The New Public Accommodations: Race Discrimination in the Platform Economy

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The platform economy raises important new questions about public accommodation laws. Such laws originally were enacted to prohibit establishments open to the public—for example, hotels, restaurants, taxi services, and retail businesses—from discriminating on the basis of characteristics such as race, color, religion, and national origin. Platform economy businesses are functional substitutes for these traditional public accommodations. Yet existing public accommodation laws are not always a good fit for the unique features of the platform economy.

This Article is the first to argue that public accommodation laws must evolve to address race discrimination in the platform economy. Available evidence suggests that, in many circumstances, race discrimination affects the platform economy in much the same way that it affects the traditional economy. Platform economy businesses use online platforms to connect providers of goods and services—such as drivers and landlords—with users of those goods and services—such as passengers and renters. These platforms often make race visible to both providers and users by requiring that they create profiles that include names, photographs, and other information. Such profiles may trigger conscious and unconscious bias and result in discrimination even if the parties never meet in person. Moreover, platform economy businesses encourage or even require providers to rate users. Rating systems aggregate biases, and users who are members of disfavored racial categories may begin to receive worse service or, eventually, to be denied service altogether.

This Article examines existing public accommodation laws—Title II of the Civil Rights Act of 1964, 42 U.S.C. § 1981, 42 U.S.C. § 1982, and the Fair Housing Act—and concludes that they hold considerable promise for remedying discrimination in the platform economy. Nonetheless, the platform economy presents new issues that existing laws do not entirely address. To the extent that platform economy businesses perform the same function as traditional public accommodations yet escape existing laws, we argue that those laws should be amended and briefly describe the form the new laws should take.

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INTRODUCTION

"There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States."

— *from the 1949 edition of* The Negro Motorist Green Book, *a listing of hotels and other public establishments hospitable to black travelers*[1]

"We find widespread discrimination against guests with distinctively African-American names."

— *from a 2016 study of Airbnb rentals*[2]

1. VICTOR H. GREEN & CO., THE NEGRO MOTORIST GREEN BOOK: AN INTERNATIONAL TRAVEL GUIDE 1 (1949 ed.).

2. Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J.: APPLIED ECON. (forthcoming) (manuscript at 2), http://www.benedelman.org/publications/airbnb-guest-discrimination-2016-09-16.pdf [https://perma.cc/9ESC-VTB5] (finding that it is 16% less likely for guests with distinctively African-American names to find a rental online through Airbnb than for identical guests with distinctively White names).

Jamal[3] is a black attorney who frequently uses Uber to get home at night when he has to work late.[4] It is easier than flagging down a cab from the street in front of his office. Sometimes it takes a while for a car to arrive, but in general Jamal is pleased with Uber and continues to use it. After a few months, however, Jamal notices that he gradually waits increasingly longer for an Uber driver to accept his request for a ride. One night he waits almost half an hour for a ride, and when one never comes, he walks several blocks to wave down a cab.

Puzzled, he calls Uber the next day. The representative tells him that his passenger rating is only a 3.2 out of 5. Jamal had not even realized he was being rated, but from speaking to the representative he learns that every time he takes a ride his driver rates him from 1 to 5, and that Uber averages those ratings together to yield an aggregate passenger rating. Further, he learns that drivers see his first name and his passenger rating whenever he requests a ride and that some drivers hesitate to pick up passengers with ratings below 4.0.

Jamal is surprised. He has taken several dozen Uber rides and cannot remember anything particularly troubling happening during any of them. Admittedly, he is not particularly friendly: after a long day of work, he often doesn't feel like talking. Usually he tells the driver where he is going and then puts on headphones to listen to music or a podcast. He can remember disagreeing with a driver a few times about what route to take home. But when he asks the Uber representative for details about why his rating is so low, he is told that no additional information is available.

Many of Jamal's white colleagues also take Uber home late at night. Jamal asks them whether they have trouble getting Uber drivers to pick them up. They respond in the negative, even though most of them agree that they are often not particularly sociable after work. Further, Jamal learns that passengers can look up their own ratings using Uber's app and asks a few of his colleagues to do so. Their scores are quite different from his: 4.6, 4.8, even a 5.0.

Jamal begins to believe that his race has affected his experience with Uber. First, he begins to suspect that some drivers might hesitate to pick up a passenger with a first name most would associate with a black man. He speculates that this might explain why, when he first began to use Uber, it would occasionally take a longer time for a car to arrive than the app estimated. Further, he wonders whether at least some Uber drivers had given him low ratings—consciously or unconsciously—because he is black, and whether these

3. "Jamal" is an acquaintance of ours. His first name is not really Jamal, but his real name is also a name that most people would identify as the name of a black man. This Article does not necessarily claim that Jamal himself has experienced discrimination, but rather uses his story to illustrate the concerns relating to race discrimination that arise in the platform economy.

4. Uber is an online platform that connects people who need a ride somewhere with people who are willing to drive them. A prospective Uber passenger submits a request for a ride using the company's application (app). Uber drivers receive the request, along with the person's name and location via GPS. A driver then picks up the passenger and takes her to her destination. The app automatically accepts payment from the passenger and transfers that payment—minus Uber's cut—to the driver. For a detailed discussion of Uber and other platform economy businesses, see Section II.A.

ratings might have made it increasingly difficult to get a ride. "Studies have shown that it's harder to get a taxi to pick you up when you're black," he says. "Why would Uber be different?"

Scholarly research and anecdotal evidence suggest that Jamal is right to be concerned that his race may affect his experience with Uber.[5] Both conscious and unconscious racial bias affect nearly every aspect of daily life, resulting in discrimination against people of color.[6] Discrimination occurs even at establishments ostensibly open to the public, affecting the ability of people of color to engage in basic activities, such as booking a hotel, eating in a restaurant, or traveling from place to place.

Race discrimination by public establishments is nothing new.[7] Indeed, for much of American history, non-white people could not make use of public facilities on an equal basis. Long after the end of legal slavery, many businesses refused to serve black customers or offered inferior services to anyone who was not white. Such exclusion limited economic opportunities for non-white people. They could not travel, transact business, obtain loans, socialize with friends, or participate in public life to the same degree and in the same ways as white people.[8] Moreover, exclusion from establishments otherwise open to the public served as a constant public reminder to people of color that others could, with impunity, treat them as less than equal because of their race.

Federal antidiscrimination law seeks to remedy this problem. Title II of the Civil Rights Act of 1964, for example, prohibits race discrimination by "public accommodations," defined as entities used by the public, including hotels, restaurants, entertainment facilities, and similar venues.[9] Other federal civil rights laws also function to prohibit discrimination by various public establishments, as do a wide range of state and local laws.[10] Public accommodation laws

5. Section II.B provides a detailed survey of this research. *See infra* notes 98–111 and accompanying text. Some Uber drivers suggest, based on anecdotes and personal experience, that Uber's rating system leads to discrimination. *See, e.g.*, *Is the Rating System Illegal?*, UBERPEOPLE (Aug. 15, 2015), http://uberpeople.net/threads/is-the-rating-system-illegal.32254/ [https://perma.cc/T5EF-Y7AS] (providing anecdotal evidence of racist behavior by Uber drivers). Here and throughout the Article, we do not claim that any particular business or the workers with whom it contracts engage in discrimination. Rather, we focus on discrimination in the marketplace as a whole.

6. *See infra* notes 98–111 and accompanying text.

7. Section I discusses the harms addressed by public accommodation laws more generally. As we use the term, "public establishment" refers to a place generally understood to be open to the public. By contrast, we use the term "place of public accommodation" as a legal term to refer to places where it is illegal to discriminate on the basis of race. "Places of public accommodation," therefore, are a subset of "public establishments." *See infra* notes 60–62 and accompanying text.

8. We do not mean to imply that the harms we have listed are the only—or even the most serious—harms suffered by people of color during the eras of de jure and de facto segregation. We mention them simply because they seem most closely related to the harms that public accommodation law is designed to address.

9. Title II defines the term "public accommodation" to include businesses such as hotels, restaurants, movie theaters, concert halls, sports arenas, stadiums, or "other place[s] of exhibition or entertainment" as long as their "operations affect commerce." 42 U.S.C. § 2000a(b) (2012).

10. *See infra* text accompanying notes 184–212.

are critical to the equal participation of people of color in society because they require nondiscriminatory treatment by private parties as well as by the government. Without such laws, trains, airlines, and taxi companies could refuse to transport passengers who are not white. Hotels could refuse to shelter them, restaurants could refuse to serve them, movie theaters and concert halls could refuse to admit them, and health clubs could refuse to enroll them.

But how do public accommodation laws apply to the experience of people like Jamal with businesses like Uber? Uber is one of many businesses that operate within the so-called "new economy" or "platform economy." There is no authoritative definition of the platform economy.[11] For our purposes, however, two features of this new form of business are important. First, platform economy businesses make money not by providing goods or services per se, but rather by *connecting* people who have particular goods with people who wish to use or obtain them or people who need particular services performed with people who want to provide them. Second, to facilitate this connection efficiently, platform economy businesses rely on online platforms. We refer to businesses that meet this criteria as "platform economy businesses" (PEBs) throughout the Article.[12]

PEBs thus function as substitutes for sectors of the traditional economy typically covered by public accommodation laws. Airbnb and Homeaway provide access to short-term housing rentals, replacing hotels. Uber and Lyft offer on-demand transportation, replacing taxis and other car services. Yet these businesses do not function like their traditional counterparts. Rather than hosting someone in a hotel, Airbnb connects that person with someone who wants to rent out his or her property and charges a fee for facilitating the connection. Likewise, rather than sending a driver to pick someone up, Uber connects that person with someone who wants to drive them and takes a percentage of the fare. PEBs do business in a fundamentally different way than their predecessors in the traditional economy, and as a result they raise new social, economic, and legal issues.

One such issue, and the subject of this Article, is how existing public accommodation laws apply to race discrimination in the platform economy. Despite many reports of such discrimination, no previous research has considered this question across the platform economy,[13] and it does not lend itself to a

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11. *See* Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, COLLABORATIVE CONSUMPTION (Nov. 22, 2013), http://www.collaborativeconsumption.com/2013/11/22/the-sharing-economy-lacks-a-shared-definition/ [https://perma.cc/SJV7-C8AT].

12. For present purposes, it is unnecessary to delineate the precise boundaries of what is and is not a PEB, and we do not attempt to do so.

13. In an online law review article, Jamila Jefferson-Jones has discussed the application of some public accommodation laws to Airbnb. *See* Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J.: CITY SQUARE (May 26, 2016), http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy/ [https://perma.cc/8C69-TP8A]. A student comment in the online companion to a law review recently discussed the applicability of Title II and the Fair

simple answer. Although PEBs provide access to facilities that fulfill needs squarely within the concern of public accommodation laws, the laws themselves are sometimes a poor fit for the platform economy business model. Moreover, the online platform used by each business creates additional complexities: laws governing activities in the physical world do not always apply identically to activities initiated in cyberspace.

As the platform economy increasingly displaces traditional businesses, public accommodation law must evolve to provide meaningful protection against race discrimination. This Article considers the unique challenges this task presents, as well as the unique opportunities it provides.[14]

The Article proceeds in four parts. Part I traces the history of public accommodations law, from its contested early roots to the watershed Civil Rights Act of 1964 to its uneasy status today. Part II turns to the platform economy. It describes the features of that economy, explains why some people hope that the platform economy offers a solution to racial discrimination in public establishments, and then offers evidence indicating that such hopes are unfounded. Part III considers the legal mechanisms available to combat discrimination in the platform economy. Although such mechanisms offer considerable promise in many situations, they do not address completely the unique ways in which discrimination operates in the platform economy. Part IV then calls for new antidiscrimination laws to account for the unique features of the platform economy and briefly describes the form such laws should take.

Finally, we note that, although the focus of this Article is race, the scope of public accommodation law also applies to discrimination on the basis of other characteristics. Much of our analysis applies to other categories of identity such

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Housing Act (FHA) to race discrimination by Airbnb hosts. *See* Michael Todisco, Comment, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121 (Mar. 14, 2015), https://www.stanfordlawreview.org/online/share-and-share-alike/ [https://perma.cc/P4TV-9SUW]. Another student comment, while discussing regulation of the platform economy, mentioned the possibility of discrimination on the basis of various identity categories. *See* Vanessa Katz, Comment, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1096–97, 1117–20 (2015). One of this Article's authors was the first to discuss the platform economy's race discrimination problems in the blogosphere on her personal blog. *See* Nancy Leong, *Uber, Privacy, and Discrimination*, NANCY LEONG (Apr. 20, 2014), http://www.nancyleong.com/race-2/uber-privacy-discrimination/ [https://perma.cc/C7UB-XQ95]; *see also* Nancy Leong, *The Sharing Economy Has a Race Problem*, SALON (Nov. 2, 2014, 6:58 AM), http://salon.com/2014/11/02/the_sharing_economy_has_a_race_problem/ [https://perma.cc/RWL7-U3HY] [hereinafter Leong, *The Sharing Economy Has a Race Problem*]. To our knowledge, at the time of this Article's acceptance and public distribution, no other scholarly legal article had discussed the problem of discrimination in the platform economy.

14. We are not alleging that any particular participant in the platform economy is a bad actor. As we will discuss, given the wealth of evidence regarding the existence and persistence of implicit bias, the empirical research about the existence of bias in the platform economy, and the considerable amount of anecdotal information about the platform economy, it would be surprising if no such discrimination took place anywhere in the platform economy, particularly given the features of that economy that research suggests would tend to facilitate the expression and accumulation of implicit bias.

as sex, gender, color, religion, and national origin[15] that are commonly protected by public accommodation laws, and we hope that future research will examine discrimination on the basis of these characteristics more closely.[16] Where our analysis applies only to race, we will specify that is the case.[17] Finally, where provisions pertaining to race are ambiguous, we sometimes analogize to laws prohibiting discrimination on the basis of disability, such as the Americans with Disabilities Act (ADA).[18] These laws often implicate similar policy considerations and provide a useful point of comparison.

I. PUBLIC ACCOMMODATION LAW

This Part traces the history of laws prohibiting race discrimination in places of public accommodation and articulates their current status in American law and society. We do not attempt a comprehensive survey, but rather seek to lay the groundwork for our discussion of how public accommodation law, broadly construed, applies to platform economy businesses. Throughout this relatively brief overview, we emphasize both that public accommodation laws are entrenched in our jurisprudence and that the precise scope of such laws is nonetheless subject to debate.

Civil rights laws in general, and public accommodation laws in particular, were controversial from their inception. Many early critics questioned whether public accommodation laws were within the permissible scope of legislation pursuant to the Reconstruction-era Amendments to the Constitution, and even those who believed such laws were permissible questioned their wisdom.[19] During the Reconstruction Era, most governmental actors understood rights as divisible into three categories: civil, political, and social.[20] Samuel Bagenstos demonstrates that, as a result, the early debates over public accommodation laws concerned whether such laws "merely" implicated social rights, rather than the ostensibly more important civil or political rights.[21]

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15. For example, Title II of the Civil Rights Act prohibits "discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2012).

16. Such research is particularly timely given that complaints reportedly have already been filed alleging discrimination on the basis of other identity categories. *See, e.g.*, Johana Bhuiyan, *Disability Rights Advocate Files Discrimination Complaint Against Uber*, BUZZFEED (Jan. 19, 2016, 11:46 AM), http://www.buzzfeed.com/johanabhuiyan/disability-rights-advocate-files-discrimination-complaint-ag#.ds7zkgZLR [https://perma.cc/EW5A-P4G4].

17. For example, sections of the 1866 Civil Rights Act prohibiting discrimination in contracting and housing are limited to discrimination on the basis of race. *See* 42 U.S.C. §§ 1981–1982.

18. 42 U.S.C. § 12101 (2012).

19. *See* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 567–68 (1989).

20. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 221–28 (2011) (describing Reconstruction-era debates referencing these three spheres of equality); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 154 (1999) (asserting that the tripartite theory of rights was developed to justify the "selective extension of rights to blacks").

21. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1211–12 (2014); *see also* BALKIN, *supra* note 20, at 222.

During the same time period, American society presented an urgent case for legislative action to prohibit race discrimination in public accommodations. Throughout the South, non-white people were blatantly excluded from both public and private facilities open to white people. Jim Crow laws, wrote C. Vann Woodward, "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking[,] . . . to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."[22] James Fox agrees: "Racial subordination and segregation in public facilities, and especially in the most common facilities of railroads, streetcars, inns, and theaters, was one of the most pervasive ways in which Whites asserted their racial power."[23]

Such restrictions were severe and pervasive. In 1900, every Southern state mandated that railroads segregate black passengers from white passengers.[24] Mobile, Alabama legislated a curfew of 10 p.m. for black people.[25] Texas had entire towns in which black people could not live.[26] Indeed, in 1944, a Swedish visitor to the South observed that segregation was so complete that whites did not see blacks except when being served by them.[27]

Although we do not generally think of them as public accommodation laws, the earliest statutes that might be so described arose out of the Civil Rights Act of 1866, which included the statutes we colloquially refer to today as sections 1981 and 1982.[28] The former prohibits race discrimination in "mak[ing] and enforc[ing] contracts,"[29] and the latter prohibits discrimination in housing sale and rental.[30] These statutes have been deployed in a range of civil rights contexts, but it is appropriate to think of them as public accommodation statutes

22. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 8 (1955). Woodward also suggests this racial ostracism was not limited to the South. *Id.* at 20–21; *see generally* LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860 (1961).

23. James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 138 (2006).

24. *See* Barbara Y. Welke, *Beyond* Plessy*: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267, 267. Welke also raises an intriguing argument that we do not address here: that by wresting control of passenger accommodations from railroads via Jim Crow laws, the state inserted itself into an area that had previously been private. *See id.* at 273–75; *see also* Fox, Jr., *supra* note 23, at 139–40.

25. WILLIAM H. CHAFE ET AL., REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH 15 (2001).

26. *See* JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 233 (2002).

27. *See* CHAFE ET AL., *supra* note 25, at 15; *see also* Frances L. Edwards & Grayson Bennett Thompson, AIA, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 145, 156–57 (2010) (describing ordinance in Pendleton, South Carolina that allowed black people to enter white spaces only under conditions of domestic servitude).

28. 42 U.S.C. §§ 1981–1982 (2012).

29. *Id.* § 1981.

30. *Id.* § 1982.

because they protect the same interest in ensuring equal access to places generally open to the public.

The Civil Rights Act of 1866 was authored by Senator Lyman Trumbull. When he introduced the Civil Rights Bill to the Senate, Trumbull stated that the Thirteenth Amendment's ban on slavery also "declared that all persons in the United States should be free" and that his bill "is intended to give effect to that declaration and secure to all persons within the United States practical freedom."[31] Trumbull's emphasis on "practical freedom" captured the widespread view that the Thirteenth Amendment encompassed more than literal freedom from slavery; it also guaranteed the right to equal participation in society.[32] As Robert Kaczorowski explained, the framers of the Thirteenth Amendment "interpreted the Thirteenth Amendment as a delegation of plenary authority to enforce the freedmen's absolute rights as free men"[33]—that is, the statute applied to both state and private action. Thus, the Civil Rights Act of 1866 reached both state and private instances of discrimination.[34]

Against that backdrop, section 1981 was drafted to prohibit race-based discrimination in the formation and performance of contracts. The statute states:

> All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[35]

The innovation of section 1981 is that it reached private contracts, protecting both "against impairment by nongovernmental discrimination and impairment under color of State law."[36] As George Rutherglen explains: "[Section 1981's] central purpose has always been to protect the right to participate in public life, regardless of race, and to provide remedies for both public and private violations of that right."[37] Section 1982, although subject to less academic discus-

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31. CONG. GLOBE, 39th Cong., 1st Sess. 471, 474 (1866) (statement of Sen. Trumbull).

32. *See, e.g.*, Kaczorowski, *supra* note 19, at 570 n.22 (collecting cites to the congressional record).

33. *Id.* at 569. For a comprehensive history of the Civil Rights Act of 1866 and its codification as 42 U.S.C. §§ 1981–1982, see generally *id.*

34. 42 U.S.C. § 1981; *see* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303. Section 1981 was initially enacted under the Thirteenth Amendment, which applies to state action as well as private action. In response to doubts about the constitutionality of section 1981, Congress ratified the Fourteenth Amendment "partly to incorporate some provisions of section 1981 in the Constitution and partly to assure that its remaining provisions were themselves constitutional. Congress then reenacted section 1981 [in the Enforcement Act of 1870] under the powers newly granted by the Fourteenth Amendment." *Id.* at 304.

35. 42 U.S.C. § 1981(a). The meaning of the words "make and enforce contracts" is what one might expect: "[T]he making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b).

36. *Id.* § 1981(c).

37. Rutherglen, *supra* note 34, at 351.

sion, was similarly conceived and has been interpreted parallel to section 1981.

Due in part to the ratification of the Fourteenth Amendment and in part to judicial decisions narrowing its scope, section 1981 "fell into a long period of disuse in which it had virtually no independent significance."[38] However, a century later in *Jones v. Alfred H. Mayer Co.*, the Supreme Court revived section 1981 and its companion, section 1982, by interpreting the latter to extend beyond the Fourteenth Amendment and thus to prohibit not only discrimination in the sale and rental of housing resulting from state action, but also discrimination by private parties.[39] The Court also extended section 1981 to apply to private-party contracting because the two statutes are construed in the same manner.[40] Subsequently, in *Runyon v. McCrary*, the Court held that it was "a classic violation of § 1981" when a private school denied admission to black students, and the school's argument that section 1981 did not reach private actors was "wholly inconsistent with *Jones*' interpretation of the legislative history of § 1 of the Civil Rights Act of 1866."[41]

Subsequent iterations of the Court endorsed this view, but expressed reservations in doing so.[42] In 1991, Congress codified the position taken in *Jones*, amending section 1981 to make clear that it applies to both private conduct and action taken under color of law.[43] Accordingly, section 1981 applies to private discrimination on the basis of race "in all forms of contracting, no matter how minor or personal."[44] And section 1982 also reaches private parties because it is construed in the same manner as section 1981.[45] The result is that today both section 1981 and section 1982 apply to both public and private actors and are available as mechanisms to remedy discrimination.[46] So, although courts and commentators have not often discussed these laws within the public accommodations framework, they advance the same goals and protect the same interests.

As sections 1981 and 1982 were evolving from their Reconstruction-era origins, other statutes that were explicitly intended to address discrimination in public accommodations took a somewhat different route. With the Civil Rights Act of 1875, Congress passed legislation guaranteeing that all citizens "shall be entitled to the full and equal enjoyment of the accommodations, advantages,

38. *Id.* at 305.

39. 392 U.S. 409, 413 (1968).

40. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 448 (2008) ("[T]he Court has construed §§ 1981 and 1982 alike because it has recognized the sister statutes' common language, origin, and purposes."); Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383–84 (1982) (noting the shared historical roots of the two provisions).

41. 427 U.S. 160, 172–73 (1976).

42. Rutherglen, *supra* note 34, at 305–06.

43. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections); 42 U.S.C. § 1981(c) (2012) (stating that right to contract is "protected against impairment by nongovernmental discrimination and impairment under color of State law").

44. Rutherglen, *supra* note 34, at 306.

45. *See Runyon*, 427 U.S. at 170–71.

46. In our view, both statutes are underutilized by civil rights litigators.

facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."[47]

But the Supreme Court invalidated much of the Civil Rights Act of 1875 in the *Civil Rights Cases*, decided in 1883.[48] There, the Court held that "Congress had no power to prohibit private discrimination in places of public accommodation."[49] In considering whether the Fourteenth Amendment gave Congress the power to pass the law, the Court said: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[50] The problem with the law, according to the Court, was that it "lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the state or its authorities."[51] The Court, then, was resistant to public accommodation statutes that explicitly reached private conduct.

Thus began the Jim Crow Era, during which state and local laws mandated racial segregation in the South, and elsewhere such discrimination by private actors was common. The lack of federal legislation had tangible consequences for non-white—and particularly black—individuals' participation in society. After the original Civil Rights Act of 1875 was enacted and then overturned, a wide variety of public establishments refused to serve non-white people.[52] The discriminatory practices not only limited where traveling black Americans could eat and sleep, but also harmed the larger interstate economy by providing a disincentive for industry to move to the South and an incentive for black workers—both skilled and unskilled—to move north.[53] As a result, "[d]iscrimination in public accommodations was one of the most visible manifestations of the continued inequality of blacks in significant sections of the country."[54]

Explicit discrimination in public accommodations continued through the first half of the twentieth century. Such discrimination was sufficiently widespread that guides designed to assist black travelers in finding hospitable hotels, restaurants, and other businesses emerged. The best known is *The Negro Motorist Green Book*, initiated in 1936 by New York City mailman Victor H.

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47. 18 Stat. 335, 336 (1875).

48. 109 U.S. 3 (1883).

49. Radiance A. Walters, Denny v. Elizabeth Arden Salons, Inc.*: Condoning Race Discrimination in Resembling Places of Public Accommodation Under Title II*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 407, 409 (2008).

50. *Civil Rights Cases*, 109 U.S. at 11.

51. *Id.* at 14.

52. *See, e.g.*, A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 L. & HIST. REV. 53, 79 (2005) ("[B]lack access to public accommodations was uneven and unpredictable, neither required nor prohibited by law, and varying not just by state and county, but often by the whims of individual clerks and conductors.").

53. *See generally* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION (2010).

54. Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J. L. & POL., 381, 401 (2000).

Green, which provided travelers with a guide to hotels, restaurants, and other businesses that were hospitable to black people traveling in unfamiliar areas, particularly the South.[55] From its inception until its last edition in 1967, the book relied on and aggregated firsthand reports to provide information to black travelers—not unlike the reviews of today on a website such as Yelp.[56] With poignant optimism, the introduction to the 1949 edition stated:

> There will be a day sometime in the near future when this guide will not have to be published. That is when we as a race will have equal opportunities and privileges in the United States. It will be a great day for us to suspend this publication for then we can go wherever we please, and without embarrassment. But until that time comes we shall continue to publish this information for your convenience each year.[57]

The need for such a book is a written testament to the discrimination that black people, and other non-white people, faced in accessing public accommodations. But such books were, of course, an incomplete solution. Countless memoirs and firsthand accounts from the time describe the overt discrimination that people of color faced in places of public accommodation.[58] W.E.B. Du Bois, for example, observed that "ever-recurring race discrimination" made it "a puzzling query as to what to do with vacations."[59]

It was in this atmosphere of widespread discrimination by private actors that the Civil Rights Act of 1964 emerged. Title II of the Act prohibits discrimination on the basis of race, color, religion, or national origin in places of public accommodation.[60] The statute defines public accommodations as "establishments" whose "operations affect commerce."[61] Title II provides for three categories of establishments: (1) inns and motels; (2) restaurants and lunch counters; and (3) "place[s] of exhibition or entertainment" such as movie theaters, concert halls, and sporting arenas.[62]

The legislative intent behind Title II is clear; the law was meant to "eliminate discrimination in public accommodations affecting interstate commerce."[63] The Senate Commerce Committee stated that the fundamental objective of Title II

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55. VICTOR H. GREEN & CO., *supra* note 1. The books are available in digitized form from the New York Public Library. *See The Negro Motorist Green Book: 1949*, N.Y. PUB. LIB.: DIGITAL COLLECTIONS, https://digitalcollections.nypl.org/collections/the-green-book#/?tab=about [https://perma.cc/LZ59-5LMZ].

56. *About Us*, YELP, https://www.yelp.com/about [https://perma.cc/84Z2-SVHC].

57. VICTOR H. GREEN & CO., *supra* note 1, at 1.

58. *See generally*, Myra B. Young Armstead, *Revisiting Hotels and Other Lodgings: American Tourist Spaces Through the Lens of Black Pleasure-Travelers, 1880–1950*, 25 J. DECORATIVE & PROPAGANDA ARTS 137 (2005).

59. W.E.B. Du Bois, *Idlewild*, 14 THE CRISIS 168, 169 (1917).

60. 42 U.S.C. § 2000a(a) (2012).

61. *Id.* § 2000a(b).

62. *Id.*

63. S. REP. NO. 88-872, at 1 (1964).

was "to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[64] People who suffered discrimination on the basis of their identity, the Committee understood, were denied full participation in an equal society.

To prevent the statute from invalidation in the same manner as the 1875 Civil Rights Act, the drafters of the 1964 Civil Rights Act explicitly linked Title II to the Commerce Clause.[65] The Commerce Clause of the United States Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[66] As a result, the Commerce Clause authorizes Congress to prohibit private business owners from engaging in discrimination because such discrimination impairs travel and market participation for many citizens, and thus affects interstate commerce.[67] Congress also invoked its powers under the Fourteenth Amendment in enacting the public accommodations provision, but did not rely solely on those powers as it had with the Civil Rights Act of 1875.[68]

Ultimately, Congress's careful drafting was successful. The Supreme Court relied on the Commerce Clause in upholding the constitutionality of Title II in *Heart of Atlanta Motel, Inc. v. United States*.[69] The Commerce Clause, the Court held, granted Congress the power to prohibit private discrimination by the public accommodations specified in Title II.[70] Although de facto elimination of discrimination on race would be a long-time coming—indeed, as we will explain, it is still coming today—the legal groundwork had been laid.

Today, Title II has become an accepted part of the antidiscrimination canon, and the basic proposition that Congress can regulate some private spaces to prevent discrimination is relatively undisputed. Still, the law occupies a unique space in our antidiscrimination regime. Most would agree that such laws are entrenched—arguments that restaurants or hotels should be able to exclude members of particular racial groups are not taken seriously, or at least are extremely unlikely to succeed. Yet such laws are not taken as moral absolutes. There are two species of objection: one from those we might describe as old-fashioned racists, who believe that they ought to be able to avoid contact with racial groups they dislike,[71] and the other from those who would explicitly

64. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).
65. 42 U.S.C. § 2000a(b).
66. U.S. CONST. art. I, § 8, cl. 3.
67. *See* Walters, *supra* note 49, at 409.
68. *See* Hoy, *supra* note 54, at 401–03.
69. *See* 379 U.S. at 261–62.
70. *See id.* at 258.
71. *See, e.g.*, Abby Ohlheiser, *"Muslim-Free" Gun Shop Teams with George Zimmerman to Sell Confederate Flag Prints*, WASH. POST (Aug. 18, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/18/facing-legal-bills-muslim-free-gun-shop-teams-with-george-zimmerman-to-sell-confederate-flag-prints/ [https://perma.cc/B6H5-NBWL]; Manny Schewitz, *SC Restaurant Owner Refuses to Serve Blacks, Cites Religious Beliefs*, FORWARD PROGRESSIVES (July 2, 2014), http://www.

disclaim racist views yet whose behavior evinces unconscious bias.[72] Although we do not discount the existence or persistence of the former, the latter will be particularly relevant to our discussion of the platform economy in Parts II and III.

II. THE NEW ECONOMY

How do statutes prohibiting discrimination by public accommodations apply to today's marketplace? To answer this question, we must understand the nuances of the platform economy. This Part first explains what the platform economy is and how transactions within that economy work. It then considers how and why racial discrimination occurs within that economy. Although many forms of identity can trigger discrimination, and various federal laws cover a range of identities, this Article focuses on race because eliminating race discrimination was the original purpose of public accommodation laws, the statutes we discuss explicitly apply to race discrimination, and the greatest amount of empirical research thus far has focused on race.

A. THE PLATFORM ECONOMY

Much has been written over the past few years about the "platform economy," which has also been called the "sharing economy," "on-demand economy," "peer-to-peer economy," "gig economy," "1099 economy."[73] Although there is no single authoritative definition of that economy,[74] one popular source characterizes the platform economy as a "socio-economic ecosystem," including "shared creation, production, distribution, trade and consumption of goods and services."[75] Others have characterized the platform economy as an "economic model based on sharing underutilized assets from spaces to skills to stuff for monetary or non-monetary benefits,"[76] or as "the peer-to-peer-based activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services."[77]

For our purposes, we define platform economy businesses (PEBs) as those that operate by creating online platforms that connect *users*, or people needing a particular good or service, with *providers*, or people controlling an underused

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forwardprogressives.com/sc-restaurant-owner-refuses-serve-blacks-cites-religious-beliefs/ [https://perma.cc/B5ZK-UYEU].

72. *See infra* notes 98–128 and accompanying text.

73. We think the term "platform economy" is most accurate because the online platform is intrinsic to businesses within the economy we describe, and we adopt that term here.

74. *See* Darcy Allen & Chris Berg, *The Sharing Economy: How Over-Regulation Could Destroy an Economic Revolution* 4 (INST. PUB. AFF., Dec. 2014), https://ipa.org.au/portal/uploads/Sharing_Economy_December_2014.pdf [https://perma.cc/44LE-NK93]; Botsman, *supra* note 11.

75. *What is the Sharing Economy?*, THE PEOPLE WHO SHARE (Sept. 1 2016), http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/ [https://perma.cc/9CZW-7D33].

76. Botsman, *supra* note 11.

77. Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS'N. INFO. SCI. & TECH. 2047, 2049 (2015).

good or service and hoping to benefit financially by sharing it.[78] If a provider and a user connect, the user then compensates the provider for the service or good and the PEB takes a cut of the total compensation for facilitating the transaction.

The concept of the platform economy is nothing new. People have been sharing unused or underused assets, often for monetary gain, for time immemorial.[79] Community members who borrow tools from neighbors, organize a neighborhood-wide babysitting swap, or carpool are engaging in a rudimentary version of the platform economy. What is new, however, is the way the Internet facilitates platform economy activity. By removing the necessity of preexisting community relationships, the Internet dramatically amplifies the scale on which platform economy activity occurs.[80] The platform economy has grown dramatically in recent years and is projected to continue to do so: one estimate predicts that the platform economy will grow from $15 billion in annual global revenue in 2013 to $335 billion in 2025.[81]

At least in theory, all participants benefit. The provider benefits by sharing an underutilized asset—whether a physical good or the capability for labor—for personal gain.[82] The user benefits by paying for *access* to an asset rather than *ownership* of it. The platform economy thus allows the full economic potential of "underexploited goods [to] be unlocked"—that is, "[b]y allowing community access to these goods, owners allow more people to use a specific good and spread the cost of using that good among the community by charging for the use of the good."[83] Joseph Shuford uses the example of a person who owns a lawnmower and uses it only once a week: "potential is wasted with the lawnmower just sitting in the shed, day after day."[84] By contrast, "[t]he mow-

78. *See supra* notes 11–12 and accompanying text.

79. *See The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 35 (2014) (written testimony of Philip Auerswald, Associate Professor of Public Policy, George Mason University), http://smallbusiness.house.gov/uploadedfiles/1-15-2014_revised_auerswald_testimony.pdf [https://perma.cc/CU6R-SYKA].

80. *See, e.g.*, Patrick Marshall, *The Sharing Economy*, SAGE BUS. RESEARCHER (Aug. 3, 2015), http://businessresearcher.sagepub.com/sbr-1645-96738-2690068/20150803/the-sharing-economy [https://perma.cc/7WMU-2A5U].

81. *The Sharing Economy—Sizing the Revenue Opportunity*, PWC (2014), http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html [https://perma.cc/KV8L-S7ZS]. Indeed, according to the Federal Trade Commission, platform- or sharing economy transactions totaled about $26 billion globally in 2013. Variation among estimates of the platform economy's value is likely a result of the lack of authoritative definition of that economy. *See* Press Release, Fed. Trade Comm'n, FTC to Examine Competition, Consumer Protection, and Economic Issues Raised by the Sharing Economy at June Workshop (Apr. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/04/ftc-examine-competition-consumer-protection-economic-issues [https://perma.cc/TNJ6-MXR3].

82. *See* Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. BAR J., 34, 34 (2014); *see also* Botsman, *supra* note 11.

83. Joseph Shuford, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. ONLINE 301, 305 (2015).

84. *Id.* at 305 n.29.

er's potential could be unlocked if the owner allowed others in his neighborhood to rent the mower on the days he was not planning on using it,"[85] and the users benefit because it is cheaper to rent a mower than buy one of their own. In short, everyone benefits when multiple parties are given access to the mower.

In the emerging platform economy, not only do providers and users benefit, but also—and on a much greater scale—PEBs benefit. By developing and promoting technology to facilitate an exchange that would not otherwise take place, the PEB creates value for both parties that they would not otherwise acquire. PEBs can therefore make money simply by creating and overseeing an opportunity for others to engage in a valuable exchange.[86]

PEBs have emerged to meet practically every major human need.[87] Two of the most popular and well-known PEBs—Uber, a business that connects drivers with passengers, and Airbnb, a business that connects property owners with short-term renters—offer illustrative examples of the way PEBs work.[88]

Uber, as we have already noted in the Introduction, connects people who want to go places with drivers who are willing to take them; some compare it to a traditional taxi service.[89] An Uber user, a passenger, needs a ride. She opens the app on her phone and, with the push of a button, requests a ride. Uber providers, here a fleet of drivers, are notified of the request via the Uber platform and given the GPS location of the passenger. A driver chooses to respond to the request and then picks up and transports the passenger to her desired location. The passenger pays through the app using a stored credit card so that no cash is exchanged in person. Uber takes a percentage of the fare for its part in facilitating the transaction. After the ride, the passenger rates the driver and the driver rates the passenger.

Airbnb connects property owners with people looking for a short-term vacation or other rental; it offers an alternative to traditional hotels and bed-and-breakfast establishments. The company's platform offers an opportunity to post attractive pictures of a property available for rent and detailed descriptions of its amenities. A transaction typically begins when an Airbnb user who desires to rent a home or an apartment, typically for a few days or weeks, logs on to the Airbnb app or website and finds a place to rent by searching through providers'

85. *Id.*

86. Each PEB structures its precise financial arrangement differently. Some charge both parties; others charge only one.

87. Well-known examples of PEBs include: Airbnb, Uber, Taskrabbit, Postmates, Homejoy, VRBO, Lyft, Relay Rides, Sidecar, Parking Panda, Rentoid, SnapGoods, MuniRent, Spinlister, GearLode, Funding Circle, and Prosper.

88. Throughout the Article we frequently use these two companies as examples. We are not claiming that they engage in discrimination or suggesting that they are any better or worse than other PEBs when it comes to discrimination. We use them as examples simply because their popularity increases the likelihood that readers will be familiar with them. Indeed, both of the authors frequently use and enjoy the services of Airbnb and Uber.

89. Lyft provides a similar service, but brands itself as comparable to a ride with a friend rather than a professional car service.

listings of their properties. The provider is notified of rental requests and, at his or her discretion, rents the unit to the user for a specified period of time. Airbnb takes a percentage of the nightly rate in exchange for facilitating the transaction. After the user's stay in the rental property, both parties to the transaction rate one another.

As illustrated by Uber and Airbnb, PEBs create value by offering an online platform that facilitates the exchange between the provider and the user. PEB platforms generally share a few key features. They almost always require parties to have profiles, which typically include names, photos, and other personal information. Sometimes the purpose of the profile is practical. For example, Lyft—a company whose business model is similar to that of Uber—encourages users to submit a photograph so that drivers can recognize their passengers.[90] Regarding profile photos, Lyft's website explains: "This is what your driver sees when picking you up. Help them out by making it look as much like you as possible!"[91] At other times, the purpose of the profile is less tangible—to build trust by giving parties more information about the person on the other side of the transaction. For example, Airbnb explains that "[y]our profile is a great way for others to learn more about you before they book your space or host you."[92] Like other PEBs, Airbnb strongly encourages both providers and users to create detailed profiles to maximize the benefits from using the site. It says: "When your profile is robust, it helps others feel that you're reliable, authentic, and committed to the spirit of Airbnb. Whether you're a host or a guest, the more complete your profile is, the more reservations you're likely to book, too."[93] The flip side of the message, of course, is that providers and users who do not create detailed profiles will be at a substantial disadvantage. If the norm in a particular PEB community is to provide a clear photo of oneself and a detailed biography, anyone who does not do so may inspire suspicion from their fellow platform participants.

PEB businesses also generally require users and providers to rate one another after transacting. The PEB then generates aggregate provider and user ratings by averaging ratings from all prior transactions. Using their platforms, PEBs

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90. *How to Edit Your Profile*, LYFT, https://help.lyft.com/hc/en-us/articles/214216247-How-to-Edit-Your-Profile [https://perma.cc/84BT-P6Y5]. Uber also encourages prospective passengers to upload a profile photo, although we were unable to determine exactly how the photo is used. *See How Do I Update My Profile*, UBER: HELP, https://help.uber.com/h/b8bc314c-6644-4305-b670-661ac42bacb8 [https://perma.cc/F5J4-T5LJ]. Uber requires drivers to upload photos, and those photos are visible to passengers once the driver is on the way to pick them up. *See Update My Profile Photo*, UBER: HELP, https://help.uber.com/h/15726fa5-152f-468c-a42c-ad63315b58ef [https://perma.cc/5WYJ-YJEL]; *see also How Do I Manage My Profile?*, TASKRABBIT, https://support.taskrabbit.com/hc/en-us/articles/204409590-How-do-I-manage-my-profile- [https://perma.cc/6WHJ-C8GP] ("Although not a requirement, we recommend adding a video that introduces yourself and shows your personality.").

91. *How to Edit Your Profile*, LYFT, https://help.lyft.com/hc/en-us/articles/214216247-How-to-Edit-Your-Profile [https://perma.cc/84BT-P6Y5].

92. *Why Do I Need to Have an Airbnb Profile or Profile Photo?*, AIRBNB, https://www.airbnb.com/help/article/67/why-do-i-need-to-have-an-airbnb-profile-or-profile-photo [https://perma.cc/N6GU-UTHV].

93. *Id.*

then disseminate this aggregate rating to participants, encouraging them to rely on it in determining whether, or with whom, to transact business. For example, Airbnb hosts and Uber drivers see their passengers' ratings before they decide whether to accept their requests. Sometimes, although not always, participants can also provide qualitative feedback about one another that will be available to future users. Airbnb posts such qualitative feedback on its platform in a way that is visible to other people using the platform, whereas Uber posts only the aggregate numerical rating while also inviting users to submit qualitative feedback to its customer service representatives.

Ratings are particularly salient in the platform economy—both numerical ratings and textual reviews. A traditional provider of goods or services is typically identified with a place in the physical world. As customers interact with the business over time, it develops a reputation in the relevant community. The platform economy does not fit this traditional business model.[94] With PEBs, much or all interaction takes place online, and the majority of PEB participants are unlikely to interact with one another more than once. At least in theory, then, rating systems are designed to compensate for this feature of the platform economy by promoting self-regulation, building trust, and creating accountability among platform economy participants. As Uber says of the numerical ratings that its drivers and passengers give one another, "[t]he rating system works to make sure that the most respectful riders and drivers are using Uber."[95] Airbnb, which displays both numerical and textual ratings, agrees: "our community relies on honest, transparent reviews."[96] The ratings function similarly to a traditional business's community reputation, offering participants a method of evaluating the other party to a transaction before engaging in the transaction.[97] Ratings thus play a significant role in the platform economy, with the result that PEB participants form judgments about one another substantially, or even exclusively, based on ratings.

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94. *See* Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/ [https://perma.cc/6KJH-PND8].

95. *I'd Like to Know My Rating*, UBER: HELP, https://help.uber.com/h/e9302f73-8625-427f-abf7-dbe7ab25af7d [https://perma.cc/XD9E-TPKG]; *see also* Elizabeth Greiwe, *Charming Your Way Into a 5-Star Uber Rating*, CHI. TRIB. (Nov. 25, 2015), http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-uber-ratings-driver-passender-1126-jm-20151125-story.html [https://perma.cc/VS6T-T4BV] (discussing her realization that many Uber drivers do not care about low ratings and do not put much thought into providing rides); Rachel Zarrell, *Here's How to Find Out Your Uber Passenger Rating (If You Really Want to Know)*, BUZZFEED (Sept. 21, 2015), http://www.buzzfeed.com/rachelzarrell/uber-passenger-rating#.qhEe1bQvjm [https://perma.cc/E2MQ-EL42] (describing the process riders should follow to determine their rating).

96. *How Do Reviews Work?*, AIRBNB: HELP CENTER, https://www.airbnb.com/help/article/13/how-do-reviews-work [https://perma.cc/B3CL-UMJV].

97. We note that traditional businesses are also increasingly evaluated on the basis of ratings websites such as Yelp and Google. Still, ratings are substantially more influential in the platform economy because participants often see one another only once and because most PEB participants cannot transact without seeing one another's ratings. Moreover, in the platform economy, *customers* are being rated in addition to businesses—an innovation unfamiliar in the traditional economy.

The emphasis on profiles and ratings in the platform economy is understandable. After all, if a PEB provider is hosting a person he has never met in his home or driving that person in his car, it is natural to want to know something about that person so that the provider can establish that the person is trustworthy or create a sense of accountability. Still, certain features of typical PEB profiles and rating systems raise concerns about bias and discriminatory behavior. We now turn to those concerns.

B. AN END TO DISCRIMINATION BY PUBLIC ACCOMMODATIONS?

American society is not colorblind. Research shows that white people receive better treatment than people of other races in a wide range of everyday situations.[98] A seminal study found that otherwise identical resumes with white-identified names (Emily, Greg) received 50% more job interviews and offers than those with black-identified names (Lakisha, Jamal).[99] Another study found that people with white-identified names, especially men, received more responses after emailing professors to request mentorship.[100] Recently, researchers found that law firm partners found more errors in an identical memo when they believed it was written by a black person than when they believed it was written by a white person.[101] Non-white people are disproportionately likely to be the victims of excessive force by police officers, both in simulations[102] and in the real world.[103] A wealth of research documents the phenomenon of

98. *See, e.g.*, Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 187–92 (2008).

99. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

100. *See* Katherine L. Milkman et al., *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway Into Organizations*, 100 J. APPLIED PSYCHOL. 1678, 1699 (2015), https://www.apa.org/pubs/journals/releases/apl-0000022.pdf [https://perma.cc/3E85-SD2E].

101. *See* Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS YELLOW PAPER SERIES (2014), http://www.nextions.com/wp-content/files_mf/1446822647201404011 4WritteninBlackandWhiteYPS.pdf [https://perma.cc/93LP-TGYN] (finding that an identical memo averaged a score of 3.2 out of 5.0 when reviewers thought the author was black and 4.1 out of 5.0 when reviewers thought the author was white).

102. *See, e.g.*, Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1007 (2007); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1314–15 (2002); Jessica J. Sim et al., *Understanding Police and Expert Performance: When Training Attenuates (vs. Exacerbates) Stereotypic Bias in the Decision to Shoot*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 291, 299 (2013) (finding that special unit officers in gang units demonstrate racial bias in the first-person-shooter task similar to untrained novices and unlike trained patrol officers).

103. Precise data on the number and race of people killed by police are notoriously difficult to obtain due to poor or inconsistent data collection practices at the local level; but many sources document substantial disparities. *See, e.g.*, Sendhil Mullainathan, *Police Killings of Blacks: Here Is What the Data Say*, N.Y. TIMES (Oct. 16, 2015), https://www.nytimes.com/2015/10/18/upshot/police-killings-of-blacks-what-the-data-says.html [https://perma.cc/22AH-FN58] (reporting that 31.8% of people shot by police are black, compared to 13.2% of African-Americans in the general population); *see also* Ryan

"driving while black or brown," in which non-white drivers are treated differently and worse than their white counterparts.[104] The same holds true in other parts of the criminal justice system.[105] One study even found that black people typically wait longer than white people for a car to stop to allow them to cross the street.[106]

Moreover, despite existing laws, race discrimination affects treatment by public accommodations. In field research using trained testers, Ian Ayres and Peter Siegelman found that white people were offered lower prices than black people when shopping for used cars.[107] Both research[108] and anecdotal evidence[109] suggest that non-white people have more difficulty hailing taxicabs. And we hear regular reports of "shopping while black" or discriminatory treatment of customers at retail establishments.[110] That discrimination occurs in these settings despite the existence of public accommodation laws attests to the unfortunate resilience of racial bias.

Many commentators have heralded the platform economy as a solution to such discrimination. Comparing Uber to the arduous task of hailing a cab, Latoya Peterson explains that "by most accounts, . . . Uber has made it easier for people of color to hail a ride home . . . . The arrival of Uber in New York meant that, finally, African American customers could catch a drama-free lift from point A to point B."[111] Calling an Uber can, in theory, avoid the problem people of color often face in hailing cabs—that is, the problem that the cab will

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Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), http://www.propublica.org/article/deadly-force-in-black-and-white?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter [https://perma.cc/JP8A-NRJR] (finding that police kill black men ages 15–19 twenty-one times more often than their white counterparts).

104. *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 275–88 (1999) (summarizing research on disparate treatment of black drivers).

105. *See, e.g.*, Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 183–99 (2013) (cataloguing empirical data revealing racial bias within the criminal justice system).

106. *See* Tara Goddard et al., *Racial Bias in Driver Yielding Behavior at Crosswalks*, NAT'L INST. FOR TRANSP. & COMMUNITIES 2 (2014) (finding over eighty-eight trials that black men had to wait 32% longer than white men to cross the street).

107. *See* Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 319 (1995).

108. *See, e.g.*, Cornell Belcher & Dee Brown, Brilliant Corners, Hailing While Black—Navigating the Discriminatory Landscape of Transportation (Feb. 12, 2015), http://www.brilliant-corners.com/post/hailing-while-black [https://perma.cc/23QU-RFKW].

109. *See, e.g.*, Cornell Belcher, *As a Black Man, It's Hard to Catch a Cab. And My Research Shows Even White People Know That*, WASH. POST (July 23, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/23/as-a-black-man-its-hard-to-catch-a-cab-research-shows-even-white-people-know-that/ [https://perma.cc/3P6H-ASCP].

110. *See, e.g.*, Harry Bruinius, *"Shopping While Black" Lawsuit—a First by Employees—Targets CVS*, CHRISTIAN SCI. MONITOR (June 4, 2015), http://www.csmonitor.com/USA/Justice/2015/0604/Shopping-while-black-lawsuit-a-first-by-employees-targets-CVS-video [https://perma.cc/S2RN-4ZR2] (describing lawsuit by former CVS employees who claim they were instructed to follow black and Hispanic customers and listing other instances of race discrimination in retail).

111. Latoya Peterson, *Uber's Convenient Racial Politics*, FUSION (July 23, 2015), http://fusion.net/story/170983/uber-racial-politics/ [https://perma.cc/AU4C-PEDL].

just keep driving. This problem is paradigmatic of the struggle people of color face in striving for equal participation in the economy. The hope, writ large, is that PEBs rely on the Internet, and that no one has a race on the Internet. Thus, race discrimination will disappear.

We certainly understand the desire for optimism, and of course we do not dispute that many people of color have positive experiences with PEBs, whether as providers, users, or PEB operators. We agree that PEBs sometimes do provide users with better experiences than analogous businesses in the traditional economy. And as we will discuss in more detail later, we think that PEBs have great potential to ameliorate race discrimination through careful design and management of their online platforms.[112]

Yet as Jerry Kang observed more than a decade ago, the claim that the Internet completely filters out racism is premature at best.[113] Most obviously, the Internet does not automatically remove either the presence or salience of race.[114] Scholars examining "big data" have found that online databases, despite implying neutrality, actually capture and perpetuate the biases of their creators and administrators.[115] Studies have shown that black and Latina/o people experience more online harassment than white people,[116] and anecdotal evidence also supports the claim.[117]

The same is also true in online markets. Research suggests that the Internet has not solved the problem of race discrimination. In a study of eBay auctions of baseball cards, researchers found that otherwise identical cards held by a black hand in a photograph sold for 20% less than cards held by a white hand.[118] Similarly, prospective buyers are less likely to respond to Craigslist postings showing an iPod held by a black hand compared to an identical ad with a white hand.[119]

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112. *See infra* notes 275–83.

113. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1159 (2000).

114. *See, e.g.*, *id.* at 1133–35 (providing examples of how race might and does matter on the Internet).

115. *See generally* Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016); James Grimmelmann, *Discrimination by Database*, JOTWELL (Nov. 14, 2014), http://cyber.jotwell.com/discrimination-by-database/ [https://perma.cc/3SSP-WG9R] ("[O]n closer inspection, almost every interesting dataset is tainted by the effects of past discrimination.").

116. *See, e.g.*, Maeve Duggan, *Part 1: Experiencing Online Harassment*, PEW RES. CTR. (Oct. 22, 2014), http://www.pewinternet.org/2014/10/22/part-1-experiencing-online-harassment/ [https://perma.cc/TR4S-M5VP] (finding that 51% of black people and 54% of Latina/o people report experiencing online harassment, as compared with 34% of white people).

117. *See, e.g.*, Terrell Jermaine Starr, *The Unbelievable Harassment Black Women Face Daily on Twitter*, ALTERNET (Sept. 16, 2014), http://www.alternet.org/unbelievable-harassment-black-women-face-daily-twitter [https://perma.cc/T98M-Z4G6].

118. *See* Ian Ayres et al., *Race Effects on eBay*, 46 RAND J. ECON. 891, 905 (2015).

119. *See generally* Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. 469 (2013).

Relatively little research or case law, thus far, has specifically examined the problem of race discrimination in the platform economy.[120] The research that has, however, provides support for the intuitive notion that the discrimination prevalent in the old economy also infects the new.[121] In a recent study, researchers found that Airbnb properties listed by black people received 12% less than otherwise comparable properties owned by white people.[122] Likewise, Airbnb users with distinctively black-identified names were 16% less likely to be accepted to rent a property.[123] Another study found that black Uber passengers tend to wait longer for their rides to arrive and are more likely to have drivers cancel rides on them.[124] In the lending arena, loan listings with pictures of black prospective borrowers on Prosper.com are less likely to receive funding than similar listings with pictures of white borrowers.[125]

The research we have described suggests that discrimination in the platform economy takes place in several different, often overlapping ways. First, research shows that discrimination often occurs if users are primed with a picture, a racially correlated name, or both.[126] The many PEB platforms that incorporate these features have the power to trigger the same explicit or implicit bias present in the traditional economy. As Jenna Wortham says of Uber, "[b]ecause drivers can reject riders for any reason, you have no way of knowing whether it's because of your rating, your name (from which race can often be inferred), or the neighborhood you're in."[127] So although we generally cannot draw conclusions about any specific PEBs because their user data are not public, it is unlikely that the entire platform economy is a discrimination-free sanctuary given the discrimination that pervades the traditional marketplace and the world at large.[128]

Indeed, in some instances, the Internet has the power to make discrimination worse than in the traditional economy. As we have noted, Uber, Airbnb, and many other PEBs allow bidirectional ratings. On Uber, drivers rate passengers

120. Some cases have examined the possibility of discrimination on the basis of disability. *See, e.g.*, Nat'l Fed'n of the Blind v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1084 (N.D. Cal. 2015) (holding that a claim of discrimination under the ADA and Unruh Act survived motion to dismiss).

121. *See* Leong, *The Sharing Economy Has a Race Problem*, *supra* note 13; *cf.* Benjamin Sachs, *Uber: A Platform for Discrimination?*, ON LABOR (Oct. 22, 2015), http://onlabor.org/2015/10/22/uber-a-platform-for-discrimination/ [https://perma.cc/35UW-2GXA] (noting the potential for discrimination that arises when Uber riders rate Uber drivers).

122. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 4 (Harvard Bus. Sch., Working Paper No. 14-054, 2014).

123. Edelman et al., *supra* note 2, at 2.

124. *See* Eric Newcomer, *Study Finds Racial Discrimination by Uber and Lyft Drivers*, BLOOMBERG (Oct. 31, 2016), https://www.bloomberg.com/news/articles/2016-10-31/study-finds-racial-discrimination-by-uber-and-lyft-drivers [https://perma.cc/4WCN-K3N4].

125. *See* Devin G. Pope & Justin R. Sydnor, *What's in a Picture?: Evidence of Discrimination from Prosper.com*, 46 J. HUM. RESOURCES 53, 55 (2011).

126. *See generally* Edelman & Luca, *supra* note 122, at 3.

127. Jenna Wortham, *Ubering While Black*, MATTER (Oct. 23, 2014), https://medium.com/matter/ubering-while-black-146db581b9db [https://perma.cc/73M6-H6RA].

128. *See supra* notes 121–27.

and passengers rate drivers.[129] On Airbnb, landlords rate renters and renters rate landlords.[130]

At first, such rating systems might seem like a good thing. As we noted in section I.A, they provide a way for PEBs to monitor the interactions facilitated by their platforms. Uber provides an illustrative example. Its rating system helps the company hold drivers and passengers accountable for their behavior, allowing Uber to ban the worst of both. But rating systems also have negative consequences, including allowing people to express biases and facilitating discrimination. As Parker Higgins has said, "[w]hen you condition catching a cab on how drivers rate passengers, you run the risk of amplifying human biases."[131]

On many platform economy platforms, providers rate users after a real-life interaction, increasing the likelihood that the ratings will reflect the conscious or unconscious bias of the provider entering the rating. So it is quite likely that some participants rate people of color less favorably than white people as the result of the biases seen time and time again in the studies we have elaborated.[132] The result of these biased ratings will be a lower overall score.[133]

Moreover, both in situations in which the provider and user meet in real life and in situations when they do not, the profiles that many PEBs encourage or require providers and users to create can be equally problematic. The typical profile includes a party's name and often a photo, which allows those who interact with the profile online, before a transaction, to infer or at least speculate about the user's race. Many PEBs require users to use their real names in their profile, and because names are often perceived as racialized ("Emily" versus "Lakisha"),[134] this practice "open[s] the door for some discrimination on the part of" providers who decide whether a user can stay in their house or ride in their car.[135] This feature creates the risk that a provider will deny service based

129. *See* Leong, *The Sharing Economy Has a Race Problem*, *supra* note 13.

130. *See* Todisco, *supra* note 13.

131. Alex Hern, *Are Uber's Passenger Ratings Big Data for Good—or Discrimination 2.0?*, THE GUARDIAN (July 28, 2014), https://www.theguardian.com/technology/2014/jul/28/are-ubers-passenger-ratings-big-data [https://perma.cc/7ANK-LL5U].

132. *See supra* notes 97–111 and accompanying text. The extent to which racial bias infects ratings may depend on the extent and nature of the in-person interaction between providers and users.

133. Given that our emphasis in this paper is on public accommodations, we focus on the ratings received by users of platform economy businesses—Uber passengers, Airbnb renters, and so forth. Future work could profitably explore the effect of rating systems on drivers, which some researchers and members of the media have already begun to examine. *See, e.g.*, Josh Dzieza, *The Rating Game: How Uber and its Peers Turned Us into Horrible Bosses*, THE VERGE (Oct. 28, 2015), http://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden [https://perma.cc/7AWZ-6JZK] ("Ratings also give power to whatever biases customers have."); Sachs, *supra* note 121.

134. *See generally* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283.

135. Biz Carson, *Harvard Study Finds People With Black-Sounding Names Have a Harder Time Booking on Airbnb*, BUSINESS INSIDER (Dec. 10, 2015), http://www.businessinsider.com/airbnb-has-a-race-

on a user's race—perhaps an Uber driver or an Airbnb host might simply not respond to a request from a prospective user of a race the provider dislikes. Similarly, studies have suggested that profile photos of users on sites like Airbnb often make it easy for providers to identify users' race and engage in discrimination.[136] Thus, discrimination not only occurs, but is also perpetuated in the platform economy as a "consequence of a seemingly-routine mechanism for building trust."[137] And the perception of the rating system as fair, or even as somewhat unfair but still useful, only compounds the problem.

Whether as a result of profiles, in-person interactions, or both, non-white people may receive lower ratings—and these biased ratings can self-perpetuate.[138] If an Uber driver sees that a passenger has a somewhat lower score than many others, he may be primed to draw a negative conclusion about the passenger on the basis of innocuous or ambiguous behavior, such as lack of talkativeness or wearing headphones, or even to form an overall negative impression of the customer for no particular reason. A snowball effect ensues, with slightly low ratings creating negative first impressions and leading to more substantially lower ratings.[139] Thus, aggregating ratings affected by bias has the potential, over time, to amplify individual expressions of bias and result in significantly lower ratings for non-white users.[140]

Ultimately, lower ratings lead to a worse user experience. If an Uber passenger has a below average rating, she may wait longer to be picked up by a driver. In some instances, particularly when demand is high, she might not be picked up at all. Uber will even ban specific passengers for allegedly extreme behavior resulting in low ratings, although the process for getting banned—or unbanned—is far from transparent.[141] In short, lower ratings interfere with the "full participation in an equal society" that the Civil Rights Act of 1964 was intended to guarantee for all people.

When a driver does pick up a passenger with a low rating, their interaction may be less pleasant if the driver—consciously or unconsciously—expects her to be unpleasant based on her rating. The driver may be less willing to turn the music down or change the station, to turn the air conditioning up or down, or to

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problem-with-names-2015-12 [https://perma.cc/6HLK-BWCS]. In contrast to this common practice by PEBs, many online marketplaces, such as eBay, Amazon, and Expedia, allow users to create a screen pseudonym or allow anonymous activity up to the point of the transaction. *Id.*

136. *See* Caroline Moss, *Harvard Study Suggests Airbnb Has a Racism Problem*, BUSINESS INSIDER (Jan. 21, 2014), http://www.businessinsider.com/airbnb-has-a-racism-problem-2014-1 [https://perma.cc/23LV-22H9].

137. *Id.*

138. Leong, *The Sharing Economy Has a Race Problem*, *supra* note 13.

139. *Cf.* Sinan Aral, *The Problem With Online Ratings*, MIT SLOAN MGMT. REV. (Dec. 19, 2013), http://sloanreview.mit.edu/article/the-problem-with-online-ratings-2/ [https://perma.cc/LG8L-5PLC].

140. Although we do not know for sure, we suspect that this may have happened to our friend Jamal, whose experiences with Uber we described in the Introduction.

141. *See* Sage Lazzaro, *Uber Will Ban You If Drivers Give You a Bad Rating*, OBSERVER (Nov. 11, 2015), http://observer.com/2015/11/uber-will-ban-you-if-drivers-give-you-a-bad-rating/ [https://perma.cc/4U2X-7H88].

take a route the passenger prefers. And if, for some reason, the interaction continues past the point of drop-off—say, for example, the passenger leaves his cell phone in the car—the driver's unfavorable impression of the passenger may affect whether the driver is willing to make a trip to drop off the missing item or whether the item simply disappears.[142]

Anecdotal evidence suggests that Uber drivers may indeed give nonwhite passengers lower ratings, whether consciously or unconsciously. Many riders report instances of discrimination involving Uber. One user tweeted: "[T]hird uber driver that said they were hesitant abt picking me up bc of my name. this is discrimination."[143] Another tweeted that his "driver stopped on the opposite side of the street, asked me to wave and then pulled off."[144] *The Daily Beast* editor Tessa Miller reported: "My Uber driver just told me he tries to remember white peoples' names so he can pick them up and not black people."[145] There have also been numerous reports of racially inflected interactions and even racially motivated violence.[146]

From a legal perspective, what can we do about race discrimination in the platform economy? The next Part considers how existing legal mechanisms apply to discrimination arising in the platform economy.

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142. Anecdotal evidence suggests that many drivers exercise discretion in deciding whether to return items left in their vehicles. On the Uber People forum, for example, one driver stated:

> I had a simple return policy—if they were nice on the phone or text, I would bring them their stuff or meet them halfway. Most people were very grateful and there was usually a cash tip or gift card. My favorite reward was getting a $50 Starbucks card for returning an iPad, that came in real handy working late nights and early morning. Any kind of attitude got their **** ignored or thrown in the trash. I don't give a frig about these animals. They want to act like losers, they get treated as such.

Odiezilla, Comment to *Honesty Reward*, UBER PEOPLE (Nov. 28, 2015), http://uberpeople.net/threads/honesty-reward.46553/#post-625487 [https://perma.cc/Z3E3-AAUK]. Another driver recalled:

> Twice a pax [passenger] left a phone in my car. First time I contacted Uber and the pax. Got the usual 'you better return it to where you dropped me off,' yeah, 15 miles away. F that. Told the pax to meet me at a place close to me and handed over their phone. I also noticed that the next day (2 days after the initial trip) my rating tanked. Next time I found a phone, I turned it off and dropped it at the nearest trash can [sic]. After a while, I don't remember if I've 'found' other stuff that was erroneously thrown in a trash can [sic] with my trash.

Not Me, Comment to *Honesty Reward*, UBER PEOPLE (Nov. 24, 2015), http://uberpeople.net/threads/honesty-reward.46553/#post-625487 [https://perma.cc/Z3E3-AAUK].

143. @is2times, TWITTER (Oct. 6, 2015, 9:39 PM), https://twitter.com/is2times/status/651572578155372548 [https://perma.cc/MX8N-DZ77].

144. @steven_bow, TWITTER (Oct. 19, 2015 10:58 PM), https://twitter.com/steven_bow/status/656303566953558017 [https://perma.cc/NT93-LNK2].

145. @TessaJeanMiller, TWITTER (June 26, 2015, 8:29 AM), https://twitter.com/TessaJeanMiller/status/614410081359273984 [https://perma.cc/TM99-T8CL].

146. *See, e.g.*, Tom Marshall, *Uber Driver 'Called Woman Black C*** and Punched Her After Multiple Drop-Off Row'*, LONDON EVENING STANDARD (Nov. 29, 2015), http://www.standard.co.uk/news/crime/uber-driver-called-woman-black-c-and-punched-her-after-multiple-dropoff-row-a3125686.html [https://perma.cc/E587-F9PF] (woman allegedly punched in the face and pushed to the ground after Uber driver called her a "black cunt").

III. NEW ECONOMY DISCRIMINATION AND LAW

This Part surveys existing antidiscrimination laws that might be used to address race discrimination in the new economy. Such laws have considerable promise. But they also provide an imperfect fit for some of the platform economy's unique characteristics. This Part discusses both the opportunities and challenges presented by our current statutory regime, ultimately concluding that some existing laws can be used to address the problem of racial discrimination in the platform economy, but that their reach is incomplete.

A. EXISTING LAWS

This section examines existing doctrinal mechanisms for addressing race discrimination by public accommodations in the new platform economy. We begin with the paradigmatic statute governing race discrimination in public accommodations, Title II of the 1964 Civil Rights Act, and then turn to other legislation that can be used to supplement Title II.

1. Title II

In enacting Title II, Congress intended to address discrimination in interstate commerce.[147] The law had both social and individual benefits. At a social level, the law ensured a better-functioning marketplace, free of irrational discrimination. And at an individual level, the law protected racial equality and dignity, as well as removing practical obstacles to the ability to travel, engage in commercial transactions, and participate fully in society. As one authority explains, "[a]t its core, the Act was calculated to 'eliminate the inconvenience, unfairness and humiliation of racial discrimination.'"[148]

Neither Congress nor the courts has addressed how Title II should apply in today's new economy. As enacted, the statute only specified public accommodations consisting of traditional physical locations,[149] but the entities that perform the function of such public accommodations have evolved.[150] Although some courts have suggested that the places specified in the statute are essentially a comprehensive list,[151] most courts have adopted a more expansive

147. *See supra* Part I.

148. RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS 993–94 (3d ed. 2016) (quoting Miller v. Amusement Enters., Inc., 394 F.2d 342, 353 (5th Cir. 1968)).

149. *See* Tara E. Thompson, Comment*, Locating Discrimination: Interactive Web Sites as Public Accommodations Under Title II of the Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 412 ("The courts, however, have not reached a consensus as to under what circumstances "non-physical" establishments can be Title II public accommodations.").

150. Moreover, neither the statute nor the legislative history provides an exhaustive definition of the term "other places of exhibition or entertainment." *See id.* at 435. So the exact scope of the phrase is not settled, either in the physical world or online. *See generally* Radiance A. Walters, Note, Denny v. Elizabeth Arden Salons, Inc.*: Condoning Race Discrimination in Resembling Places of Public Accommodation Under Title II*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 407 (2008).

151. *See, e.g.*, Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431 (4th Cir. 2006) (holding hair salon not an "other place of exhibition or entertainment").

reading.[152] The Fifth Circuit, for example, has held that it is "well established" that "Title II of the Civil Rights Act is to be liberally construed and broadly read."[153] This sentiment has been echoed by commentators: "Certainly, Congress did not intend to allow or promote racial discrimination in places that were not listed in the statute."[154] In short, if the Act was calculated "to eliminate the inconvenience, unfairness and humiliation of racial discrimination,"[155] then Title II should be read liberally to eliminate racial discrimination in public places.

Do PEBs fall within the ambit of Title II? To answer this question, we should first evaluate whether Title II applies to the *individuals* who act as providers in transactions via PEBs.

Consider housing rental businesses such as Airbnb. Courts have not yet addressed whether Title II applies to Airbnb providers, but there is a plausible argument that it covers many of them. Title II explicitly applies to "any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence."[156] So Title II certainly proscribes discrimination by any provider whose property has more than five rooms or by any provider who never lives on the property she offers on Airbnb. Other situations are less clear. For example, what about an owner who rents out his own house while he travels overseas—can such an individual be said to "actually occup[y]" the rental property?[157] Some of these situations, if not covered by Title II, might be covered by other federal statutes; others might not, highlighting the need for new legislation.

Or consider ride-sharing businesses such as Uber and Lyft. Title II itself is silent as to whether it covers taxicabs, although, as we have noted, most courts have held that the statute's list of covered places is not exhaustive.[158] Under the common carrier doctrine, many commentators have assumed that taxicabs are public accommodations,[159] while others have argued that they should be so

152. *See, e.g.*, Daniel v. Paul, 395 U.S. 298, 305–08 (1969) (reading statute broadly to find that lakeside recreational club was "place of exhibition or entertainment").

153. *Miller*, 394 F.2d at 349.

154. Walters, *supra* note 150, at 428–29.

155. *Miller*, 394 F.2d at 353.

156. 42 U.S.C. § 2000a(b) (2012); *see also* Todisco, *supra* note 13, at 124.

157. Researchers have also considered whether housing-specific statutes such as the Fair Housing Act (FHA) might apply to Airbnb and other platform economy businesses operating in the housing sector. *See generally* Todisco, *supra* note 13. We discuss the FHA in section III.A.2, *infra*.

158. *See supra* notes 149–55 and accompanying text.

159. *See, e.g.*, Peter Siegelman, *Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?*, *in* A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69, 70 (Michael Fix & Margery Austin Turner eds., 1998) (referring to "hailing a taxicab" as a "public accommodation"); Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 605–06 (1999) ("Since . . . Congress passed the Civil Rights Act of 1964, it has been illegal for common carriers, including taxis to discriminate on the basis of race.").

classified.[160] In both instances, litigation of such cases is rare because prospective litigants often lack the resources to engage in litigation and suffer from imperfect information.[161]

One source of assistance in understanding the term "public accommodation" is the Americans With Disabilities Act (ADA),[162] which is particularly relevant because, like public accommodation laws, it is designed to protect against discrimination. The ADA has been interpreted to cover transportation businesses, and federal regulations explicitly apply the term to taxicab companies.[163] And in any event, taxicabs remain subject to state and local regulations that prohibit discrimination in public accommodations.[164] Here, then, existing law suggests that Title II might cover not only Uber drivers, but also reach Uber itself. This would allow plaintiffs to sue not only individual drivers—who may be judgment-proof—but also the large companies for whom they work, who are generally more appealing defendants.

This reading of the law sets up the more important question, which is not whether Title II would apply to individual Airbnb or Uber providers, but whether the statute would apply to Uber, Airbnb, and other PEBs themselves. Reaching PEBs themselves is critical to providing a meaningful remedy to plaintiffs[165] and to instituting structural reform. The question thus becomes: are PEBs public accommodations?

Analysis of this question could proceed in either of two ways, and we think that under either analysis Title II is best construed to apply to PEBs such as Airbnb and Uber. The first analysis is a functional one similar to the analysis some courts have adopted with respect to traditional economy businesses that are not explicitly covered by existing statutes.[166] Under this analysis, PEBs should be considered subject to Title II simply because they are displacing and replacing businesses that are subject to Title II, and because, from the perspective of the consumer, they fulfill exactly the same needs as traditional businesses that are in fact subject to Title II. Surely it would not make sense to

160. *See, e.g.*, Danita L. Davis, Note, *Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier Than Hailing a Taxi*, 37 VAL. U. L. REV. 929, 931 (2003).

161. Prospective litigants nearly always lack the information, financial resources, time, and will to sue under any civil rights statute; moreover, it is difficult for a single individual to gather the information necessary for a lawsuit. *See* Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 347 (1996).

162. 42 U.S.C. §§ 12101–12213 (2012).

163. 49 C.F.R. § 37.29(a) (2009) ("Providers of taxi service are subject to the requirements of [the transportation and related provisions of Titles II and III of the ADA].").

164. Some state statutes specify that taxis are a public accommodation. *See, e.g.*, D.C. CODE § 2-1401.02(24) (2010) (defining "place of public accommodation" to include "all public conveyances"); MINN. STAT. ANN. § 363.03, subdiv. 3 (West 1998); *see generally* Totem Taxi, Inc. v. New York State Human Rights Appeal Bd., 480 N.E.2d 1075 (N.Y. 1985) (treating taxis as public accommodations under the New York State civil rights law).

165. For example, many individual providers may be insolvent.

166. *See* Singleton v. Gendason, 545 F.2d 1224, 1227 (9th Cir. 1976).

exclude from Title II an Airbnb rental that fulfills exactly the same consumer need as a hotel simply because Airbnb is not technically a hotel,[167] or to exclude an Uber service that functions exactly like a taxi ride simply because it is not technically a taxi.[168] One might fairly argue that individual Airbnb owners are not equivalent to a Hilton or Marriott, but the company as a whole presents a close analogy.

The second analysis is more complex, but yields the same result. This analysis evaluates whether PEBs are public accommodations by examining the online platforms integral to their business model. Because these platforms are public accommodations within the meaning of Title II,[169] so are the businesses, and individuals must be able to access both the platforms and the services those platforms provide.

Case law concerning whether websites are places of public accommodation is scant. In *Noah v. AOL Time Warner Inc.*, the Eastern District of Virginia held than an online chat room was not an "establishment" covered by Title II of the Civil Rights Act, while stating that "'places of public accommodation' must consist of, or have a clear connection to, actual physical facilities or structures."[170] That is, a website can be a public accommodation, even though the chat room at issue was not. Commentators have also argued that Title II should apply in cyberspace—some contending that it should apply to all websites generally, others asserting that it should apply at least to those with a clear nexus to physical places.[171]

The ADA again helps to clarify the meaning of "public accommodation." Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[172] Both the *Noah* court, which relied on ADA cases in its decision, and other courts have indicated that the definition of

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167. One might argue that this is exactly what the current exemption for businesses with fewer than five units whose owners live on the rental property accomplishes—that is, it exempts something that functions exactly like a hotel but is not a hotel. This argument, however, fails to acknowledge that Airbnb is in some sense the largest hotel chain in the world: it aggregates listings from thousands of owners, and it is therefore inapposite to apply an exception designed to address situations involving very small lodgings with a single owner.

168. *Cf.* Leong, *The Sharing Economy Has a Race Problem*, *supra* note 13 (noting the potential for discrimination that arises when Uber riders rate Uber drivers).

169. *See* Daniel H. Kahn, *Social Intermediaries: Creating a More Responsible Web Through Portable Identity, Cross-Web Reputation, and Code-Backed Norms*, 11 COLUM. SCI. & TECH. L. REV. 176, 237 (2010) (arguing that excluding people from websites on the basis of race, whether directly or indirectly, violates Title II); Thompson, *supra* note 150, at 411 (contending that websites are places of public accommodation within the meaning of existing Civil Rights Act law).

170. 261 F. Supp. 2d 532, 543–44 (E.D. Va. 2003).

171. *See* Ronnie Cohen & Janine S. Hiller, *Towards a Theory of CyberPlace: A Proposal for a New Legal Framework*, 10 RICH. J.L. & TECH. 41, ¶¶ 52–64 (2003).

172. 42 U.S.C. § 12182(a) (2012).

"public accommodation" for purposes of the ADA is broader than Title II,[173] but have also held that the more abundant case law interpreting the ADA provides insight into the question of whether a particular website is a public accommodation.[174]

Courts have reached varying conclusions as to whether websites operated by public accommodations are, themselves, public accommodations for purposes of the ADA.[175] The most recent precedents, however, tend toward a broader understanding of public accommodations. In *National Federation of the Blind v. Scribd Inc.*, for example, the District of Vermont held that Scribd—an online-only document repository—was a public accommodation within the meaning of Title III of the ADA.[176] The court reasoned that the meaning of a public accommodation is not limited to physical places because "it would make little sense if a customer who bought insurance from someone selling policies door to door was not covered but someone buying the same policy in the parent company's office was covered. It is highly unlikely Congress intended such inconsistent results."[177] Moreover, the legislative history of the ADA counsels in favor of such a finding: "[T]he Committee Reports suggest that the important quality public accommodations share is that they offer goods or services to the public, not that they offer goods or services to the public at a physical location."[178]

The same trend is evident in other sources of authority. The Department of Justice is in the process of promulgating official regulations regarding the ADA in relation to the Internet[179] and, in at least some settings, it has argued that the ADA applies.[180] Likewise, scholars have argued that the Internet as a whole,[181]

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173. *Noah*, 261 F. Supp. 2d at 544.

174. *See id.*

175. *See, e.g.*, Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012) (holding that web-streaming services offered by Netflix are subject to Title III of the ADA even without a nexus to a physical place of accommodation); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1115–16 (N.D. Cal. 2011) (holding that Facebook is not a public accommodation); Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006) (holding that Title III of the ADA applies only when there is a "nexus" between a challenged service offered over the Internet and a physical place of public accommodation); Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (holding that an airline's website was not a place of public accommodation because plaintiffs "failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation").

176. 97 F. Supp. 3d 565, 576 (D. Vt. 2015).

177. *Id.* at 572–73.

178. *Id.* at 573–74.

179. *See* Nondiscrimination on the Basis of Disability, 75 Fed. Reg. 43,460 (July 26, 2010) (to be codified at 28 C.F.R. pts. 35 and 36).

180. *See, e.g.*, *Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the House Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 2 (2000) (statement of Rep. Canady, Chairman, Subcomm. on the Constitution) ("[I]t is the opinion of the Department of Justice currently that the accessibility requirements of the Americans with Disabilities Act already apply to private Internet Web sites and services."); Nondiscrimination on the Basis of Disability, 75 Fed. Reg. at 43,465 ("The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of 'public accommodations,'

or at a minimum individual websites, are public accommodations.[182]

This authority supports the claim that PEBs are public accommodations. Although Internet platforms are integral to their operation, PEBs are nonetheless intimately linked to physical places that function like public accommodations in the traditional economy. A PEB's online platform is the only way of accessing its physical aspects—that is, Airbnb's website is the only way of gaining access to a physical rental, and Uber's app is the only way of summoning a physical car. This relationship to physical place distinguishes PEB websites from the chat room in *Noah*, which had no physical component.[183] For our purposes, it is unnecessary to determine whether a website *must* have a link to something in the physical world: PEB platforms do, and that is sufficient to establish that they are public accommodations.

On the basis of these authorities, we conclude that PEBs should be considered public accommodations. Like the public accommodations traditionally covered by Title II of the Civil Rights Act, PEBs are held out as open to the public, so ensuring that such entities do not engage in race discrimination comports with the purpose of that legislation. Moreover, if the traditional economy business that a PEB is replacing is a public accommodation, then it makes sense to categorize the two in the same way. To act differently would move an increasingly large number of businesses outside the scope of our civil rights enforcement mechanisms. Finally, the analogous precedent from the disability arena favors a conclusion that PEBs are public accommodations. Although, as we will discuss in section III.B, prospective litigants must overcome certain unique obstacles in any public accommodation lawsuit against a PEB, in many circumstances Title II offers recourse for users who suffer discrimination on the basis of race.

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as defined by the statute and regulations."); Letter from Deval L. Patrick, Assistant Att'y Gen., to Senator Tom Harkin (Sept. 9, 1996), http://www.techlawjournal.com/docs/1996/19960909.asp [https://perma.cc/5NJ6-UCJ2] ("Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet.").

181. *See, e.g.*, Colin Crawford, *Cyberplace: Defining a Right to Internet Access Through Public Accommodation Law*, 76 TEMP. L. REV. 225, 227 (2003) ("Internet exclusion is a real and troubling phenomenon."); Thompson, *supra* note 149, at 428–29 (describing divide among courts and commentators as to whether websites require a relationship to a physical location to count as public accommodations).

182. *See* Thompson, *supra* note 149, at 439. Much of this scholarship has approached the issue of whether a website requires a nexus to a physical place to qualify as a public accommodation from a disability-rights perspective, arguing that websites are public accommodations and are therefore covered by section III of the ADA. *See, e.g.*, Trevor Crowley, Comment, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651, 652 (arguing that a website functioning as a "storefront" for a business that provides a substantial amount of goods or services from a physical location is a public accommodation).

183. Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003).

2. Other Legislation

Other federal statutes, although not targeted specifically at public accommodations, complement Title II of the Civil Rights Act and offer additional remedies for some individuals who suffer discrimination in public accommodations on the basis of race. These statutes may be a more natural fit for certain situations than are lawsuits under Title II.

As we discussed in Part I, 42 U.S.C. § 1981—a Reconstruction Era civil rights statute passed as part of the Civil Rights Act of 1866—can help to ensure public accommodation norms. Section 1981 protects the equal right of all persons to make and enforce contracts without discrimination.[184] As the Eleventh Circuit stated, "[t]he aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."[185]

Unlike Title II, section 1981 applies broadly to all contracts: it has no limitation parallel to the question of whether a particular PEB falls under the definition of a public accommodation. Accordingly, even though it is not specifically oriented to address discrimination by public accommodations, section 1981 is a useful tool in the civil rights litigator's toolbox to combat this form of discrimination in the platform economy.[186]

The statute defines "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[187] As noted previously, it applies to both private discrimination and discrimination resulting from state action.

Section 1981 covers activities undertaken by PEBs during their normal course of business.[188] When a user signs up with a given PEB platform, the user and the PEB become parties to a contract. A secondary or subsidiary contract is formed between the user and provider when the user engages with the application to take advantage of the service being offered. If a non-white user suffers inferior service or even a total denial of service on the basis of her race, her ability to contract with the PEB is impaired and section 1981 should apply.[189]

In transactions involving PEBs that deal with renting houses, apartments, or other lodging, both 42 U.S.C. § 1982 and the Fair Housing Act (FHA) provide potential remedies for race discrimination. Section 1982 is a companion statute

184. *See* Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 474 (2006).

185. Brown v. Am. Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991).

186. Section 1981 is already used in other situations that implicate the concerns of traditional public accommodation law. *See* Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1091 (10th Cir. 2001) (holding that store interfered with enforcement of contract under section 1981 based on customer's race).

187. 42 U.S.C. § 1981(b) (2012); *see also Domino's*, 546 U.S. at 475.

188. *See* Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).

189. *See* 42 U.S.C. § 1981(c).

to section 1981, also originating from the Civil Rights Act of 1866.[190] Section 1982 states: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[191] Therefore, the statute would apply to transactions involving PEBs such as Airbnb, and would prohibit any discrimination on the basis of race.

The FHA, enacted as Title VIII of the Civil Rights Act of 1968, also addresses discrimination in housing on the basis of race.[192] It prohibits race discrimination in buying or renting dwellings—including discriminatory terms in sale or rental agreements, and discriminatory advertising—and misrepresentation of relevant information to prospective residents because of their race.[193]

The statute exempts single-family homes rented by the owner.[194] Nonetheless, many rentals that take place through PEBs such as Airbnb would still warrant protection under the terms of the statute. The single-family home exemption applies only to owners, and many Airbnb rentals are listed by people who are themselves renters rather than owners. Moreover, the exemption does not apply "when the services of a real estate broker or any person in the business of renting dwellings are involved in the rental transaction."[195] Airbnb's business model is closely comparable to that of a broker—its website performs the services of a broker—and because it profits whenever a property is rented, it seems fair to say that it is in the "business of renting dwellings."[196]

Precedent supports such an interpretation. In *Singleton v. Gendason*, the Ninth Circuit considered the applicability of section 1982 and the FHA to a "rental organization that receives notices of available housing from various landlords and compiles a list which it then sells for a fee to persons seeking housing."[197] The court held: "Rosalie's Rentals is not a real estate broker, dealer, or agent, but the services it offers fall within the broad category of services embraced in the language 'business of renting dwellings.'"[198] The court then concluded that the owner exception was a narrow one: "The single-family dwelling owner can [discriminate] only if he goes his discriminatory way

190. Malone v. Schenk, 638 F. Supp. 423, 426 (C.D. Ill. 1985) ("Because Congress originally enacted both section 1981 and section 1982 as parts of the Civil Rights Act of 1866, the Supreme Court has consistently relied upon a common legislative history to construe the two statutes similarly." (citations omitted)); *see also* Runyon v. McCrary, 427 U.S. 160, 168–74 (1976); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439–40 (1973). We will discuss these similarities in more detail in section III.A.3.

191. 42 U.S.C. § 1982. The statute would also apply to rental of other property, such as vehicles or tools, although we focus on housing given that the largest PEBs currently involve real property rather than other kinds of personal property.

192. *Id.* §§ 3601–3619.

193. *Id.* § 3604.

194. *Id.* § 3603(b)(1).

195. Singleton v. Gendason, 545 F.2d 1224, 1227 (9th Cir. 1976).

196. *See id.*

197. *Id.* at 1226.

198. *Id.* at 1227.

alone. If he seeks the help of others who furnish any rental service for compensation, he forfeits his exemption."[199] This functional approach would readily extend to housing sector PEBs such as Airbnb.

In addition to the federal statutes we have described above, state and local laws also play an important role in making public accommodations open to the public. Most states have their own public accommodation laws,[200] although a few do not,[201] and the scope of those laws varies considerably.[202] In some instances, such laws are essentially coextensive with the federal public accommodation regime.[203] In other instances, state public accommodation laws provide substantially greater protection to racial minorities, both on the face of the laws and as they are applied.[204]

From a pragmatic perspective, state public accommodation laws are sometimes more useful than federal laws because they are more expansive in scope. Many include types of businesses that federal laws do not. For example, although Title II does not cover retail establishments, twenty states and the District of Columbia explicitly include retail establishments in their public accommodation statutes, and another sixteen contain language sufficiently broad to include such establishments even though they do not mention them explicitly.[205] To the extent that a platform economy business stands in for a retail business—Etsy, for example—the statutes in over half of the states would explicitly prohibit race discrimination by that business on the ground that it is a public accommodation.

Likewise, some states' public accommodation statutes are written broadly and have been construed broadly by courts. California, for instance, states that all citizens "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[206] Likewise, in Utah, the public accommodation statute defines a "place of public accommodation" as "every place, establishment, or facility of whatever kind, nature, or class that caters or offers its services, facilities, or

199. *Id.*

200. For a list of such laws, *see State Public Accommodation Laws*, NAT.'L CONF. STATE. LEG. (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/2YU8-DNQZ].

201. As of the writing of this Article, five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—do not have public accommodation statutes that prohibit discrimination on the basis of race. *See id*; *see, e.g.*, Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 300 (2011).

202. *See* Bayless & Wang, *supra* note 201, at 300–05.

203. *See* Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL'Y & L. 331, 340–42 (2006).

204. *See id.* at 356–61.

205. *See* Bayless & Wang, *supra* note 201, at 300–01.

206. CAL. CIV. CODE § 51(b) (West 2016).

goods to the general public for a fee or charge."[207] The language in both statutes extends beyond the protection afforded by Title II and, by their plain meanings, cover the websites that form the basis for most platform economy businesses as well as their physical counterparts. One might argue that such statutes only extend to PEBs within those states, but given that the Internet is present everywhere, such statutes could provide a powerful tool for plaintiffs at least within those states. Uber is currently available all over the world;[208] a property owner anywhere in the United States can make that property available over Airbnb; Postmates is available in two dozen states and growing.[209] If an individual suffers race discrimination in any of the jurisdictions where PEBs operate on the ground, these more expansive state laws might offer an opportunity for recourse.

Many local laws and regulations also take an expansive view of public accommodations. Progressive municipalities and counties have expanded upon the protection afforded by both state and local laws. We believe that taxicabs are subject to Title II, although federal courts have not conclusively so held; in any event, they are often subject to local ordinances that prohibit discrimination.[210] Other local ordinances prohibit discrimination by businesses that are not necessarily covered by other laws—for example, retail businesses.[211] Many recent examples have not only expanded the class of people protected by public accommodation laws—for example, to include LGBTQ customers—but have also included expansion of the scope of the laws themselves.[212]

Although state and local laws banning racial discrimination by public accommodations offer a promising avenue for some plaintiffs, they cannot offer a wholesale remedy for race discrimination in the platform economy. Certainly, attorneys should take advantage of these avenues as a replacement for, or

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207. UTAH CODE ANN. § 13-7-2(1)(a) (West 2016).

208. *Find a City*, UBER, https://www.uber.com/cities [https://perma.cc/H2BK-YV7C].

209. *Support*, POSTMATES, https://help.postmates.com/hc/en-us/articles/220089087-What-cities-is-Postmates-available-in [https://perma.cc/THL8-FUZ9].

210. *See, e.g.*, N.Y. MUN. CODE § 8-102(9) (2016) (defining public accommodations to "include providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold or otherwise made available"); *The Law: In Public Spaces*, NYC HUMAN RIGHTS, http://www1.nyc.gov/site/cchr/law/in-public-spaces.page [https://perma.cc/GS2F-86JJ] (listing "taxis" as an example of a public accommodation).

211. *See, e.g.*, CHI. MUN. CODE § 2-160-020(j) (2016) (defining "public accommodation" to include "a place, business establishment or agency that sells, leases, provides or offers any product, facility or service to the general public, regardless of ownership or operation").

212. Prompted by Obergefell v. Hodges, 135 S. Ct. 2584 (2015), which held that same-sex marriage is constitutionally protected, much of the recent discussion of public accommodation has centered on the purported infringement on the First Amendment freedom of religion of business owners who disapprove of same-sex marriage or homosexuality. Although we largely bracket this issue here, we note that if the freedom of religion is read this broadly, it might include the freedom to discriminate on the basis of race if one's religious views so dictate. Such a reading seems to us entirely contrary to the language and purpose of Title II, not to mention its subsequent interpretation by the courts.

supplement to, federal laws. But the patchwork quilt such laws provide is an incomplete solution. They leave prospective plaintiffs with different remedies in different jurisdictions, businesses with uncertainty as to their obligations, and the ideal of nondiscrimination in public accommodations, at best, only partially realized.

As a result, we think that federal law is ultimately the best tool for addressing discrimination by PEBs. Statutes including Title II of the Civil Rights Act of 1964, the FHA, section 1981, and section 1982 are all valuable tools. In the next section, we discuss some obstacles to litigating using federal laws and how they might be overcome.

B. CHALLENGES

Antidiscrimination statutes such as Title II, sections 1981 and 1982, and the FHA offer viable, if imperfect, mechanisms for addressing discrimination in the platform economy. To prevail, however, plaintiffs will also need to overcome certain obstacles. In this section, we will discuss two potential doctrinal obstacles to plaintiffs availing themselves of the federal statutory mechanisms we have discussed in the previous two sections: section 230 of the Communications Decency Act and the requirement of discriminatory intent that courts have read into some antidiscrimination statutes. Although courts have yet to consider these obstacles in the specific context of PEBs, our view is that these obstacles are surmountable in some circumstances.

1. The Communications Decency Act

One potential defense to PEB liability for race discrimination is section 230 of the Communications Decency Act (CDA).[213] That statute says: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[214] Broadly speaking, that provision immunizes Internet service providers—those who own and operate websites—from liability for content created by the users of their site.[215]

Despite its broad language, section 230 has a number of exceptions. For instance, the statute explicitly does not immunize Internet providers from liability arising from federal criminal law, intellectual property law, and communications privacy law.[216] Thus, Internet providers face legal liability for offenses

213. 47 U.S.C. § 230 (2012).

214. *Id.* § 230(c)(1).

215. *See, e.g.*, Leslie Paul Machado, *Immunity Under § 230 of the Communications Decency Act of 1996: A Short Primer*, 10 J. INTERNET LAW 3, 4 (2006); Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113 (1996).

216. 47 U.S.C. § 230(e).

ranging from child pornography to copyright violations.[217] The array of exceptions demonstrates that—although Congress had strong policy reasons for immunizing Internet providers and users from liability for others' speech—these policy reasons also give way in the face of other, stronger policy reasons that counsel against immunity.[218]

No federal court has yet addressed whether section 230 immunizes PEBs from liability under Title II or other statutes prohibiting discrimination on the basis of race. Virtually no commentators have specifically opined about immunity for liability resulting from race discrimination,[219] but most see the issue of section 230 immunity in various other contexts as an unsettled one.[220] Venkat Balasubramani, for example, concludes in the context of consumer personal injury lawsuits that "the applicability of [a section 230] defense to [platform] economy companies is less certain" because "the extensive marketing (as a service rather than a platform), screening, and logistical involvement by the platform economy companies may make it tougher for these companies to argue that they are mere intermediaries of information."[221]

Although we agree that section 230 immunity is an open question, our view is that the best reading of available precedent suggests that section 230 will not immunize PEBs from many suits for race discrimination under Title II and the other federal civil rights statutes we discuss.[222] In the most analogous case, *Fair Housing Counsel of San Fernando Valley v. Roommates.com*, the Ninth Circuit, sitting en banc, held that the CDA did not bar a lawsuit under the FHA for liability arising from certain types of discriminatory preferences in housing.[223] To use its website, Roommates.com required users to disclose their sex, their sexual orientation, and whether they had children via drop-down menus. Roommates.com then provided that information to other users; as a result, the court held that Roomates.com was not merely a "provider . . . of an interactive computer service," but rather an "information content provider."[224] In other words,

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217. Even with these carve-outs, the provision has proven controversial in many circles due to its immunizing of providers for liability even when users engage in defamation, various torts, and state criminal violations, among other problematic behavior. The primary purpose of this Article is not to call for modifications to the CDA itself, but as we will explain in Part IV, we think that future legislation should be drafted so that the CDA does not provide a barrier to liability for platform economy businesses.

218. *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 89–95 (2009).

219. Todisco, *supra* note 13, at 127 (stating that section 230 exempts Airbnb from liability for discrimination).

220. *See, e.g.*, Katz, *supra* note 13, at 1105–07 (describing ambiguity as to application of section 230); Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149, 160 (2015) (describing "legal uncertainty" regarding section 230).

221. Venkat Balasubramani, *Court Says Uber and Lyft Drivers May Be Employees*, TECH. & MKTG. L. BLOG (Mar. 24, 2015), http://blog.ericgoldman.org/archives/2015/03/court-says-uber-and-lyft-drivers-may-be-employees.htm [https://perma.cc/KTS5-VUQH].

222. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008).

223. *See id.*

224. *Id.* at 1162, 1164 (citing 47 U.S.C. § 230(c)).

the court held, "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct."[225] Roommates.com was an active developer of information, not merely a passive intermediary, and so section 230 provided no shield against liability for facilitating discrimination by users. As the court explained, "[i]f such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."[226]

Other courts have held that section 230 does provide a shield against liability for discrimination when the website simply provides a neutral forum and users of the website then engage in discrimination. In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the court held that because the website merely created a space for people offering housing rentals to write their own free-form descriptions of what they wanted, Craigslist was not liable when individual users expressed preferences for race and other identity categories in violation of the FHA.[227] This is consistent with other decisions: where the website did no more than create a neutral forum for people to engage in facially innocuous activity, the website was not liable when users engaged in behavior that violated various federal civil rights statutes.[228]

This precedent suggests that in some instances the CDA will not shield PEBs from liability. The activity of PEBs such as Airbnb and Uber is more like the activity in *Roommates.com* than that in *Craigslist.* Such PEBs do much more than simply provide a blank slate where people can describe their housing and transportation needs or the services they offer. As we explained in section II.B, they prompt, or even require, users to engage in behavior that facilitates discrimination by providers. Airbnb and Uber, for example, strongly encourage users to upload photographs and create profiles with their names, explicitly stating that users will have a better experience if they create "robust" profiles.[229] Providing photographs and names may reveal the user's race and expose them to discrimination. This results in a self-fulfilling prophecy: by dictating a default level of disclosure for profiles, PEBs create norms about the type of information participants expect to see in others' profiles. Accordingly, although individual participants are not literally required to share such identifying profile information, participants who do not include such information may be at a disadvantage

225. *Id.* at 1168.

226. *Id.* at 1164.

227. *See* 519 F.3d 666, 668–71 (7th Cir. 2008).

228. *See, e.g.*, Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 408 (6th Cir. 2014) (holding that if the "website operator is in part responsible for the creation or development of content, then it is . . . not immune"); Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009) (holding that section 230 immunity does not dissipate simply because website allows users to search website for postings involving illegal activities).

229. As previously noted, research has already found that Airbnb users with black-identified names have more difficulty finding providers to rent to them. *See supra* Section II.B.

if they refuse to comply with these norms of accountability. Moreover, both of these PEBs—and many others—rely heavily on rating systems that have been shown to capture, aggregate, and perpetuate racial bias. Airbnb prompts hosts to rate their guests. Uber *requires* drivers to rate passengers before they can accept another fare. And both PEBs prominently display these aggregate ratings to future hosts and drivers, urging reliance on them.

The websites, therefore, are not neutral with respect to some behavior that leads to discrimination. Indeed, they actively encourage providers and users to engage with the website in ways that lead to discrimination. As with *Roommates.com*, PEBs are materially involved in developing the content they provide to participants, and thus qualify as "information content providers" under the CDA. PEBs shape the interactions of providers and users by directing them to create profiles that contain information that can trigger racial bias, such as photographs and names. PEBs also rely heavily on rating systems, which have been shown in other contexts to disadvantage non-white people.[230] Moreover, they aggregate ratings in such a way as to express and amplify potentially discriminatory preferences, communicate those preferences to providers, and encourage providers to rely on the ratings. In many cases, therefore, courts are likely to find that PEBs do more than provide a passive forum as in the *Craigslist* case. In our view then, section 230 does not pose an insurmountable obstacle to suits against PEBs that develop online content in the manner we have described.

2. Discriminatory Intent

Plaintiffs alleging discrimination by public accommodations also face the challenge of showing discriminatory intent. That challenge is not limited to the platform economy, although it is sometimes more salient there.

The intent requirement varies among statutes. Some statutes that address discrimination by public accommodations do not provide a cause of action for claims alleging only disparate impact.[231] Sections 1981 and 1982 require a showing of intentional discrimination,[232] but courts are divided as to whether the same is true of Title II.[233] But not all statutes have such a requirement. The

230. *See supra* Section II.A.

231. *See* Gen. Bldg. Contractors Ass'n v Pennsylvania, 458 U.S. 375, 390–91 (1982).

232. *See, e.g.*, *id.* at 387–89; Daniels v. Dillard's, Inc., 373 F.3d 885, 887 (8th Cir. 2004).

233. *Compare* Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333, 1340–42 (2d Cir. 1974) (indicating showing of discriminatory intent necessary for Title II claims); Hardie v. Nat'l Collegiate Athletic Ass'n, 97 F. Supp. 3d 1163, 1163 (S.D. Cal. 2015) (showing of disparate impact insufficient for Title II claims); Akiyama v. U.S. Judo Inc., 181 F. Supp. 2d 1179, 1184–85 (W.D. Wash. 2002) (holding intent required for claims of religious discrimination brought under Title II, but recognizing that race might be different than religion), *with* Arguello v. Conoco, Inc., 207 F.3d 803, 813 (5th Cir. 2000) (assuming without deciding that disparate impact claims are cognizable under Title II); Jefferson v. City of Fremont, 73 F. Supp. 3d 1133, 1146 (N.D. Cal. 2014) (reserving judgment on availability of disparate impact claim under Title II); Robinson v. Power Pizza, Inc., 993 F. Supp. 1462, 1465 (M.D. Fla. 1998) (holding that showing of disparate impact sufficient to support claim under Title II).

Supreme Court recently held that the FHA merely requires a showing of disparate impact, meaning that plaintiffs alleging discrimination in the housing sector need not demonstrate intent to discriminate.[234] Although the FHA may be helpful in some instances, many PEBs do not involve housing rentals, and even in the housing sector other statutes may provide a better fit than the FHA. Consequently, we address the issue of intent even though it may not be an obstacle in every case.[235]

The intent requirement in antidiscrimination law has been widely criticized by commentators,[236] and we think there is a strong argument for premising liability across the board on disparate impact rather than discriminatory intent. Regardless of whether a business *intends* to exclude people of a particular race, if it does so, particularly with knowledge of the consequences of its actions, then those people have suffered precisely the economic and dignitary injuries against which antidiscrimination legislation is designed to protect.

In any event, our view is that plaintiffs can make a doctrinally sufficient showing of discriminatory intent in many cases involving racially disparate treatment by PEBs. To succeed on a claim under sections 1981 or 1982, plaintiffs must prove "an intent to discriminate on the basis of race by the defendant."[237] The analysis follows the order and allocation of proof of a disparate treatment suit under Title VII.[238] There, a plaintiff's prima facie case establishes an inference of intentional discrimination. The defendant then has the opportunity to articulate a "legitimate, nondiscriminatory reason" (LNDR) for the adverse action.[239] Finally, the plaintiff has the opportunity to rebut the LNDR by demonstrating it is either pretext for racial discrimination or was applied in a discriminatory manner.[240]

Generally speaking, PEBs will attempt to defend against claims of intentional discrimination by "argu[ing] that they are only technology platforms, serving to connect people or businesses, and therefore should not be held liable."[241] A PEB will almost certainly argue that it is merely a passive participant, connecting two willing individuals via its platform. A PEB is also likely to argue that its platform, despite the profile requirement and ratings system, is a facially neutral

234. *See* Tex. Dept. of Hous. & Cmty. Affairs. v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2507 (2015).

235. Courts have held that sections 1981 and 1982 are analogous, and we also proceed on the assumption that if courts were to hold that a showing of discriminatory intent is necessary for a Title II claim, the analysis would be the same. Because there are differences among the statutes, our analysis is, by necessity, somewhat impressionistic. The majority of our examples will relate to section 1981 because there is the most case law relating to that statute.

236. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–26 (1987).

237. Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993).

238. *See* Person v. J. S. Alberici Constr. Co., 640 F.2d 916, 918 (8th Cir. 1981).

239. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

240. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

241. *See* Molly Cohen & Corey Zehngebot, *supra* note 82, at 36.

method of providing accountability and self-regulation.[242]

In our view, a plaintiff may show intent by either of two avenues. The first establishes liability against the PEB via the behavior of individual providers; the second establishes liability directly against the PEB.

The first avenue is to sue individual providers—Airbnb hosts and Uber drivers—for specific acts of intentional discrimination while demonstrating the providers are agents or employees of the PEB. When an agent intentionally discriminates against a user, the principal can be held vicariously liable.[243] The strength of this claim may turn in part on pending litigation over whether the providers for some PEBs are employees or independent contractors.[244] Although we are persuaded by existing decisions that PEB providers such as Uber and Lyft drivers are properly classified as employees, vicarious liability does not necessarily depend on the distinction.[245] Our discussion throughout this paper, therefore, holds true even if Uber and Lyft drivers are classified as independent contractors and would only be strengthened by a conclusion that they are in fact employees.

When a PEB user experiences discrimination because of the conduct of a provider, demonstrating discriminatory intent will depend on the facts of the individual case. If a driver refuses to allow someone to get into his car after seeing her, abruptly drives away after making contact, or cancels the transaction after speaking on the phone and hearing her accent, a court is likely to hold that

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242. *See* Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 349 (1977).

243. *See, e.g.*, Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 392 (1982) ("Even if the doctrine of respondeat superior were broadly applicable to suits based on § 1981, . . . it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship."); Flanagan v. Aaron E. Henry Cmty. Health Servs. Ctr., 876 F.2d 1231, 1236 (5th Cir. 1989); Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1430 (D.C. Cir.) *on reh'g*, 852 F.2d 619 (D.C. Cir. 1988); Mahone v. Waddle, 564 F.2d 1018, 1028–30 (3d Cir. 1977) (finding the unique purpose and history of § 1981 permitted the imposition of respondeat superior under § 1981); Malone v. Schenk, 638 F. Supp. 423, 426 (C.D. Ill. 1985) ("Nothing in the legislative history indicates that section 1981 precludes holding employers vicariously liable for the acts of their employees."). Once a plaintiff proves that a provider is an agent or employee of a PEB, the roadmap for successful section 1981 litigation is already well established in the employment discrimination context. Plaintiffs often bring section 1981 claims either alongside a Title VII suit or, because section 1981 does not have the fifteen-employee requirement that Title VII does, as the sole cause of action against small employers who discriminate on the basis of race.

244. Uber's drivers, for example, are currently litigating the issue of whether they should qualify as employees for purposes of benefits and other legal protections. *See, e.g.*, Ogunmokun v. Uber Techs., Inc., No. 1:15-CV-06143 (E.D.N.Y. Oct. 26, 2015); O'Connor v. Uber Techs., Inc., No. C–13–3826 EMC, 2013 WL 6407583 (N.D. Cal. Dec. 06, 2013); Berwick v. Uber Techs., Inc., 80 Cal. Comp. Cases 936 (Workers Comp. Appeal Bd. June 3, 2015); Rasier LLC v. Fla. Dep't of Econ. Opportunity, Docket No. 0026 2825 90-02 (Dep't of Econ. Opportunity Reemployment Assistance Appeals Sept. 30, 2015) (holding that Uber drivers are independent contractors, not employees); Comm'r of the Bureau of Labor and Indus. of the State of Or., Advisory Opinion 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 [https://perma.cc/P4JG-PL4H] (concluding that Uber drivers are employees because "Uber suffers or permits drivers to work for the company's benefit" and "drivers are economically dependent on Uber").

245. *See supra* note 243.

there is sufficient evidence to make a prima facie showing of discrimination. Once a plaintiff establishes intentional discrimination on the part of a provider, she can assert vicarious liability to reach the PEB.[246]

But reaching PEBs through individual providers is not necessarily the most effective way to ameliorate widespread discrimination in the platform economy. And the vicarious liability theory is less compelling with respect to PEBs whose providers are not easily characterized as employees of the company—for example, Airbnb hosts.

The second, and potentially more fruitful, avenue of litigation targets PEBs directly. Here, plaintiffs would need to prove the PEB itself, rather than an individual provider, committed intentional acts of discrimination. Such an argument could include evidence such as the design of the online platform, the use of rating systems, the reliance on ratings systems' data in the face of demonstrated racial disparities, and other conduct by the company. For example, a user-turned-plaintiff might demonstrate discriminatory intent by showing that a PEB knew about the racially disparate impact of its platform design and its aggregation of and reliance on ratings, yet did not change its practices. Given Airbnb's recent decision to retain profile pictures and real names on its website—justified only by reference to its community norms—a court might conclude that this indifference to available research showing that these features lead to discrimination is sufficient to establish discriminatory intent. Another possibility would involve the plaintiff establishing intent through the pattern-or-practice disparate treatment model. Other behavior by the company might also suffice to show discriminatory intent. Our goal is not to provide a comprehensive guide, but rather to suggest possible avenues that might be available to plaintiffs who suffer race discrimination in the new platform economy.

In some instances, a plaintiff's case will rest primarily on a PEB's decision to design its online platform in a way that results in racial disparities, to apply metrics such as rating systems that result in racial disparities, or both. Such a theory of discriminatory intent makes intuitive sense when considering that the purpose of antidiscrimination law concerning public accommodations is to ensure that people are not limited in their ability to participate in the market on the basis of their race. Suppose a PEB knows that its rating system captures racial bias and that aggregating the ratings amplifies the expression of that bias, and that it continues to use its rating system and to encourage providers to rely on the rating system. If the company fails to change these structural features of its business, it creates an "impediment of discrimination" to the ability of people of color "to participate fully and equally in the marketplace."[247] By aggregating racially biased data, communicating it to providers, and encouraging providers

246. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 392 (assuming without deciding that respondeat superior is generally applicable to suits under § 1981 where there exists an agency or employment relationship); *Mahone*, 564 F.2d at 1028–30; *Malone*, 638 F. Supp. at 426.

247. Brown v. Am. Honda Motor Co., 939 F.2d 946, 949 (11th Cir. 1991).

to rely on such data when deciding with whom to transact business, a PEB engages in an intentional act that the PEB knows will result in discrimination. We are not, of course, suggesting that mere disparate impact can or should support a lawsuit.[248] Rather, our argument is that when a PEB knows of a disparity caused by racial bias and not only fails to correct it, but also persists in applying it, that failure establishes discriminatory intent.[249]

Courts have sometimes required plaintiffs to show a discriminatory practice was chosen *because* it was discriminatory rather than *in spite of* its discriminatory effects.[250] We are not persuaded that this distinction is coherent even with respect to traditional businesses. After all, if a company chooses to engage in a business practice that has discriminatory effects over equally effective practices that do not have such effects, then why would it do so if it did not approve of the discriminatory consequences? But even if one found this position tenable in the traditional economy, the requirement is anachronistic or, at a minimum, inapplicable to the new platform economy as a whole.

Precedent indicates that a PEB's intentional decision to continue such practices may be sufficient to establish discriminatory intent. In *United States v. City of New York*, the Second Circuit addressed whether plaintiffs could establish intent using statistical evidence of the disparate impact employment exams had on workers of color and the decision of senior officials to ignore the disparity.[251] The court concluded they could, noting that "[t]he record contains ample evidence of the officials' awareness of the disparate impact of the Exams,"[252] and held that "the failure of senior officials to act can support an inference of discriminatory intent in some circumstances, particularly where they are in a position to avoid likely unconstitutional consequences."[253] Thus, "the decision to continue using" exams producing a discriminatory impact coupled "with awareness of their disparate impact" was sufficient to establish discriminatory intent.[254] Moreover, Supreme Court cases from other contexts support the idea

248. If a plaintiff presents only statistical evidence of a disparity, the case becomes a disparate impact case, which generally would not establish a claim under the civil rights statutes, Title II, sections 1981 and 1982, that we discuss here.

249. Distinguishing this from a pattern-or-practice claim is that plaintiffs would not be required to show a statistical disparity so significant that there exists no other explanation than a PEB's intentional race discrimination. Instead, plaintiffs would merely need to show (1) the PEB's metrics facilitate discrimination, (2) the PEB has access to the data and know about the metrics' effect, and (3) the PEB persists in aggregating and communicating the information to participants and relying on those metrics. The statistical significance of the data is not at issue under this method. Rather, the data itself, along with the PEB's unprecedented collection of and access to it, and the PEB's intentional communication of and reliance on it, establishes the intent necessary to make a prima facie case.

250. *See, e.g.*, *Brown*, 939 F.2d at 953. The cases that appear to take this position have arisen in the context of claims under section 1981, but it is possible a court could apply a similar interpretation in cases involving Title II or section 1982.

251. 717 F.3d 72, 76 (2d Cir. 2013).

252. *Id.* at 94.

253. *Id.*

254. *Id.* Indeed, the court even found it theoretically possible that the use of such exams might establish discriminatory intent on the part of the mayor, although it also noted some practical obstacles:

that a PEB's persistence in applying metrics known to cause racial disparities is sufficient to infer discriminatory intent.[255] Indeed, the Court has indicated support for allowing punitive damages for reckless indifference to federally protected rights, thereby lending support to the idea that indifference to racial disparities can establish intent to discriminate.[256]

Reliance on statistical data to prove discriminatory intent is consistent with prior antidiscrimination decisions: courts have consistently held that statistics can be used to infer discriminatory intent.[257] And in suits against PEBs, statistics provide particularly compelling evidence of intent because of the innate features of the platform economy and its participants. PEBs have unprecedented access to participants' demographic data, such as age, gender, location, habits, and, of course, other information, like names and photos, that allow other participants to infer race.[258] In this way, PEBs are simply different from many traditional places of public accommodations.[259] PEBs can easily analyze participants' data to control for the factors that would legitimately lead to participants being treated differently.[260] If a racial disparity remains after controlling for relevant variables, a finder of fact could infer racial bias. Thus, the notion that intentionally disregarding a practice that evinces racial bias is tantamount to intentional discrimination is not a radical one, but rather one supported by antidiscrimination case law from a variety of contexts.

The second way to establish discriminatory intent in an antidiscrimination lawsuit against a PEB is a pattern-or-practice claim, in which a plaintiff proves

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"In light of the myriad duties imposed upon the chief executive officer of a city of eight million people, more evidence would be needed to permit a fact-finder to find that the decision of one municipal department to continue using the results of the Exams supports an inference of discriminatory intent on the part of the Mayor." *Id.* Likewise, in *Fitzgerald v. Mountain States Tel. & Tel. Co.*, the Tenth Circuit suggested that a parent company could be held liable for failing to thoroughly investigate a discrimination incident, although it found the plaintiffs had failed to adequately present that theory. 68 F.3d 1257, 1264 (10th Cir. 1995).

255. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985) (holding that a violation of the ADEA was "willful" where a company "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA"); *see also* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 130 (1988) (holding that *Thurston* standard—knowledge or "reckless disregard"—was applicable to define "willful" violations of the Fair Labor Standards Act).

256. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 529–30 (1999).

257. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973); McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1258 (10th Cir. 1988); Person v. J.S. Alberici Constr. Co., 640 F.2d 916, 919 (8th Cir. 1981).

258. It is unlikely a traditional business *could* collect such data and on such a scale without voluntary participation by customers. Of course, some such businesses do collect customer data on a smaller scale by inviting customers to share their names, emails, and mailing addresses.

259. *See* Cannon & Summers, *supra* note 94.

260. Thus, PEBs' data regarding user interactions can be analyzed "to single out the factors that convert merely different treatment into unjustified discriminatory treatment." Spaulding v. Univ. of Wash., 740 F.2d 686, 704 (9th Cir. 1984), *overruled on other grounds by* Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987). Analyzing data may be more difficult for newer, smaller PEBs with fewer resources, but for the dominant market players such as Airbnb, Uber, and Lyft, it is a relatively minor burden.

intentional discrimination using statistical evidence demonstrating a system-wide policy of discrimination.[261] A pattern-or-practice claim against a PEB would potentially employ a method of proof quite similar to the one already discussed, except that a plaintiff would not need to demonstrate the PEB knew of the discriminatory effect of its metrics and chose to persist anyway. Rather, in these cases, "statistics alone may be sufficient to warrant a plausible inference of discriminatory intent if they show a pattern or practice that cannot be explained except on the basis of intentional discrimination."[262]

For a plaintiff to demonstrate discriminatory intent "based on statistics alone, the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely."[263] This route is attractive where the data reveal a stark disparity or where a class of plaintiffs elects to bring suit collectively.[264] Pattern-or-practice claims are particularly useful for reducing discrimination in the new platform economy because they are designed to address widespread discrimination resulting from "the [SEB]'s standard operating procedure."[265] The requirement of a statistical disparity so significant that other explanations are implausible is a demanding one, but not insuperable. Several appellate cases provide guidance for establishing such a claim against a PEB.[266]

SEBs have the unique capacity to provide detailed data on participants and their use of the PEB's application. For example, PEBs could analyze the wait time for rides that non-white users experience versus wait times for white users or the ease with which white users can rent homes versus that for non-white users. And this raw data could be supplemented with qualitative reviews of users of a particular PEB (for example, "passenger was drunk and confrontational"; "renter left apartment in terrible condition, see photos").[267] Courts have noted that

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261. *See* David J. Bross, *The Use of Pattern-and-Practice by Individuals in Non-Class Claims*, 28 NOVA L. REV. 795, 804 (2004).

262. Burgis v. N.Y. City Dep't of Sanitation, 798 F.3d 63, 69 (2d Cir. 2015); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1997) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

263. 8 Emp. Coordinator, Emp. Practices § 107:9 (2016) (quoting *Burgis*, 798 F.3d at 69). As we have noted, available evidence suggests that data may establish a statistical disparity significant enough to establish a pattern-or-practice case.

264. Some courts require pattern-or-practice claims to be brought as class actions, whereas others hold that an individual plaintiff may do so. *See* Bross, *supra* note 262, at 802.

265. United States v. City of New York, 717 F.3d 72, 83 (2d Cir. 2013).

266. *See Teamsters*, 431 U.S. at 339; *Burgis*, 798 F.3d at 69 ("[S]tatistics alone may be sufficient to warrant a plausible inference of discriminatory intent if they show a pattern or practice that cannot be explained except on the basis of intentional discrimination," but "the statistics must not only be statistically significant in the mathematical sense," but also "be of a level that makes other plausible non-discriminatory explanations very unlikely.").

267. *Teamsters*, 431 U.S. at 339 ("The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.").

> the usefulness of such comparative statistics . . . rests directly on their capacity to single out the factors that convert merely different treatment into unjustified discriminatory treatment. The more sophisticated the method of algebraic adjustment that is used, such as multivariate regression analysis, the more likely an illicit discriminatory factor can be ferreted out.[268]

Such analysis would require PEBs to obtain racial data from users, but this is a relatively minimal obstacle: companies might solicit that information from customers voluntarily, explaining that it will be used to address problems of discrimination, or might use methods employed in the social sciences and ask research subjects to ascribe racial identity to a large sample of photos.

The final step in proving a discrimination case requires the plaintiff to overcome any legitimate non-discriminatory reason (LNDR) the defendant puts forward to justify its behavior. If a plaintiff has established a prima facie case showing that a PEB intentionally persisted in a practice that created racial disparities, our view is that a PEB will have an uphill battle in articulating an LNDR because once the aggregated data is known to reflect bias and result in discrimination, use of that data is no longer legitimate or non-discriminatory. The specific language the Court employed in *McDonnell Douglas* when it formulated the Title VII analytical framework supports this analysis. In enumerating the now-familiar disparate treatment test, the Court held that after a plaintiff established a prima facie case and the defendant articulated an LNDR, the plaintiff "must be afforded a fair opportunity to demonstrate that petitioner's [LNDR] was a pretext *or discriminatory in its application*."[269] The discriminatory application of PEBs' metrics is precisely "the kind of 'artificial, arbitrary, and unnecessary barrier[]'" to participation in the platform economy that "the Court found to be the intention of Congress to remove" when it enacted Title VII.[270] Accordingly, rather than allege "classic" pretext, a plaintiff could overcome the LNDR by showing the PEB's metrics are discriminatory in their application.

In sum, although the question is not always an easy one, we think that in the final analysis, plaintiffs will, in many instances, be able to make a Title VII-like showing of intentional discrimination even if their evidence consists primarily or only of a PEB's decision to continue using a platform design or rating system despite having compelling evidence that the system results in racially disparate treatment of customers. Some plaintiffs may, of course, be able to rely on other evidence of discriminatory intent as well. The important point is that at least

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268. Spaulding v. Univ. of Wash., 740 F.2d 686, 704 (9th Cir. 1984), *overruled on other grounds by* Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987).

269. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (emphasis added); *see, e.g.*, Lynn v. Regents of Univ. of Cal., 656 F.2d 1337, 1346 n.13 (9th Cir. 1981).

270. *McDonnell Douglas Corp.*, 411 U.S. at 806 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

some plaintiffs will be able to satisfy the intent requirement for the antidiscrimination statutes that require it.

IV. NEW LAWS FOR THE NEW PUBLIC ACCOMMODATIONS

Antidiscrimination laws that apply to places of public accommodation have played a critical role in the struggle for racial equality. Yet such discrimination still occurs, and available evidence indicates that it has traveled from the traditional economy to the platform economy. As we explained in Part III, we think that existing laws—Title II, sections 1981 and 1982, the FHA, and state and local laws—hold considerable promise in addressing this discrimination. But these laws do not fully address the concerns about race discrimination in the new public accommodations.

The most straightforward way to prohibit race discrimination in the platform economy is federal legislation. Even if existing laws are eventually held to cover all discrimination in the platform economy one way or another, legislation could remove all doubt much more quickly than could a series of judicial decisions applying a patchwork of laws. And a legislative update to Title II would be desirable for other reasons. It would provide a logical update to public accommodation laws that were drafted at a time when legislators simply could not have contemplated the existence—let alone the transformative impact—of the Internet. The Supreme Court has made clear that rapidly evolving technology merits reinterpretation of even fundamental constitutional principles;[271] surely, then, changing technology also merits revision of relevant statutory provisions.

Moreover, statutory law has a powerful signaling function.[272] As Cass Sunstein has explained: "Many laws have an expressive function. . . . [T]hey are designed to change existing norms and to influence behavior . . . ."[273] The passage of Title II and the Supreme Court's decision to uphold that statute in *Heart of Atlanta Motel* broadcast powerful antidiscrimination norms to both owners and users of public accommodations.[274] By passing comprehensive new federal legislation that explicitly includes taxi-like services such as Uber and hotel-like services such as Airbnb, Congress would revitalize a signature piece of civil rights legislation and send a strong message that discrimination is no more acceptable in the platform economy than in the traditional economy.

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271. *See, e.g.*, Riley v. California, 134 S. Ct. 2473 (2014); Kyllo v. United States 533 U.S. 27 (2001).

272. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612, 2626 (2013) ("There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process . . . . Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.").

273. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 964 (1996).

274. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964).

The mismatch between existing laws and the new economy results partly from the inherent characteristics of PEBs. Traditional businesses that discriminate against customers are engaged in a somewhat different activity than businesses that match service providers with users in a manner that results in racial discrimination. Today both models are common, and the result is the same: people of some races are denied the opportunity to participate equally in the marketplace. Accordingly, we believe that the two situations generally should be treated the same under federal law. But at the time the federal antidiscrimination statutes we have discussed were drafted, only the former was a common business model, and thus the drafted legislation is often an imperfect fit for PEBs.

Building on our discussion in Part III, we offer four recommendations for legislative reforms designed to address the potential shortcomings of existing antidiscrimination law.[275]

First, some PEBs may not be covered by existing antidiscrimination laws, the scope of which remains contested even in the traditional economy. For example, it is not conclusively established that taxis are covered by Title II, and as a result some might argue that ride-sharing PEBs, such as Uber, might not be covered either. Likewise, federal law might exempt PEBs such as Airbnb from liability for the behavior of providers who fall within Title II's exemption for hosts who do not live on their property and rent fewer than five rooms or the FHA's single dwelling requirement.[276]

Accordingly, as we explained in section III.A.1, we think that Title II should be updated to cover PEBs that offer goods and services tantamount to those provided by public accommodations in the traditional economy. In our view, there are strong arguments that because Title II covers hotels it should cover PEBs that provide lodging—such as Airbnb and VRBO—or that because Title II covers restaurant delivery it should cover PEBs that provide food service—such as Grubhub and Postmates. In both instances, discrimination affects the end user in the same way by impairing or denying her ability to obtain lodging or food. Some might argue that Airbnb is different from a hotel because it connects users and providers rather than operating a facility or that Postmates is different from a restaurant that provides delivery because it does not actually prepare the food. We disagree with these arguments because in our view Airbnb is the functional market equivalent of a hotel and should be covered by the same federal statutes that hotels must obey. But to the extent courts might find such distinctions persuasive, it would move many PEBs beyond the scope of Title II

275. In some instances, we view these as statutory gaps; in others, we simply think there is ambiguity best resolved by finding that a statute applies to PEBs but that Congress should clarify that the statute applies so as to leave no doubt.

276. To be clear, we are not advocating that Title II and the FHA should not have these exemptions. Rather, we think that Airbnb, with its huge network of properties, is best analogized to either a traditional hotel or to a real estate broker, neither of which is exempt from, respectively, Title II or the FHA.

protection.[277]

Our goal is not to establish a comprehensive catalog of which statutes cover which PEBs for engaging in which activities. Rather, we simply observe as a general matter that some PEBs whose activities appear to implicate the same norms as traditional public accommodations might be excluded by a narrow or literal reading of federal civil rights laws such as Title II. Although we think that race discrimination by most PEBs is addressed by at least one of the various statutes we have described, an update to Title II would remove all doubt and would do so more efficiently than would incremental litigation in the courts.

Second, it may be difficult for an individual to prove discrimination resulting from a single encounter or even a series of encounters. The problem results from an information asymmetry. PEBs have massive data about their business operations that they can access at the click of a button; meanwhile, prospective plaintiffs often must rely on personal experience, anecdotes, and painstakingly constructed studies to build a case that a PEB engages in discrimination within the meaning of federal law.

To address this concern, we favor federal legislation to mandate transparency by PEBs about their business practices and the consequences of those practices. PEBs should be required to maintain and disclose aggregate information about their business transactions to the Civil Rights Division of the Department of Justice, and the agency should make the information publicly available. So, for example, Uber should be required to track and disclose the number, cost, location, destination, and duration of the trips its drivers make. Airbnb should be required to disclose the number, cost, size, features, location, and duration of its rentals. Moreover, businesses should pay a steep penalty for noncompliance with these mandatory disclosures and an additional penalty for submitting inaccurate or misleading information.

Such disclosures are not a new or radical idea. Rather, they would be similar to disclosures to other federal agencies, such as those required by the Equal Employment Opportunity Commission,[278] the Department of Housing and Urban Development,[279] and the Department of Education.[280] By requesting and aggregating its users' information, the PEB will not infringe on the privacy of any individual passenger or driver to a greater extent than most governmental agencies already do. But making the data public will allow independent researchers to make conclusions about whether some practice of a PEB is having disparate effects and will allow an unprecedented level of access to information

277. Other statutes might apply, but would present their own obstacles. For example, sections 1981 and 1982 would require a showing of intent. *See* 42 U.S.C. §§ 1981, 1982 (2012).

278. 29 C.F.R. § 1602.7 (1991) (requiring all businesses subject to Title VII of the 1964 Civil Rights Act to report data concerning the racial and ethnic composition of their employees).

279. 24 C.F.R. §§ 1.6, 1.8 (1996) (mandating disclosures including the race and ethnicity of those who participate in federally funded housing programs).

280. 34 C.F.R. § 100.6 (1988) (requiring all educational institutions that receive federal funding to report the racial and ethnic composition of their student bodies).

that may provide surprising and useful insights into eliminating discrimination. The risk of negative publicity will also encourage PEBs to be proactive about policing disparate effects that their platforms cause. And in situations where a PEB lags in correcting discrimination, transparency provisions will help prospective plaintiffs obtain the evidence they need to successfully pursue a lawsuit.

Moreover, transparency laws will further the broader antidiscrimination project by providing researchers with a useful data set to analyze. The information available from PEBs, with their online platforms and meticulous data tracking, are a gold mine of information unavailable from traditional businesses. And the purpose of such research could be to find good actors as well as bad ones. If Airbnb and Uber are, in fact, *not* facilitating discrimination, their practices can provide a valuable lesson for other companies. Less successful businesses can look at what Airbnb and Uber are doing in order to eradicate their own practices that cause disparities, and in the meantime Airbnb and Uber can advertise their own success at creating marketplaces free of racial bias.

Perhaps most importantly, transparency laws also offer the opportunity to realize the unique antidiscrimination potential of the platform economy. By providing incentives for PEBs to identify and eradicate practices that result in discrimination, the law can encourage methods of operation that eliminate expression of bias.

To ensure compliance with disclosure laws, legislation should impose a significant penalty on businesses that fail to comply with either the collection or disclosure component of the regulatory framework. Existing disclosure statutes for other federal agencies serve as an appropriate model.[281] This statutory reform will address some of the pervasive problems with PEBs' current monopoly on information.

Third, the requirement of discriminatory intent presents unique obstacles in cyberspace. The nature of the platform economy means most transactions take place online rather than in person. Discriminatory intent may therefore be particularly difficult to establish for the statutes—namely, sections 1981 and 1982—for which it is required.[282] As we have noted, courts have not reached a consensus as to whether Title II also requires discriminatory intent or whether, like the FHA, it merely requires a showing of disparate impact.[283] Congress should clarify Title II to specify that a claim brought under the statute requires only a showing of disparate impact, not of discriminatory intent.

Fourth, although we think that precedent indicates that section 230 of the CDA does not immunize PEBs from liability, the Supreme Court has yet to address the issue. If courts were to hold that section 230 immunizes some or all PEBs—a result we think is unlikely based on existing precedent, albeit theoreti-

281. *See, e.g.*, 29 C.F.R §§ 1602.9, 1602.51 (2016) (imposing penalties for companies that fail to file reports regarding the racial and ethnic composition of their workforces or that make willfully false statements in those reports).

282. *See supra* notes 231–42 and accompanying text.

283. *See id.*

cally possible—Congress should either amend section 230 or specify in Title II that section 230 does not immunize PEBs from liability for race discrimination.[284] More specifically, section 230 should not shield PEBs from liability when they have engaged in conduct, including selecting a particular design for their platforms or contributing to or facilitating discrimination by providers.[285] As we explained in section III.B.1, section 230 was intended to ensure that website owners would not be held liable if they engaged in socially desirable activity such as shielding children from explicit material or removing content that "the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[286] Nothing in these policy objectives suggests that the purpose of section 230 was to immunize PEBs from liability for their activities that contribute to racial discrimination.

Any statutory update should address these four issues. Although our task here is not to draft such a statutory framework—that we will leave for future researchers and policymakers—our hope is that the issues we have highlighted will provide an agenda that legislative reform can accomplish.

There is reason for optimism about the efficacy of new laws. As Brishen Rogers has explained, Uber's structure makes it easier to regulate in some ways,[287] and the same is true of other PEBs. Moreover, such legislation represents an opportunity for bipartisan collaboration on an issue that will benefit the public at large.

But perhaps as effective as new legislation would be PEBs' voluntary reform of their own practices.[288] Such reforms would often include an overhaul of the PEBs' platforms. For example, platforms should not disclose racial proxies such as names or photographs to either users or providers until after the provider and user have agreed to a transaction.[289] By collecting racial data about both providers and users, the businesses could determine whether individual providers and users exhibit discriminatory preferences over time and could point out these preferences to the various parties or even ban providers and users who fail to improve their behavior. And PEBs could also revise the ratings systems. For

284. Indeed, such legislation would be desirable even if courts do not so hold because it would clarify that section 230 does not shield PEBs from liability for race discrimination.

285. We note that this is not the same as saying that PEBs should be held liable in all of these situations. Our point is simply that section 230 should not provide immunity from discrimination claims in these circumstances. *Cf.* Katz, *supra* note 13, at 1103–05.

286. 47 U.S.C. § 230(c)(2)(A) (1998).

287. *See* Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 90 (2015) ("With its vast network of drivers and customers and its mountains of data on their behavior, Uber is a game changer.").

288. For example, Airbnb recently issued a comprehensive new antidiscrimination policy, although experts have questioned whether the touted reforms will have the desired effect. *See* Benjamin Edelman, *Response to Airbnb's Report on Discrimination*, BENJAMIN EDELMAN (Sept. 19, 2016), http://www.benedelman.org/news/091916-1.html [http://perma.cc/YGT7-7AT7].

289. Some might make arguments such as, "How will ride-share companies identify their passengers?" We think these arguments make little sense: a passenger can, for example, text a driver to describe what they are wearing or where precisely they are waiting.

example, requiring qualitative information where participants are given low ratings—for example, "I rated this passenger two stars because he threw up in my car"—would have a number of benefits. If people were forced to explain why they gave someone a low rating, they might be less likely to do so for irrational reasons such as racial bias. Moreover, qualitative explanations for ratings would provide future participants with better information. If, for example, an Uber passenger has a marginal rating but the reasons for the rating seem vague or unfair, then future drivers might properly decide to take the rating with a grain of salt.

Such reform need not be costly—indeed, it might prove quite profitable. If Uber, Airbnb, or another platform economy giant were to allow an independent audit of its own data, present the results to the public in an accessible format, and hold itself out as a place that takes seriously a commitment to nondiscrimination, it might benefit enormously in comparison to its competitors.

CONCLUSION

The platform economy presents new challenges for enforcing public accommodation norms. But it also presents new opportunities. Sensible interpretation of existing statutes can provide legal remedies for racial discrimination by public accommodations, and legislative reform can fill any gaps in existing laws. Moreover, examining how public accommodation statutes should apply to the platform economy helps to expose the shortcomings of the ways those statutes have been applied in the traditional economy. Such examination offers an opportunity to improve the way those statutes function in all marketplaces and allows progress toward eradicating discrimination in all public accommodations.