

## Unemployment Insurance for the Gig Economy

*Benjamin Della Rocca*

**ABSTRACT.** For most of its history, U.S. unemployment insurance has excluded workers lying outside the conventional employer/employee binary. That should change. This Essay argues that lawmakers should extend such benefits to workers in the gig economy. To do so, it draws from two widely accepted philosophical frameworks within tax-law scholarship – liberal egalitarianism and utilitarianism – and applies their principles to gig-worker unemployment benefits. It supports, in particular, a gig-worker unemployment-benefit system modeled on existing U.S. unemployment programs. The Essay concludes by discussing solutions to pragmatic challenges that may arise when implementing this reform.

### INTRODUCTION

Every year, across all fifty states, millions of laid-off employees claim unemployment-insurance (UI) benefits. Yet many other jobless Americans are not so fortunate. For most of U.S. history, UI has categorically excluded laborers whose work arrangements lie outside the conventional employer/employee binary – including independent contractors and other self-employed workers.<sup>1</sup>

In recent years, this trend has grown more serious as the numbers of workers joining the gig economy have skyrocketed. In 2017, depending on one’s definition of “gig worker,” as many as 55 million Americans worked in the gig economy

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1. Following the COVID-19 outbreak, the federal government expanded unemployment-insurance (UI) eligibility to independent contractors and other categories of workers who were typically ineligible for it, but this expansion was temporary. See *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP’T LAB., <https://www.dol.gov/coronavirus/unemployment-insurance> [<https://perma.cc/B3MH-GRPJ>].

(or thirty-four percent of the U.S. labor force).<sup>2</sup> Recent projections for 2020 data reach as high as forty-three percent of the workforce.<sup>3</sup> Over the long term, these numbers may only rise, with the COVID-19 pandemic expanding the potential for remote work.<sup>4</sup>

This Essay presents a normative argument for extending UI to gig-economy workers, broadly construed. To do so, it applies two different theories of distributive justice – liberal egalitarianism and utilitarianism – to the question of gig-worker UI. The normative tax-law literature – including that on redistributive-welfare policies<sup>5</sup> and unemployment benefits in particular<sup>6</sup> – generally grounds its reasoning in these traditions. And as this Essay shows, commonly invoked liberal egalitarian and utilitarian principles justify gig-worker UI as much as, if not more than, standard benefits.

The primary contribution of this Essay is normative. Sorting through every implementational challenge involved with instituting gig-worker UI lies beyond its scope. The Essay aims to show, however, that distributive-justice principles support a realistically achievable version of such benefits. To that end, it specifically advances a UI regime that mirrors the funding structure and design of states' existing unemployment programs, rather than focusing on an ideal UI scheme.<sup>7</sup> It also identifies – and briefly sketches potential solutions to – practical problems that officials implementing such a program will likely encounter. The

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2. See Nandita Bose, *U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021, 11:50 AM EDT), <https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29> [https://perma.cc/VZ6J-QUSN].
  3. *Id.*
  4. See Rachel Scarfe, *What Will Be the Effect of Coronavirus on Gig Economy Workers?*, ECON. OBSERVATORY (Aug. 23, 2020), <https://www.economicsobservatory.com/what-will-be-effect-coronavirus-gig-economy-workers> [https://perma.cc/A4EG-FKGR].
  5. See, e.g., Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 638-65 (2020); Matthew Dimick, *Better than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473, 485-97 (2017); Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 727-44 (2013); Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, 52 EMORY L.J. 1, 7-20, 35-63 (2003); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFFS. 146, 160-68 (1981).
  6. See, e.g., Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 369-84 (2001); Shelley Phipps, *Equity and Efficiency Consequences of Unemployment Insurance Reform in Canada: The Importance of Sensitivity Analyses*, 58 ECONOMICA 199, 204-11 (1991); Günther Schmid, *Social Risk Management Through Transitional Labour Markets*, 4 SOCIO-ECON. REV. 1, 18-27 (2006); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 331-50 (2002).
  7. That is, the hypothetical UI scheme that would maximize efficiency, distributive, and other normative goals, subject to real-world resource constraints.

argument here, then, aims to rally real-world policy makers, particularly at the state level, to make current UI more inclusive.

Recent years have seen a surge in legal scholarship on the gig economy. This Essay fills a noticeable gap in that literature. A majority of gig-economy scholarship tackles questions of how to classify various types of gig workers for regulatory purposes.<sup>8</sup> Other pieces discuss how the gig economy figures into conventional labor-law topics like collective bargaining,<sup>9</sup> arbitration practices,<sup>10</sup> and tax compliance.<sup>11</sup> Still others analyze questions further afield from employment law, like the antitrust<sup>12</sup> and privacy implications<sup>13</sup> of gig firms. None advance anything approximating this Essay's central prescription – extending states' existing UI programs to gig workers – nor do they defend similar policies on distributive-justice grounds.

This Essay proceeds as follows. Part I offers a brief definition of “gig-economy workers” and an overview of states' existing UI programs. Part II introduces two widely accepted theories of distributive justice and explains how they support UI for gig and non-gig workers alike. Part III discusses how states finance UI today and argues that gig-worker benefits, if funded similarly, are still supported by distributive justice. Part IV briefly explores implementational challenges and possible avenues for overcoming them.

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8. See, e.g., Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *The Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017); Anirudh Mandagere, *Examining Worker Status in the Gig Economy*, 4 J. INT'L & COMPAR. L. 389 (2017); Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1 (2018); Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443 (2018); Andrew G. Malik, Note, *Worker Classification and the Gig-Economy*, 69 RUTGERS L. REV. 1729 (2017).
  9. See, e.g., James de Haan, *The Über-Union: Re-Thinking Collective Bargaining for the Gig Economy*, 12 CHARLESTON L. REV. 97 (2017).
  10. See, e.g., Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205.
  11. See, e.g., Kathleen DeLaney Thomas, *Taxing the Gig Economy*, 166 U. PA. L. REV. 1415 (2018).
  12. See, e.g., Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBS. 45 (2019).
  13. See, e.g., Casey Thomas, Note, *Ride Oversharing: Privacy Regulation Within the Gig Economy*, 36 CARDOZO ARTS & ENT. L.J. 247 (2018).

## I. GIG WORKERS AND UI TODAY

### A. Who Are Gig Workers?

The gig economy has no single definition. Commentators use phrases like “gig job” to refer to all sorts of informal, contingent, or otherwise unconventional working arrangements.<sup>14</sup> Still, most agree that the gig economy includes those who, pursuant to a labor agreement, provide clients with on-demand services.<sup>15</sup> For simplicity, this Essay adopts a broad usage of the term “gig worker,” although implementing policy makers might narrow the definition. This Essay uses the term to cover self-employed, nonfarm workers—a classification which includes independent contractors.<sup>16</sup> Not all such laborers provide on-demand services, but a great many do, and most gig-economy definitions include large numbers from this group.<sup>17</sup> For tax and regulatory purposes, workers conventionally associated with the “gig economy” — such as Uber drivers and DoorDash deliverers — typically count as independent contractors.<sup>18</sup>

How large is this group? As of August 2021, according to Bureau of Labor Statistics figures, just over ten million Americans identified as self-employed.<sup>19</sup>

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14. This becomes clear from standard dictionary definitions of terms like “gig economy” and “gig worker.” See, e.g., Kerry Maxwell, *Buzzword: Gig Economy*, MACMILLAN DICTIONARY (Jan. 17, 2017), <https://www.macmillandictionary.com/us/buzzword/entries/gig-economy.html> [<https://perma.cc/7JZ5-HLLQ>]; *Gig Worker*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gig%20worker> [<https://perma.cc/G34D-2EMF>].
  15. See, e.g., SARAH A. DONOVAN, DAVID H. BRADLEY & JON O. SHIMABUKURO, CONG. RSCH. SERV., R44365, *WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS?* 1 (2017).
  16. Katharine G. Abraham, Susan N. Houseman & Christopher J. O’Leary, *Extending Unemployment Benefits to Workers in Precarious and Nonstandard Arrangements*, MIT TASK FORCE ON WORK FUTURE 10 (Nov. 2020), <https://workofthefuture.mit.edu/wp-content/uploads/2020/11/2020-Research-Brief-Abraham-Houseman-OLeary.pdf> [<https://perma.cc/D5EA-X6ED>].
  17. See Roy Maurer, *Just How Many Gig Workers Are There, Anyway?*, SHRM (Dec. 5, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/how-many-gig-workers-are-there.aspx> [<https://perma.cc/YJ4U-Y8ZM>].
  18. See Jillian Kaltner, *Employment Status of Uber and Lyft Drivers: Unsettlingly Settled*, 29 HASTINGS WOMEN’S L.J. 29, 29 (2018); Abraham et al., *supra* note 16, at 9.
  19. *How Many Americans Are Self-Employed in 2021?*, OBERLO (2021), <https://www.oberlo.com/statistics/how-many-americans-are-self-employed> [<https://perma.cc/PG28-TBFC>]. This figure accounts only for unincorporated self-employed workers — that is, those who have not incorporated a self-owned business to pay themselves wages. Incorporated self-employed workers, by contrast, are generally treated as wage and salary workers, and they typically have the choice to opt into states’ UI systems. Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky & James R. Spletzer, *Measuring the Gig Economy: Current Knowledge and Open Issues*, GA. ST. UNIV. 7 n.1 (Mar. 2, 2017), <https://aysps.gsu.edu/files/2016/09/Measuring-the-Gig-Economy-Current-Knowledge-and-Open-Issues.pdf> [<https://perma.cc/S4XV-2RZ4>]; *Labor*

That estimate falls between the widest gig-economy definitions, which include other categories of “alternative” workers,<sup>20</sup> and more conservative tallies of workers at “conventional” gig employers,<sup>21</sup> like Uber or Lyft.<sup>22</sup> By any metric, though, ten million Americans is a large group. Whether policy makers grant unemployment protections to this many workers, to a smaller subset, or to still more “alternative” laborers, gig-work benefits would affect a huge swath of the workforce.

Although this Essay classifies “gig workers” broadly, it observes a second conceptual distinction *among* members of this group. The gig economy’s rise has heralded a growing number of internet-based firms<sup>23</sup> that, like ridesharing giant Uber or delivery service DoorDash, regularly hire large volumes of contractors for indefinite periods. The literature has classified this subset of firms as the “narrow” definition of the gig economy.<sup>24</sup> In practice, firms in this category frequently play roles akin to standard employers for their contractors.<sup>25</sup> Like most standard employers, companies like Uber offer structured, long-term jobs that many occupants perform full time.<sup>26</sup> As will be seen, this distinction matters particularly for the normative and implementational discussions in Parts III and IV.

### B. The UI Landscape

The United States has provided publicly funded UI on a national scale since the Social Security Act of 1935.<sup>27</sup> Each state operates its own UI scheme in partnership with the federal government, with the Department of Labor overseeing

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*Force Statistics from the Current Population Survey*, BUREAU LAB. STAT. (Oct. 21, 2021), <https://www.bls.gov/cps/definitions.htm> [<https://perma.cc/5H9D-6AP7>].

20. See Bose, *supra* note 2.

21. The term “employer” is used loosely here, as throughout the Essay, to encompass gig-economy firms that retain gig-worker labor, even when providers of that labor do not meet the technical legal threshold of “employee.”

22. See Maurer, *supra* note 17.

23. Some scholarship has emphasized, instead, these firms’ provision of a platform to “match . . . underused labor” to others who “want[] to pay for” it. Oranburg, *supra* note 8, at 19. The “platform” distinction, however, has little bearing on the discussion that follows.

24. Recent scholarship has characterized the “narrow” definition of “gig economy” as jobs involving “ex ante specified, paid tasks carried out by independent contractors mediated by online platforms.” Nikos Koutsimpogiorgos, Jaap van Slageren, Andrea M. Herrmann & Koen Frenken, *Conceptualizing the Gig Economy and Its Regulatory Problems*, 12 POL’Y & INTERNET 525, 531 (2020).

25. Maurer, *supra* note 17.

26. Uber, in fact, advertises itself as a full-time “alternative to traditional driving jobs.” *Drive*, UBER TECH. INC., <https://www.uber.com/us/en/drive> [<https://perma.cc/XDE8-XWF2>].

27. 42 U.S.C. §§ 501-504, 1101-1109, 1321-1324 (2018).

the entire system.<sup>28</sup> Federal regulations set certain minimum rules for states' programs—including stipulations for the eligibility of seasonal workers and noncitizens<sup>29</sup>—while states control most of the details.<sup>30</sup> States finance the bulk of their programs, with funding for cash benefits coming out of state budgets.<sup>31</sup> The federal government reimburses states' administrative costs.<sup>32</sup>

Millions of Americans rely on UI. As of 2019, the UI system covers nearly 145 million workers nationwide.<sup>33</sup> Total payments that fiscal year surpassed \$27 billion, with 5.5 million people newly claiming eligibility.<sup>34</sup> Covered individuals may claim benefits only after involuntarily losing their jobs.

The benefits workers receive differ according to state law. Most states' systems seek to replace roughly half of beneficiaries' former wages, up to a cap,<sup>35</sup> which can vary considerably. The highest-capped state, as of September 2021, is Massachusetts, which limits weekly payments to \$823 (or \$1,234 for workers with dependents); Alabama's \$275 cap is the lowest.<sup>36</sup> Recipients' eligibility in most states, but not all, lasts for twenty-six weeks, with adjustments for workers with uneven earnings or short work histories.<sup>37</sup> States typically impose further restrictions on part-time workers' eligibility, such that many states effectively disqualify them.<sup>38</sup>

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28. Chad Stone & William Chen, *Introduction to Unemployment Insurance*, CTR. ON BUDGET & POL'Y PRIORITIES (July 30, 2014), <https://www.cbpp.org/research/introduction-to-unemployment-insurance> [<https://perma.cc/TKB9-HZCA>].

29. OFF. OF UNEMPLOYMENT INS., U.S. DEP'T OF LAB., *UNEMPLOYMENT COMPENSATION: FEDERAL-STATE PARTNERSHIP 3-4* (May 2019).

30. Brian Galle, *How to Save Unemployment Insurance*, 50 ARIZ. ST. L.J. 1009, 1014 (2018).

31. For further discussion on state financing, see *infra* Section III.A.

32. Stone & Chen, *supra* note 28.

33. OFF. OF UNEMPLOYMENT INS., *supra* note 29, at 2.

34. *Id.*

35. *Id.*

36. *A Guide to COVID-19 Unemployment Benefits by State*, ZIPRECRUITER (Sept. 7, 2021), <https://www.ziprecruiter.com/blog/unemployment-benefits-by-state/> [<https://perma.cc/QZ54-3A3S>].

37. Stone & Chen, *supra* note 28.

38. See Galle, *supra* note 30, at 1015; see also *infra* note 136 (explaining how UI excludes part-time non-gig workers).

Gig workers do not receive UI eligibility under any state law.<sup>39</sup> State laws also exclude many other categories of alternative or “contingent” workers.<sup>40</sup> For the first time ever, though, gig workers across the country gained temporary UI eligibility when Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March 2020, near the start of the COVID-19 pandemic.<sup>41</sup>

The CARES Act expanded UI in three ways. Most relevant for gig workers, the Pandemic Unemployment Assistance (PUA) program paid to extend UI to independent contractors and other self-employed workers (in addition to other categories).<sup>42</sup> Additionally, the Federal Pandemic Unemployment Compensation program gave UI recipients a \$600 weekly federal benefit, on top of states’ standard payments,<sup>43</sup> while the Pandemic Emergency Unemployment Compensation lengthened state eligibility periods by thirteen weeks.<sup>44</sup>

PUA was set to expire at the end of 2020, but lawmakers extended it as the pandemic wore on. It finally lapsed on September 6, 2021,<sup>45</sup> terminating millions of Americans’ benefits. As of the previous July, 5.1 million people were enrolled

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39. See Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT’L EMP. L. PROJECT 3 (May 2016), <https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf> [<https://perma.cc/W2XR-T99H>]; Limor Riza, *Taxation of Long-Term Unemployment: Facing the Twenty-First Century Challenges*, 70 CATH. U. L. REV. 421, 427 (2021).
  40. Katherine Lucas McKay, *Reforming Unemployment Insurance to Support Income Stability and Financial Security*, ASPEN INST. 4 (Aug. 2017), [http://www.aspenepic.org/wp-content/uploads/2017/09/ASPEN\\_EPIC\\_UNEMPLOYMENT\\_INSURANCE\\_02.pdf](http://www.aspenepic.org/wp-content/uploads/2017/09/ASPEN_EPIC_UNEMPLOYMENT_INSURANCE_02.pdf) [<https://perma.cc/AG3A-JL4K>].
  41. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C.A. §§ 9001-9141 (West 2021)).
  42. *Id.* § 2102, 134 Stat. at 313-17 (codified as amended at 15 U.S.C.A. § 9021 (West 2021)). This provision originally permitted benefits through December 31, 2020. States retained the option to extend such benefits to their citizens. *Unemployment Insurance Relief During COVID-19 Outbreak*, U.S. DEP’T OF LAB., <https://www.dol.gov/coronavirus/unemployment-insurance> [<https://perma.cc/B3MH-GRPJ>].
  43. CARES Act § 2104, 134 Stat. at 318-19 (codified as amended at 15 U.S.C.A. § 9023 (West 2021)). This provision originally took effect until July 31, 2020.
  44. *Id.* § 2107, 134 Stat. at 323-28 (codified as amended at 15 U.S.C.A. § 9025 (West 2021)). This provision originally provided for such additional compensation through December 31, 2020.
  45. Ben Casselman, *Federal Jobless Aid, a Lifeline to Millions, Reaches an End*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/2021/09/02/business/economy/federal-unemployment-benefit-cutoff.html> [<https://perma.cc/6AMG-UDQD>]; Andrew Stettner, *7.5 Million Workers Face Devastating Unemployment Benefits Cliff This Labor Day*, CENTURY FOUND. (Aug. 5, 2021), <https://tcf.org/content/report/7-5-million-workers-face-devastating-unemployment-benefits-cliff-labor-day> [<https://perma.cc/LT3L-5Y6T>].

in UI through PUA, and an estimated 4.2 million remained so by September 6.<sup>46</sup> Today, self-employed workers are, once again, categorically ineligible for UI.

## II. THE NORMATIVE BASIS FOR BENEFITS

This Essay's normative argument focuses on two distributive-justice theories: utilitarianism and liberal egalitarianism. These two theories dominate the normative scholarship and practice of tax law, with a third tradition, libertarianism, also carrying some influence.<sup>47</sup> Utilitarianism has long been the "standard" approach of the field,<sup>48</sup> and its principles are orthodoxy of the economics literature on taxation, in particular.<sup>49</sup> The liberal egalitarian tradition, by contrast, traces back to John Rawls,<sup>50</sup> whose work, *A Theory of Justice*, expounded a relationship between justice, equality, and personal autonomy.<sup>51</sup> Since Rawls, Ronald Dworkin and numerous others have written in this tradition.<sup>52</sup>

As the rest of this Part argues, UI finds normative backing in both liberal egalitarianism and utilitarianism. Moreover, the logic of both frameworks weighs in favor of extending benefits to gig workers. Given these theories' predominance, this Part's normative argument should hold broad-based appeal.

The final significant school of thought in normative tax scholarship—libertarianism—would likely not sanction gig-worker UI. Libertarianism, made "a major theory in political philosophy" by the writing of Robert Nozick,<sup>53</sup> typically opposes redistribution beyond a "minimal state" for conflicting with individuals'

46. Stettner, *supra* note 45.

47. Marc Fleurbaey, *Welfarism, Libertarianism, and Fairness in the Economic Approach to Taxation*, in *TAXATION: PHILOSOPHICAL PERSPECTIVES* 37, 37-39 (Martin O'Neill & Shepley Orr eds., 2018) (describing the historical dominance of the utilitarian "theory of optimal income taxation," which lasted until John Rawls's work prompted a "new line" of "egalitarian" thought and until, separately from Rawls's work, "libertarianism . . . gain[ed] momentum").

48. Alexander W. Cappelen & Bertil Tungodden, *Tax Policy and Fair Inequality*, in *TAXATION: PHILOSOPHICAL PERSPECTIVES*, *supra* note 47, at 111, 111; Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 *TAX L. REV.* 229, 230 (2011) ("[U]tilitarian conceptions of social welfare . . . have become the dominant construct in tax policy analysis.").

49. See *infra* note 73 and accompanying text; N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution*, 2 *AM. ECON. J.: ECON. POL'Y* 155, 157 n.2 (2010).

50. Cappelen & Tungodden, *supra* note 48, at 112.

51. JOHN RAWLS, *A THEORY OF JUSTICE* 60, 250, 302 (1971).

52. For a review of liberal egalitarian literature, see Cappelen & Tungodden, *supra* note 48, at 112-13.

53. Jason Brennan, *Libertarianism After Nozick*, *PHIL. COMPASS*, Jan. 17, 2018, at 1, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/phc3.12485> [<https://perma.cc/G47S-55S4>].



free, legitimate private decisions.<sup>54</sup> Extreme adherents to this tradition might “condemn[] any form of taxation as evil.”<sup>55</sup> Purely libertarian principles, therefore, would likely deny UI in general<sup>56</sup> – let alone for UI for gig workers – although some scholars argue they support basic social safety nets more than initially apparent.<sup>57</sup>

This Essay, then, does not take up arguments from the libertarian tradition. But this choice should not blunt the Essay’s normative or practical impact. Libertarianism, despite being the third normative tax-law tradition of significance, is by far the minority position within the economics,<sup>58</sup> political-philosophy,<sup>59</sup> and legal academic fields<sup>60</sup> – not to mention the U.S. population.<sup>61</sup> The Essay’s case for gig-worker UI thus retains its significance for scholarship and policy making.

### A. *The Liberal Egalitarian Lens*

Liberal egalitarians, similar to those in the libertarian tradition, hold that each individual has equal moral worth and therefore deserves autonomy.<sup>62</sup> But liberal egalitarianism splits from libertarianism in that, in order to respect each person’s equal moral worth, it strives to account for differences in individuals’

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54. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-64 (1974).

55. Fleurbaey, *supra* note 47, at 37.

56. See Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 *THEORETICAL INQUIRIES L.* 239, 262 (2008) (“[N]early everyone besides the most rigid libertarians accepts a sufficientarian safety net at the bottom.”).

57. Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 *WIS. L. REV.* 1189, 1194, 1209, 1213, 1220 (suggesting that certain “strands” of libertarianism could justify social support for individuals “faultlessly . . . in sufficiently dire straits” or “locked out of the labor market”; that such benefits might count as “public good[s]”; and that “consent” principles, too, could justify these benefits (quoting Eric Mack, *Non-Absolute Rights and Libertarian Taxation*, 23 *SOC. PHIL. & POL’Y* 109, 109 (2006))).

58. Fleurbaey, *supra* note 47, at 57 (“Economists . . . are divided into welfarists (Mirrlees’ tradition) and luck egalitarians (the fair allocation tradition).”).

59. Brennan, *supra* note 53, at 1 n.1.

60. See James C. Phillips, *Why Are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 *HARV. J.L. & PUB. POL’Y* 153, 180-82 (2016); Adam Bonica, Adam S. Chilton, Kyle Rozema & Maya Sen, *The Legal Academy’s Ideological Uniformity*, 47 *J. LEGAL STUD.* 1, 3 (2018).

61. Emily Ekins, *How Many Libertarians Are There? The Answer Depends on the Method You Use*, CATO INST. (June 21, 2017, 2:37 PM), <https://www.cato.org/blog/how-many-libertarians-are-there-answer-depends-method-you-use> [<https://perma.cc/YS7S-WREQ>].

62. Jeff McMahan, *Challenges to Human Equality*, 12 *J. ETHICS* 81, 81 (2008).

background distributions.<sup>63</sup> As a result, its adherents scrutinize social institutions that shape autonomy and, to aid the least advantaged, seek to correct inequalities that those institutions produce.<sup>64</sup>

UI, in general, almost certainly aids those disadvantaged in society. By definition, those eligible for UI have involuntarily lost their jobs – often through no fault of their own, but through exogenous economic developments.<sup>65</sup> For many unemployed individuals, then, background employment and economic structures have brought income deprivation that leads to severe disadvantages. Jobs, after all, are most people’s largest source of income.<sup>66</sup> And while theorists disagree on income’s precise role in individual welfare or autonomy,<sup>67</sup> it surely matters heavily for each. Without income, most workers would struggle to meet basic physical needs, rendering nonessential consumption or other pursuits inaccessible. Spending time and resources to find new employment can itself be harder without income security.<sup>68</sup> Likely because of job-search costs, research

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63. See, e.g., Alstott, *supra* note 5, at 730 (“The liberal ideal of income taxation aims to capture differentials in individual fortune produced by undeserved good and bad luck.”); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283, 293-97 (1981).

64. See, e.g., Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (2017), <https://plato.stanford.edu/entries/justice-distributive/> [https://perma.cc/H8H5-YMZ8] (describing John Rawls, a liberal egalitarian, as advocating “changes” to “basic institutional structures” to “improve the lifetime prospects of the least advantaged in society”).

65. See *What Is Unemployment?*, CORP. FIN. INST. (2021), <https://corporatefinanceinstitute.com/resources/knowledge/economics/unemployment> [https://perma.cc/Y6CE-H4JU] (describing “demand deficient unemployment” – that is, unemployment due to low external demand – as “the biggest cause of unemployment”).

66. Alan Cole, *The Top Ten Sources of Personal Income*, TAX FOUND. (Feb. 2, 2015), <https://taxfoundation.org/top-ten-sources-personal-income> [https://perma.cc/J6A4-BG64] (showing total “salaries and wages” to exceed the next largest source on U.S. individual income tax returns – net “capital gains” – by a factor of ten).

67. Compare AMARTYA SEN, *THE IDEA OF JUSTICE* 253 (2009) (arguing – albeit from a utilitarian framework – that a person’s “means” to use resources, as distinct from the total amount of resources they possess, should factor heavily into individual-welfare assessments), with Thomas Pogge, *A Critique of the Capability Approach*, in *MEASURING JUSTICE: PRIMARY GOODS AND CAPABILITIES* 17 (Harry Brighouse & Ingrid Robeyns eds., 2010) (critiquing Sen’s position).

68. Job searches involve myriad costs measured in money, time, and effort – including researching job openings, drafting resumes and job-application materials, contacting employers, preparing for interviews, and traveling to interview locations. See M. Daniele Paserman, *Job Search and Hyperbolic Discounting: Structural Estimation and Policy Evaluation*, *ECON. J.* 1418, 1422, 1443 (2008); Kenneth I. Wolpin, *Estimating a Structural Search Model: The Transition from School to Work*, 55 *ECONOMETRICA* 801, 808, 812 (1987) (estimating nominal search costs for 1979 high-school graduates to range between \$104 and \$223). Recent work indicates particularly high job-search costs following the COVID-19 pandemic, perhaps owing to costly public-health requirements. See Peter Ganong, Fiona Greig, Max Liebeskind, Pascal Noel, Daniel

suggests that less generous UI benefits push job hunters into positions that satisfy their preferences relatively poorly.<sup>69</sup>

Unemployment has other, indirect autonomy-reducing effects as well. Studies reveal, for instance, that unemployment can cause psychological damage, impede skill development, and delay professional advancement<sup>70</sup>—all limiting workers' future opportunities. Unemployment also undermines the autonomy of workers' dependents, who rely on workers' income<sup>71</sup> and suffer psychological harms when their family members lose work.<sup>72</sup> By distributing resources to the least socially advantaged individuals, then, UI bears out liberal egalitarian goals.

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M. Sullivan & Joseph Vavra, *Spending and Job Search Impacts of Expanded Unemployment Benefits: Evidence from Administrative Micro Data* 30-32 (Becker Friedman Inst. for Econ., Working Paper No. 2021-19, 2021).

69. Ammar Farooq, Adriana D. Kugler & Umberto Muratori, *Do Unemployment Insurance Benefits Improve Match Quality? Evidence from Recent U.S. Recessions* 1-5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27574, 2020), [https://www.nber.org/system/files/working\\_papers/w27574/w27574.pdf](https://www.nber.org/system/files/working_papers/w27574/w27574.pdf) [<https://perma.cc/9SNH-8GS3>].
70. See, e.g., Anna Manzoni & Irma Mooi-Reci, *The Cumulative Disadvantage of Unemployment: Longitudinal Evidence Across Gender and Age at First Unemployment in Germany*, 15 PLOS ONE 1, 1-2, 4-5 (2020); Stephanie Pappas, *The Toll of Job Loss*, AM. PSYCH. ASS'N (Oct. 1, 2020), <https://www.apa.org/monitor/2020/10/toll-job-loss> [<https://perma.cc/4K2N-RX7A>] (summarizing the literature).
71. Austin Nichols, Josh Mitchell & Stephan Lindner, *Consequences of Long-Term Unemployment*, URB. INST. 3-4 (2013), <https://www.urban.org/sites/default/files/publication/23921/412887-Consequences-of-Long-Term-Unemployment.PDF> [<https://perma.cc/54NU-KJLW>].
72. See, e.g., *id.* at 10-12; Stephan Lindner & H. Elizabeth Peters, *How Does Unemployment Affect Family Arrangements for Children?*, URB. INST. 1-2 (2014), <https://www.urban.org/sites/default/files/publication/33816/413214-How-Does-Unemployment-Affect-Family-Arrangements-for-Children-.PDF> [<https://perma.cc/2DQG-7M9Y>]; Amy Finnegan, *Unemployment: How It Affects Family Behavioral Health*, PURDUE UNIV. 17-18 (2015), [https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s\\_ncfiso8co3.pdf](https://www.purdue.edu/hhs/hdfs/fii/wp-content/uploads/2015/07/s_ncfiso8co3.pdf) [<https://perma.cc/2CP9-AEMP>].

### B. *The Utilitarian Lens*

UI also finds backing under utilitarian principles.<sup>73</sup> Utilitarianism, which takes as its goal maximizing total social welfare, has two main values<sup>74</sup> that ground its treatment of UI. The first is *redistribution*, which entails allocating resources to those who derive the highest marginal utility from them.<sup>75</sup> This factor weighs in favor of UI, for the reasons discussed above.<sup>76</sup> Because many unemployed citizens have little other income, each UI dollar distributed to them would significantly boost utility.<sup>77</sup>

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73. This Section applies utilitarian principles as articulated in the legal and philosophical literature. Economics scholarship, of course, also frequently embeds utilitarian principles within its quantitative and theoretical models. Utilitarianism's role in economic modeling lies beyond this Essay's scope, though utilitarian models are regularly used to support various kinds of UI programs. For a recent study along these lines, see, for example, Kurt Mitman & Stanislav Rabinovich, *Whether, When and How to Extend Unemployment Benefits: Theory and Application to COVID-19* (Inst. of Lab. Econ., Working Paper No. 14085, 2021), <https://www.econstor.eu/handle/10419/232837> [<https://perma.cc/F55K-EGKL>].
74. Minimizing negative externalities and capturing positive ones is a third core value within utilitarian frameworks. For a discussion of externalities' role in utilitarianism, see J. Moreh, *Utilitarianism and the Conflict of Interests*, 29 J. CONFLICT RESOL. 137, 149-52 (1985). Good evidence exists that, at least in some contexts, UI programs capture positive externalities for particular groups, which increases efficiency overall. See generally Joanne W. Hsu, David A. Matsa & Brian T. Melzer, *Positive Externalities of Social Insurance: Unemployment Insurance and Consumer Credit* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20353, 2014), [https://www.nber.org/system/files/working\\_papers/w20353/w20353.pdf](https://www.nber.org/system/files/working_papers/w20353/w20353.pdf) [<https://perma.cc/PP2Q-5YHZ>] (discussing positive externalities in low-income credit markets); Rafael Lalive, Camille Landaïs & Josef Zweimüller, *Market Externalities of Large Unemployment Insurance Extension Programs*, 105 AM. ECON. REV. 3564 (2015) (discussing positive externalities for non-UI-eligible workers). Other empirical work suggests that UI does *not* reduce negative externalities for beneficiaries in general. Kurt Mitman & Stanislav Rabinovich, *Optimal Unemployment Insurance in an Equilibrium Business-Cycle Model*, 2014 J. MONETARY ECON. 1, 18. This Essay, however, omits a fuller discussion of externalities. Externalities, to the extent they exist, do have bearing on utilitarianism's treatment of UI policies. But properly diagnosing the many diverse kinds of externalities—and weighing them to arrive at a confident conclusion about UI—would involve complex, context-dependent, and lengthy empirical inquiries. It would also require resolving questions around which empirical scholarship has not yet developed a consensus. While externalities may well support gig-worker UI, then, the discussion here confines itself to efficiency and redistribution—the evidence for which is clearer cut and more generalizable.
75. See, e.g., Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 498 (2007) (“The optimal tax system, on [the utilitarian] view, would maximize utility gains due to egalitarian redistribution while minimizing utility losses due to distortionary taxation.”).
76. See *supra* Section II.A.
77. See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 50-55 (4th ed. 2013) (discussing the concept of diminishing marginal utility).

Utilitarians also value *efficiency*, which counsels against distorting individuals' decision-making. Efficiency dictates, for instance, that policy makers should not incentivize people to partake in activities that they otherwise would not.<sup>78</sup> Doing so would undervalue or overvalue particular goods, keeping the market from producing each at utility-maximizing levels.<sup>79</sup> At first, UI might seem to distort choices by discouraging the unemployed, once jobless, from seeking work.<sup>80</sup> Because UI raises the returns to unemployment, some people might come to prefer joblessness over working.

This outcome is theoretically possible, but empirical studies offer strong reason to doubt it. Most research finds that, at least in the short term, UI does not meaningfully discourage job hunting.<sup>81</sup> These findings are unsurprising, perhaps, given that UI benefits are temporary and often low,<sup>82</sup> and given

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78. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-20 (1980); Alstott, *supra* note 75, at 498.

79. Cf. GRUBER, *supra* note 77, at 50-55 (discussing the concept of “deadweight loss”). Under economists' standard notion of efficiency, Kaldor-Hicks efficiency, an efficient equilibrium is inherently utility maximizing. See, e.g., Coleman, *supra* note 78, at 513-14.

80. Cf. Lily L. Batchelder, *Leveling the Playing Field Between Inherited Income and Income from Work Through an Inheritance Tax*, in TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE 43, 50-52 (Jay Shambaugh & Amy Ganz eds., 2020) (discussing this potential effect in the context of inheritance taxation); DANIEL HALLIDAY, *The Utilitarian Case Against Iterated Bequests*, in INHERITANCE OF WEALTH: JUSTICE, EQUALITY, AND THE RIGHT TO BEQUEATH 54, 59 (2018) (discussing the same, and presenting the views of Eugenio Rignano, who advocated for an inheritance tax within the bounds of John Stuart Mill's utilitarian framework). Efficiency, as used in this Essay, is distinct from the colloquial usage of “efficiency” to mean “maximizing economic output.” The *particular* inefficient distortion described here, however, would incidentally also tend to lower aggregate economic output by discouraging work.

81. See Johannes F. Schmieder & Till von Wachter, *The Effects of Unemployment Insurance Benefits: New Evidence and Interpretation*, 8 ANN. REV. ECON. 547, 556-60 (2016) (reviewing the literature). Schmieder and von Wachter characterize the U.S. literature as showing a “moderate effect” of UI-benefit increases on labor supply, with “smaller” effects in recent research. *Id.* Most empirical research, further, fails to control effectively for the fact that UI expansions tend to occur during economic recession, which itself decreases labor supply and employment. One study, which controls for this dynamic effectively, finds that extending UI eligibility periods yields only “a very modest effect” on labor supply, increasing the percentage of claimants who exhaust their standard UI eligibility by just one to three percent. David Card & Phillip B. Levine, *Extended Benefits and the Duration of UI Spells: Evidence from the New Jersey Extended Benefit Program*, 78 J. PUB. ECON. 107, 109 (2000). Card and Levine study a short-term change in New Jersey's UI policy; they extrapolate their findings to predict that a long-term increase could have a slightly larger effect, possibly raising the average duration of UI claims by about one week. *Id.* Research on other, non-UI benefits programs similarly find that welfare benefits carry small disincentives to work particularly for male heads of household. Emmanuel Saez, *Optimal Income Transfer Programs: Intensive Versus Extensive Labor Supply Responses*, 117 Q.J. ECON. 1039, 1056-57 (2002).

82. Galle, *supra* note 30, at 1015.

unemployment's indirect harms on workers.<sup>83</sup> Even following the COVID-19 pandemic<sup>84</sup> – when Congress temporarily expanded unemployment payments far beyond normal levels<sup>85</sup> – early research suggests new benefits had only modest labor-supply impacts.<sup>86</sup> Moreover, UI arguably *increases* efficiency for some who desire work but, without UI, would be too income deprived to spend resources finding jobs effectively.<sup>87</sup> Both distributional goals and efficiency, therefore, work to justify UI.

### C. Application to Gig Workers

Liberal egalitarian and utilitarian justifications for UI each extend logically to gig workers. As for liberal egalitarianism, those aspects of unemployment that restrict *standard* workers' autonomy equally affect many participants in the gig economy. As gig jobs have surged, growing numbers use gig work to replace, not supplement, standard full-time work. Government surveys show, for instance, that nearly three-quarters of workers on app- or internet-based gig platforms rely on gigs as their primary income source.<sup>88</sup> By another estimate, roughly one-third of gig workers spend over forty hours per week on gig jobs.<sup>89</sup>

Moreover, a liberal egalitarian would observe, other factors likely make gig workers *worse* off, all else equal, than standard employees upon entering unemployment. For one, gig jobs are often low skilled.<sup>90</sup> This suggests that the

83. See *supra* Section II.A.

84. See *supra* notes 41-46 and accompanying text.

85. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, §§ 2102, 2104, 2107, 134 Stat. 281, 313-17, 318-20, 323-28 (2020) (codified as amended at 15 U.S.C.A. §§ 9021, 9023, 9025 (West 2021)).

86. See, e.g., Nicolas Petrosky-Nadeau & Robert G. Valletta, *UI Generosity and Job Acceptance: Effects of the 2020 CARES Act 1-4* (Fed. Rsrv. Bank of S.F., Working Paper No. 2021-13, 2021), <https://www.frbsf.org/economic-research/files/wp2021-13.pdf> [<https://perma.cc/M5VX-C2N9>].

87. Cf. Lester, *supra* note 6, at 371-72 (citing research suggesting that UI “increases labor force participation and employment”).

88. Maurer, *supra* note 17.

89. Katherine Hill, *Almost a Third of Gig Workers Work Full Time. They Deserve Labor Protections Now*, UT NEWS (Sept. 18, 2020), <https://news.utexas.edu/2020/09/18/almost-a-third-of-gig-workers-work-full-time-they-deserve-labor-protections-now> [<https://perma.cc/27BL-T4QR>].

90. DONOVAN ET AL., *supra* note 15, at 2 n.8. But see Adi Gaskell, *Is the Gig Economy More Highly Skilled than We Think?*, FORBES (Sept. 4, 2019, 8:15 AM EDT), <https://www.forbes.com/sites/adigaskell/2019/09/04/is-the-gig-economy-more-highly-skilled-than-we-think> [<https://perma.cc/M59C-FW74>] (arguing that, at least in the United Kingdom, high-skilled “freelancers” are better represented among self-employed workers than many realize).

workers filling such jobs, on average, have less earning power.<sup>91</sup> Gig workers will therefore tend to begin unemployment with less wealth, meaning that income deprivation restricts their autonomy more than it otherwise would. Additionally, most standard employers give employees health insurance, retirement savings, and other benefits.<sup>92</sup> Many gig workers do not receive these. Without these benefits, workers are ill-equipped to weather crises, such as job loss, and build savings “buffers.”<sup>93</sup> Studies conducted before the rise of the gig economy, in fact, document low-skilled workers’ tendency to enter “alternative” working arrangements with low pay, sparse benefits, and minimal job security – all of which foster economic vulnerability.<sup>94</sup>

From a utilitarian standpoint, these same dynamics also suggest that jobless gig workers, like other unemployed individuals, possess high marginal utilities. Distributional criteria therefore support UI benefits for gig workers as much as for other individuals. Efficiency criteria support the same conclusion for another reason. Against the backdrop of modern employment law,<sup>95</sup> gig-worker UI would arguably *correct* inefficient distortions. While UI does not – empirically speaking – significantly distort work/leisure choices,<sup>96</sup> it may well distort choices between gig jobs and non-gig jobs. Providing UI for just one type of work may incentivize some workers to switch from one to the other.<sup>97</sup> Insuring

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91. See SARAH A. DONOVAN & DAVID H. BRADLEY, CONG. RSCH. SERV., R45090, REAL WAGE TRENDS, 1979 TO 2019, at 13-17, 21 (2020).

92. See Bureau of Lab. Stat., *Employee Benefits in the United States – March 2021*, U.S. DEP’T LAB. 3, 6-10 (Sept. 23, 2021, 10:00 AM ET), <https://www.bls.gov/news.release/pdf/ebs2.pdf> [https://perma.cc/LYX6-38FC].

93. Galle, *supra* note 30, at 1018.

94. Julia Lane, Kelly S. Mikelson, Patrick T. Sharkey & Douglas Wissoker, *Low-Income and Low-Skilled Workers’ Involvement in Nonstandard Employment*, URB. INST. 8-13 (Oct. 2001), <https://www.urban.org/sites/default/files/publication/61701/410374-Low-Income-and-Low-Skilled-Workers-Involvement-in-Nonstandard-Employment.PDF> [https://perma.cc/642T-VDJ5].

95. The backdrop of existing law presents a reasonable baseline from which to draw contrasts in this analysis. For purposes of the normative tax-law literature, “[t]he situation is . . . that we begin from the point of view of members of an existing society – beings formed by a civilization and leading lives that would be inconceivable without it.” LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 42 (2002).

96. See *supra* note 81 and accompanying text.

97. The work/leisure choice might, for different workers, be distorted in either direction. As discussed below, employers usually pass UI-tax costs through to employees’ wages, which, to some employees, might be a greater disincentive to work than the prospect of benefits payments as a positive incentive. See *infra* Section III.C. Moreover, as already discussed, some workers use gig jobs to complement traditional employment. See *supra* notes 88-89 and accompanying text; *Independent Work: Choice, Necessity, and the Gig Economy*, MCKINSEY GLOB. INST. 4, 7 (Oct. 2016), <https://www.mckinsey.com/~media/mckinsey/featured%20insights>

both sectors equally, therefore, is a more efficient outcome under utilitarian principles.<sup>98</sup>

### III. INTEGRATING BENEFITS WITH COSTS

The foregoing discussion shows that under accepted distributive-justice principles, providing benefits to unemployed gig-workers is justified. But to determine whether such principles support expanding existing UI programs, we must also account for UI's costs.<sup>99</sup>

Theoretically, any government revenue stream could cover these payments.<sup>100</sup> But in practice, states fund UI programs with specific taxes on employers.<sup>101</sup> At least for the foreseeable future, this practice seems likely to persist. The public, after all, tends to compartmentalize policy views into “silos,” meaning that they evaluate the fairness of redistributive policies on a category-by-category basis.<sup>102</sup> This tendency suggests that voters will continue supporting UI systems that (nominally) pin the costs on employers – even if firms pass costs on to workers, or if lower taxes elsewhere offset UI-specific levies. It is “only fair,” the policy-silo logic would run, for employers to shoulder the cost. Employers are the ones who fire workers in the first place.

This Essay aims to justify a UI system that is realistically achievable within American political institutions. Accordingly, this Part explores how gig-worker benefits could be funded within the country's prevailing UI-program framework, where particular UI taxes provide the entire revenue for benefits. This

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/employment%20and%20growth/independent%20work%20choice%20necessity%20and%20the%20gig%20economy/independent-work-choice-necessity-and-the-gig-economy-executive-summary.pdf [https://perma.cc/2MJL-P958]. In some circumstances, this possibility could decrease the rate of substitution between gig and non-gig work – such as for traditional employees who can drive for Uber and need not quit their primary job to drive a few hours each night. But in other cases, this possibility would *increase* substitution, as it lets workers substitute smaller increments of traditional work (e.g., individual overtime hours) with equivalent time periods spent on gig work.

98. See Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 824 n.5, 825-27 (2000) (“[O]ne distortion may offset another.”).
99. On the importance of analyzing tax policies and government spending in conjunction, see David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 959-60 (2004).
100. Galle, *supra* note 30, at 1018-19 (noting that the United States, however, “has gone in exactly the opposite direction”).
101. See Stone & Chen, *supra* note 28.
102. Zachary D. Liscow, *Redistribution for Realists* 17 (Feb. 24, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3792122> [https://perma.cc/C5HX-GX55].



structure places costs upon different actors than those in alternative arrangements where, for example, a top-one-percent wealth tax or general budget revenue funds UI payments. As this Part argues, however, the ideals of distributive justice still support gig-worker benefits fashioned after the existing U.S. system.

#### A. Funding Gig-Worker UI

Today, all fifty states tax employers to fund UI payments.<sup>103</sup> Under UI-tax regimes, employers' payments equal a fixed portion of their total wage expenses multiplied by their state's UI-tax rate.<sup>104</sup> The taxes are experience rated, meaning that employers whose former employees claim more benefits pay proportionally more.<sup>105</sup> States store tax proceeds in federally managed trust funds, from which they disburse benefits.<sup>106</sup>

This system would be straightforward to administer for certain gig workers—namely, those who have long-term contracting relationships with major contractors, such as Uber drivers. In these cases, the government could directly tax the contracting corporation. That arrangement would function analogously to normal UI taxes and would therefore introduce no new distributive-justice concerns. The government would likely need a different approach, however, for self-employed workers with successive, short-term labor contracts. Levying a special tax on all parties paying these workers would be administratively costly<sup>107</sup>—and such an approach could unnecessarily stifle taxpayers' business operations if it required extensive recordkeeping.<sup>108</sup>

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<sup>103.</sup> See Galle, *supra* note 30, at 1016; ZIPRECRUITER, *supra* note 36.

<sup>104.</sup> Galle, *supra* note 30, at 1016.

<sup>105.</sup> *Id.* at 1015.

<sup>106.</sup> *Id.* at 1015-16.

<sup>107.</sup> See A. Mitchell Polinsky & Steven Shavell, *Pigouvian Taxation with Administrative Costs*, 19 J. PUB. ECON. 385, 385 (1982) (citing administrative costs from “the processing of forms” and, when increasing taxes on a particular firm, “the expense of resolving disputes”). See generally Marius Farioletti, *Tax Administration Funding and Fiscal Policy*, 26 NAT'L TAX J. 1, 2 (1973) (discussing administrability of tax policies in the context of taxpayers' total compliance levels).

<sup>108.</sup> Economics research finds tax complexity to impose significant administrative costs on firms and individuals, including costs associated with recordkeeping. See, e.g., F. ON TAX ADMIN.: TAXPAYER SERV. SUB-GRP., ORG. FOR ECON. CO-OPERATION & DEV., PROGRAMS TO REDUCE THE ADMINISTRATIVE BURDEN OF TAX REGULATIONS IN SELECTED COUNTRIES 21-22, 28, 50 (2008); William G. Gale & Janet Holtzblatt, *The Role of Administrative Issues in Tax Reform: Simplicity, Compliance, and Administration*, BROOKINGS INST. 3 (Dec. 2000), <https://www.brookings.edu/wp-content/uploads/2016/06/20001205.pdf> [<https://perma.cc/GJ3D-KNSM>]; Joel Slemrod & Nikki Sorum, *The Compliance Cost of the U.S. Individual Income Tax System*, 37 NAT'L TAX J. 461, 465-68 (1984); Marsha Blumenthal & Joel Slemrod, *The Compliance Cost of the U.S. Individual Income Tax System: A Second Look After Tax Reform*, 45 NAT'L TAX J. 185, 189-92 (1992); Eric Zwick, *The Costs of Corporate Tax Complexity*, 13 AM. ECON. J.

A more realistic option for most states, therefore, is directly taxing this group of workers. With new legislation, most states could implement this tax straightforwardly via existing mechanisms for reporting and collecting statewide income taxes.<sup>109</sup> At first glance, this financing method might introduce distributive-justice problems. From a liberal egalitarian standpoint, the direct tax would amount to forcing gig workers to buy UI. Compelled purchases would interfere with individual autonomy and contravene conventional assumptions that each person knows best how to allocate their own resources.<sup>110</sup> From a utilitarian standpoint, the direct tax could cause distortions.<sup>111</sup> But, as explained below, neither objection carries much force.

### *B. The Liberal Egalitarian Lens*

Taxing gig workers to pay for UI, a liberal egalitarian might object, would restrict autonomous allocation of resources. This observation is correct, but liberal egalitarians might justify such restrictions for at least two reasons. First, as for the choice to buy UI, gig workers have limited autonomy in the first place. Economists widely believe that – owing to information asymmetries and adverse selection into insurance programs – market-based UI schemes are largely infeasible.<sup>112</sup> Absent government-provided UI, then, gig workers who *do* want insurance cannot buy it on the market. Therefore, tax-funded UI would not deprive gig workers of any real choice that they now enjoy. It would replace one forced outcome with another, potentially superior one.

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467, 467-70, 473-74 (2021). For further discussion of the complexity and administrative costs of tax filing and collection generally, see Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 *YALE L.J.* 261, 273-77 (2002). Administrative costs borne by those transacting with gig workers would also harm workers by reducing hiring or depressing wages.

109. A few states do not tax income, such as Texas, which constitutionally prohibits doing so. TEX. CONST. art. VIII, § 24-a. These states could likely achieve similar results via alternative tax measures. For example, states could levy a sales tax on services provided by self-employed workers, calibrated to derive the same revenue that an income tax would.

110. For a discussion of the role of personal choice in liberal egalitarian thought, see, for example, David Hasen, *Liberalism and Ability Taxation*, 85 *TEX. L. REV.* 1057, 1061 (2007).

111. See *supra* notes 78-79 and accompanying text.

112. See, e.g., Galle, *supra* note 30, at 1017; Nathaniel Hendren, *Private Information and Unemployment Insurance 2* (July 2015) (unpublished manuscript), [https://scholar.harvard.edu/files/hendren/files/unemployment\\_insurance\\_v150719\\_o.pdf](https://scholar.harvard.edu/files/hendren/files/unemployment_insurance_v150719_o.pdf) [<https://perma.cc/4WSF-QWNJ>].

Second, the preference for autonomy rests in part—at least for many liberal egalitarians—on an implicit assumption that individuals are rational.<sup>113</sup> But this assumption likely fails for the decision to purchase UI, which involves saving for (seemingly) remote or unlikely risks. Individuals often behave irrationally in such contexts. Empirical evidence indicates, for instance, that enrolling people automatically in retirement plans increases retirement savings.<sup>114</sup> Assuming that manual enrollment is not overly burdensome, and that retirement savings improve lifetime welfare,<sup>115</sup> such findings suggest that people do not rationally manage future financial risks.<sup>116</sup> This tendency would be even more pronounced with saving for unemployment, an event that, unlike retirement, does not happen for all workers.<sup>117</sup>

It is also worth noting that taxing gig workers would treat them, in economic terms, roughly the same as normal employees. Ample empirical evidence shows that employers transfer UI-tax incidence<sup>118</sup> to employees by cutting wages, particularly in the long run.<sup>119</sup> Standard UI thus restricts autonomy as much as a direct tax. Liberal egalitarians who oppose gig-worker UI on direct-taxation grounds, then, likely must also accept the less-intuitive stance that standard UI benefits are normatively wrong.

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113. See André Barata & Maria João Cabrita, *What Principle of Difference for a Truly Egalitarian Social Democracy? Rereading Rawls After Social Democracy's Failures*, 5 PALGRAVE COMM'N 69, 73-74 (2019) (discussing John Rawls's appeals to rationality).
114. William G. Gale, Benjamin H. Harris & Claire Haldeman, *Evidence-Based Retirement Policy: Necessity and Opportunity*, BROOKINGS INST. 5-6 (2020), [https://www.brookings.edu/wp-content/uploads/2020/01/ES\\_20200123\\_GaleHarrisHaldeman\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2020/01/ES_20200123_GaleHarrisHaldeman_final.pdf) [<https://perma.cc/3UWA-B5DR>].
115. See Galle, *supra* note 30, at 1016-17.
116. For other studies documenting cognitive biases that appear to preclude individuals from saving in amounts considered “rational” under economic theory, see, for example, James J. Choi, David Laibson & Brigitte C. Madrian, *\$100 Bills on the Sidewalk: Suboptimal Investment in 401(k) Plans*, 93 REV. ECON. STAT. 748, 748-50 (2011), which notes that time-inconsistent preferences can produce suboptimal investment decisions; George Loewenstein, Ted O'Donoghue & Matthew Rabin, *Projection Bias in Predicting Future Utility*, 118 Q.J. ECON. 1209, 1211 (2003), which shows that projection bias can cause individuals to forecast incorrectly their utility from future consumption; and Nicholas Epley, Dennis Mak & Lorraine Chen Idson, *Bonus or Rebate?: The Impact of Income Framing on Spending and Saving*, 19 J. BEHAV. DECISION MAKING 213, 214 (2006), which explains how reframing income as a gain in wealth, versus a return to a former wealth level, can alter spending decisions.
117. Behavioral psychologists have documented the “certainty effect,” which causes people to “prefer[] . . . a loss that is merely probable over a smaller loss that is certain.” Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268-69 (1979).
118. For a discussion of tax incidence and the market dynamics in which it typically obtains, see HARVEY ROSEN, PUBLIC FINANCE 304-08 (9th ed. 2009).
119. Galle, *supra* note 30, at 1030.

### C. *The Utilitarian Lens*

Utilitarians might object to direct UI taxation on choice-distortion grounds. Two potential distortions are relevant. Taxing gig workers might distort choices, first, between gig and non-gig jobs.<sup>120</sup> However, given that employers pass on UI-tax incidence, as discussed above,<sup>121</sup> a gig-worker tax would equalize gig jobs' treatment with other occupations (where workers pay UI taxes in practice). Just as with extending UI *benefits* to gig workers,<sup>122</sup> forcing gig workers to pay for UI would thus improve efficiency versus today's baseline. An overall gig-worker UI scheme would yield no distortion for any worker's job choice—regardless of whether that worker prefers job-insurance protections or higher wages.<sup>123</sup>

Second, utilitarians might fear intertemporal distortion. Forcing gig workers to pay taxes, in other words, might make them consume less today than they otherwise would (and, presumably, more during periods of unemployment). This distortion is likely inevitable, but it is also easy to justify. As with redistribution from rich to poor, such intertemporal substitution distributes money over the course of one's life from high-income periods to low-income periods, when marginal utility is higher. Any distortion of this kind, therefore, scores highly by utilitarianism's distributional criteria.

## IV. TRANSLATING THEORY TO PRACTICE

As discussed in the Introduction, this Essay's central contribution is normative. It shows that principles of justice widely accepted in tax-law scholarship compel gig-worker UI. Articulating the normative case for such a policy—separately from prescribing exactly *how* to implement it—makes two significant contributions. First, and most fundamentally, it is only through normative inquiry that policy makers, advocates, or anyone else can determine their values and, consequently, which kinds of policies they support. For this reason, as one scholar writes, “[p]hilosophy-free tax theory or practice does not exist.”<sup>124</sup> Indeed, the interdisciplinary nature of tax theory, which is “shape[d] . . . at the

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120. See *supra* note 97 and accompanying text for further qualifications on this point.

121. See *supra* notes 118-119 and accompanying text.

122. See *supra* Section II.C.

123. Cf. Kaplow & Shavell, *supra* note 98, at 824 n.5, 825-27.

124. Tyler A. LeFevre, *Justice in Taxation*, 41 VT. L. REV. 763, 768 (2017); cf. Nicolas Michaud, *Why Philosophy Is Important for Administrators in Education*, 6 J. INQUIRY & ACTION EDUC. 74, 74 (2015) (“[A]ll policy is grounded in some philosophical notion . . . . As such, philosophy remains essential in . . . administration and leadership.”).

most basic level” by “moral ideas about justice and human welfare,” is perhaps one reason our real-world tax system is so notoriously complex.<sup>125</sup>

Second, clearly articulated normative reasoning has direct, measurable effects on policy. Policy makers widely appeal, in explicit terms, to normative theories of justice and their constitutive principles. Utilitarian values dominate contemporary tax-design debates<sup>126</sup> and underpin the cost-benefit analyses to which federal agencies subject new regulation.<sup>127</sup> Economic efficiency, some joke, is fairly characterized as the “Brookings Religion”<sup>128</sup> – a nod to the Washington, D.C. policy think tank. The influence of liberal egalitarian ideas is perhaps less keenly felt than utilitarianism, yet these traditions, too, hold noticeable sway over law, lawmaking, and regulation.<sup>129</sup>

When converting normative theory to practice, lawmakers and regulators will inevitably be left to fill in the details. Although that task exceeds this Essay’s scope, this Part briefly sketches some implementational hurdles policy makers will encounter. In doing so, it aims both to guide future research and to furnish further support for the proposition that gig-worker UI is, in fact, workable.

Crafting a gig-worker UI system requires, first, legal standards for when gig workers are unemployed. Sometimes, this analysis will be straightforward. Many contracting companies already report contractor payments to the Internal Revenue Service;<sup>130</sup> agencies can leverage this data and require more frequent reporting. But other cases are more complicated. Would Uber drivers be “unemployed,” for instance, when recessions (or events like pandemics<sup>131</sup>) allow them

125. LeFevre, *supra* note 124, at 767–68.

126. Sugin, *supra* note 48, at 229 (“The most intractable problem in tax design has long been the conflict between equity and efficiency. . . . The [utilitarian] theory of optimal taxation [has been] the most important twentieth-century development in tax policy analysis.”).

127. Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1688–91 (2018).

128. *Id.* at 1651.

129. See, e.g., Julia Klimova, *In the Shadow of Justice: An Interview with Katrina Forrester*, TOYNBEE PRIZE FOUND., (May 4, 2020), <https://toynbeeprize.org/posts/katrina-forrester> [<https://perma.cc/NAP6-GFM9>] (“Some of Rawls’s ideas, and certainly liberal egalitarian modes of argument, came to have a subtle but important influence at the level of the law.”); Thad Williamson & Martin O’Neill, *Property-Owning Democracy and the Demands of Justice*, LIVING REVS. DEMOCRACY, Sept. 2009, at 1, 8 (noting that Rawls’s conceptions of “property-owning democracy” have accompanied “increased interest among . . . practitioners in ‘asset-based’ policy approaches to redressing poverty”).

130. See *Form 1099-NEC & Independent Contractors*, INTERNAL REVENUE SERV. (Nov. 4, 2021), <https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-misc-independent-contractors> [<https://perma.cc/AM95-SVGB>].

131. See *Coronavirus: Uber Customer Activity Falls Sharply*, BBC (Aug. 6, 2020), <https://www.bbc.com/news/business-53687422> [<https://perma.cc/DLX4-WHCB>].

to find only a handful of working hours per week? How can lawmakers verify self-employed-worker unemployment in a manner that prevents fraud?

Answering these questions is important for minimizing policy distortions and helping benefits reach recipients proportionally to their need – that is, their low marginal utilities or unearned disadvantages. Agencies, therefore, should develop overlapping sets of legal tests and checks, applicable to different workers. Some self-employed workers, for example, may be asked to document particular year-over-year revenue declines. This requirement would mirror the Small Business Administration’s criteria for Paycheck Protection Program loan eligibility.<sup>132</sup> For other groups, quarterly tax filings may suffice – or even deposit statements from bank accounts preregistered with state agencies. States have already accepted this kind of documentation to verify PUA eligibility.<sup>133</sup> The precise qualifying criteria, moreover, might be written to vary automatically with economic conditions.<sup>134</sup> A stronger “presumption” of unemployment during recessions, for instance, could advance justice by boosting total aid as market-provided job opportunities diminish.

States will have to adjust other UI standards for the gig economy, too. Another important question is how much support jobless gig workers will receive. Current UI systems pay recipients a portion of their former salaries, but gig jobs’ earnings are inconsistent and volatile.<sup>135</sup> States will likely need to select discrete time periods, which may vary by industry, over which to calculate “average earnings.” Drawing these kinds of distinctions, again, is a pragmatic way to satisfy the respective proportionality demands of theories of justice.

Further, states will need standards for part-time gig-worker eligibility. Today, UI excludes many part-time non-gig workers because they are not “able and available” for work under state law.<sup>136</sup> Short of expanding general part-time benefits, states must develop new formulae for defining “part-time” thresholds for

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132. Jeff Drew, *New PPP Guidance Issued by SBA, Treasury*, J. ACCT. (Jan. 8, 2021), <https://www.journalofaccountancy.com/news/2021/jan/sba-treasury-issue-ppp2-guidance.html> [https://perma.cc/2HU9-KQ4L].

133. See, e.g., *PUA Proof of Employment and Earnings*, JOB SERV. N.D., <https://www.jobsnd.com/pua-proof-employment-and-earnings> [https://perma.cc/WT3X-QLUT].

134. For an example of proposals for benefits that vary according to economic conditions, particularly for individuals who experience losses in disposable income, see Claudia Sahn, *Direct Stimulus Payments to Individuals*, in REcession Ready: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY 67, 69 (Heather Boushey, Ryan Nunn & Jay Shambaugh eds., 2019).

135. *What Are the Experiences of Gig Workers?*, GIG ECON. DATA HUB (2021), <https://www.gigeconomydata.org/basics/what-are-experiences-gig-workers> [https://perma.cc/VF5Q-8QUH].

136. *Part Time Workers and Unemployment Insurance*, NAT’L EMP. L. PROJECT (Mar. 2004), <https://www.nelp.org/wp-content/uploads/2015/03/parttimeui0304.pdf> [https://perma.cc/TC8B-QJL2]; see also Galle, *supra* note 30, at 1015 (discussing part-time workers’ effective ineligibility for UI).

gig workers, which again may vary by industry. Along these lines, states must also determine how to treat those using gig work to supplement traditional employment (on a part-time or full-time basis). Hours worked in gig and non-gig jobs would, ideally, factor equally into regulators' judgments about individuals' UI eligibility – as theories of justice would grant that distinction no normative significance. This policy objective may require benefits recipients to make additional disclosures.

Ultimately, the questions above introduce “edge cases” regarding which workers should receive gig-economy UI benefits, and to what extent. Lawmakers and regulators, in all likelihood, can find reasonable ways to draw these lines equitably. But importantly, none of these questions should be sticking points that halt the broader adoption of gig-economy UI. Public concerns about fraud or abuse in the edge cases, in other words, might well preclude extending UI to as wide a group as justice requires (particularly if gig employers continue their prolific political spending<sup>137</sup>). Regardless, policy makers should not hesitate to grant it to the millions of gig workers whose circumstances are clearer cut. In the short term, they can design benefits underinclusively, if need be, while developing protocols that mitigate public concerns.

As a final issue, gig-worker UI will put significant strain on states' unemployment-claims processing systems. Many states' UI infrastructure is outdated, which caused difficulties when Congress expanded unemployment benefits during the COVID-19 pandemic.<sup>138</sup> Conceptually, building out claims-processing capacity should not be difficult, but it may require politicians to support upfront public expenditures. In any event, given administrative obstacles' tendency to inflict the greatest harm on the least advantaged,<sup>139</sup> overcoming this hurdle matters for distributive goals.

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137. See Zak Cassel & Rose Adams, *Opposing Pro Act, Uber and Other Gig Companies Spend over \$1 Million Lobbying Congress*, INTERCEPT (May 6, 2021, 6:00 AM), <https://theintercept.com/2021/05/06/pro-act-uber-lyft-doordash-instacart-lobbying> [<https://perma.cc/2CKJ-TGAZ>].

138. Before the coronavirus crisis, for instance, only about sixteen states had “fully modernized unemployment systems and websites,” with a majority of states using computer infrastructure dating to the 1970s. Megan Leonhardt, *These 25 States Are Already Paying Gig Workers and Self-Employed Americans Unemployment*, CNBC (Apr. 30, 2020, 3:27 PM EDT), <https://www.cnbc.com/2020/04/24/states-paying-unemployment-to-gig-workers-self-employed-americans.html> [<https://perma.cc/M63A-9D2W>].

139. For example, research into the haphazardly implemented first phase of Paycheck Protection Program loan distributions shows that larger businesses – with greater wherewithal to navigate complex, overburdened application infrastructure, or with closer relationships to loan distributors – received disproportionate shares of emergency lending. Benjamin Della Rocca & Nate Loewentheil, *Analysis of the Distribution of Phase I of the Federal Paycheck Protection Program* 2-3, 11-14 (Yale Inst. for Soc. & Pol’y Stud., ISPS Working Paper 20-8, 2020), [https://isps.yale.edu/sites/default/files/publication/2020/05/analysis\\_of\\_federal\\_ppp\\_program\\_workingpaper\\_isps20-08\\_o.pdf](https://isps.yale.edu/sites/default/files/publication/2020/05/analysis_of_federal_ppp_program_workingpaper_isps20-08_o.pdf) [<https://perma.cc/QP58-3K2U>] (analyzing the

**CONCLUSION**

Gig-worker UI benefits, structured similarly to existing UI programs, can be easily justified under accepted theories of justice – accounting for both the program’s costs and benefits. Justice therefore compels states to extend UI to the gig economy. Of course, implementing any such program, as discussed above, would introduce additional challenges, some of which implicate distributive justice. For instance, states must design unemployment-reporting protocols, boost their own institutional capacities, and develop fair standards for adapting part-time-worker eligibility rules to the gig economy. But surmounting these hurdles serves worthy distributive-justice goals and aligns with the philosophical principles already underpinning our tax system.

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distribution of the first phase of the Paycheck Protection Program); *cf.* John Barnshaw & Joseph Trainor, *Race, Class, and Capital Amidst the Hurricane Katrina Diaspora*, in *THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE* 91, 91-93 (David L. Brunzma, David Overfelt & J. Steven Picou eds., 2007) (discussing inequalities that arise during the policy-response stage of disaster events).