

ASSESSING THE GIG ECONOMY IN COMPARATIVE PERSPECTIVE: HOW PLATFORM WORK CHALLENGES THE FRENCH AND AMERICAN LEGAL ORDERS

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Both the gig economy's critics and supporters tend to assume that it represents an assault on current employment structures. Comparative theory, however, emphasizes that legal regimes are durable in the face of new challenges. Fortunately, the gig economy's prevalence throughout the world gives scholars the chance to evaluate this tension. This paper analyzes whether platform work undermines existing legal systems by testing two comparative theories in the United States and France. The first predicts that French law should mobilize against platform firms to protect producers' livelihoods and that American law should embrace these services for lowering consumer prices. The second forecasts that French welfare institutions should more aggressively safeguard gig workers' wellbeing than their American counterparts. Surprisingly, the results show that neither hypothesis holds. Though France initially fought companies like Uber to preserve taxi drivers' advantages, it began adopting a more consumer-friendly stance toward the sector after its 2017 elections. The United States, meanwhile, has become a site of mounting resistance to the way platform firms treat their workers. Furthermore, while U.S. social programs have done little to shield platform workers from market forces, those in France have evinced similar features; both countries have denied these laborers basic assurances such as a minimum wage, unemployment insurance, and workers' compensation. These findings suggest that the gig economy embodies a significant challenge to long-standing legal regimes—one that could even cause dissimilar nations to converge in the coming years. Lawmakers will need to devote more attention to the plight of workers caught in what appears to be a fundamental legal reordering.

INTRODUCTION

The nature of work has transformed over the past thirty years. While full-time jobs were the norm in industrialized countries for much of the twentieth century, they have gradually been replaced by non-standard employment relationships that offer lower pay, less predictable hours, fewer benefits, and uncertain career prospects.¹ No aspect of this change has generated a more heated debate than the rise of the so-called “gig” or “platform” economy,² symbolized by ridesharing companies like Uber and its competitors.³ To some, these companies embody a “wave of small-scale entrepreneurship and business growth with powerful new opportunities.”⁴ To others, they threaten to turn labor markets into “a dystopia where regular careers are vanishing, every worker is a freelancer, every labor transaction is a one-night stand, and we collude with one another to cut our wages.”⁵

These diverging predictions share two important assumptions: first, that the gig economy represents a fundamental assault on existing employment structures; and second, that it will drive

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¹ “Non-standard” is a term of art long used in sociology and labor law to distinguish new forms of work from the “standard,” 9-5 employment relationships that prevailed in the mid-20th century. See *Non-standard Forms of Employment*, INT’L LABOUR ORG., <https://www.ilo.org/global/topics/non-standard-employment/lang--en/index.htm> (last visited Feb. 13, 2019); see also *infra* Section I.A.

² See generally Will Kenton, *Gig Economy*, INVESTOPEDIA (May 24, 2018), <https://www.investopedia.com/terms/g/gig-economy.asp> (defining “gig economy” and noting the possibility that America is on its way to becoming a “gig” economy).

³ See *infra* Section I.B.

⁴ Dan Blacharski, *Gig Economy Platforms Are Creating a New Class of Entrepreneurs*, ENTREPRENEUR (Feb. 15, 2017), <https://www.entrepreneur.com/article/288178>.

⁵ Robert Kuttner, *The Task Rabbit Economy*, AM. PROSPECT (Oct. 10, 2013), <http://prospect.org/article/task-rabbit-economy>.

convergence between countries in which platform firms do business. From a legal perspective, however, neither outcome is obvious. Comparative theory has long emphasized that legal regimes are durable in the face of new challenges, absorbing rather than bending to them; their historical trajectory firmly tends toward continuity.⁶ Fortunately, the gig economy's prevalence throughout the developed world gives scholars the chance to rigorously evaluate this tension.

This Article analyzes whether the gig economy undermines existing legal regimes by testing two leading comparative theories in France and the United States. The first predicts that French law should mobilize against platform firms to protect workers' livelihoods, and that American law should embrace these services for lowering consumer prices. The second forecasts that French welfare institutions should more aggressively safeguard gig workers' wellbeing than their American counterparts.

As the results show, neither hypothesis holds. Although France initially fought companies like Uber to preserve taxi drivers' advantages, the country began adopting a more consumer-friendly stance toward the sector soon after its 2017 elections.⁷ The United States, meanwhile, has become a site of mounting resistance to the way platform firms treat their workers.⁸ Furthermore, while social programs in the U.S. have done little to shield platform workers from market forces, those in France have evinced similar features.⁹ Both countries have denied these laborers vital legal assurances such as a minimum wage, unemployment insurance, and workers' compensation, condemning them to the ranks of an increasingly precarious underclass.¹⁰ Together, these findings suggest that the gig economy represents a major challenge to long-standing legal orders—one that could even spur convergence between dissimilar nations' legal regimes in the coming years.

The Article proceeds in four parts. Part I describes the growth of non-standard work and situates the gig economy's rise within it.

⁶ See *infra* Part II.

⁷ See *infra* Section III.A.

⁸ See *infra* Section III.B.

⁹ See *infra* Part IV.

¹⁰ See *infra* Part IV.

Part II outlines each of the foregoing theories and their expectations about platform work's evolution in the United States and France. Part III demonstrates that the gig economy challenges prevailing approaches to the consumer-producer relationship in each nation. Finally, Part IV shows how gig work similarly undermines each country's traditional welfare orientation.

I. CHANGING LABOR MARKETS IN THE DEVELOPED WORLD

Advanced economies' labor markets have noticeably shifted in the past thirty years. While developed countries were once characterized by full-time employment relationships that conferred good pay and benefits, they have experienced a persistent rise in non-standard work.¹¹ These non-standard working arrangements—which echo configurations prevalent in the nineteenth century—tend to feature less predictable hours, lower pay, and fewer protections against the risks of ill health, old age, and unemployment.¹² Many scholars fear that the proliferation of non-standard work will deepen already record levels of wealth inequality.¹³ Perhaps no manifestation of this phenomenon has garnered more attention than the emergence of the so-called “gig economy.”¹⁴ From a legal standpoint, however, it remains unclear just how much of a challenge platform companies pose to existing employment and welfare structures.

A. *The Rise of Non-Standard Work*

In the decades following World War II, most advanced capitalist economies organized their labor markets around what scholars call the “standard employment relationship” (SER).¹⁵ This

¹¹ See *infra* Section I.A.

¹² See *infra* Section I.A.

¹³ See *infra* Section I.A.

¹⁴ See *infra* Section II.B.

¹⁵ Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* 63 (Katherine V.W. Stone & Harry Arthurs eds., 2013); Katherine V.W. Stone & Harry Arthurs, *The Transformation of Employment*

arrangement, which mainly applied to male breadwinners in manufacturing or a unionized trade, was defined by the exchange of labor for money, tasks performed at the employer's worksite according to pre-set schedules, and the expectation of long-term, full-time employment.¹⁶ The "standard contract . . . promised job security, predictable promotions, and wage growth opportunities. In addition, it often included health insurance, pensions, vacation entitlements, and other employer-based benefits."¹⁷ As labor law expert Katherine Stone has observed, "the standard employment contract became one of the pillars of the postwar economic system. Decent wages gave workers the opportunity to consume, to acquire the accoutrements of middle-class life, and to better the prospects of their families."¹⁸

In the 1980s, however, the SER began eroding across the developed world.¹⁹ Globalization, technological change, and public policies favoring more intense competition pushed firms to seek the "flexibility to hire and fire on short notice; to increase or shrink the overall size of their workforce; to adjust pay to short-term performance results; to redeploy workers within the firm and to outside production partners; and to retain workers with particular skills on an as-needed basis."²⁰ As a result, companies progressively turned to non-standard forms of employment,²¹

Regimes: A Worldwide Challenge, in RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 2 (Katherine V.W. Stone & Harry Arthurs eds., 2013).

¹⁶ Arne L. Kalleberg & Peter V. Marsden, *Transformation of the Employment Relationship*, in EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES 3 (2015).

¹⁷ Stone, *supra* note 15.

¹⁸ Stone & Arthurs, *supra* note 15, at 2.

¹⁹ See *id.* at 7–10; Katherine V.W. Stone, *In the Shadow of Globalization: Changing Firm-Level Employment Practices and Shifting Employment Risks in the United States*, RES. PAPER 07-13 UCLA SCH. OF L., LAW & ECON. RES. PAPER SERIES 12 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023696 [hereinafter *In the Shadow of Globalization*].

²⁰ *In the Shadow of Globalization*, *supra* note 19, at 2–3.

²¹ *Id.* at 10.

primarily part-time, temporary, contract, on-call, and independent work.²²

These arrangements have multiplied rapidly across Organisation for Economic Co-operation and Development (OECD) nations. In the United States, the Government Accountability Office (GAO) has estimated that “contingent” work, which it defines to include all of the above categories, rose from 35.3 percent of employed workers in 2006 to 40.4 percent in 2010.²³ Economists Laurence Katz and Alan Krueger have similarly found that “alternative” workers—defined to include all of the foregoing groups other than part-timers—grew from 10.1 percent of the American labor force in 2005 to 15.8 percent in 2015.²⁴ Remarkably, as the authors emphasized in their study, “*all net employment growth in the U.S. economy from 2005 to 2015 appears to have occurred in alternative work arrangements.*”²⁵ This trend also looks likely to endure: a 2014 SAP/Oxford Economics survey revealed that “83 percent of [corporate]

²² Arne L. Kalleberg, *Nonstandard Employment Relations: Part-Time, Temporary & Contract Work*, 26 ANN. REV. SOC. 341 (2000). Part-time workers are generally defined as those working less than 35 hours a week. *Id.* at 343. Contract employees work for firms that provide services to other employees under contract; they are generally assigned to a single client and perform their duties at its place of business. *Id.* at 350–51. Temporary workers perform services for clients over a narrow period; they are usually leased to other companies on an hourly basis rather than staffed to one project. *Id.* at 346–47. Independent contractors are self-employed workers who market and provide services to clients on their own. *Id.* at 355. Finally, on-call workers are individuals called into work on an as-needed basis. *Id.* at 353; see also PETER S. FISHER, ELAINE DITSLER, COLIN GORDON, & DAVID WEST, NONSTANDARD JOBS, SUBSTANDARD BENEFITS 5 (Iowa Pol’y Proj. 2005), <http://www.cfcw.org/nonstandard.pdf>.

²³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, & BENEFITS 4 (2015), <http://www.gao.gov/assets/670/669766.pdf>.

²⁴ Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* 2 (Nat’l Bureau of Econ. Res., Working Paper No. 22667, 2016), <http://www.sole-jole.org/16KK.pdf>.

²⁵ *Id.* at 7.

executives sa[id] they w[ould] be increasing the use of contingent, intermittent or consultant employees.”²⁶

European labor markets have mirrored these changes. Between 1987 and 2007, temporary work increased from 8.3 percent to 14.7 percent of overall EU employment.²⁷ Part-time work rose from 16 percent to 19 percent.²⁸ Conversely, between 2006 and 2016, the proportion of standard jobs in the EU labor market fell from 62 percent to 59 percent “in favour of more flexible types of work.”²⁹ On average across 29 OECD countries, non-standard work made up 33 percent of total employment in 2013.³⁰ As the European Parliament’s Directorate-General for Internal Policies has remarked, “[i]f this trend continues, it may well become the case that standard contracts will only apply to a minority of workers within the next decade.”³¹

These changes have proven especially prominent in France. Between the mid-1980s and late 1990s, the percentage of workers with non-permanent contracts more than doubled, from 5 percent to 12 percent.³² Though that growth has since slowed, nonstandard job creation has continued to outpace that of standard employment,

²⁶ *The Looming Talent Crisis: Research Shows Companies Unprepared for Future of Work*, SAP NEWS (Sept. 10, 2014), <https://news.sap.com/workforce-2020-looming-talent-crisis-research-shows-companies-unprepared-future-work/>.

²⁷ Zoe Adams & Simon Deakin, *Institutional Solutions to Precariousness and Inequality in Labour Markets*, 52 BRIT. J. INDUS. REL. 779, 790 (2014).

²⁸ *Id.* at 789.

²⁹ *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, at 58, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU\(2016\)587285_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU(2016)587285_EN.pdf).

³⁰ ORG. FOR ECON. COOPERATION AND DEV’T, *NEW FORMS OF WORK IN THE DIGITAL ECONOMY* 24 (2016), <https://www.oecd-ilibrary.org/docserver/5jlwnklt820x-en.pdf?expires=1526177710&id=id&accname=guest&checksum=38744D467131548D6B1170B7F12C7878>.

³¹ *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, *supra* note 29, at 32.

³² *Id.* at 47.

with the former rising twice as fast between 2007 and 2013.³³ This progress has largely been fueled by an increase in the number of “fixed-term contracts (FTCs) of very short duration.”³⁴ In France, “between 2000 and 2012, [fixed-term contracts] of less than one week increased by 120 percent while [those] of less than one month but more than one week increased by 38.6 percent.”³⁵ The result has been that, “of the 20 [million] or so job contracts signed [in France] each year, two-thirds are now for less than a month.”³⁶ In 2014, a total of “3.2 million people, or 14 percent of all employees,” held a non-standard contract.³⁷

Though often cast as a new phenomenon, non-standard employment was the norm in Western countries for much of the nineteenth and early twentieth centuries.³⁸ Economist Jim Stanford has underlined that many features of independent work, such as its proclivity toward “on-call labour, piece-based compensation, and the requirement that workers provide their own capital equipment . . . are as old as capitalism.”³⁹ Furthermore, “[c]asual, seasonal and contract labour were the predominant forms of paid work as capitalism first emerged and consolidated.”⁴⁰ Some

³³ ORG. FOR ECON. COOPERATION AND DEV'T, *supra* note 30, at 23–25.

³⁴ *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, *supra* note 29, at 47.

³⁵ *Id.*

³⁶ Anne-Sylvanie Chassany, *New World of Work: Outsiders Battle in France's Dual Jobs Market*, FIN. TIMES (Aug. 10, 2015), <https://www.ft.com/content/a42b533e-1fc0-11e5-aa5a-398b2169cf79>.

³⁷ *Precarious Employment in Europe Part II: Country Case Studies*, at 11, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU\(2016\)587285\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587285/IPOL_STU(2016)587285(ANN01)_EN.pdf).

³⁸ Michael Quinlan, *The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context*, 23 ECON. & LAB. REL. REV. 3, 6 (2012); Jim Stanford, *The Resurgence of Gig Work: Historical and Theoretical Perspectives*, 28 ECON. & LAB. REL. REV. 382 (2017).

³⁹ Stanford, *supra* note 38, at 383.

⁴⁰ *Id.* at 385.

scholars have therefore labeled the rise of non-standard work as a form of labor “recommodification.”⁴¹

This “recommodification” has sparked fears of the low wages and sparse protections characteristic of earlier periods.⁴² Evidence suggests there is reason to worry that non-standard employment may increase income precarity and inequality. In a 2015 survey of American workers, the GAO found that those in non-standard positions earned about 10.6 percent less per hour, and 47.9 percent less per year, than those in SERs.⁴³ The study further discovered that non-standard workers experienced more job instability and were less likely to have employer-provided benefits.⁴⁴ Confirming these results, Katz and Krueger have concluded that people “in alternative work arrangements earn considerably less per week than do regular employees with similar characteristics and in similar occupations.”⁴⁵

The story looks the same in Europe. One 2016 OECD analysis “found that non-regular employees are likely to earn less than full-time permanent employees . . . [and that existing] pay gaps are likely to increase over time.”⁴⁶ The report also showed that “[n]on-regular workers . . . have a significantly higher probability of being in unemployment one year after their current . . . arrangement as compared to full-time regular workers.”⁴⁷ In France, the data highlight that temporary employees face a poverty risk three times higher than that of permanent workers.⁴⁸ Fixed-term contracts, in particular, are associated with low wages.⁴⁹

Finally, because most welfare states were built around the SER, non-standard workers on both continents risk receiving fewer

⁴¹ See generally Carlos Frade & Isabelle Darmon, *New Modes of Business Organization and Precarious Employment: Towards the Recommodification of Labour?*, 15 J. EUR. SOC. POL’Y 107 (2005).

⁴² *Id.*

⁴³ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 23, at 5–6.

⁴⁴ *Id.*

⁴⁵ Katz & Krueger, *supra* note 24, at 26.

⁴⁶ ORG. FOR ECON. COOPERATION AND DEV’T, *supra* note 30, at 26.

⁴⁷ *Id.* at 28.

⁴⁸ *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, *supra* note 29, at 66 (Figure 10).

⁴⁹ *Id.* at 13.

and less extensive job protections. In the United States, robust private health and pension packages have long been one of the key features of the SER.⁵⁰ To this day, public entitlements such as social security, unemployment insurance, and worker's compensation remain a function of an individual's earning power.⁵¹ In France, social insurance against the vagaries of old age, sickness, and work accidents similarly varies in generosity according to a person's contributions.⁵² Non-standard workers' low wages and fractured job histories jeopardize these safeguards.

B. The Gig Economy: The Labor Market Transition's Latest Phase

Perhaps no development better captures the anxieties associated with non-standard work than the emergence of the "gig economy," and in particular the rise of ridesharing services like Uber.⁵³ Many are familiar with Uber's business model, which uses an online platform to quickly connect customers with drivers.⁵⁴ These drivers are generally classified as independent contractors rather than employees in an SER.⁵⁵ This means that they do not have a wage contract and are responsible for their own tax

⁵⁰ Stone, *supra* note 15, at 63.

⁵¹ Robert A. Moffitt, *The Deserving Poor, the Family, and the U.S. Welfare System*, 52 DEMOGRAPHY 729, 731–34 (2015).

⁵² See Martin Seeleib-Kaiser, Adam Saunders, & Marek Naczyk, *The Age of Dualization: The Changing Face of Inequality in Deindustrializing Societies*, in THE AGE OF DUALIZATION: THE CHANGING FACE OF INEQUALITY IN DEINDUSTRIALIZING SOCIETIES 155–56 (Patrick Emmenegger, Silja Hausermann, Bruno Palier, & Martin Seeleib-Kaiser eds., 2012).

⁵³ See generally Geoffrey Dudley, David Banister, & Tim Schwanen, *The Rise of Uber and Regulating the Disruptive Innovator*, 88 POL. Q. 492 (2017).

⁵⁴ See Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86–87 (2016).

⁵⁵ See Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*, 4 NAT'L EMP. L. PROJ. 3 (2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>; see generally NICOLAS AMAR & LOUIS-CHARLES VIOSSAT, LES PLATEFORMES COLLABORATIVES, L'EMPLOI ET LA PROTECTION SOCIALE (Inspection Générale des Affaires Sociales ed. 2016), <http://www.igas.gouv.fr/IMG/pdf/2015-121R.pdf>.

arrangements.⁵⁶ In both popular and policy debates, “[u]berisation has come to mean the turning of traditional service industries on their head.”⁵⁷ For the gig economy’s opponents, the term has become synonymous with the destruction of traditional jobs in the sectors new companies enter, such as the taxi industry in the case of Uber.⁵⁸

Reliable data on the gig economy is hard to come by.⁵⁹ Still, evidence suggests that, like other non-standard work, it is growing rapidly in both the United States and France. Katz and Krueger have estimated that independent contractors grew from 6.9 percent to 8.4 percent of the American labor force between 2005 and 2015—and that gig economy workers accounted for one-third of that rise.⁶⁰ In France, there are more than one million “auto-entrepreneurs”⁶¹ just eight years after the government created that legal status to make it easier for independent workers, such as Uber drivers and Deliveroo meal cyclers, to enter the service arena.⁶² Researchers for the European Parliament recently declared that “France is one of the leading sites in the development of the

⁵⁶ See KATHERINE LUCAS MCKAY, REFORMING UNEMPLOYMENT INSURANCE TO SUPPORT INCOME STABILITY AND FINANCIAL SECURITY 5 (ASPEN EPIC ed. 2017), http://www.aspenepic.org/wp-content/uploads/2017/09/ASPEN_EPIC_UNEMPLOYMENT_INSURANCE_02.pdf.

⁵⁷ Simon Jack, *Now What Next for Uberisation?*, BBC NEWS (Sept. 22, 2017), <http://www.bbc.com/news/business-41359327>.

⁵⁸ Guillaume Errard, “L’ubérisation De L’économie Va Détruire Des Millions D’emplois”, LE FIGARO (Nov. 10, 2015, 6:00 AM), <http://www.lefigaro.fr/secteur/high-tech/2015/11/10/32001-20151110ARTFIG00015-l-uberisation-de-l-economie-va-detruire-des-millions-d-emplois.php>.

⁵⁹ JANE DOKKO, MEGAN MUMFORD, & DIANE WHITMORE SCHANZENBACH, WORKERS AND THE ONLINE GIG ECONOMY 2 (Hamilton Proj., 2015), https://www.brookings.edu/wp-content/uploads/2016/07/workers_and_the_online_gig_economy.pdf.

⁶⁰ Katz & Krueger, *supra* note 24, at 9, 16.

⁶¹ Michael Rose, *France’s Gig Economy Creates Hope and Tension as Election Looms*, REUTERS (Apr. 11, 2017, 4:55 AM), <https://www.reuters.com/article/us-france-election-gigeconomy-analysis-idUSKBN17D0IU>.

⁶² See *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, *supra* note 29, at 178.

platform economy in Europe, with the sector being much more developed than in neighbouring countries such as Germany or Spain.”⁶³ Furthermore, whether in the United States,⁶⁴ France,⁶⁵ or the European Union,⁶⁶ experts agree that the gig economy is set to expand exponentially in the coming years.

Uber’s rise has been particularly meteoric. While the company was founded in 2009 and counted only a few thousand drivers in its first year of operations, that number has since soared to 750,000 in the United States and 2 million around the world.⁶⁷ In France, Uber has formed a major part of the country’s uptick in auto-entrepreneurs. A Boston Consulting Group analysis found that “one in four jobs created in the first half of 2016 in the Paris region was due alone to cab services operated by Uber and its rivals.”⁶⁸ These transport companies were also responsible for “15 percent of new net jobs in the whole of France” during that period.⁶⁹

This growth has raised many of the concerns associated with other forms of non-standard employment. Gig workers must contend with irregular schedules driven by demand fluctuations, piecemeal compensation, and the high startup costs of providing their own equipment.⁷⁰ According to a 2016 survey by the European Parliament’s Directorate-General for Internal Policies, pay levels across a range of online platforms “were significantly lower than national minimum wage rates across European

⁶³ *The Social Protection of Workers in the Platform Economy*, at 38, EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES (Nov. 2017), [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU\(2017\)614184\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184(ANN01)_EN.pdf).

⁶⁴ Katz & Krueger, *supra* note 24, at 3.

⁶⁵ AMAR & VIOSSAT, *supra* note 55, at 74.

⁶⁶ *The Social Protection of Workers in the Platform Economy*, *supra* note 63, at 38.

⁶⁷ Sara Ashley O’Brien, *Uber Has More Work to Do Winning Over Drivers*, CNN (Dec. 18, 2017), <http://money.cnn.com/2017/12/18/technology/uber-drivers-180-days-of-change/index.html>.

⁶⁸ Rose, *supra* note 61.

⁶⁹ *Id.*

⁷⁰ Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What Are the Options?*, 28 *ECON. & LAB. REL. REV.* 420, 421 (2017).

countries and the U.S., ranging from a 54.1 percent gap in France to [a] 3.4 percent [gap] in the United States.”⁷¹ Gig workers also reported a “lack of task autonomy and dissatisfaction with career prospects, pay levels, and job security . . . [that] was considerably higher than the representative average figure across European labor markets.”⁷² Alarming, in France, nine out of ten auto-entrepreneurs currently earn less than the country’s minimum wage.⁷³

Gig workers also appear to have difficulty obtaining basic benefits and social insurance. A 2016 GAO survey revealed that independent contractors in the United States were “significantly less satisfied [with their fringe benefits] than standard full-time workers.”⁷⁴ Likewise, the aforementioned European Parliament survey found that “access to social protection schemes . . . was very low for platform economy workers.”⁷⁵ Up to 70 percent of [them] . . . reported that they could not access basic schemes like pregnancy, childcare and housing benefits.”⁷⁶ Only about a third of platform workers were paying into a personal pension.⁷⁷ In a 2017 Eurofound survey, 69 percent of self-employed French respondents further indicated that they would not be financially secure in the case of a long-term illness—a full 21 points above the EU average.⁷⁸

⁷¹ *The Social Protection of Workers in the Platform Economy*, *supra* note 63, at 11.

⁷² *Id.*

⁷³ *Precarious Employment in Europe Part II: Country Case Studies*, *supra* note 37, at 16.

⁷⁴ U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 23, at 23.

⁷⁵ *The Social Protection of Workers in the Platform Economy*, *supra* note 63, at 11.

⁷⁶ *Id.* at 11–12.

⁷⁷ *Id.* at 55.

⁷⁸ EUROFOUND, EXPLORING SELF-EMPLOYMENT IN THE EUROPEAN UNION 13 (2017), https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1718en.pdf.

C. Are These Trends Legally Significant?

Two points emerge from this portrait of the rise of non-standard employment, and gig economy platforms in particular. First, these forms of work appear to represent a significant departure from the more stable and better remunerated labor market relationships of the twentieth century—bringing with them the specter of growing poverty and inequality on a wide scale. Second, to the degree that non-standard arrangements have flourished in both Europe and the United States, they raise the possibility of convergence between employment and welfare regimes that have heretofore been characterized by different levels of generosity.

However, to say that these shifts appear significant and may drive convergence is not enough. These observations represent hypotheses at best. Scholars have the power to systematically examine these changes to discern both their precise nature and the extent to which they clash with existing legal structures. By turning to theories that capture the internal workings of different countries' legal systems, researchers may discover how radically, if at all, non-standard work and its attendant challenges depart from historical norms.

The remainder of this Article takes a first pass at this question by focusing on the success of the gig economy, specifically ridesharing services, in the United States and France. To cover all types of non-standard work in a single essay would be impossible. It is also, to some degree, unnecessary. In response to the surge of non-standard employment over the past several decades, labor and employment law scholars like Katherine Stone have already given a fair amount of attention to relationships such as temporary and contract work.⁷⁹ The same cannot be said of the gig economy. As Brishen Rogers has noted, debates surrounding platform

⁷⁹ See generally KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004) (providing a framework for how norms of the workplace have changed from what they were for most of the twentieth century); see also KATHERINE V.W. STONE & HARRY ARTHURS EDs., *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (2013) (reviewing the erosion of standard practices in employment contracts).

companies like Uber have “so far generated more heat than light.”⁸⁰ Some analysts are prepared to conclude that their rise “poses fundamental challenges to traditional models for regulating work and setting minimum standards.”⁸¹ Others, like Rogers, maintain that their “longer-term impact on labor standards is quite unclear.”⁸²

Here, comparativists have a special role to play. One of the most remarkable features of the gig economy is its ascendance across a range of countries.⁸³ Uber’s core business model remains the same whether it tries to implement it in the United States or France.⁸⁴ As the next section will show, however, the legal regimes underlying each country’s labor and welfare structures substantially diverge. By examining them side-by-side, scholars can determine just how much of a challenge platform companies pose to existing institutions, and whether they are forcing states to converge toward one variety of labor market. Given the affinities between the gig economy and other non-standard arrangements, this analysis also holds the potential to yield broader insights about the future of work.

II. WHAT COMPARATIVE LEGAL THEORIES PREDICT ABOUT CHANGING LABOR MARKETS

New labor market players like platform firms do not emerge in a vacuum. Rather, they step into economies structured by laws that govern everything from how workers and employers interact to the social rights that people are due alongside employment. As legal scholar and political economist David Grewal has observed, “[c]apitalism is fundamentally a *legal ordering*: the bargains at the heart of capitalism are the products of law . . . A detailed study of these legal foundations is [therefore] essential to understanding the

⁸⁰ Rogers, *supra* note 54, at 86.

⁸¹ Stewart & Stanford, *supra* note 70, at 2.

⁸² Rogers, *supra* note 54, at 86.

⁸³ See *supra* Section I.B.

⁸⁴ Dudley, Banister, and Schwanen, *supra* note 53, at 492.

institutional structure of capitalism” and the ways new market entrants build into it.⁸⁵

Comparativists have developed rich theories explaining different countries’ institutional underpinnings. Above all, their research has stressed that there is not just one kind of capitalism, but a variety.⁸⁶ Platform companies like Uber should therefore be expected to encounter unique legal responses in each market they enter. Given this paper’s focus on employment and social policy, two theories stand out:⁸⁷ one juxtaposing “consumerist” and “producerist” nations⁸⁸ and another distinguishing various “worlds of welfare.”⁸⁹ These frameworks differentiate France and the United States along several dimensions. While each predicts that

⁸⁵ David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 652, 656 (2014).

⁸⁶ See *infra* Sections II.A and II.B.

⁸⁷ One theory remains conspicuously absent from this list: Peter Hall and David Soskice’s “Varieties of Capitalism” (VOC). This framework focuses on the ways in which private firms rely on a country’s institutions to coordinate with other market players. Peter A. Hall & David Soskice, *An Introduction to the Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1–68 (Peter A. Hall & David Soskice eds., 2001). It distinguishes between two broad categories of states: *coordinated* market economies, in which “firms pursue production strategies that depend on workers with specific skills and high levels of corporate commitment that are secured by offering them long employment tenures, industry-based wages, and protective work councils,” and *liberal* market economies, in which “[l]abor market arrangements that allow companies to cut costs in a downturn by shedding labor are complementary to financial markets that render a firm’s access to funds dependent on current profitability.” *Id.* at 27, 32. Although the U.S. is a paradigmatic liberal market economy, this paper leaves the VOC theory aside because France defies both its analytical categories: France “appears . . . to be a political economy characterized fundamentally by the uncertainty of expectations of economic actors. This is because there is no organizing principle behind the French economy according to which the principal actors orient their expectations.” Pepper D. Culpepper, *Capitalism, Coordination, and Economic Change: the French Political Economy Since 1985*, in CHANGING FRANCE: THE POLITICS THAT MARKETS MAKE 46 (Pepper D. Culpepper, Peter A. Hall, & Bruno Palier eds., 2008).

⁸⁸ See James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 YALE L.J. 340 (2007).

⁸⁹ See generally GÖSTA ESPING-ANDERSON, *THE THREE WORLDS OF WELFARE CAPITALISM* 5 (Polity Press, ed., 1990).

platform firms like Uber should clash more vigorously with the French legal regime, they undermine the notion that the gig economy poses a fundamental challenge to existing legal orders.

A. Consumerism Versus Producerism

The first of these theories, elaborated by comparative law scholar James Whitman, helps researchers make sense of labor market dislocations by distinguishing between two legal orientations: one that hews toward “consumerism” and one that focuses more heavily on “producerism.”⁹⁰ In a market economy, most individuals are both consumers and producers.⁹¹ The choice of which interest to promote through law is therefore a cultural one: it is “about which of these two possible economic identities deserves priority in a modern market order.”⁹²

A consumerist country features a body of laws which favor the consumer’s *economic* interests above other imperatives.⁹³ In essence, this boils down to the “right of consumers to buy goods and services at competitive prices, or the right of consumers to warranties of quality and safety.”⁹⁴ The consumer economic interest should not be confused with the consumer *protection* interest;

“[c]onsumer protection legislation . . . tends to be produced through paternalistic bureaucratic regulations By contrast, the consumer economic interest has an obvious affinity with relatively free, unregulated markets [T]he core value behind the protection of the consumer economic interest is consumer sovereignty, maximally immune from bureaucratic interference.”⁹⁵

⁹⁰ Whitman, *supra* note 88, at 345.

⁹¹ *Id.* at 370.

⁹² *Id.*

⁹³ *Id.* at 347.

⁹⁴ *Id.* at 346.

⁹⁵ *Id.* at 367.

A producerist country, on the other hand, features a legal system that “focuse[s] on the rights of actors on the supply side of the market—on the rights of producers (as well as distributors).”⁹⁶ From this perspective, “what matter[s], in both law and human life, [is] the organization of production. To be fully human [is] to *make* things, [such that] the primary problems of economic regulation [are] problems in sorting out the conflicting rights of participants in the processes of production and distribution.”⁹⁷

Producerist systems stand in opposition to consumerist values: “they reject law that aims to lower consumer prices no matter what the cost to producers in distributors . . . [For instance], they reject law that allows enterprises like Wal-Mart to offer low prices at the cost of protections for workers and small-square-footage stores.”⁹⁸ It is important to note, however, that there is no single “producer” interest; “[p]roducerist law does not favor ‘the’ producer interest, but *some* producer interest. When [scholars] speak of producerism, [they] are not speaking for any particular legal program, but of law that tends to focus on rights, interests, and most especially conflicts on the supply side.”⁹⁹

Scholars have demonstrated that American law is more consumerist and that French law is more producerist.¹⁰⁰ Across a range of “sectors, American law has a consistently deeper affinity with the ideal type of an order oriented toward the consumer economic interest; while countries like France . . . , despite decades of change, remain much more producerist in their basic orientation.”¹⁰¹ This theory should therefore generate certain expectations about the rise of the gig economy in each country.

In light of this theory, platform companies should conflict forcefully with French work laws and fit comfortably in the American legal landscape. These firms place large numbers of low-paid independent workers in competition with one another to deliver services to consumers as cheaply and as quickly as

⁹⁶ *Id.* at 345.

⁹⁷ *Id.* at 356 (emphasis in original).

⁹⁸ *Id.* at 347.

⁹⁹ *Id.* (emphasis in original).

¹⁰⁰ *Id.* at 397–98.

¹⁰¹ *Id.*

possible.¹⁰² In doing so, they pull consumer demand away from existing providers in the sector who have historically benefited from greater pay and protections. This is precisely what has happened to traditional taxi drivers as Uber has gained steam in cities around the world.¹⁰³ French law should therefore be expected to contest the rise of platform work in an effort to protect producer interests. By contrast, American law should be expected to make fast peace with companies that lower prices for consumers.

B. The Three Worlds of Welfare

As Part I of this essay explained, the gig economy does not only threaten to upend workers' labor market status.¹⁰⁴ Since this status is intimately intertwined with an individual's access to job benefits and social protections, changing modes of employment risk affecting workers' income security along a broader spectrum.¹⁰⁵ One comparative theory, Gøsta Esping-Andersen's *Three Worlds of Welfare Capitalism*, focuses attention on this question by exploring the process of "decommodification."¹⁰⁶ This concept refers to "the degree to which individuals, or families, can uphold a socially acceptable standard of living independently of market participation."¹⁰⁷

By examining welfare laws along three dimensions—the eligibility rules attached to social entitlements, the degree of income replacement, and the range of cash benefits provided—Esping-Andersen has shown that a country's level of decommodification roughly corresponds to one of three ideal-types: the *social democratic* welfare regime, the *conservative* welfare regime, or the *liberal* welfare regime.¹⁰⁸ Social democratic countries, such as Norway and Sweden, provide universal access to public welfare services on the basis of citizenship.¹⁰⁹ In doing so,

¹⁰² Smith & Leberstein, *supra* note 55, at 3–4.

¹⁰³ *See id.* at 3–4.

¹⁰⁴ *See supra* Section I.B.

¹⁰⁵ *See supra* Section I.B.

¹⁰⁶ ESPING-ANDERSON, *supra* note 89, at 37.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 26–27, 47.

¹⁰⁹ *Id.* at 27–28, 30.

they maximize autonomy and reduce people's reliance on markets or families for assistance.¹¹⁰ They are the most decommodifying of the three groupings.¹¹¹

Conservative states, such as France and Germany, rely on social insurance as their main welfare delivery mechanism.¹¹² This means that they provide income replacement in the event of a social risk—such as illness, old age, or unemployment—in proportion to a worker's earnings and contributions into the system.¹¹³ As a result of this income-based stratification, conservative states are on average less decommodifying than social democratic nations.¹¹⁴ Nevertheless, they achieve a relatively high level of decommodification thanks to generous baseline benefits and efforts to extend social protections to vulnerable groups outside the labor market.¹¹⁵

Liberal countries, such as the United States, feature the least decommodification because they prioritize market dominance and private benefit provision over public welfare.¹¹⁶ In such countries, the state only acts to reduce poverty and provide for basic needs, largely through means-tested programs.¹¹⁷ In the United States, these programs include Medicaid, Old-Age, Survivors, and Disability Insurance (OASDI), Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP).¹¹⁸ These benefits tend to be minimal, and increase in value in tandem with earnings and work hours.¹¹⁹

Similarly to the first theory, this framework suggests certain hypotheses regarding the treatment of gig economy workers in the United States and France. American platform workers should

¹¹⁰ *Id.* at 28.

¹¹¹ *Id.*

¹¹² Bruno Palier, *Continental Western Europe*, in *THE OXFORD HANDBOOK OF THE WELFARE STATE* 606 (Francis G. Castles, Stephen Leibfried, Jane Lewis, Herbert Oringer, & Christopher Pierson eds., 2010).

¹¹³ *Id.*

¹¹⁴ ESPING-ANDERSON, *supra* note 89, at 27.

¹¹⁵ *See id.*

¹¹⁶ *See id.* at 26–27.

¹¹⁷ *Id.*

¹¹⁸ Moffitt, *supra* note 51.

¹¹⁹ *Id.*

expect to rely almost entirely on the market for retirement pay and insurance against risks such as ill-health or injury. French platform workers, by contrast, should expect a greater level of decommodification courtesy of more robust public welfare institutions. Exactly how much protection the latter should expect given their low incomes and variable social insurance contributions remains uncertain.

C. Testing the Theories

In short, theories of comparative law urge those making alarmist claims about the gig economy to take pause. The foregoing frameworks forecast neither that platform work will upend international labor markets, nor that it will spur convergence among legal systems that have long differed. Rather, they favor predictions of regime continuity.

The first theory suggests that gig work should elicit a negative response from French legal structures that place the interests of producers above those of consumers.¹²⁰ It further intimates that platform work should fit neatly within a U.S. legal system which promotes lower prices through competition.¹²¹ The second theory suggests that, much like prior labor market changes, the gig economy should produce American workers who benefit from little decommodification and French workers who enjoy a much higher degree of social protection.¹²²

However, as the next two sections will show, empirical evidence undermines both predictions.¹²³ The gig economy may therefore be as tumultuous a legal and economic development as it first appears.

¹²⁰ See *supra* Section II.A.

¹²¹ See *supra* Section II.A.

¹²² See *supra* Section II.B.

¹²³ See *infra* Parts III and IV.

III. HOW THE GIG ECONOMY CHALLENGES THE CONSUMERIST/PRODUCERIST DICHOTOMY

Contrary to expectations, the rise of the gig economy does not fit neatly into traditional consumerist or producerist molds. The theory only partly holds with respect to France.¹²⁴ When Uber first launched the full version of its platform in early 2014, the French government intervened to prevent the company from diluting taxi drivers' pay and protections, eventually shutting down many features of the service.¹²⁵ However, there are signs that the country has begun to move in a more consumerist direction under its newly-elected president, Emmanuel Macron.¹²⁶

The United States, meanwhile, has not proven to be a consumerist paradise for ride-sharing applications.¹²⁷ Through state regulations, city ordinances, and private litigation, the American legal system has mustered a strong producerist backlash to platforms like Uber.¹²⁸ This reaction, which appears to be growing in confidence, signals that the gig economy may present a foundational challenge to existing legal orders.¹²⁹ Relatedly, it favors hypotheses that suggest a degree of convergence between dissimilar nations.¹³⁰

A. France: Still Producerist, But Moving Toward Consumerism

i. The Producerist Impulse Strikes First

When it comes to ridesharing platforms, France at first largely stayed true to its producerist reputation. These companies initially encountered fierce government opposition upon introducing services that threatened producers in the name of consumer

¹²⁴ See *infra* Section III.A.

¹²⁵ See *infra* Section III.A.i.

¹²⁶ See *infra* Section III.A.ii.

¹²⁷ See *infra* Section III.B.

¹²⁸ See *infra* Section III.B.

¹²⁹ See *infra* Section III.C.

¹³⁰ See *infra* Section III.C.

welfare. The story of Uber's attempt to unveil a full-fledged version of its application in Paris is instructive.

Although Uber first began operating in France in 2011, it did not release a complete version of its platform—allowing anyone, not just professionally-licensed black car drivers, to chauffeur passengers—until it launched “UberPOP” in February 2014.¹³¹ The French Parliament had hoped to get ahead of such services by passing the so-called “15-minute law,” which aimed to protect taxis by requiring Uber drivers to wait a quarter-of-an-hour before picking up a new customer.¹³² However, just days before UberPOP went live, the Conseil d'État, the country's supreme administrative court, invalidated the law on the basis that it created a “competitive imbalance.”¹³³

This ruling did not deter the French government's desire to preserve taxi drivers' labor and living standards. Just weeks after UberPOP's launch, France's consumer protection agency began lobbying to ban the platform on the grounds that it was a taxi service “masquerading” as a ridesharing application.¹³⁴ Following a wave of strikes by taxi drivers throughout the spring and summer of 2014, the French Parliament passed a law in the early fall requiring transport service providers other than taxis to return to a garage in between fares.¹³⁵ The legal system dealt Uber another blow in October 2014, when a court ruled that the company was violating precedent banning carpooling for profit, and ordered the company to pay a €100,000 fine.¹³⁶ Uber only won a small

¹³¹ Natasha Lomas, *France Bans UberPop Starting January*, TECH CRUNCH (Dec. 15, 2014), <https://techcrunch.com/2014/12/15/uberpop-non/>; Mark Scott, *French Law That Banned UberPop Service Survives Legal Challenge*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/technology/french-law-that-banned-uberpop-service-survives-legal-challenge.html>.

¹³² Lomas, *supra* note 131.

¹³³ *Id.*

¹³⁴ Sam Schechner, *Uber Technologies Fights French Court Ruling*, WSJ L. BLOG (Oct. 17, 2014), <https://blogs.wsj.com/law/2014/10/17/uber-technologies-fights-french-court-ruling/>.

¹³⁵ *Id.*

¹³⁶ *Id.*; Sam Schechner, *Uber Launches Car Pooling Service in Paris*, WSJ (Nov. 13, 2014), <https://www.wsj.com/articles/uber-launches-carpooling-service-in-paris-1415896525>.

reprieve in December 2014, when a judge decided not to fully ban UberPOP in a case brought by Parisian taxi associations, which alleged that the company was engaging in unfair competition in a market where the one-time fee for a taxi license cost up to \$300,000.¹³⁷

As in the face of prior rulings favoring the company, lawmakers quickly responded to vindicate producer interests. Just days after the judge handed down his decision, which sparked strikes during which taxis halted traffic across Paris, the French government announced that it would ban UberPOP through legislation known as the “Thévenoud Law.”¹³⁸ The law required all drivers who chauffeured passengers to obtain a professional license and adequate insurance beginning January 1, 2015.¹³⁹ It also prevented ridesharing platforms from using GPS software to show the locations of potential customers.¹⁴⁰ The Interior Ministry stressed that the law would help “better regulat[e] the profession to avoid unfair competition” amongst providers.¹⁴¹

As soon as the new law went into effect, Paris police began vigorously enforcing it.¹⁴² Citing a provision allowing penalties of up to \$17,000 and one year in prison, they issued fines to over one hundred drivers who continued to pick up fares through UberPOP.¹⁴³ Interior Minister Bernard Cazeneuve warned that vehicles caught using the application in the capital would “be

¹³⁷ Laure Fourquet & Mark Scott, *Uber Drivers Face Fines in Paris*, N.Y. TIMES (Feb. 22, 2015), <http://bits.blogs.nytimes.com/2015/02/22/uber-drivers-face-fines-in-paris/>.

¹³⁸ David Jolly & Mark Scott, *France Says It Will Ban Uber’s Low-Cost Service in New Year*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/business/international/france-says-it-will-ban-ubers-low-cost-service-in-new-year.html>.

¹³⁹ *Id.*

¹⁴⁰ Julia Fioretti, *EU Commission Asks France For More Information on Taxi Law*, REUTERS (May 28, 2015), <https://af.reuters.com/article/worldNews/idAFKBN0OD2GX20150528>.

¹⁴¹ Jolly & Scott, *supra* note 138.

¹⁴² Fourquet & Scott, *supra* note 137.

¹⁴³ *Id.*

systematically seized.”¹⁴⁴ French President François Hollande also lent strong support to traditional taxi drivers, stating that UberPOP ““doesn’t respect any laws’ and should be dissolved.”¹⁴⁵

Nonetheless, throughout 2015, Uber and many of its drivers continued to flout the restrictions.¹⁴⁶ French taxi drivers escalated the intensity of their strikes in protest.¹⁴⁷ In June 2015, nearly 3,000 taxi drivers took to the streets to violently denounce UberPOP, shutting down major thoroughfares, burning cars, and in some cases attacking people thought to be using the platform.¹⁴⁸ To quell tensions, Interior Minister Cazeneuve asked the Paris police chief to issue a decree making UperPOP illegal in the city.¹⁴⁹ The French government also took the unusual step of arresting both Uber’s head of European operations and its French CEO—charging them with running an illegal taxi operation, deceiving consumers, and violating privacy laws.¹⁵⁰ Cazeneuve admitted, however, that only a court could affirm the platform’s illegality throughout the nation.¹⁵¹

He did not have to wait long for the French justice system to make a decision, once more in the producerist mold. On September 22, 2015, France’s highest court ruled the Thévenoud Law constitutional.¹⁵² The court certified that only licensed taxi drivers

¹⁴⁴ Laura Smith-Spark & Jethro Mullen, *French Government Orders Paris Police to Crack Down on Uber After Protests*, CNN (June 26, 2015), <http://edition.cnn.com/2015/06/26/europe/france-paris-uberpop-protests/>.

¹⁴⁵ *Id.*

¹⁴⁶ Greg Sandoval, *Uber Execs Dodge Bullet in France But Criminal Case Reveals Flaws in Expansion Strategy*, GEEKWIRE (Feb. 15, 2016), <https://www.geekwire.com/2016/uber-execs-dodge-bullet-in-france-but-criminal-case-reveals-flaws-in-expansion-strategy/>.

¹⁴⁷ Romain Dillet, *French Anti-Uber Protest Turns to Guerrilla Warfare as Cabbies Burn Cars, Attack Uber Drivers*, TECH CRUNCH (June 25, 2015), <https://techcrunch.com/2015/06/25/french-anti-uber-protest-turns-to-guerrilla-warfare-as-cabbies-burn-cars-attack-uber-drivers/>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Sandoval, *supra* note 146.

¹⁵¹ Dillet, *supra* note 147.

¹⁵² Amar Toor, *France’s Highest Court Upholds Ban on Uber’s Low-Cost Service*, THE VERGE (Sept. 22, 2015), <http://www.theverge.com/2015/9/22/9372917/uber-france-court-ruling-uberpop>.

and chauffeurs could use technology putting them in touch with riders, cementing the UberPOP ban into law.¹⁵³ In January 2016, Uber suffered another setback when a Paris Grand Tribunal ordered it to pay France's national taxi union €1.2 million in damages for unlawfully telling drivers that they could stop on public roadways or cruise the city while awaiting a fare—privileges that legal precedent had limited to taxi services.¹⁵⁴ In June 2016, a French court again fined the company €800,000 “for running an illegal taxi service with non-professional drivers” during the period that it marketed UberPOP.¹⁵⁵ The platform failed to find a more receptive audience at the EU level: in April 2018, the Court of Justice of the European Union held that France had the right to bring criminal charges against Uber's managers for running an unlawful taxi service.¹⁵⁶

ii. Consumerist Principles Are Gaining Steam

Early on, France's reaction to the gig economy lived up to its producerist image. The country's legislators and judges repeatedly used the law to prevent Uber's price-cutting model from encroaching on the livelihoods of transport service providers.¹⁵⁷ Nevertheless, in the wake of the 2017 presidential election, there

¹⁵³ CONSEIL CONSTITUTIONNEL [Constitutional Council], DÉCISION N° 2015-484 QPC DU 22 SEPTEMBRE (2015) (Fr.), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-484-qpc/decision-n-2015-484-qpc-du-22-septembre-2015.144387.html>.

¹⁵⁴ Le Monde Staff/Reuters, *Uber France Condamnée à Verser 1,2 Million D'euros à L'Union Nationale des Taxis*, LE MONDE (Jan. 27, 2016), http://www.lemonde.fr/societe/article/2016/01/27/uber-france-condamne-a-verser-1-2-million-d-euros-a-l-union-nationale-des-taxis_4854568_3224.html.

¹⁵⁵ China Labbé, *French Court Fines Uber, Execs for Illegal Taxi Service*, REUTERS (June 9, 2016), <https://www.reuters.com/article/us-france-ubertech-court/french-court-fines-uber-execs-for-illegal-taxi-service-idUSKCN0YV1DQ>.

¹⁵⁶ Julia Fioretti, *Uber Loses EU Court Case in Fight Against French Criminal Charges*, REUTERS (Apr. 10, 2018), <https://www.reuters.com/article/us-uber-court-eu/uber-loses-eu-court-case-in-fight-against-french-criminal-charges-idUSKBN1HH0W4>.

¹⁵⁷ See *supra* Section III.A.i.

have been signs that France may be shifting in a more consumerist direction.

While France has aggressively defended incumbent producers' labor market advantages, it has not been nearly as willing to trade consumer welfare for enhanced *independent* worker protections. Although UberPOP no longer exists, Uber continues to operate in France as a platform which connects professionally licensed chauffeurs with prospective riders.¹⁵⁸ Most of these chauffeurs are auto-entrepreneurs responsible for their own incomes and taxes.¹⁵⁹ Though the government has acknowledged that their livelihoods are more precarious than those of full-time workers,¹⁶⁰ it has been slow to improve their situation. There are currently only a handful of cases before French courts alleging that auto-entrepreneurs are misclassified employees who should benefit from higher salaries and social guarantees.¹⁶¹ So far, none of these cases have led to a reclassification decision.¹⁶²

The French government has also been much quicker to improve consumer utility in platform markets than to safeguard producer interests. In 2016, French Prime Minister Manuel Valls commissioned a first-of-its-kind report on the development of the gig economy to sharpen the government's policy response to the sector.¹⁶³ The final product, prepared by lawmaker Pascale Terrasse (and dubbed the "Terrasse Report" by the press), outlined a range of legal proposals designed to both maximize platform users' economic interests and increase gig workers' welfare.¹⁶⁴

¹⁵⁸ Labbé, *supra* note 155.

¹⁵⁹ AMAR & VIOSSAT, *supra* note 55, at 16; Edouard de Mareschal, *VTC: L'usage du Statut D'auto-Entrepreneur Fait Débat*, LE FIGARO (Feb. 10, 2014), <http://www.lefigaro.fr/societes/2014/02/10/20005-20140210ARTFIG00031-vtc-l-usage-du-statut-d-auto-entrepreneur-fait-debat.php>.

¹⁶⁰ AMAR & VIOSSAT, *supra* note 55, at 107–116.

¹⁶¹ *Id.* at 54.

¹⁶² *Id.*

¹⁶³ PHILIPPE BARBEZIEUX & CAMILLE HERODY, DÉPUTÉ DE L'ARDÈCHE, RAPPORT AU PREMIER MINISTRE SUR L'ÉCONOMIE COLLABORATIVE: MISSION CONFIEE À PASCAL TERRASSE (Feb. 2016), <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000100.pdf>.

¹⁶⁴ *Id.*

Thus far, however, only the first set of recommendations from the Terrasse Report have been enacted. Less than a year after the report went public, the French Parliament codified three of the four reform proposals centered on consumer utility: (1) a law requiring online platforms to more clearly list price information and the factors that go into pricing so that consumers can make efficient economic decisions;¹⁶⁵ (2) a law requiring that gig economy platforms transparently communicate the terms and conditions of their relationship with each consumer, the regulations applicable to their transactions, and the nature and extent of any quality assurances they offer;¹⁶⁶ and (3) a law bolstering platforms' obligation to make customer feedback available and plainly visible to consumers wishing to use their software.¹⁶⁷

While the report also included calls to clarify auto-entrepreneurs' tax status, and alter social programs to reflect these workers' low wages and lack of fringe benefits,¹⁶⁸ the French government has yet to heed them. The major labor law reform

¹⁶⁵ Décret n° 2017-1434 du 29 septembre 2017 relatif aux obligations d'information des opérateurs de plateformes numériques, [Law 2017-1434 of September 29, 2017 on the information obligations of digital platform operators] Oct. 5, 2017, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035720908&fastPos=1&fastReqId=1151966919&categorieLien=id&oldAction=rechTexte>.

¹⁶⁶ Décret n° 2017-1435 du 29 septembre 2017 relatif à la fixation d'un seuil de connexions à partir duquel les opérateurs de plateformes en ligne élaborent et diffusent des bonnes pratiques pour renforcer la loyauté, la clarté et la transparence des informations transmises aux consommateurs, [Law 2017-1434 of September 29, 2017 on the information obligations of digital platform operators] Oct. 5, 2017, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035720925&fastPos=1&fastReqId=1841709131&categorieLien=id&oldAction=rechTexte>.

¹⁶⁷ Décret n° 2017-1436 du 29 septembre 2017 relatif aux obligations d'information relatives aux avis en ligne de consommateurs, [Law 2017-1434 of September 29, 2017 on the information obligations of digital platform operators] Oct. 5, 2017, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035720935&fastPos=1&fastReqId=1799094107&categorieLien=id&oldAction=rechTexte>.

¹⁶⁸ Barbezieux & Herody, *supra* note 163.

President Macron muscled through parliament in September 2017 conspicuously omitted changes addressing platform workers and other independent contractors.¹⁶⁹ The result, as one headline exclaimed in February 2018, is that “gig workers are desperate for Macron to fix the rules” governing their activities.¹⁷⁰ French leaders, however, appear unwilling to rush the process for fear of quashing a sector they see as vital to the country’s economic success.¹⁷¹

Indeed, Macron has not been shy about his ambition to turn France into a “start-up nation.”¹⁷² Promoting consumers’ economic interests forms a large part of his political motivation.¹⁷³ In an April 2018 interview, he explained that

“[t]he question is how to embrace th[e] change [brought by the gig economy] and be proud of it Many people explain to French citizens, ‘I will protect you against the side effects of Uber or Airbnb,’ but these companies are here *and French consumers love them*”¹⁷⁴

This sentiment suggests that France will move in a more consumerist direction if Macron continues to get his way in parliament. As he reiterated at a later stage of the interview, “I want my country to be open to disruption and to these new models. So I will deliver the evidence of that.”¹⁷⁵

¹⁶⁹ Helene Fouquet, *France’s Gig Workers Are Desperate for Macron to Fix the Rules*, BLOOMBERG (Feb. 26, 2018), <https://www.bloomberg.com/news/articles/2018-02-26/france-s-gig-workers-are-desperate-for-macron-to-fix-the-rules>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; Rose, *supra* note 61.

¹⁷² *French Business Creation Surges as Macron Promises “Start-Up Nation”*, REUTERS (Jan. 16, 2018), <https://www.reuters.com/article/us-france-business/french-business-creation-surges-as-macron-promises-start-up-nation-idUSKBN1F51M0>.

¹⁷³ See Randall Lane, *Exclusive: French President Macron Says He Will End France’s Notorious ‘Exit Tax’*, FORBES (May 1, 2018), <https://www.forbes.com/sites/randalllane/2018/05/01/exclusive-french-president-macron-says-he-will-end-frances-notorious-exit-tax/#be8ae6b1d2b3>.

¹⁷⁴ *Id.* (emphasis added).

¹⁷⁵ *Id.*

B. The United States: A Site of Ascendant Producerism

Macron's words reflect a legal philosophy that comparative theory predicts should prevail in the United States. However, the facts on the ground tell a different story. There is no question that Uber and its competitors have had success in American markets.¹⁷⁶ These companies have used their sizeable resources to lobby for friendly legislation throughout the country, winning the right to operate many of their services without interference.¹⁷⁷ Nonetheless, across just about every level of law, the United States has also been a site of producerist resistance to the way these companies treat their workers.¹⁷⁸ The federal government has generally left regulation in this arena to other actors.¹⁷⁹ As this section shows, states, cities, and private plaintiffs have stepped in to fill the void.¹⁸⁰

i. Resistance from the States

American states have not been passive bystanders to Uber's rise. As of today, "48 states and the District of Columbia have passed [Transportation Network Company (TNC)] legislation to regulate TNCs in some form."¹⁸¹ Several have even taken steps to order platform markets in ways that mirror more producerist France.

Some of the earliest legal pushback to companies like Uber can be traced to state labor commissioners. Though most platform

¹⁷⁶ Wolf Richter, *Uber and Lyft Are Gaining Even More Market Share Over Taxis and Rentals*, BUS. INSIDER (July 30, 2018), <https://www.businessinsider.com/uber-lyft-are-gaining-even-more-market-share-over-taxis-and-rentals-2018-7>.

¹⁷⁷ Alison Griwold, *Uber Pulled Off a Spectacular Political Coup and Hardly Anyone Noticed*, QUARTZ (Jan. 21, 2016), <http://qz.com/589041/uber-pulled-off-a-spectacular-political-coup-and-hardly-anyone-noticed/>.

¹⁷⁸ See *supra* Sections III.A, III.B; *infra* Section III.C.

¹⁷⁹ Patrick Gavin, *Regional Regulation of Transportation Network Companies*, 11 HARV. L. & POL'Y REV. 337, 338 (2017).

¹⁸⁰ See *supra* Sections III.A, III.B; *infra* Section III.C.

¹⁸¹ SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, THE TNC REGULATORY LANDSCAPE: AN OVERVIEW OF CURRENT TNC REGULATION IN CALIFORNIA AND ACROSS THE COUNTRY (2017).

firms have labeled their drivers independent contractors—and thereby avoided responsibility for providing them stable pay or benefits—a number of states have contested this classification and argued that drivers should obtain the same protections as full-time employees.¹⁸² In doing so, they have sought to even competition between producers to ensure that consumer sovereignty does not trump workers' rights.

In June 2015, California's labor commissioner issued a ruling in favor of an Uber driver seeking reimbursement for work expenses she incurred while using the company's software.¹⁸³ Though the holding did not have precedential authority, it staked out a clear producerist stance on the duties Uber owes its workers.¹⁸⁴ The opinion stressed that

“[d]efendants hold themselves out as nothing more than a neutral technology platform, designed simply to enable drivers and passengers to transact the business of transportation. The reality, however, is that Defendants are involved in every aspect of the operation In light of [this, the plaintiff driver] was [Uber's] employee.”¹⁸⁵

Just four months later, Oregon's labor commissioner issued a similar advisory, holding that because “Uber suffers or permits drivers to work for the company's benefit” and because “drivers are economically dependent on Uber . . . Uber drivers are employees.”¹⁸⁶

¹⁸² Mike Isaac & Natasha Singer, *California Says Uber Driver is Employee, not a Contractor*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html>; Elliot Njus, *Uber Drivers Are Employees, Labor Commissioner Says*, OREGONIAN (Oct. 14, 2015), http://www.oregonlive.com/commuting/index.ssf/2015/10/uber_drivers_are_employees_lab.html.

¹⁸³ *Berwick v. Uber Technologies, Inc.*, No. 11-46739 EK, Decision of the Labor Commissioner of the State of California (2015).

¹⁸⁴ *Id.* at 9–10.

¹⁸⁵ *Id.*

¹⁸⁶ Or. Dep't of Labor and Industries, Opinion Letter on The Employment Status of Uber Drivers (Oct. 14, 2015), <http://media.oregonlive.com/commuting/other/101415%20Advisory%20Opinion%20on%20the%20Employment%20Status%20of%20Uber%20Drivers.pdf>.

Echoing the strategy embodied in France's Thévenoud Law, states have also used regulations outside the spheres of labor and employment to level the playing field for transport providers. The California Public Utilities Commission, which has primary regulatory authority over TNCs like Uber,¹⁸⁷ has introduced several regulations in this vein.¹⁸⁸ Like in France, TNC drivers may only offer pre-arranged travel, and may not accept "street hails" from people on the curb.¹⁸⁹ TNCs are required to complete criminal background checks of their drivers and exclude applicants who have committed particular offenses.¹⁹⁰ Furthermore, like under the Thévenoud Law, these companies must provide primary commercial insurance covering each of their drivers in the amount of \$1 million¹⁹¹—the minimum quality of which the California legislature ratcheted up in 2017.¹⁹²

Other states have implemented similar regimes. In Colorado, TNCs must have primary liability insurance covering at least \$1 million per incident. The companies must also complete criminal background checks and annual vehicle safety inspections before approving drivers.¹⁹³ Massachusetts has adopted even stricter background check requirements than Colorado and California.¹⁹⁴ All told, 48 states have now implemented minimum insurance

¹⁸⁷ CAL. PUB. UTIL. CODE § 5430 (Deering 2015).

¹⁸⁸ *Decision Adopting Rules and Regulations to Protect Safety While Allowing New Entrants to the Transportation Industry*, Cal. Pub. Util. Commission, Decision 13-09-045 (2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G0000/M077/K192/77192355.PDF>.

¹⁸⁹ *Id.* at 30.

¹⁹⁰ *Id.* at 26.

¹⁹¹ CALIFORNIA PUBLIC UTILITIES COMMISSION, INSURANCE REQUIREMENTS FOR TNCs (2018), <http://www.cpuc.ca.gov/General.aspx?id=3802>.

¹⁹² Cal. Dept. of Insurance, Comment Letter on Survey of Transportation Network Services (TNCs), Insurance Experience (Feb. 6, 2017), <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/rsb-forms/2016/upload/TNCDataCallCvrLtrFinalFeb0617.pdf>.

¹⁹³ SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, *supra* note 181, at 11.

¹⁹⁴ *Id.* at 10–11.

requirements for TNCs and 42 have enacted background check requirements for their drivers.¹⁹⁵ These rules have minimized competitive disadvantages between transport providers in a world where taxis have long operated under similar regulations.¹⁹⁶

ii. Resistance from Cities

Cities have also stepped in to safeguard producer interests.¹⁹⁷ No locality has made more visible efforts on this front than Austin, Texas.¹⁹⁸ In December 2015, “the city council voted 9-2 in favor of an ordinance aimed at regulating [TNCs] more like traditional taxi companies.”¹⁹⁹ The ordinance required Uber and its competitors to obtain “permits from the city, pay annual fees, limit driver hours, and use geo-fenced pickup and drop-off areas during special events. Most controversially, TNCs were required to complete both driving history checks and fingerprint background checks of prospective drivers.”²⁰⁰

The following May, Austin’s residents overwhelmingly voted to defeat a ballot measure funded by Uber and Lyft that would have rolled back the regulations.²⁰¹ This prompted the companies

¹⁹⁵ MAARIT MORAN, BEN ETTelman, GRETCHEN STOELTJE, TODD HANSEN & ASHESH PANT, TEXAS A&M TRANSP. INST., POLICY IMPLICATIONS OF TRANSPORTATION NETWORK COMPANIES: FINAL REPORT 19 (Oct. 2017), <https://static.tti.tamu.edu/tti.tamu.edu/documents/PRC-17-70-F.pdf>.

¹⁹⁶ *See id.* at 14.

¹⁹⁷ Harriet Taylor, *Uber and Lyft Are Getting Pushback from Municipalities All Over the US*, CNBC (Sept. 2, 2016), <https://www.cnbc.com/2016/09/02/uber-and-lyft-are-getting-pushback-from-municipalities-all-over-the-us.html>.

¹⁹⁸ *See* Aman Batheja, *With New Rules, Will Uber, Lyft Stay in Austin?*, TEX. TRIB. (Dec. 17, 2015), <https://www.texastribune.org/2015/12/17/austin-city-council-approves-new-uber-regs-uber-th/>.

¹⁹⁹ *Id.*

²⁰⁰ SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, *supra* note 181, at 13.

²⁰¹ Rick Jervis, *Austin Voters Reject Uber, Lyft Plan for Self-Regulation*, CNBC (May 8, 2015), <https://www.cnbc.com/2016/05/08/austin-voters-reject-uber-lyft-plan-for-self-regulation.html>.

to abandon operations in the city for a year.²⁰² However, in May 2017, with heavy backing from TNCs, the Texas legislature passed a bill nullifying the Austin ordinance.²⁰³

Elsewhere around the country, New York City has passed ordinances requiring TNCs to operate under the jurisdiction of its Taxi & Limousine Commission, pay a fee for a three-year e-hail application provider license, obtain commercial insurance covering all travel, and make drivers go through fingerprinting and background checks.²⁰⁴ Chicago has enacted laws requiring TNC drivers to obtain either a public chauffeur license or one of its newly-created TNC chauffeur permits.²⁰⁵ Additionally, Chicago has implemented fingerprint-based background checks, “prohibit[ed] TNC drivers from operating any TNC vehicle for more than 10 hours in a 24-hour period[,] and prohibit[ed] TNC vehicles from being driven, even if by more than one driver, for more than 10 hours in that period.”²⁰⁶ Both Seattle, Washington²⁰⁷ and Portland, Oregon²⁰⁸ have similarly instituted stringent TNC insurance, background check, data reporting, and operating standards.

These regulations are not the product of a consumerist regime that primarily seeks to protect riders’ economic wishes. To the contrary, they add costs that platform firms pass on to consumers in the form of higher prices. These municipal regulations should therefore be understood as an attempt to create a degree of parity

²⁰² See Patrick Sisson, *Uber and Lyft Are Coming Back to Austin*, CURBED (May 18, 2017), <https://www.curbed.com/2017/5/18/15657684/uber-lyft-austin-texas-ridehailing-state-law>.

²⁰³ Alex Samuels, *Uber, Lyft Return to Austin as Texas Gov. Abbott Signs Ride-Hailing Measure Into Law*, TEX. TRIB. (May 29, 2017), <https://www.texastribune.org/2017/05/29/texas-gov-greg-abbott-signs-measure-creating-statewide-regulations-rid/>.

²⁰⁴ SAN FRANCISCO COUNTY TRANSPORTATION AUTHORITY, *supra* note 181, at 12.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See generally *Business Regulations: Transportation Network Companies*, SEATTLE.GOV, <https://www.seattle.gov/business-regulations/taxis-for-hires-and-tncs/transportation-network-companies/tnc-companies#insurance> (last visited Feb. 14, 2019).

²⁰⁸ See generally PORTLAND, OR., CODE §§ 16.40.200–290 (2018).

between TNCs and traditional transport service providers—one of the classic producerist moves.

iii. Resistance from the Private Bar and the Judicial System

Finally, private litigation appears to have focused more heavily on producer welfare than consumers' economic desires. An original Westlaw analysis of state and federal actions conducted in May 2018 revealed that Uber had appeared as a named party in 109 different cases since it was founded.²⁰⁹ Of these, 81—or nearly three-quarters—aimed to vindicate producer interests (Figure 1). These included cases in which drivers claimed they should be classified as employees rather than independent contractors for wage and overtime purposes,²¹⁰ contested the minimum criteria to offer services through the platform,²¹¹ and alleged that Uber engaged in “tortious interference with prospective business relations.”²¹² These also included cases in which taxi companies brought claims against the platform for “false advertising,”²¹³ “unfair competition,”²¹⁴ violations of state transportation laws,²¹⁵

²⁰⁹ This analysis was completed by (1) performing a party name search for “Uber Technologies” among all state and federal cases; (2) going through all 241 opinions listed and organizing them by matter, which yielded a total of 109 distinct cases; (3) analyzing the contents of these actions and sorting them on the basis of whether they involved a producerist dispute, a consumerist dispute, or some other form of disagreement.

²¹⁰ See, e.g., *Lamour v. Uber Technologies, Inc.*, No. 1:16-CIV-21449, 2017 WL 878712 at *3 (S.D. Fla. Mar. 1, 2017); *Singh v. Uber Technologies Inc.*, 235 F. Supp. 3d 656, 661 (D.N.J. 2017); *O'Connor v. Uber Technologies, Inc.*, 58 F. Supp. 3d 989, 994 (N.D. Cal. 2014).

²¹¹ See, e.g., *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201, 1206–07 (9th Cir. 2016).

²¹² *Lee v. Uber Technologies, Inc.*, 208 F. Supp. 3d 886, 888 (N.D. Ill. 2016).

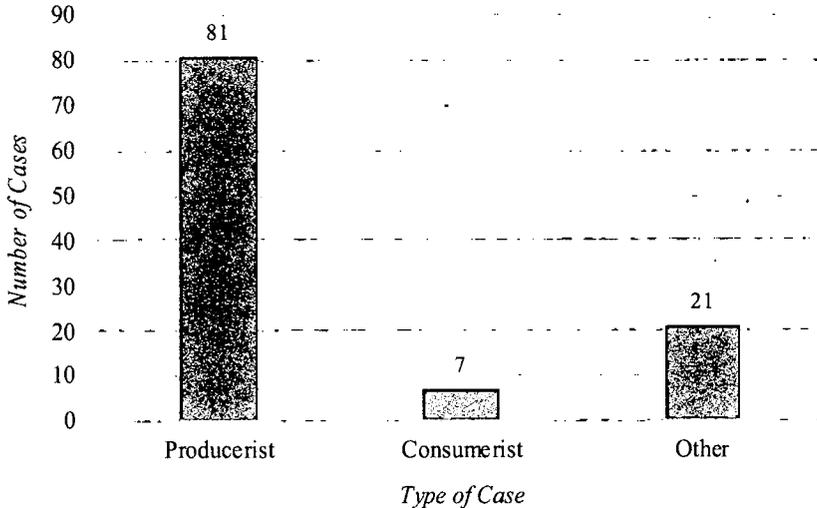
²¹³ See, e.g., *Greenwich Taxi, Inc. v. Uber Technologies, Inc.*, 123 F. Supp. 3d 327, 334 (D. Conn. 2015).

²¹⁴ See, e.g., *Checker Cab of Philadelphia Inc. v. Uber Technologies, Inc.*, 643 Fed.Appx. 229, 231 (3d Cir. 2016).

²¹⁵ See, e.g., *Mifsud v. Uber Technologies, Inc.*, 203 F. Supp. 3d 820, 823–24 (E.D. Mich. 2016).

and the “dismantl[ement of] decades of [antitrust] laws and regulations.”²¹⁶

FIGURE 1. TYPES OF CASES BROUGHT AGAINST UBER IN STATE AND FEDERAL COURT



By contrast, only seven cases alleged harm to consumers’ economic interests. These included actions by riders who were simultaneously charged taxi and Uber fares,²¹⁷ believed the company misrepresented its gratuity policy,²¹⁸ challenged Uber’s cancellation fees,²¹⁹ alleged they were subject to fictitious charges,²²⁰ claimed they should not have to pay a “safe rides

²¹⁶ *The Yellow Cab Co. v. Uber Technologies, Inc.*, No. RDB-14-2764, 2015 WL 4987653 at *1 (D. Md. Aug. 19, 2015).

²¹⁷ *Phillips v. Uber Technologies, Inc.*, No. 3:15-cv-544-JAG, 2016 WL 165024 (E.D. Va. Jan. 13, 2016).

²¹⁸ *Ehret v. Uber Technologies, Inc.*, 68 F. Supp. 3d 1121 (N.D. Cal. 2014).

²¹⁹ *Metter v. Uber Technologies, Inc.*, No. 16-cv-06652-RS, 2017 WL 1374579, at *1–2 (N.D. Cal. Apr. 17, 2017); *Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985, 987 (N.D. Cal. 2017).

²²⁰ *Cullinane v. Uber Technologies, Inc.*, No. 14-14750-DPW, 2016 WL 3751652, at *2 (D. Mass. July 11, 2016).

fee,²²¹ and were allegedly overcharged for taxes and tolls.²²² The handful of remaining cases, involving issues such as intellectual property,²²³ computer fraud,²²⁴ torts,²²⁵ and disability discrimination,²²⁶ did not fall neatly into either the consumerist or producerist category.

Though much private litigation has ended in dismissal or settlement, it has generated intense public debate about the nature of gig work—casting Uber's rise through a producerist, rather than a consumerist, lens. The most prominent of these disputes have centered on whether TNC drivers should be classified as employees or independent contractors.²²⁷ These battles are high-stakes: as the next section details, independent contractors have less income security than employees because they are excluded from national minimum wage laws, cannot depend on a set number of work hours, and generally receive few if any benefits from the company they transact with.²²⁸ The flagship case in this arena, *O'Connor v. Uber*,²²⁹ sparked national discussions about these questions after it “received a great deal of media attention [for]

²²¹ *McKnight v. Uber Technologies, Inc.*, No. 14-cv-05615-JST, 2017 WL 3427895, at *1–2 (N.D. Cal. Aug. 7, 2017).

²²² *Tadepalli v. Uber Technologies, Inc.*, No. 15-cv-04348-MEJ, 2016 WL 1622881 (N.D. Cal. Apr. 25, 2016).

²²³ *See, e.g., Waymo LLC v. Uber Technologies, Inc.*, No. 2017-1904, 2017 WL 4620809 (Fed. Cir. Apr. 24, 2017); *X One, Inc. v. Uber Technologies, Inc.*, 239 F. Supp. 3d 1174, 1177 (N.D. Cal. 2017).

²²⁴ *Uber Technologies, Inc. v. Doe*, No. C-15-00908 LB, 2015 WL 1205167 (N.D. Cal. Mar. 16, 2015).

²²⁵ *See Evanston Insurance Co. v. Uber Technologies, Inc.*, No. 15-03988 WHA, 2015 WL 8597239 (N.D. Cal. Dec. 14, 2015).

²²⁶ *See e.g., Nat'l Fed. of the Blind of California v. Uber Technologies, Inc.*, 103 F. Supp. 3d 1073 (N.D. Cal. 2015).

²²⁷ *See Brishen Rogers, Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479 (2016).

²²⁸ Smith & Leberstein, *supra* note 55, at 1–7.

²²⁹ *O'Connor v. Uber Technologies, Inc.*, 58 F. Supp. 3d 989 (N.D. Cal. 2014); *see Joel Rosenblatt and Bob Van Voris, Uber Drivers Suing for Better Pay Lose Critical Court Ruling*, BLOOMBERG (Sept. 25, 2018), <https://www.bloomberg.com/news/articles/2018-09-25/uber-wins-appeal-in-case-targeting-classification-of-drivers>.

[t]he large size of [its] certified class” and settlement of “close to \$100 million.”²³⁰

A case against Uber’s main competitor, Lyft, similarly highlighted the legal challenges and policy significance of these disputes.²³¹ In his opinion, Northern California District Court Judge Vince Chhabria underscored the inadequacy of the legal standards used to determine whether a worker is an employee or an independent contractor.²³² Judge Chhabria noted that if the case eventually reached a jury, it would “be handed a square peg and asked to choose between two round holes [because t]he test . . . courts . . . developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”²³³

Even in the face of these doctrinal hurdles, courts have started to find ways to place producer interests over low consumer prices. In a landmark decision issued in April 2018, the California Supreme Court scrapped its existing test for determining employee status and erected a far simpler—and more worker-friendly—replacement, under which a person is an employee if they do a job that forms part of the “usual course” of the company’s business.²³⁴ As *The New York Times* reported, this “decision could eventually require companies like Uber, many of which are based in California, to follow minimum-wage and overtime laws and to pay workers’ compensation and unemployment insurance and payroll taxes, potentially upending their business models.”²³⁵

²³⁰ Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577, 583 (2016).

²³¹ See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

²³² *Id.* at 1081–82.

²³³ *Id.*

²³⁴ *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903, 956–57 (Cal. 2018). Importantly, the California Supreme Court also placed the evidentiary burden of proving that a person is an independent contractor on the hiring entity, rather than the worker.

²³⁵ Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html>.

Indeed, law enforcers are already exploring the possibility of bringing industry-changing suits using this precedent. In May 2018, in direct response to the California Supreme Court's ruling, the San Francisco City Attorney "issued subpoenas to Uber and Lyft to turn over records on whether they classify drivers as employees or private contractors, as well as records on driver pay and benefits."²³⁶ Existing case law's producerist slant may therefore grow even more pronounced in the coming years.

C. A Significant Legal Shift

The French and American legal reactions to platform companies have confounded the consumerist/producerist theory's predictions. According to this framework, France should have used its laws to protect producer welfare and the United States should have allowed the gig economy to flourish. The facts do not fit comfortably into either narrative. France certainly began by taking an aggressive stance toward Uber to safeguard taxi drivers' livelihoods.²³⁷ Since President Macron's election in 2017, however, the country has been slow to address gig workers' ambiguous labor status due to a desire to foster start-ups that will benefit consumers.²³⁸

The U.S. case is even more surprising. While Uber has enjoyed success in the country, it has battled strong and growing producerist headwinds from nearly every part of the legal system.²³⁹ The California Supreme Court's 2018 ruling, which makes it easier for gig workers to claim employee status, may cause Uber's business model to collapse in the state where it is headquartered.²⁴⁰ The fact that platform work has stirred consumerist passions in France and producerist backlash in the

²³⁶ Press release, City Attorney of San Francisco, *Herrera Investigates Uber, Lyft over Driver Pay and Benefits* (May 29, 2018), <https://www.sfcityattorney.org/2018/05/29/herrera-investigates-uber-lyft-driver-pay-benefits/>.

²³⁷ See *supra* Section III.A.i.

²³⁸ See *supra* Section III.A.ii.

²³⁹ See *supra* Section III.B.

²⁴⁰ See Scheiber, *supra* note 235; UBER, COMPANY INFO (2019), <https://www.uber.com/newsroom/company-info/>.

United States suggests that it represents a frontal challenge to existing legal orders. If current trends persist, they may well spur some degree of convergence between the two nations in the coming years.

IV. HOW THE GIG ECONOMY UPENDS THE WORLDS OF WELFARE

An analysis of the worlds of welfare favors similar conclusions. As discussed earlier, this theory predicts that French gig workers should experience a much higher degree of decommodification than their American counterparts.²⁴¹ However, a close look at the countries' legal systems shows that they treat the independent workers who run the platform economy similarly. Both countries have effectively evolved two-track labor regimes: employees in SERs enjoy stable pay, fringe benefits, and a range of public guarantees, while independent workers receive only residual protections.

A. *The United States: Staying True to Its Liberal Roots*

When it comes to the independent workforce that companies like Uber rely on, the United States has lived up to its "liberal welfare regime" status. These workers are severely disadvantaged compared to full-time employees with respect to pay, benefit provisions, and eligibility for social programs. Correspondingly, they experience very little decommodification: if they cannot obtain supplemental earnings or insurance from private markets, they must usually go without it.

Independent contractors do not receive the same income protections as workers in an SER. The Fair Labor Standards Act (FLSA) establishes a national minimum wage rate²⁴² and mandates that employers provide overtime compensation.²⁴³ However, by limiting its coverage to "employees,"²⁴⁴ the law excludes

²⁴¹ See *supra* Section II.B.

²⁴² 29 U.S.C. § 206 (2016).

²⁴³ *Id.*

²⁴⁴ § 203.

independent contractors such as rideshare drivers.²⁴⁵ The result is “that these workers often earn significantly less than employees or better-resourced entrepreneurs.”²⁴⁶ A 2015 survey by the Center for American Progress found that “independent contractors . . . self-reported median annual earnings of \$25,000 compared with employees’ median annual earnings of \$35,000 . . . Independent contractors at the 10th percentile in their respective worker classification self-reported earnings as low as \$4.44 per hour, 57 percent of the earnings reported by employees at the 10th percentile.”²⁴⁷

These workers fare no better when it comes to benefits and social protections. As the National Employment Law Project has observed, most are “not covered under their companies’ employee benefit plans.”²⁴⁸ Businesses do not pay into Social Security or Medicare—which respectively provide the elderly with retirement income and healthcare—on these workers’ behalf.²⁴⁹ This forces independent contractors to shoulder both the employer and employee shares of these taxes, and to try to recoup the employer half in tax credits.²⁵⁰

Many federal programs designed to minimize market risks also exclude independent contractors. Though the Family and Medical Leave Act (FMLA) provides employees with unpaid time off to care for themselves or a sick relative,²⁵¹ the law does not cover independent contractors.²⁵² These workers are ineligible for

²⁴⁵ Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV 4 (2002), <https://www.bls.gov/opub/mlr/2002/01/art1full.pdf>.

²⁴⁶ Karla Walter & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROG. (Oct. 13, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/>.

²⁴⁷ *Id.* at ¶ 32.

²⁴⁸ Smith & Leberstein, *supra* note 55, at 4.

²⁴⁹ *Id.* at 11–12.

²⁵⁰ Topic No. 554 – Self-Employment Tax, INTERNAL REVENUE SERV. (Jan. 31, 2018), <https://www.irs.gov/taxtopics/tc554>.

²⁵¹ 29 U.S.C. § 2601 (2018).

²⁵² Nancy K. Cauthen, Annette Case, & Sarah Wilhelm, *Promoting Security in a 21st Century Labor Market: Addressing Intermittent Unemployment in Nonstandard Work*, FAMILY VALUES AT WORK ii (Sept.

Unemployment Insurance, meaning they do not enjoy even minimal income replacement in the event of job loss.²⁵³ Furthermore, most states exempt independent contractors from their workers' compensation systems.²⁵⁴

As such, these laborers are left with the minimum social guarantees available to all low-income Americans, namely Social Security, Medicaid (which provides healthcare to the poor), the Supplemental Nutrition Assistance Program (which provides food stamps to the poor), and the Earned Income Tax Credit (which provides an income subsidy to the working poor in the form of a tax refund).²⁵⁵ These programs are heavily means-tested, and have become less generous with time.²⁵⁶ The size of a person's social security income also varies as a function of the contributions they make during their working years; this means that independent contractors' low median incomes put them at an even greater disadvantage once they reach retirement.²⁵⁷

B. France: Pushing Workers Toward Residual Welfare Arrangements

The French case unexpectedly displays a number of similarities. As noted earlier, most of the country's platform service providers operate as "auto-entrepreneurs," an independent contractor status the government created in 2009 to streamline these workers' tax obligations.²⁵⁸ Unfortunately, policymakers did not simultaneously address how potential gaps in the welfare

2015), http://familyvaluesatwork.org/wp-content/uploads/2015/05/nonstandard_work_final-1.pdf.

²⁵³ *Id.*

²⁵⁴ See generally Workers' Compensation Laws-State by State Comparison, NAT'L FED'N OF INDEP. BUS (June 7, 2017), <https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/>.

²⁵⁵ See Moffitt, *supra* note 51, at 729–37.

²⁵⁶ *Id.*

²⁵⁷ See *How Do Benefits Compare to Earnings?*, NAT'L ACAD. OF SOC. INS., <https://www.nasi.org/learn/socialsecurity/benefits-compare-earnings> (last visited Feb. 14, 2019).

²⁵⁸ *Precarious Employment in Europe Part II: Country Case Studies*, *supra* note 37, at 15–16.

system might impact this category of earners.²⁵⁹ Moreover, auto-entrepreneurs remain exposed to much higher levels of financial insecurity than people in traditional employment relationships.

Like in the United States, auto-entrepreneurs are not entitled to a minimum wage because they are deemed to control their own enterprises.²⁶⁰ Data show that they earn far less than other types of workers as a result. A 2012 study released by the INSEE, France's national institute of statistics, revealed that 90 percent of auto-entrepreneurs earned below the country's minimum wage, the "SMIC."²⁶¹ Across nearly all income levels, auto-entrepreneurs made around three times less than traditional independent workers²⁶² (such as bakery owners). Even the top tenth percentile of auto-entrepreneurs only earned an average of €12,000 a year.²⁶³ To make matters worse, these already low figures appear to be declining with time.²⁶⁴ This state of affairs has prompted increasingly heated protests calling for auto-entrepreneurs to receive a minimum wage.²⁶⁵

²⁵⁹ Emmanuelle Réju, *Auto-entrepreneur, Un Statut Sous Surveillance*, LA CROIX (Jan. 15, 2018), <https://www.la-croix.com/Journal/Auto-entrepreneur-statut-surveillance-2018-01-15-1100905812>.

²⁶⁰ See *Precarious Employment in Europe Part I: Patterns, Trends, and Policy Strategy*, *supra* note 29, at 178 (explaining that the French government created the auto-entrepreneur status "[t]o help people set up their own businesses."); *Precarious Employment in Europe Part II: Country Case Studies*, *supra* note 37, at 15–16 (noting that auto-entrepreneurs "do not belong to the traditional wage-earning relationship . . . [as] independent workers [who] benefit from simplified tax returns and social security contributions," and that "[m]ore than nine out of ten auto-entrepreneurs earn less than the minimum wage.").

²⁶¹ Jérôme Domens & Justine Pigner, *Auto-entrepreneurs: Au Bout de Trois Ans, 90% Dégagent Un Revenu Inférieur au Smic au Titre de Leur Activité Non-salariée*, INSEE (Sept. 20, 2012), <https://www.insee.fr/fr/statistiques/1287883>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See Laurianne Salembier & Guilhem Théron, *Revenus d'activité des Non-salariés en 2014: Hausse Pour les Indépendants "Classiques," Baisse Pour les Auto-entrepreneurs*, INSEE (Dec. 19, 2016), <https://www.insee.fr/fr/statistiques/2531942>.

²⁶⁵ Deliveroo: "Les Plateformes se Servent du Statut d'auto-entrepreneur Pour Faire ce qu'elles Veulent," France Info (Aug. 28, 2017), <https://www.francetvinfo.fr/economie/autoentrepreneurs/deliveroo-les->

Auto-entrepreneurs also enjoy fewer social protections than standard workers. Since they do not have an employer, they do not collect fringe benefits such as paid leave or vacation days.²⁶⁶ Like in the United States, they are barred from receiving workers' compensation.²⁶⁷ Most importantly, auto-entrepreneurs remain fully excluded from the country's unemployment insurance system,²⁶⁸ leaving them in a precarious position in the event of a work stoppage. As the head of France's auto-entrepreneurs' union explained in May 2018, "we have been pleading since the beginning . . . to be eligible for the same kind of unemployment insurance a salaried worker earning the SMIC would receive."²⁶⁹ While the government recently promised to address the shortfall,²⁷⁰ it continues to struggle to craft a solution.²⁷¹

It is true that other parts of the French welfare state help fill these gaps, particularly the country's retirement and health systems.²⁷² Even in these domains, however, auto-entrepreneurs

plateformes-se-servent-du-statut-d-auto-entrepreneur-pour-faire-ce-qu-elles-veulent_2346055.html.

²⁶⁶ See "*Quand on est Livreur, on se Fait enc*** par les Plateformes Numériques*," FRANCE CULTURE (Oct. 27, 2017), <https://www.franceculture.fr/emissions/hashtag/quand-on-est-livreur-on-se-fait-enc-par-les-plateformes-numeriques>.

²⁶⁷ *La Sécurité Sociale pour les Indépendants Verse-t-elle des Indemnités Journalières en cas d'accident du Travail?*, PREVISSIMA (Jan. 8, 2018), <https://www.previssima.fr/question-pratique/le-rsi-verse-t-il-des-indemnite-journalieres-en-cas-daccident-du-travail.html>.

²⁶⁸ AMAR & VIOSSAT, *supra* note 55, at 102–103.

²⁶⁹ Marion Perroud, *Assurance Chômage: les Auto-entrepreneurs, Grands Oubliés de la Réforme?*, CHALLENGES (May 3, 2018, 6:47 PM), https://www.challenges.fr/economie/social/assurance-chomage-les-auto-entrepreneurs-grands-oublies-de-la-reforme_571600 (translation by author).

²⁷⁰ Sarah Belouezzane & Bertrand Bissuel, *L'Exécutif Plaide Pour Une Protection Sociale des Travailleurs "Ubérisés"*, LE MONDE (May 9, 2018, 11:02 PM), http://www.lemonde.fr/politique/article/2018/05/09/1-executif-plaide-pour-une-protection-sociale-des-travailleurs-uberises_5296574_823448.html.

²⁷¹ Source AFP, *Réforme Assurance Chômage: Le Conseil d'État Demande des Modifications*, LE POINT (Apr. 28, 2014, 6:20 PM), http://www.lepoint.fr/politique/reforme-assurance-chomage-le-gouvernement-doit-revoir-sa-copie-28-04-2018-2214361_20.php.

²⁷² AMAR & VIOSSAT, *supra* note 55, at 102–103.

suffer significant disadvantages. These programs vary in generosity according to workers' incomes.²⁷³ Retirement benefits are heavily dependent on a worker's lifetime earnings.²⁷⁴ Furthermore, while the state provides baseline medical coverage to all citizens, co-payments in the range of 25 to 35 percent remain common.²⁷⁵ Upper- and middle-class workers buy top-up insurance to avoid these costs; low-income workers like auto-entrepreneurs usually cannot afford it.²⁷⁶ Aggravating matters, the "free supplementary health insurance [that low-income workers receive (the CMU)] does not cover all fees [B]eneficiaries of the CMU are [also] significantly more likely to be refused treatment when they present themselves as CMU recipients."²⁷⁷

Collectively, these forces deepen a welfare dualization process that the rise of earlier forms of non-standard work got underway.²⁷⁸ As political scientists Philippe Askenazy and Bruno Palier have observed, in France,

[t]wo distinct worlds of welfare have come to coexist The French population . . . seems to be increasingly divided into, on the one hand, those who can rely on a rather generous social insurance program and continue to have access (thanks to their employers or their own health) to private complements, and on the other hand, those who have fallen out of that system and are dependent on minimum benefits.²⁷⁹

²⁷³ *Id.* at 107–08.

²⁷⁴ *Id.* at 155.

²⁷⁵ Seeleib-Kaiser, Saunders & Naczyk, *supra* note 52, at 168.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ Philippe Askenazy & Bruno Palier, *France: Rising Precariousness Supported by the Welfare State* (SciencesPo LIEPP Working Paper No. 74, 2018), <https://spire.sciencespo.fr/hdl:/2441/1ofgl9koia9o2qabjaeabmaqqu/resources/wp74-askenazy-palier.pdf>.

²⁷⁹ *Id.* at 26–27.

Put another way, French laws—and in many cases their absence—have helped “increase inequalities and divide society.”²⁸⁰

C. Collapsing Distinctions Between the Worlds of Welfare

The gig economy appears to pose as significant a challenge to welfare regimes as it does to labor markets. While theory predicts that French laws should do far more to decommodify platform workers than American social programs, empirical evidence shows that they do not. Both countries deny independent workers a minimum wage, unemployment insurance, workers' compensation, and access to fringe benefits such as paid leave and vacation days. In doing so, they force gig workers to rely on health, retirement, and income guarantees that are universally available but markedly less generous than those enjoyed by standard workers. These results are surprising given France's reputation as a low-inequality nation with extensive public protections.²⁸¹ If the country does not address these shortfalls in the coming years, it may find itself converging toward the liberal welfare state model as platform firms expand.

CONCLUSION

The rise of the gig economy and non-standard employment has substantially altered the nature of work. In doing so, it has generated intense debates about labor market design, welfare institutions, and inequality. Nonetheless, the legal significance of these shifts has remained opaque. This Article has aimed to bring analytical clarity to this question by comparing the French and American responses to platform work.

Comparative legal theory anticipated two patterns: first, that French law would suppress the sector to protect producers' interests while U.S. law would welcome its low prices, and second,

²⁸⁰ *Id.* at 27.

²⁸¹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GROWING UNEQUAL? COUNTRY NOTE: FRANCE 1 (2008), <http://www.oecd.org/france/41525323.pdf>.

that the French welfare system would better protect gig workers than its American counterpart.²⁸²

Empirical analysis has revealed that neither of these predictions hold.²⁸³ While France initially did everything it could to prevent Uber from competing with taxi services, it has since relaxed its stance toward the industry.²⁸⁴ Meanwhile, the United States has become a site of mounting resistance to the way platform companies treat their workers.²⁸⁵ In the welfare arena, the two countries have treated the independent workers who underwrite the gig economy's growth in a similar manner, offering them only minimal protection from a precarious existence.²⁸⁶

Aside from American social policy's persistent thrift, none of these trends accords with past behavior. This finding suggests that those who have labeled the gig economy an assault on existing legal structures are largely correct. It further intimates that long-dissimilar countries' labor market policies may start to converge. Only time will tell exactly how these regimes will evolve. One thing, however, is certain: lawmakers must devote more attention to the plight of workers caught in what looks to be a fundamental legal reordering.

²⁸² See *supra* Part II.

²⁸³ See *supra* Parts III and IV.

²⁸⁴ See *supra* Section III.A.

²⁸⁵ See *supra* Section III.B.

²⁸⁶ See *supra* Part IV.