Tailoring Class Actions to the On-Demand Economy

JOSEPH A. SEINER*

In O'Connor v. Uber Technologies, Inc.*, a federal district court permitted a class action case to proceed on the question of whether 160,000 drivers were misclassified by their employer as independent contractors rather than employees. The case has garnered widespread interest, making headlines across the country. Yet, it represents only one of many class action cases currently pending against technology companies in the modern economy. Indeed, similar systemic claims have already been brought against Yelp, GrubHub, Handy, CrowdFlower, Amazon, and many others.*

The courts have struggled in their efforts to address the proper scope of class cases brought against corporations in the on-demand economy. This is likely the result of a lack of clarity in this area as well as the unique fact patterns that often arise with technology-sector claims. Nothing has been written on this issue in the academic literature to date, and this Article seeks to fill that void in the scholarship.

Navigating the statutes, case law, and procedural rules, this Article proposes a workable, five-part framework for analyzing systemic claims brought in the technology sector and sets forth a model for the courts and litigants to follow when evaluating the proper scope of these cases. This Article seeks to spark a dialogue on this important—yet unexplored—area of the law.

"The guys who invented the steam engine, if you met them you might say they were a bunch of arrogant assholes. But the steam engine still changed the world. It doesn't matter."

– Bill Gates[1]

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* Professor of Law, University of South Carolina School of Law. The author would like to thank the Seton Hall Law School for the opportunity to present this Article as part of the Employment & Labor Law Scholars' Forum held in honor of Michael Zimmer. The author would also like to thank those participants at the Labor & Employment Law Colloquium held at the University of Indiana School of Law for their helpful thoughts on pending legal issues in the on-demand economy. Special thanks to Benjamin Means, Derek Black, and the Honorable Mark Bennett for their helpful input on this Article. This Article benefited greatly from the extraordinary research efforts of Arden Lowndes, Megan Clemency, Chelsea Evans, Elliot Condon, and Emily Rummel.

[1] *Q&A: Robots, Uber and the Role of Government*, FIN. TIMES (June 25, 2015), http://www.ft.com/cms/s/0/ed5ec9c4-1b37-11e5-8201-cbdb03d71480.html#axzz3trC6MmtG [https://perma.cc/EDK3-GN4L].

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I. INTRODUCTION

For better or for worse, Uber and Lyft have changed the world. These companies—which provide a technological platform that allows just about anyone to drive for hire—represent an emerging (but quite controversial) modern economy.[2] This growing industry faces enormous legal challenges.[3] The class action litigation brought in *O'Connor v. Uber Technologies, Inc.*—

[2] *See, e.g.*, *Apply Now*, LYFT, https://www.lyft.com/drive-with-lyft [https://perma.cc/8ECX-6LB9]; *Driving Jobs vs Driving with Uber*, UBER, https://www.uber.com/driver-jobs/ [https://perma.cc/L7ZB-73P8].

[3] Marisa Kendall, *Uber Battling More than 70 Lawsuits in Federal Courts*, MERCURY NEWS (July 4, 2016), http://www.mercurynews.com/business/ci_30091649/uber-faces-attacks-multiple-fronts [https://perma.cc/TEK9-B94C].

and certified by a California federal court in late 2015—alleges that the company has been misclassifying its workers since its inception.[4] The plaintiffs maintain that they should be treated as employees, rather than independent contractors, which would entitle them to a higher rate of pay and additional benefits—putting the company at risk for additional liability.[5] The issue continues to make headlines as more technology companies join the growing number of businesses involved in this type of litigation.[6] Worker misclassification suits have even found their way to the on-demand food industry as class action cases have been brought against GrubHub and DoorDash.[7]

Individual cases brought against these emerging companies are entirely appropriate. But the class action mechanism—the aggregation of each of the individual claims into a single case—should only be allowed after much more careful scrutiny. Class action litigation on the independent

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[4] *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *1, *37 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part plaintiffs' motion for class certification); O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 994 (N.D. Cal. 2014) (order granting defendant's motion for judgment on the pleadings) (alleging misclassification of workers on a systemic basis under the California Labor Code).

[5] *See O'Connor*, 2015 WL 5138097, at *1; *O'Connor*, 58 F. Supp. 3d at 994.

[6] *See, e.g.*, Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 934 (N.D. Cal. 2015) ("Plaintiffs were classified by Instacart as independent contractors. They claim, however, that they are Instacart's employees . . . ." (citation omitted)); Iglesias v. Homejoy, Inc., No. 15-cv-01286-EMC, 2015 WL 5698741, at *1 (N.D. Cal. Sept. 29, 2015) (order granting plaintiff's motion for entry of default) ("The complaint alleges that Homejoy[, an on-demand cleaning services company,] violated its employees' rights . . . by . . . misclassifying cleaners as independent contracts . . . ."); Loewen v. Lyft, Inc., 129 F. Supp. 3d 945, 956 (N.D. Cal. 2015) (alleging wrongful classification of drivers as contractors instead of employees); Zenelaj v. Handybook Inc., 82 F. Supp. 3d 968, 970 (N.D. Cal. 2015) (alleging in a class action that Handybook was deliberately misclassifying its employees as independent contractors); First Amended Collective & Class Action Complaint & Jury Demand ¶¶ 1–2, Singer v. Postmates Inc., No. 4:15-cv-01284 (N.D. Cal. Mar. 19, 2015) [hereinafter Singer Class Action Complaint] (alleging the delivery service Postmates incorrectly classified couriers as independent contractors rather than employees); Class Action Complaint & Jury Demand ¶¶ 1–2, Taranto v. Washio, Inc., No. CGC-15-546584 (Cal. Super. Ct. June 29, 2015) [hereinafter Taranto Class Action Complaint] (alleging that Washio laundry service, which "provide[d] dry cleaning and wash and fold delivery service through a mobile phone application," misclassified Washio drivers as independent contractors); Amended Class Action Arbitration Demand ¶¶ 1–2, Tang v. Shyp, Inc., No. 01-15-0004-0358 (Am. Arbitration Ass'n July 17, 2015) (alleging that on-demand shipping service, Shyp, misclassified couriers as independent contractors); Patrick Chu, *Labor Cases Filed Against Shyp, Washio, Postmates*, S.F. BUS. TIMES (July 1, 2015), http://www.bizjournals.com/sanfrancisco/news/2015/07/01/shyp-washio-postmates-sued-uber-lyft-caviar.html [https://perma.cc/7UVX-42T8].

[7] Class Action Complaint ¶ 2, Kissner v. DoorDash, Inc., No. CGC-15-548102 (Cal. Super. Ct. Sept. 23, 2015) [hereinafter Kissner Class Action Complaint]; Class Action Complaint ¶ 2, Tan v. GrubHub, Inc., No. CGC-15-548103 (Cal. Super. Ct. Sept. 23, 2015) [hereinafter Tan Class Action Complaint].

contractor/employee issue in cases that involve modern technologies is often self-defeating because it asks a "one-size-fits-all" question.[8] There is often no uniform answer to this question for the extraordinarily varied workers who are typically involved.

The *O'Connor* case does not stand as an anomaly. CrowdFlower recently settled a case for approximately a half million dollars on the employee/independent contractor issue.[9] And a case was recently dismissed by another federal district court where plaintiffs argued that Yelp reviewers should be considered employees.[10] We are beginning to see a piling-on effect with these cases. Many of these companies in the so-called "gig economy" are highly successful and represent an irresistible target.[11] While the question of whether the workers are employees or independent contractors in these cases is a fair one to ask, there is frequently no single, broad-based answer to the question. The issue that we are seeing is not new. Over seven decades ago, U.S. Supreme Court Justice Wiley Blount Rutledge wrote, "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."[12] This problem persists today, and we must be careful to handle it in a way that does not undermine job growth, technological advancement, or worker flexibility.

This Article seeks to provide much-needed clarity to this confused area. This Article addresses the nuances of the on-demand economy, and situates them within the context of the class action mechanism. Navigating this area of the law—as well as the Supreme Court's recent decision on systemic litigation in *Wal-Mart Stores, Inc. v. Dukes*,[13] this Article proposes a framework for analyzing whether aggregate litigation is appropriate for gig-sector cases on the employee/independent contractor question.

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[8] *See* Amy L. Groff et al., *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees: Facing the Challenges to Employment Law Presented by Seemingly Intermediary Platforms of the Modern On-Demand Economy*, 16 COMPUTER L. REV. INT'L 166, 171 (2015), http://www.klgates.com/files/Publication/04dcde30-9c10-4003-b663-f7f5f2cdec32/Presentation/PublicationAttachment/805ddc72-69b2-426b-ad51-fe92be45434e/CLRI_2016.pdf [https://perma.cc/5BEH-NG7Q].

[9] *See* Otey v. CrowdFlower, Inc., No. 12-cv-05524-JST, 2014 WL 1477630, at *1–2 (N.D. Cal. Apr. 15, 2014) (order denying motion for approval of settlement without prejudice).

[10] Jeung v. Yelp, Inc., No. 15-cv-02228-RS, 2015 WL 4776424, at *1, *3 (N.D. Cal. Aug. 13, 2015) (order granting motion to dismiss, granting motion to strike, denying motion for sanctions, and denying motion for preliminary certification of collective action).

[11] *See, e.g.*, Tricia Gorman & Rebecca Ditsch, *Q&A: The Uber Settlement and Its Impact on Worker Classification in the Gig Economy*, WESTLAW J. COMPUTER & INTERNET, May 20, 2016,*1, *2, *10.

[12] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

[13] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

Through an extensive review of the case law, federal statutes, and on-demand economy, this Article provides a model for the courts and litigants to follow when evaluating whether there is sufficient "commonality" under recent Supreme Court precedent to proceed in a class action case. This framework sets forth five different elements that the courts and litigants should consider when evaluating class action litigation on the employee/independent contractor question. The proposed test helps determine whether aggregate litigation should be pursued in these technology-sector cases by exploring the importance of five critical components of the working relationship—the time, place, frequency, and manner of the work performed, as well as the pricing model of the business involved.

There has been very little written to date in the academic literature on the question of the independent contractor/employee test for on-demand cases.[14] This Article synthesizes the cases, regulations, and statutes to bring some structure to this confused area. Where these cases are permitted to proceed, the framework offered here also provides helpful guidance on the proper size and scope of the class involved.

This Article also takes the next important step of applying the proposed model to the class action in *O'Connor v. Uber*.[15] It explains how the framework would apply in that particular context, outlining the importance of each of the elements in the test. The problem here is much broader than *O'Connor* and involves the entire technology sector. Given the high-profile nature of this class certification decision, as well as its likely influence on other cases, however, *O'Connor* provides a useful example for explaining how the model outlined here should be applied.[16]

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[14] *Cf.* Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1515 (2016) (presenting a new approach to the problem of worker misclassification). There has been excellent recent scholarship on class actions more generally. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 755–58 (2013) (addressing recent trends in aggregate litigation); Arthur R. Miller, Keynote Address, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014) (discussing the status of class action cases); *cf.* Megan Carboni, Note, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 11, 47 (2016), http://scholarship.richmond.edu/jolt/vol22/iss4/2/ [https://perma.cc/YX7S-NTYQ] (proposing a third category of work, the "dependent contractor" in the sharing economy).

[15] O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part plaintiffs' motion for class certification).

[16] *See* Bloomberg News, *California Judge Sides with Ex-Uber Driver over Arbitration Clause*, WASH. POST (Sept. 21, 2015), https://www.washingtonpost.com/business/economy/california-judge-sides-with-ex-uber-driver-over-arbitration-clause/2015/09/21/7e54031a-6087-11e5-8e9e-dce8a2a2a679_story.html [https://perma.cc/G6GS-5WRC]; Chelsey Dulaney, *Uber Ruling Adds More Drivers to Class-Action Suit*, WALL STREET J., http://www.wsj.com/articles/uber-ruling-adds-more-drivers-to-class-action-suit-1449699041 [https://perma.cc/AQ9A-7QTX] (last updated Dec. 9, 2015); Mike Isaac et al., *Seattle*

This is not to say that the proposed framework is exhaustive; indeed, the five factors are meant only to provide general, straightforward guidelines for the courts and litigants to consider to better focus the inquiry in this area. As cases continue to emerge in this area, and as other scholars begin to weigh in on the topic, the parameters of the test proposed here can be further revisited and refined. Similarly, the weight given to the factors suggested here will vary depending upon the facts of the particular case. This Article does not examine the well-traveled question of *how* the independent contractor/employee test should be analyzed.[17] Rather, it addresses the more expansive issue of how to shape the proper scope of the class often involved in this type of litigation.

This Article proceeds in several parts. In Part II, this Article sets forth the general guidelines for aggregate litigation under the Federal Rules of Civil Procedure. This Part further addresses the Supreme Court's recent litigation in *Wal-Mart Stores, Inc. v. Dukes*, explaining how the Court has redefined the standard for "commonality" under the Federal Rules. Part III examines the most important statute for worker classification issues—the Fair Labor Standards Act—which creates the federal standards for wage/hour claims. Part IV explores the federal district court decision in *O'Connor v. Uber*, which permitted the aggregation of a class on the worker classification issue. Part V examines the potential harm of the *O'Connor* analysis, the need for more clarity in this area, and other class action litigation currently pending in the gig sector. Part VI proposes a framework for analyzing whether class action claims should be permitted to proceed in technology-sector cases, and applies the analysis to the *O'Connor* decision. Finally, Part VII explores how Federal

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Considers Measure to Let Uber and Lyft Drivers Unionize, N.Y. TIMES (Dec. 13, 2015), http://www.nytimes.com/2015/12/14/technology/seattle-considers-measure-to-let-uber-and-lyft-drivers-unionize.html?_r=0 [https://perma.cc/KT6H-HSRE]; Dan Levine, *In U.S. Driver Lawsuit, Uber Must Live with Class Action Order for Now*, REUTERS (Nov. 17, 2015), http://www.reuters.com/article/us-uber-tech-classaction-idUSKCN0T62IA20151117 [https://perma.cc/HBH5-D9R5]; Tracey Lien, *Uber Sued by Drivers Excluded from Class-Action Lawsuit*, L.A. TIMES (Jan. 4, 2016), http://www.latimes.com/business/technology/la-fi-tn-uber-lawsuit-driver-misclassification-20160104-story.html [https://perma.cc/CKJ7-KSSY]; Laura Lorenzetti, *Everything to Know About the Uber Class Action Lawsuit*, FORTUNE (Sept. 2, 2015), http://fortune.com/2015/09/02/uber-lawsuit/ [https://perma.cc/4KDQ-MU9G]; Reuters, *Judge Expands Driver Class-Action Lawsuit Against Uber*, N.Y. POST (Dec. 9, 2015), http://nypost.com/2015/12/09/judge-expands-driver-class-action-lawsuit-against-uber/ [https://perma.cc/29FB-X6BM]; Joel Rosenblatt & Pamela MacLean, *Uber Judge Taps Brakes on California Drivers' Suit Outcome*, BLOOMBERG (Dec. 22, 2015), http://www.bloomberg.com/news/articles/2015-12-23/uber-wins-conditional-halt-to-part-of-california-drivers-lawsuit [https://perma.cc/DJ34-X3DW]; Katy Steinmetz, *Judge Lets Drivers' Class Action Lawsuit Against Uber Go Forward*, TIME (Sept. 1, 2015), http://time.com/4019439/uber-judge-class-action/ [https://perma.cc/8G2F-6T3R]; Matt Thompson, *The Class-Action Lawsuit Against Uber Is a Case to Watch*, ATLANTIC (Sept. 7, 2015), http://www.theatlantic.com/notes/2015/09/the-class-action-lawsuit-against-uber-is-a-case-to-watch/404116/ [https://perma.cc/9X2G-PNB4].

[17] *See infra* Part III (discussing how workers are classified under wage/hour law and setting forth scholarship in this area).

Rule of Civil Procedure 23(c)(4)—issue class certification—can affect the analysis of class action cases in the on-demand economy.

II. CLASS ACTIONS GENERALLY—SYSTEMIC LITIGATION

Class action litigation is a complex process that has evolved over time. This Part examines the basic rules of aggregate litigation and explores how the Supreme Court has refined those rules.

A. *The Rules and Benefits of Systemic Litigation*

The class action mechanism has had a controversial history over the years.[18] The benefits of the class action model are numerous. It provides the ability to resolve hundreds or thousands of legal claims as part of a single piece of litigation, thus substantially streamlining the judicial process.[19] Through aggregation, the courts and parties can achieve judicial economies which translate into substantial savings of time and money.[20] By resolving a

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[18] *See* Jeffrey H. Dasteel & Ronda McKaig, *What's Money Got to Do with It?: How Subjective, Ad Hoc Standards for Permitting Money Damages in Rule 23(b)(2) Injunctive Relief Classes Undermine Rule 23's Analytical Framework*, 80 TUL. L. REV. 1881, 1882–83 (2006) (discussing controversy surrounding the standard used for determining if a limitation on classes seeking injunctive or declaratory relief applies); *see also* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 545–51 (2006) (discussing the issues in "litigating complex claims" in class actions); Alison Frankel, *The Supreme Court's Next Big Class Action Controversy: Ascertainability*, REUTERS (Jan. 4, 2016), http://blogs.reuters.com/alison-frankel/2016/01/04/the-supreme-courts-next-big-class-action-controversy-ascertainability/ [https://perma.cc/XY9X-YLHG] (arguing that upcoming cases before the Supreme Court require it to decide on an ascertainability standard for class action suits). *See generally* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (exploring the controversy surrounding pleading standards following the *Twombly* and *Iqbal* Supreme Court decisions).

[19] *See* Redish & Kastanek, *supra* note 18, at 545–46.

[20] *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 477–78 (noting that aggregation, at least in theory, allows for lower individual costs); *cf.* Buford v. Am. Fin. Co., 333 F. Supp. 1243, 1250 (N.D. Ga. 1971) ("One of the purposes of the class action is to achieve economies of time and effort . . . ."); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 432 (2014) ("[C]lass action procedure is lauded because it arguably supports the goals of Rule 1 to achieve the just, speedy, and efficient resolution of large-scale complex litigation."); Janet Cooper Alexander, Presentation at the Debates over Group Litigation in Comparative Perspective Conference in Geneva, Switzerland, An Introduction to Class Action Procedure in the United States (July 21–22, 2000) (abstract available at https://law.duke.edu/grouplit/papers/classactionalexander.pdf [https://perma.cc/D5S7-ZU4J]) (discussing aggregate litigation).

question only once, the entire process becomes far more efficient and much less cumbersome.[21]

At the same time, aggregating claims into a single lawsuit presents numerous drawbacks. There is a concern that this type of systemic litigation will strip some potential plaintiffs of their day in court.[22] The Supreme Court has held that—if done properly—class action litigation can still protect the rights of aggrieved persons that are foregoing the opportunity for individual litigation.[23]

Rule 23 of the Federal Rules of Civil Procedure was put in place to help realize the many benefits of the class action mechanism while still preserving these rights of individuals.[24] Under Rule 23(a), a proposed class must satisfy a number of specific requirements to be permitted to proceed. Specifically, the purported class must demonstrate sufficient numerosity, typicality, commonality, and adequacy of representation.[25] Through these requirements, the Rules balance the competing benefits of systemic and individual litigation and allow only the more appropriate cases to be aggregated in the courts.[26]

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[21] S*ee* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 36 (2011), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1054&context=nulr_online [https://perma.cc/4CFB-W263] (noting that aggregate litigation saves "time and cost by resolving similar claims all at once"). *See generally* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:9 (5th ed. 2011) (explaining that efficiency is one of the objectives of the class action device); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015) (addressing the future of class action litigation); Mullenix, *supra* note 20, at 403–05 (discussing the evolution of class action litigation, suggesting "that class actions are not dead but . . . just badly done," and proposing reform in the form of a "simplified class action rule").

[22] *See generally* Hansberry v. Lee, 311 U.S. 32, 41–43 (1940) (discussing the interests of individuals in class litigation); Joseph A. Seiner, *Commonality and the Constitution: A Framework for Federal and State Court Class Actions*, 91 IND. L.J. 455, 467–68 (2016) (discussing class action litigation and the problem of ensuring potential plaintiffs are actually heard in court); Alexander, *supra* note 20 (explaining that class actions, in certain circumstances, may disadvantage individual plaintiffs because the plaintiffs would lack substantial voice in the direction of their case).

[23] *See Hansberry*, 311 U.S. at 41–43 (addressing tension between class action litigation and protecting interests of individuals); Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PA. ST. L. REV. 1, 10 (2005) (noting generally that the Supreme Court recognizes that the drafters of Rule 23 intended to consider the rights of individuals).

[24] *See* Blank & Zacks, *supra* note 23, at 10–12.

[25] FED. R. CIV. P. 23(a); *see also* J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 163 (2009) (discussing class action standard).

[26] *See, e.g.*, Malveaux, *supra* note 21, at 35 ("A class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' Because a representative action runs counter to this fundamental principle, the legislature and judicial system have established rigorous criteria to ensure that departure from the norm is justified. The federal class action rule—Rule 23 of the Federal Rules of

In recent years, the Supreme Court has taken a more narrow view of systemic litigation involving workplace claims. In particular, in *Wal-Mart Stores, Inc. v. Dukes*,[27] the Court expressed a reluctance to permit these claims where there was not overwhelming support for the commonality requirement of the test.[28]

B. *The* Wal-Mart *Test*

The Supreme Court has narrowly restricted class action employment claims in recent years.[29] The centerpiece of the Court's jurisprudence in this area is *Wal-Mart Stores, Inc. v. Dukes*.[30] Much has already been written on this case, so this Article only briefly summarizes the pertinent facts and holdings here.[31]

In *Wal-Mart*, the Court considered whether a purported class of over a million current and former female employees should be certified where the workers alleged discrimination on pay and promotion issues.[32] The case, which was "one of the most expansive class actions ever,"[33] was brought against Wal-Mart, the country's largest private employer.[34] The plaintiffs in the case maintained that there was a unified "corporate culture" at the company that was biased against women and subsequently led to discriminatory decisionmaking.[35] The plaintiffs further maintained that the discretion given to management-level employees to weigh in on pay and promotion issues was being exercised consistently in a way that negatively

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Civil Procedure—sets out the requirements for when a party can represent others so that efficiency and due process are served. The courts must conduct a rigorous analysis to make certain the Rule's requirements are met." (footnote omitted) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979))).

[27] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[28] *See, e.g.*, *id.* at 349–52; Malveaux, *supra* note 21, at 37–38 ("In a 5–4 decision written by Justice Scalia, the conservative majority raised the bar for commonality—arguably one of the easiest class action thresholds. Conceding that all it takes is a single common question to satisfy the requirement, the Court concluded that this criterion was not met.").

[29] *See* Joseph A. Seiner, *Weathering* Wal-Mart, 89 NOTRE DAME L. REV. 1343, 1344 (2014).

[30] *See id.*

[31] *See id.* at 1347–50.

[32] *Wal-Mart*, 564 U.S. at 342.

[33] *Id.*

[34] *Id.* ("[Wal-Mart] operates four types of retail stores . . . . Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than 1 million people.").

[35] *See id.* at 345.

impacted female workers.[36] In light of these facts, the plaintiffs alleged a violation of Title VII of the Civil Rights Act of 1964, which protects workers on the basis of several characteristics, including sex.[37]

The federal district court certified the class, and the appellate court largely affirmed the decision.[38] The Supreme Court granted certiorari to determine whether class certification was warranted under Federal Rule of Civil Procedure 23(a).[39] Specifically, the Court addressed whether the claimants satisfied the commonality requirement of the Rule.[40] Under Rule 23(a)(2), plaintiffs must demonstrate sufficient "questions of law or fact" that are "common to the class."[41] According to the Court, this "common contention" in the case "must be of such a nature that it is capable of classwide resolution."[42] The question presented must therefore "resolve an issue that is central to the validity of each one of the claims in one stroke."[43]

Applying this standard to the facts of the case, the Court found no commonality in the million-plus claims alleged.[44] The plaintiffs failed to establish that the discretion exercised by management was done in a common way that discriminated against female employees.[45] Indeed, there was no showing of "a common mode of exercising discretion that pervades the entire company."[46] Given the "size and geographical scope" of Wal-Mart, the Court

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[36] *See id.* ("Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart's female employees. The basic theory of their case is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers . . . .").

[37] *Id.* at 343.

[38] *Wal-Mart*, 564 U.S. at 347.

[39] *Id.* at 342.

[40] *Id.* at 349–52.

[41] *See* FED. R. CIV. P. 23(a)(2).

[42] *Wal-Mart*, 564 U.S. at 350.

[43] *Id.*

[44] *Id.* at 355–59. As the Court concluded, "[t]he only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action . . . ." *Id.* at 355.

[45] *Id.* at 359; Malveaux, *supra* note 21, at 38 ("Conceding that all it takes is a single common question to satisfy the requirement, the Court concluded that this criterion was not met.").

[46] *Wal-Mart*, 564 U.S. at 356. In a separate part of the opinion that is beyond the scope of this Article, the Court further concluded that the plaintiffs'

> claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our [previous] opinion . . . expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

Id. at 360 (citation omitted).

found it "quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[47] The plaintiffs had only put forth a "bare existence of delegated discretion," failing to show a "specific employment practice" that "tie[d] all their 1.5 million claims together."[48] In sum, the Court concluded that there was simply no commonality in the case, noting that the plaintiffs were attempting

> to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[49]

In short, simply allowing management discretion in making pay and promotion decisions is—in and of itself—insufficient to support a class action Title VII discrimination claim.[50] This is not to say that discrimination did not occur in each of these cases or that the individual class members were not treated disparately when it came to pay and promotion issues. Indeed, each individual class member would still be allowed to pursue claims against the company (assuming that administrative and procedural requirements had otherwise been satisfied).[51] The Court's holding, then, stands for the proposition that, while discrimination may have occurred in individual instances, there was simply no glue holding all of the claims together.[52] In this instance, individual, rather than aggregate, litigation was appropriate.

More recent case law—most notably *Tyson Foods, Inc. v. Bouaphakeo*—may call into question how the commonality standard should be applied in

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[47] *Id.* at 356.

[48] *Id.* at 357.

[49] *Id.* at 352. Indeed, citing to the dissenting opinion of Chief Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit, the Court agreed that the plaintiffs here

> held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed . . . . Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Id. at 359–60 (alteration in original) (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J., dissenting)).

[50] *Id.* at 357; Malveaux, *supra* note 21, at 40 ("The Court claimed that merely proving that a discretionary system resulted in a statistical disparity was insufficient to demonstrate commonality, absent identification of a specific employment practice.").

[51] *See Wal-Mart*, 564 U.S. at 366–67.

[52] *See id.* at 352, 358–59. As the Court concluded, there was "no convincing proof of a companywide discriminatory pay and promotion policy," and there was thus no "common question" in the case to be resolved. *Id.* at 359.

certain workplace cases.[53] Nonetheless, the *Wal-Mart* case makes clear that this standard will now be applied much more rigidly in most class action cases.

III. CLASSIFICATION QUESTIONS AND THE FLSA

The commonality issue in *Wal-Mart* arose in the employment context, and much has been written on the extent to which the decision provides a more rigid standard for workplace class action cases.[54] For technology-sector cases, the common employment law question, which the courts continue to face, is the issue of whether workers are employees or independent contractors.[55]

Under federal law, if a company misclassifies a worker as an independent contractor, it can be subjected to back pay and liquidated damages.[56] And, more potentially damaging to the companies involved, these types of claims necessarily implicate a class of workers. Where an employer misclassifies one worker, it will likely misclassify many others as well. After *Wal-Mart*, then, we should examine what factors these misclassified workers must share to satisfy the more rigid commonality requirement for class certification.[57] A

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[53] Tyson Foods, Inc., v. Bouaphakeo, 136 S. Ct. 1036 (2016). *Tyson Foods* involved the question of whether an expert's analysis of the number of hours workers spent donning and doffing was sufficient to support the certification of a class action under the Fair Labor Standards Act. *Id.* at 1043–44, 1046–49. While the Court found that a jury could have concluded that the expert's analysis was sufficient to prove the hours worked, the Court did note that it was not adopting "broad and categorical rules governing the use of representative and statistical evidence in class actions," and that "[w]hether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." *Id.* at 1049.

[54] *See, e.g.*, Klonoff, *supra* note 14, at 775–76 (calling the *Wal-Mart* commonality standard "exacting" and noting that it "cannot be squared with . . . Rule 23(a)(2)"); Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127, 1143 (2013) (claiming that the *Wal-Mart* decision limited the possibility of certification for some classes with monetary claims); Sherry E. Clegg, Comment, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in* Wal-Mart v. Dukes, 44 TEX. TECH L. REV. 1087, 1108 (2012) (claiming that *Dukes*' heightened certification standard could lead to a decline in federal class action lawsuits); *see also* Stephanie S. Silk, Note, *More Decentralization, Less Liability: The Future of Systemic Disparate Treatment Claims in the Wake of* Wal-Mart v. Dukes, 67 U. MIAMI L. REV. 637, 658 (2013) (arguing that the Court's decision in *Wal-Mart* "has made it more difficult for plaintiffs asserting discrimination to proceed as a class").

[55] Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMP. LAB. L. & POL'Y J. 471, 481 (2016) ("And indeed, one of the chief legal issues that concern [the gig-economy], one that has already triggered major litigation in this field, is precisely the classification of the workers involved as employees or independent contractors.").

[56] *See* 29 U.S.C. § 216(a)–(c) (2012) (noting that violators are subject to various penalties, including fines, imprisonment, back pay, and liquidated damages).

[57] *See generally Wal-Mart*, 564 U.S. at 338.

discussion of wage/hour law in this area helps to frame this analysis more clearly.

The Fair Labor Standards Act (FLSA) is a federal law that provides three primary areas of protection.[58] First, it establishes a minimum wage, which is currently set at $7.25 per hour.[59] Second, it mandates premium pay for any work over forty hours in a particular week.[60] Finally, it prohibits the oppressive work of children, establishing extensive child labor restrictions.[61]

Coverage under the FLSA is broad, and almost all businesses must abide by the provisions of this federal law.[62] Thus, most companies easily satisfy the test of being "employers" under the statute.[63] A more difficult inquiry, however, is whether a particular worker is an "employee" under the law. Only *employees* are afforded the protections of the FLSA, and independent contractors have no avenue of recourse under this statute.[64]

The independent contractor/employee distinction has caused substantial consternation over the decades since the FLSA was passed, and the problems of interpreting the statute persist to the present day.[65] Under the FLSA, to

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[58] *See* 29 U.S.C. §§ 206, 207, 212 (providing three primary areas of protection for minimum wage, maximum hours, and child labor provisions).

[59] *Id.* § 206(a)(1)(C).

[60] *Id.* § 207(a)(1).

[61] *Id.* §§ 203(*l*), 212.

[62] *See id.* § 203(r)–(s) (defining broadly "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce," which are covered by the FLSA); *see also* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2009) ("Employees who work for certain business or organizations (or 'enterprises') are covered by the FLSA.").

[63] *See* DAVID WEIL, DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, THE APPLICATION OF THE FAIR LABOR STANDARDS ACT'S "SUFFER OR PERMIT" STANDARD IN THE IDENTIFICATION OF EMPLOYEES WHO ARE MISCLASSIFIED AS INDEPENDENT CONTRACTORS 15 (2015); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1004–05 (1999).

[64] *See* 29 U.S.C. § 203(e)(1) (defining "employee" generally as "any individual employed by an employer"). In an interesting gig-sector decision interpreting California state law, a federal court noted that the state "[l]egislature has decided that employees need . . . protections as a check against the bargaining advantage employers have over employees—particularly unskilled, lower-wage employees—and the corresponding ability employers would otherwise have to dictate the terms and conditions of the work." Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1074 (N.D. Cal. 2015) (order denying cross-motions for summary judgment). The court further stated, "[i]ndependent contractors do not receive these protections because they generally are in a far more advantageous position." *Id.*

[65] *See, e.g.*, Saleem v. Corp. Transp. Grp., 52 F. Supp. 3d 526, 545 (S.D.N.Y. 2014) (finding that cab drivers were independent contractors rather that employees under FLSA); Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1354 (M.D. Fla. 1997) (holding that nightclub dancers were employees under FLSA and thus subject to overtime pay); Wirtz v. Silbertson, 217 F. Supp. 148, 154 (E.D. Pa. 1963) (holding that persons who sold newspapers on commission were employees and not independent contractors).

"[e]mploy" means "to suffer or permit to work."[66] This overly broad, somewhat circular definition provides little guidance on the proper standard for coverage in many cases.[67] To assist in resolving this ambiguity, the courts have developed numerous tests on the question to help better analyze the issue.[68] There is often variation on the exact parameters of these tests, but the courts frequently consider:

> 1) the level of control the employer maintains over the worker; 2) the opportunity for profit or loss maintained by the worker in the business; 3) the amount of capital investment the worker puts into the process; 4) the degree of skill necessary to perform the job; 5) whether performance of the job is integral to the operation of the business; and 6) the permanency of the relationship between the worker and the employer.[69]

The major consideration of this test is the element of control.[70] And, arguably, all of the other factors noted above play into the amount of control exerted by either the employer or employee. The more control a *business* has in the working relationship, the more the worker is likely to be defined as an employee.[71] The more control the *worker* has, the more likely that individual is to be characterized as an independent contractor.[72] The exact amount of control required—and the precise test used to gauge that level of control—varies in the courts.[73] The Department of Labor has recently provided

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[66] 29 U.S.C. § 203(g).

[67] *Cf.* WEIL, *supra* note 63, at 1 ("The FLSA's definition of employ as 'to suffer or permit to work' and the later-developed 'economic realities' test provide a broader scope of employment than the common law control test.").

[68] *See* Means & Seiner, *supra* note 14, at 1526.

[69] *Id.* (citing Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534–35 (7th Cir. 1987)); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992).

[70] *See* Hennighan v. Insphere Ins. Sols., Inc., 38 F. Supp. 3d 1083, 1097 (N.D. Cal. 2014), *aff'd*, 650 F. App'x 500 (9th Cir. 2016); *see, e.g.*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 338 (2001). *See generally* Ash v. Anderson Merchandisers, LLC, 799 F.3d 957, 961 (8th Cir. 2015) (discussing the importance of control as part of the test for employment status); Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999) (same).

[71] *See* Carlson, *supra* note 70, at 338–43.

[72] *See id.* at 339–40.

[73] *Compare, e.g.*, Perez v. Oak Grove Cinemas, Inc., 68 F. Supp. 3d 1234, 1242 (D. Or. 2014) (citing the use of a six-factor "economics realities test" that examines the right to control the manner of work, an employee's opportunity for profit or loss depending on management, an employee's investment in required equipment or tools, special skills, temporary or permanent work, and if work is integral to the alleged employer's business), *with* Kalloo v. Unlimited Mech. Co. of N.Y., 977 F. Supp. 2d 187, 201 (E.D.N.Y. 2013) (advocating another form of the "economics realities test" that looks at the ability to hire and fire, work schedules, payment, and employment records).

guidance on how to evaluate the employee/independent contractor question,[74] but the issue is one that ultimately continues to be resolved in the courts.[75]

The decades following the passage of the FLSA have seen a steady flow of development in the case law on the question of what it takes for an individual to satisfy the "employee" test.[76] While the courts have taken varying approaches to the issue—sometimes with conflicting results[77]—the parameters of the test have been roughly established over the years.[78] The cases arising in the modern economy, however, have pushed the boundaries of the "employee" definition and created widespread uncertainty in this area of the law.[79] Technology-sector cases have transformed the employment law question, as workers look far different from those employed in traditional brick-and-mortar facilities.[80] The on-demand economy has only further put this area of the law into flux. Workers now perform services at home, on the road, on a part-time or full-time basis, and in many other ways never before conceived possible.[81]

The courts have taken the now much-outdated definition of "employee" in the FLSA and attempted to apply it to this modern economy.[82] As one federal court recently noted, this is like being "handed a square peg and asked to choose between two round holes."[83] I have previously explored the difficulty

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[74] *See generally* WEIL, *supra* note 63.

[75] *See infra* Part V (examining recent technology-sector cases where the worker classification issue has been litigated).

[76] *See generally* Baker v. Barnard Constr. Co., 860 F. Supp. 766, 770 (D.N.M. 1994) (progressing towards a six-factor economic dependence test), *aff'd sub nom*. Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998); Wirtz v. Kneece, 249 F. Supp. 564, 568 (D.S.C. 1966) (adding that the term "employee" is also not determined by "'contractual labels' which parties may attach to their relationship"); Fleming v. Demeritt Co., 56 F. Supp. 376, 378 (D. Vt. 1944) (delineating that the test is no longer common law, but dependent on the "history, terms and purposes of the [FLSA]").

[77] *See generally* Means & Seiner, *supra* note 14.

[78] *See id.* at 1526.

[79] *See* De Stefano, *supra* note 55, at 481.

[80] *See id.* at 480–85.

[81] *See* Greg Ip, *As the Gig Economy Changes Work, So Should Rules*, WALL STREET J. (Dec. 9, 2015), http://www.wsj.com/articles/as-the-gig-economy-changes-work-so-should-rules-1449683384 [https://perma.cc/9AAU-VHZF] (noting that Uber drivers can work at any time and for however long they desire); Arun Sundararajan, *The 'Gig Economy' Is Coming. What Will It Mean for Work?*, GUARDIAN (July 25, 2015), http://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy [https://perma.cc/6UU8-3UR5] (claiming that a gig economy allows for a more blurred line between personal and business life due to the varied work environments); *see also* Jennifer Ludden, *The End of 9-to-5: When Work Time Is Anytime*, NPR (Mar. 16, 2010), http://www.npr.org/templates/story/story.php?storyId=124705801 [https://perma.cc/9KFW-GTSM] (discussing "results-only work environments," working from home, and flex time as growing types of work scheduling).

[82] *See* De Stefano, *supra* note 55, at 498.

[83] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (order denying cross-motions for summary judgment). As the Court discussed, "[s]ome factors point in one direction, some point in the other, and some are ambiguous." *Id.*

of applying a decades-old test to cases arising in the gig sector, highlighting the importance of flexibility in the consideration.[84]

This Article addresses a more expansive issue—the scope of the class action mechanism used to litigate these cases. Thus, this Article does not revisit the well-traveled ground of how the independent contractor/employee test should be analyzed.[85] Instead, in those growing number of technology-sector cases where the test is implicated, this Article looks at whether the class action model should be used to resolve the question. Given the individualized nature of these inquiries, this Article argues for a more limited, class-based approach.

As noted earlier in this Article, class action cases have pervaded almost every area of the technology sector.[86] The question most frequently addressed by these cases is whether or not the provider of services is an employee or an independent contractor.[87] This Article attempts to provide the appropriate

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[84] *See* Means & Seiner, *supra* note 14, at 1536–45. *See generally* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment) ("Arguably many of the factors in [the employee/independent contractor] test appear outmoded in this [modern] context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the [current] test.").

[85] *See generally* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457 (1999) (discussing classification of workers); David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138 (2015) (discussing the misclassification of independent contractors and its impact on the labor market, taxes, and other areas, as well as potential solutions); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 166–69 (2003) (discussing varying definitions of "employees," and how they have changed over time); Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661 (2013) (discussing a new theory of classification); Carlson, *supra* note 70 (discussing the evolution of tests to determine employee status, why previous tests have failed and will likely continue to fail, and a proposed solution involving statutory-based changes); Karen R. Harned et al., *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93 (2010) (discussing the classification of employees, analyzing current business and legal requirements/considerations, and proposing a "step-back test" approach for defining employment); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353 (2011) (discussing classification standards); Deanne M. Mosley & William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 MISS. L.J. 613 (1998) (discussing worker classification, tests for worker classification, and the importance of worker classification); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143 (2005) (analyzing the independent contractor/employee issue in the collective bargaining context).

[86] *See supra* notes 79–80 and accompanying text.

[87] *See infra* Part V (discussing various class action cases brought in the modern economy).

parameters that should be used to help answer this question—as well as a model for analyzing the proper scope of the class. However, it is difficult to conceptualize this question in the abstract. Indeed, discussing the issue in the context of more concrete litigation is helpful when evaluating the proposed framework discussed below.

The federal district court case of *O'Connor v. Uber*[88] provides an excellent opportunity for addressing the class action litigation which exists on the employee/independent contractor question. The case is not addressed here to limit the scope of this Article, but rather to serve as a springboard for discussing the broader, more important question of the appropriate breadth of this type of litigation.

IV. THE *O'CONNOR* DECISION

The Supreme Court's reluctance to allow aggregate litigation transcends *Wal-Mart* and pervades all areas of the law. Indeed, recent Court decisions have cut back on the ability of plaintiffs to bring aggregate arbitration claims[89] as well as antitrust litigation.[90] In light of this trend, it is interesting to see the *O'Connor* court permit class certification on the worker misclassification issue.[91] Indeed, this lower court decision may conflict with the Supreme Court's mandates in this area. The Court has clearly expressed its view that commonality must be narrowly construed in employment cases, and that aggregate litigation should only proceed where all of the elements of the Federal Rules of Civil Procedure have been adequately satisfied.[92] This is not to say that the Supreme Court was correct in its decision to create a heightened commonality standard (indeed, this Article takes no position on that issue). Given the new *Wal-Mart* test for commonality, however, it is difficult to reconcile the reasoning in *O'Connor* with the Supreme Court's new heightened standard.

As noted earlier, the number of modern technology companies involved in class action litigation on the worker misclassification issue is only growing.[93] A sampling of these cases (discussed in greater detail below) include aggregate litigation against GrubHub, Doordash, Handy, CrowdFlower, Yelp,

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[88] O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 994 (N.D. Cal. 2014) (order granting defendant's motion for judgment on the pleadings).

[89] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the Federal Arbitration Act preempts state laws that may disallow contracts that prohibit class-wide arbitration).

[90] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (creating a higher pleading standard that requires plausibility of the facts alleged).

[91] *See infra* Part V.C (discussing other pending class-action cases in the gig sector).

[92] *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–51 (2011) (discussing the test for certification in an employment case).

[93] *See supra* Part I.

and Amazon.[94] In terms of prominence, however, there can simply be no comparison with the class action case brought against Uber, which has captured headlines around the globe.[95] The case has the potential to change the very way that the workplace is structured, and how we consider the contours of the employment relationship.

In *O'Connor*, a federal district court in the Northern District of California considered whether a class of drivers for a technology company should be certified on the question of whether their employment status was misclassified.[96] Specifically, the court considered whether a putative class of 160,000 drivers should be permitted to proceed where the workers used a technology platform provided by Uber to act as a transportation provider for customers.[97] The putative class sought numerous damages as a result of being misclassified as independent contractors rather than employees and asked for any damages that flowed from this mischaracterization.[98] More specifically, the class sought unpaid tips and gratuities that the company "uniformly failed to pass on,"[99] in addition to reimbursement for expenses.[100] Federal District Court Judge Chen appropriately noted that the proper question before the court was whether "the drivers' working relationships with Uber [were] sufficiently similar so that a jury can resolve the Plaintiffs' legal claims all at once."[101]

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[94] *See infra* Part V.C (discussing existing systemic litigation on the worker misclassification issue).

[95] *See supra* notes 4–6 and accompanying text (citing widespread attention given to the *Uber* class-action case).

[96] O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *3 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification). In an earlier decision, the district court specifically outlined the business model of the company:

> Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination.

O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment).

[97] *O'Connor*, 2015 WL 5138097, at *1. In an earlier decision denying summary judgment, the court stated that it "concludes that Plaintiffs are Uber's presumptive employees because they 'perform services' for the benefit of Uber." *O'Connor*, 82 F. Supp. 3d at 1135. The court further found that "whether an individual should ultimately be classified as an employee or an independent contractor . . . presents a mixed question of law and fact that must typically be resolved by a jury." *Id.* The court also concluded that "because a number of facts material to the employee/independent contractor determination . . . remain in dispute, the Court denies Uber's summary judgment motion." *Id.*

[98] *O'Connor*, 2015 WL 5138097, at *1–2.

[99] *Id.* at *1.

[100] *Id.*

[101] *Id.* at *2.

Looking to California law, the court further addressed the common law employment test that is used to classify workers.[102] That test examines a number of factors in determining whether workers are properly characterized as independent contractors or employees. Similar to federal law, the most important factor in the test is the question of control.[103] The court must thus closely examine "not how much control a hirer [actually] exercises, but how much control the hirer retains the right to exercise."[104] In determining control, the court looked to a number of different factors that could be helpful when evaluating this question.[105] All of these factors largely mirror the federal examination of worker status under the FLSA.[106]

In considering these different elements, the court ultimately examined whether these different factors determining employment status could be analyzed on a classwide basis.[107] The court thus looked at whether the application of the control test could be considered across all 160,000 drivers when evaluating whether or not they were employees under California law.[108] As to Federal Rule of Civil Procedure 23(a)(1), the court easily found

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[102] *Id.* at *2, *5–6.

[103] *Id.* at *5.

[104] *O'Connor*, 2015 WL 5138097, at *5 (alteration in original) (emphasis omitted) (quoting Ayala v. Antelope Valley Newspapers, Inc., 327 P.3d 165, 172 (Cal. 2014)).

[105] *Id.* at *5–6. The court noted eight specific factors that should be explored, in addition to the "right to control work details," in the employee/independent contractor determination:

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Id. at *6 (quoting S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989)). Some other factors that can be evaluated were also noted by the court, which include:

> (i) the alleged employee's opportunity for profit or loss depending on his managerial skill; (j) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (k) whether the service rendered requires a special skill; (l) the degree of permanence of the working relationship; and (m) whether the service rendered is an integral part of the alleged employer's business.

Id. (quoting *Borello*, 769 P.2d at 407).

[106] *See supra* Part III.

[107] *O'Connor*, 2015 WL 5138097, at *8.

[108] *Id.* at *16.

numerosity to be satisfied given the large size of the Uber class.[109] And, the question did not even appear to be contested in the case.[110]

The district court struggled with the application of commonality under Rule 23(a)(2). In examining this question, the court noted the restrictive commonality standard so clearly enunciated by the *Wal-Mart* decision.[111] The court concluded that this "rigorous" standard had been satisfied.[112] In reaching this conclusion, the court found that the jury's resolution of the classification question could be outcome determinative.[113] In this regard, the court noted that if the "jury determine[s] that the class members here are not Uber's employees, this class action will have reached its end."[114] On the other hand, if the trier of fact reaches the opposite conclusion, then the drivers "are likely to be entitled to relief as a class."[115] As to commonality, the court further determined that the "worker classification claim presents a common issue capable of classwide adjudication because all (or nearly all) of the individual elements of the . . . test themselves raise common questions which will have common answers."[116]

Addressing the final two components of the certification rules—typicality and adequacy of representation—the district court further found that these elements had been satisfied as to some of the claims in the case.[117] The court expressed the overlap between these two elements and the adequacy requirement that the named plaintiff have "no conflicts of interest with other class members" and "will prosecute the action vigorously on behalf of the class."[118] Examining these requirements, the court concluded that there was adequacy of representation and typicality as to the purported tip violations of California's Labor Code.[119] The court, however, could not find typicality on the reimbursement claim set forth by the plaintiffs and rejected aggregate litigation of this claim.[120]

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[109] *Id.* at *7.
[110] *See id.*
[111] *See id.* at *8.
[112] *Id.* (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)).
[113] *O'Connor*, 2015 WL 5138097, at *8.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *See id.* at *12–13.
[118] *Id.* at *9.
[119] *O'Connor*, 2015 WL 5138097, at *9–13.
[120] *See id.* at *13–15. According to the court:

> On the current record . . . the Plaintiffs have not provided the Court with sufficient information for it to be reasonably assured that what Plaintiffs purport to be giving up on behalf of the class members they seek to represent is not of such value to absent class members that the interests of those class members would be at odds with those of the named Plaintiffs.

Id. at *15.

The court further looked to a number of factors specifically enumerated in California case law in deciding that the issue of whether the workers were employees or independent contractors satisfied the predominance requirement of Rule 23(b)(3)—and was appropriate for class certification.[121] The court highlighted the lack of control that Uber had over driver schedules, noting that:

> [B]oth parties agree that Uber does not control any of its drivers's schedules—all Uber drivers are free to work as much or as little as they like so long as [the] drivers give at least one ride every thirty days, and [another category of] drivers give at least one ride every 180 days.[122]

In terms of routes or territories, the court noted that there was no dispute over the route individual drivers take with passengers.[123] The court also noted that the rate of pay was "unilaterally" set by Uber and that the company would establish the rate of pay "without any input" from its drivers.[124] And, among other considerations, the court emphasized that the company could fire workers without cause.[125] Evaluating all of these factors, the court concluded that: "[I]t appears that common questions will substantially predominate over individual inquiries with respect to class members' proper employment classification . . . . Indeed, every (or nearly every) consideration under the California common-law test of employment can be adjudicated with common proof on a classwide basis."[126]

In the thirty-seven-page opinion, the court gives limited attention to the *Wal-Mart v. Dukes* decision. Indeed, the district court's citations to this case are only for the basic propositions that class actions represent an exception for similarly situated litigants to the general rule of individual litigation in civil cases, and that there must be at least one common claim for a class action to proceed.[127] The district court does not address anywhere in its opinion the

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[121] *See id.* at *16–30.

[122] *Id.* at *17. The court went on to note:

> [W]hile Uber is correct that this factor will likely weigh in its favor on the merits, the fact that Uber admits that it exercises a *uniform* amount of control over its drivers' work schedules (*i.e.*, none) benefits Plaintiffs at the class certification stage because it proves that this factor can be adjudicated on a classwide basis.

Id.

[123] *Id.*

[124] *Id.*

[125] *O'Connor*, 2015 WL 5138097, at *18–19. In its decision, the court highlighted the factors discussed by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989). *Id.* at *16–17. As the *O'Connor* court recognized, these factors tend to go to the issue of who has control in the working relationship. *Id.* at *5.

[126] *Id.* at *30.

[127] *Id.* at *4, *8.

restrictive commonality standard that was enunciated by the *Wal-Mart* decision.[128]

There have been efforts to settle this matter. However, the district court rejected a $100 million dollar agreement between the parties as "unfair" to the drivers as "it low-balled potential claims under California law."[129]

V. PIERCING THE *O'CONNOR* CLASS ACTION MODEL

A. *The* O'Connor *Decision*

In *O'Connor*, the federal district court permitted a class action against Uber to proceed that included 160,000 litigants.[130] The judge's analysis does not properly consider the importance of the commonality standard after the Supreme Court's *Wal-Mart* decision. The *O'Connor* case establishes important precedent, as other class action litigation is pending on the same question in similar cases brought against other companies in the technology sector throughout the country.[131] The analysis used in *O'Connor* should be reconsidered, as it provides confusing guidance that gives insufficient weight to the *Wal-Mart* commonality standard. While it is only federal district court precedent at this time, the case threatens to create an unworkable model for gig sector class action cases, given the attention the litigation has received and the high-profile nature of the issues involved.[132]

The analysis used by the court concludes that there is commonality in the matter because the resolution of the issue will help resolve the case.[133] While it is true that if the employee/independent contractor issue is decided, it would greatly streamline—and potentially resolve—the matter, this is not the appropriate legal question to be asking when addressing commonality under the Federal Rules (particularly after *Wal-Mart*). Indeed, there are many issues a jury could weigh in on that would help clear the court's docket. This does not mean that these issues are appropriate for class certification.

The commonality test enunciated in *Wal-Mart* demands a far more detailed and rigid analysis than what the district court was willing to give in this case, as demonstrated by the district court's sparing citation to the

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[128] *Id.* at *8.

[129] Joel Rosenblatt, *Uber's $100 Million Driver Pay Settlement Rejected by Judge*, BLOOMBERG (Aug. 18, 2016), https://www.bloomberg.com/news/articles/2016-08-18/uber-s-100-million-driver-pay-settlement-is-rejected-by-judge [https://perma.cc/WK65-6YEE].

[130] *O'Connor*, 2015 WL 5138097, at *1.

[131] *See infra* Part V.C (discussing examples of class-action claims brought against other technology-sector companies).

[132] *See Uber Drivers*, UBERLAWSUIT.COM, http://uberlawsuit.com [https://perma.cc/5GEZ-RAE3] (compiling various links to news coverage of the *O'Connor* case); *see also supra* Part I (outlining coverage of the *O'Connor* case in various news outlets).

[133] *See O'Connor*, 2015 WL 5138097, at *2.

Supreme Court's decision.[134] The district court acknowledges the restrictive nature of the commonality test enunciated by the Supreme Court, but it does not apply this more restrictive standard.[135]

A more appropriate inquiry into the commonality standard would have looked at the *Wal-Mart* Court's analysis of Rule 23(a)(2) and whether the plaintiffs sufficiently demonstrated "questions of law or fact" that are "common to the class."[136] According to the Supreme Court, this "common contention" in the case "must be of such a nature that it is capable of classwide resolution."[137] The question presented must, therefore, "resolve an issue that is central to the validity of each one of the claims in one stroke."[138] Here, the district court certified the issue of whether or not Uber drivers are employees or independent contractors.[139] This question cannot be answered on a classwide basis, at least not with the massive 160,000 worker class presented by the *O'Connor* case. Instead, a more individualized inquiry is demanded in this situation.

The problem with adjudicating this type of massive class comes from the variance of the workers themselves. The employee/independent contractor question is by nature a fact-intensive inquiry, and the work performed by Uber drivers is highly varied. Take the experience of one Uber driver, who detailed the variance in his own work schedule:

> I drove for Uber between March and July of 2014. I was also employed full-time as a barback at a local seafood bar in San Diego, California during that period. I joined the company to earn extra money in my spare time. . . .
>
> . . . .
>
> The initial draw to Uber was the flexibility to create my own schedule.[140]

The driver further detailed the level of control and influence Uber exerted over his work,[141] and his personalized account of employment at the company explains the individualized nature of working for this business. Workers will likely seek employment for a variety of reasons: extra money while working other jobs (as in this example), full-time employment to make a living, or

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[134] *See, e.g.*, *id.* at *4.

[135] *Id.*

[136] *See* FED. R. CIV. P. 23(a)(2); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

[137] *Wal-Mart*, 564 U.S. at 350. The question presented must therefore "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

[138] *Id.*

[139] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment).

[140] Memorandum from Colton Tully-Doyle, Former Uber Driver, to author (July 30, 2015) (on file with author).

[141] *See id.* ("My choice of hours was heavily influenced by Uber. . . . [E]arnings are slim outside the suggested time frame so I always drove within hours proposed by Uber.").

simply part-time work while in school or pursuing other activities.[142] The flexibility and diversity of individuals who pursue employment in this industry thus result in key differentiating factors between these workers.[143] Trying to aggregate such individuals as part of a class in this industry is difficult, if not impossible, across such a broad swath of workers.

As demanded by the Supreme Court in *Wal-Mart*, there must be "some glue holding" the case together.[144] That bond does not appear to exist here for all 160,000 individuals, as workers differ on their hours, rate of pay, work schedules,[145] and other critical factors of employment.[146] This is not to say that a class could not proceed as to certain groups of workers with a similar employment make-up. Or, as will be discussed in greater detail below, an "issue class" could be pursued as to certain questions in the case.[147] But aggregating a class of 160,000 workers with such individualized variances should not be permitted under the more rigid *Wal-Mart* analysis.

This is not to say that the *Wal-Mart* Court got the analysis right—indeed, this Article does not take a view on this highly controversial Supreme Court decision. Rather, the analysis here looks at how—and when—technology sector claims should be aggregated in light of the Court's heightened commonality standard.

B. *The Potential Harm in the* O'Connor *Analysis*

At first blush, it may appear that there is little danger in treating workers on an aggregate basis in gig-sector cases. While it is true that Uber is a multi-billion dollar company that can likely withstand substantial litigation costs,[148] such cases do create potentially large business expenses for certain employers.[149] In the face of this type of possible litigation, existing employers

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[142] *See id.*

[143] *See infra* Part V.C (detailing the different nature of workers in modern economy cases).

[144] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011).

[145] *Cf.* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1152 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment) ("Finally, Uber makes much of the fact that Uber has no control over its drivers' hours or whether its drivers even 'report' for work more than once in the relevant period.").

[146] *Cf. id.* at 1138 ("Among other things, Uber notes that drivers set their own hours and work schedules, provide their own vehicles, and are subject to little direct supervision.").

[147] *See infra* Part VII (discussing the issue of class certification).

[148] *See* Mike Isaac & Michael J. de la Merced, *Uber Turns to Saudi Arabia for $3.5 Billion Cash Infusion*, N.Y. TIMES (June 1, 2016), http://www.nytimes.com/2016/06/02/technology/uber-investment-saudi-arabia.html [https://perma.cc/4K4A-TN9U]; Douglas MacMillan, *Uber Drivers Suit Granted Class-Action Status*, WALL STREET J. (Sept. 1, 2015), http://www.wsj.com/Essays/uber-drivers-suit-granted-class-action-status-1441141539 [https://perma.cc/2SDC-SLWK].

[149] *See* MacMillan, *supra* note 148.

may become more cautious about expanding operations or creating new employment opportunities, and prospective companies may even think twice about incorporating.[150]

This is not to say that litigation costs should not be borne where appropriate, or that labor/employment laws are unnecessarily hindering business. Rather, the concern created by cases such as *O'Connor* is the cost and uncertainty that is generated by potentially *inappropriate* aggregate litigation (at least as defined by the Supreme Court). These costs can directly impact how the entire sector operates, as well as the growth of this particular industry. The threat of massive class action cases like we see in *O'Connor* will have to be considered when structuring a business model, and employment (as well as economic growth) will likely be impacted as a result. As already noted, this Article takes no view on the validity of the *Wal-Mart* commonality standard. Given the Supreme Court's heightened view of the commonality test, however, a more careful consideration of class action cases in the technology sector is necessary.

Many have argued that this type of case will serve as the death knell for the gig sector—restricting flexibility and imposing an outdated, rigid employment model on this industry.[151] Such calls are clearly premature, and sometimes overstated. But these arguments do demonstrate the existing conflict between the emerging modern economy and the older, brick-and-mortar employment model that has persisted for decades. Until the law evolves further, and the legal standards are clarified, it will be impossible to

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[150] *See, e.g.*, Kate Rogers, *What the Uber, Lyft Lawsuits Mean for the US Economy*, CNBC (Mar. 16, 2015), http://www.cnbc.com/2015/03/16/what-the-uber-lyft-lawsuits-mean-for-the-us-economy.html [https://perma.cc/DYU4-7UJW].

[151] *See* Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FASTCOMPANY (Feb. 17, 2015), http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death [https://perma.cc/9UJK-YUA9] (exploring the enormous financial implications of a potential loss in the class action suits against emerging technology companies); A.J. Kritikos, *A Lawsuit to Break the Gig Economy*, WALL STREET J. (Sept. 20, 2015), http://www.wsj.com/Essays/a-lawsuit-to-break-the-gig-economy-1442788712 [https://perma.cc/NF89-BPSL]; Tracey Lien, *Meet the Attorney Suing Uber, Lyft, GrubHub and a Dozen California Tech Firms*, L.A. TIMES (Jan. 24, 2016), http://www.latimes.com/business/technology/la-fi-class-action-lawyer-20160124-story.html [https://perma.cc/4MA6-9BCW] (noting that critics believe these suits ruin businesses before they can fix problems); *see also, e.g.*, Jeff Bercovici, *Why the Next Uber Wannabe Is Already Dead*, INC. (Nov. 2015), http://www.inc.com/magazine/201511/jeff-bercovici/the-1099-bind.html [https://perma.cc/8L5Y-SNNP]; Therese Poletti, *Uber Drivers' Class-Action Lawsuit Endangers Much More than Uber*, MARKETWATCH (Sept. 1, 2015), http://www.marketwatch.com/story/uber-drivers-class-action-lawsuit-endangers-much-more-than-uber-2015-09-01 [https://perma.cc/C5FL-U26B]; Cole Stangler, *Why the Uber, Lyft Driver Union Push Could Disrupt the Gig Economy*, INT'L BUS. TIMES (Dec. 18, 2015), http://www.ibtimes.com/why-uber-lyft-driver-union-push-could-disrupt-gig-economy-2232778 [https://perma.cc/FEQ2-5HAV]. *See generally* Means & Seiner, *supra* note 14 (discussing the use of flexibility to determine whether an individual is an employee or independent contractor).

understand the precise effect cases such as *O'Connor* will have on the employment landscape.

This Article, then, does not argue that *all* class action litigation is inappropriate in the gig sector. Quite the contrary—such aggregate litigation should be allowed to proceed in many technology-sector cases. A clearer standard is needed to help the courts better understand when such systemic litigation should be allowed to proceed. This Article seeks to provide that framework.

C. *GrubHub, DoorDash, Amazon, and More*

Though this Article focuses on the existing litigation against Uber, the case really represents only the tip of the iceberg. There is also substantial other litigation pending against businesses throughout the on-demand economy. Many of these cases involve the question of worker misclassification and are worth brief exploration. These cases underscore the prevalence of this issue, and the increasing importance of finding a way to address class actions in the technology sector.

1. *GrubHub and DoorDash*

GrubHub and DoorDash provide on-demand delivery food services, allowing customers to order from local businesses through online and mobile applications.[152] On September 23, 2015, delivery drivers for GrubHub brought a class action in California state court alleging that they were misclassified as independent contractors, when they should have been classified as employees for purposes of wage payment law.[153] The drivers for GrubHub receive a flat fee for each delivery as well as any tip added by the customer.[154] The drivers allege that they are employees because they sign up for shifts in advance.[155] GrubHub controls the drivers' work by instructing them where to report, how to dress, where to go to pick up deliveries, and how to handle the food and timeliness of the deliveries themselves.[156] However, GrubHub required the drivers to bear the expenses of their vehicle, gas, parking, and phone data.[157] A similar complaint was also filed against DoorDash for misclassification of

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[152] *About Us*, DOORDASH, https://www.doordash.com/about/ [https://perma.cc/EC47-C27L]; *About Us*, GRUBHUB, http://about.grubhub.com/about-us/what-is-grubhub/default.aspx [https://perma.cc/243Z-PV3L].

[153] Tan Class Action Complaint, *supra* note 7, ¶¶ 6–7.

[154] *Id.* ¶ 2.

[155] *Id.* ¶ 10; *see also* Scott Holland, *Drivers Deliver Class Action Saying GrubHub Needs to Treat Them as Employees, Not Contractors*, COOK COUNTY REC. (July 11, 2016), http://cookcountyrecord.com/stories/510955592-drivers-deliver-class-action-saying-grubhub-needs-to-treat-them-as-employees-not-contractors [https://perma.cc/AK2M-YJXD] ("Drivers earn a flat fee for each delivery plus tips.").

[156] Tan Class Action Complaint, *supra* note 7, ¶ 10.

[157] *Id.* ¶ 12.

workers as independent contractors in California state court.[158] These cases are both pending.

2. *Instacart*

Similarly, Instacart is an on-demand "grocery delivery service."[159] The company hires workers to purchase and deliver grocery orders for Instacart's customers.[160] The company has been extremely successful and boasted an impressive $2 billion dollar valuation in 2015.[161] However, Instacart has been entangled in litigation over the classification of its workers.[162] In February 2015, several workers initiated a class action lawsuit in California's state courts—later removed to the Northern District of California—claiming that Instacart misclassified the workers as independent contractors.[163] The plaintiffs claimed that they were entitled to a minimum wage, overtime pay, and employment-related expenses such as automobile maintenance, fuel, and insurance.[164] The plaintiffs further alleged that Instacart asserted extensive control over its workers as evidenced by the company's control over "when and where [workers] were to collect and deliver groceries," the manner by which workers interfaced with customers, and the requirement that workers dress in clothing displaying the Instacart logo.[165] Furthermore, Instacart fired workers at will,[166] determined workers' wages[167] and the prices charged to customers,[168] required workers to work in shifts,[169] and constantly monitored

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[158] Kissner Class Action Complaint, *supra* note 7, ¶ 2.

[159] *What Is Instacart?*, INSTACART, https://www.instacart.com/help/section/200758544#204426950 [https://perma.cc/2TKG-THGV]; *see also* Farhad Manjoo, *Grocery Deliveries in Sharing Economy*, N.Y. TIMES (May 21, 2014), http://www.nytimes.com/2014/05/22/technology/personaltech/online-grocery-start-up-takes-page-from-sharing-services.html?_r=0 [https://perma.cc/DKM6-NPWZ].

[160] *What Is Instacart?*, *supra* note 159; *see also* Manjoo, *supra* note 159.

[161] *See* Brian Solomon, *America's Most Promising Company: Instacart, the $2 Billion Grocery Delivery App*, FORBES (Jan. 21, 2015), http://www.forbes.com/sites/briansolomon/2015/01/21/americas-most-promising-company-instacart-the-2-billion-grocery-delivery-app/#5e4092544858 [https://perma.cc/WAJ2-X66Z].

[162] *See* Complaint ¶ 29, Bynum v. Maplebear Inc., 160 F. Supp. 3d 572 (E.D.N.Y. 2016) (No. 15-CV-6263); Complaint ¶ 29, Moton v. Maplebear Inc., No. 1:15-cv-08879-CM, 2016 WL 616343 (S.D.N.Y. Feb. 9, 2016); Class Action Complaint for Damages and Demand for Jury Trial ¶ 20, Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930 (N.D. Cal. 2015) (No. 3:15-cv-00697-EMC); Class Action Complaint ¶ 11, Sumerlin v. Maplebear, Inc., No. BC 603030 (Cal. Super. Ct. Dec. 2, 2015).

[163] *See* Class Action Complaint for Damages and Demand for Jury Trial, *supra* note 162, ¶ 63.

[164] *See id.* ¶¶ 31, 39, 44, 51.

[165] *See id.* ¶ 24.

[166] *See id.* ¶ 22.

[167] *See id.* ¶ 23.

[168] *See id.* ¶ 27.

workers' actions.[170] The courts have consistently granted Instacart's motions to compel arbitration.[171]

3. *Amazon*

Amazon Prime Now provides a benefit to users of Amazon Prime that allows the members to place orders for same-day delivery in select zip codes through the use of a mobile application.[172] The drivers of Amazon Prime Now filed a class action suit in California state court on October 27, 2015, alleging misclassification as independent contractors and failure to pay minimum wage.[173] The drivers state that they work regular shifts for hourly pay in order to deliver only the packages that Amazon Prime specifically assigns to them, while wearing an Amazon uniform.[174] Amazon provides the drivers with a smart phone to use for the deliveries, but drivers must provide their own vehicle and fuel.[175] The drivers work fixed shifts in which they check in with the dispatcher to receive their package assignments.[176] They can neither reject assignments nor request to work in a particular geographic area.[177] Amazon determines the sequence of their deliveries as well as the routes and can track the drivers while they are out on delivery.[178] The drivers do not have the ability to negotiate any aspect of their compensation.[179] The Amazon Prime Now class action suit awaits possible certification by the Superior Court of California.[180]

4. *Yelp*

Yelp was founded as a means of connecting customers with local businesses.[181] Through the Yelp platform, consumers can find local businesses

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[169] *See* Class Action Complaint for Damages and Demand for Jury Trial, *supra* note 162, ¶ 32.

[170] *See id.* ¶ 23.

[171] *See* Bynum v. Maplebear Inc., 160 F. Supp. 3d 527, 529 (E.D.N.Y. 2016) (order granting motion to compel arbitration); Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 935 (N.D. Cal. 2015) (order granting defendant's motion to compel arbitration).

[172] *About Amazon Prime Now*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=201687630 [https://perma.cc/NW3X-NPZQ].

[173] Class Action Complaint ¶¶ 2, 4, Truong v. Amazon.com, Inc., No. BC598993 (Cal. Super. Ct. Oct. 27, 2015).

[174] *Id.* ¶ 1.

[175] *Id.* ¶¶ 18, 25.

[176] *See id.* ¶ 19.

[177] *Id.* ¶ 20.

[178] *Id.* ¶ 21.

[179] Class Action Complaint, *supra* note 173, ¶ 23.

[180] *See generally id.*

[181] *About Us*, YELP, http://www.yelp.com/about [https://perma.cc/GZ45-DBU4].

and leave reviews for the companies that they have visited.[182] Business managers can set up accounts to post photos of their business and message customers.[183] Yelp reviewers filed a class action suit in federal district court against the company alleging that the reviewers should be considered employees.[184] However, the court granted Yelp's motion to dismiss for failure to state a claim on August 13, 2015.[185] The court emphasized that the language used by the plaintiffs to assert that they were "hired" by Yelp should reasonably be inferred to refer to a process by which any person can sign up on Yelp and submit reviews.[186]

5. *Handy*

Handy, previously Handybook, is an online platform that connects individuals looking for household jobs, like cleaning or handyman services, with independent professionals.[187] Cleaning professionals book their work through the list of available jobs provided by the application.[188] Handy retains control over the cleaning professionals through its ability to terminate at will and through its control over the location of the cleaning job and amount charged to the customer.[189] These independent professionals filed a class action suit alleging that Handy was misclassifying its employees as independent contractors and failed to pay the workers overtime compensation.[190] The complaint was filed on October 30, 2014.[191] The court granted the cleaning service's motion to compel arbitration.[192]

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[182] *See id.*

[183] *Id.* ("Every business owner (or manager) can setup a free account to post photos and message their customers."); *see also* Lydia O'Connor, *Yelp Reviewers File Class-Action Lawsuit Claiming They Are Unpaid Writers*, HUFFINGTON POST (Oct. 31, 2013), http://www.huffingtonpost.com/2013/10/30/yelp-lawsuit-_n_4179663.html [https://perma.cc/PGL7-D2B7].

[184] *See* Jeung v. Yelp, Inc., No. 15-CV-02228-RS, 2015 WL 4776424, at *1 (N.D. Cal. Aug. 13, 2015) (order granting motion to dismiss, granting motion to strike, and denying motion for sanctions).

[185] *Id.* at *3.

[186] *Id.* at *2.

[187] *About Us*, HANDY, https://www.handy.com/about [https://perma.cc/W8SW-67W4].

[188] Zenelaj v. Handybook Inc., 82 F. Supp. 3d 968, 975 (N.D. Cal. 2015) (order granting defendant's motion to compel arbitration).

[189] *Id.*

[190] *Id.* at 970; *see also* Maya Kosoff, *Two Workers Are Suing a Cleaning Startup Called Handy over Alleged Labor Violations*, BUS. INSIDER (Nov. 12, 2014), http://www.businessinsider.com/handy-cleaning-lawsuit-2014-11 [https://perma.cc/BR53-YCYQ].

[191] *Zenelaj*, 82 F. Supp. 3d at 970.

[192] *Id.*

6. *Postmates*

Postmates is a courier service that "connects customers with local couriers who can deliver anything from any store or restaurant in minutes."[193] Couriers have filed several class action lawsuits against Postmates for worker misclassification.[194] A class action complaint filed in the Northern District of California alleges that Postmates misclassifies its couriers as independent contractors and fails to pay a minimum wage, overtime, and various expenses that an employer should incur.[195] The complaint further alleges that couriers

> are required to follow detailed requirements imposed on them by Postmates, and they are graded, and are subject to termination, based on Postmates' discretion and/or their failure to adhere to these requirements (such as rules regarding their conduct with customers, their timeliness in picking up items and delivering them to customers, the accurateness of their orders, etc.).[196]

Couriers are responsible for many of their work-related expenses, such as transportation and phone costs.[197] The class action "has been stayed pending mediation."[198]

7. *CrowdFlower*

CrowdFlower is a company that provides data enrichment, data mining, and crowdsourcing.[199] Customers upload their data onto the CrowdFlower website and set up instructions to create their job.[200] Once the job has been

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[193] *About Postmates*, POSTMATES, https://about.postmates.com/ [https://perma.cc/Q937-XPBC].

[194] *See* Singer Class Action Complaint, *supra* note 6, ¶ 2; Class Action Complaint ¶ 1, Peppler v. Postmates, Inc., No. 1:15-cv-05145-RCL (D.C. Super. Ct. Aug. 25, 2015); Complaint ¶ 1, Marable v. Postmates, Inc., No. BC589052 (Cal. Super. Ct. July 23, 2015); *see also* Katy Steinmetz, *Homejoy, Postmates, and Try Caviar Sued over Labor Practices*, TIME (Mar. 19, 2015), http://time.com/3751745/postmates-homejoy-try-caviar-lawsuits/ [https://perma.cc/7ATR-KMJL].

[195] Singer Class Action Complaint, *supra* note 6, ¶¶ 2–3.

[196] *Id.* ¶ 21.

[197] *Id.* ¶ 23.

[198] Jessica Karmasek, *Boston Plaintiffs Attorney Targets Startup Companies in Class Actions*, LEGAL NEWSLINE (May 27, 2016), http://legalnewsline.com/stories/510743555-boston-plaintiffs-attorney-targets-startup-companies-in-class-actions [https://perma.cc/WP3V-44EG].

[199] *AI for Your Business*, CROWDFLOWER, http://www.crowdflower.com [https://perma.cc/3B6P-665F].

[200] *Platform Overview*, CROWDFLOWER, https://success.crowdflower.com/hc/en-us/articles/201856129-Platform-Overview [https://perma.cc/UHJ4-L69K] ("When users log in to CrowdFlower and create a new job, the first option that appears is to load data into the job.").

created, people will task on the job until it has been completed.[201] Individuals that had performed some of these tasks for CrowdFlower brought a class action suit against the company alleging that they were misclassified as independent contractors and paid less than the legal minimum wage.[202] The parties entered a settlement in the case in which defendants agreed to pay $585,507 to be distributed among the plaintiffs and plaintiffs' counsel.[203] The settlement was approved on July 2, 2015.[204]

8. *Homejoy*

Homejoy was an on-demand start-up that connected independent professional cleaners with customers.[205] The company classified its 1,000-plus cleaners as independent contractors.[206] At the outset, the company enjoyed considerable growth and raised a significant amount of venture capital financing.[207] Despite its early successes, workers filed a series of lawsuits, including three class actions, against Homejoy, alleging that the company's cleaners were improperly classified as independent contractors.[208] Each complaint asserts that Homejoy exerted a substantial amount of control over its cleaners, and, therefore, misclassified its workers as independent contractors.[209] A class action complaint filed on March 19, 2015 in the Northern District of California alleges Homejoy failed to compensate cleaners for overtime and work-related expenses that Homejoy should have reimbursed.[210] A separate class action complaint filed in California state court alleges that the company's cleaners could not "negotiate their pay," and had no discretion over which homes to clean or the amount of time spent cleaning a

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[201] *Id.*

[202] Otey v. CrowdFlower, Inc., No. 12-cv-05524-JST, 2014 WL 1477630, at *1 (N.D. Cal. Apr. 14, 2014) (order denying motion for approval of settlement without prejudice).

[203] *Id.* at *2.

[204] Craig Johnson, *Crowdsourcing Supplier Settles Class Action Lawsuit*, STAFFING INDUSTRY ANALYSTS (July 8, 2015), http://www.staffingindustry.com/Research-Publications/Publications/CWS-3.0/July-2015/July-8-2015/Crowdsourcing-supplier-settles-class-action-lawsuit [https://perma.cc/99W6-XCGK].

[205] *See* Lora Kolodny, *Homejoy Raises $38M for House Cleaning on Demand*, WALL STREET J. (Dec. 5, 2013), http://blogs.wsj.com/venturecapital/2013/12/05/homejoy-raises-38m-for-house-cleaning-on-demand/ [https://perma.cc/P6QN-R9U6].

[206] *See id.*; *see also* Kia Kokalitcheva, *Home Cleaning Startup Homejoy Bites the Dust—Literally*, FORTUNE (July 17, 2015), http://fortune.com/2015/07/17/homejoy-closing-cleaning-google/ [https://perma.cc/6KEB-EH8N].

[207] *See* Kolodny, *supra* note 205.

[208] Collective & Class Action Complaint & Jury Demand ¶¶ 15–17, Iglesias v. Homejoy, Inc., No. 3:15-cv-01286-LB (N.D. Cal. Mar. 19, 2015); Class Action Complaint for Damages ¶¶ 1–2, Ventura v. Homejoy, Inc., No. CGC-15-544750 (Cal. Super. Ct. Mar. 16, 2015); Class Action Complaint ¶ 3, Malveaux-Smith v. Homejoy, Inc., No. 37-2015-00005070-CU-OE-CTL (Cal. Super. Ct. Feb. 13, 2015).

[209] *See* Class Action Complaint for Damages, *supra* note 208, ¶¶ 32–33, 44.

[210] Collective & Class Action Complaint & Jury Demand, *supra* note 208, ¶ 3.

home.[211] Additionally, Homejoy could fire a cleaner at any time or place a cleaner on a "performance improvement plan[]."[212] The complaint further alleges that Homejoy could change a cleaner's schedule with very little notice,[213] determined the cleaning fees,[214] mandated a "minimum number of jobs" per week,[215] and required cleaners to wear a shirt emblazoned with the company's logo.[216] Furthermore, the cleaners were required to adhere to a cleaning checklist provided by Homejoy and could not determine "cleaning tasks" within the home.[217] In July 2015, Homejoy announced that it would cease operations primarily due to pending lawsuits over worker misclassification.[218]

9. *Washio*

Washio was an on-demand dry cleaning and laundry service that hired drivers to pick up and deliver laundry to customers.[219] Washio drivers filed a class action lawsuit on June 29, 2015 in California state court alleging that drivers were improperly classified as independent contractors.[220] The complaint claims that Washio required its drivers to adhere to rules dictating client interactions and how drivers should "store clothes in their vehicles."[221] Additionally, Washio drivers were evaluated on how quickly they completed pick-ups and drop-offs, and the company could fire workers at will.[222] The complaint further alleges that Washio required drivers to consent to an exclusivity agreement, which prohibited drivers from working for Washio's

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[211] Class Action Complaint for Damages, *supra* note 208, ¶ 43.

[212] *Id.*

[213] *See id.* ¶ 37.

[214] *See id.* ¶ 44.

[215] *Id.* ¶ 35.

[216] *Id.* ¶ 39.

[217] Class Action Complaint for Damages, *supra* note 208, ¶ 40.

[218] *See* Kokalitcheva, *supra* note 206; *see also* Ellen Huet, *Homejoy Shuts Down, Citing Worker Misclassification Lawsuits*, FORBES (July 17, 2015), http://www.forbes.com/sites/ellenhuet/2015/07/17/cleaning-startup-homejoy-shuts-down-citing-worker-misclassification-lawsuits/#1006dcb87780 [https://perma.cc/L8XN-MBT8].

[219] *See* Brian Solomon, *Washio, the On-Demand Laundry Startup, Washes Out*, FORBES (Aug. 30, 2016), http://www.forbes.com/sites/briansolomon/2016/08/30/washio-the-on-demand-laundry-startup-washes-out/#97aa85a68361 [https://perma.cc/LW6F-FY9T].

[220] Taranto Class Action Complaint, *supra* note 6, ¶ 2; *see* Biz Carson, *The Lawyer Fighting for Uber and Lyft Employees Is Taking the Fight to Four More Companies*, BUS. INSIDER (July 1, 2015), http://www.businessinsider.com/postmates-shyp-and-washio-hit-with-legal-action-from-contractors-2015-7 [https://perma.cc/6S2U-ENJM]; *see also* Class Action Complaint for Damages & Injunctive Relief, Bennett v. Washio, Inc., No. BC603067 (Cal. Super. Ct. Dec. 8, 2015) (a separate case brought against Washio).

[221] Taranto Class Action Complaint, *supra* note 6, ¶ 11.

[222] *Id.* ¶ 11–12.

competitors.[223] Washio ceased operations in August 2016,[224] though the company cited reasons other than litigation for shutting down.[225]

As these cases demonstrate, there is a vast amount of litigation against technology-sector companies on the worker-classification issue. This litigation has had differing results. Some cases have been allowed to proceed, others have been dismissed, others have settled, and still others have found their way to arbitration.

More importantly, these cases emphasize the varied fact patterns that can give rise to technology-sector working relationships. While the ultimate question is one of control, there is no uniform set of facts in these cases that will help provide guidance on how that control should be measured. Indeed, these cases emphasize how this question is highly individualized in nature. With regard to control in this economy, we see that GrubHub controls where to report, how to dress, where to pick up deliveries, and how to address timeliness issues.[226] Amazon Prime Now controls the application that drivers use, the appearance of drivers, and the rate of pay.[227] Yelp apparently maintains almost no control over its reviewers.[228] And, there is an additional panoply of businesses which have yet to see litigation in this area but that are ripe for a potential dispute on this question.

Regardless of the potential company involved, the worker classification question will continue to arise in numerous contexts within the modern economy until more guidance is given in this area. This Article seeks to provide a framework with which to address these issues on a classwide basis.

VI. REDIRECTING THE CLASS ACTION INQUIRY: WEIGHING INDICIA OF EMPLOYMENT

The difficulty highlighted with litigating class action cases in many of the technology-sector jobs discussed above is, somewhat ironically, also one of the greatest benefits associated with this type of employment—worker flexibility.[229] Workers in the gig economy enjoy an unprecedented amount of

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[223] *Id.* ¶ 14.

[224] *See* Solomon, *supra* note 219.

[225] *See id.*; *see also* Shan Li, *On-Demand Laundry Start-Up Washio Shuts Down*, L.A. TIMES (Aug. 30, 2016), http://www.latimes.com/business/la-fi-washio-startup-20160830-snap-story.html [https://perma.cc/MG93-M82Q] (explaining the difficulty of making money while maintaining high quality service, various expenses, and unhappy online customers).

[226] Tan Class Action Complaint, *supra* note 7, ¶ 10.

[227] Class Action Complaint, *supra* note 173, ¶¶ 18, 23.

[228] *See* Jeung v. Yelp, Inc., No. 15-cv-02228-RS, 2015 WL 4776424, at *2 (N.D. Cal. 2015) (order granting motion to dismiss, granting motion to strike, denying motion for sanctions, and denying motion for preliminary certification of collective action).

[229] Noam Scheiber, *Growth in the 'Gig Economy' Fuels Work Force Anxieties*, N.Y. TIMES (July 12, 2015), https://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html [https://perma.cc/8LY

flexibility in many instances, and often choose when, where, and how to carry out their job duties.[230] While this workplace flexibility often works to the benefit of individuals, it makes aggregation of claims far more difficult. Unlike a traditional brick-and-mortar type place of employment, or a factory assembly line setting, workers in the gig industry often do not perform identical services or work similar hours.[231]

A. *The Indicia of Employment Test*

The problem with *O'Connor* (and cases following its analysis) is the lack of *commonality* that often exists among workers in technology-sector cases. The key inquiry here, which will continue to be a question for years to come, is whether or not a worker is an employee or an independent contractor. But this question is very difficult to answer on an aggregate level—the workers are often too varied in these cases.[232] This is not to say that in certain circumstances (or in particular employment settings) that workers cannot be aggregated. However, each case must be examined on an individualized basis.[233] Indeed, there may be groups of workers that have similar employment characteristics that would allow them to be aggregated for purposes of systemic litigation. Or, there may be subclasses that would work in the particular litigation. The major point here, however, is that there is often no

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4-9RX6].

[230] *Id.*; *There's an App for That*, ECONOMIST (Dec. 30, 2014), http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and [https://perma.cc/5Z6K-DDYW]; *see also* James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits [https://perma.cc/HZ6T-RFJR]. Though this Article focuses on a handful of illustrative examples of class action cases in the technology sector, there are many more cases that have been filed. *See, e.g.*, *supra* note 6 (aggregating cases).

[231] *See, e.g.*, Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU LAB. STAT. (May 2016), http://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm [https://perma.cc/L9BS-XHBA] ("Gig workers are spread among diverse occupation groups and are not easily identified in surveys of employment and earnings.").

[232] *See supra* Part V.C (discussing specific examples of technology-sector litigation). The federal court in the *Lyft* case addressed the confusion in this area of the law, noting that:

> Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this.

Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015) (order denying cross-motions for summary judgment).

[233] Bauer, *supra* note 85, at 152–54 (discussing common law test for classifying workers).

"one-size-fits-all"[234] answer to this question for technology-sector cases. Rather, the best that we can do is to provide some general guidelines on how—and when—to aggregate these claims.

This Article proposes a framework that helps identify those technology-sector cases that would be appropriate for aggregation on the employee/independent contractor question. Through an extensive review of the case law, several factors emerged which help clarify which cases should be permitted to proceed on a systemic level. The key component of this framework is an emphasis on the level of *commonality* of the workers as required by the Supreme Court's *Wal-Mart* decision discussed above.[235] Those workers that have more in common with each other share a number of similar characteristics, which are identified in the model proposed below.

This framework sets forth five different characteristics that the courts and litigants should consider when evaluating class action litigation on the employee/independent contractor question. These characteristics should only serve as a guideline and are not dispositive. Each case—particularly in this emerging economy—is unique and should be evaluated on its own merits. The model below, however, is sufficiently comprehensive to help the courts navigate this complex area of the law. It also provides some basic guidelines to consider when evaluating the appropriate scope of a class on this commonality question. Each of the five factors below should be carefully considered by the court when addressing this type of systemic litigation.

These factors can help shape a systemic class when considering the independent contractor/employee issue and should be examined when any aggregate litigation is proposed on this question. It is important to note that these factors should not be confused with the test discussed earlier for determining the existence of an employment relationship.[236] Rather, these factors are intended primarily to help evaluate the more precise question of whether worker claims should be *aggregated* on the independent contractor/employment issue. Each factor should be evaluated separately when examining this issue, and the weight given to any specific factor will depend on the particular case. These factors are not exhaustive. Indeed, it is entirely possible that factors not contemplated here may still play a major role in shaping a proposed class. Nonetheless, the following framework attempts to

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[234] Groff et al., *supra* note 8, at 171.

[235] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352–53 (2011).

[236] This test typically emphasizes an employer's control over the working relationship. *See, e.g.*, Wells v. FedEx Ground Package Sys., Inc., 979 F. Supp. 2d 1006, 1013 (E.D. Mo. 2013) ("The right to control 'is the pivotal factor in distinguishing between employees and other types of workers. If the employer has a right to control the means and manner of a person's service—as opposed to controlling only the results of that service—the person is an employee rather than an independent contractor.'" (quoting Leach v. Bd. of Police Comm'rs, 118 S.W.3d 646, 649 (Mo. Ct. App. 2003))), *rev'd and remanded sub nom*. Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995 (8th Cir. 2015). The test suggested in this Article closely tracks the analysis I recently proposed on the independent contractor/employee question. Means & Seiner, *supra* note 14, at 1514–15.

provide some basic guidelines for considering how to aggregate a class in the technology sector.

These five factors—which are unweighted—are set forth below:

1. *The Time that the Work Occurs.* When an individual performs work is a critical component of that individual's status as an employee.[237] Thus, when aggregating claims, the courts should closely examine the timing of the work itself. If an individual works exclusively on evenings, that individual's experience may be far different than someone who is employed only during the day.[238] Thus, individuals who perform work at similar times will be more likely to satisfy the commonality component of Rule 23.[239] Timing is simply one factor[240]—but an important indicia of employment[241]—and should be considered when grouping plaintiffs in systemic litigation on the independent contractor question.

2. *The Place Where Work Is Performed*. The place where the work is performed is a critical factor which helps differentiate individuals.[242] Workers will likely vary in where their job duties are executed, such as at home, in an

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[237] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (determining that the "hired party's discretion over when and how long to work" is a consideration in whether someone is an employee); *see, e.g.*, Kramer v. Cash Link Sys., 715 F.3d 1082, 1088–89 (8th Cir. 2013) ("Where a sales representative has the option to set his own schedule and to train himself, he is not subject to the sort of control that exists in the traditional employer-employee relationship."); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1152 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment) ("Uber makes much of the fact that Uber has no control over its drivers' hours or whether its drivers even 'report' for work more than once in the relevant period. This is a significant point, and one on which this Court previously commented in noting that such evidence might weigh heavily in favor of a finding of independent contractor status."). *But see* Estate of Suskovich v. Anthem Health Plans of Va., Inc., 553 F.3d 559, 566 (7th Cir. 2009) ("Merely setting a work schedule is not sufficient to support a finding that a given person is an employee rather than an independent contractor. Nor is the fact that a person is required to be at a given place at a given time or assigned project work sufficient to support an employer-employee relationship." (citation omitted)).

[238] *See, e.g.*, Laura A. Stokowski, *Nurses Are Talking About: Working the Night Shift*, MEDSCAPE (Jan. 11, 2013), http://www.medscape.com/viewarticle/777286 [https://perma.cc/V7RR-AN2K] (discussing the differing experiences of nurses working day versus night shifts).

[239] Individuals with common work experiences are more likely to have a "common contention . . . capable of classwide resolution" where disputes relating to their employment arise. *See Wal-Mart*, 564 U.S. at 350.

[240] *See Estate of Suskovich*, 553 F.3d at 566; Alexander v. Rush N. Shore Med. Ctr., 101 F.3d 487, 493 (7th Cir. 1996).

[241] *See, e.g.*, *Darden*, 503 U.S. at 323 (including when an individual works as an indication of employee or independent contractor status).

[242] *See, e.g.*, Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979) (laying out "whether the 'employer' or the individual in question furnishes the equipment used and the place of work" as a critical factor in determining whether someone is an independent contractor).

office, or even in their car.[243] Those that carry out their tasks in a similar physical location will be far more likely to satisfy the commonality necessary to be part of a class action.[244] Individuals who work at different locations may be too different from one another to warrant class certification.[245]

3. *The Frequency of Work Performed*. Frequency is likely the most important factor in the five-part framework, as it helps clarify which workers are truly similar to each other.[246] Frequency is a term that is malleable to the specific workplace, but in most contexts—as in the technology sector—it can be more simply defined as *how often* the work is performed.[247] In the context of Uber, for example, the frequency of work would mean the number of hours that a driver performs her duties—how often the driver is actually on the road transporting customers.[248]

The *frequency factor*—at least in the technology sector—is where employees will likely diverge substantially from one another.[249] Some drivers might work forty to sixty hours a week, whereas other drivers may treat their employment as a part-time job, working only a few hours a week to make extra money on the side.[250] Frequency of work can, and often is, driven by a number of different criteria.[251] Individuals that are unemployed could see

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[243] *See* Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/ [https://perma.cc/59L7-HUDM] (exploring the size of various gig economy workplaces, including cars, bedrooms, and kitchens).

[244] *See, e.g.*, *Wal-Mart*, 564 U.S. at 357 (indicating that the commonality requirement for class certification depends upon the plaintiffs showing a "uniform, store-by-store" issue underlying the class action claim).

[245] *See id.*

[246] For example, the Bureau of Labor Statistics distinguishes between full-time and part-time employees. *See* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 10, 21 (Nat'l Bureau of Econ. Research, Working Paper No. 22843, 2016).

[247] *See, e.g.*, Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 261 (4th Cir. 1997) (noting that a physician's nonuniform hours of work and his ability to set those hours were significant in determining his independent contractor status).

[248] *See* Hall & Krueger, *supra* note 246, at 10 (measuring the frequency of drivers' hours per week "with the 'Uber Platform'" rather than using the typical distinction between full- and part-time workers).

[249] *Id.* at 2.

[250] *See, e.g.*, Sam Frizell, *Uber Just Answered Everything You Want to Know About Your Driver*, TIME (Jan. 22, 2015), http://time.com/3678507/uber-driver-questions/ [https://perma.cc/Y6F3-WGJ9]; *see also Driving Jobs vs Driving with Uber*, *supra* note 2; *Uber Needs Partners Like You*, UBER, https://get.uber.com/drive/ [https://perma.cc/U2YN-4PVR] ("Need something outside the 9 to 5? As an independent contractor with Uber, you've got freedom and flexibility to drive whenever you have time. Set your own schedule, so you can be there for all of life's most important moments.").

[251] *See* Jonathan Hall, *In the Driver's Seat: A Closer Look at the Uber Partner Experience*, UBER (Jan. 22, 2015), https://newsroom.uber.com/in-the-drivers-seat-understanding-the-uber-partner-experience/ [https://perma.cc/4PB6-PB5W]; *see also* Claire, *How Partnering with Uber Can Spark Small Business & Entrepreneurship*, UBER

being a full-time Uber driver as an excellent employment opportunity.[252] Individuals that are currently employed in other parts of the economy may quit their jobs to make more money at Uber full-time.[253] Or, workers might have other full-time employment, be full-time students, or simply only want to work for the company for a limited number of hours per week.[254] Irrespective of the particular worker's situation, however, *how often* the work is performed will be a critical (and often overlooked) criteria for aggregation on the employee/independent contractor question.

4. *Manner of Work Performed*. The manner of work performed can more simply be defined as how a worker performs her job.[255] This factor is important, but often not likely to differ between workers in technology-driven jobs. In the *Uber* case, for example, courts could look at whether the individual drives her own car, or whether she utilizes a vehicle owned by the company. Or, the court could examine whether some workers perform their jobs under particularly high-stress conditions, whereas others do not face the same obstacles or difficulties. How a particular individual's work is evaluated and/or supervised is another critical factor that forms part of this inquiry.[256]

(June 30, 2016), https://newsroom.uber.com/how-partnering-with-uber-can-spark-small-business-entrepreneurship/ [https://perma.cc/8W26-2G5Z].

[252] *See Can You Really Make Money Driving for Uber?*, ONE MORE CUP COFFEE, http://onemorecupof-coffee.com/can-you-really-make-money-driving-for-uber/ [https://perma.cc/HTH6-U6LV]; *see also* Claire, *supra* note 251; Hall, *supra* note 251.

[253] *See, e.g.*, *Driving Jobs vs Driving with Uber*, *supra* note 2 ("The best part about driving with Uber is that you can set your own hours. On the other hand, driving jobs like truck driving can have very long hours and strict schedules. The opportunity that works best for you depends on whether you want a traditional full-time or part-time job, or want to work whenever you choose.").

[254] *See id.*; *Uber Driving Partner – A Great Opportunity for College Students*, UBER, https://get.uber.com/p/college-student-driver-partner/ [https://perma.cc/ZDP9-R6BV].

[255] *In re* FedEx Ground Package Sys., Inc. (*FedEx II*), 869 F. Supp. 2d 942, 973 (N.D. Ind. 2012) (considering factors such as the right to control *the manner and methods of performance*, the mode of payment, the furnishing of material or tools, the control of the premises where the work is done, and the right of the employer to discharge); *see also* Kramer v. Cash Link Sys., 715 F.3d 1082, 1088–89 (8th Cir. 2013) (noting that an employee's choice to work from the office or home favored independent contractor status); Petri v. Kestrel Oil & Gas Props., 878 F. Supp. 2d 744, 770 n.19 (S.D. Tex. 2012) ("[T]he employer must control not merely the end to be accomplished, but in addition the means and details of reaching that end . . . ."); *cf.* Ruiz v. Affinity Logistics Corp., 887 F. Supp. 2d 1034, 1040–41 (S.D. Cal. 2012) (noting that the most important factor to consider is the extent to which the employer has the right to control the details of the work performed), *rev'd and remanded*, 754 F.3d 1093 (9th Cir. 2014).

[256] *In re* FedEx Ground Package Sys., Inc., No. 3:05-MD-527 RM, 2010 WL 597988, at *2 (N.D. Ind. Feb. 17, 2017); *In re* FedEx Ground Package Sys., Inc., 283 F.R.D. 427, 468 (N.D. Ind. 2012); *see also In re* FedEx Ground Package Sys., Inc. (*FedEx I*), 662 F. Supp. 2d 1069, 1076 (N.D. Ind. 2009) (noting employer control as a critical factor). "[W]hether a particular state's law looked to the right to control as distinct from the actual exercise of control" was determinative of FedEx drivers' classification as independent contractors or employees. *Id.* Of the states examined in this case, only North Carolina,

Like the other factors, those that perform work in a similar manner will be more likely to satisfy the commonality component as defined by the Supreme Court. This factor should thus be carefully scrutinized when evaluating the scope of a particular class action in the workplace.

5. *Pricing Models.* Price is a particularly unique component of the framework set forth in this Article.[257] The other factors—time, place, frequency, and manner—all go to the core of *how* work is performed.[258] Pricing questions can reveal the level of control an employee exerts in the working relationship with the company.[259] Those individuals who are able to set their own pricing models for their services will be far more likely to be independent contractors than those who do not have this amount of control.[260] Similarly, class actions on the question of the employee/independent contractor issue should be grouped among employees that have similar levels of control over setting their own pricing structures for their particular services. Those workers that have different levels of power in setting prices should not be considered as part of the same class on this question, as they are far different in their status as employees.[261]

The five-part model set forth above is intended to serve only as a guide and to provide common markers for courts to look to when assessing the scope of a class claim. The framework addresses the appropriate breadth of a class on the question of whether workers are independent contractors or employees. The model should not be used on the more precise question of whether workers actually *are* employees or independent contractors.[262] That question is beyond the scope of this Article and has been well-trodden in the academic literature.[263] Nonetheless, the same factors used to shape a class action in this

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Oregon, and Louisiana considered pricing models when determining class certification. *See id.* at 1088, 1100, 1106.

[257] *See FedEx I*, 662 F. Supp. 2d at 1088, 1100, 1106; *see also, e.g.*, Simpkins v. Unigard Mut. Ins. Co., 203 S.E.2d 742, 745 (Ga. Ct. App. 1974) (defining the manner of work performed as how an employee goes about doing his job).

[258] For example, the Restatement of Agency distinguishes the issue of an employer's control from other factors concerning the manner in which work is performed and which are critical to distinguishing between employees and independent contractors. *See* RESTATEMENT (SECOND) OF AGENCY § 220(1) cmt. e (AM. LAW INST. 1958) ("Those rendering service but retaining control over the manner of doing it are not [employees].").

[259] *See* Hennighan v. Insphere Ins. Sols., 38 F. Supp. 3d 1083, 1104 (N.D. Cal. 2014) (explaining that workers paid by the hour are typically employees and those paid by the job are independent contractors); *see, e.g.*, Kibodeaux v. Progressive Ins. Co., 4 So. 3d 222, 225 (La. Ct. App. 2009); McCown v. Hines, 549 S.E.2d 175, 177–78 (N.C. 2001).

[260] *See, e.g.*, Woodring v. Robinson, 892 F. Supp. 2d 769, 776 (S.D. Miss. 2012); Mary Kay Inc. v. Woolf, 146 S.W.3d 813, 818 (Tex. App. 2004).

[261] *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1255, 1259–60 (11th Cir. 2008) (considering the managers' level of control in setting pay in assessing whether they were similarly situated for purposes of class certification).

[262] *Cf.* Bodie, *supra* note 85, at 664–65 (attempting to define employees).

[263] *See supra* note 85 (discussing literature on the independent contractor/employee classification issue).

area will typically be relevant to the ultimate question of whether a worker is an employee or an independent contractor.[264]

Attempting to define an appropriate class on this issue can be a difficult task, and the model offered by this Article is simply one approach to this type of aggregate litigation.[265] This model should serve as a guide to systemic litigation in this area of the law—one of many tools practitioners and the judiciary can use to help establish the parameters of this common type of class action litigation. This is not to say that there cannot be other approaches to class action cases, however, as there are surely other indicia the courts can look to when considering the independent contractor/employee issue.[266] The model is thus not intended to be exhaustive, and serves as a single formulation to help better define this complex area of the law. This Article primarily sets out to spark a debate on the need for a test in this area, and this Article welcomes opposing views on what the factors of that test should look like.

Additionally, the technology cases in this area are often highly individualized.[267] The model offered here attempts to be broad enough in scope to help account for specific variances in the cases.[268] However, the model is malleable and may need to be adjusted in specific situations that do not fit neatly within its parameters. As the modern economy is constantly evolving,[269] the framework offered here must only be considered a guide—and some businesses may fall outside of the factors contemplated. Each case will thus present a unique set of facts and should be considered accordingly.

In short, no model can account for all of the potential variances in a constantly changing industry. This Article offers a basic framework to address the bulk of the cases, but should be considered flexible and may need to be adapted to more unique or novel situations. Nonetheless, this model provides

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[264] *See generally* Means & Seiner, *supra* note 14, at 1527.

[265] *See, e.g.*, Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 132–33 (2015); Julia Morpurgo, Note, *Should Class Be Dismissed? The Advantages of a One-Step Class Certification Process in Unpaid Intern FLSA Lawsuits*, 36 CARDOZO L. REV. 765, 798–99 (2014). For a discussion of one other such tool, the issue class, see *infra* Part VII.

[266] For example, courts could also consider, among other factors, the level of training required, the continuity of the relationship, or any requirements for reports. *See* Barron, *supra* note 85, at 459; Morpurgo, *supra* note 265, at 798–99.

[267] *See, e.g.*, *supra* Part V.A (discussing the individualized nature of Uber drivers' claims in *O'Connor*).

[268] *See supra* Part V (discussing gig-sector class action cases).

[269] *See* Larry Alton, *Four Ways the On-Demand Economy Is Changing the Face of Business*, FORBES (Dec. 30, 2016), http://www.forbes.com/sites/larryalton/2016/12/30/4-ways-the-on-demand-economy-is-changing-the-face-of-business/#166d0b843aa5 [https://perma.cc/ZM2Y-U9K4]; Charles Colby & Kelly Bell, *The On-Demand Economy Is Growing, and Not Just for the Young and Wealthy*, HARV. BUS. REV. (Apr. 14, 2016), https://hbr.org/2016/04/the-on-demand-economy-is-growing-and-not-just-for-the-young-and-wealthy [https://perma.cc/A27M-6HZD]; Mike Jaconi, *The 'On-Demand Economy' Is Revolutionizing Consumer Behavior—Here's How*, BUS. INSIDER (July 13, 2014), http://www.businessinsider.com/the-on-demand-economy-2014-7 [https://perma.cc/AQ2M-WXWW].

an important framework for evaluating the scope of much of the class action litigation in the modern economy.

B. *Applying the Indicia of Employment Test to* O'Connor

The proposed model set forth here is meant to apply to all cases arising in the technology sector. The proposed framework is broad enough to be adapted to each of these cases. However, it is helpful to understand the contours of the test by applying it to the facts of one particular situation: the *O'Connor* case.[270]

When evaluating the framework in this context, we see that the time in which the work is performed will vary greatly across the Uber workforce.[271] Some drivers perform their services during the day, others at night, and some drivers work exclusively on weekends.[272] Similarly, the place where drivers perform the work will vary as well.[273] Some will drive in specific areas of the city or primarily near particular venues or attractions.[274] Frequency differs among workers here too—some drivers will work full-time schedules while others will only spend a few hours a week driving for the company.[275] The manner in which the work is performed can also vary—those driving during rush hour, high-peak times, or during nighttime hours will have a far different experience than those working during the day or on weekends.[276] Finally, the pricing model appears to be consistent across the proposed Uber class, as the fares and reimbursements are established by the company itself.[277]

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[270] *See supra* Part V.A.

[271] Frizell, *supra* note 250; *see also* Hall, *supra* note 251.

[272] *See Can You Really Make Money Driving for Uber?*, *supra* note 252.

[273] *See Driving Jobs vs Driving with Uber*, *supra* note 2; Laura Peters, *Uber Expands into the Area*, NEWS LEADER (Dec. 28, 2015), http://www.newsleader.com/story/news/local/2015/12/28/uber-expands-into-area/77970560/ [https://perma.cc/H9BT-2U8H] (discussing Uber availability in urban versus rural areas); Alina Selyukh, *Uber Surge Price? Research Says Walk a Few Blocks, Wait a Few Minutes*, NPR (Oct. 29, 2015), http://www.npr.org/sections/alltechconsidered/2015/10/29/452585089/uber-surge-price-research-says-walk-a-few-blocks-wait-a-few-minutes [https://perma.cc/R28P-9ZGH] (describing Uber driver practices in certain areas during surge pricing).

[274] *See* Peters, *supra* note 273; Selyukh, *supra* note 273.

[275] *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *17 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification); Frizell, *supra* note 250 (noting that Uber drivers do not drive that many hours a week, but in fact, "[a] majority (51%) of Uber drivers work 15 hours a week or fewer. Only 19% of [them] are really driving full-time (35 hours per week and more) compared with 81% of regular taxi drivers and chauffeurs").

[276] The experience of workers will depend heavily on several individualized factors. *See, e.g.*, *Where to Drive: Houston*, UBER, http://www.driveuberhouston.com/peakhours/ [https://perma.cc/J5N7-CDUS] (giving the peak hours and locations in which demand is highest in Houston due to factors such as night life and work rushes).

[277] *See* Nicholas Diakopoulos, *How Uber Surge Pricing Really Works*, WASH. POST (Apr. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/17/how-uber-

As we see from the *Uber* example, then, perhaps the greatest advantage of the model proposed here is its simplicity. Through this model, we are able to quickly identify and assess some of the unifying and differing characteristics of the proposed class.[278] We can readily identify what factors would make drivers similar—and different—from one another.[279] We can find the "glue" holding the purported class together as demanded by the Supreme Court in *Wal-Mart*.[280] Four of the five factors of the framework—time, place, frequency, and manner—highly suggest that allowing a single, aggregated class among all 160,000 drivers would likely be too excessive, at least under the *Wal-Mart* test.[281] There is simply too much variance present to satisfy the commonality necessary for a class action claim under the Supreme Court's new heightened standard.[282]

This is not to say that a class action would never be appropriate against Uber (or in other technology-sector cases). Rather, the class action mechanism should be used to litigate several smaller systemic cases where workers are grouped together in similar classes.[283] The courts and litigants must approach each case from the standpoint of commonality[284]—how workers can be placed in classes where they share sufficiently similar characteristics.[285] The touchstone for this inquiry should be the five-part framework set forth above. If drivers work a similar number of hours at the same times of the day, in similar geographic locations, they are far more likely to represent an adequate—and fair—class of litigants.

In the *O'Connor* situation, it is impossible to say how many class cases should be properly used to aggregate the workers (or whether subclasses could be properly utilized in the matter). It may be that five or ten classes of workers would be appropriate and would help to more similarly situate the workers together. This would still represent average classes of well over ten thousand

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surge-pricing-really-works/ [https://perma.cc/FMX6-US3N]; *How Are Fares Calculated?*, UBER, https://help.uber.com/h/33ed4293-383c-4d73-a610-d171d3aa5a78 [https://perma.cc/PD6Z-E33F]; Dan Kedmey, *This Is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), http://time.com/3633469/uber-surge-pricing/ [https://perma.cc/ZHE5-Y9FQ]; *Uber Moves: Columbia, SC*, UBER, https://www.uber.com/cities/columbia [https://perma.cc/UK2A-SAFQ] (showing various fare rates for UberX and UberXL trips in Columbia, SC) .

[278] *See supra* notes 250–56 and accompanying text.

[279] *See supra* notes 250–56 and accompanying text.

[280] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011).

[281] *See id.* at 352, 355.

[282] *Id.* at 352.

[283] Malveaux, *supra* note 21, at 44 ("Smaller classes are bound to be more successful.").

[284] *See* FED. R. CIV. P. 23(a)(2) (requiring that there be "questions of law or fact common to the class").

[285] *See* Malveaux, *supra* note 21, at 44 ("With 1.5 million potential class members nationwide, *Dukes* unquestionably tested the outer bounds of what it takes to hold a class together.").

workers each,[286] which are still massive cases for the company to defend against. If situated in the framework presented above, however, such classes would be far easier to conceptualize and would make the determination of whether such workers were independent contractors or employees much easier to resolve.[287] Until we have a better idea of how many workers share similar characteristics with one another, however, it will be impossible to know precisely how many class cases should be pursued here.[288] The exact number of cases is irrelevant; the more important consideration is a focus on the elements of the Federal Rules and making sure that all of the claimants share sufficient commonality.[289] If this commonality is assured, then the cases will be far easier to define.[290]

This will likely also mean that aggregation is inappropriate for certain workers. Many of the 160,000 drivers will work completely unique schedules, drive in particular geographic areas, or otherwise perform their services in a way that sets them apart.[291] Such drivers should not be considered with the other workers here, and their claims should be litigated and resolved independently.[292] Whether such drivers are employees or independent contractors must thus be considered on an individual rather than a class basis.[293]

Again, it is impossible to know at this stage of the proceedings how many workers are independent enough to fall outside of a particular class of workers. However, where these drivers fail to share common characteristics with the other workers, their claims must be resolved separately.[294]

It is important to note again that this Article does not take a position on the validity of the rigid commonality standard set forth in *Wal-Mart*. Nonetheless,

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[286] *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *1 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification) (plaintiffs alleging a class of 160,000 drivers).

[287] *Compare supra* Part VI.A (giving a five factor framework for determining whether workers' claims should be aggregated into a class-action), *with* Means & Seiner, *supra* note 14, at 1526 (giving a similar multifactor framework for distinguishing employees from independent contractors).

[288] Through discovery and further analysis of the factors discussed above, the district court should more fully analyze the application of these elements to the facts of the case.

[289] *See* FED. R. CIV. P. 23(a)(2); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) (interpreting the commonality requirement of federal rules).

[290] *See Wal-mart*, 564 U.S. at 356–57 (providing various examples in which commonality fails and thus class is more difficult to define).

[291] Hall & Krueger, *supra* note 246, at 10, 21.

[292] These drivers are distinct from the rest of the class so they would not likely suffer the same common issues, and "individual lawsuits [would] be superior." Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 299.

[293] *See Wal-Mart*, 564 U.S. at 359–60 (holding that issues should be resolved individually where members of a class have "little in common but . . . [the] lawsuit" (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (Kozinski, C.J., dissenting))).

[294] *See id.* at 349–50.

given that standard, a more narrow grouping of workers is likely necessary under the heightened commonality standard adopted by the Supreme Court.[295] Others—like the district court in *O'Connor*—will likely argue that the commonality standard is already satisfied and that a 160,000 worker class is acceptable.[296] My view is that the Supreme Court would reject this analysis given the *Wal-Mart* decision.

C. *Implications of the Proposed Model*

Adopting the framework proposed here would have several important implications for the courts and the litigants. There are a number of specific advantages of the model that are worth highlighting. Perhaps most importantly, the proposed framework offers a level of certainty to an otherwise confused area of the law.[297] It navigates a complex field and breaks down the cases in this area into a workable five-part test for the courts and litigants that they can easily follow. The straightforward model thus synthesizes the law and Federal Rules in this area and allows the courts to aggregate cases pursuant to a much more simple formula.[298] This is not to say that the goal of choosing appropriate groupings of workers could not be accomplished in the absence of the formula offered here. The proposed framework makes the process much more straightforward, however, and far less susceptible to error.

While simplicity is an important goal and advantage of the test, the framework proposed here offers far more. It has the further advantage of assuring commonality in diverse cases frequently brought in the technology

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[295] *See* Adam Klein et al., *Individualized Justice in Class and Collective Actions*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 326, 327–28 (Samuel Estreicher & Joy Radice eds., 2016) ("In *Walmart Stores v. Dukes*, the Supreme Court . . . denied class certification because the plaintiffs lacked 'significant proof' that Walmart engaged in a 'general policy of discrimination.' Instead, the Court heightened the standard of proof of commonality to a 'rigorous' level . . . . As a result, for the individual named plaintiff, this heightened standard has meant that her class claims must flow from a 'common contention . . . capable of class-wide resolution' in the form of a common biased testing procedure or a common discrimination policy." (third omission in original) (footnotes omitted) (quoting *Wal-Mart*, 564 U.S. at 350–51, 353)).

[296] *See* O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *9, *37 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification) (holding that commonality was satisfied for a class of 160,000 Uber drivers and certifying the class).

[297] *See* Groff et al., *supra* note 8, at 171. *See generally* Means & Seiner, *supra* note 14, at 1513–14 (naming class certification and the classification of workers as employees versus independent contractors as "[o]ne of the most controversial issues in labor and employment law").

[298] In particular, this approach standardizes class certification using the same factors that are used in worker classification determinations, streamlining class actions to fit the on-demand economy. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); *supra* Parts III, IV.

sector.[299] So called gig-sector cases are notoriously difficult to navigate, and finding a common thread with which to aggregate these matters can be hard to identify.[300] The Supreme Court's definition of commonality in the *Wal-Mart* case has made aggregating employment cases difficult under the Federal Rules of Civil Procedure.[301] The Court's heightened commonality standard can be difficult to apply to claims brought in the on-demand economy.[302] The framework offered here helps assure that commonality is achieved in these difficult cases, and that the Supreme Court's new standard is adequately satisfied.[303] Quite simply, the framework proposed here makes certain that workers share enough similar characteristics to proceed in a class action case.[304]

The proposed model also helps balance the interests of all parties in the litigation.[305] By providing a fair test, it allows the scope of the litigation to be framed in an appropriate way.[306] Similarly, the framework provides fairness to defendants, who can more precisely defend against this more focused class action litigation.[307] The model proposed here is far more useful than the approach currently used in the courts, which essentially involves scattered attempts by the judiciary to make sense of a hodgepodge of case law in this evolving area.[308]

This is not to say that there are not some drawbacks to the offered approach. Though the framework offered here would bring much-needed simplicity to this area of the law, it would also lead to additional litigation in some instances.[309] As noted by the *O'Connor* example, the current class of 160,000 Uber drivers would need to be broken down into smaller classes, leading to additional (albeit smaller) cases on the dockets of the courts.[310]

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[299] *See, e.g.*, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1049 (2016); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment); Groff et al., *supra* note 8, at 171.

[300] *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1153 ("The application of the traditional test of employment—a test which evolved under an economic model very different from the new 'sharing economy'—to Uber's business model creates significant challenges.").

[301] A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 475–87 (2013). *See generally* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50, 352 (2011).

[302] *Wal-Mart*, 564 U.S. at 349–50, 352.

[303] *See id.*

[304] *See supra* Part VI.B.

[305] *See* Romberg, *supra* note 292, at 258–59.

[306] *Id.*

[307] *Id.*

[308] *See, e.g.*, Tyson Foods, Inc. v. Bouphakeo, 136 S. Ct. 1036, 1046–49 (2016); *Wal-Mart*, 564 U.S. at 358–59; Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (order denying cross-motions for summary judgment); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (order denying defendant's motion for summary judgment).

[309] *See* Romberg, *supra* note 292, at 299.

[310] *See supra* Part V.A.

And, this would also mean that individual, nonsystemic litigation would also be preferred in many gig-sector cases. More cases—both individual or otherwise—likely means more litigation time for the courts and the parties, and less efficiency.[311] Nonetheless, the importance here is that the courts "get it right." By assuring that only similar claimants with common characteristics are aggregated together,[312] the framework offered here helps achieve a proper result under existing Supreme Court precedent. And, by proposing a more straightforward, streamlined approach, the model offers many efficiencies that are not currently realized by the current system.

Additionally, some might argue that, by adding an additional framework to certain class action cases, the model proposed here adds an additional layer of complexity to an already complex process. While it is a fair concern that the framework offered here could make the class action process *more* difficult, that is not the intent of the model. Indeed, the factors suggested here are simply meant to serve as nonexhaustive, unweighted guidelines to assist the courts to help construct a proper class in gig-sector cases.[313] The framework is *not* intended to introduce an additional rigid, inflexible test into an already cumbersome process. It is thus meant to serve as a tool to assist the courts in working through cases in an emerging, ill-defined area of the law.[314]

At the end of the day, no approach is perfect. The model offered here simplifies a complex area of the law, proposes a straightforward framework for the courts to follow, and assures that Supreme Court case law[315] and the Federal Rules[316] are being followed. The approach should strongly be considered for this type of technology-driven litigation.

As a final consideration, it is worth highlighting that the approach described in this Article could apply to cases brought outside of the on-demand economy. The independent contractor/employee question pervades many areas of the law beyond the technology sector.[317] While this test could

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311 *See* Romberg, *supra* note 292, at 258 ("[T]he class-action mechanism is intended to: 'promote judicial economy and efficiency by obviating the need for multiple adjudications of the same issues' . . . ." (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 1998))).

312 *See supra* Part VI.B.

313 *See supra* Part VI.A.

314 *See* Groff et al., *supra* note 8, at 171. For a discussion of one tool already used by the courts, the issue class, see *infra* Part VII.

315 *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011).

316 FED. R. CIV. P. 23.

317 *See, e.g.*, Thomas K. Kruppstadt, Note, *Determining Whether a Physician Is a United States Employee or an Independent Contractor in a Medical Malpractice Action Under the Federal Tort Claims Act*, 47 BAYLOR L. REV. 223, 233 (1995); Jean Tom, Note, *Is a Newscarrier an Employee or an Independent Contractor? Deterring Abuse of the "Independent Contractor" Label via State Tort Claims*, 19 YALE L. & POL'Y REV. 489, 493–94 (2001); *see also* Max Trucking, LLC v. Liberty Mut. Ins. Corp., 802 F.3d 793, 799 (6th Cir. 2015) (regarding a classification issue with truck drivers); Marie v. Am. Red Cross, 771 F.3d 344, 348 (6th Cir. 2014) (same with Catholic nuns as disaster relief

certainly be adapted to other areas of the economy, it was formulated specifically for cases brought in the technology sector. As this is the area that is currently the most divisive and complex, and as the cases are rapidly evolving in this sector,[318] this Article attempts to bring clarity to this specific field. The considerations addressed here, however, could certainly be easily tailored to other areas of the law as well.

It is also worth noting that this Article offers the first attempt in the academic literature to streamline gig-sector class action cases. As such, it primarily attempts to open a dialogue on this topic. As already noted, the factors here should not be considered exclusive, and others are encouraged to weigh in on possible elements that could be used to help define systemic litigation in this area. Others may even disagree over how much weight should be assigned to particular factors (or may even take issue with some of the elements that have been proposed here).[319] The framework offered here is thus a starting point. The courts, litigants, and others in the academic community should further attempt to find ways to simplify this confusing process and bring clarity to these often cumbersome class action cases.

VII. A NOTE ABOUT THE ISSUE CLASS

This Article seeks to develop a framework for litigating class action claims on the employee/independent contractor question in technology-driven cases. The framework helps define classes of workers who can litigate systemically and thus assists in resolving their claims.[320] While the model here proposes a way for workers to bring their cases together, there is another approach to this type of litigation that is often overlooked: issue class certification.[321]

Federal Rule of Civil Procedure 23(c)(4) allows for issue class certification where specific issue(s) can be resolved on a classwide basis.[322] The Rule allows a particular issue to be resolved in an entire class of cases, while still permitting these cases to proceed individually on the other issues involved.[323] Under Rule 23(c)(4), "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[324] Issue class certification has the advantage of resolving specific issues across a

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volunteers); Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 432 (5th Cir. 2013) (same with volunteer firefighters); Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 257 (4th Cir. 1997) (same with a physician in the healthcare industry).

[318] *See supra* Part V (outlining complexities of other technology-sector litigation).

[319] *See, e.g.*, Morpurgo, *supra* note 265, at 798–99 (proposing an eight factor test for class certification under the FLSA).

[320] *See supra* Parts III, VI.A.

[321] FED. R. CIV. P. 23(c)(4); Seiner, *supra* note 265, at 122–23.

[322] FED. R. CIV. P. 23(c)(4); *see also* Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1588 (2011) (discussing issue class certifications under federal rules).

[323] *See* Farleigh, *supra* note 322, at 1624, 1624 n.250.

[324] FED. R. CIV. P. 23(c)(4).

broad spectrum of cases a single time, while not requiring the complete resolution of the other facts or issues involved in individual cases.[325] Unlike other class action cases, claims brought under Rule 23(c)(4) do not "involve 'an all-or-nothing decision to aggregate individual cases.'"[326] Rather, specific issues can be addressed that are common to a number of cases, while allowing the rest of each claim to proceed individually.[327]

Issue class certification tends to be appropriate when "there are common issues present in the case that would apply to the entire class, even where other questions will need to be resolved individually in specific cases."[328] Technology-driven cases often fit squarely within these parameters, as many of the workers share a basic common set of facts but have been harmed in varying ways.

In the *O'Connor* case, for example, drivers have many overlapping commonalities which include using the same technology platform, having similar pay/compensation schemes, and sharing other terms, conditions, and privileges of the working relationship.[329] The drivers also have suffered varying levels of harm.[330] As noted earlier, these workers have a number of identifiable differences with regard to how and when they perform their services, leading to differing amounts of damages.[331] As further noted, these drivers perform their duties in a number of different locations,[332] at differing times,[333] and under varying conditions.[334] Issue class certification would thus often be appropriate in technology-sector cases. These types of cases often offer overlapping legal issues and varying factual nuances. Rule 23(c)(4) fits perfectly with these types of cases to allow the courts to streamline this type of litigation by resolving the specific overlapping issues a single time, while still allowing the differing facts and issues in the case to be resolved independently.[335]

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[325] Seiner, *supra* note 265, at 133.

[326] *Id.* at 132–33 (quoting Romberg, *supra* note 292, at 251); Jenna C. Smith, Comment, *"Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187, 1212–25 (2013) (addressing issue class certification issues).

[327] *See* Seiner, *supra* note 265, at 133.

[328] *Id.* at 133, 135–36.

[329] *See supra* Part IV (discussing facts of the *O'Connor* decision).

[330] O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *37 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification).

[331] *See supra* Part IV.

[332] *See Driving Jobs vs Driving with Uber*, *supra* note 2; Frizell, *supra* note 250; Peters, *supra* note 273; Selyukh, *supra* note 273.

[333] *See* Hall & Krueger, *supra* note 246, at 1; *Driving Jobs vs Driving with Uber*, *supra* note 2; Frizell, *supra* note 250.

[334] *See supra* Part IV.

[335] *See* Seiner, *supra* note 265, at 122–23.

Without more information, it is impossible to frame precisely how the issue class could be used in an on-demand case, but it offers enormous potential. A court could, for example, resolve the issue—across a case like *O'Connor*—of whether workers that fit a specified set of parameters would be employees or independent contractors.[336] This would help streamline much of the controversy currently present in the case, while still preserving litigation on the already identified differences that also exist.[337]

Issue class certification offers enormous flexibility and efficiency for the courts.[338] It permits the judge overseeing the matter another case management tool when adjudicating the issues.[339] The court can determine which issue(s) can be resolved on a broader basis, while leaving the remaining claims to be addressed individually.[340] Additionally, issue class certification can provide efficiency to the proceedings, as common questions are resolved a single time without the need to revisit these particular issues.[341] This procedural tool thus provides "a happy medium between individual cases and a global class action."[342]

As the cases continue to emerge in this area, issue class certification should be strongly considered, as it seems particularly appropriate for these types of technology-sector claims. As the litigation presents common companywide policies, personnel, and workplace practices,[343] issue class certification should be contemplated as a possible procedural tool for the case. Issue class certification has already been used effectively in employment class action litigation after *Wal-Mart*.[344] Indeed, Judge Posner approved the use of this tool in a class case brought against a major brokerage house.[345] As the court stated in that case:

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[336] *See supra* Part V.A (discussing the *O'Connor* decision).

[337] *See supra* notes 250–56 and accompanying text.

[338] *See generally* Seiner, *supra* note 265, at 135; David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 785 (2003) ("Practice under Rule 23(c) gives the court flexibility in determining the appropriate time to consider the issue of class certification.").

[339] *See* Seiner, *supra* note 265, at 123.

[340] *See* 7AA WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. 2005) ("[S]ubdivision (c)(4) is designed to give the court additional flexibility in handling class actions . . . .").

[341] *See* Seiner, *supra* note 265, at 135; *see also* Koysza, *supra* note 338, at 794–95 (noting the benefits of issue class certification to prevent a multiplicity of suits regarding the same issue).

[342] Romberg, *supra* note 292, at 299; *see also* Seiner, *supra* note 265, at 135.

[343] *E.g.*, O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097, at *1–2 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification).

[344] *See* Seiner, *supra* note 265, at 148–49 (discussing Judge Posner's opinion and the *Wal-Mart* decision).

[345] *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491–92 (7th Cir. 2012), *abrogated by* Phillips v. Sheriff of Cook Cty., 828 F.3d 541 (7th Cir. 2016).

> [A] single proceeding . . . could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies . . . . But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.[346]

Just like the employment case before the Seventh Circuit Court of Appeals,[347] many cases that arise in the technology sector will present similar corporate policies that can be litigated in an aggregate proceeding. The individual issues, damages, and other factual differences can similarly be litigated independently.[348]

Thus, while this Article proposes a model for assisting the courts to determine the breadth of a class action claim,[349] it also encourages the use of issue class certification to help peel off issues where appropriate. Issue class certification can be used independently with the model offered here, or in conjunction with it. While the complete extent of the appropriate use of issue class certification in the modern economy is well beyond the scope of this Article, it is helpful for the courts and litigants to consider using this procedural tool.[350] This Article thus seeks simply to identify this tool as an additional way to help sort through this complex litigation.

VIII. CONCLUSION

This Article seeks to provide some clarity to the confused area of class action worker misclassification issues in the technology sector. As one federal judge recently noted, "[t]he test the . . . courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem."[351] In the modern economy, we have experienced a surge of these cases given the varied and uncertain status of the workers involved.[352]

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[346] *Id.* at 490–91; *see also* Seiner, *supra* note 265, at 148–49.

[347] *See generally McReynolds*, 672 F.3d 482.

[348] *See* 7AA WRIGHT ET AL., *supra* note 340, § 1790.

[349] *See supra* Part VI.A.

[350] This is not to say that there are not some drawbacks of this approach. *See* Romberg, *supra* note 292, at 290. Issue class certification is—on its face—less efficient than a global class case where such an action is permissible. *Id.* at 299. It does not completely resolve all of the issues in the case, and it therefore requires additional litigation. *Id.* "For a controversy with little in the way of severable common issues, certification may well not be worth the bother—individual lawsuits will be superior. For a controversy that is entirely composed of common issues, a global class action will be superior." *Id.* The courts should thus carefully consider whether this tool can be used to help streamline the systemic litigation. *Id.* at 298–99.

[351] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (order denying cross-motions for summary judgment).

[352] *See generally, e.g.*, O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015) (amended order granting in part and denying in part the motion for class certification).

The Supreme Court's recent jurisprudence in *Wal-Mart v. Dukes* has only served to confuse the area and to raise the bar on the certification issues arising in the workplace context.[353] This Article provides a streamlined five-part framework to help analyze aggregate litigation on the worker misclassification issue arising in gig-sector cases.

Application of this framework will make it clear that the class action mechanism should be used cautiously in technology-sector cases. As these cases typically involve highly individualized fact patterns,[354] it will often be more appropriate to litigate these cases on an individualized or more narrow class action basis.[355] The factors identified here are not exhaustive, and the framework is only one way of evaluating these claims. This Article thus seeks to open a dialogue in this important and emerging field.

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[353] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011); *see also supra* Part II.B.

[354] *See supra* notes 250–59 and accompanying text.

[355] *See* Romberg, *supra* note 292, at 299.