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Reputation Systems Bias in the Platform Workplace

E. Gary Spitko*

Online reputation systems enable the providers and consumers of a product or service to rate one another and allow others to rely upon those reputation scores in deciding whether to engage with a particular provider or consumer. Reputation systems are an intrinsic feature of the platform workplace, in which a platform operator, such as Uber or TaskRabbit, intermediates between the provider of a service and the consumer of that service. Operators typically rely upon consumer ratings of providers in rewarding and penalizing providers. Thus, these reputation systems allow an operator to achieve enormous scale while maintaining quality control and user trust without employing supervisors to manage the vast number of providers who engage consumers on the operator's platform. At the same time, an increasing number of commentators have expressed concerns that the invidious biases of raters impact these reputation systems.

This Article considers how best to mitigate reputation systems bias in the platform workplace. After reviewing and rejecting both a hands-off approach and the anti-exceptionalism approach to regulation of the platform economy, this Article argues in favor of applying what the author labels a "structural-purposive" analysis to regulation of reputation systems discrimination in the platform workplace. A structural-purposive analysis seeks to ensure that regulation is informed by the goals and structure of the existing workplace regulation scheme but also is consistent with the inherent characteristics of the platform economy. Thus, this approach facilitates the screening out of proposed regulation that would be inimical to the inherent characteristics of the platform economy and aids in the framing of regulatory proposals that would leverage those characteristics. This Article then demonstrates the merits of a structural-purposive approach in the context of a regulatory framework addressing

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reputation systems discrimination in the platform workplace. Applying this approach, the Article derives several principles that should guide regulatory efforts to ameliorate the prevalence and effects of reputation systems bias in the platform workplace and outlines a proposed regulatory framework grounded in those principles.

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INTRODUCTION

In the platform economy, sometimes referred to as the “sharing economy” or the “gig economy,” the platform operator utilizes advanced information and communications technologies to make available an online marketplace through which a consumer seeking a product or service matches with a provider of that product or

service.¹ Principally by enabling efficient matching and promoting trust, the operator allows for both the consumer and the provider to minimize their transaction costs.² The best-known platform operators include Uber,³ Lyft,⁴ TaskRabbit,⁵ Handy,⁶ Fiverr,⁷ and Amazon Mechanical Turk.⁸ More broadly, within the last decade, platform operators have significantly impacted—some would say

1. PETER C. EVANS & ANNABELLE GAWER, CTR. FOR GLOBAL ENTER., *THE RISE OF THE PLATFORM ENTERPRISE: A GLOBAL SURVEY* 5, 9 (2016), https://www.thecge.net/app/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf; RUDY TELLES JR., U.S. DEPT OF COMMERCE, ESA ISSUE BRIEF NO. 01-16, *DIGITAL MATCHING FIRMS: A NEW DEFINITION IN THE "SHARING ECONOMY" SPACE* 2 (2016), <https://permanent.access.gpo.gov/gpo94038/digital-matching-firms-new-definition-sharing-economy-space.pdf> (defining digital matching firms as "entities that provide online platforms (or marketplaces) that enable the matching of service providers with customers" and noting that digital matching firms are sometimes identified as belonging to the "sharing economy," among other names).

2. See JEREMIAS PRASSL, *HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY* 18–20 (2018) (discussing several ways that platform operators reduce market frictions, including through efficient matching and promotion of trust); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdtwork, and Labor Protection in the "Gig-Economy,"* 37 *COMP. LAB. L. & POL'Y J.* 471, 475 (2016); Brishen Rogers, *The Social Costs of Uber,* 82 *U. CHI. L. REV. DIALOGUE* 85, 87–88 (2015–2016) (discussing several ways in which Uber has reduced transaction costs that plague the taxi industry); E. Gary Spitko, *A Structural-Purposive Interpretation of "Employment" in the Platform Economy,* 70 *FLA. L. REV.* 409, 431–33 (2018) (discussing why "[t]rust between consumers and providers is critical to the success of the platform economy" and how platform operators build and maintain such trust); James Sherk, *The Rise of the "Gig" Economy: Good for Workers and Consumers,* HERITAGE FOUND. (Oct. 7, 2016), <https://www.heritage.org/jobs-and-labor/report/the-rise-the-gig-economy-good-workers-and-consumers> (discussing how software applications promote efficient matching in the platform economy); Erica Swallow, *The Rise of the Reputation Economy,* *FORBES* (Oct. 9, 2013, 8:15 AM), <http://www.forbes.com/sites/ericaswallow/2013/10/09/reputation-economy/> (discussing the need for systems that promote trust of providers and consumers in online markets); see also TELLES, *supra* note 1, at 11 (defining transaction costs as "the time, money, skill, and effort needed to facilitate a market transaction").

3. See UBER, <https://www.uber.com> (last visited Oct. 22, 2019).

4. See LYFT, <https://www.lyft.com> (last visited Oct. 22, 2019).

5. See TASKRABBIT, <https://www.taskrabbit.com> (last visited Oct. 22, 2019) (online marketplace for consumers seeking providers to assist with everyday tasks such as furniture assembly, yard work, and grocery shopping).

6. See HANDY, <https://www.handy.com> (last visited Oct. 22, 2019) (online marketplace for consumers seeking "highly rated pros for cleaning and handyman tasks").

7. See FIVERR, <https://www.fiverr.com> (last visited Oct. 22, 2019) (online marketplace for freelance business services such as graphic design, editing, and digital marketing).

8. See AMAZON MECHANICAL TURK, <https://www.mturk.com> (last visited Oct. 22, 2019) ("Amazon Mechanical Turk (MTurk) is a[n online] crowdsourcing marketplace that makes it easier for individuals and businesses to outsource their processes and jobs to a distributed workforce who can perform these tasks virtually.").

disrupted⁹—a host of industries including transportation, lodging, home cleaning, and home improvement.¹⁰

The rise of the platform economy presents a critical challenge to workplace regulators—how best to balance a desire to foster this new form of digital marketplace with the need to protect the workplace interests of platform economy providers.¹¹ To that end, this Article considers how the law should address concerns that reputation systems¹² in the platform economy incorporate the invidious biases of raters and that platform operators then rely upon discriminatory consumer ratings as the basis for taking adverse actions against providers. The Article proposes regulation that seeks to minimize reputation systems discrimination in the platform workplace in a manner that is consistent with the inherent characteristics of the platform economy and mindful of the purposes and structure of existing workplace regulation for the traditional firm.

Part I of the Article discusses the utilities of reputation systems in the platform economy.¹³ This Part then reviews concerns that commentators have raised about the use of reputation systems by platform operators, including that reputation systems may incorporate the invidious biases of consumer raters to the detriment of the providers being rated.¹⁴ Parts II and III focus on how best to address reputation systems discrimination in the platform workplace. Part II begins by considering the predicate issue of

9. See Clayton M. Christensen et al., *What Is Disruptive Innovation?*, HARV. BUS. REV., Dec. 2015, <https://hbr.org/2015/12/what-is-disruptive-innovation> (setting out the elements of the theory of “disruptive innovation” and bemoaning that “too many people who speak of ‘disruption’ . . . use the term loosely to invoke the concept of innovation in support of whatever it is they wish to do”).

10. Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES SCI. & TECH 61, 61, 63 (2016) (“Uber, Airbnb, TaskRabbit, Handy, and other platform firms are transforming industries by connecting ‘producers’ with consumers in new ways.”); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 95 (2016).

11. See TELLES, *supra* note 1, at 19 (“[D]igital matching firms are promoting debate about how to capture the benefits of technology driven change without abandoning important aspects of the current industrial organization, such as workers’ rights . . .”).

12. See Chrysanthos Dellarocas, *Designing Reputation Systems for the Social Web*, in THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD 3, 4 (Hassan Masum & Mark Tovey eds., 2011) (defining a reputation system as “an information system that mediates and facilitates the process of assessing reputations within the context of a specific community”).

13. See *infra* notes 22–52 and accompanying text.

14. See *infra* notes 53–95 and accompanying text.

selecting an appropriate framework for regulating the platform workplace. This Part reviews and rejects a hands-off approach to regulation of the platform economy, which argues principally that regulation threatens to unnecessarily stifle the promise and innovations of the platform economy.¹⁵ This Part also considers and dismisses as unsuitable an anti-exceptionalism approach, which denies that the platform economy possesses unique characteristics or presents novel concerns sufficient to merit special regulation. Rather, this approach calls for wholesale application of the existing body of workplace regulation to the platform workplace.¹⁶ Next, Part II argues in favor of a structural-purposive approach to regulation of the platform workplace.¹⁷ The structural-purposive approach seeks to ensure that regulation is informed by the goals and structure of the existing workplace regulation scheme but also is consistent with the inherent characteristics of the platform economy. Finally, Part III applies the structural-purposive approach to the problem of reputation systems discrimination in the platform workplace.¹⁸ This Part derives several principles that should inform regulatory efforts to mitigate reputation systems bias in the platform workplace and outlines a proposed regulatory framework grounded in those principles.

I. REPUTATION SYSTEMS IN THE PLATFORM WORKPLACE

This Article focuses on the segment of the platform economy that relates to the provision of services, rather than the supplying of products. This focus on the provision of services follows from the fact that the Article is concerned with discriminatory ratings of workers but not of goods. Thus, the reader should think, for example, of Uber rather than of Amazon.¹⁹ More specifically, the Article is concerned with platform operators that would satisfy each of the four elements contained in the U.S. Department of Commerce's definition of a "digital matching firm."²⁰

15. See *infra* notes 96–125 and accompanying text.

16. See *infra* notes 126–70 and accompanying text.

17. See *infra* notes 171–87 and accompanying text.

18. See *infra* notes 188–295 and accompanying text.

19. See TELLES, *supra* note 1, at 6 (explaining why Amazon falls outside of the Department of Commerce's definition of a digital matching firm).

20. See *id.* at 1–4.

Specifically, these operators (1) facilitate peer-to-peer transactions using mobile software applications or other internet platforms; (2) allow platform providers flexibility in deciding when and for how long they will work; (3) require providers to supply their own tools and assets needed to provide the service at issue; and, (4) of greatest instant interest, utilize ratings by platform consumers to evaluate providers.²¹ This Part discusses both the utilities of reputation systems in the platform workplace and concerns that some have raised about reliance on such reputation systems.

A. The Utilities of Reputation Systems in the Platform Workplace

Platform operators establish reputation systems consisting of quantitative ratings or qualitative reviews by consumers of providers and, often, by providers of consumers.²² For a number of reasons, this Article is concerned solely with the former – ratings or reviews by consumers of providers.²³ Traditional firms have long solicited consumer feedback and incorporated that feedback into their decisions concerning workforce management.²⁴ Reputation systems in the platform economy, however, are far more powerful than those in the traditional economy. The platform is structured so that every consumer who utilizes the platform can be prompted after each completed transaction to rate her provider and so that the consumer can do so with remarkable ease.²⁵ The end result is a

21. *Id.*; see also *id.* at 18 (proposing “a definition for ‘digital matching firms’ as firms that use Internet and smartphone-enabled apps to match service providers with consumers, help ensure trust and quality assurance via peer-rating services, and rely on flexible service providers who, when necessary, use their own assets”).

22. Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1116 (2015).

23. For a thorough discussion of race discrimination by platform providers and operators against platform consumers and the need to evolve public accommodation laws to address this discrimination, see generally Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

24. See Gilbert A. Churchill, Jr. & Carol Surprenant, *An Investigation into the Determinants of Customer Satisfaction*, 19 J. MARKETING RES. 491, 491 (1982) (noting the emergence of consumer satisfaction as “a legitimate field of inquiry” in the early 1970s).

25. Josh Dzieza, *The Rating Game: How Uber and Its Peers Turned Us into Horrible Bosses*, VERGE (Oct. 28, 2015, 11:00 AM), <https://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden> (“Ratings help these companies [platform operators] to achieve enormous scale, managing large pools of untrained contract workers without having to hire supervisors.”); see also Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1190 (2017) (“[T]he advent of the internet and new social media tools have made soliciting customer feedback easier, faster, and less expensive than ever.”).

high rate of consumer participation in platform reputation systems that makes feasible a scheme for management of providers that relies largely on the reputation systems.²⁶

Operators use these reputation systems principally to monitor provider performance and, thus, to encourage providers to comply with the operator's quality control standards.²⁷ In essence, these reputation systems enable the consumer to become the eyes and ears of the operator and to function as the operator's on-site supervisor of quality control.²⁸ Thus, these reputation systems allow an operator to achieve enormous scale while maintaining quality control and user trust without employing supervisors to manage the vast number of providers who engage consumers on the operator's platform.²⁹

Platform operators typically rely upon consumer ratings of providers in rewarding and penalizing providers. Thus, a provider's high composite score may qualify the provider for preferential search listings, more desirable work, or higher compensation.³⁰ Conversely, an operator may "downgrade" a provider based upon poor consumer ratings so that the provider appears further down a list of options that the operator presents

26. Dzieza, *supra* note 25.

27. De Stefano, *supra* note 2, at 492.

28. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 *COMP. LAB. L. & POL'Y J.* 577, 597 (2016); Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 *INT'L J. COMMS.* 3758, 3771 (2016) ("[B]ecause there are no formal managers to oversee the quality of individual drivers' job performance, Uber's system recruits passengers to perform a type of managerial assessment through driver ratings."); Alex Rosenblat et al., *Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination*, 9 *POL'Y & INTERNET* 256, 260 (2017) ("In Uber's driver-rating model, consumers act as middle managers of workers, both through the design of the app and in the evaluation functions they perform." (citations omitted)).

29. Dzieza, *supra* note 25; cf. Leong & Belzer, *supra* note 23, at 1285 ("By removing the necessity of preexisting community relationships, the Internet dramatically amplifies the scale on which platform economy activity occurs.").

30. PRASSL, *supra* note 2, at 61-62 ("Some platforms link quality (and quantity) of work to some form of 'elite' status, which allows users access to better tasks and higher pay, or ensures preferential search listings . . ."); Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 *BERKELEY TECH. L.J.* 1183, 1218 (2018) (discussing Fiverr's "level up" policy based partly on ratings); Rosenblat et al., *supra* note 28, at 261 ("The reputations that workers develop on platforms through ratings systems . . . can directly impact their earnings and opportunities for higher paid work.").

to consumers.³¹ Indeed, if the provider fails to maintain a composite score above a certain cut-off, the operator may “deactivate” the provider so that the provider no longer may utilize the operator’s platform to match with consumers.³²

Operators generally make available to consumers the composite scores or qualitative reviews that providers receive on the platform.³³ Thus, of critical importance, platform reputation systems allow for the building and maintaining of trust among semi-anonymous strangers often from separate and physically distant communities.³⁴ Reputation systems are especially critical to building trust among platform consumers given the nature of the platform economy—in which a consumer initiates a transaction online rather than at a physical space where a provider has developed a community reputation, platform users who are parties to a transaction are unlikely to know one another, and the parties are unlikely to engage with one another more than once.³⁵ Thus, consumers rely upon an operator’s reputation system, often exclusively, to screen providers efficiently and to avoid providers who the reputation system suggests might not be trustworthy.³⁶ In this way, a platform operator’s reputation system helps the

31. Alex Rosenblat, *There’s an App for Wrecking Nannies’ Lives*, N.Y. TIMES (July 12, 2018), <https://www.nytimes.com/2018/07/12/opinion/gig-economy-domestic-workers-uber.html> (“Ratings by [platform consumers] can reduce a [platform] worker’s search ranking and their eligibility for jobs . . .”); Dzieza, *supra* note 25 (discussing the downgrade policies of Airbnb and TaskRabbit).

32. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1071, 1079 (N.D. Cal. 2015) (noting that Lyft may deactivate a driver whose customer rating falls below a certain threshold); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1143, 1151 (N.D. Cal. 2015) (discussing Uber’s deactivation of drivers who fail to maintain a certain composite consumer rating); Cherry, *supra* note 28, at 597.

33. Leong & Belzer, *supra* note 23, at 1287–88; *Participation Agreement*, AMAZON MECHANICAL TURK, <https://www.mturk.com/worker/participation-agreement> (last updated Oct. 17, 2017) (providing that Amazon Mechanical Turk reserves the right to “implement mechanisms allowing us and others to track your requests for, or your performance of, Tasks and rate your performance as a Requester or Worker, and we reserve the right to collect that feedback related to you and to post that feedback on the Site”).

34. ARUN SUNDARARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM* 13 (2016).

35. Leong & Belzer, *supra* note 23, at 1287–88.

36. Katz, *supra* note 22, at 1075; Leong & Belzer, *supra* note 23, at 1288–89; TELLES, *supra* note 1, at 14 (“Digital matching firms, via rating systems within their platforms, have provided the consumer an efficient mechanism through which they are willing to trust complete strangers to provide goods and services.”).

operator and consumers avoid the “lemons problem” that otherwise would plague the platform.³⁷

Long before the rise of the platform economy, George Akerlof described the “market for lemons” in a 1970 paper for which he later was awarded the Nobel Prize in Economics.³⁸ The market for lemons is characterized by asymmetrical information—the seller knows better than the buyer the quality of a good or service before purchase.³⁹ When a buyer cannot tell the quality of a good or service before purchase, that buyer will be willing to pay only for the average quality of the good or service. Thus, high-quality providers will be underpaid and low-quality providers will be overpaid.⁴⁰ This dynamic will cause high-quality providers to leave the market, further reducing the average quality of providers.⁴¹ In the end, only low-quality providers will remain in the market.⁴² The solution to the lemons problem is signaling—a means for high-quality providers to convey to buyers their high quality.⁴³ A reliable reputation system is one such means of signaling.⁴⁴

Indeed, without a sound reputation system, many platforms would become a market for lemons, characterized by information asymmetry, where consumers have insufficient knowledge about provider quality and providers similarly lack adequate knowledge

37. See generally Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem,”* 70 U. MIAMI L. REV. 830 (2016). See also PRASSL, *supra* note 2, at 53 (describing “what economists call the ‘lemons problem’ [.] When hiring a worker over the Internet, it’s nearly impossible to know how good they will be, with negative consequences for all involved. Good workers will be underpaid and bad ones overpaid, with firms potentially unwilling to hire anyone.”).

38. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

39. *Id.* at 489.

40. *Id.* at 489–90.

41. *Id.* at 488, 489–90, 493.

42. *Id.* at 495.

43. *Id.* at 499–500 (discussing how the brand-name good “counteracts the effects of quality uncertainty”).

44. PRASSL, *supra* note 2, at 87 (“The dramatic increase in information available [through rating algorithms] about workers and consumers alike has gone a long way towards alleviating the information asymmetries that traditionally plague two-sided markets.”). Other means to counteract the effects of quality uncertainty include a warranty or guarantee and a licensure scheme. Akerlof, *supra* note 38, at 499–500; Thierer et al., *supra* note 37, at 858–63.

about consumer quality.⁴⁵ Parties might take advantage of this ignorance about platform user quality and the consequent lack of user accountability by engaging in shirking or other objectionable behavior such as providing shoddy work.⁴⁶ As a result of the information asymmetry and the behavior it begets, in time, the platform would suffer from “adverse selection” whereby higher-quality providers and consumers would forsake the platform.⁴⁷

A platform operator’s reputation system protects the platform and its users from the lemons problem and reduces transaction costs through a substitute for branding.⁴⁸ The reputation system serves a branding function for providers, suggesting a level of provider quality and thereby fostering consumer trust or distrust of the provider.⁴⁹ The reputation system also allows the operator to make a more informed decision as to whether it should have a certain provider associated with the operator’s own brand or, in the alternative, should deactivate the provider to protect the operator’s brand and the consumer.⁵⁰ The reputation system simultaneously serves as a type of credit score for consumers, enabling providers to gauge the desirability of entering into a transaction with a certain consumer.⁵¹ In sum, by reducing information asymmetries and increasing accountability, a platform operator’s reputation system gives users an incentive to be on their best behavior when engaging

45. See Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 120 (2015–2016) (“Most forms of peer-to-peer exchange are characterized by asymmetric information.”); cf. J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 136–37 (1998) (“The labor market, like the used car market, can be understood as a market for lemons.”).

46. Cohen & Sundararajan, *supra* note 45, at 120–21 (discussing this “moral hazard” that might arise from information asymmetry); Spitko, *supra* note 2, at 421, 434–35 (discussing how quality control standards and the ratings systems that enforce those standards by rough approximation “prevent a sort of tragedy of the commons . . . [in which] consumer trust in the specific platform and the platform economy generally serves as the relevant shared resource”).

47. See Cohen & Sundararajan, *supra* note 45, at 120 (“[A]dverse selection . . . occurs when the information asymmetry makes higher-quality traders less likely to participate.” (internal quotations omitted)).

48. See SUNDARARAJAN, *supra* note 34, at 145 (discussing the importance of brand in the “sharing economy”).

49. Katz, *supra* note 22, at 1116–17 (“[R]eputation systems serve a function similar to a brand or trademark for [platform] providers.”).

50. Spitko, *supra* note 2, at 432–33 (discussing how quality control standards, enforced through reputation systems, are an essential means for the platform operator to protect its brand).

51. Katz, *supra* note 22, at 1117–18.

in a platform transaction and thereby lessens the likelihood of adverse selection.⁵²

*B. Concerns Arising from Reliance upon Reputation Systems
in the Platform Workplace*

Commentators have raised a variety of concerns respecting the platform economy's reliance upon reputation systems to manage platform providers. These concerns relate to the quality of platform reputation systems, the economic effects of these systems on providers, the increased emotional labor for providers subject to the use of these systems, and invidious discrimination against providers that these systems may enable. This Article next discusses each of these concerns.

1. Quality of the systems

Some commentators have focused on the quality of platform reputation systems. For example, a few critics have argued that consumer ratings of providers generally are arbitrary and, thus, reputation systems fail to distinguish meaningfully between high-quality providers and low-quality providers.⁵³ A related concern is

52. *Id.*; Min Kyung Lee et al., *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*, 33 *PROCS. ACM ON HUM. FACTORS COMPUTING SYS.* 1603, 1608 (2015) (reporting from their study of Uber and Lyft providers that the reputation systems "promoted a service mindset in all drivers"); Rosenblat & Stark, *supra* note 28, at 3772 ("The ratings that passengers give drivers constitute the most significant performance metric according to driver discussions."); Rosenblat et al., *supra* note 28, at 259-60 (discussing empirical evidence that reputation systems in the platform economy encourage platform provider accountability); Dara Kerr, *Should Uber and Lyft Keep Passenger Ratings Secret?*, CNET (Sept. 25, 2014, 7:00 AM), <http://www.cnet.com/news/should-uber-and-lyft-keep-passenger-ratings-secret/> ("If passengers are aware they may get dropped rides [due to low passenger scores], they might make more of an effort to be courteous.").

53. PRASSL, *supra* note 2, at 62 ("Rating system's [sic] sanctions aren't just all-powerful; they often appear to operate in an entirely unpredictable and arbitrary fashion . . ."); TOM SLEE, *WHAT'S YOURS IS MINE: AGAINST THE SHARING ECONOMY* 98 (2d ed. 2017) ("[R]eputation systems fail in their basic task of distinguishing high quality or trustworthy offerings from lower-quality or untrustworthy offerings. There is no evidence that an Uber driver or a Handy cleaner with a rating of 4.9 is better in any way than someone with a rating of 4.6."). *But see* Katz, *supra* note 22, at 1118 n.271 (noting evidence that platform reputation systems quantitative ratings tend to be skewed to the extremes with most raters giving the highest rating and a small percentage of raters giving the lowest rating and concluding that "[t]he score therefore functions more like a 'thumbs up' or 'thumbs down'"); Jacob Thebault-Spieker et al., *Simulation Experiments on (the Absence of) Ratings Bias in Reputation Systems*,

that, frequently, a platform consumer may give a provider a lower rating because of the consumer's frustrations with use of the platform app that have nothing to do with the provider.⁵⁴ Thus, platform drivers have expressed apprehension that they may receive lowered ratings in response to the platform operator's surge pricing, problems with GPS navigation systems, the passenger's difficulty using the operator's app to set a pick-up location, or the provider merely insisting that passengers comply with the operator's rules and local laws.⁵⁵ The chief objection here is that providers may bear serious consequences, including deactivation, arising from arbitrary or unfair consumer ratings.⁵⁶

2. Economic effects

Other critics have focused more directly on the economic effects of reputation systems on platform providers. Some commentators have noted that a platform operator's use of a reputation system may tend to lock high-quality providers into that particular operator's platform ecosystem, given that a provider is not able to transfer her high composite score earned through that operator for use on another operator's platform.⁵⁷ The specific concern is with

PROCS. ACM ON HUM.-COMPUTER INTERACTION, Dec. 2017, at 101:1, 101:5 (2017) (reporting on a four-part Mechanical Turk-based study in which the participants in each part "reliably differentiated between low- and high-quality [simulated gig] work").

54. De Stefano, *supra* note 2, at 478; Rosenblat & Stark, *supra* note 28, at 3772 ("By design, systematic accountability for the whole interactive process is downloaded onto individual drivers because passengers do not have the option to rate the Uber system in-app separately from their drivers." (citation omitted)); Rosenblat et al., *supra* note 28, at 261–62 ("Because the Uber system is designed and marketed as a seamless experience, and coupled with confusion over what driver ratings are for, any friction during a ride can cause passengers to channel their frustrations with the Uber system as a whole into the ratings that impact an individual driver." (citation omitted)).

55. Lee et al., *supra* note 52 ("[D]rivers noticed that passengers misattributed system faults and negative experiences that drivers could not control to drivers themselves, which in turn resulted in lower ratings (e.g., surge pricing, traffic jams, GPS errors[,] etc.)."); Rosenblat et al., *supra* note 28, at 262.

56. See De Stefano, *supra* note 2, at 478 ("[Negative ratings] might have severe implications on [platform providers'] ability to work or earn in the future as the possibilities to continue working with a particular app or to accede to better-paying jobs on crowdsourcing platforms are strictly dependent on the rates and reviews of past activities."); *id.* at 488.

57. PRASSL, *supra* note 2, at 54 ("Rather than merely signalling quality, then, the real point of rating algorithms is to control workers—both on a day-to-day basis and by locking them into a particular platform's ecosystem."); Dellarocas, *supra* note 12, at 4 (discussing how reputation "constitutes a powerful form of lock-in").

providers who invest significant time and effort on a particular platform building a reputation score that is both high and durable—the latter because the score is based on a large number of ratings that will outweigh a few future low ratings. Such a provider may become reluctant to abandon that platform, and her high and durable reputation score, to start from scratch with a different platform.⁵⁸ Further, Jeremias Prassl has argued that this lock-in effect may also negatively impact the operator’s competitors and would-be competitors: “Algorithmic ratings . . . are an attempt to make life difficult for competitors, who cannot gain the necessary momentum when workers and, to a lesser extent, consumers would have to start from scratch after defecting.”⁵⁹ Thus, a number of commentators have called for regulation mandating portability of platform reputation scores so that a provider might use her high reputation score earned on one platform on a competitor platform.⁶⁰

Portability, however, would have drawbacks for the platform economy. Most significantly, portability of provider reputation scores would arguably make certain reputation scores less meaningful for consumers.⁶¹ For example, a provider’s excellent reputation score earned while the provider was a driver on Uber may be a poor predictor of the provider’s quality as a plumber on TaskRabbit.⁶²

58. PRASSL, *supra* note 2, at 87–88 (“[T]wo of the most important functions of algorithmic ratings are to control workers—and to lock them into a particular app’s ‘eco-system’: ratings need to be built up over time and cannot be taken from one platform to another.”); DZIEZA, *supra* note 25 (“For a worker who spends weeks or months building up a durable reputation on a particular platform, leaving for a competitor means starting from scratch.”).

59. PRASSL, *supra* note 2, at 88.

60. *See id.* at 111–12 (“A system of portable ratings would empower workers to follow up grievances and negotiate for better conditions—or to move on to a different platform.”); DZIEZA, *supra* note 25 (discussing portability as a means to increase provider bargaining power).

61. *See* Randy Farmer, *Web Reputation Systems and the Real World*, in *THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD*, *supra* note 12, at 13, 21 (“[G]ood reputation has limited context. Naïvely combining scores from diverse contexts makes the calculation about no context at all.”).

62. *Cf.* Johannes Sanger & Gunther Pernul, *Interactive Reputation Systems: How to Cope with Malicious Behavior in Feedback Mechanisms*, 60 *BUS. INFO. SYS. ENGINEERING* 273, 275 (2018) (“In reputation systems that do not consider transaction context, . . . a malicious actor could show a discriminating behavior in different situations such as selling high quality chewing gum but low quality laptops.”).

Further, the lock-in effect of reputation systems in the platform economy is not unique to the platform economy. Seniority systems in the traditional workplace have a similar effect in incentivizing employees to remain with their present employer.⁶³ Workplace law has long tolerated and even favored such seniority systems.⁶⁴ Indeed, seniority systems would seem to have a greater lock-in effect than do platform economy reputation systems, given the characteristic greater flexibility afforded to providers in the platform economy. An employee of a traditional firm may be limited with respect to her freedom to work simultaneously at a competitor firm.⁶⁵ Thus, such an employee would be precluded from beginning to build seniority at the competitor firm while remaining employed with her longer-term employer.

Platform operators, however, tout the flexibility that the platform economy affords providers, including the freedom of providers to engage with consumers on multiple platforms.⁶⁶ Indeed, for example, many platform drivers engage with passengers through both the Uber and Lyft platforms.⁶⁷ Thus, a platform provider has the ability to begin to build a high and durable reputation score with a competitor firm while continuing

63. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002) (“[Seniority systems] encourage employees to invest in the employing company, accepting ‘less than their value to the firm early in their careers’ in return for greater benefits in later years.” (citation omitted)).

64. *See id.* at 403–05 (holding that an assignment proposed as an accommodation under the Americans with Disabilities Act that would interfere with the rules of a seniority system “will not be reasonable in the run of cases”); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79–81 (1977) (holding that Title VII does not require an employer to abrogate the seniority rights of some employees to accommodate the religious needs of another employee).

65. *See Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005) (“[T]he most common manifestation of the duty of loyalty . . . is that an employee has a duty not to compete with his or her employer concerning the subject matter of employment.”); RESTATEMENT (SECOND) OF AGENCY § 393, cmt. e (AM. LAW INST. 1958) (explaining that an agent may not “solicit customers for [a] rival business . . . [or] do other similar acts in direct competition with the employer’s business” during her employment).

66. *See O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 WL 5138097, at *17 (N.D. Cal. Sept. 1, 2015) (noting Uber’s claim that it allows its providers to work with other firms including simultaneously with Uber’s rideshare competitors).

67. Sherk, *supra* note 2 (“[D]rivers often seek clients through both Uber and Lyft simultaneously.”); Miranda Katz, *This App Lets Drivers Juggle Competing Uber and Lyft Rides*, WIRED (Feb. 15, 2018, 7:00 AM), <https://www.wired.com/story/this-app-lets-drivers-juggle-competing-uber-and-lyft-rides/> (“Nearly 70 percent of on-demand drivers work for both Uber and Lyft, and one-quarter drive for more than just those two . . .”).

to engage consumers through the platform on which she has already built a high and durable reputation score.

3. *Emotional labor*

Other commentators have suggested that platform reputation systems force platform providers to engage in relatively greater amounts of sometimes demeaning “emotional labor” in exchange for positive ratings.⁶⁸ The concern is that providers must “suppress or contain their emergent emotions to present a placating or welcoming demeanor to customers, regardless of that customer’s reciprocal emotional state.”⁶⁹ Brishen Rogers, for example, contrasts platform drivers, who are obligated to perform emotional labor to maintain high ratings, with cab drivers who “can afford to be themselves—which may involve venting their frustrations at long hours and low pay.”⁷⁰

In a sense, this criticism respecting emotional labor is an acknowledgment that reputation systems are well-designed to achieve their intended aim of promoting high-quality service. Moreover, it is highly questionable whether workplace regulation should be concerned per se with a worker’s right to refrain from being pleasant to the consumer for whom she provides a service. Rogers raises the additional concern, however, that “emotional labor may impose a disparate burden on racial minorities” in that

68. Sociologist Arlie Russell Hochschild coined the term “emotional labor.” See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (1st ed. 1983).

69. Rosenblat & Stark, *supra* note 28, at 3775; see also De Stefano, *supra* note 2, at 478 (“Particularly for activities that are carried out in the physical world, this also requires a significant amount of ‘emotional labor’: to show kindness and be cheerful with customers as this would likely affect the rating of one’s work.”); Dzieza, *supra* note 25 (“[R]atings result in a sort of coerced friendliness, emotional labor markedly different from unrated taxi drivers.”); Luke Stark, *Recognizing the Role of Emotional Labor in the On-Demand Economy*, HARV. BUS. REV. (Aug. 26, 2016), <https://hbr.org/2016/08/recognizing-the-role-of-emotional-labor-in-the-on-demand-economy> (“As a result [of platform reputation systems], on-demand workers end up performing outsize amounts of what sociologists call ‘emotional labor’”); cf. Lee et al., *supra* note 52, at 1610 (discussing the effects of platform rating systems and concluding that “[t]rying to deliver good services for all service interactions could pose psychological stress to [platform economy] workers”); Christoph Lutz et al., *Emotional Labor in the Sharing Economy*, 51 PROCS. HAW. INT’L CONF. ON SYS. SCI. 636, 640, 642 (2018) (“Consumers of sharing economy services perform relatively high levels of emotional labor [G]reater exposure to the sharing economy increased the level of emotional labor, suggesting an element of behavioral change.”).

70. Rogers, *supra* note 2, at 97.

“[m]inority drivers, to retain high ratings, may need to overcome white passengers’ preconceptions, which can involve ‘identity work,’ or a conscious effort to track white, middle-class norms.”⁷¹ This specific concern raises the more general issue of the conscious and unconscious biases of raters.⁷²

4. Discrimination

A frequently discussed concern, which is the focus of this Article, is that platform reputation systems ratings may enable invidious discrimination against providers.⁷³ Specifically, critics allege that platform consumer ratings are influenced by the raters’ biases, whether conscious or unconscious.⁷⁴ Thus, platform

71. *Id.* at 97–98.

72. An unconscious or implicit bias is an unconscious association between a certain trait, such as a specific race, gender, or sexual orientation, and a particular value. These implicit biases may feed into one’s attitudes toward persons possessing those certain traits. See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (discussing the pervasive nature of implicit bias and its association with race discrimination); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1507–1535 (2005) (discussing implications of a “lack [of] introspective access to the racial meanings embedded within our racial schemas”). Unconscious bias has been the focus of increased national attention recently in light of a significant number of instances in which police have been called on to investigate people of color engaged in otherwise routine behavior, such as sitting in a Starbucks, touring a college campus, napping in a university dormitory lounge, checking out of an Airbnb rental, and golfing—reportedly too slowly. See, e.g., Christina Caron, *Yale Police Are Called over a Black Student Napping in Her Building*, N.Y. TIMES, May 9, 2018, at A21; Jacey Fortin, *Settlement is Reached over Arrests at Starbucks*, N.Y. TIMES, May 2, 2018, at B3; Tyler Pager, *Black Resident Is Accused of Not Living in Building*, N.Y. TIMES, Dec. 24, 2018, at A19; Daniel Victor, *Napping and Golfing While Black Raise Suspicion, and the Police*, N.Y. TIMES, May 12, 2018, at A19.

73. See, e.g., Rosenblat et al., *supra* note 28, at 263–65 (“In Uber’s case, any biases held by passengers may be funneled through the ratings model feedback mechanism and could have a disproportionately adverse impact on drivers who, for example, are people of color.”); see also, e.g., Lobel, *supra* note 10, at 166 (“While the mutual rating and review systems widely adopted on the platform have positive implications for trust and credibility, rating systems may also be affected by biases informed by attitudes on race, sexual orientation, or disability.”); Greg Harman, *The Sharing Economy Is Not as Open as You Might Think*, GUARDIAN (Nov. 12, 2014), <http://www.theguardian.com/sustainable-business/2014/nov/12/algorithms-race-discrimination-uber-lyft-airbnb-peer> (discussing concerns that “Uber’s rating system leaves it open for abuse” through customer discrimination).

74. See, e.g., PRASSL, *supra* note 2, at 62 (“[Platform ratings] might, on occasion, be downright racist or sexist.”); Cherry, *supra* note 28, at 597 (“Some have alleged that these ratings could be reflecting racial or religious bias, whether conscious or unconscious and are problematic as such.”); Levy & Barocas, *supra* note 30, at 1223–24 (“Though [a platform reputation system] can provide a basis for trust and reliability with unknown parties, it is also likely to be [affected] by users’ implicit biases and may therefore result in systematically

operators carry out consumer biases when they rely on consumer ratings to make decisions that affect providers.⁷⁵

Given the frequency with which concerns of reputation systems discrimination in the platform workplace have been raised,⁷⁶ one might expect to find ample evidence of such discrimination. In fact, only a handful of empirical studies have focused specifically on the issue. This lack of extensive empirical evidence directly on point may be explained, at least in part, by the difficulty that researchers would have in obtaining access to platform reputation systems ratings data and platform provider characteristics.⁷⁷

That being said, the few empirical studies specifically focusing on reputation systems bias in the platform workplace have produced some evidence of invidious bias.⁷⁸ Anikó Hannák and her

worse outcomes for users from marginalized groups.”); Rogers, *supra* note 2, at 95 (“Discrimination seems to be a risk of Uber’s rider-feedback model . . . [in that p]assengers may give bad reviews to racial-minority drivers, whether out of implicit or explicit bias.”); cf. Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL’Y REV. 309, 311 (2016) (“Platforms increase discrimination by identifying customers with picture-based profiles which reveal their race or racially-identified names.”).

75. See, e.g., Levy & Barocas, *supra* note 30, at 1220 (“[I]f platforms make material employment determinations based on consumer-sourced ratings, they may create a facially neutral avenue through which discrimination can creep into employment decisions”); Rosenblat et al., *supra* note 28, at 263 (“If a platform bases material employment determinations on such ratings, these systems—while appearing outwardly neutral—can operate as vehicles through which consumer bias can adversely impact protected groups.”); Julia Tomassetti, *Does Uber Redefine the Firm?: The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 75 (2016) (“Uber may be discriminating against drivers on the basis of race, sex, religion, and other protected categories by acting on the discriminatory ratings of passengers; for instance, if passengers tend to give black drivers lower ratings.”).

76. See *supra* notes 73–75 and accompanying text.

77. See Rosenblat et al., *supra* note 28, at 263 (“Without analysis of (and access to) both ratings data and information about worker characteristics, we cannot determine unequivocally whether consumer-sourced ratings . . . are, in the aggregate, racially biased”).

78. At the same time, some empirical studies directly on point have failed to show evidence of bias in platform reputation systems. See Cody Cook et al., *The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers* 7–8 (Nat’l Bureau of Econ. Research, Working Paper No. 24732, 2018) (“[T]he average of [Uber] rider ratings of drivers is statistically indistinguishable between genders.”); Yanbo Ge et al., *Racial and Gender Discrimination in Transport Network Companies* 10 n.5, 18 n.9 (Nat’l Bureau of Econ. Research, Working Paper No. 22776, 2016) (finding that the race of consumer passengers did not influence ratings by Uber and Lyft drivers); Thebault-Spieker et al., *supra* note 53, at 101:15 (reporting on a four-part Mechanical Turk-based study in which the authors found no significant race or gender bias in participant ratings of “simulated gig work” after participants had been provided with race and gender information about the (simulated) provider who created it).

colleagues studied ratings of providers on the freelancing platforms TaskRabbit and Fiverr.⁷⁹ They found that, on TaskRabbit, providers perceived to be women received fewer reviews than providers perceived to be men with equivalent work experience, and providers perceived to be black received lower reputation scores as compared to providers with similar work-related attributes who were not perceived to be black.⁸⁰ They further found that, on Fiverr, providers perceived to be black received fewer reviews and lower ratings than other similarly-situated providers, and reviews of providers perceived to be black used significantly more negative adjectives. Finally, the researchers found that Fiverr reviews of providers perceived to be black women used significantly fewer positive adjectives as compared to reviews for other providers.⁸¹

In addition, Brad N. Greenwood and his co-researchers have reported evidence of gender bias in the context of ridesharing platform reputation systems.⁸² Greenwood and his colleagues asked participants in their study to rate a driver in a (fictional) new ridesharing platform after the participants were given a structured narrative about the driver.⁸³ The researchers found no evidence of gender bias when the consumer experience was of high quality.⁸⁴ They also found, however, that when the consumer experience was of low quality, “women [drivers] are penalized to a far greater degree than men, particularly by male raters [and] this penalty accrues notably for highly ‘gendered’ tasks, such as the cleanliness of the vehicle, while men are penalized more uniformly for imperfect service.”⁸⁵

Given the small number of studies directly on point, commentators have reasonably extrapolated from empirical

79. Anikó Hannák et al., *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr*, 2017 PROCS. ACM CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK & SOC. COMPUTING 1914.

80. *Id.* at 1921–22, 1927.

81. *Id.* at 1923, 1925, 1927. The authors also reported finding a significant ratings bias on Fiverr in favor of providers perceived to be women compared to providers perceived to be men. *Id.* at 1923.

82. Brad Greenwood et al., *How Unbecoming of You: Gender Biases in Perceptions of Ridesharing Performance*, 52 PROCS. HAW. INT’L CONF. ON SYS. SCI. 6581, 6588 (2019).

83. *Id.* at 6581, 6584–85 (methodology described).

84. *Id.* at 6584.

85. *Id.* at 6588.

evidence of discrimination in other aspects of the platform economy and of reputation systems discrimination elsewhere to infer a strong likelihood that reputation systems in the platform workplace are influenced by invidious discrimination.⁸⁶ Indeed, a number of recent studies suggest that users' racial bias leads to lower offer prices and decreased response rates in online marketplaces.⁸⁷ For example, in one such study conducted in 2015 and published in 2017, Benjamin Edelman and his colleagues found that users of Airbnb⁸⁸ with African-American-sounding names were 16 percent less likely to be accepted as guests by Airbnb users offering lodging than were users with white-sounding names.⁸⁹ In 2016, in response to the Edelman study, Airbnb commissioned its own study of discrimination experienced on the Airbnb platform.⁹⁰ Following that review, Airbnb acknowledged that, indeed, invidious discrimination on its platform was a significant problem and implemented a series of policy and platform reforms to prevent and address discrimination on its platform.⁹¹

Outside the context of an online marketplace, numerous studies suggest that biases based on race, national origin, and gender impact managerial evaluations of workers⁹² and customer

86. See, e.g., Leong & Belzer, *supra* note 23, at 1276 n.14; Rosenblat et al., *supra* note 28, at 263–65 (“Consumer-sourced ratings like those used by Uber are highly likely to be influenced by bias on the basis of factors like race or ethnicity.”).

87. See Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J.: APPLIED ECON., Apr. 2017, at 1, 17 (discussing several studies); Rosenblat et al., *supra* note 28, at 263–65 (discussing several studies); Ge et al., *supra* note 78, at 18–19 (reporting evidence of race discrimination by platform drivers with respect to acceptance times, times for a vehicle to arrive, and trip cancellation rates); Jorge Mejia & Chris Parker, *When Transparency Fails: Bias and Financial Incentives in Ridesharing Platforms* 21 (Kelley Sch. of Bus., Research Paper No. 18-59, 2018), <https://ssrn.com/abstract=3209274> (finding that racial minorities and riders who exhibit support for the LGBT community experience significantly higher cancellation rates on a ridesharing platform).

88. The U.S. Department of Commerce refers to Airbnb as a “lodging digital matching platform.” TELLES, *supra* note 1, at 5. Still, one might think of Airbnb as falling outside the scope of this Article given that Airbnb intermediates access to an asset (a room) rather than a service (work). See PRASSL, *supra* note 2, at 143 n.7 (excluding Airbnb from discussion of the platform workplace because “the product offered [by Airbnb] to the consumer is use of an asset, rather than on-demand labour”).

89. Edelman et al., *supra* note 87, at 2, 7.

90. LAURA W. MURPHY, AIRBNB, AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION: A REPORT SUBMITTED TO AIRBNB (Sept. 8, 2016), https://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion_09292016.pdf.

91. See *id.* at 10–12, 19–25.

92. E.g., Rosenblat et al., *supra* note 28, at 265 (citing several studies).

satisfaction ratings.⁹³ Together, this evidence supports the fear that invidious bias very likely influences reputation systems in the platform workplace to the detriment of providers. Moreover, to the extent that such biases undermine the reliability of platform reputation systems, reputation systems discrimination also less directly negatively impacts platform consumers and operators.

Given the efficiencies of platform management by reputation systems, use of the model is likely to spread.⁹⁴ Thus, the issue of reputation systems discrimination in the platform workplace is worthy of study by regulators.⁹⁵ Part II of this Article argues in favor of a structural-purposive approach to frame that inquiry: regulators should regulate platform operators qua platform operators focusing on the inherent characteristics of the platform workplace and giving due regard to the structure of existing workplace protective regulation and the purposes the existing framework seeks to promote.

II. A FRAMEWORK FOR REGULATING THE PLATFORM WORKPLACE

In evaluating how best to respond to reputation systems discrimination in the platform workplace, it is useful to have in mind a framework for regulating the platform workplace more generally. This Part first reviews and rejects arguments for a hands-off approach that would refrain from regulation and for an anti-exceptionalism approach that would simply apply existing workplace regulation to the platform workplace. This Part then argues in favor of a structural-purposive approach that would regulate platform operators specifically, taking into consideration the special characteristics of the platform workplace, the structure

93. Flake, *supra* note 25, at 1190 (discussing several studies evidencing race or gender bias or both in customer evaluations of workers); Lu-in Wang, *When the Customer is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 283-85 (2016) (same); cf. Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1041-42 (2018) (discussing several studies suggesting that gender and race biases impact student evaluations of professors).

94. Dzieza, *supra* note 25 ("All the economists, investors, and even workers [the author] spoke to were in agreement on [this] point.").

95. See Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 228 (2016) (noting "that the matter of discrimination by customers is of growing importance" in light of the rise of the "sharing economy").

of existing workplace regulation, and the goals grounding that existing structure.

A. A Hands-Off Approach

The primary argument advanced in opposition to regulation of the platform economy, often focused on licensing regimes as opposed to regulation of the workplace per se, is that regulation risks stifling innovation.⁹⁶ For example, Matthew Feeney has argued that rather than level the playing field between platform operators and their competitors in traditional firms by regulating platform operators like their traditional competitors, legislatures should deregulate the traditional firms, thus, “allowing for innovative disruptors to enter markets.”⁹⁷ At the same time, a number of commentators have argued that the nature of the platform economy—specifically its reliance on reputation systems—obviates or at least mitigates the need for regulation of the platform economy.⁹⁸ The suggestion is that the platform economy’s two-way rating systems encourage good behavior on the part of the provider and the consumer and serve as a type of regulation, promoting safety and good service.⁹⁹

96. See Cohen & Sundararajan, *supra* note 45, at 123 (“Applying a regulatory regime developed for full-time or large-scale professional providers to smaller, semiprofessional providers could create barriers to entry, stifling peer-to-peer exchange as well as the grassroots innovation that the sharing economy facilitates.”); Matthew Feeney, *Level the Playing Field—By Deregulating*, CATO UNBOUND (Feb. 10, 2015), <https://www.cato-unbound.org/2015/02/10/matthew-feeney/level-playing-field-deregulating> (“In my view, policy relating to the sharing economy must be as hands-off as possible, not least because attempts to regulate companies such as Lyft and Airbnb in ways analogous to taxis and hotels could limit innovation and be used to engage in regulatory capture.”).

97. Feeney, *supra* note 96; see also Thierer et al., *supra* note 37, at 876 (arguing with respect to regulation of the “sharing economy” that “policymakers should level the playing field by ‘deregulating down’ to put similarly situated competitors on an equal footing, not by ‘regulating up’ to achieve parity”).

98. See, e.g., Thierer et al., *supra* note 37, at 874 (“[I]nformation markets, reputational systems, and rapid ongoing innovation often solve problems more efficiently than regulation”); Dzieza, *supra* note 25 (“Rather than a single certification before you can begin work, everyone [who is a user in the platform economy] is regulated constantly through a system of mutually assured judgment.”); Arun Sundararajan, *Why the Government Doesn’t Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <https://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/>.

99. Feeney, *supra* note 96 (“Badly behaved providers and consumers in the sharing economy do not last long, and the lack of anonymity means that anyone who does commit a crime is unlikely to escape justice.”).

Arun Sundararajan is a leading proponent of this perspective that “[t]echnology enables digitally mediated self-policing” that can reduce the need for government enforcement of regulation¹⁰⁰:

Because salient details are made visible [through reputation systems] not only to transacting parties but to the entire community, sellers (and buyers) have to stay honest and reliable to stay in business. In the sharing economy, *reputation* serves as the digital institution that protects buyers and prevents the market failure that economists and policy makers worry about.¹⁰¹

This peer regulation argument—relying on reputation systems—speaks persuasively to control of consumers and providers but fails to address adequately the need to regulate platform operators for the protection of those consumers and providers¹⁰² and, indeed, for the protection of society.¹⁰³ For example, it remains an open question as to whether the platform operator is a “public accommodation” within the purview of the Americans with Disabilities Act or related statutes or regulations.¹⁰⁴ If the platform operator is held to fall outside the definition of a public accommodation, it may escape disability law’s accommodation mandates intended to provide equal access to services for consumers with disabilities.¹⁰⁵ Indeed, in the face of

100. Sundararajan, *supra* note 98; see also SUNDARARAJAN, *supra* note 34, at 150–52 (discussing the merits of peer regulation of the platform economy).

101. Sundararajan, *supra* note 98.

102. Feeney argues that “[w]ithout regulation it is still in the best interests of sharing economy companies that their providers and consumers are not harmed and enjoy their experiences.” Feeney, *supra* note 96.

103. See Cohen & Sundararajan, *supra* note 45, at 117 (“[B]ecause the interests of digital, third-party platforms are not always perfectly aligned with the broader interests of society, some governmental involvement or oversight [of platform operators] is likely to remain useful.”).

104. TELLES, *supra* note 1, at 18; Rogers, *supra* note 2, at 95–96.

105. Cf. Leong & Belzer, *supra* note 23, at 1318–19 (observing that platform operators “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” of the 1964 Civil Rights Act, which prohibits discrimination in certain places of public accommodation on account of race, color, national origin, or religion). The power of disabled consumers to give negative reviews is likely to be insufficient to incentivize platform operators or providers to give equal access to consumers with disabilities. An operator or provider may prefer to discourage use by a disabled consumer rather than accommodate that consumer given that the cost of accommodation may be expected to exceed any potential profit arising from accommodation. Moreover, one who is foreclosed or discouraged from using a platform is less likely to rate the platform.

allegations by platform consumers of egregious disability discrimination, platform operators such as Uber have argued that they are not subject to such regulation.¹⁰⁶

A subsidiary argument favoring a hands-off approach to regulating the platform economy is the fear of regulatory capture by incumbent platform operators.¹⁰⁷ The specific concern is that incumbents will influence regulators to enact a scheme of regulation that will raise barriers to entry, especially for smaller companies, and thereby limit future competition.¹⁰⁸ In furtherance of this argument, Christopher Koopman points to regulation of the taxi industry to illustrate the potential pitfalls of platform economy regulation: “The general lack of competition caused by taxi regulations explains the absence of customer care among taxicabs that created the opportunity for ridesharing to become as popular as it is today.”¹⁰⁹

These concerns about regulatory capture should be weighed against concerns that the structure of the platform economy will enable the unregulated platform operator to generate even greater

106. *See, e.g., Nat'l Fed'n of the Blind v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073, 1082–84 (N.D. Cal. 2015) (discussing Uber's argument “that it is not a public accommodation under the ADA”); *Ramos v. Uber Techs., Inc.*, Civil Action No. SA-14-CA-502-XR, 2015 WL 758087, at *5–6 (W.D. Tex. Feb. 20, 2015) (discussing Uber and Lyft's arguments that they are not public accommodations under the ADA); Jen Wiecezner, *Why the Disabled Are Suing Uber and Lyft*, TIME (May 22, 2015), <http://time.com/3895021/why-the-disabled-are-suing-uber-and-lyft/> (recounting allegations of egregious discrimination against disabled passengers by platform operators utilizing Uber and Lyft and noting that Uber has argued in disability discrimination lawsuits that, because it is a technology company rather than a transportation company, it is not subject to disability discrimination regulations applicable to public accommodations).

107. Cohen & Sundararajan, *supra* note 45, at 123 (“Applying a regulatory regime developed for full-time or large-scale professional providers to smaller, semiprofessional providers could create barriers to entry, stifling peer-to-peer exchange as well as the grassroots innovation that the sharing economy facilitates.”); Feeney, *supra* note 96 (“New regulatory designations for the sharing economy . . . offer sharing economy companies the opportunity to influence policymakers and engage in regulatory capture.”); Christopher Koopman, *Today's Solutions, Tomorrow's Problems*, CATO UNBOUND (Feb. 17, 2015), <https://www.cato-unbound.org/2015/02/17/christopher-koopman/todays-solutions-tomorrows-problems> (agreeing with the argument that certain regulation of the platform economy “will create opportunities for rent-seeking and regulatory capture in the future”).

108. Feeney, *supra* note 96 (arguing that regulation of platform companies “could be abused by established companies such as Uber in order to limit competition”); Koopman, *supra* note 107 (arguing that regulation of the platform economy will raise barriers to entry and, ultimately, limit competition against incumbent operators).

109. Koopman, *supra* note 107.

barriers to entry.¹¹⁰ Arguably, a greater barrier to entry than regulatory capture and, thus, a greater threat to future competition arises from the network effects that incumbent platform operators leverage.¹¹¹ Network effects exist with respect to a product or service when the value of the product or service to the consumer depends upon how many other consumers use the product or service.¹¹² With positive network effects, the consumer derives greater value from a larger network.¹¹³ That is, the consumer's utility increases as more consumers use the product or service, and the consumer's utility decreases as fewer consumers use the product or service.¹¹⁴ Language usage provides a helpful analogy: The greater number of people who speak a language, the more useful knowledge of and use of that language becomes.¹¹⁵

In the platform economy, as the number of consumers who use a certain platform grows, that platform becomes more valuable to providers, and as the number of providers who use a specific platform grows, that platform becomes more valuable to consumers.¹¹⁶ Thus, a consumer seeking a ride will generally prefer a platform operator with an extensive network of drivers so that she can be matched with a driver quickly no matter her present location. Similarly, the provider seeking a rider will prefer an operator with an extensive network of passengers so that she can be matched with a passenger quickly no matter where she finds herself.¹¹⁷ In this way, the platform operator's true product is

110. See Kenney & Zysman, *supra* note 10, at 68 (arguing that “many platforms [broadly defined] by their very nature prove to be winner-take-all markets, in which only one or two companies survive” and that a resulting “monopoly position or even a strong oligopoly might inhibit, or sharply constrain, further entrepreneurial efforts”).

111. See BRHME BALARAM, FAIR SHARE: RECLAIMING POWER IN THE SHARING ECONOMY 17-19 (2016) (discussing how network effects in the “sharing economy” enable platform operators to exercise monopoly power).

112. SUNDARARAJAN, *supra* note 34, at 118; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 45 (2000).

113. Merrill & Smith, *supra* note 112, at 46 n.163.

114. *Id.* at 45-46.

115. *Id.* at 45 (mentioning language as an example of “metaphorical” network effects).

116. Katz, *supra* note 22, at 1122 (“Sharing platforms benefit from indirect network effects—the more providers operate on the platform, the more valuable the service becomes for users.”).

117. SUNDARARAJAN, *supra* note 34, at 95; Spitko, *supra* note 2, at 435-36 (making this point more generally).

its network.¹¹⁸ More precisely, the platform's providers and consumers are the operator's true product.

The incumbent platform operator's ability to harness network effects presents the threat of a significant barrier to entry for non-incumbents.¹¹⁹ Consumers and providers will tend to use the incumbent platform simply because other consumers and providers tend to use that platform.¹²⁰ Thus, network effects may give rise to monopoly power in the incumbent platform operator to the detriment of non-incumbents and, ultimately, to the detriment of consumers and providers.¹²¹

In sum, the need to protect platform consumers and providers and to guard against market power arising from network effects should outweigh concerns that regulation will stifle innovation or lead to regulatory capture.¹²² Specifically, an operator's decision to deactivate or downgrade a provider can have severe economic consequences for the provider.¹²³ This critical importance of reputation systems to the livelihoods of providers is a compelling justification for regulating their use by the platform operator, especially given credible concerns that an operator's adverse action affecting a provider may be a product of invidious discrimination arising from the operator's reputation system.¹²⁴ More generally,

118. BALARAM, *supra* note 111, at 14 (pointing out that a platform operator's "value is not dependent on a finite product but on an infinite network").

119. See Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 175, 186 (Mohamed Abdel Wahab et al. eds., 2011) (discussing how network effects led online auction traffic to consolidate onto eBay).

120. See BALARAM, *supra* note 111, at 17 (commenting with respect to users of "sharing platforms" that "it is more efficient to go where everyone else is already").

121. See Dzieza, *supra* note 25 ("The question is how do we deal with the fact that network effects are very powerful, so many [platform operators] will become quasi monopolies."). *But see* Rogers, *supra* note 2, at 92 ("While Uber's success relies in part on network effects—more riders and drivers enable a more efficient market—the switching costs for riders and drivers appear to be fairly minimal.").

122. See Katz, *supra* note 22, at 1109 ("Given the public interest in consumer and worker welfare, absolute immunity for sharing platforms rarely makes sense.").

123. Dzieza, *supra* note 25 ("If you're dependent on a platform for work, getting deactivated is less like an independent contractor getting a poor Yelp review and more like being fired, having your livelihood cut off, except through anonymous and opaque reviews and with very little recourse.").

124. See TELLES, *supra* note 1, at 14 ("Service providers in the digital matching economy are fully reliant on the digital matching platform's ability to connect them with consumers . . .").

many platform operators have become too powerful and the platform workplace as a whole has become too big to not regulate.¹²⁵

B. The Anti-Exceptionalism Approach

While some commentators have touted the potential of the platform economy to transform the workplace,¹²⁶ others have minimized the platform economy's importance for labor markets.¹²⁷ Indeed, a number of commentators have wholly or largely rejected platform exceptionalism.¹²⁸ The anti-exceptionalism argument asserts that "[m]ost of the features scholars point to as evidence of the exceptionalism of platform companies are defining characteristics of almost all service production."¹²⁹ Thus, the platform economy does not merit special treatment with respect to workplace regulation.¹³⁰ Rather, platform

125. Frank Pasquale & Siva Vaidhyanathan, *Uber and the Lawlessness of 'Sharing Economy' Corporates*, GUARDIAN (July 28, 2015), <https://www.theguardian.com/technology/2015/jul/28/uber-lawlessness-sharing-economy-corporates-airbnb-google> ("As allegedly 'innovative' firms increasingly influence our economy and culture, they must be held accountable for the power they exercise.").

126. See, e.g., Micha Kaufman, *The Gig Economy: The Force that Could Save the American Worker?*, WIRED (Sept. 2013), <https://www.wired.com/insights/2013/09/the-gig-economy-the-force-that-could-save-the-american-worker/> (suggesting that "platforms create a bridge between traditional enterprises and th[e] emerging [gig] economy" and predicting that "the Gig Economy will itself become an engine of economic and social transformation").

127. See, e.g., Frank A. Kalman, *Yes, the Gig Economy Is Great – But It Isn't the Future of Work*, MEDIUM (Nov. 18, 2016), <https://medium.com/@FaKalman/yes-the-gig-economy-is-great-but-it-isnt-the-future-of-work-a5629f2b9e2d> (arguing that "[a]ssuming the gig economy is the future of work based on proliferation of a few platforms runs almost entirely counter to the kinds of workplace cultures that leaders are working so hard to cultivate" and, for this and other reasons, "gig work is likely to remain a small part of the overall labor force, both from an economic perspective and a cultural, performance and management perspective").

128. See, e.g., Avi Asher-Schapiro, *The Sharing Economy Is Propaganda*, CATO UNBOUND (Feb. 13, 2015), <https://www.cato-unbound.org/2015/02/13/avi-asher-schapiro/sharing-economy-propaganda> ("That a smartphone or website mediates the exchange . . . does not change fundamentally the relationship between consumers, laborers, and management.").

129. Tomassetti, *supra* note 75, at 6–7; *id.* at 67 ("Terms often reserved for platform work, like the 'peer-to-peer economy' and the 'human-to-human economy' would seem to describe almost all service work involving customer interaction." (footnotes omitted)).

130. *Id.* at 67 ("The sophistic appeal of the Uber narrative suggests that we need to interrogate the coherence of the 'platform economy' as an empirical phenomenon relevant to policy making."); cf. PRASSL, *supra* note 2, at 6, 9–10 (rejecting "technological exceptionalism" and arguing that the platform workplace "needs to be brought within the

operators should be subject to the same workplace regulation as any traditional firm.¹³¹ Julia Tomassetti's query is representative of the anti-exceptionalism critique: "Why do we more readily accept that Uber intermediates between buyers and sellers, but that a restaurant does not intermediate a market between buyers of hospitality services (diners) and sellers (waiters)?"¹³²

Generally speaking, Uber is far less involved in the actual provision of the respective product/service than is Tomassetti's comparator restaurant. The structural differences between the two firms preordain this result. More precisely, a typical restaurant does not possess any of the defining characteristics of a platform operator.¹³³ The restaurant does not utilize an online platform to facilitate the patron-waiter transaction, but rather utilizes a physical space that it controls completely to host the transaction.¹³⁴ The restaurant does not afford its wait staff the flexibility for each to decide when and for how long she will work.¹³⁵ The restaurant does not require its wait staff to supply the assets needed to provide the service at issue.¹³⁶ And finally, the restaurant, unlike the platform operator, has the ability to supervise and direct its wait staff in real time.¹³⁷ Thus, the restaurant need not and does not

scope of employment law" but also that regulators should "develop existing standards in response to the specific challenges of precarious work").

131. See PRASSL, *supra* note 2, at 93 ("Technology apart, the control exerted by on-demand platforms is not fundamentally different from the control exerted by other businesses – nor should the baseline protection for workers be."); Asher-Schapiro, *supra* note 128 (arguing that platform economy "[c]ompanies that profit from the labor of hundreds of thousands of people should be forced to behave like responsible employers"); Dean Baker, *The Sharing Economy Must Share a Level Playing Field*, CATO UNBOUND (Feb. 11, 2015), <https://www.cato-unbound.org/2015/02/11/dean-baker/sharing-economy-must-share-level-playing-field> (speaking of labor market regulations and arguing that "it does not make sense to have one set of rules that apply to incumbent taxi services and a whole different set that applies to Uber").

132. Tomassetti, *supra* note 75, at 77.

133. *Contra id.* at 6–7.

134. *But cf.* TELLES, *supra* note 1, at 3 ("Digital matching firms use information technology (IT systems), typically available via web-based platforms such as mobile 'apps' on Internet-enabled devices, to facilitate peer-to-peer transactions.").

135. *But cf. id.* ("Individuals who provide services via digital matching platforms have flexibility in deciding their typical working hours.").

136. *But cf. id.* at 4 ("To the extent that tools and assets are necessary to provide a service, digital matching firms rely on the workers using their own.").

137. *But cf. id.* at 3 ("Digital matching firms rely on user-based rating systems for quality control, ensuring a level of trust between consumers and service providers who have not previously met.").

rely almost exclusively on algorithmic management¹³⁸ by reputation systems.¹³⁹

Each of these differences between the platform operator and the typical restaurant speaks to the lesser degree of control exercised by the platform operator over its provider as contrasted with the restaurant, or numerous other traditional businesses in the service industry, with respect to its employee. The degree of control that a firm exercises over a worker or has the right to exercise over a worker is a critical factor in analyzing whether the firm employs the worker.¹⁴⁰ Therefore, each of these differences, separately and in sum, makes it far less likely that the operator will be found to be the employer of the platform provider than in the case of the restaurant with respect to its waiter or the traditional service firm with respect to its worker.

The anti-exceptionalism project seeks to fit the platform workplace within the existing framework of workplace protective regulation. Yet, most U.S. workplace protective regulation applies to a firm only with respect to the firm's employees and not with respect to the firm's independent contractors.¹⁴¹ Thus, application under the anti-exceptionalism view of the existing workplace

138. See Lee et al., *supra* note 52, at 1603 (defining algorithmic management as "software algorithms that assume managerial functions and surrounding institutional devices that support algorithms in practice"). A "sharing economy" worker has commented, "We do still have a boss. It just isn't a person. It's an algorithm." Andrew Callaway, *Apploitation in a City of Instaserfs: How the "Sharing Economy" Has Turned San Francisco into a Dystopia for the Working Class*, CAN. CTR. FOR POL'Y ALTERNATIVES (Jan. 1, 2016), <https://www.policyalternatives.ca/publications/monitor/aploitation-city-instaserfs>.

139. See Notice of Motion and Motion of Defendant Uber Technologies, Inc. for Summary Judgment: Memorandum of Points and Authorities in Support Thereof at 4 n.6, *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (No. 13-03826-EMC) (Uber asserting that its "only insight into the quality of service provided by drivers comes from passengers, in the form of star ratings or comments"). Moreover, the platform and the restaurant differ greatly with respect to network effects. Unlike Uber, the restaurant does not leverage network effects. Indeed, to the extent that the restaurant gives rise to network effects that impact its patrons, it gives rise to negative network effects. A negative network effect arises when a consumer's use of a product or service reduces the value of that product or service for other consumers. Merrill & Smith, *supra* note 112, at 45 n.162. In the case of the restaurant, the restaurant's increasing popularity will produce negative network effects through overcrowding: the value of the restaurant decreases for the patron who is unable to secure a reservation or who must wait an hour to be seated at one of a limited number of tables.

140. Spitko, *supra* note 2, at 424-27 (discussing the traditional framework for classifying workers as either employees or as independent contractors).

141. *Id.* at 423.

regulation framework to the platform operator will make it far less likely that the operator will be subject to workplace protective regulation as contrasted with the traditional firm.¹⁴²

Indeed, application of the existing workplace regulation framework to the platform operator in the context of reputation systems discrimination demonstrates the fallacies and inadequacies of the anti-exceptionalism approach. Most federal and state workplace antidiscrimination statutes, including Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in employment with respect to race, color, religion, sex, and national origin),¹⁴³ the Age Discrimination in Employment Act,¹⁴⁴ and the Americans with Disabilities Act,¹⁴⁵ prohibit a covered firm from discriminating against its employees with respect to the characteristics protected by the statute but leave the firm free to discriminate against independent contractors.¹⁴⁶ Thus, a platform provider who believes that an operator has subjected her to reputation systems discrimination has no remedy against the operator under any of these statutes if, as is likely under the existing workplace regulation framework, the provider is found to be an independent contractor with respect to the operator.¹⁴⁷

Moreover, even if the platform operator were found to employ the provider, the existing workplace regulation framework would prove grossly inadequate at preventing, mitigating, or remedying

142. Cf. Edelman et al., *supra* note 87, at 18 (commenting that civil rights laws proscribing certain invidious discrimination with respect to public accommodations “appear to be a poor fit for the informal sharing economy, where private citizens rent out a room in their home”).

143. See 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2018).

144. See 29 U.S.C. §§ 623(a), 630(b) (2018).

145. See 42 U.S.C. §§ 12111(5), 12112.

146. Section 1981 of the Civil Rights Act of 1866 is a major exception to this rule. See 42 U.S.C. § 1981(a). Section 1981 proscribes race discrimination in the making of contracts. *Id.* The Supreme Court has held that the provision applies to intentional discrimination in employment as well as in independent contractor relationships. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459–60 (1975) (“[Section] 1981 affords a federal remedy against discrimination in private employment on the basis of race.”). The Court also has held, however, that Section 1981 does not provide for recovery under a disparate impact theory. *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 383–91 (1982).

147. See Rosenblat et al., *supra* note 28, at 267 (“In general, the unsettled nature of labor classification with respect to platform-based companies imposes a significant hurdle on prospective plaintiffs bringing a Title VII suit premised on discriminatory consumer-sourced ratings.”).

reputation systems discrimination in the platform workplace.¹⁴⁸ There does not appear to be any reported case directly on point in which an employee argues that her employer violated an antidiscrimination statute in taking an adverse action against her by relying upon a customer review grounded in invidious bias.¹⁴⁹ Still, the Title VII framework illustrates the inadequacy.¹⁵⁰ Title VII provides for only two theories of recovery: disparate treatment and disparate impact.¹⁵¹ In a disparate treatment case, the plaintiff bears the burden of demonstrating that the employer intended to discriminate against the employee on the basis of a protected characteristic.¹⁵² At a minimum, the plaintiff must prove that the

148. See Wang, *supra* note 93, at 277 (commenting, in relation to the traditional workplace, that “management by customers may be especially difficult to challenge under existing doctrine”).

149. See Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2170 (2018) (reporting that “by the end of 2017 there still were no published court opinions directly addressing whether, or to what extent, employers should be liable for using discriminatory customer feedback to make employment decisions”); Wang, *supra* note 93, at 285 n.225 (stating that the author failed to find any reported case addressing this precise issue); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1416–17 (2009) (posing a hypothetical in which an employer relies upon a customer review that suggests a racist basis for the customer’s dissatisfaction and reporting that “[n]o published decision is precisely on point”).

150. See Rosenblat et al., *supra* note 28, at 265–69 (“The legal protections against discrimination usually available to U.S. workers (under Title VII of the Civil Rights Act of 1964) may be difficult to apply when customer-sourced ratings drive employment determinations . . .”); Wang, *supra* note 93, at 285–86 (discussing why reputation systems discrimination in the traditional workplace “would be difficult to challenge under current Title VII doctrine”).

151. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) (“These two proscriptions, often referred to as the ‘disparate treatment’ (or ‘intentional discrimination’) provision and the ‘disparate impact’ provision, are the only causes of action under Title VII.”).

152. The law governing third-party and coworker harassment claims presents an anomaly. Zatz, *supra* note 149, at 1366–86. Where a third party or a coworker of a firm’s employee has subjected the employee to a hostile work environment because of the employee’s protected trait, the employee may succeed in a disparate treatment claim against the firm by showing that the firm knew or should have known about the harassment and failed to take reasonable steps to stop the harassment. See Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (noting that lower federal courts had “uniformly judg[ed] employer liability for co-worker harassment under a negligence standard”); Galdamez v. Potter, 415 F.3d 1015, 1022 (9th Cir. 2005) (“This hostile environment theory of employer liability [for customer harassment of an employee] is grounded in negligence and ratification rather than intentional discrimination.”); Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003) (“When . . . the alleged harassment is committed by co-workers or customers, a Title VII plaintiff must show that the employer either knew (actual notice) or should have known

employee's protected characteristic "was a motivating factor" in the employer's treatment of the employee.¹⁵³ Thus, in seeking to recover for reputation systems discrimination, a provider would be required to show, at a minimum, that the protected characteristic was a motivating factor in the operator's decision to rely upon the ratings in taking an adverse action against the provider.¹⁵⁴ The typical provider would be highly unlikely to be able to meet this burden in light of the utility of reputation systems to operators needing to manage a large, atomized, remote, and widely-dispersed workforce and the difficulty of demonstrating invidious bias in reputation systems.¹⁵⁵

U.S. Supreme Court case law does provide an avenue for holding an employer liable for disparate treatment where the decisionmaker did not intend to discriminate on the basis of a protected trait but was influenced in her employment decision by someone who did have such a discriminatory intent. In *Staub v. Proctor Hospital*,¹⁵⁶ the Supreme Court set forth a rule for such a case

(constructive notice) of the harassment and failed to take immediate and appropriate corrective action." (citing *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000)).

153. 42 U.S.C. § 2000e-2(a), (m) (2018). Where the employer bases its adverse action against an employee directly on a desire to accommodate a customer's preference to not interact with the employee based on the employee's protected trait, the employer has acted with the requisite discriminatory intent. *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("It is now widely accepted that a company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race."); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

154. An employer may escape liability where it has acted to satisfy a customer preference to discriminate on the basis of a protected trait if the employer can demonstrate that the protected trait "is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of that particular business or enterprise[.]" 42 U.S.C. § 2000e-2(e)(1) (2018). Courts have recognized that customer privacy interests may support a successful BFOQ defense. *See, e.g., Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979, 989-94 (9th Cir. 2015) (focusing on privacy interests in concluding that sex is a BFOQ for certain prison guard positions); *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133-34 (3d Cir. 1996) (holding that privacy concerns supported BFOQ defense relating to child care specialist position at facility for emotionally disturbed and sexually abused adolescents and children).

155. *See Rosenblat et al., supra* note 28, at 268 ("[I]t is precisely this form of rating system which allows Uber to manage a large, geographically distributed, and transitory population of 1.1 million workers worldwide."); *cf. Leong & Belzer, supra* note 23, at 1320 (noting that "[t]he nature of the platform economy means most transactions take place online rather than in person" and arguing that proving discriminatory intent in the platform economy "may therefore be particularly difficult").

156. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011).

of “cat’s-paw”¹⁵⁷ liability: “[I]f a supervisor performs an act motivated by [prohibited] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under [the antidiscrimination statute].”¹⁵⁸ Thus, where a supervisor gives a negative rating of an employee, the supervisor is motivated by a prohibited bias in doing so, and the supervisor intends for her own superior to rely upon that negative evaluation in taking an adverse action against the employee, the employer has violated Title VII.

A platform provider alleging that the operator relied upon an impermissibly biased reputation system rating in taking an adverse action against the provider would be unlikely to avail herself successfully of the cat’s paw theory.¹⁵⁹ In *Staub*, the Supreme Court expressly declined to express a view as to whether the cat’s paw theory would be available where an employee’s coworker who was not the employee’s supervisor acted with discriminatory intent and that action influenced the ultimate employment action.¹⁶⁰ Still, the Court’s reasoning would not seem to apply to a discriminatory act by a coworker, let alone by a platform consumer.¹⁶¹ In either case, traditional agency principles would not support imputing liability to the employer.¹⁶²

Finally, Title VII’s disparate impact provision makes it an unlawful employment practice under certain circumstances for an employer to “use[] a particular employment practice that causes a

157. *Id.* at 415 n.1 (discussing the derivation of the term “cat’s paw” from an Aesop fable and Judge Richard Posner’s introduction of the term into U.S. employment discrimination law).

158. *Id.* at 422 (footnotes omitted). *Staub* involved a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.* (2018). *Id.* at 415. The Supreme Court noted in *Staub* that “[t]he statute is very similar to Title VII[.]” *Id.* at 417.

159. See Flake, *supra* note 149, at 2202–03 (discussing difficulties with applying the cat’s paw theory to customer discrimination).

160. *Staub*, 562 U.S. at 422 n.4.

161. See *id.* (“Needless to say, the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles.”).

162. See Wang, *supra* note 93, at 260 (“[B]ecause its analysis focused on agency law, it is unlikely that the Court’s reasoning [in *Staub*] would extend to discrimination by customers.”).

disparate impact on the basis of race, color, religion, sex, or national origin[.]”¹⁶³ To succeed with a disparate impact claim, a platform provider would not need to prove that the platform operator intended to discriminate.¹⁶⁴ Rather, the provider would need to show that the operator’s reliance upon the reputation system gave rise to an adverse impact against a protected group.¹⁶⁵ Even if the provider were to meet this difficult and expensive burden,¹⁶⁶ the operator could still prevail in the litigation if the operator were able to demonstrate that its reliance on the reputation system was “job related for the position in question and consistent with business necessity[.]”¹⁶⁷ Almost by definition, a reputation system such as those that platform operators typically employ is job-related and consistent with business necessity in that it is arguably the best measure of the consumer’s satisfaction with the provider.¹⁶⁸

In sum, in the context of reputation systems discrimination, the anti-exceptionalism project arguing for application of the existing workplace regulation framework to platform operators is not worth the candle.¹⁶⁹ Because the operator is less likely to be found to be the platform provider’s employer than a traditional firm with respect to its worker, the operator is less likely to be subject

163. 42 U.S.C. § 2000e-2(k) (2018).

164. *See* EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1273 (11th Cir. 2000) (noting that disparate impact claims do not require proof of discriminatory intent).

165. *See id.* at 1274 (plaintiff alleging disparate impact must show “that a causal nexus exists between the specific employment practice identified and the statistical disparity shown” (citing EEOC v. Joe’s Stone Crab, Inc., 969 F. Supp. 727, 735 (S.D. Fla. 1997))).

166. *See* Bartlett & Gulati, *supra* note 95, at 250 (stating that to demonstrate that a particular employment practice caused a disparate impact “can be next to impossible to do in the case of customer discrimination”); Rosenblat et al., *supra* note 28, at 263 (noting that a platform provider lacks access to critical data and concluding that “[p]ractically speaking, it would be very challenging for anyone other than [the platform operator] to do the analysis required to investigate disparate impact of protected-class [providers]”); Wang, *supra* note 93, at 286 (noting that a disparate impact claim based on the employer’s use of customer evaluations in the traditional workplace would be “difficult to establish”).

167. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

168. *See* Rosenblat et al., *supra* note 28, at 267 (“Uber should be able to successfully meet [the business necessity] burden based on data it is already collecting from its platform: it seems probable that consumer ratings will bear some correlation in aggregate with a range of different job performance variables such as rider satisfaction, driver safety, or successful trip completion.”); *cf.* Flake, *supra* note 149, at 2209–10 (discussing the argument that an employer’s “ability to consider customer feedback in making employment decisions is . . . necessary to ensure customer satisfaction”).

169. *See* Rosenblat et al., *supra* note 28, at 269 (“Title VII [is] an ineffective means of ending discriminatory employment practices that may be perpetuated through Uber’s rating systems and similar mechanisms on other online platforms.”).

whatsoever to most antidiscrimination statutes. Further, even if the operator were found to be the provider's employer, the applicable antidiscrimination statutes are unlikely to provide an effective remedy for the provider or deterrent for the operator. Thus, workplace regulators would be better off focusing their energy on efforts to regulate the platform operator qua platform operator.¹⁷⁰ This Article turns next to a structural-purposive approach for doing so.

C. A Structural-Purposive Approach

The current workplace regulation scheme was not designed for and is ill-suited to the circumstances of the platform economy. In formulating a scheme that is more pertinent to the platform workplace, regulators should keep in mind the goals that the existing regulation framework seeks to achieve and how the existing framework serves those purposes in the context of the traditional workplace. The critical issue then becomes how these purposes and the existing framework relate to the structure of the platform economy. I label this focus a structural-purposive approach.

A structural approach, as a mode of statutory *interpretation*, posits that the meaning of a term or provision may become clearer when the term or provision in question is placed in the context of a whole statutory scheme.¹⁷¹ Thus, to ascertain meaning, one examines how the term or provision relates to other provisions in a statute or a body of law or how those other provisions relate to each other.¹⁷² The theory is that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings

170. Cf. Feeney, *supra* note 96 (arguing that “[w]hile some regulators are tempted to regulate sharing economy companies like their competitors, to do so would be a mistake that betrays a misunderstanding of how the sharing economy works” but arguing against regulation of platform operators).

171. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (“[W]hen deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))).

172. See *id.* at 2490.

produces a substantive effect that is compatible with the rest of the law.’’¹⁷³

Previously, I have argued for a species of structural approach that I label a structural-purposive approach to aid statutory interpretation in the context of the platform economy where neither the text nor the legislative history of the relevant workplace protective legislation under consideration provides reliable indicators of the meaning of a statutory term.¹⁷⁴ Specifically, I have argued that such an approach would be useful in analyzing whether the legislature that enacted certain workplace protective legislation would have intended for a platform operator’s reservation of the right to impose quality control standards on a platform provider to give rise to employment obligations running in favor of the provider and against the operator pursuant to that workplace protective legislation.¹⁷⁵ This interpretive analysis focuses on both the structure of workplace protective regulation generally and the structure of the platform economy to which the statute at issue is being applied.¹⁷⁶ Focusing on these elements informs consideration of the critical issue—how would the legislature that enacted the workplace protective legislation framework for regulation of the traditional firm wish to achieve the purposes of that framework within the context of the platform workplace?

One might ask a substantially similar question when applying a structural-purposive approach to statutory *formulation* for the platform workplace: the issue becomes how a legislature should seek to achieve the purposes of the traditional workplace protective regulation framework in the context of the platform economy and in light of the structure of the platform economy.¹⁷⁷ The structural-purposive approach seeks to be guided by the purposes

173. *Id.* at 2492 (quoting *United Sav. Ass’n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

174. *See generally* Spitko, *supra* note 2.

175. *Id.* at 416–22.

176. *Id.* at 418–19.

177. *Cf.* GUY DAVIDOV, *A PURPOSIVE APPROACH TO LABOUR LAW* (2016) (arguing that workplace law reformers should first articulate the goals of workplace law and then consider how workplace laws should be changed to better advance those goals); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (applying a structural-purposive approach to statutory formulation in the context of succession law).

and experiences of the traditional workplace protective regulation framework without being constrained by that framework's shortcomings and limitations in the context of the platform economy.

A concern that may arise with the use of a structural approach as a tool for statutory interpretation is that the method leaves too much discretion to the eye of the beholder. Thus, the Supreme Court has cautioned, "Reliance on context and structure in statutory interpretation is a 'subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.'"¹⁷⁸ Still, a structural approach is useful, at a minimum, as a means to eliminate possible interpretations of a piece of a statute or body of law that would be at war with the statute or body of law as a whole.

The same is true of a structural-purposive approach to statutory formulation. The mode of analysis is useful as a lens through which to view and evaluate alternative designs for regulation. In the context of the platform economy, the approach allows for the screening out of proposed regulation that would be inimical to the inherent characteristics of the platform economy and aids in the framing of regulatory proposals that would leverage those characteristics.

A counterexample may helpfully demonstrate the value of a structural-purposive approach to regulation of the platform workplace. Alex Rosenblat and her colleagues have studied rating systems in the platform workplace and have focused particularly on workplace discrimination arising from the use of these systems.¹⁷⁹ In light of their analysis of bias specifically on the Uber platform, they have offered for discussion several "potential interventions to allow the protections of Title VII to more effectively extend into this new labor environment, and to limit the bias that might affect consumer ratings and the employment decisions that depend upon them."¹⁸⁰ Several of their potential interventions

178. *King*, 135 S. Ct. at 2495-96 (quoting *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939)).

179. Rosenblat et al., *supra* note 28.

180. *Id.* at 269. Rosenblat and her colleagues clarify that their potential interventions "are intended as a set of provocations for further reflection rather than recommended policy prescriptions, and as a means of laying out potential alternatives[.]" *Id.*

would greatly de-emphasize consumer ratings or even decouple consumer ratings from outcomes for workers altogether.¹⁸¹ For example, pursuant to one suggested intervention, consumer ratings “might be used to inform a worker or the platform about her/his performance, but not be formally fed into workplace evaluation processes[.]”¹⁸²

Such a proposed regulation that would require a platform operator to decouple the operator’s reputation system from the operator’s treatment of providers is inimical to the inherent characteristics of the platform economy.¹⁸³ Platform operators depend upon reputation systems to ensure quality and trust in a large, atomized, remote, and widely-dispersed workforce.¹⁸⁴ Thus, as noted, reputation systems enable platform operators to achieve enormous scale without employing supervisors to manage the provider workforce.¹⁸⁵

Indeed, Rosenblat and her colleagues concede that their potential interventions that would decouple ratings from worker outcomes “imply reliance on alternative workplace evaluation processes, which could present challenges to the scalability of platform-based management.”¹⁸⁶ Thus, such interventions are inconsistent with a structural-purposive approach, which seeks to ensure that regulation is consistent with the intrinsic features of the regulated entity.¹⁸⁷ Part III of this Article further demonstrates the

181. *See id.* at 270–73.

182. *Id.* at 273; *see also* Bartlett & Gulati, *supra* note 95, at 249, 253 (asserting that “[c]ustomer evaluations are notoriously biased along race and gender lines” and proposing a duty on firms that are subject to antidiscrimination laws to refrain from relying upon customer evaluations of workers “unless they find a way to negate that bias”).

183. *See* PRASSL, *supra* note 2, at 13 (“[A]ll gig-economy platforms’ business models overlap and intersect – with several crucial commonalities, including the use of algorithmic rating mechanisms . . .”).

184. Rosenblat et al., *supra* note 28, at 258 (noting that, for the platform operator, a reputation system “is a scalable solution to maintaining quality control over a far-flung and fluctuating workforce”).

185. *See supra* notes 27–29 and accompanying text.

186. Rosenblat et al., *supra* note 28, at 273; *see also id.* (acknowledging that another suggested potential intervention “might run contrary to a platform’s business model premised on the cost savings that come from deferring evaluations of workers to consumers”).

187. A platform operator might refrain from acting on platform consumer ratings other than to make those ratings available to all consumers who might then decide for themselves whether they wish to engage with a provider whose reputation score falls below a

utility of a structural-purposive mode of analysis in the context of a regulatory framework seeking to mitigate reputation systems discrimination in the platform workplace.

III. A STRUCTURAL-PURPOSIVE PROPOSAL TO MINIMIZE REPUTATION SYSTEMS DISCRIMINATION IN THE PLATFORM WORKPLACE

This Part applies a structural-purposive analysis to consider how best to address reputation systems discrimination in the platform workplace. The analysis begins with an examination of the structure and goals of the existing regulatory framework for the traditional firm with respect to reputation systems discrimination specifically and, more broadly, with respect to workplace discrimination arising from customer preference. The analysis continues with consideration of how this structure and these purposes relate to the inherent characteristics of the platform economy. Finally, this Part uses the principles derived from this analysis to sketch out the contours of a proposed regulatory framework to ameliorate the prevalence and effects of reputation systems discrimination in the platform workplace.

A. Derivation of Principles

Derivation of principles to guide regulation of the platform workplace pursuant to a structural-purposive approach begins with an analysis of the structure and goals of existing workplace protective regulation. The existing regulatory framework for the traditional firm does not specifically target reputation systems discrimination or discrimination arising from customer preference. Rather, antidiscrimination law more generally prohibits firms that employ a certain number of employees from discriminating against their employees on the basis of enumerated protected traits, such

certain threshold. See Benjamin Sachs, *Uber and Lyft: Customer Reviews and the Right-to-Control*, ONLABOR (May 20, 2015), <https://onlabor.org/uber-and-lyft-customer-reviews-and-the-right-to-control/> (arguing that such a system would lessen the likelihood that the platform operator would be found to be the employer of the platform provider). A mere shift to this variation would leave bias in the reputation system unaddressed.

as race, gender, religion, age, and disability.¹⁸⁸ As discussed, this framework provides two theories pursuant to which an employee might seek to vindicate her right to be free from invidious discrimination arising from customer preference: disparate treatment and disparate impact.¹⁸⁹

This framework has two distinct goals. First, antidiscrimination statutes seek principally to discourage employers from engaging in invidious employment discrimination in the first place.¹⁹⁰ Second, these statutes seek also to remedy an employee's injuries arising from her employer's invidious discrimination that occurs nonetheless by providing the employee with a private cause of action against her employer.¹⁹¹

Notably, this framework does not impose liability upon customers for their own discriminatory behavior.¹⁹² One can discern a principal rationale for this omission in the structure of most antidiscrimination statutes: these statutes typically exempt individuals as well as small employers from the scope of the

188. See, e.g., 29 U.S.C. §§ 623(a), 630(b) (2018) (prohibiting certain employers with twenty or more employees from discriminating on the basis of age); 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2018) (prohibiting certain employers with fifteen or more employees from discriminating on the basis of race, color, religion, sex, or national origin); 42 U.S.C. §§ 12111(5), 12112(a) (prohibiting certain employers with fifteen or more employees from discriminating on the basis of disability).

189. See *supra* notes 151–68 and accompanying text.

190. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254–55 (1994) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (“[T]he primary objective [of Title VII] was a prophylactic one . . .”).

191. *Landgraf*, 511 U.S. at 254–55; *Albemarle Paper Co.*, 422 U.S. at 418.

192. *Bartlett & Gulati*, *supra* note 95, at 225–26. *Bartlett* and *Gulati* point out that Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, arguably could be used to hold a customer liable for race discrimination against a worker but has not been applied for this purpose. *Id.* at 225 n.12, 247.

statutes' proscriptions.¹⁹³ Title VII,¹⁹⁴ the ADA,¹⁹⁵ and the ADEA,¹⁹⁶ for example, each applies only to employers with a minimum number of employees—fifteen, fifteen, and twenty employees, respectively. The small-firm exemption reflects legislative concern regarding the impact on small businesses of compliance costs associated with antidiscrimination statutes.¹⁹⁷ As the U.S. Court of Appeals for the Seventh Circuit has stated, these exemptions evidence legislative intent “to spare . . . small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail.”¹⁹⁸ Similarly, the present framework exempts customers from liability for their own discriminatory behavior, in part, to spare individuals from the significant costs associated with compliance and litigation.

Katharine Bartlett and Mitu Gulati suggest additional reasons for the customer exemption that are rooted in efficacy and efficiency concerns as well as privacy and individual autonomy concerns.¹⁹⁹ Regulating the firm arguably is more efficacious and efficient than regulating the customer given that the firm is easier to identify and hold accountable, is typically the least cost avoider, has a profit motive to eliminate certain inefficiencies arising from invidious discrimination, and is otherwise already subject to

193. E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 646–48 (2009).

194. 42 U.S.C. § 2000e(b) (2018) (defining “employer” for purposes of Title VII in part as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

195. *Id.* § 12111(5) (defining “employer” for purposes of the ADA in part as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”).

196. 29 U.S.C. § 630(b) (2018) (defining “employer” for purposes of the ADEA in part as “a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

197. *See Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 447 (2003) (asserting that the ADA’s small-employer exemption was intended to “eas[e] entry into the market and preserv[e] the competitive position of smaller firms”).

198. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999).

199. *See Bartlett & Gulati, supra* note 95, at 228–41.

extensive regulation.²⁰⁰ Moreover, direct regulation of the customer might impact choices central to her private identity and, thus, might implicate societal norms valuing privacy and individual autonomy.²⁰¹

Although the antidiscrimination framework does not impose liability upon consumers for their discriminatory behavior, other branches of workplace law might be employed to do so. Most pertinent to reputation systems discrimination is defamation law. As tailored to the workplace context, defamation law might be used to address defamatory statements that are a pretext for bias and to redress damage to a worker's occupational reputation.²⁰²

The ultimate aim of this structural-purposive analysis is to further the purposes of the most apposite existing workplace regulation in the context of the platform economy. Thus, the next step in the derivation of principles is to relate these structures and goals of the traditional framework to the inherent characteristics of the platform economy. As developed in detail below, an analysis of these structures and purposes yields three broad principles to guide regulators addressing reputation systems discrimination in the platform workplace: (1) even though the traditional workplace protective regulation framework does not specifically regulate the use of ratings or reputation systems, platform workplace protective regulation should do so; (2) efforts to mitigate invidious bias in platform reputation systems should rely principally on education of raters and on algorithms to detect bias rather than on a private cause of action in providers against operators; and (3) any private cause of action for providers to vindicate their interests protected under the regulation should be structured so as not to unduly discourage consumer participation in or operator reliance upon reputation systems.

Applying these three principles, this Part below advances an argument for legislation that would provide for a two-pronged effort to mitigate reputation systems discrimination in the platform workplace. The first prong would mandate that platform operators take certain steps up front to reduce the likelihood of rater bias.

200. *Id.* at 228–29.

201. *Id.* at 238.

202. See *infra* notes 260–84 and accompanying text (discussing the structure of workplace defamation law).

Specifically, operators would be required to educate consumers respecting bias before those consumers engage with providers on the platform, and, operators would be required to employ algorithms in an effort to detect possible bias in their reputation systems. The second prong would allow for a private cause of action for any provider who alleges that (1) she has been harmed by invidious reputation systems discrimination and (2) the platform operator acted with “actual malice” in relying upon the reputation system.

*B. Regulation Should Specifically Target
Reputation Systems Discrimination in the Platform Workplace*

Regulation of platform operators as platform operators should specifically target reputation systems discrimination. This is so, even though the traditional workplace protective regulation framework does not single out reputation systems for special treatment. The critical differences favoring targeted regulation of reputation systems in the platform workplace are the relatively greater importance of reputation systems to workers in the platform economy and the relatively superior ability of platform operators to detect and mitigate reputation systems bias.

As a general rule, reputation systems are of far greater importance to the livelihoods of workers in the platform economy as contrasted with workers in the traditional economy. As noted, platform operators rely predominantly on reputation systems rather than direct supervision to manage platform providers.²⁰³ Thus, a provider’s reputation score typically is the single most significant factor respecting whether she is eligible for preferential search listings, more desirable work, or higher compensation on the one hand, or is downgraded or deactivated by the operator on the other.²⁰⁴ Moreover, when an operator does downgrade or deactivate a provider, the provider may have few options to replace the consequential lost access to consumers: the network effects that are an inherent characteristic of the platform economy may mean that the operator enjoys monopoly power as an online marketplace

203. *Supra* note 137 and accompanying text.

204. *Supra* notes 30–32 and accompanying text.

for the provider to engage with consumers.²⁰⁵ Finally, irrespective of the operator's reliance on its reputation system, the platform provider typically cannot engage with a platform consumer without the consumer first seeing the provider's reputation system score or reviews.²⁰⁶ Thus, even absent the provider suffering a downgrade or deactivation, the operator's reputation system is likely to have a profound impact on the provider's ability to engage with consumers. In sum, the relatively greater economic impact that reputation systems have on platform providers weighs in favor of regulation specifically targeted at those systems in the platform economy.²⁰⁷

A second reason to specifically target reputation systems discrimination in the platform workplace is that the platform operator is better-suited to fight reputation systems bias successfully as contrasted with the traditional firm.²⁰⁸ The very nature of the platform economy ensures that every engagement of a provider by a consumer in the platform workplace leaves digital fingerprints. Of particular relevance, platform consumers can be linked to their ratings of providers, unlike most consumers in the traditional economy who possess relative anonymity when rating workers.²⁰⁹ Operators compile vast amounts of reputation systems data and other data concerning their users. This data may be employed in antidiscrimination efforts, especially in conjunction with the use of algorithms.²¹⁰ Indeed, platform operators, by their

205. *Supra* note 121 and accompanying text.

206. Leong & Belzer, *supra* note 23, at 1288 n.97.

207. *Supra* notes 122–25 and accompanying text.

208. See SUNDARARAJAN, *supra* note 34, at 142 (arguing that the platform economy presents new opportunities to detect and mitigate invidious discrimination against consumers given that “the peer-to-peer activity is mediated by a platform now, rather than occurring in the more anonymous ‘physical world’”).

209. *Cf.* Wang, *supra* note 93, at 282 (noting that customers in the traditional economy are usually anonymous in relation to their evaluations of workers).

210. Rogers, *supra* note 2, at 86, 90, 95–96 (suggesting that the data that Uber collects on its drivers and passengers may be employed in antidiscrimination efforts); Noah Zatz, *Beyond Misclassification: Gig Economy Outside Employment Law*, ONLABOR (Jan. 19, 2016), <https://onlabor.org/beyond-misclassification-gig-economy-discrimination-outside-employment-law/> (“[T]he voracious appetite for data gathering and analysis characteristic of these platforms . . . could be brought to bear [to fight reputation systems bias].”).

very nature, have expertise in algorithmic management. Such expertise lends itself to detection of bias on the platform.²¹¹

In sum, platform operators, providers, and consumers are situated differently with respect to reputation systems as contrasted with their counterparts in the traditional workplace. Because of the distinct inherent characteristics of the platform workplace, regulation of reputation systems discrimination that would be unreasonably burdensome and utterly ineffective if applied in the traditional economy might be well-suited to mitigating bias in the platform economy. Thus, regulators should specifically target reputation systems discrimination in the platform workplace. Next, the Article details what that targeted regulation should look like.

*C. Bias Mitigation Efforts Should Focus Principally
on Education of Raters and on Algorithms that May Detect Bias*

In general, the regulatory framework targeting reputation systems discrimination in the platform workplace should rely principally on education of raters and on engineering to detect and block bias rather than on litigation to achieve its bias-mitigation aims.²¹² As discussed above, litigation is likely to be relatively ineffective at mitigating reputation systems bias.²¹³ Under any acceptable standard, a platform provider is likely to have great difficulty proving that invidious discrimination significantly impacted her reputation system composite score.²¹⁴ Moreover, the provider is extremely unlikely to be able to demonstrate that the platform operator engaged in invidious discrimination in relying upon its reputation system as the basis for taking an adverse action against the provider.²¹⁵ These difficulties not only will make it unlikely that a provider will prevail in litigation but also will make

211. See Lior Jacob Strahilevitz, “How’s My Driving?” for Everyone (and Everything?), 81 N.Y.U. L. REV. 1699, 1733–34 (2006) (arguing that algorithms can be used to identify invidious bias in online reputation regimes and other public feedback mechanisms).

212. See Murphy, *supra* note 90, at 24 (“Just as teams of lawyers were assembled to fight discrimination in the mid-20th century, it is my hope that 21st-century engineers will do their part to help eliminate bias and set an example for other technology startups and companies in the sharing economy to do the same.”).

213. See *supra* notes 150–68 and accompanying text.

214. See *supra* notes 76–77 and accompanying text.

215. See *supra* notes 150–68 and accompanying text.

it so that a provider should be reluctant to sue in the first place. A private cause of action, therefore, will be of limited utility in shaping consumer or operator behaviors.

Conversely, given the online nature of the platform economy, platform operators are better suited relative to traditional firms to educate consumers about conscious and unconscious bias.²¹⁶ Operators also are better situated to utilize algorithms to detect such bias and to take steps to limit the participation of particular raters in the reputation system.²¹⁷ Thus, a regulatory framework might feasibly require a platform operator to (1) educate each consumer about bias before the consumer may engage a provider on the operator's platform, (2) employ algorithms to detect bias in its reputation system, and (3) further educate or limit the access of raters identified as potentially biased. Such a framework would likely prove far more effective at reducing ratings bias than would a right in the provider to bring a private cause of action against the operator for reliance on discriminatory consumer ratings of the provider.

Accordingly, the regulatory framework should contain, at a minimum, the following general proscription and set of specific prescriptions for platform operators. As an initial matter, regulation should explicitly provide that it is wrong and prohibited for a platform operator to knowingly or recklessly rely on ratings that are biased based on a protected category.²¹⁸ Protected categories should be specified and might include, at a minimum, certain traits that are both frequently the basis for discrimination and relatively easily discernible by the platform consumer, such as race, color, national origin, sex, religion, age, disability, sexual orientation, and gender identity.²¹⁹

216. *See supra* notes 24–26 and accompanying text (noting that the platform is structured to allow the platform operator to easily communicate with a platform consumer with each transaction).

217. *See supra* notes 208–10 and accompanying text.

218. *Cf. Bartlett & Gulati, supra* note 95, at 249 (calling for firms of a certain size, among other entities, to “have an explicit obligation to curtail and not to facilitate discrimination by their customers”).

219. *See, e.g., CAL. GOV'T CODE* § 12940(a) (2019) (prohibiting employment discrimination on the basis of “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status”).

In addition to this general proscription, regulation should set forth the specific affirmative steps that all platform operators must take to mitigate reputation systems discrimination. Regulation should require operators to educate consumers by informing consumers that the operator is prohibited from relying on biased ratings and that the operator is required to take action against consumers whom the operator concludes are likely to have submitted biased ratings.²²⁰ Operators should be required to adopt a policy prohibiting invidious discrimination in connection with the submission of ratings and should be required to structure their platform so that a consumer initially may not engage a provider on the platform unless and until the consumer has expressly agreed to abide by the platform's nondiscrimination policy with respect to reputation systems.²²¹ The platform consumer appropriately should bear this minimal burden and other burdens set out below even though a non-platform consumer is not required to do so, given that the platform consumer performs a relatively greater supervisory function with respect to providers.²²²

For two reasons, a platform consumer should complete this initial education with respect to a platform's antidiscrimination policy prior to engaging a provider on the platform, rather than merely before the consumer submits a rating on the platform. First, ideally, the education may positively influence the consumer's interaction with the provider. Second, allowing the consumer to engage a provider on the platform and only then requiring that the consumer complete education prior to offering a rating in the

220. Harman, *supra* note 73 (suggesting that platform operators might reduce reputation systems bias by "post[ing] anti-discrimination policies much more prominently on their websites and offer[ing] anti-racism training"); *Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy-our-commitment-to-inclusion-and-respect> (last visited Mar. 14, 2020) ("If the host improperly rejects guests on the basis of protected class, or uses language demonstrating that his or her actions were motivated by factors prohibited by this [antidiscrimination] policy, Airbnb will take steps to enforce this policy, up to and including suspending the host from the platform.").

221. See Bartlett & Gulati, *supra* note 95, at 251 (arguing that a firm might curtail customer discrimination by declaring that the firm will not accede to a customer's discriminatory preference and requiring that its customers promise not to discriminate); Murphy, *supra* note 90, at 10-11, 19-20 (outlining Airbnb's policy requiring users of its platform to agree to its nondiscrimination policy and providing that a user may not engage in a transaction on the platform until she so agrees).

222. See *supra* notes 27-28 and accompanying text.

platform's reputation system would tend to discourage consumers from submitting ratings.²²³

Regulation should require all platform operators to take further steps to enforce their antidiscrimination policies. First, regulation should require operators to employ algorithms to try to detect bias in connection with the submission of ratings by platform consumers.²²⁴ Second, regulation should require operators to take action with respect to consumers whom the operator concludes are likely to have submitted biased ratings, either because the ratings are overtly biased or because an algorithm has alerted the operator to a likelihood of bias.²²⁵ Remedial action might include additional education for the consumer on bias or, in the alternative, termination of the consumer's privilege to participate in the operator's reputation system.²²⁶

Regulation should favor education over exclusion, however, and should guard against a platform operator's natural tendency to take the path of least resistance. Thus, except with respect to platform consumers who have continued to offer biased ratings after additional education, regulation should require operators to offer consumers who have been identified as offering potentially biased ratings the choice between either additional bias education for the consumer or termination of the consumer's privilege to rate platform providers. If the consumer chooses the former, the

223. See Levy & Barocas, *supra* note 30, at 1228 ("If platforms ask users to complete more detailed reviews—and therefore spend more time and thought on their assessments—platforms may find that fewer users are willing to even complete the process.").

224. See Cohen & Sundararajan, *supra* note 45, at 133 ("One might imagine a variety of societal goals being achieved in part by the platforms applying machine-learning techniques to their data to detect patterns corresponding to, say, discriminatory practices, much like credit card issuers use automated systems to detect criminal fraud."); Harman, *supra* note 73 (suggesting that platform operators reduce reputation systems discrimination by means of algorithms designed to detect biased ratings); Katz, *supra* note 22, at 1120 (suggesting that platform operators "us[e] algorithmic filtering to detect unfair or biased reviewers").

225. See Airbnb's *Nondiscrimination Policy*, *supra* note 220 ("Hosts who demonstrate a pattern of rejecting guests from a protected class (even while articulating legitimate reasons) undermine the strength of our community by making potential guests feel unwelcome, and Airbnb may suspend hosts who have demonstrated such a pattern from the Airbnb platform.").

226. Cf. Jessi Hempel, *For Nextdoor, Eliminating Racism Is No Quick Fix*, WIRED (Feb. 16, 2017), <https://www.wired.com/2017/02/for-nextdoor-eliminating-racism-is-no-quick-fix/> (discussing Nextdoor's efforts to reduce racial profiling on its social network by not allowing users to post about race in an incident description unless the user first fills in specified additional distinguishing information).

operator should be required to offer the consumer online education designed to combat conscious and unconscious bias.²²⁷ Finally, the operator should be required to ensure that the consumer has successfully completed that online training prior to the operator reenabling the consumer to participate in the operator's reputation system.

My suggested approach to regulation that would require a platform operator to utilize its own data in an effort to detect and mitigate reputation systems bias has much to recommend it over an approach that would, instead, require the operator to turn over its data to government regulators for the regulators' use in their antidiscrimination efforts. Indeed, Arun Sundararajan has argued more generally that this type of "data-driven delegation" of regulation, which "asks a platform [operator] to leverage its data to ensure compliance with a set of laws in a manner geared towards delegating responsibility to the platform [operator]," has several advantages as an approach to regulation of the platform economy versus traditional regulatory models.²²⁸ First, the platform operator is likely to possess relatively greater competence to leverage its own data to serve the purposes of the regulation.²²⁹ Moreover, the operator's use of its own data is likely to be relatively more efficient,²³⁰ to raise relatively fewer privacy concerns,²³¹ and to pose relatively fewer risks of leakage of the operator's proprietary data to a competitor.²³²

D. A Private Cause of Action for Providers Should Be Structured to Avoid Unduly Disincentivizing the Use of Reputation Systems

In considering how best to structure regulation aimed at mitigating reputation systems bias in the platform workplace, it is essential to appreciate the ways in which reputation systems themselves may mitigate bias. Specifically, reputation systems

227. For a set of suggested principles to guide the design of workplace unconscious bias training, see Joelle Emerson, *Don't Give Up on Unconscious Bias Training—Make It Better*, HARV. BUS. REV. (Apr. 28, 2017), <https://hbr.org/2017/04/dont-give-up-on-unconscious-bias-training-make-it-better>.

228. SUNDARARAJAN, *supra* note 34, at 155.

229. *Id.* at 156.

230. *Id.* at 157.

231. *Id.* at 156–57.

232. *Id.* at 157.

likely reduce “statistical discrimination” grounded in group-based stereotypes that may have some basis in fact but may not apply to any particular member of the group.²³³ When a consumer or firm lacks information about a specific worker’s history or abilities critical to making a hiring decision, the decisionmaker is more likely to rely upon group stereotypes in making the decision.²³⁴ For example, the decisionmaker might assume that a relatively older candidate is less energetic than a significantly younger candidate. Reputation systems can supply the critical information specific to a particular worker’s history or abilities so that the decisionmaker will come to rely upon the worker’s reputation score or reviews rather than upon a group stereotype.²³⁵ As Lior Jacob Strahilevitz has argued, “an important potential upside of new reputation tracking technologies is their potential to displace statistical discrimination on the basis of race, gender, age, appearance, and other easily observable characteristics.”²³⁶

In a similar vein, reputation systems also might offset the natural tendency that people have to trust persons similar to themselves more than they trust persons dissimilar to themselves.²³⁷ A 2017 study by Bruno Abrahao and his colleagues provides evidence of this impact of reputation systems in the specific context of the platform economy.²³⁸ Abrahao and his co-researchers looked at one million requests for accommodations on Airbnb and considered the effect of similarity between potential

233. See generally Strahilevitz, *Less Regulation, More Reputation*, in *THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD*, *supra* note 12, at 63. “Statistical discrimination occurs when an individual treats members of a group differently because he or she believes that group membership correlates with some attribute that is both relevant and more difficult to observe than group membership.” *Id.* at 67 (emphasis omitted).

234. *Id.* at 64, 67–68; Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1683–84 (2008); see also Levy & Barocas, *supra* note 30, at 1215 (making a similar point with respect to eBay users).

235. Strahilevitz, *supra* note 233, at 64 (“Reputation tracking tools . . . provide detailed information about individuals, thereby reducing the temptation for decision makers to rely on group-based stereotypes.”); Ruomeng Cui et al., *Reducing Discrimination with Reviews in the Sharing Economy: Evidence from Field Experiments on Airbnb*, 66 MGMT. SCI. 1071, 1087 (2020) (empirical study involving fictional Airbnb guests finding that “a positive review can significantly reduce the observed racial discrimination based on a name’s perceived racial origin.”).

236. Strahilevitz, *supra* note 233, at 64.

237. See Bruno Abrahao et al., *Reputation Offsets Trust Judgments Based on Social Biases Among Airbnb Users*, 114 PROC. NAT’L ACAD. SCI. 9848 (2017).

238. *Id.*

guest and potential host with respect to age and gender on the willingness of the potential guest to request an accommodation from the potential host.²³⁹ Their study found “higher tolerance for individuals at farther social distance [as measured by differences in age and gender] between guests and their selected hosts as the reputation of the host got better.”²⁴⁰

Thus, regulators who seek to lessen reputation systems bias in the platform workplace should be careful not to unduly disincentivize the use of reputations systems, lest regulation result in a net increase in invidious bias against platform providers.²⁴¹ Moreover, a structural-purposeful approach to regulation of bias in platform reputation systems should be cognizant of not only the importance of reputation systems to the livelihoods of platform providers, but also of their critical significance to platform consumers and operators. As noted, reputation systems increase accountability and reduce information asymmetries, thereby helping consumers and operators to avoid the “lemons problem” that otherwise would plague the platform.²⁴² Thus, reputation systems are critical to the operator’s ability to leverage network effects that are of crucial importance to the success and even the viability of the platform.²⁴³

Accordingly, any private cause of action for platform providers to vindicate their interests protected under the regulation should be structured so as not to unduly discourage consumer participation in or operator reliance upon reputation systems;²⁴⁴ the value to platform consumers and operators of using reputation systems should outweigh the burdens of regulation. Applying this principle, regulation should exempt consumers from liability

239. *Id.* at 9853.

240. *Id.*

241. *Cf.* Strahilevitz, *supra* note 233, at 69 (“By making the media liable for publishing individuals’ criminal histories or making it expensive for reporters to obtain aggregated criminal history information that is already in the government’s hands, information privacy protections can run counter to antidiscrimination interests.” (citations omitted)); Strahilevitz, *supra* note 234, at 1676, 1688.

242. *See supra* notes 33–47 and accompanying text.

243. Spitko, *supra* note 2, at 435–36 (discussing the relationship between quality control standards and network effects in the platform economy).

244. To be clear, the platform provider’s private cause of action would be to address injuries arising from the platform operator’s reliance upon biased ratings, but not for injuries arising from the operator’s failure to prevent biased ratings.

altogether and should employ a deferential standard of liability for operators.

A platform provider's private cause of action under the regulation should be against the platform operator who relied upon biased ratings but not against the platform consumer who offered biased ratings.²⁴⁵ Employment discrimination law generally does not impose liability on a consumer even when the employer was motivated in taking its adverse action against its employee by a desire to please the consumer.²⁴⁶ As discussed above, this approach is grounded principally in a desire to spare individuals from the significant compliance costs associated with antidiscrimination statutes.²⁴⁷ In addition, as noted, efficiency and privacy concerns also support this approach.²⁴⁸

In the case of a platform consumer, any significant risk of liability arising from participation in a platform operator's reputation system would likely cause the consumer to refrain from participating.²⁴⁹ Consumers as a group gain a great deal from offering ratings in the operator's reputation system. Indeed, their participation as a group is necessary for the reputation system to perform its function of signaling platform provider trustworthiness to consumers. But any individual consumer gains little from her individual rating of a provider. She might refrain from offering any ratings and still rely fruitfully upon the ratings offered by the other consumers in the operator's network. Therefore, a prudent consumer will refrain from offering a negative rating when the regulation framework imposes a significant risk on the consumer

245. The regulatory framework also should give to the provider a right of access to reputation systems data concerning the provider to facilitate the provider's prosecution of the private cause of action. Cf. Katz, *supra* note 22, at 1120–21 (suggesting that legislatures consider regulation requiring greater transparency with respect to platform reputation systems ratings).

246. See 42 U.S.C. § 2000e-2(a) (2018) (defining an "unlawful employment practice" as one taken by an employer) and § 2000e(b) (defining the term "employer"); see also Flake, *supra* note 25, at 1178 ("[E]mployment discrimination liability extends only to employers, whereas customers face no repercussions under the law for either their direct or indirect discriminatory actions against employees.").

247. See *supra* notes 192–98 and accompanying text.

248. See *supra* notes 199–201 and accompanying text.

249. See Rule & Singh, *supra* note 119, at 189 (discussing the tendency of consumers to self-censor on eBay's former reputation system for fear of receiving a retaliatory negative rating from a seller).

for offering that negative rating.²⁵⁰ The end result of such a framework would be a reputation system that fails to distinguish meaningfully between high-quality providers and low-quality providers.²⁵¹ For this reason, in addition to the reasons discussed above, the regulatory framework should exempt even consumers who offer biased ratings from potential liability arising from a provider's private cause of action.

A platform operator is situated quite differently from a platform consumer with respect to the ability to minimize involvement in the platform's reputation system. The operator's heavy reliance on a reputation system is inherent to the operator's business model.²⁵² Thus, the operator would not be able to easily or cheaply avoid the burdens of regulation targeting reputation systems bias in the platform workplace. Still, there remains the question of how deferential a standard of liability to apply in evaluating the operator's bias mitigation efforts.

Several academics have proposed a negligence or reasonableness standard of liability for firms that utilize consumer ratings to manage their workforce, pursuant to which a firm would be liable for relying on biased customer reviews if the firm failed to take reasonable steps to mitigate such customer bias.²⁵³ The reasonableness standard, however, would introduce a great deal of uncertainty into the platform operator's task of mitigating reputation systems bias. One might expect that reasonable people will disagree as to what constitutes a reasonable effort to address bias in a platform reputation system. Consider, for example, Katharine Bartlett and Mitu Gulati's proposed rule that "would only require firms to take reasonable steps calculated to end the

250. See BALARAM, *supra* note 111, at 45 ("[Platform users] may abstain from the review process altogether to avoid the risk of retaliation.").

251. See Tom Slee, *Some Obvious Things About Internet Reputation Systems*, TOMSLEE.NET (Sept. 29, 2013), <http://tomslee.net/2013/09/some-obvious-things-about-internet-reputation-systems.html> (speculating that "[c]ollusion and fear of retaliation are the reasons why there are essentially no reviews less than [the highest rating of] five stars" of drivers on the French long-distance ridesharing platform BlaBlaCar).

252. See *supra* notes 22-32 and accompanying text.

253. Bartlett & Gulati, *supra* note 95, at 253 (proposing a duty on firms that are already subject to antidiscrimination laws "to take reasonable steps calculated to end the harmful effects of discrimination by their customers"); Flake, *supra* note 149, at 2214-26 ("[E]mployers should be held to a negligence standard in customer feedback discrimination cases, whereby they would be liable if they knew, or had reason to know, the feedback was biased and failed to act reasonably in response."); Flake, *supra* note 25, at 1220.

harmful effects of discrimination by its customers.”²⁵⁴ After asserting that customer evaluations are “notoriously biased,” Bartlett and Gulati conclude that, under their reasonableness standard, firms “should not rely on these evaluations unless they find a way to negate that bias.”²⁵⁵ To the contrary, Dallan Flake has asserted that his proposed reasonableness standard for mitigating customer discrimination would not require the negation of customer bias.²⁵⁶

With respect to the design of bias mitigation efforts, my proposal relying upon a set of specific prescriptions with which all platform operators must comply would result in comparatively less uncertainty. In essence, my proposed regulation framework would require regulators to decide beforehand, ideally with expert assistance, what a reasonable operator should do to mitigate reputation systems discrimination on its platform. The regulators’ conclusions with respect to what is reasonable would then be set forth in a list of mandates applicable to platform operators across the board. Thus, operators would have certainty up front as to what is required of them. Consequently, litigation and related expenses should be greatly reduced.

Moreover, across-the-board application may make certain steps reasonable when those very steps otherwise would not have been feasible. For example, a platform operator that requires a platform consumer to be educated about bias before the consumer may use the operator’s platform to engage a provider will be disadvantaged relative to a platform operator that does not impose such an education prerequisite. To avoid the inconvenience of receiving education, the consumer may forgo using the first operator’s platform and, instead, simply migrate to the second operator’s platform.

In addition to providing greater certainty for platform operators, my proposed regulatory scheme also would be more certain to bring about meaningful reform relative to a cause of

254. Bartlett & Gulati, *supra* note 95, at 253.

255. *Id.*

256. See Flake, *supra* note 149, at 2223 (asserting that, under his proposed negligence standard for customer discrimination, “liability would not necessarily hinge on an employer’s ability to eliminate the discrimination altogether but rather its reasonable efforts to do so”).

action for negligent design and monitoring. As noted above, the nature of reputation systems bias will make it extremely difficult for a platform provider to bring a successful action demonstrating that invidious bias significantly impacted her reputation score, let alone that the operator's negligent design or monitoring of its reputation system contributed to her injury.²⁵⁷ Thus, an operator's fear of successful litigation against it is far less likely to shape its behavior than is an across-the-board set of specific mandates.

With respect to the implementation of bias mitigation efforts, the reasonableness standard is far less deferential to firms than is the traditional framework, which requires proof of intent to discriminate or a showing of disparate impact that the employer does not subsequently demonstrate to be job-related and consistent with business necessity.²⁵⁸ Given the importance of reputation systems to platform operators and users, the difficulty for an operator of detecting bias in a reputation system, and the operator's lack of direct control over platform consumers who offer ratings, I propose an "actual malice" standard as the measure of liability for the platform provider's private cause of action. This standard is situated in between the two poles of reasonableness on the one hand and discriminatory intent/disparate impact on the other.²⁵⁹ The actual malice standard would require the platform provider to show that the platform operator relied upon biased reputation system ratings with knowledge that those ratings were biased or with reckless disregard of whether those ratings were biased.²⁶⁰ The operator would act with reckless disregard if it relied upon biased reputation system ratings with a high degree of awareness of probable bias or serious doubt as to whether the ratings were unbiased.²⁶¹

257. See *supra* notes 214–15 and accompanying text.

258. See *supra* notes 151–68 and accompanying text.

259. Cf. Flake, *supra* note 25, at 1173, 1191, 1217 (noting that it is difficult for employers to detect discriminatory customer feedback and that employers have only limited control over non-employees' behavior and proposing a reasonableness standard to govern employer liability for non-employee discrimination).

260. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defining actual malice as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not").

261. See RESTATEMENT (SECOND) OF TORTS § 600 cmt. b (AM. LAW INST. 1977) ("Reckless disregard as to truth or falsity exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.").

This actual malice standard is rooted in the traditional workplace law framework concerning harm to worker reputation. Indeed, the standard derives from workplace defamation law, which addresses a harm closely analogous to the harm arising from reputation systems bias in the platform workplace. Moreover, the policies grounding the structure of workplace defamation law are fully applicable to the use of reputation systems in the platform workplace.

A defamatory statement is a statement that adversely affects the subject's reputation in the community.²⁶² The "community" includes any "substantial and respectable minority of [members of the community]."²⁶³ Thus, any statement impugning the ability of a worker to perform her job is almost certainly defamatory.²⁶⁴

The Restatement (Second) Torts sets out the elements of the modern defamation tort: "(a) a false and defamatory statement concerning another;²⁶⁵ (b) an unprivileged publication to a third party;²⁶⁶ (c) fault amounting at least to negligence on the part of the publisher;²⁶⁷ and (d) either actionability of the statement

262. RESTATEMENT (SECOND) OF TORTS § 559 ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

263. RESTATEMENT (SECOND) OF TORTS § 559 cmt. e.

264. *Shannon v. Taylor AMC/Jeep, Inc.*, 425 N.W.2d 165, 167 (Mich. Ct. App. 1988) ("Slander per se is found where the words spoken are false and malicious and are injurious to a person in his or her profession or employment."); Matthew W. Finkin & Kenneth G. Dau-Schmidt, *Solving the Employee Reference Problem: Lessons from the German Experience*, 57 AM. J. COMP. L. 387, 393 (2009) ("The utterance (or 'publication') to any third party of an erroneous fact that injures a person's ability to practice her trade or profession—in most jurisdictions, her ability to secure a job—works a defamation.").

265. In general, a defamatory statement must be one of fact to be actionable. A statement of opinion may be actionable, however, provided that the listener would reasonably assume, given the nature of the statement and the circumstances surrounding its publication, that the opinion is grounded in specific facts that themselves would be actionable as defamation if the defendant were to publish those facts. RESTATEMENT (SECOND) OF TORTS § 566.

266. *Publication* has a specialized meaning in defamation law that is broader than the common understanding of the term *publication*. Publication in defamation law is the "communication [of the defamatory statement] intentionally or negligently to one other than the person defamed." RESTATEMENT (SECOND) OF TORTS § 577.

267. Where the defamatory statement is on a matter of public concern and the plaintiff is either a public official or a public figure, the First Amendment requires that the plaintiff demonstrate that the defendant made the statement with actual malice—that is, that the defendant knew the statement was false or acted with reckless disregard of its truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co. v. Sullivan*,

irrespective of special harm or the existence of special harm caused by the publication.”²⁶⁸

Where the public interest in certain speech is sufficiently great, a speaker will enjoy an absolute privilege to engage in defamatory speech.²⁶⁹ Thus, statements made in judicial proceedings,²⁷⁰ in legislative proceedings,²⁷¹ by executive branch officials within the scope of their duty,²⁷² and communications between spouses²⁷³ enjoy an absolute privilege against a civil action for defamation. An absolute privilege cannot be lost regardless of the speaker’s fault or motive.²⁷⁴

Where the public interest in certain speech does not support an absolute privilege, yet the speech nonetheless promotes a sufficiently important interest of either the public, the speaker, the recipient, or a third person, then the speaker may enjoy a qualified

376 U.S. 254, 279–80 (1964); RESTATEMENT (SECOND) OF TORTS § 580A. For the purposes of constitutional defamation, a public figure is a person who has achieved fame or notoriety for all purposes or who has voluntarily become a limited public figure by assuming a central role in a public controversy. *Gertz*, 418 U.S. at 345. In the workplace context generally, and in the context of reputation systems within the platform workplace specifically, the communication is not likely to be a matter of public concern, as defamation law defines that term. Moreover, the object of the statement is likely to be a private figure. Thus, these constitutional limits on defamation law are unlikely to apply. See TIMOTHY P. GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 284 (3d ed. 2015) (noting that defamation litigation in the workplace context almost always involves a private individual suing a non-media defendant).

268. RESTATEMENT (SECOND) OF TORTS § 558. A defamatory statement is actionable irrespective of special harm where the statement is libel or is slander per se. RESTATEMENT (SECOND) OF TORTS §§ 569–570. The categories of slander per se include a statement that impugns the plaintiff in her profession, accuses the plaintiff of a serious crime, imputes to the plaintiff a loathsome disease, or suggests that the plaintiff has engaged in serious sexual misconduct. RESTATEMENT (SECOND) OF TORTS §§ 571–574.

269. See, e.g., RESTATEMENT (SECOND) OF TORTS § 585, cmt. a (“The public interest in securing the utmost freedom to those who preside over judicial proceedings, or who otherwise perform a judicial function, is so important as to preclude inquiry in a civil action into the motive or purpose of such an officer.”).

270. RESTATEMENT (SECOND) OF TORTS §§ 586–589.

271. RESTATEMENT (SECOND) OF TORTS §§ 590–590A.

272. RESTATEMENT (SECOND) OF TORTS § 591.

273. RESTATEMENT (SECOND) OF TORTS § 592.

274. See, e.g., RESTATEMENT (SECOND) OF TORTS § 586, cmt. a (the absolute privilege for certain statements made by an attorney “protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity”); RESTATEMENT (SECOND) OF TORTS § 592, cmt. a (the absolute privilege for certain spousal communications protects the speaker from an action for defamation “although the matter communicated is known to be false and the purpose of the communication is altogether improper”).

privilege to engage in defamatory speech.²⁷⁵ In the case of a qualified privilege, the law seeks to balance the interest of the defamed person in the protection of her reputation against the relevant interest in the defamatory speech.²⁷⁶ Thus, the speaker may lose the protection of the qualified privilege where the speaker abuses the privilege.²⁷⁷ Among the circumstances that constitute such abuse is where the speaker makes the statement with actual malice—that is, where the speaker has knowledge of the statement’s falsity or acts in reckless disregard as to the statement’s truth or falsity.²⁷⁸ The speaker acts in reckless disregard when she has “a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.”²⁷⁹

In the specific context of workplace speech, a qualified privilege reflects a balancing of the worker’s interest in her occupational reputation against the interest of employers and the public “in open and candid communications between employers, by employers with licensing or regulatory authorities, and among employees of the same employer, concerning the skills, performance, capabilities, and character of employees and former employees.”²⁸⁰ Thus, certain categories of workplace communications frequently

275. RESTATEMENT (SECOND) OF TORTS §§ 593–598.

276. RESTATEMENT (SECOND) OF TORTS § 593, cmt. c.

277. RESTATEMENT (SECOND) OF TORTS §§ 599–605A. The defamation defendant has the burden to demonstrate that the privilege exists. RESTATEMENT (SECOND) OF TORTS § 613(2); *Denardo v. Bax*, 147 P.3d 672, 679 (Alaska 2006). Once the defendant carries this burden, the defamation plaintiff has the burden to demonstrate that the privilege has been lost through abuse. RESTATEMENT (SECOND) OF TORTS § 613(1)(h); *Denardo*, 147 P.3d at 679; *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988).

278. RESTATEMENT (SECOND) OF TORTS § 600; *Denardo*, 147 P.3d at 679; *Gambardella v. Apple Health Care, Inc.*, 969 A.2d 736, 744 (Conn. 2009). The speaker abuses the qualified privilege also where the speaker acts for a purpose other than the purpose for which the privilege is given, RESTATEMENT (SECOND) OF TORTS § 603, communicates the defamatory matter to a person the speaker does not reasonably believe has a need to know the information to promote the privilege’s purpose, RESTATEMENT (SECOND) OF TORTS § 604, or communicates defamatory matter that the speaker does not reasonably believe needs to be communicated to achieve the privilege’s purpose, RESTATEMENT (SECOND) OF TORTS § 605.

279. RESTATEMENT (SECOND) OF TORTS § 600 cmt. b; *see also* *Jackson v. Columbus*, 117 Ohio St. 3d 328, 2006-Ohio-2096, 883 N.E.2d 1060, at ¶10 (“The phrase ‘reckless disregard’ applies when a publisher of defamatory statements acts with a high degree of awareness of their probable falsity or when the publisher in fact entertained serious doubts as to the truth of his publication.”) (internal quotations and citations omitted).

280. RESTATEMENT OF EMP’T LAW § 6.01, cmt. a (AM. LAW INST. 2015); *see also* *Bals v. Verduzco*, 600 N.E.2d 1353, 1355–56 (Ind. 1992) (discussing the competing employee and employer interests accommodated by the qualified privilege protecting personnel evaluations).

give rise to a qualified privilege.²⁸¹ These categories include external employment references, internal employer evaluations, communications to an employee concerning the employer's reasons for disciplining the employee, and employer communications with the firm's customers.²⁸²

With respect to external employment references, the qualified privilege that a worker's former employer enjoys to provide an evaluation of her work to the worker's prospective employer reflects the prospective employer's compelling need for this information.²⁸³ The privilege also reflects the interest of the public in enabling employers to "determine which prospective employees are best suited for efficient and productive service and if they have committed violent acts against, or otherwise inflicted harm on, coworkers, customers, or others in ways that indicate risks if given the position sought."²⁸⁴ The former employer loses the qualified privilege when it acts with actual malice—that is, when it communicates false defamatory information concerning the worker knowing that the information is false or in reckless disregard as to its truth or falsity.²⁸⁵ The prospective employer, however, does not incur any liability for merely relying upon the false and defamatory reference.

My proposed regulatory framework for mitigating reputation systems bias in the platform workplace essentially would borrow from the structure of workplace defamation law but would extend liability to the platform operator that merely relies upon a biased reputation system, provided that the operator knows when it relies that its reputation system is biased with respect to the platform provider at issue or relies in reckless disregard as to such bias.²⁸⁶

281. *See, e.g., Churchey*, 759 P.2d at 1346 (listing categories of workplace communications protected by a qualified privilege against defamation claims).

282. GLYNN ET AL., *supra* note 267, at 298.

283. RESTATEMENT OF EMP'T LAW § 6.02, cmt. a (AM. LAW INST. 2015).

284. *Id.*; *see also Calero v. Del. Chem. Corp.*, 228 N.W.2d 737, 744 (Wis. 1975) (noting that "[t]here is social utility in encouraging the free flow of information between" a worker's former employer and her prospective employer); Finkin & Dau-Schmidt, *supra* note 264, at 393–94 (noting that societal interests ground the qualified privilege for employment references).

285. RESTATEMENT OF EMP'T LAW § 6.02(b).

286. Section 230 of the Communications Decency Act protects a platform operator from liability for merely republishing platform consumer ratings. *See* 47 U.S.C. § 230(c) (2018). *See*

This extension of liability reflects a rebalancing of relevant interests in the context of the platform workplace. The principal interests that are reflected in the structure of workplace defamation law are equally relevant in the context of reputation systems in the platform workplace. Comparable to a prior employer, the platform consumer who offers a rating has an interest in encouraging and rewarding good provider performance, in punishing past bad provider performance, and in avoiding future bad provider performance.²⁸⁷ The platform operator, comparable to an employer,

also Rule & Singh, *supra* note 119, at 181 (“[The Communications Decency Act] prevents a reputation system administrator from being held liable for publishing material created by third parties . . .”).

287. *Cf.* Finkin & Dau-Schmidt, *supra* note 264, at 399 (discussing references in the traditional economy and commenting that “[t]he first employer has an interest in using references to encourage and reward good work and to discourage and punish bad performance”). The platform consumer who rates a platform provider through the platform may be liable to the provider for defamation. *See* Frain Group, Inc. v. Steve’s Frozen Chillers, No. 14C7907, 2015 WL 1186131, at *4 (N.D. Ill. Mar. 10, 2015) (denying defendant’s motion to dismiss defamation claim arising from defendant’s customer review on Facebook); Wong v. Tai Jing, 117 Cal. Rptr. 3d 747, 764–66 (Cal. Ct. App. 2010) (finding that a dentist had demonstrated a prima facie case of probable success on the merits of a libel action against a patient who had offered a Yelp review of the dentist’s services); Fireworks Restoration Co., LLC v. Hosto, 371 S.W.3d 83, 88 (Mo. Ct. App. 2012) (affirming jury verdict against defamation defendants for defamatory web reviews); Eric Goldman, *Regulating Reputation*, in THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD, *supra* note 12, at 54, 57–58 (noting that consumers who offer an online review “face the same legal risks that former employers face when providing job references, such as the risk of personal liability for publishing negative reputational information”). To reduce a disincentive to consumer participation in platform reputation systems, regulatory reform might expressly codify that a platform consumer enjoys a qualified privilege to offer a rating, that the platform provider may defeat the privilege only by demonstrating by clear and convincing evidence that the consumer acted with actual malice, and that a prevailing consumer defamation defendant shall recover her litigation costs and attorney fees. *Cf.* ARIZ. REV. STAT. ANN. § 23-1361(C), (D), (I) (2015) (providing a qualified privilege to an employer who gives an employment reference and providing that a court shall award court costs, attorney fees, and other related expenses to the prevailing party in an employment reference defamation civil action); FLA. STAT. § 768.095 (2005) (providing qualified immunity to an employer who offers an employment reference and requiring clear and convincing evidence that the employer knowingly offered false information or violated the employee’s civil right to defeat the privilege); MD. CODE ANN., CTS. & JUD. PROC. § 5-423 (LexisNexis 2006) (providing qualified immunity to an employer who offers an employment reference and requiring clear and convincing evidence that the employer acted with actual malice toward the employee or intentionally or recklessly offered false information about the employee to defeat the privilege); OHIO REV. CODE ANN. § 4113.71(B)–(C) (LexisNexis 2001) (providing a qualified privilege to an employer who gives an employment reference and providing that a court may award reasonable attorney’s fees and court costs to a prevailing defendant in an employment reference defamation civil action if the court finds that the lawsuit was frivolous).

has an interest in associating with the highest quality workforce and promoting a positive consumer experience.²⁸⁸ Finally, the platform provider, comparable to a traditional economy worker, has an interest in protecting her occupational reputation to ensure her continuing livelihood.²⁸⁹ The balancing of these interests in the context of the platform workplace, however, should take into account the relatively greater importance of reputation systems to the livelihoods of providers in the platform economy as contrasted with workers in the traditional economy.²⁹⁰ As discussed, the greater vulnerability of the platform provider to harms arising from reputation systems bias is a principal reason that regulators should specifically target reputation systems discrimination in the platform workplace.²⁹¹ The platform provider's greater vulnerability also specifically supports extending liability to a platform operator who relies upon a biased reputation system knowing that the reputation system is biased with respect to the provider at issue or acting in reckless disregard as to such bias.

One might question whether my proposed actual malice standard would unduly discourage platform operator reliance upon reputation systems, given the deterring effect that the actual malice standard of liability appears to have had on employer reference practices. It is widely understood that many employers are extremely reluctant to provide a reference regarding a former employee beyond stating the former employee's dates of employment, position, and salary, for fear of being sued for defamation.²⁹² This is so despite the fact that employers universally enjoy a common law privilege to give a reference regarding a former employee, which generally protects the employer from liability for defamation unless the former employee can show that

288. Cf. Finkin & Dau-Schmidt, *supra* note 264, at 399 (discussing references in the traditional economy and commenting that "[t]he second employer has an interest in an accurate reference to allow him to pick the best prospective employee and match employees to appropriate jobs").

289. Cf. *id.* (discussing references in the traditional economy and commenting that "[t]he employee has an interest in a positive reference, to reward him for a good performance, or to allow him to escape the costs of a bad performance").

290. See *supra* notes 203–07 and accompanying text.

291. See *supra* notes 203–07 and accompanying text.

292. GLYNN ET AL., *supra* note 267, at 295; Finkin & Dau-Schmidt, *supra* note 264, at 388–92.

the employer acted with actual malice in providing the reference.²⁹³ Indeed, to encourage employers to provide employment references, a large majority of states have codified the qualified privilege against defamation liability for employers who communicate information about the job performance of their former employees.²⁹⁴ The typical employer's calculus appears to be that, nonetheless, the employer gains little or nothing by offering a more substantive reference and, therefore, even a small risk of being forced to defend against a defamation claim outweighs any potential benefit to the employer.²⁹⁵ A platform operator has much to gain, however, from its use of a reputation system to manage and ensure quality among the providers who engage through its platform. Indeed, a platform operator may not have any feasible alternative for overseeing its providers. Thus, extending liability to platform operators for reputation systems bias under an actual malice standard should not unduly discourage operator use of reputation systems.

CONCLUSION

This Article calls for a structural-purposive approach to regulation of the platform workplace. The structural-purposive approach seeks to ensure that regulation is informed by the goals and structure of the existing regulatory framework for the traditional firm but also is consistent with the inherent characteristics of the platform economy. Thus, this approach facilitates the screening out of proposed regulation that would be inimical to the inherent characteristics of the platform economy and aids in the framing of regulatory proposals that would leverage those characteristics.

293. See RESTATEMENT OF EMP'T LAW § 6.02, Reporters' Notes, cmt. a (AM. LAW INST. 2015) (noting "the rule in all jurisdictions that employer communications about current or former employees to other prospective employers and employment agencies are conditionally privileged unless the privilege is abused").

294. See generally RESTATEMENT OF EMP'T LAW § 6.02, cmt. h; GLYNN ET AL., *supra* note 267, at 295; Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL'Y 1 (2002); Finkin & Dau-Schmidt, *supra* note 264, at 389.

295. Finkin & Dau-Schmidt, *supra* note 264, at 400, 402; Verkerke, *supra* note 45, at 135 (commenting that a negative employment reference "creates a risk of defamation liability while offering few clear benefits to the referring employer").

The Article demonstrates the merits of a structural-purposive approach in the context of a regulatory framework addressing reputation systems bias in the platform workplace. Traditional workplace protective regulation does not specifically target reputation systems discrimination. This traditional regulatory framework is particularly ill-suited to prevent or redress such discrimination in the platform economy in light of the essential features of the platform workplace.

Applying a structural-purposive approach, this Article derives several principles that should inform regulatory efforts to more effectively mitigate reputation systems bias in the platform workplace. Given the relatively greater importance of reputation systems to workers in the platform economy and the relatively superior ability of platform operators to detect and mitigate reputation systems bias, regulation of the platform workplace should specifically target reputation systems discrimination. The Article offers a framework for regulation that relies principally upon education of consumers and upon engineering to detect bias and secondarily upon a provider's right to bring a private cause of action that would utilize a deferential actual malice standard borrowed from workplace defamation law and adapted to the context of the platform workplace.