring – previously contained in AB 5
[7] Consulting
[8] Youth sports coaching
[9] Caddying
[10] Wedding planning
[11] event planning – previously contained in AB 5
[12] Services provided by wedding and event vendors
[13] Minor home repair – previously contained in AB 5
[14] Moving – previously contained in AB 5
[15] Errands – previously contained in AB 5
[16] Furniture assembly – previously contained in AB 5
[17] Animal services – previously contained in AB 5
[18] Dog walking – previously contained in AB 5
[19] Dog grooming – previously contained in AB 5
[20] Picture hanging – previously contained in AB 5
[21] Pool cleaning – previously contained in AB 5
[22] Yard cleanup – previously contained in AB 5
[23] Interpreting services
[24] "Professional services"
[25] Marketing – previously contained in AB 5
[26] Administrator of human resources – previously contained in AB 5
[27] Travel agent services – previously contained in AB 5
[28] Graphic design – previously contained in AB 5
[29] Grant writer – previously contained in AB 5
[30] Fine artist – previously contained in AB 5
[31] Services provided by an enrolled agent – previously contained in AB 5
[32] Payment processing agent through an independent sales organization – previously contained in AB 5
[33] Still photographer – previously contained in AB 5
[34] Photojournalist – previously contained in AB 5
[35] Videographer

284. Source: AB5, AB2257 & Chris Micheli, *AB 5 'Fix:' New Exemptions Added to California's Independent Contractor Law*, CAL. GLOBE (Sept. 14, 2020), https://californiaglobe.com/section-2/ab-5-fix-new-exemptions-added-to-californias-independent-contractor-law/.

[36] Photo editor who works under a written contract
[37] Digital content aggregator
[38] Freelance writer – previously contained in AB 5
[39] Translator
[40] Editor – previously contained in AB 5
[41] Copy editor
[42] Illustrator
[43] Newspaper cartoonist – previously contained in AB 5
[44] Content contributor
[45] Advisor
[46] Producer
[47] Narrator
[48] Cartographer
[49] Licensed esthetician – previously contained in AB 5
[50] Licensed electrologist – previously contained in AB 5
[51] Licensed manicurist – previously contained in AB 5
[52] Licensed barber – previously contained in AB 5
[53] Licensed cosmetologist – previously contained in AB 5
[54] A specialized performer
[55] Services provided by an appraiser
[56] Registered professional foresters
[57] A real estate licensee – previously contained in AB 5
[58] A home inspector
[59] A repossession agency – previously contained in AB 5
[60] Relationship between two individuals wherein each individual is acting as a sole proprietor or separate business entity
[61] Recording artists
[62] Songwriters
[63] Lyricists
[64] Composers
[65] Proofers
[66] Managers of recording artists
[67] Record producers
[68] Directors
[69] Musical engineers
[70] Mixers engaged in the creation of sound recordings
[71] Musicians engaged in the creation of sound recordings
[72] Vocalists
[73] Photographers working on recording photo shoots, album covers, and other press and publicity purposes
[74] Independent radio promoters
[75] Any other individual engaged to render any creative, production, marketing
[76] Musician
[77] Musical group
[78] An individual performance artist performing material that is their

original work and creative in character
[79] Relationship between a contractor and an individual performing work pursuant to a subcontract in the construction industry – previously contained in AB 5
[80] Relationship between a data aggregator and an individual providing feedback
[81] A person or organization who is licensed by the Department of Insurance pursuant to Chapter 5 (commencing with Section 1621) – previously contained in AB 5
[82] A person or organization who is licensed by the Department of Insurance pursuant to Chapter 6 (commencing with Section 1760) – previously contained in AB 5
[83] A person or organization who is licensed by the Department of Insurance pursuant to Chapter 8 (commencing with Section 1831) of Part 2 of Division 1 of the Insurance Code – previously contained in AB 5
[84] A person who provides underwriting inspections
[85] A person who provides premium audits
[86] A person who provides risk management
[87] A person who provides loss control work for the insurance and financial service industries
[88] A physician and surgeon – previously contained in AB 5
[89] Dentist – previously contained in AB 5
[90] Podiatrist – previously contained in AB 5
[91] Psychologist – previously contained in AB 5
[92] Veterinarian – previously contained in AB 5
[93] Lawyer – previously contained in AB 5
[94] Architect – previously contained in AB 5
[95] Landscape architect
[96] Engineer – previously contained in AB 5
[97] Private investigator – previously contained in AB 5
[98] Accountant – previously contained in AB 5
[99] A securities broker-dealer – previously contained in AB 5
[100] Investment adviser – previously contained in AB 5
[101] Agents and representatives of securities brokers and investment advisory – previously contained in AB 5
[102] A direct sales salesperson – previously contained in AB 5
[103] A manufactured housing salesperson
[104] A commercial fisher working on an American vessel – previously contained in AB 5
[105] A newspaper distributor
[106] A newspaper carrier
[107] An individual who is engaged by an international exchange visitor program
[108] A competition judge with a specialized skill set or expertise
[109] Relationship between a motor club holding a certificate of authority – previously contained in AB 5