

**USER ERROR: REGULATORY FAILURES TO PROPERLY
ADDRESS TECHNOLOGICAL ISSUES IN BUSINESS AND
TAXATION**

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ABSTRACT

Technological changes in business, both in how business is conducted and the services it may provide, have demonstrated failures by regulatory bodies to accurately address and properly understand these issues. From the *Wayfair* decision on sales tax, to California's Assembly Bill 5 distorting the definition of "employee," to President Reagan legislating computer fraud based on a White House viewing of *WarGames*, executives, legislatures, and courts have relied on a forced approach to understanding and regulating technology: doing is better than understanding. The approach has relied on two false assumptions: (i) technological advancements are only different methods of conventional business; ride sharing is simply a digital way to hail a cab at the street corner; the gig economy is just part-time or a stopgap measure for those who cannot find full-time employment; ecommerce is the digital door-to-door salesman, and (ii) technological innovation necessitates innovative solutions when existing law already covers the issues. A technological educational awakening must occur amongst those seeking to regulate it. While others have written about the odd outcomes of regulation in regards to particular laws or court cases, this paper aims to illustrate how the failures to understand emerging technology are systemic within governmental entities.

The paper analyzes failures to understand technology through three different examples: from Ronald Reagan's Computer Fraud and Abuse Act of 1986, *South Dakota vs. Wayfair*, and California's Assembly Bill 5. In each of these instances, government actors have failed to understand how and what the technology is doing. Instead of seeing a developing or emerging technology as an innovation and taking steps to foster it, it is erroneously and contradictorily viewed and regulated as a digital version of an already existing business dynamic, yet is addressed by requiring new laws. That is, by viewing these technologies as merely modern versions of preexisting business practices or products, they have been regulated as if they are as well by creating modern new versions of existing laws. This paper discusses how the regulated technologies should be viewed in the context of their innovation rather than a normative pigeonhole. Bringing these examples together offers a more complete perspective of the issue facing emerging technologies. They cannot be viewed and treated as a transformed predecessor rather than a creator of a new business model where existing law and tradition allowed the innovation to come to fruition and still have the necessary effect given proper understanding of the underlying technology.

“Just because something doesn't do what you planned it to do doesn't mean it's useless.”

- Thomas Edison¹

I. INTRODUCTION

[1] Alexander Hamilton wrote in The Federalist No. 78 that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents.”² Stare decisis, as a doctrine, is necessary to “avoid arbitrary discretion in the courts.”³ It allows for a modicum of predictability in the legal system and permits the Court to consider some topics settled, “liberat[ing] the Justices from what otherwise would be a constitutional obligation to reconsider every potentially disputable issue as if it were being raised for the first time.”⁴

[2] The purpose of this paper is not to dispute the constitutionality or applicability of the doctrine of stare decisis, as Michael Stokes Paulson interestingly argued,⁵ but to bring light to the issue that is playing out in technology-related business cases and laws. Stare decisis allows the court to review previous decisions on similar legal issues to assist the court in concluding that the law is settled.⁶ However, courts and legislatures proceed

¹ *Thomas A. Edison Quotes*, BRAINYQUOTE, https://www.brainyquote.com/quotes/thomas_a_edison_100430 [<https://perma.cc/N45K-THGG>].

² THE FEDERALIST NO. 78 (Alexander Hamilton).

³ *Id.*

⁴ Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 573 (2001) (citing Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 111–13 (1997) (discussing Justices' refusals to accept precedent as controlling)).

⁵ Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 (2000).

⁶ *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997).

under an erroneous, though possibly subconscious, theory that if a legal issue is settled, the underlying business structures must be as well. This theory presumes that all business organizations and ideas have previously existed with all prior laws applying similarly, and, if there happens to be a novel business idea, then any existing laws cannot address the new issues that may arise. Technological innovation demands judicial and legislative innovation.

[3] Possibly the most dramatic new category of business has been illustrated through the growth of ecommerce. Ecommerce (or e-commerce) has been described as “monopoly busting,”⁷ likened to 13th century trade routes⁸ and the “next great marketplace.”⁹ The Internet has led to ecommerce dramatically altering the way many businesses conduct their affairs.¹⁰

[4] The first modern Internet retail transaction (using credit card encryption) was made on August 11, 1994 when Phil Brandenberger

⁷ David Bank, *Electronic commerce debuts on Internet*, AUSTIN AM.-STATESMAN, Apr. 12, 1994, at E1.

⁸ Joanna Bean, *Internet Commerce/ Businesses go online to land more customers*, COLO. SPRINGS GAZETTE-TEL., Dec. 11, 1994, at E1.

⁹ Edward D. Murphy, *Maine Firms Wary of Orders Via E-Mail; L.L. Bean is Among Companies Hoping that Security Will Improve for Commerce; on the Internet*, PORTLAND PRESS HERALD, Oct. 20, 1995, at 1.B.

¹⁰ See generally R. John Aalbrecht, *eCommerce Comes of Age*, CHEM. WK., Sept. 27, 2000, at 22 (explaining how eCommerce effected the chemical industry); Kathy Gramling et al., *How E-Commerce Fits into Retail's Post-Pandemic Future*, HARV. BUS. REV. (May 11, 2021), <https://hbr.org/2021/05/how-e-commerce-fits-into-retails-post-pandemic-future> [<https://perma.cc/F9P7-RXAW>] (explaining how the COVID-19 pandemic increased the need for eCommerce platforms for retailers); Joseph Probasco, *Reforming the Retail Sales Tax System in Light of the E-Economy*, 2 FLA. ST. U. BUS. REV. 117, 121 (2002) (discussing the impact of eCommerce on business supply chains).

purchased a Sting compact disc.¹¹ In the early days of ecommerce, simple goods that had historically been purchased over the phone became the preferred Internet commodity: pizzas.¹² It took another few years from that first CD sale for a company to reach \$1 million in online revenue per day when Dell accomplished the feat six months after launching online sales in 1996.¹³ By 2000, Dell was selling \$40 million per day.¹⁴ In 2020, Amazon sold \$218 billion of retail goods online with total revenues increasing 39% from the previous year to \$341 billion.¹⁵ To further demonstrate the growth of ecommerce and ecommerce companies, Amazon will spend around \$10 billion to stream Thursday night National Football League games from 2023 through 2032.¹⁶

[5] The Internet has created opportunities for businesses to sell their products to vastly larger audiences without the overhead necessary to service them in a traditional brick and mortar store. It created a new marketplace that facilitated volume which would otherwise be unachievable in conventional retailing. However, despite the opportunities created by the

¹¹ Peter H. Lewis, *Attention Shoppers: Internet is Open*, N.Y. TIMES, Aug. 12, 1994, at D1.

¹² See Peter H. Lewis, *Internet Commerce: Hold the Anchovies*, N.Y. TIMES, Apr. 7, 1995, at D2.

¹³ Jason Fell, *3 Decades of Dell: From Dorm Room Inspiration to Multi-Billion Dollar Acquisition*, ENTREPRENEUR (Feb. 5, 2013), <https://www.entrepreneur.com/article/225670> [<https://perma.cc/PU9X-L82H>].

¹⁴ *Id.*

¹⁵ Nicholas Rossolillo, *When Will Amazon Catch Walmart as the World's Largest Retailer?*, MOTLEY FOOL (Mar. 18, 2021, 8:30 AM), <https://www.fool.com/investing/2021/03/18/when-amazon-catch-walmart-world-large-retailer> [<https://perma.cc/CHV2-JBR6>].

¹⁶ See Sahil Patel, *With NFL Deal, Amazon Accelerates Its Streaming-TV Advertising Ambitions*, WALL ST. J., (Mar. 19, 2021, 5:30 AM), <https://www.wsj.com/articles/with-nfl-deal-amazon-accelerates-its-streaming-tv-advertising-ambitions-11616146200> [<https://perma.cc/HXY5-3U2R>].

Internet, regulators have continuously viewed Internet and technology businesses through a simple lens of conventionality. Their responses to these emerging issues have fallen into two categories: the business is shattering conventional business practices and must then be met with radical new laws or judgements, or erroneously characterizing the business in a conventional silo in which it should not be placed. These two interpretations are the result of a fundamental misunderstanding of emerging technologies and a tendency to act out of reflex rather than reflection.

[6] This naivete about the Internet and the associated technological and business advancements can be seen in the nascent days of the Internet before it was a commercial marketplace or even widely used. Ronald Reagan famously stoked the fear of computer hacking in June 1983 by telling his cabinet the story he saw two days earlier in the film *WarGames* about a teenage hacker who infiltrated NORAD.¹⁷ Within a few months, Congress held hearings on computer hacking which resulted in a report from the Committee on the Judiciary that stated that *WarGames* “showed a realistic representation of the automatic dialing and access capabilities of the personal computer . . . [P]rior to the personal computer, password codes were generally satisfactory due to the security inherent in the tedious trial of combination necessary to break the passwords manually. This aspect is now gone.”¹⁸ The fear this film instilled in Washington led Reagan to overreact and sign the Computer Fraud and Abuse Act into law in 1986, which led to the criminalization of breach of contract of a terms of service agreement.¹⁹

¹⁷ See LOU CANNON, PRESIDENT REAGAN: THE ROLE OF A LIFETIME 38 (PublicAffairs 2000) (1991).

¹⁸ H.R. REP. NO. 98-894, at 10–11 (1984).

¹⁹ See *From WarGames to Terms of Service: How the Supreme Court’s Review of Computer Fraud Abuse Act Will Impact Your Trade Secrets*, FISH & RICHARDSON (Aug. 7, 2020), <https://www.jdsupra.com/legalnews/from-wargames-to-terms-of-service-how-33249> [<https://perma.cc/4YZP-CZ9E>].

[7] This paper will explore several recent developments illustrating these issues in law-making and adjudicating in respect to technology and Internet-based business models. Each example shows a critical misunderstanding of the nature of the business, instead applying an assumption that results in new laws which are themselves not understood at their inception or which force a square-pegged business to fit into a legal hole.

II. COMPUTER FRAUD AND ABUSE ACT

A. Background

[8] Despite its strange origin,²⁰ the Computer Fraud and Abuse Act (CFAA)²¹ was passed as the federal government’s main tool in combating computer hacking and computer fraud-related activities.²² Though originally set into motion as a response to credit card fraud, it was also seen as the first step in “detering the criminal element from abusing computer technology” by shifting attention in statutes from concepts of “tangible property” to that of “information.”²³ At the onset, the scope was limited to national security, but Congress has since expanded the reach of the CFAA to include every computer engaged in or affecting interstate commerce.²⁴

²⁰ See *supra* text accompanying notes 15–18.

²¹ 18 U.S.C. § 1030 (2018).

²² See Paul J. Larkin, Jr., *Reasonably Construing the Computer Fraud and Abuse Act to Avoid Overcriminalization*, HERITAGE FOUND. (June 19, 2013), <https://www.heritage.org/government-regulation/report/reasonably-construing-the-computer-fraud-and-abuse-act-avoid> [<https://perma.cc/994N-NHRT>].

²³ H.R. REP. NO. 98-894, at 4 (1984).

²⁴ 18 U.S.C. § 1030(e)(2)(B); Michael J. O’Connor, *Standing Under the Computer Fraud Abuse Act*, 124 PENN ST. L. REV. 743, 745 (2020).

Given the ubiquity of the Internet, nearly any device that can access it, directly or indirectly, can be a “protected computer” element of the law.²⁵

[9] This far-reaching definition has produced some radical outcomes. Violations of end user license agreements (EULA) or terms of service (ToS) have generally been considered contractual violations.²⁶ As such, the remedy available to the harmed party should be “damages sufficient to place the injured party in as good a position as it would have been had the breaching party fully performed”²⁷ under the “general principle . . . that all losses, however described, are recoverable.”²⁸ However, contractual breaches of the EULA have been met with criminal prosecutions under § 1030(c) of the CFAA.²⁹

[10] This section will illustrate the federal government’s misuse of the CFAA based on a fundamental misunderstanding of how computing has evolved since the law’s inception and what true property the law was intended to protect. The law treated computers as physical property where

²⁵ *From WarGames to Terms of Service*, *supra* note 19; *United States v. Nosal*, 844 F.3d 1024, 1050 (9th Cir. 2016) (Reinhardt, J., dissenting) (viewing any “Internet-enabled device” as a protected computer under 18 U.S.C. § 1030(e)); *United States v. Kramer*, 631 F.3d 900, 901 (8th Cir. 2011) (holding that a cellular phone without Internet access is deemed a protected computer based on 18 U.S.C. § 1030(e)).

²⁶ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding that an EULA was valid and enforceable as a contract). *See generally* Nicholas Robinson, *From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming*, 20 N.C. J.L. & TECH. 286, 323–27 (2018) (discussing EULAs as a contractual agreement).

²⁷ *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005).

²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 347 cmt. c (AM. L. INST. 1981).

²⁹ 18 U.S.C. § 1030(c) (2018). *See generally* *Computer Fraud and Abuse Act (CFAA)*, INTERNET L. TREATISE (Apr. 24, 2013), [https://ilt.eff.org/Computer_Fraud_and_Abuse_Act_\(CFAA\).html](https://ilt.eff.org/Computer_Fraud_and_Abuse_Act_(CFAA).html) [<https://perma.cc/MK4V-APHB>] (describing the criminal offenses associated with the CFAA and giving examples of criminal cases that have arisen under the Act).

unauthorized intrusion would be akin to trespass.³⁰ Remote computer access was rare and considered a “secret” functionality of personal computers in 1986.³¹ While it was obvious that it should be illegal for an unauthorized user to remotely access a computer system,³² this article will focus on the failures of the CFAA in its lack of foresight and application. Many computer networks that allowed for remote access existed at the time of the law’s signing,³³ even before the birth of the World Wide Web in 1989.³⁴ Generally, remotely accessing a computer is not about a physical intrusion of the system but acquiring the data the system contains.

B. Aaron Swartz and JSTOR

[11] Regarded as one of the most tragic examples of the CFAA overreaching its original intentions, the case of Aaron Swartz and JSTOR illustrates the failure of the legal system to properly understand the digital marketplace.³⁵

³⁰ Jonathon W. Penney & Bruce Schneier, *Platforms, Encryption, and the CFAA: The Case of Whatsapp v. NSO Group*, 36 BERKELEY TECH. L.J. 469, 500 (2021).

³¹ M. David Stone, *Carbon Copy Allows Use of PC From Remote Site*, PC MAG., Mar. 11, 1986, at 56.

³² H.R. REP. NO. 98-894, at 10–11 (1984).

³³ See generally Stuart Mathison et al., *The History of Telenet and the Commercialization of Packet Switching in the U.S.*, 50 IEEE COMM. MAG. 28, 28 (2012); Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOC’Y (1997), <https://www.internetsociety.org/internet/history-internet/brief-history-internet> [<https://perma.cc/8L2G-KQRS>]; B.W. Behling, *Playnet, AHOY!*, Jan. 1986, at 81–83.

³⁴ *History of the Web*, WORLD WIDE WEB FOUND., <https://webfoundation.org/about/vision/history-of-the-web> [<https://perma.cc/LE3Z-4RPS>].

³⁵ See Declan McCullagh, *From 'Wargames' to Aaron Swartz: How U.S. anti-hacking law went astray*, CNET (Mar. 13, 2013, 4:00 AM), <https://www.cnet.com/news/from-wargames-to-aaron-swartz-how-u-s-anti-hacking-law-went-astray> [<https://perma.cc/QUQ6-EYFF>]; David Amsden, *The Brilliant Life and Tragic Death of Aaron Swartz*, ROLLING STONE (Feb. 15, 2013),

Aaron Swartz was a gifted computer talent who was able to make important technical contributions to the architecture of the Internet by the age of fourteen.³⁶ He was also an advocate for public participation in government and open access to scholarly works, being posthumously inducted into the Internet Hall of Fame in 2013.³⁷ Between 2010 and 2011, Swartz logged onto the Massachusetts Institute of Technology's network to access the JSTOR academic database.³⁸ The license that MIT had for the database allowed for public access and was one of the most open and accessible networks available.³⁹ Furthermore, there were no limits placed on how many articles a user was allowed to download, only the physical limitations of a person submitting the download request.⁴⁰ Swartz was able to expediate the downloading process by writing a script to automatically make requests. When JSTOR blocked his computer's IP address, he altered the script to

<https://www.rollingstone.com/culture/culture-news/the-brilliant-life-and-tragic-death-of-aaron-swartz-177191> [<https://perma.cc/Y7TS-MYLS>]; Hal Abelson, *The Lessons of Aaron Swartz*, MIT TECH. REV. (Oct. 4, 2013), <https://www.technologyreview.com/2013/10/04/176233/the-lessons-of-aaron-swartz> [<https://perma.cc/4AP5-PBLP>]; Spencer E. Ante et al., *Legal Case Strained Troubled Web Activist*, WALL ST. J., Jan. 13, 2013, at B1; Amy Chozick & Charlie Savage, *Hacker Case Leads to Calls for Better Law*, N.Y. TIMES, Mar. 17, 2013, at B1; Austin C. Murnane, *Faith and Martyrdom: The Tragedy of Aaron Swartz*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1101, 1104 (2015).

³⁶ Abelson, *supra* note 35.

³⁷ *2013 Inductee Aaron Swartz*, INTERNET HALL OF FAME, <https://internethalloffame.org/inductees/aaron-swartz> [<https://perma.cc/Q483-54LB>].

³⁸ Sarah A. Constant, *The Computer Fraud and Abuse Act: A Prosecutor's Dream and a Hacker's Worst Nightmare—The Case Against Aaron Swartz and the Need to Reform the CFAA*, 16 TUL. J. TECH. & INTELL. PROP. 231, 241 (2013) (discussing the actions of Swartz and the criminal case against him).

³⁹ Alex Stamos, *The Truth about Aaron Swartz's "Crime"*, UNHANDLED EXCEPTION (Jan. 12, 2013), <https://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime> [<https://perma.cc/8Y CZ-GME4>].

⁴⁰ *Id.*

have the download requests appear to come from different users. His approach was successful enough to download nearly 4.8 million academic articles, about 80% of JSTOR's database.⁴¹ Swartz was indicted on July 14, 2011 on 13 felony counts of fraud under the CFAA.⁴² Just months before his trial was set to begin, Aaron Swartz took his own life.⁴³ His partner, Taren Stinebrickner-Kauffman, found him hanging in their apartment and blamed the "malfeasance" of the government prosecutors.⁴⁴

[12] The problem with the Swartz case was the ambiguity in the language and interpretation of the CFAA. The prosecuting attorney for the United States believed that "stealing is stealing, whether you use a computer command or a crowbar, and whether you take documents, data or dollars."⁴⁵ However, Swartz was not charged with theft; he was charged with fraud.⁴⁶ JSOTR never claimed Swartz stole the articles but rather that he simply accessed them in a manner that it did not like, akin to overstaying his welcome at an all-you-can-eat buffet.⁴⁷ As MIT's license with JSTOR allowed for unlimited access, Swartz's fraudulent actions were only a

⁴¹ *JSTOR Evidence in United States vs. Aaron Swartz*, JSTOR (July 30, 2013), <https://docs.jstor.org> [<https://perma.cc/UR77-AYJR>].

⁴² *See* Superseding Indictment, United States v. Swartz, No. 11-CR-10260 (D. Mass. Sept. 12, 2011).

⁴³ Amsden, *supra* note 35.

⁴⁴ Murnane, *supra* note 35, at 1101–03.

⁴⁵ John Schwartz, *Internet Activist, a Creator of RSS, Is Dead at 26, Apparently a Suicide*, N.Y. TIMES (Jan. 12, 2013), <https://www.nytimes.com/2013/01/13/technology/aaron-swartz-internet-activist-dies-at-26.html> [<https://perma.cc/46KD-7ZT7>].

⁴⁶ *See id.*

⁴⁷ Superseding Indictment, *supra* note 42, at 3; *see* Brianna Wellen, *Man with huge appetite banned from all-you-can-eat Buffet*, THE TAKEOUT (Nov. 18, 2021), <https://thetakeout.com/man-banned-all-you-can-eat-buffet-china-1848082587> [<https://perma.cc/6DMN-E2R8>].

response to the contractual breach of JSTOR through its throttling of access from the MIT campus.⁴⁸

[13] The language of the CFAA is clearly oriented towards financial and government systems, as every specific clause refers to such.⁴⁹ The catchall that Swartz fell subject to was the inclusion of “protected computer,” defined as any computer used by a financial institution or the United States Government that is engaged in a federal election or that affects interstate or foreign commerce with the United States.⁵⁰ This is a major expansion of the scope of the statute from banks and governmental computers to anything that affects interstate commerce when the Internet is considered. It would be impossible for a computer connected to the Internet to not be covered by the clause.

[14] The government’s prosecution relied on section 1030(a)(2) of the CFAA which criminalizes activity that “exceeds authorized access” to a computer.⁵¹ This element of the law is defined as “access[ing] a computer *with* authorization and to use such access to obtain or alter information in the computer that the accesser is *not entitled so to obtain* or alter.”⁵² While the indictment claimed Swartz exceeded his authorization,⁵³ it fails to establish or even claim he did so in its overview of the offenses.⁵⁴ Furthermore, the CFAA fails to define what is and what is not deemed

⁴⁸ See Stamos, *supra* note 39.

⁴⁹ See 18 U.S.C. § 1030(a).

⁵⁰ *Id.* § 1030(e)(2).

⁵¹ *Id.* § 1030(a)(2).

⁵² *Id.* § 1030(e)(6) (emphasis added).

⁵³ Superceding Indictment, *supra* note 42, at 11.

⁵⁴ See *id.* at 3.

“authorized.”⁵⁵ Swartz only exceeded his access in that he made it much more efficient. Nothing in the statute suggests that the speed with which rightly accessed data was acquired is a violation. This is only a matter of the agreement between MIT, its users, and JSTOR, a contractual dispute which could be settled in a civil suit.

C. “Authorized” and *Van Buren v. United States*

[15] Public confusion over the meaning of “authorized” continued with the Ninth Circuit’s ruling in *United States v. Nosal*.⁵⁶ The dissent of Justice Reinhart appeared as a voice of reason amongst the confusion, as he suggested that the majority opinion opened the door for terms of service violations to be criminalized.⁵⁷ However, the majority addressed and attempted to distinguish his concern, stating:

that ill-defined terms may capture arguably innocuous conduct, such as password sharing among friends and family . . . But these concerns are ill-founded because § 1030(a)(4) requires access be “knowingly and with intent to defraud” and further, we have held that violating use restrictions, like a website’s terms of use, is insufficient without more to form the basis for liability under the CFAA.⁵⁸

⁵⁵ See Paul J. Larkin, Jr., *United States v. Nosal: Rebooting the Computer Fraud and Abuse Act*, 8 SETON HALL CIR. REV. 257, 269–71 (2012) (discussing the Ninth Circuit’s reasoning on the appropriate definition of “authorization”).

⁵⁶ *Id.*

⁵⁷ *United States v. Nosal*, 844 F.3d 1024, 1049 (9th Cir. 2016) (Reinhardt, J., dissenting).

⁵⁸ *Id.* at 1038.

[16] The majority opinion felt insufficient for Reinhart and the media that latched onto the story.⁵⁹ This case, known as *Nosal II*, was the final word on Nosal’s feud with the government after his dispute had gone through several iterations of back and forth between courts and their interpretations of “authorized.”⁶⁰ The public concern and interpretation in the case is illustrative of the horrible language and applications of the CFAA. Poorly reasoned legislation will lead to poorly applied outcomes.⁶¹ While the majority opinion did not believe that their decision would open up password-sharing and terms of service violations to federal criminal prosecution, that certainly was what already happened to Aaron Swartz.

[17] In 2021, the Supreme Court attempted to reel in the confusion over the meaning of “authorized” from § 1030(a) of the CFAA in *Van Buren v.*

⁵⁹ See Fitz Tepper, *A court ruled that it could be a federal crime to share your Netflix password*, TECHCRUNCH (July 11, 2016, 3:31 PM), <https://techcrunch.com/2016/07/11/a-court-ruled-that-it-could-be-a-federal-crime-to-share-your-netflix-password> [<https://perma.cc/M4X7-TGFE>]; Tim Walker, *Sharing Sharing your Netflix password might just be a federal crime*, THE INDEPENDENT (July 12, 2016, 1:39 PM), <https://www.independent.co.uk/life-style/gadgets-and-tech/sharing-netflix-password-federal-crime-a7132156.html> [<https://perma.cc/7FKY-CSDN>]; Todd Spangler, *Sharing Netflix or HBO Go Passwords Is Technically a Federal Crime Under 9th Circuit Ruling*, VARIETY (July 11, 2016, 10:01 AM), <https://variety.com/2016/digital/news/netflix-hbo-password-sharing-illegal-crime-1201811793/#!> [<https://perma.cc/89GV-8EFN>]; David Z. Morris, *Sharing Passwords Can Now Be a Federal Crime, Appeals Court Rules*, FORTUNE (July 10, 2016, 11:28 AM), <https://fortune.com/2016/07/10/sharing-netflix-password-crime> [<https://perma.cc/39UP-E639>].

⁶⁰ See generally Futoshi Dean Takatsuki, *Comment: United States v. Nosal II*, 37 LOY. L.A. ENT. L. REV. 305 (2017) (providing a case history leading up to the decision and dissent in *Nosal II*); see also *Case Timeline*, TRUTH BEHIND THE NOSAL CASE, <https://www.thetruthbehindthenosalcase.com/case-timeline> [<https://perma.cc/5LNR-HYTH>] (showing a chronological timeline of the events leading up to the *Nosal* trial and post case actions).

⁶¹ See generally Bailey McGowan, *Eject the Floppy Disk: How to Modernize the Computer Fraud and Abuse Act to Meet Cybersecurity Needs*, 14 SETON HALL CIR. REV. 19, 25–30 (2017) (discussing many instances of vastly different interpretations and outcomes in CFAA cases).

United States, though again, the ruling was murky.⁶² Van Buren was a police officer in Georgia who used his patrol car’s onboard computer to access license plate information in exchange for money.⁶³ His actions were caught by an FBI sting operation that resulted in a jury conviction and an 18-month sentence for “exceed[ing] authorized access” in violation of 18 U.S.C § 1030(a)(2).⁶⁴ The majority opinion viewed Van Buren’s actions as allowable because he did have the authority to access the data.⁶⁵ Justice Barrett wrote for the majority, stating that “an individual ‘exceeds authorized access’ when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him.”⁶⁶

[18] The dissent of Justices Thomas and Alito and Chief Justice Roberts reiterated the common argument that the intent of the user must be taken into account. As the opinion in *Nosal II* argued that password sharing would not be made illegal as it lacked an intent to defraud,⁶⁷ Justice Thomas wrote that the scope of the intent of the use of otherwise authorized property is a matter of “ordinary principles of property law.”⁶⁸ Justice Thomas gives the example of a valet who has authorization to drive and park a customer’s car but does not have the authority to take it on a joyride.⁶⁹ These two ideas conflict, however. If intent of the access is the determining factor, then the valet’s joyride may not be illegal. The valet may have been given authorized

⁶² *Van Buren v. United States*, 141 U.S. 1648, 1649 (2021).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1662.

⁶⁶ *Id.*

⁶⁷ *United States v. Nosal*, 844 F.3d 1024, 1038 (9th Cir. 2016).

⁶⁸ *Van Buren*, 141 U.S. at 1663.

⁶⁹ *Id.* at 1662.

access to drive the car, and he did so with the legitimate intent of parking it. Only later he decides to go on a dalliance and see how fast it can go. His access to the vehicle was completely authorized, and it was done so with proper intent. This situation, however, is already covered as a criminal conversion of property.⁷⁰

[19] Conversion, as with most property law, is a matter of state law.⁷¹ The CFAA attempted to federalize computer property law but came far short of what was needed to achieve the goals of preserving data as an asset.⁷² The dissent in *Van Buren* was concerned with the temporal aspect of accessing the computer system. While its conclusion is likely the appropriate interpretation of the CFAA, the reasoning is flawed due to its invocation of the concept of conversion. The mindset of the accessor at the time of the access is somewhat irrelevant for many computer crimes. For example, suppose a person has authority to access data and downloads it off the system to some tangible medium. Only later does the person use the data, which is no longer on a protected computer according to the CFAA definition, in an illegal manner. While other laws exist to protect against such instances,⁷³ the CFAA as written does not. Hoping for the correct interpretation that can allow the law to serve its purpose is wishful thinking.

D. What to do with the CFAA

[20] The prior literature on the CFAA offers changes to the statutory language to update it to be relevant for the modern computer-using

⁷⁰ See *In re Clayton*, 778 N.E.2d 404, 405 (Ind. 2002) (interpreting criminal conversion as a misuse of property the user was otherwise authorized to access).

⁷¹ *But see* 18 U.S.C. § 641 (criminalizing federally the conversion and theft of U.S. government and federal public property).

⁷² See H.R. REP. NO. 98-894, at 1–3 (1984).

⁷³ See 18 U.S.C. § 641.

environment.⁷⁴ This solution is far more complicated than it needs to be. As shown, the issues surrounding the use of the CFAA are addressed through already existing laws. The CFAA is inherently flawed because of the technological naivete of the writers, prosecutors, and judges whom dealt with it at the time. The CFAA needs to be scrapped for a narrowly written law only covering hacking. The other issues it portends to regulate with the nebulous concept of exceeding authorized access are already regulated with existing laws. Misuse of computer services is covered through contract law. Viewing data as property, as was the intent of the committee recommending the CFAA,⁷⁵ would allow for the actions of current computer hackers to be regulated. Accessing a government computer to play a video game version of thermonuclear war⁷⁶ is far less dangerous to the security of the country than bad actors with authorized access to troves of sensitive data who decide to cause harm with that data.⁷⁷

⁷⁴ See McGowan, *supra* note 61, at 41; John Thurston, *Cyberwarfare and the Computer Fraud and Abuse Act*, 2022 B.C. INTELL. PROP. & TECH. F. 1 (2022); Larkin, *supra* note 55, at 282–84; Penney & Schneier, *supra* note 30, at 508–10; Constant, *supra* note 38, at 244–48.

⁷⁵ H.R. REP. NO. 98-894, at 9–10 (1984).

⁷⁶ See *WarGames Plot*, IMDB, <https://www.imdb.com/title/tt0086567/plotsummary> [<https://perma.cc/5DEE-7FR6>].

⁷⁷ See Press Release, Dep’t of Just., Office of Pub. Aff., Five Men Indicted for Crimes Related to Transnational Repression Scheme to Silence Critics of the People’s Republic of China Residing in the United States (July 7, 2022), <https://www.justice.gov/opa/pr/five-men-indicted-crimes-related-transnational-repression-scheme-silence-critics-people-s> [<https://perma.cc/CAW5-W48R>]; Nicholas Graham, “*Perfect Sleeper Agent*”: Chinese Spy ‘Slept’ In US For 2 Decades, HUFFINGTON POST (May 25, 2011), https://www.huffpost.com/entry/perfect-sleeper-agent-chi_n_94846 [<https://perma.cc/XYA5-YFFR>]; *All in the Family: Spy and His Son Indicted*, FED. BUREAU OF INVESTIGATION (Feb. 2, 2009), https://archives.fbi.gov/archives/news/stories/2009/february/familyspies_020209 [<https://perma.cc/3JVH-9HBB>].

III. UNLIMITED TAXING AUTHORITY: SOUTH DAKOTA V. WAYFAIR

A. Background of Interstate Commerce Leading to Tax Nexus

[21] The next example centers on the judicial interpretation of the Commerce Clause as business and technology have evolved beyond what was conceivable at the drafting of the Constitution.⁷⁸ Again, technological advancements in the ways companies conduct business have caused the Court to overturn nearly two hundred years of precedent in exchange for a novel approach that fails to solve the issue and only offers more confusion. Illustrative of the evolving nature of business and the Court's interpretation of the Commerce Clause begins in *Gibbons v. Ogden*.⁷⁹

[22] The relevant section of the Commerce Clause gives Congress the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes[.]”⁸⁰ The recent failure of the Articles of Confederation led to the inclusion of the Commerce Clause in the Constitution as

reflect[ing] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among colonies and later among the States⁸¹

⁷⁸ U.S. CONST. art. 1, § 8, cl. 3.

⁷⁹ *Gibbons v. Ogden*, 22 U.S. 1, 83 (1824).

⁸⁰ *Id.*

⁸¹ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

[23] In *South Dakota v. Wayfair*, the Court gave a historical perspective that while the clause was written as an affirmation of power to Congress, it has also been used by the courts as a tool to limit power of the States.⁸² With this power, Congress has been charged with assuring interstate business flows smoothly and the States are not disadvantaging out-of-state entities in favor of local ones.

[24] The questions at issue in *Gibbons* were which elements of business qualified as interstate business under the Commerce Clause, and to what extent could the States and the Federal Government split the power to grant access to and to regulate interstate commerce.⁸³ In the case, Aaron Ogden owned a steamboat and had been granted the “exclusive navigation of all waters within the jurisdiction of . . . [New York] State, with boats moved by fire or steam[.]”⁸⁴ The Appellant, Thomas Gibbons, had received a federal license to conduct commerce between Elizabethtown, New Jersey and the city of New York under an act of Congress.⁸⁵

[25] The ruling of the Court was in favor of Gibbons, recognizing his right to navigate the waters of New York and conduct business in them under the Supremacy Clause, which affirms the Commerce Clause’s granting of power to the federal government to regulate interstate commerce.⁸⁶ This ruling laid the groundwork for the concept of the Dormant Commerce Clause, where actions that “affect” interstate

⁸² *Id.* at 2089.

⁸³ *Gibbons*, 22 U.S. at 3.

⁸⁴ *Id.* at 1.

⁸⁵ *Id.* at 2 (describing a 1793 Act for “enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same”).

⁸⁶ *Id.* at 210–11.

commerce can be regulated,⁸⁷ and the multitude of cases juggling this concept of “affect” to varying degrees.⁸⁸

[26] It took many years before remote business activities came into existence and again tested the definitions and extent of the Commerce Clause and interstate business. The new standard tied to these concepts came in 1945 from the seminal case *International Shoe Co. v. Washington*.⁸⁹ International Shoe was an entity incorporated in Delaware and headquartered in Missouri. The company employed salesmen in the state of Washington and “suppl[ied] its salesmen with a line of samples, each consisting of one shoe of a pair, which they display[ed] to prospective purchasers.”⁹⁰ The issue at question was whether International Shoe was responsible for liability payments into the unemployment fund of the State of Washington.⁹¹

[27] International Shoe argued that it did not conduct any substantial business activities in Washington; the salesmen only demonstrated samples, the company was incorporated in another state, and all backend business functions took place out of state.⁹² Its lack of presence in the state made any enforcement of the laws of Washington against it a violation of the

⁸⁷ See Dawinder Sidhu, *Interstate Commerce x Due Process*, 106 IOWA L. REV. 1801, 1806–07 (2021) (quoting *Gibbons*, 22 U.S. at 194–95).

⁸⁸ See generally Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 16–31 (2003) (discussing a history of different interpretations of the Dormant Commerce Clause and the varying definitions of affect).

⁸⁹ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁹⁰ *Id.* at 313–14.

⁹¹ *Id.* at 311.

⁹² *Id.* at 312.

company's right to due process under the 14th Amendment: a state should not have the right to tax nonresidents.⁹³

[28] The Court's opinion reflected a continuation of the concept of "affect" in the Commerce Clause. Justice Black's concurrent opinion said that there "is no reason for reading the due process clause so as to restrict a State's power to tax and sue those whose activities affect persons"⁹⁴ As a company benefits from conducting business within a state through sales and the protection of the local laws, it stands to reason that those benefits should be balanced with the same sort of obligations that natural persons would, namely taxation.⁹⁵

[29] *International Shoe's* mandate to view the corporation as a fictitious entity comprised of physical individuals, allowing for the foreign business to have a physical presence in another state, was the basis for establishing a tax nexus until *South Dakota v. Wayfair*.⁹⁶ As technology has advanced, businesses have achieved ever diminishing physical presence in a state while still exerting an economic affect. Leading up to the opinion in *Wayfair*, which attempted to address ecommerce businesses, three key cases addressed the technological progression of presence since *International Shoe: National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).⁹⁷

⁹³ *Id.* at 315.

⁹⁴ *Int'l Shoe Co.*, 326 U.S. at 325.

⁹⁵ *Id.* at 319.

⁹⁶ *Id.* at 316.

⁹⁷ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2084–85 (2018); *see also* Paul Mines, *Commentary Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 N.Y.U. TAX L. REV. 581 (1997) (providing a thorough history and commentary of the progression of sales tax nexus law before the *Wayfair* decision and the explosion of e-commerce).

B. Sales Tax Nexus

[30] Nexus is the concept of an entity having a presence in a state, thus giving the state the authority to assert taxing rights over the entity.⁹⁸ As was decided in *International Shoe* and continued with the three cases discussed below, a physical presence has been necessary for a state to assert its taxing authority over a business through property ownership or presence of employees or agents.⁹⁹ With technological advancements, the definition of what constitutes a “presence” has been the central issue of litigation.¹⁰⁰ This evolution is the subject of the proceeding section.

C. Evolution of Tax Nexus and the Burden of Taxation

[31] The first major case to address the concept of presence to establish tax nexus since *International Shoe* was *National Bellas Hess v. Department of Revenue of Illinois*.¹⁰¹ National Bellas Hess (National) was a mail order house which did not distribute marketing materials to Illinois, outside of catalogs sent generally across the United States biannually.¹⁰² National’s principal place of business was in North Kansas City, Missouri.¹⁰³ Through lower court rulings, including by the Illinois State Supreme Court, National

⁹⁸ *Sales Tax Frequently Asked Questions*, MISS. DEP’T OF REVENUE, <https://www.dor.ms.gov/business/sales-tax-frequently-asked-questions> [<https://perma.cc/DC4T-BJ4B>].

⁹⁹ *Id.*

¹⁰⁰ See generally Sara Schoenfeld, *Much Ado About Nexus: The States Struggle to Impose Sales Tax Obligations on Out-of-State Sellers Engaged in E-Commerce*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 263, 266–68 (2013) (discussing the evolution and history of sales tax nexus).

¹⁰¹ *Nat’l Bellas Hess v. Dep’t of Rev.*, 386 U.S. 753 (1967).

¹⁰² *Id.* at 761.

¹⁰³ *Id.* at 760.

was ordered to collect and remit use tax¹⁰⁴ for goods used in Illinois.¹⁰⁵ The U.S. Supreme Court overturned, holding that “[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control.”¹⁰⁶ Understanding the reasoning behind the ruling requires a deeper exploration into the facts of the case. The details are necessary to establish the degree of “presence” a business has in a state that can establish nexus.

[32] National mailed catalogs twice a year across the country as direct marketing to active or recent customers.¹⁰⁷ The catalogs may have also been supplemented with advertising “flyers” to the same individuals.¹⁰⁸ Both items were transported by either the U.S. Postal Service or a common carrier.¹⁰⁹ Customers mailed orders for merchandise back to National’s principal place of business at its Missouri plant.¹¹⁰ The ordered goods were prepared and sent to the customer by either the U. S. Postal Service or common carrier.¹¹¹ This process was considered a “retailer maintaining a place of business in this state” under Illinois Revenue Statute 120, ch. 120,

¹⁰⁴ See generally Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1104 (2010) (describing how states have brought tax suits regarding a lack of compliance with payment of use tax, the tax on goods used within a state when sales tax has not been paid).

¹⁰⁵ *Nat’l Bellas Hess*, 386 U.S at 754 (citing *Dep’t of Rev. v. Nat’l Bellas Hess*, 214 N.E.2d 755 (Ill. 1966)).

¹⁰⁶ *Id.* at 760.

¹⁰⁷ *Id.* at 754.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Nat’l Bellas Hess*, 386 U.S at 754–55.

¹¹¹ *Id.* at 755.

§ 439.3 (1965) which included: “[e]ngaging in soliciting orders within this State from users by means of catalogs or other advertising whether such orders are received or accepted within or without the State.”¹¹²

[33] The statute further required National to keep extensive records of receipts which, if not done sufficiently, could lead to fines up to \$5,000 and jail sentences.¹¹³ National argued that the requirements of maintaining records and collecting use tax for its Illinoisan customers and the subjection to potential fines “violate the Due Process Clause of the Fourteenth Amendment and create an unconstitutional burden upon interstate commerce.”¹¹⁴

[34] The Court detailed many earlier cases which addressed various parts of this issue. One of the pivotal cases on which it relied for its decision was *Miller Brothers. Co. v. Maryland*, where Justice Jackson wrote that there must be “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”¹¹⁵ The Court wrote in *National Bellas Hess* that:

to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.¹¹⁶

¹¹² Illinois Use Tax Act, Ill. Rev. Stat., ch. 120, § 439.2 (1961) (current version at 35 ILL. COMP. STAT. 105/2 (2022)).

¹¹³ *Nat’l Bellas Hess*, 386 U.S. at 755.

¹¹⁴ *Id.* at 756.

¹¹⁵ *See id.* (citing *Miller Brothers. Co. v. Maryland*, 347 U.S. 340, 44–45 (1954)).

¹¹⁶ *Nat’l Bellas Hess*, 386 U.S. at 758.

The Court continued:

it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State[.]¹¹⁷

[35] This final, bold statement is the crux of the position in this section. The Court clearly and firmly held that it must protect the free flow of interstate commerce. If Illinois were allowed to assess use tax collection obligations on National, it would open the floodgates for compliance hardships.

[36] The next case illustrating the Court's definitional nexus progression was *Complete Auto Transit, Inc.*. Complete Auto Transit (Complete) was a Michigan-based automobile transporter working in partnership with General Motors (GM). The GM plant in Georgia would assemble cars and ship them from Georgia to Mississippi by rail.¹¹⁸ Complete would then unload in Jackson, Mississippi and use its trucks to deliver to car dealerships across the state.¹¹⁹ The issue at question was if Complete was responsible for paying state taxes to Mississippi under section 27-65-13 of the Mississippi Code Annotated,¹²⁰ or if they were exempted due to the interstate commerce nature of the transactions leaving Mississippi without

¹¹⁷ *Id.* at 759.

¹¹⁸ *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 276 (1977).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 274-75.

nexus over the company. Mississippi Code Annotated Section 27-65-13, which was enacted in 1972, reads:

There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.¹²¹

The following section 27-65-19 goes on to read:

Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business¹²²

[37] The Court heard this case to clarify to what extent a state may tax interstate commerce, which involves operation in its state, and at which point the Commerce Clause prevents it from doing so.¹²³ The Court sought to determine the degree of burden a state could impart on a business through taxes, and used nexus as the protractor. Complete Auto Transit’s claim was that “its transportation was but one part of an interstate movement, and that the taxes assessed and paid were unconstitutional as applied to operations in interstate commerce.”¹²⁴ The Mississippi State Supreme Court affirmed

¹²¹ MISS. CODE ANN. § 27-65-13 (2020).

¹²² MISS. CODE § 10109 (1942) (current version at MISS. CODE ANN. § 27-65-19 (2020)).

¹²³ *Complete Auto Transit*, 430 U.S. at 274.

¹²⁴ *Id.* at 277.

the lower court's ruling that Complete was responsible to pay taxes under the above mentioned code and concluded that Complete:

ha[d] a large operation in this State. It is dependent upon the State for police protection and other State services that same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce . . . being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case.¹²⁵

[38] The Supreme Court affirmed the ruling of the Mississippi Supreme Court, while also establishing a very critical precedent for the four-prong test of constitutionality within the Commerce Clause: Does the activity taxed have a substantial nexus with the taxing state?; Is the tax fairly apportioned?; Does the tax discriminate against interstate commerce?; Is the tax related to services the state provides the taxpayer?¹²⁶ The first prong of this test was the main source of the dispute in *Wayfair*.¹²⁷ The advancement, and likely more importantly, the prevalence¹²⁸ of ecommerce has distinguished the Court's perception on what constitutes nexus from that of many scholars and legislators.¹²⁹

¹²⁵ See *id.* (citing *Complete Auto Transit, Inc. v. Brady*, 330 So. 2d 268, 272 (1976)).

¹²⁶ See *id.* at 287.

¹²⁷ See generally *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2085 (2018) (referencing critical material cited to in the case which further elucidates the first prong).

¹²⁸ See generally *id.* at 2088 (stating that states lose out on \$8 to \$33 billion in taxes they otherwise would collect for not the nexus rules from *Complete Auto Transit* and *National Bellas Hess*).

¹²⁹ See Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333, 375 (2002); John E. Sununu, *The Taxation of Internet Commerce*, 39 HARV J. ON LEGIS. 325, 329 (2002). See generally W. Ray Williams, *The Role of Caesar in the Next Millenium? Taxation of E-Commerce: An*

[39] The final precedential case which governed ecommerce until *Wayfair* was *Quill Corporation v North Dakota*.¹³⁰ Quill Corporation was seeking remedy against North Dakota for the requirement to collect and pay a use tax on goods purchased in the state.¹³¹ Similar to *National Bellas Hess*, Quill Corporation was “an out-of-state mail-order house with neither outlets nor sales representatives in the State”¹³² The Supreme Court held that an unconstitutional burden was placed on interstate commerce because of the use tax payment in North Dakota.¹³³

[40] The Court clarified its position on nexus that “contrary to the State’s suggestion, a corporation may have the ‘minimum contracts’ with a taxing State as required by the Due Process Clause, and yet lack the ‘substantial nexus’ with the State as required by the Commerce Clause.”¹³⁴ *Quill* reaffirmed the *National Bellas Hess* rule of requiring a physical presence in a state for that state to burden a business with sales of use tax collections.¹³⁵ Interestingly, the Court attributed the “bright-line” rule of physical presence to the growth and popularity of mail order business.¹³⁶ Removing the burden of unintended taxing authorities through clearly understood nexus rules “regulates” interstate commerce in the drafter’s definition of the word.

Overview and Analysis, 27 WM. MITCHELL L. REV., 1703, 1716 (2001) (touching on the legal theory regarding e-commerce).

¹³⁰ See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

¹³¹ See *id.* at 303.

¹³² *Id.* at 301.

¹³³ See *id.* at 317–18.

¹³⁴ See *id.* at 313.

¹³⁵ See *Quill*, 504 U.S. at 317–18.

¹³⁶ *Id.* at 316.

[41] Through policies that act to promote the growth of new business models, the Court saw its role in the Commerce Clause.

[42] While conducting business through the Internet was more of a rarity than a norm at the time of this decision, *Quill* is the precedential hurdle the Court overcame in *Wayfair*. Justice Kennedy wrote for the majority in favor of relieving the burdens on the states rather than those of the companies conducting business within their borders.

D. Wayfair and the Burden of Competition

[43] Moving forward almost 20 years from the *Quill* decision, the business climate has changed drastically, with many companies conducting their business solely through the Internet. This change in climate led to sufficient interest in reassessing nexus in the case of *South Dakota v. Wayfair, Inc.*¹³⁷ This case was brought before the Court appealing the South Dakota Supreme Court's ruling¹³⁸ on Senate Bill 106 (2016) which outlines that:

[Sellers of] tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state¹³⁹

[44] The Bill lists the minimum economic requirements of gross revenue derived from products or services delivered to the state of (i) at least one

¹³⁷ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018).

¹³⁸ *State v. Wayfair Inc.*, 2017 SD 56, ¶ 15, 901 N.W.2d 754, 760.

¹³⁹ S. 106, 91st Leg. Assemb., Reg. Sess. (S.D. 2016) [hereinafter *South Dakota S. 106*]; see S.D. CODIFIED LAWS § 10-45-2.4 (2022).

hundred thousand dollars, or (ii) the seller must at least two hundred separate transactions to establish sufficient presence in South Dakota.¹⁴⁰ The South Dakota Supreme Court ruled that, due to the Supreme Court's rulings in *National Bellas Hess* and *Quill*, "Senate Bill 106 could not impose a valid obligation on Sellers to collect and remit sales tax to this State because none of them had a physical presence in the state."¹⁴¹ This new economic presence test established by the Bill would again impart a Commerce Clause undue burden on business. The applicable facts of Wayfair's remote business to those in *Quill* gave the South Dakota Supreme Court no option but to find the Bill unconstitutional despite their seeming desire to accept it.¹⁴²

[45] Senate Bill 106's encroachment upon the bright line rules established in *Quill*—establishing the strict requirement of physical presence in a state to allow taxation by that state— did not sneak up on observers. In a tax alert published by RSM, the firm stated its sense that this would likely lead to a review of the *Quill* doctrine due to the lack of action by Congress to establish a federal rule.¹⁴³ States began making new rules of economic presence to circumvent *Quill's* physical presence rule, only to quickly amend them to better align with the supposed safe harbor provision granted in *Wayfair*.¹⁴⁴

¹⁴⁰ South Dakota S. 106.

¹⁴¹ *Wayfair*, 901 N.W.2d at 760.

¹⁴² *Id.* at 761.

¹⁴³ See Brian Kirkell & Mo Bell-Jacobs, *U.S. Supreme Court kills Quill physical presence*, RSM (June 21, 2018), <https://rsmus.com/insights/tax-alerts/2018/u-s--supreme-court-kills-quill-physical-presence.html> [<https://perma.cc/QJK6-P9M8>].

¹⁴⁴ See ALA. ADMIN. CODE r. 810-6-2-.90.03. (2015) (examining the physical presence rule). *But see* ALA. ADMIN. CODE r. 810-6-2-.90.03. (2018) (diminishing the use of the physical presence rule).

[46] The South Dakota Legislature’s central argument justifying the passage of this Bill, along with similar ones from other states, comes from state government’s self-created “emergency”¹⁴⁵ need to continually increase revenue to match constantly rising state spending.¹⁴⁶ As the ecommerce industry grows at a rapid pace, state governments see it as an opportunity to expand tax revenues.¹⁴⁷ States viewed the federal government’s lack of action regarding taxation of the move from brick and mortar to ecommerce as a weakening of their taxing power, and bills such as Senate Bill 106 are their retaliation.¹⁴⁸

[47] In accepting this case, the Supreme Court recognized the growing trend of states attempting once again to change how they tax ecommerce and, subsequently, interstate commerce.¹⁴⁹ The South Dakota Supreme Court stated in their ruling that while they viewed the case and current

¹⁴⁵ South Dakota S. 106, at § 9.

¹⁴⁶ See Christopher Chantrill, *South Dakota Government Tax and Revenue Chart*, U.S. GOVERNMENT REVENUE, https://www.usgovernmentrevenue.com/revenue_chart_2000_2017SDb_24s1li111mcny_F0s [<https://perma.cc/26B3-Y9NK>] (noting that from 2000 to 2017, the sales tax revenues of South Dakota increased more than 40% per person from \$1,229.70 to \$1,727.10 while spend actually increased at a slower rate of 30% per person, all adjusted for 2012 dollars); see also Christopher Chantrill, *South Dakota Government Spending Chart*, U.S. GOVERNMENT SPENDING, https://www.usgovernmentspending.com/spending_chart_2000_2017SDb_24s2li111mcny_F0sF0l [<https://perma.cc/89SD-7RPP>] (highlighting that nationally, state and local spending per person increased by almost 32% during the same time with sales tax revenues increase 20%. South Dakota’s sales tax revenues were performing significantly better than the national average).

¹⁴⁷ South Dakota S. 106, at § 8(1) (claiming that ecommerce was eroding the state’s tax base despite the data showing the contrary).

¹⁴⁸ *Id.* at § 8(6)–(9).

¹⁴⁹ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2085 (2018).

economic realities as having merit, the ruling in *Quill* still stood, and the Court heard their plea and granted certiorari.¹⁵⁰

[48] To make its ruling on this case, the majority first reviewed the previously discussed Commerce Clause decisions to establish if they were flawed enough to reject stare decisis. The argument began by stating “[i]f it becomes apparent that the Court’s Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error.”¹⁵¹ The majority then argued that while Congress has the authority to change rules such as the physical presence rule, it cannot change the default rules already created by the Courts.¹⁵² In other words, this was a problem of the Court’s own creation, thus a problem it alone must resolve.

[49] Next, the majority analyzed why they believe the *Quill* decision has become out of date. This starts with how, at the time of the decision, roughly two percent of Americans had access to the Internet, while that number in 2018 was closer to 89%.¹⁵³ They referenced the fact that the largest retailer in the world, Amazon, is an online retailer, a scenario almost unimaginable in the early 1990s.¹⁵⁴ The Department of Commerce had also identified that from when they began tracking ecommerce sales, such sales accounted for less than 1% of total retail sales, while that number had grown to nearly 9%.¹⁵⁵ This translated to \$453.5 billion in 2017.¹⁵⁶ South Dakota focused

¹⁵⁰ *Id.* at 2089.

¹⁵¹ *Id.* at 2086.

¹⁵² *Id.* at 2096–97.

¹⁵³ *Id.* at 2097.

¹⁵⁴ *Wayfair*, 138 S. Ct. at 2097.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

on these numbers, claiming it showed a directed shift from previously taxable transactions for the state towards non-taxable transactions, which South Dakota estimated at between \$48 and \$58 million a year.¹⁵⁷

[50] Where the Court begins to encroach upon the topic of this paper is its statement in the opinion that:

[r]eliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent But even on its own terms, the physical presence rule defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced. And, importantly, stare decisis accommodates only “legitimate reliance interest[s].” *United States v. Ross*, 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Here, the tax distortion created by *Quill* exists in large part because consumers regularly fail to comply with lawful use taxes.¹⁵⁸

[51] Here, the Court makes the argument that the physical presence rule of *Quill* is no longer applicable. The Court comes to this conclusion in two parts: (i) because of the tax collection effects of its application in the new ecommerce landscape and (ii) defining physical presence in light of the internet. However, the rulings in the previous cases discussed in this paper, as well as others, have all been argued through the lens of constitutionality, specifically, as they relate to the Commerce Clause or Due Process. This Court now brings the tax collection consequences of previous decisions into their analysis of the *Wayfair* case when choosing to overrule the precedents. This, at its core, should restrict the actions of the Court, as they are less questioning the constitutionality of precedents but rather the consequences

¹⁵⁷ *Id.* at 2088.

¹⁵⁸ *Id.*

of those precedents. No longer are questions of Due Process,¹⁵⁹ undue burdens,¹⁶⁰ or the promotion of investment¹⁶¹ legitimate concerns of constitutionality. State coffers at levels lower than legislators wish them to be is now an issue of higher importance.

[52] At a very basic level, the purpose of the Commerce Clause is to prevent states from imposing an undue burden on interstate business.¹⁶² This has been illustrated many times above by applications of this concept onto various business types, from steamboat businesses, to mail order catalogs, and now to ecommerce. All the while, the Court failed to recognize that ecommerce is an entirely new way of doing business, not simply a remake of the prior mail order catalogs. The Court should have retained the position of supporting the growth and investment in new technologies.¹⁶³ Instead, it was clouded by the erroneous claim that physical presence cannot be defined through the Internet. It can be defined—selling through the Internet does not create a physical presence. Irrespective of the outcome this creates, it is the correct interpretation.

[53] In the previously mentioned cases, the businesses had physical actions taking place in various states which created nexus, be it through salespeople, actual operations, or distribution warehouses. When looking at a business such as Wayfair, it may have staff located in one state and warehouses in a few others. But to say simply having a specific volume of sales in a taxing jurisdiction creates nexus is to potentially burden it with

¹⁵⁹ *Nat'l Bellas Hess v. Dep't of Rev.*, 386 U.S. 753, 756 (1967).

¹⁶⁰ *Quill Corp. v. North Dakota*, 504 U.S. 298, 298 (1992).

¹⁶¹ *Id.* at 316.

¹⁶² *Nat'l Bellas Hess*, 386 U.S. at 760.

¹⁶³ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2086 (2018).

over 11,000 sales tax jurisdictions in the U.S. alone.¹⁶⁴ Is this not the essence of undue burden? Returning to a quote from the Court in *National Bellas Hess*:

[a]nd if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State[.]¹⁶⁵

[54] While the *Wayfair* Court did consider the issue of burdening taxpayers, it was more concerned with the harm on states wanting to collect tax.¹⁶⁶ The Court turned the table from concern for the benefit of commerce—its constitutionally obligated duty—to concern for State prosperity by equally harming all market participants.¹⁶⁷ Rather, the concern of the Court should be to encourage states to make themselves competitive in the marketplace, not change the rules to benefit poor players. Delaware, Montana, Alaska, New Hampshire, and Oregon all still manage to fund their operations without a sales tax.¹⁶⁸ Creating an attractive business environment should be the prerogative of the states if they wish it, not the Court to assure all business environments are equally poor as to assure none is the most poor.

¹⁶⁴ Jared Walczak & Jeremiah Nguyen, *Sales Tax Rates in Major Cities, Midyear 2021*, TAX FOUND. (Aug. 18, 2021), <https://taxfoundation.org/sales-tax-rates-by-city-2021> [<https://perma.cc/MA8U-2C7N>].

¹⁶⁵ *Nat'l Bellas Hess*, 386 U.S. at 759.

¹⁶⁶ *See Wayfair*, 138 S. Ct. at 2097.

¹⁶⁷ *Id.* at 2096.

¹⁶⁸ Brett Holzhauser, *Here are the 5 states that don't have sales tax, and what you need to know about each*, CNBC (Sept. 3, 2021), <https://www.cnbc.com/select/states-with-no-sales-tax> [<https://perma.cc/YAG7-UBYB>].

[55] The second failure of the majority decision was its inability to set a specific standard or line for what now constitutes the State’s ability to tax interstate commerce. It stated that:

[t]he Act applies only to sellers that deliver more than \$100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.¹⁶⁹

[56] This is precisely why the issue should have been addressed by Congress and not the Courts. They declared the requirements set fourth by the South Dakota bill as satisfactory at establishing nexus under *Complete Auto* but failed to set a standard to be used in the future. This has led to countless bills and rules in thousands of other taxing jurisdictions and will continue to do so.¹⁷⁰

E. Future Effects of this Case

[57] The two main problematic effects of this decision moving forward are the lack of a hardline rule for establishing nexus and the further promotion of an uncompetitive online marketplace.

[58] As noted in an RSM article, “[a]fter only three years, *Wayfair* has emerged from young adulthood to near maturity and universal adoption

¹⁶⁹ *Wayfair*, 138 S. Ct. at 2099.

¹⁷⁰ See generally *Remote Seller Nexus Chart*, SALES TAX INST. (May 4, 2021), <https://www.salestaxinstitute.com/resources/remote-seller-nexus-chart> [<https://perma.cc/3BFG-A85V>] (offering an overview of Internet sales rules for establishing nexus in each state).

with the final two states passing economic nexus standards in 2021 legislative sessions.”¹⁷¹

These safe harbor variances are the results of the Court’s unwillingness, or more likely error, to create a solid line. The Court did not adopt the South Dakota safe harbor thresholds as the law of the land but rather merely concluded that \$100,000 of transactions is evidence of receiving a “substantial privilege” from conducting business in the state.¹⁷² This shows immense business naivete, as the threshold is based on revenues. Depending on the product, \$100,000 could represent a single sale which might not necessarily result in a profit.

[59] These thresholds may appear to be high enough to support compliance costs. However, if a business is making \$2 million in revenue over 10 states, both the software costs to track transactions and the additional fees for an accounting firm to prepare returns in those states can create a highly material burden on the business.¹⁷³ The original bills by the

¹⁷¹ *Wayfair nexus turns three by celebrating near universal adoption*, RSM (Aug. 10, 2021), <https://rsmus.com/insights/services/business-tax/wayfair-nexus-turns-three-by-celebrating-near-universal-adoption.html> [<https://perma.cc/D7HN-C4Z9>].

¹⁷² *Wayfair*, 138 S. Ct. at 2099.

¹⁷³ See Karen Kim, Note, *The Disproportionate Sales Tax Compliance Burden on Small- And Medium-Sized Online Businesses After Wayfair*, 22 COLUM. SCI. & TECH. L. REV. 181, 213 (2020) (citing *Small-Business Owners Discuss Struggle with Wayfair Decision*, NAT’L FED. INDEP. BUS. (Dec. 20, 2019), <https://www.nfib.com/content/news/arizona/small-business-owners-discuss-their-real-life-horror-with-the-wayfair-decision> [<https://perma.cc/VY88-JE6X>]); see also Brief for Flipper LLC as Amicus Curiae in Support of Respondents, *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018) (No. 17-494) (describing the failure of a safe harbor provision to protect small businesses as they cannot predict their sales retroactively collect sales tax if they exceed the limit); Brief for eBay Inc., et al as Amici Curiae Supporting Respondents at 12–14, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) (illustrating several small businesses that would suffer material economic harm from the compliance costs of economic nexus rules).

South Dakota government and decision by the Court had marketplace facilitators like Amazon and Wayfair in mind, but failed to consider small businesses transacting through their own websites. Small business will take the full force of compliance costs, in turn pushing them towards the use of a marketplace facilitator.¹⁷⁴

[60] Some of the biggest proponents of this decision were big retailers such as Target, Walmart, and Amazon.¹⁷⁵ It may seem counterintuitive for Amazon to support more stringent tax laws for online retailers, but as one of the largest companies in the world, it already collects sales tax in every jurisdiction and possesses the infrastructure to comply with these regulations without any additional burden.¹⁷⁶ Amazon simply extended its infrastructure to cover taxable goods sold through its platform.¹⁷⁷ This marketplace facilitator model is only bolstered through the facilitator managing the sales tax receipts and remittance for the sellers. This now creates another factor driving small businesses to sell their goods on their platform, as Amazon can provide the backend needed for compliance at little additional cost to itself, and thus can offer substantial savings to retail customers.¹⁷⁸ Amazon benefitting from having this dynamic, in part, creates

¹⁷⁴ See Kim, *supra* note 173, at 210–14 (providing an overview of marketplace facilitators and their legal definition).

¹⁷⁵ Jackie Crosby, *Target, Best Buy laud Supreme Court decision allowing states to collect taxes from online retailers*, STAR TRIBUNE (June 21, 2018, 7:40 PM), <https://www.startribune.com/target-best-buy-laud-supreme-court-decision-allowing-states-to-collect-taxes-from-online-retailers/486200901/?refresh=true> [<https://perma.cc/UVE5-GEWH>].

¹⁷⁶ *Id.*

¹⁷⁷ Tax calculation services, AMAZON: SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/G200787660?language=en_US&ref=efph_G200787660_cont_69036 [<https://perma.cc/7WZ7-RDTS>].

¹⁷⁸ Kim, *supra* note 173, at 214; see also Eugene Kim, *Why Amazon is the winner of the Supreme Court sales tax ruling*, CNBC (June 21, 2018, 5:41 PM),

another barrier for smaller businesses competing with large e-retailers such as Amazon.

[61] There is very little chance of a competitor to Amazon emerging with the compliance burden placed upon any startup due to this ruling. The benefit to Amazon maintaining and strengthening the marketplace facilitator business model was illustrated by its promotion of states passing marketplace facilitator tax collection laws.¹⁷⁹ Amazon's lobbyists have been successful, as all 50 states have now passed laws requiring the marketplace facilitator to collect and remit sales tax and not just offer it as a service.¹⁸⁰ The largest facilitators—Amazon, eBay, Walmart, and the like—now have multiple avenues for maintaining their dominance. The compliance costs of collecting and remitting sales tax for small businesses can be prohibitive. The added service of collecting sales tax as a marketplace facilitator will entice retailers to use the service as opposed to competing against it, and by requiring marketplace facilitators to collect and remit sales tax, competitors are further restricted from competing against the large entities on that front as well.

[62] The ill-founded decision in *Wayfair* has quickly evolved beyond the original intentions of the Court. Marketplace facilitator collection laws now require third-parties, who are neither buyers nor sellers, to collect and remit

<https://www.cnbc.com/2018/06/21/why-amazon-wins-with-supreme-court-sales-tax-ruling.html> [<https://perma.cc/KK7J-W7EY>] (emphasizing how Supreme Court tax views benefit Amazon).

¹⁷⁹ Jason Garcia, *Lobbyists for Amazon, Walmart and other big businesses are writing a law to collect Florida sales tax online*, ORLANDO SENTINEL (Sept. 25, 2019, 10:14 AM), <https://www.orlandosentinel.com/politics/os-ne-amazon-walmart-online-sales-tax-20190925-rfd5arlp3vajnotwc5a4rtklye-story.html> [<https://perma.cc/YC95-N2A6>].

¹⁸⁰ *US Marketplace Tax and Regulatory Fee Collection FAQ*, AMAZON: SELLER CENTRAL, https://sellercentral.amazon.com/gp/help/external/G7VYHGGJ8ZT2M58CP?language=en_US&ref=efph_G7VYHGGJ8ZT2M58CP_cont_G200787660 [<https://perma.cc/5JQG-FSAB>].

sales tax.¹⁸¹ Nexus has been forcibly evolved by the Court from the physical presence in *International Shoe* and *National Bellas Hess*, to an economic presence in *Wayfair*, and now snatched from it through the help of Amazon's lobbyists as the path of least resistance for local governments. Chief Justice Roberts lamented about *Wayfair*, saying:

[a] good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake.

...

The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era.¹⁸²

[63] The dissent foresaw that the problems of ecommerce would only be exacerbated by this ruling. The originating tax laws of South Dakota, the rulings of the Court, and the subsequent greedy responses by every state are all wrought with issues, demonstrating a fundamental misunderstanding of ecommerce as a marketplace.

[64] The Court blindly accepted the argument that states were losing between \$8 and \$33 billion a year due to the physical presence rule for nexus.¹⁸³

¹⁸¹ *Id.*

¹⁸² *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting).

¹⁸³ *Id.* at 2088 (majority opinion).

[65] This shows a complete misunderstanding of the concept of taxation; the premise is flawed from the onset. The states are not losing anything—the sales tax revenue is not theirs because they have no right to it. What they are losing, however, is the use tax that is owed. But, as the Court admits, use tax is difficult to collect as compliance is low.¹⁸⁴ States are faced with a burden to collect the money they are owed because they lack a mechanism to enforce it. So, the Court allowed a new mechanism that placed the burden on the shoulders of business, justifying the burden as outweighed by a legitimate public interest.¹⁸⁵ States relieving themselves of collection duties to wholly place those duties, burdens, and costs on private business is apparently legitimate to the Court. Recognizing that these compliance burdens would disproportionately affect small businesses, the Court dismissed this issue by stating that technological advancements “may” make it easier to comply in the future.¹⁸⁶ The Court’s repudiation of the rational physical presence rule in exchange for a new economic presences rule does nothing more than relieve states of their duty, hinder the technological and marketplace growth of business, and fortify Amazon, Walmart, and eBay’s monopolistic power to rule the ecommerce marketplace.

IV. GIG ECONOMY WORKER CLASSIFICATION AND CALIFORNIA AB-5

A. The Gig Economy

[66] The final area of legislation to be discussed is a response to California’s Assembly Bill 5 (AB-5) which demonstrates a fundamental misunderstanding of technology and the gig economy classification of employees versus independent contractors.¹⁸⁷ The gig economy refers to

¹⁸⁴ *Id.* at 2084.

¹⁸⁵ *Id.* at 2091.

¹⁸⁶ *Id.* at 2098.

¹⁸⁷ Assemb. B. 5, 2019–2020 Reg. Sess., 2019 Cal. Stat. 91.

new business models that offer temporary, flexible, autonomous, and on-demand types of jobs.¹⁸⁸ The most well-known types of gig economy jobs are rideshare drivers (e.g., Uber, Lyft), food delivery drivers (e.g., DoorDash, GrubHub), real estate lessors (e.g., AirBNB, Vrbo), and marketplace sellers (e.g., eBay, Etsy, Amazon). These jobs are often sought by individuals who are attracted to the ability to set their own hours, have a stronger sense of working for themselves, produce more income with minimal effort,¹⁸⁹ and seek additional financial stability in a time of personal economic shock.¹⁹⁰

[67] The nature of gig economy jobs—that they are not what would be considered traditional full-time employment—means that most states and federal laws would classify the workers as independent contractors as opposed to employees.¹⁹¹ The worker classification standard defaults to independent contractor when the worker or employer cannot affirmatively show or prove that the person should be classified as an employee.¹⁹² There

¹⁸⁸ Emily C. Atmore, Note, *Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy*, 102 MINN. L. REV. 887, 888 (2017).

¹⁸⁹ Peter Swaniker, *What Are The Pros And Cons Of The Gig Economy?*, FORBES (Jan. 8, 2019, 12:22 PM), <https://www.forbes.com/sites/quora/2019/01/08/what-are-the-pros-and-cons-of-the-gig-economy/?sh=1bc42c401388> [<https://perma.cc/N8QL-A8BE>].

¹⁹⁰ Dmitri K. Koustas, *What Do Big Data Tell Us About Why People Take Gig Economy Jobs?*, 109 AM. ECON. ASS'N PAPERS & PROCS. 367, 369–70 (2019).

¹⁹¹ Atmore, *supra* note 188, at 888.

¹⁹² *Id.* at 888–89.

are significant employment law and tax consequences that balance on the employee/contractor designation.¹⁹³

B. The “ABC” Test & California Assembly Bill 5

[68] In 2019, California Assembly Member Lorena Gonzalez saw the opportunity to reclassify thousands of gig workers as employees, attempting to secure better pay and benefits after a court ruling opened the legal door.¹⁹⁴ AB-5 was a piece of legislation created and enacted in California with the intention of stopping workers from being “exploited by being misclassified as independent contractors instead of recognized as employees . . .” in the gig economy.¹⁹⁵

[69] This legislation was in reaction to the California Supreme Court’s decision in the case of *Dynamex*, attempting “to codify the decision . . . and clarify its application.”¹⁹⁶

¹⁹³ Atmore, *supra* note 188, at 888–89; *see also Independent Contractor (Self-Employed) or Employee?*, I.R.S. (Jan. 27, 2023), <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/W95Y-5Q6L>] (highlighting key issues with employee taxation); Frank Messina et al., *Employee Versus Independent Contractor*, CPA J. (Feb. 2019), <https://www.cpajournal.com/2019/02/11/employee-versus-independent-contractor> [<https://perma.cc/ST7E-Y98X>] (denoting the taxable differences between employees and independent contractors).

¹⁹⁴ Kate Conger & Noam Scheiber, *California Bill Makes App-Based Companies Treat Workers as Employees*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/technology/california-gig-economy-bill.html> [<https://perma.cc/45TV-7K8M>].

¹⁹⁵ Assemb. B. 5, 2019–2020 Reg. Sess., 2019 Cal. Stat. 91.

¹⁹⁶ *Id.*

[70] AB-5 has never gained its full force due to both public and private outcry, and its ultimate fate remains undecided.¹⁹⁷ However, the flawed mindset of the law is significant for the purposes of this paper. The California Supreme Court reversed the burden of proof for worker classification.¹⁹⁸ Now, the default position in California is that workers are employees, and the “ABC” test must be fulfilled to establish they are not.¹⁹⁹

[71] The “ABC” test lists three elements that all must be fulfilled to establish a worker as an independent contractor.²⁰⁰ The three elements, as defined in *Dynamex*, are:

(A) that the worker 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) that the worker performs work that is outside the usual course of the hiring entity’s business; and

¹⁹⁷ See Kari Paul & Julia Carrie Wong, *California passes Prop 22 in a major victory for Uber and Lyft*, GUARDIAN (Nov. 4, 2020, 4:14 PM), <https://www.theguardian.com/us-news/2020/nov/04/california-election-voters-prop-22-uber-lyft> [<https://perma.cc/7SSY-FKUE>] (describing how some of Silicon Valley’s most powerful tech companies, spent upwards of \$200 million on the efforts to continue classifying drivers as contractors, not employees, and how the law passed with about 58% of the vote); see also Chris Marr & Erin Mulvaney, *Washington Lyft, Uber Driver Deal Not Safe from Court Challenge*, BLOOMBERG L. (Apr. 4, 2022, 1:12 PM) https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/XF54MFDG000000?bna_news_filter=daily-labor-report#jcite [<https://perma.cc/J3BZ-B5MJ>] (describing how the SEIU challenged the constitutionality of the process whereby the law was passed. However, it was ruled unconstitutional in 2021 but stayed, thus still in effect, as it is being appealed).

¹⁹⁸ *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 7 (Cal. 2018).

¹⁹⁹ See *id.* (establishing the ABC test which was later codified to apply to the whole of the California Labor Code in CAL. LAB. CODE § 2775 (West 2020)).

²⁰⁰ *Id.* at 35–36.

(C) that the worker is customarily engaged in an independently established trade, occupation, or business.²⁰¹

[72] This test was created by the California Supreme Court without taking into account the interests of companies within the gig economy. While it is easily applied to the business dynamic in *Dynamex*, element C appears ill-suited and impossible to satisfy in the context of gig work.

[73] *Dynamex* employed truckers, and the courts relied on this fact in citing case law of businesses hiring out for other specialized tasks, including building siding installation and auto collision appraisals.²⁰² These are professions that require training, certification, or licensure to complete.²⁰³ Going through the process of securing the special license is considered establishing engagement in the trade or occupation.²⁰⁴ How can an Uber driver be deemed to have an established occupation as an Uber driver when they first start? One of the attractions to gig jobs is the ease of entry. Such jobs generally do not require any specialized training or education.²⁰⁵ It

²⁰¹ *Id.* at 40.

²⁰² *Id.* at 39 n.31.

²⁰³ *Dynamex*, 416 P.3d at 39 n.31.

²⁰⁴ See *Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act*, 155 A.3d 738, 745–49 (Conn. 2017) (describing how workers should have been deemed to be engaged in an established business because they were, amongst other factors, licensed as automobile collision appraisers).

²⁰⁵ See *Driver requirements*, UBER, <https://www.uber.com/us/en/drive/requirements> [<https://perma.cc/3MT7-FJU3>] (describing the minimum requirements to drive for Uber); *Learn what you need to drive with Lyft*, LYFT, <https://www.lyft.com/driver-application-requirements> [<https://perma.cc/9BCX-YCZH>] (describing the minimum requirements to drive for Lyft).

seems illogical that the person must be deemed an employee because they are new at the task.

[74] The underlying dispute which brought this employment issue to the California Supreme Court arose from two delivery drivers leading a class action lawsuit against Dynamex Operations West, Inc., a nationwide package and document delivery company.²⁰⁶ These drivers alleged that Dynamex wrongfully classified them as independent contractors rather than employees because “[i]n 2004 . . . Dynamex adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather than employees.”²⁰⁷

The trial court used alternative definitions of “employ” and “employer” to certify the class of drivers as employees: “(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship.”²⁰⁸

[75] The California Supreme Court affirmed the ruling of the Court of Appeals and took the decision a step further.²⁰⁹ The court also changed the perspective from which California’s classification of employees is to be viewed in the future. Instead of assuming that workers are independent contractors unless they satisfy the criteria to be classified as an employee, the court decided that workers would be presumptively classified as employees unless proven otherwise.²¹⁰ This decision affirmed the “ABC” test in California.

²⁰⁶ *Dynamex*, 416 P.3d at 5.

²⁰⁷ *Id.* at 5–6.

²⁰⁸ *Id.* at 6 (citing *Martinez v. Combs*, 231 P.3d 259, 278 (Cal. 2010)).

²⁰⁹ *Id.* at 42.

²¹⁰ *Id.* at 40.

[76] The *Dynamex* court determined the drivers for Dynamex could be certified as employees because their services failed two of the three parts of the “ABC” test.²¹¹ The court did not apply element A of the test to the drivers and noted that “each part of the ABC test may be independently determinative of the employee or independent contractor question[.]”²¹² This means failure of only one element indicates that the worker is an employee, so the court did not see reason to address each part.²¹³ The court did, however, address elements B and C of the test. It deemed the workers, in their roles as delivery drivers, were not outside of the usual course of business for a hiring company engaged in deliveries.²¹⁴ This interpretation is where the court’s views of gig economy businesses conflicts with the true nature of the business.

[77] Element C of the “ABC” test was narrowly viewed in *Dynamex*.²¹⁵ The court ruled that the drivers were not engaged in an “independently established trade” because, during the period at issue, they neither worked for other delivery companies nor serviced their own personal customers.²¹⁶ This is a very strained definition of “independent” as it relates to the test. If a driver receives sufficient work from a single provider to satisfy his or her

²¹¹ *Dynamex*, 416 P.3d at 41–42 (holding that a sufficient commonality of interest under two parts of the ABC test adequately supported the trial court's certification of a class of drivers).

²¹² *Id.* at 41.

²¹³ See CAL. LAB. CODE § 2775(b)(1) (West, Westlaw through 2023 Reg. Sess.) (codifying the “ABC” test and stating that each element must be met to classify a person as an independent contractor).

²¹⁴ *Dynamex*, 416 P.3d at 41.

²¹⁵ See *id.* at 39 (holding that in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business).

²¹⁶ *Id.* at 42.

economic needs, why should it mean they are no longer independent? Furthermore, if a driver was hired as an employee but moonlighted at night driving a truck for another company, would it negate his or her independence? The court said that establishing independence means that “[s]uch an individual generally takes the usual steps to establish and promote his or her independent business[.]”²¹⁷ The court focused on the promotion part of this requirement rather than the establishment part.²¹⁸ Because the drivers did not advertise or have jobs outside of Dynamex, they did not promote their business.²¹⁹ The court ignored the idea that there was establishment of their business through the drivers’ investment in their own trucks because this was necessary to secure the Dynamex jobs.²²⁰ Why should a functioning and profitable business that apparently has all the work it can perform—as the drivers did not work outside of Dynamex—need to advertise? Fundamentally, the *Dynamex* court failed to understand how the businesses of an independent contractor and the businesses that would hire them would function.

[78] The California court system saw Dynamex as simply hiring drivers to deliver goods, but this is a core misunderstanding of the business model. Dynamex is not a delivery company but rather a logistics company that coordinates and delivers goods.²²¹ The drivers in question “are required to

²¹⁷ *Id.* at 39.

²¹⁸ *See id.* at 39, 42 (comparing Dynamex workers who could not perform delivery services for other companies or for their own personal customers to independent contractors who generally take steps to advertise and offer to provide the services of their independent business to the public or to a number of potential customers).

²¹⁹ *See Dynamex*, 416 P.3d at 42 (stating that the class of drivers certified by the court only performed delivery services for Dynamex).

²²⁰ *See id.* at 8, 41 (holding that there was a sufficient commonality of interest to support certification of the proposed class, even though drivers had to provide their own vehicles and pay for all of their own transportation expenses).

²²¹ *Id.* at 8.

provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance."²²² This misunderstanding is analogous to the general lack of understanding of the business models of many gig economy businesses like Uber and Doordash. Neither are delivery companies—they are software companies whose model is focused on facilitating a service to provide a willing driver the opportunity to serve a willing customer. Just as Amazon provides a forum or marketplace for sellers to reach buyers, Uber and Lyft offer a forum for drivers and riders to negotiate in near real time, upgrading the handwritten notes on a college wall asking and hoping for a lift.

[79] As mentioned, Assembly Bill 5 was passed with the purpose of codifying the tortured employment definition established in *Dynamex* to then be applied to gig economy workers.²²³ Assembly Bill 5 takes the view that Uber would be a modern iteration of a taxi service rather than the software company it is.²²⁴ The core difference lies in the additional freedoms provided to Uber drivers as opposed to taxi drivers.²²⁵ An Uber customer inputs the service they are looking for, and Uber essentially creates a ride request note in their digital system.²²⁶ Drivers can then see the requests and make the decision if they want to fulfill the request by accepting or declining it.²²⁷ They then pick up the customers in their car and

²²² *Id.*

²²³ Assemb. B. 5, 2019–2020 Reg. Sess., 2019 Cal. Stat. 91.

²²⁴ Faiz Siddiqui, *Uber and Lyft must make their drivers in California full employees, judge rules*, WASH. POST (Aug. 10, 2020, 6:24 PM), <https://www.washingtonpost.com/technology/2020/08/10/uber-lyft-ab5> [<https://perma.cc/3BGQ-HDZN>].

²²⁵ Joshua D. Angrist et al., *Uber Versus Taxi: A Driver's Eye View*, 13 AM. ECON. J. 272, 273 (2021).

²²⁶ *See How to use the Uber app*, UBER, <https://www.uber.com/us/en/about/how-does-uber-work/> [<https://perma.cc/6JYG-NC75>].

²²⁷ *Id.*

complete the transport.²²⁸ Uber then takes a percentage fee of the drive for facilitating the transaction.²²⁹ Uber’s only involvement in its ridesharing business is providing a platform through technology for the customer to connect with a driver, then taking a fee from the fare price.²³⁰

[80] Viewing the Uber business model through the lens of the “ABC” test produces interesting outcomes. Assembly Bill 5 amended Section 2750.3 of the California Labor Code then was codified again in 2020 in Section 2775.²³¹ The current “ABC” test elements are:

“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.”²³²

[81] Uber rightly contends it holds neither control nor direction over the driver in the completion of their work.²³³ Uber’s website provides Help and Frequently Asked Question articles for drivers that illustrates this contention that the driver has freedom in the direction of how the trip is conducted. While it provides maps and additional services to help drivers complete their task,²³⁴ it does not have power over them. Drivers have the

²²⁸ *Id.*

²²⁹ *Tracking your earnings*, UBER, <https://www.uber.com/do/en/drive/basics/tracking-your-earnings/> [<https://perma.cc/PBC2-RQK7>].

²³⁰ *Cold Call: Uber’s Strategy for Global Success*, HAR. BUS. REV. at 5–10 (Dec. 8, 2020), <https://hbr.org/podcast/2020/12/ubers-strategy-for-global-success>.

²³¹ Assemb. B. 5, 2019–2020 Reg. Sess., 2019 Cal. Stat. 91; CAL. LAB. CODE § 2775 (West, Westlaw through 2023 Reg. Sess.).

²³² § 2775(b)(1)(A).

²³³ *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).

²³⁴ *See Your guide to driving with UberPool*, UBER, <https://www.uber.com/us/en/drive/>

option to accept or refuse the trip based on the details and fare.²³⁵ The contract exists between the driver and the customer.²³⁶ The manner of completing the job, transporting the rider to the requested destination, is between the driver and the rider.²³⁷ That is, Uber does not dictate how to get to the requested location. The driver and the rider are responsible for that determination. Uber provides navigational guidance as an option, not a requirement.²³⁸

“B – *The person performs work that is outside the usual course of the hiring entity’s business.*”²³⁹

[82] As discussed above, Uber’s business is serving as a marketplace facilitator for willing drivers to find and accept transportation requests from willing customers.²⁴⁰ Both have the ability to cancel the ride at any time

services/shared-rides/ [https://perma.cc/R8XT-TASW] (Under the Frequently Asked Questions, drivers are provided in-app navigation but are not required to use it); *Using a third-party navigation app*, UBER, https://help.uber.com/driving-and-delivering/article/using-a-third-party-navigation-app?nodeId=36a70c53-4bb0-4e17-a044-d91c2d1ff080 (help page providing step-by-step instructions on using the driver’s preferred navigation application).

²³⁵ *How a trip works*, UBER, https://www.uber.com/us/en/drive/basics/how-to-take-trips [https://perma.cc/E729-SURU].

²³⁶ *Terms and Conditions*, UBER, https://www.uber.com/legal/en/document/?country=51akistan&lang=en&name=general-terms-of-use [https://perma.cc/683K-X3TG].

²³⁷ *Id.*

²³⁸ *Supra* note **Error! Bookmark not defined.**

²³⁹ CAL. LAB. CODE § 2775 (West, Westlaw through 2023 Reg. Sess.) (emphasis added).

²⁴⁰ *O’Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

before its completion.²⁴¹ Uber merely connects the two parties.²⁴² As Uber is a software company in business to act as an intermediary between drivers and riders,²⁴³ it is important to consider which positions they are hiring for to understand its usual course of business. Searching the career openings at Uber, despite the 1,871 open roles,²⁴⁴ one does not find a position as a “driver.”²⁴⁵ The positions all seem consistent with the usual course of business for a software company, not a taxi service.²⁴⁶

“C – *The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.*”²⁴⁷

[83] This element is flawed, as a plain language reading of it precludes any newcomer to the job from qualifying as an independent contractor. To be customarily engaged suggests that the person has performed the work prior. However, this would be an untenable definition. Though courts have not ruled on how to define “customarily,” a reasonable definition in the

²⁴¹ *How a trip works*, *supra* note 235.

²⁴² *O’Connor*, 82 F. Supp. 3d at 1141.

²⁴³ *Id.*

²⁴⁴ *Find open roles*, UBER, <https://www.uber.com/us/en/careers/list/?query=> [<https://perma.cc/AW6V-DD8M>] (noting that at the time of submission for publication, there were 1,871 open roles, however, this number may change based on availability).

²⁴⁵ *Find open roles*, UBER, <https://www.uber.com/us/en/careers/list/?query=driver> [<https://perma.cc/KV5K-CS6R>] (noting that at the time of submission for publication, there were no open roles as a driver, however, this number may change based on availability).

²⁴⁶ *See generally id.* (demonstrating that searching for a “driver” job does not yield desired results).

²⁴⁷ CAL. LAB. CODE § 2775(a)(1)(C) (West, Westlaw through 2023 Reg. Sess.) (emphasis added).

context of the test is a person who “hold[s] himself in readiness” to perform the task.²⁴⁸ In a practical sense, this is the necessary definition. Being ready and able to serve in a function should be all that is required to qualify oneself as an independent contractor. Different jobs may require different levels of readiness, such as licenses or registrations, but nothing more should be necessary. The requirements for an Uber driver include holding a valid drivers license, owning a qualified vehicle, and being old enough.²⁴⁹ If a person meets these requirements, they should be viewed as satisfying element C, provided they are willing to perform the work.

[84] Additionally, the flexibility of the Uber style of gig work allows for nearly a quarter of these contractors to be working for multiple different companies at the same time.²⁵⁰ A driver may be flipping between Uber and Lyft throughout the night, while also delivering orders on Instacart.²⁵¹ While these services are similar in nature, being completed through various platforms makes them independent of each other. The court’s default classification creates an untenable and illogical situation because it classifies an individual as an employee if they work for only Uber but then changes them to an independent contractor if that person also signs up for

²⁴⁸ Benjamin S. Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 YALE L.J. 76, 87 (1945).

²⁴⁹ See *Driver Requirements*, *supra* note 205.

²⁵⁰ See Smiljanic Stasha, *Ride-Sharing Industry Statistics To Get You Going in 2022*, POL’YADVICE, (Sep. 29, 2022), <https://policyadvice.net/insurance/insights/ride-sharing-industry-statistics> [<https://perma.cc/GB52-RJ2Z>].

²⁵¹ See Brett Helling, *Forget Uber and Lyft – Be an Instacart Driver Instead*, GIGWORKER (Feb. 17, 2023), <https://gigworker.com/instacart-driver> [<https://perma.cc/4RQN-5S2Q>].

Lyft.²⁵² The default classification should be as an independent contractor.²⁵³ The possibility of having employee-level drivers may appeal to certain people and even to the companies themselves,²⁵⁴ but neutering the gig economy because of misguided interpretations of how a business operates is inappropriate.

[85] On April 29, 2019, the U.S. Department of Labor published an opinion letter addressing virtual marketplace companies and reaffirming its commitment to use the six-factor realities test for classification.²⁵⁵ While this letter does not have any direct enforcement power, it does illustrate a division between how various parties in government think the issue should be addressed. This letter was later withdrawn on February 19, 2021, as the department announced it would be revisiting the issue.²⁵⁶ The Biden administration issued a final rule on May 6, 2021, which establishes how the administration sees the worker classification dilemma and provides some clarity on possible desired legislation from the administration.²⁵⁷ The

²⁵² See Eric Spengler, *Lessons From the Uber Case: “Employees” vs. “Independent Contractors”*, SPENGLER & AGANS PLLC (May 19, 2022), <https://www.sab.law/news-and-insights/blog/ubercase> [<https://perma.cc/GR95-RAVP>].

²⁵³ See generally Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353, 353, 357–58 (2021) (discussing an overview of differing ideas for a third employment designation and an economic determination for said designation, while maintaining that the most tenable default position is for an independent contractor classification).

²⁵⁴ See Spengler, *supra* note 251.

²⁵⁵ See Megan Sweeney, *U.S. Department of Labor Issues New Wage and Hour Opinion Letter, Concludes Service Providers for a Virtual Marketplace Company Are Independent Contractors*, DEP’T OF LABOR (Apr. 29, 2019), <https://www.dol.gov/newsroom/releases/whd/whd20190429> [<https://perma.cc/4RX4-YSM>].

²⁵⁶ See Ben Penn, *Trump’s Gig-Worker Guidance Thrown Out by Biden Labor Department*, BLOOMBERG L. (Feb. 19, 2021, 11:19 AM), <https://news.bloomberglaw.com/daily-labor-report/trumps-gig-worker-guidance-thrown-out-by-biden-labor-department?context=search&index=0> [<https://perma.cc/YEJ6-D9YS>].

National Labor Relations Board has indicated its willingness to address the independent contractor definition soon, potentially leading to even more confusion and issues for the gig economy.²⁵⁸

C. Problems With Employment Definition

[86] Assembly Bill 5 and the political efforts for employee classification of gig workers has been framed as a fight between big business and the working class from the onset.²⁵⁹ The optics of the legal battles, like the \$200 million spent advocating for Proposition 22, added to the perception that AB-5 was good for workers and bad for businesses.²⁶⁰ While some news stories discussed the downsides for gig workers, they have overwhelmingly focused their assessment on how businesses would likely change their

²⁵⁷ See generally Independent Contractor Status Under the Fair Labor Standards (FLSA): Withdrawal, 86 Fed. Reg. 24,303, 24,304 (May 6, 2021) (to be codified at 29 C.F.R. pts 780, 788, 795).

²⁵⁸ See David J. Pryzbylski, *Classifying Workers as Independent Contractors May Soon Become More Complicated*, 12 NAT. L. REV 199 (July 18, 2022), <https://www.natlawreview.com/article/classifying-workers-independent-contractors-may-soon-become-more-complicated> [<https://perma.cc/JKQ8-W5RR>].

²⁵⁹ Margot Roosevelt & Suhauna Hussain, *Prop. 22 is ruled unconstitutional, a blow to California gig economy law*, L.A. TIMES (Aug. 20, 2021, 10:22 PM), <https://www.latimes.com/business/story/2021-08-20/prop-22-unconstitutional> [<https://perma.cc/VW7L-K6H4>]; Kari Paul, *California advances bill that would 'lead the world' on gig worker rights*, GUARDIAN (Aug. 30, 2019, 1:00 AM), <https://www.theguardian.com/technology/2019/aug/29/california-lawmakers-consider-bill-that-would-lead-the-world-on-gig-worker-rights> [<https://perma.cc/7DXK-X739>]; see also Johana Bhuiyan, *Uber and Lyft drivers were paid up to \$100 to protest a bill that could make them employees*, L.A. TIMES (July 15, 2019, 12:11 PM), <https://www.latimes.com/business/technology/la-fi-tn-ab5-uber-lyft-rally-sacramento-pay-20190715-story.html> [<https://perma.cc/C393-LB2H>]; Cyrus Farivar, *'Gaming the system' — Uber and Lyft face a driver reckoning in California*, NBC NEWS (June 2, 2019, 5:35 AM), <https://www.nbcnews.com/tech/tech-news/gaming-system-uber-lyft-face-driver-reckoning-california-n1012376> [<https://perma.cc/JY3P-JW2Z>].

²⁶⁰ Paul & Wong, *supra* note 197.

hiring behaviors to avoid paying the more expensive benefits that the law would require.²⁶¹ This section will focus on the tax issues which have not yet been explored in public commentary and would likely crush rideshare drivers' ability to operate.

[87] The Internal Revenue Service qualifies individuals as employees or independent contractors for the purposes of determining responsibility for paying employment taxes.²⁶² Employees pay Federal Insurance Contributions Act (FICA) taxes to Social Security and Medicare at the rates of 6.2% and 1.45%, respectively.²⁶³ Independent contractors have the downside of being both an employer and employee for themselves.²⁶⁴ This means they must pay the "self-employment tax" of 15.3%, the amount that conventional employers pay to FICA, along with the employee taxes in the

²⁶¹ See, e.g., Katy Grimes, *California Lawmakers Could Ruin the Gig Economy if AB 5 is Signed into Law*, CAL. GLOBE (Sept. 9, 2019, 3:52 PM), <https://californiaglobe.com/articles/california-lawmakers-could-ruin-the-gig-economy-if-ab-5-is-signed-into-law> [<https://perma.cc/8PHL-Z5WD>]; Deborah Lockridge, *California Bill Means 'End for Independent Trucking' in State*, TRUCKINGINFO (Sept. 11, 2019), <https://www.truckinginfo.com/340211/california-bill-means-end-for-independent-trucking-in-state> [<https://perma.cc/BGU9-3XZV>]; Allana Akhtar, *'It feels cold and heartless': Hundreds of California freelancers have been fired before the holidays over a state law meant to help Uber and Lyft drivers*, BUS. INSIDER (Dec. 18, 2019, 11:54 AM), <https://www.businessinsider.com/california-ab5-bill-left-freelancers-out-of-work-2019-12> [<https://perma.cc/VK6T-L3HP>].

²⁶² See generally I.R.S., PUB. 1779, INDEPENDENT CONTRACTOR OR EMPLOYEE 1–12 (2022), <https://www.irs.gov/pub/irs-pdf/p1779.pdf> [<https://perma.cc/8754-R3FG>] (outlining the differences between an independent contractor and employee according to the IRS) [hereinafter PUB. 1779].

²⁶³ See Amanda Dixon, *All About the FICA Tax*, SMARTASSET (Feb. 1, 2023), <https://smartasset.com/taxes/all-about-the-fica-tax#:~:text=Employers%20and%20employees%20split%20the,total%20FICA%20contribution%20of%2015.3%25> [<https://perma.cc/K5EA-E6N3>].

²⁶⁴ See PUB. 1779, *supra* note 261.

same amount.²⁶⁵ This additional tax burden is often seen as a detrimental element of being an independent contractor.²⁶⁶ However, the unique nature of rideshare driving would result in dramatic tax problems for employees.

[88] Independent contractors are burdened with the self-employment tax because they are operating as a business.²⁶⁷ Businesses are permitted a deduction against their revenues for “ordinary and necessary” expenses.²⁶⁸ “Ordinary” means “common in the type of business performed,” and “necessary” is defined as “appropriate and helpful.”²⁶⁹ If an Uber driver is running a business, ordinary and necessary expenses would include things like the vehicle the driver uses, fuel, insurance, repairs and upkeep of the vehicle, a cellular phone, and cellular service.²⁷⁰ These expenses would be allowed as deductions against the revenue generated and reduce the taxable

²⁶⁵ See *Self-Employment Tax (Social Security and Medicare Taxes)*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes#1> [<https://perma.cc/2RDV-4FJ4>].

²⁶⁶ See Independent Contractor Status Under the Fair Labor Standards (FLSA): Withdrawal, 86 Fed. Reg. at 24324; Gabrielle Canon, *What is California's AB 5? The bill could make gig economy workers like Uber drivers employees*, USA TODAY (Sept. 13, 2019, 5:44 PM), <https://www.usatoday.com/story/news/politics/2019/09/06/what-you-need-know-california-ab-5-gig-economy-bill-uber-lyft-drivers/2213459001> [<https://perma.cc/MM65-JPNF>].

²⁶⁷ *Independent Contractor Defined*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined> [<https://perma.cc/W95Y-5Q6L>].

²⁶⁸ I.R.C. § 162 (West 2021).

²⁶⁹ Cheryl A. Cunagin, *The Double Standard Under Section 162: Why the Employee Business Deduction is No Longer for Employees*, 82 KY. L.J. 771, 771 (1994).

²⁷⁰ *Tax Tips for Uber Driver-Partners: Understanding Your Taxes*, INTUIT: TURBOTAX (Jan. 12, 2023, 7:20 PM), <https://turbotax.intuit.com/tax-tips/self-employment-taxes/tax-tips-for-uber-drivers-understanding-your-taxes/L7sbLCS4> [<https://perma.cc/YAY2-9LPS>].

income of an independent contractor but not an employee.²⁷¹ The Tax Cuts and Job Act eliminated the itemizing of these expenses as well.²⁷² Even if the driver were designated as an employee, Internal Revenue Code Section 67 previously allowed for these expenses to be deducted above a 2% threshold.²⁷³

[89] While the standard deduction—the amount that all taxpayers may deduct from their taxable income—was nearly doubled with the Tax Cut and Jobs Act, the personal exemption was eliminated.²⁷⁴ A single individual without any children could deduct \$6,350 from their income or choose to itemize business expenses of driving for Uber.²⁷⁵ For tax year 2022, the standard deduction is \$12,950 with all related expenses of driving disallowed.²⁷⁶ The expenses related with driving correlate with the amount of driving—the more you drive, the more expenses you incur. Estimates show, on average, that the expenses of driving for Uber or Lyft range from about \$5.50 an hour to around \$10 an hour.²⁷⁷ Fifty weeks of full-time work

²⁷¹ I.R.C. § 62(a)(1) (West 2020).

²⁷² Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11045, 131 Stat. 2088 (2017).

²⁷³ I.R.C. § 67(a), (g) (West 2017).

²⁷⁴ I.R.S., PUB. 5307, TAX REFORM: BASICS FOR INDIVIDUALS AND FAMILIES 4, 7 (2020), <https://www.irs.gov/pub/irs-pdf/p5307.pdf> [<https://perma.cc/TD4P-FFS9>].

²⁷⁵ *Taxpayers Can Choose to Itemize or Take Standard Deduction for Tax Year 2017*, I.R.S. (Feb. 22, 2018), <https://www.irs.gov/newsroom/taxpayers-can-choose-to-itemize-or-take-standard-deduction-for-tax-year-2017> [<https://perma.cc/3VBR-L2UG>].

²⁷⁶ *IRS provides tax inflation adjustments for tax year 2022*, I.R.S. (Nov. 10, 2021), <https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2022> [<https://perma.cc/T4HH-KMJN>].

²⁷⁷ See Paula Lemar, *Uber Passenger & Driver Statistics, Demographics, Revenue, & More*, RIDESHARE GUY (Feb. 11, 2022), <https://therideshareguy.com/uber-statistics/#uber-statistics-vs-lyft-statistics> [<https://perma.cc/L8YK-H5W9>]; Brett Helling, *How Much Does it Really Cost to Drive Your Car for Uber and Lyft?*, RIDESTER (Jan. 13,

a year is two-thousand hours. At a minimum, that is \$11,000 of annual expenses a driver would not be allowed to offset for taxes. Even electric vehicles have similar expense levels.²⁷⁸

[90] Because these expenses are non-deductible, they are included in an individual's taxable income.²⁷⁹ Thus, the \$11,000 of disallowed expenses would be taxed at the marginal tax rate of the individual. For 2022, this would likely be at 22% for a full-time driver.²⁸⁰ This would be a difference of at least \$2,420 a year (\$11,000 x 22%), an amount that is likely less than the value of employee benefits AB-5 was intended to secure. Furthermore, the costs of providing these benefits have also been ignored by the media.

[91] Certainly, blocking AB-5 is in the best interests of Uber and Lyft. They would not have spent \$200 million fighting for Proposition 22 if it were not.²⁸¹ Hiring full-time employees generally costs about 30% more than hiring independent contractors, even though the hourly pay for the employees is less.²⁸² At the same time, classifying the drivers as employees

2023), <https://www.ridester.com/uber-lyft-driver-costs-and-expenses> [https://perma.cc/M4VD-CP47].

²⁷⁸ Helling, *supra* note 276.

²⁷⁹ Shopify Staff, *Understanding Nondeductible Expenses for Business Owners*, SHOPIFY (Oct. 20, 2022), <https://www.shopify.com/blog/non-deductible-expenses#:~:text=What%20are%20nondeductible%20expenses%3F,subtract%2C%20lowering%20your%20tax%20liability> [https://perma.cc/BCN9-S85E].

²⁸⁰ *IRS provides tax inflation adjustments for tax year 2022*, *supra* note 279 (noting that income from \$41,775 up to \$89,075 is taxed at 22% in 2022).

²⁸¹ Roosevelt & Hussain, *supra* note 258.

²⁸² Jennn Fusion, *Costs of an Employee Vs. Independent Contractor*, CHRON., <https://smallbusiness.chron.com/costs-employee-vs-independent-contractor-1077.html> [https://perma.cc/Y9M7-4WFC].

would significantly increase the tax revenues for California.²⁸³ While advocates for AB-5 claimed that Uber and Lyft had plenty of money to pay their drivers more, looking at their financial records does not suggest such a story.²⁸⁴ Justification for this conclusion lies in Uber's market valuation and the pittance spent on federal lobbying.²⁸⁵ A company's market value is an estimate on the amount of money a company will make in the future.²⁸⁶ Uber's initial valuation of \$82.4 billion did not mean it put that money in its bank account.²⁸⁷ While Uber does have \$4.3 billion in cash on hand, it has lost over \$24.9 billion from 2019 through 2022.²⁸⁸ Furthermore, Uber's federal lobbying consisted of only \$2.3 million in 2018 and \$2.06 million

²⁸³ See Celine McNicholas & Margaret Poydock, *How California's AB5 protects workers from misclassification*, ECON. POL'Y INST. (Nov. 14, 2019), <https://www.epi.org/publication/how-californias-ab5-protects-workers-from-misclassification/> [<https://perma.cc/38UY-HL73>] (noting that the state estimates that up to \$7 billion of tax revenue is lost due to misclassifying people as independent contractors instead of employees); see also Katie Sobko & Trenton Bureau, *Employee or independent contractor? The difference can affect your wage and NJ benefits*, NORTHJERSEY.COM (May 8, 2022, 9:05 PM), <https://www.northjersey.com/story/news/new-jersey/2022/05/07/independent-contractor-vs-employee-difference-nj-unemployment-wages/7075373001> [<https://perma.cc/UY37-RV2A>] (noting that New Jersey estimated it lost out on about half a billion of tax contributions in 2020 due to worker misclassifications).

²⁸⁴ See Paul, *supra* note 258.

²⁸⁵ *Id.*

²⁸⁶ See Douglas K. Pearce, *Stock Prices and the Economy*, 68 ECON. REV. 7, 8 (1983).

²⁸⁷ Lora Kolodny, *Uber prices IPO at \$45 per share, toward the low end of range*, CNBC (May 10, 2019, 10:11 AM), <https://www.cnbc.com/2019/05/09/uber-ipo-pricing.html> [<https://perma.cc/D5G8-WEVY>].

²⁸⁸ *Uber Technologies, Inc., Company Financials*, YAHOO! FIN., <https://finance.yahoo.com/quote/UBER/financials/> [<https://perma.cc/HZ29-GKSQ>].

in 2021.²⁸⁹ There are at least one million Uber drivers in the United States²⁹⁰ and as many as five million worldwide.²⁹¹ Uber is not spending extravagant amounts that could otherwise be spent on their drivers.²⁹² Compared to the number of drivers that use the service, their lobbying expenditures are small and are not a fair representation of the financial wherewithal of the company.²⁹³

[92] Every business has limited resources. Tom Brady famously took smaller contracts in order to free up cash to pay other players and keep his team competitive.²⁹⁴ This paper is not contending that drivers need to take

²⁸⁹ Paul, *supra* note 258; Rebecca Bellan, *Uber shareholders to vote on lobbying disclosure proposal*, TECHCRUNCH (May 9, 2022, 11:56 AM), <https://techcrunch.com/2022/05/09/uber-fully-disclose-lobbying-efforts/> [<https://perma.cc/TL6P-MVR9>].

²⁹⁰ *A First Step Toward A New Model For Independent Platform Work*, UBER: NEWSROOM (Aug. 10, 2020), <https://www.uber.com/newsroom/working-together-priorities> [<https://perma.cc/U9RQ-4FC9>].

²⁹¹ Mansoor Iqbal, *Uber Revenue and Usage Statistics (2023)*, BUS. OF APPS (Jan. 9, 2023), <https://www.businessofapps.com/data/uber-statistics> [<https://perma.cc/WPS3-QFZY>].

²⁹² See generally Kellen Browning, *Uber posts record revenue but loses nearly \$2 billion on investments*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/business/uber-quarterly-earnings.html> [<https://perma.cc/BHF2-YAQR>] (quoting Uber's CEO as saying that the company would be focused on cutting costs to maximize profitability).

²⁹³ See Bellan, *supra* note 288 (reporting that in 2021, Uber spent \$2,060,000 in U.S. federal lobbying and \$3,933,353 at the U.S. state and local levels).

²⁹⁴ See Scott Davis & Cork Gaines, *Tom Brady sacrificed at least \$60 million in his career helping the Patriots build Super Bowl-winning rosters*, BUS. INSIDER (Mar. 17, 2020, 2:32 PM), <https://www.businessinsider.com/tom-brady-contract-discounts-patriots-bargain-2018-7?op=1> [<https://perma.cc/8C7Z-KXUR>].

one for the team to help the business. In fact, it fully recognizes that Uber has long misled drivers and cities on the benefits of driving for the company.²⁹⁵ The contention is that Uber is not as well off as advocates of AB-5 claim.²⁹⁶ Uber's current market value is about three-fourths what it was at its initial public offering.²⁹⁷ As discussed above, Uber has only

²⁹⁵ Elahe Izadi, *Mark MacGann, former top executive, comes forward as Uber Files leaker*, WASH. POST (July 11, 2022, 2:11 PM), https://www.washingtonpost.com/media/2022/07/11/uber-files-whistleblower-mark-macgann/?utm_campaign=wp_main&utm_medium=social&utm_source=twitter [<https://perma.cc/F4HZ-EDVZ>] (reporting that whistleblower documents show the aggressive tactics to gain market share in Europe through heavily subsidized drivers and promises of economic upward mobility); Michael Sainato, *'They treat us like crap': Uber drivers feel poor and powerless on eve of IPO*, GUARDIAN (May 7, 2019, 2:00 AM), <https://www.theguardian.com/technology/2019/may/07/uber-drivers-feel-poor-powerless-ipo-looms> [<https://perma.cc/HA3R-D5T9>] (reporting on allegations by Uber drivers of the company initially luring them with promises of good wages which were later reduced). *But see, e.g.*, Tyler Theile, *How much do rideshare drivers earn? More than you might think.*, CHI. SUN-TIMES (Mar. 24, 2022, 6:00 PM), <https://chicago.suntimes.com/2022/3/24/22993114/rideshare-drivers-uber-earnings-analysis-aeg-tyler-theile-op-ed> [<https://perma.cc/EQH2-3PFF>] (finding that in 2021, Uber drivers' wages had increased above what they were prior to the pandemic—up to 35 dollars per hour); Harry Campbell, *How Much Do Uber Drivers Make? Pay & Salary [Review]*, RIDESHARE GUY (Dec. 26, 2022), <https://therideshareguy.com/how-much-do-uber-drivers-make> [<https://perma.cc/76NJ-GGJH>] (asserting that Uber drivers can earn up to \$50 per hour, depending on the individual driver's location and strategies).

²⁹⁶ *See, e.g.*, Faiz Siddiqui, *California Senate passes ride-hail bill that has divided Democrats over the future of Uber and Lyft drivers*, WASH. POST (Sept. 11, 2019, 3:40 PM), <https://www.washingtonpost.com/technology/2019/09/11/how-california-rideshare-bill-has-divided-democrats-over-future-uber-lyft-drivers/> [<https://perma.cc/DH7T-LK2T>].

²⁹⁷ *See Uber Technologies, Inc. (UBER)*, YAHOO! FIN., <https://finance.yahoo.com/quote/UBER> [<https://perma.cc/P4AW-LQKT>] (stating that Uber's current stock price is \$34.90 per share); Michael J. de la Merced & Kate Conger, *Uber I.P.O. Values Ride-Hailing Giant at \$82.4 Billion*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/technology/uber-ipo-stock-price.html#:~:text=Uber%20priced%20its%20public%20offering,company%20at%20about%20%2482.4%20billion> [<https://perma.cc/V5ZQ-SCGJ>] (reporting that Uber's stock price at the time of its IPO was \$45 per share).

posted a profit in one year of its existence, having lost close to \$20 billion since 2016.²⁹⁸ During the COVID-19 pandemic, Uber laid off 25% of its workforce²⁹⁹ and announced a hiring freeze where “hiring will be treated as a privilege.”³⁰⁰ If Uber were to pay the additional costs associated with converting its drivers to employees, it may not remain a viable business, putting the drivers out of work all together.³⁰¹

[93] Estimates suggest that converting these drivers to employees would cost Uber an extra \$500 million a year.³⁰² Advocates’ arguments for supporting the employee classification rely on a lack of economic literacy, and “it is not yet clear if these costs will be passed along to consumers, causing higher fees to use ride sharing apps in California.”³⁰³ With rising costs, Uber would be forced to either raise prices for consumers or raise the

²⁹⁸ See *Uber Technologies Inc.*, WALL ST. J.: MKTS., <https://www.wsj.com/market-data/quotes/UBER/financials/annual/balance-sheet> [<https://perma.cc/P3SY-XPNX>]; Hubert Horan, *The Uber Bubble: Why Is a Company That Lost \$20 Billion Claimed to Be Successful?*, PROMARKET (Nov. 20, 2019), <https://www.promarket.org/2019/11/20/the-uber-bubble-why-is-a-company-that-lost-20-billion-claimed-to-be-successful> [<https://perma.cc/HNY7-WHM4>].

²⁹⁹ Sara Ashley O'Brien, *Uber has now cut 25% of its staff during coronavirus pandemic*, CNN: BUS. (May 18, 2020, 2:18 PM), <https://www.cnn.com/2020/05/18/tech/uber-layoffs-pandemic/index.html> [<https://perma.cc/VR7C-NBG2>].

³⁰⁰ Weilun Soon, *Lyft joins Uber in 'significantly' slowing hiring and cutting budgets, but promises no layoffs*: *WSJ*, BUS. INSIDER (May 25, 2022, 2:59 AM), <https://www.businessinsider.com/lyft-joins-uber-hiring-freeze-budget-cuts-but-no-layoffs-2022-5?op=1> [<https://perma.cc/LA35-APZ7>].

³⁰¹ See *Uber Technologies Inc.*, *supra* note 297 (showing a declining share price as well as three consecutive years of losses).

³⁰² Tyler Sonnemaker, *Uber and Lyft say the battle over AB-5 is about preserving flexibility for part-time gig workers. The reality is their businesses have become dependent on full-time drivers and they can't afford to pay them like employees.*, BUS. INSIDER (Aug. 21, 2020, 5:32 PM), <https://www.businessinsider.com/uber-lyft-ab5-fight-reveals-dependence-full-time-drivers-2020-8?op=1> [<https://perma.cc/C2LF-8DQM>].

³⁰³ Paul, *supra* note 258.

company's share it takes from drivers. If Uber does not raise prices or its commission, it would likely lose even more money. Uber charging customers higher fares would likely result in fewer riders, while taking a larger cut from drivers would likely result in fewer drivers. This would likely result in either higher supply costs and reduced demand, or decreased supply with increased costs to meet the new supply. Irrespective of how Uber would react to the price of their product, profitability would likely drop even more. A company that has been impressively hemorrhaging cash for the full span of its existence is not long for the business world.

D. How Regulators Should View Gig Economy Workers

[94] The *Dynamex* decision and Assembly Bill 5 were the result of regulators forcing their views of what the gig economy should be rather than accepting what it is. *Dynamex* created a new standard for employment law with little regard for the practical realities of a changing workplace due to technological advancements.³⁰⁴ Though the decision to punish *Dynamex* for misclassifying their drivers was appropriate, the reasoning to get to that conclusion is flawed. The California Supreme Court Chief Justice wrote that an independent contractor “has been understood to refer to an individual who independently has made the decision to go into business for himself or herself.”³⁰⁵ This is relevant to the *Dynamex* case, but it is not relevant to gig economy workers. *Dynamex* changed the rules for its drivers in 2004 by making them employees, but then a policy shift caused them to be classified as independent contractors.³⁰⁶ They did not make the conscious decision to go into business for themselves as independent contractors—it was forced upon them.³⁰⁷

³⁰⁴ See Terri Bui, *The Codification of Dynamex and Its Effect on Gig Economy Businesses*, KAHANA FELD (Jul. 12, 2019), <https://kahanafeld.com/2019/07/12/codification-dynamex-effect-gig-economy-businesses> [<https://perma.cc/2S6Z-9DJ4>].

³⁰⁵ *Dynamex Operations W. v. Super. Ct.*, 416 P.3d 1, 39 (Cal. 2018).

³⁰⁶ *Id.* at 5–6.

³⁰⁷ *See id.*

[95] Uber drivers, however, typically make the decision to drive for Uber knowing that they will be independent contractors and what that will entail. The court presumes that an independent contractor would advertise. But franchises do not advertise on their own—they rely upon the franchisor’s advertising,³⁰⁸ just like Uber as a company advertises for the benefit of the drivers. As discussed in section IV(b), the “ABC” test does not fit within the practical framework of the gig economy either.³⁰⁹ While the *Dynamex* court may be forgiven for AB-5’s reliance in application to the gig economy as Dynamex is a conventional shipping company, creating massive new rules with the “ABC” test changed decades of precedent and will undoubtedly have unforeseen consequences.³¹⁰ The court should not be forgiven for failing to have such foresight and should leave the lawmaking to the legislators.

[96] Gig economy workers choose their jobs because of the flexibility and ease of entry.³¹¹ As easy as it is to get into a gig, it is nearly as easy to get out of one as well.³¹² Uber drivers entered the business knowing what it was. Now, they want to change it when leaving it is an even easier route.

³⁰⁸ See *id.* at 39.

³⁰⁹ See Shannon Liss-Riordan & Anastasia Doherty, *The Ongoing Battle of Worker Classification*, AM. BAR ASS’N (Nov. 19, 2021), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2021-issue/ongoing-battle-worker-classification/ [<https://perma.cc/V9ZK-7V2J>].

³¹⁰ See generally Gregg Fisch et. al, *Unintended consequences of Dynamex decision could affect California’s health care employers*, BUS. J.: S.F. BUS. TIMES (Oct. 8, 2019), <https://www.bizjournals.com/sanfrancisco/news/2019/10/08/unintended-consequences-of-dynamex-decision-could.html> [<https://perma.cc/QE3N-287K>] (“If the court concludes that the hospital is misclassifying its workers as independent contractors, the hospital may face multiple misclassification risks, such as a doctor or other service provider suing the hospital for employment taxes, employee benefit payments, and back wages.”).

³¹¹ See Atmore, *supra* note 188, at 908–09.

³¹² See *id.*

Legislators should not try to remake the business or the business model—that is not their role.³¹³ While local lawmakers have a duty to protect employees and uphold employees’ rights, erroneously classifying independent contractors as employees is disingenuous and further compromises the right of people to negotiate their for their own labor.³¹⁴ The mischaracterization of Uber’s business, be it purposeful or incidental, is problematic. Legislators and courts need to understand how businesses work even as they implement new technologies. Only through understanding how businesses work can the regulators act to support both businesses and workers. Absent such an understanding, the regulators try to make Uber what they want it to be and ignore what it is.

V. CONCLUSION

[97] While Chief Justice Roberts saw one of the many errors of the *Wayfair* decision, the majority decided to usurp the role of Congress by eliminating the physical presence rule. In doing so, it erroneously assumed that Congress’s ability to weigh differing interests would result in the correct, or even constitutional, response.³¹⁵ As demonstrated with the paper’s discussion of CFAA and AB-5, legislative initiatives reacting to shifting technological advancements can lead to enduring and poor laws.³¹⁶ The CFAA continues to outstay its welcome. Assembly Bill 5 is the will of the California legislature but no one else, and it does not seem willing to accept its fate.

[98] South Dakota’s legislature knew it was violating the Constitution, and the Supreme Court rewarded it. It freely admitted, in the text of the law,

³¹³ Paul, *supra* note 258 (“[AB-5] may ruin the way [Uber and Lyft] are currently functioning, and might force them to change their business model”).

³¹⁴ Spengler, *supra* note 251.

³¹⁵ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting).

³¹⁶ *See McGowan, supra* note 61, at 19.

that “‘a decision from the Supreme Court of the United States abrogating its existing doctrine’ would be necessary for the Act to be enforced.”³¹⁷ As Senator Ted Cruz pointed out in his amicus curiae brief in *Wayfair*, South Dakota should have petitioned Congress to act.³¹⁸ Instead, those voting for the law willfully and admittedly violated their oath of office and should have their status as members of the legislature revoked.³¹⁹

[99] State legislatures were testing the extremes of rational tax policy before *Wayfair* through various methods.³²⁰ The Court’s decision to eliminate the physical presence test in exchange for economic presence has resulted in the adoption of at least six different thresholds with differing standards in each state for which transactions count against the threshold.³²¹ The Court exceeded its role with this decision in favor of state governments and abdicated the purpose of the Commerce Clause to increase state coffers. With the power to tax out-of-state entities that cannot resist, states may soon implement exorbitant taxes, such as those for hotel guests.³²²

[100] Reactionary decisions on technological advancements have only led to more problems and more confusion. The current issues the CFAA attempts to address are already properly addressed with centuries-old

³¹⁷ Brief for Senator Ted Cruz et al. as Amici Curiae Supporting Respondents at 2, *Wayfair*, 138 S. Ct. 2080 (No. 17-494) [hereinafter Cruz Brief].

³¹⁸ *Id.* at 4.

³¹⁹ S.D. CONST. art. III, § 8.9.

³²⁰ See Kim, *supra* note 173, at 202 (discussing the variety of creative nexus rules enacted by states leading up to the *Wayfair* decision).

³²¹ *Economic Nexus: Find out where you're on the hook to collect and file sales tax*, AVALARA, <https://www.avalara.com/us/en/learn/guides/state-by-state-guide-economic-nexus-laws.html#economicnexus thresholds> [<https://perma.cc/9G9P-X4V3>].

³²² See Cruz Brief, *supra* note 316, at 10–11 (suggesting that those who do not have representation in a state are unable to argue against high taxes such as the 14.8% hotel tax in Washington, D.C.).

contract law.³²³ The purported problems of gig economy workers are undertaken as a matter of choice, and again, can be understood through contract law.³²⁴ Ignoring the burdens on business in favor of easing the claims of state taxing authorities flies in the face of the purpose of the Commerce Clause.³²⁵

[101] Despite the popular saying, modern problems do not always require modern solutions. The solutions likely already exist. Unfortunately, existing solutions are not politically expedient. Actions get one elected, and greater actions get one ever greater positions. It is a better campaign promise to say you will give thousands of Uber drivers health insurance than tell them that they need to negotiate for what they want on their own. This creates a disincentive to learn and understand the technology as reaction is rewarded and explanation is not. Ultimately, the economy will pay the price as innovation is stifled through increased regulation, confusion, and financial burden.

³²³ See Adam G., *The Computer Fraud and Abuse Act is Stifling Security and Individual Rights*, MEDIUM: DIGIT. DIPL. (July 15, 2020), <https://medium.com/digital-diplomacy/the-computer90-p-fraud-and-abuse-act-is-stifling-security-and-individual-rights-51ffc25bf784> [<https://perma.cc/Z45R-CCSZ>].

³²⁴ See *The Gig Economy and the Law: What You Need to Know*, FORAGE (Oct. 3, 2022), <https://www.theforage.com/blog/basics/the-gig-economy-and-the-law> [<https://perma.cc/9D4P-YJKA>].

³²⁵ INST. ON TAX'N & ECON. POL'Y, WHY LARGE CORPORATIONS CAN DO BUSINESS IN YOUR STATE TAX-FREE 1 (2006), <https://itep.sfo2.digitaloceanspaces.com/physicalpresence.pdf> [<https://perma.cc/8AX3-MEPY>].