

1-1-2018

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Recommended Citation

Norrinda B. Hayat, *Accommodating Bias in the Sharing Economy*, 83 Brook. L. Rev. (2017).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol83/iss2/14>

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Accommodating Bias in the Sharing Economy

Norrinda Brown Hayat[†]

INTRODUCTION

Airbnb spent an estimated \$5 million for its 30-second “#weaccept” advertisement to air during the 2017 Super Bowl.¹ The advertisement was a montage of faces of people of different nationalities while an “uplifting melody play[ed], and a caption about inclusion appear[ed]”² The caption read: “We believe no matter who you are, where you’re from, who you love or who you worship, we all belong. The world is more beautiful the more you accept.”³ The #weaccept ad was considered a bold response on the part of the company to the Trump Administration’s controversial order banning entry into the United States to refugees and immigrants from certain countries.⁴ And it was that. But those familiar with Airbnb recognized the ad as also saying something related, but different. They recognized it as a message to the company’s hosts to also “accept.”⁵ Indeed, Airbnb had released an almost identical version of the ad, called

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¹ Black and White, *Airbnb Super Bowl Commercial 2017 (We Accept)*, YOUTUBE (Feb. 11, 2017), https://www.youtube.com/watch?v=E-Dg-z_SojE [<https://perma.cc/RKK5-K4NJ>]; Jeff John Roberts, *Airbnb’s Super Bowl Ad Is Not What It Seems, Critics Say*, FORTUNE (Feb. 6 2017), <http://fortune.com/2017/02/06/super-bowl-2017-airbnb-ad/> [<https://perma.cc/N523-7869>].

² See Roberts, *supra* note 1; see also *Airbnb Super Bowl Commercial 2017 (We Accept)*, *supra* note 1.

³ Black and White, *supra* note 1; see also Roberts, *supra* note 1.

⁴ Roberts, *supra* note 1.

⁵ Sam Byford, *Airbnb’s Super Bowl Ad Says ‘We Accept’ Everyone*, VERGE (Feb. 5, 2017, 7:37 PM), <http://www.theverge.com/2017/2/5/14517708/airbnb-super-bowl-ad-donation-aid> [<https://perma.cc/J7P5-DH8L>].

“Accept,” in November 2016 (before the order was executed) to address its own hosts’ controversial problems with inclusion.⁶

One study has suggested that Airbnb hosts discriminate against black guests because of their race.⁷ Anecdotal reports from African American potential guests confirm the study’s results.⁸ In May 2016, the hashtag #Airbnbwhileblack cropped up on Facebook and Twitter as African American would-be guests expressed frustration over their inability to successfully book units using the platform.⁹ On May 17, 2016, the first lawsuit against Airbnb alleging race discrimination, *Selden v. Airbnb, Inc.*, was filed. The plaintiff alleged that an Airbnb host rejected plaintiff’s initial application but subsequently accepted the same application when plaintiff re-applied using profiles imitating white men.¹⁰

Some hosts openly admit they are not accepting blacks for what would be discriminatory reasons under Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations.¹¹ For example, in May 2016, it was widely reported that a North Carolina host had used racial

⁶ Christina Warren, *Hmm . . . Airbnb’s Super Bowl Commercial Sure Looks Familiar*, GIZMODO (Feb. 6, 2017, 5:56 PM), <http://gizmodo.com/hmm-airbnbs-super-bowl-commercial-sure-looks-familia-1792058308> [<https://perma.cc/ZK6Q-GWSV>]; see also David Gianatasio, *Ad of the Day: Airbnb Preaches, and Pledges, Acceptance in Evocative Post-Election Ad*, ADWEEK (Nov. 11, 2017), <http://www.adweek.com/brand-marketing/ad-day-airbnb-preaches-and-pledges-acceptance-evocative-post-election-ad-174579/> [<https://perma.cc/9Y7Z-DA8N>].

⁷ See generally Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1 (2017), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/app.20160213> [<https://perma.cc/YD5A-ZKRU>].

⁸ See *Selden v. Airbnb, Inc.*, No. 16-cv-00933, 2016 WL 6476934, at *1 (D.D.C. Nov. 1, 2016).

⁹ See Hannah Jane Parkinson, *#AirBnBWhileBlack Hashtag Highlights Potential Racial Bias on Rental App*, GUARDIAN (May 5, 2016, 10:28 AM), <https://www.theguardian.com/technology/2016/may/05/airbnbwhileblack-hashtag-highlights-potential-racial-bias-rental-app> [<https://perma.cc/85LA-EVSG>].

¹⁰ *Selden*, 2016 WL 6476934, at *1.

¹¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a, 2000a-6 (2012)); see Caroline O’Donovan, *Racist Host Kicked Off Airbnb*, BUZZFEED NEWS (June 1, 2016, 2:46 PM), https://www.buzzfeed.com/carolineodonovan/airbnb-removes-host-for-racist-remarks?utm_term=.neyjqQZ2X#.qvBBypVq [<https://perma.cc/Z6VD-FAB4>]; see also Kate Irby, *Airbnb Bans Host Who Called Guest Racial Slur*, CHARLOTTE OBSERVER (June 2, 2016, 10:11 AM), <http://www.charlotteobserver.com/news/local/article81314892.html> [<https://perma.cc/SS9L-E3AG>]. The election of Donald Trump as the 45th President of the United States has resulted in an increase in the breadth and scope of the discrimination that has been shown to already exist on Airbnb’s platform. See generally Richard Cohen, *Hate Crimes Rise for Second Straight Year: Anti-Muslim Violence Soars amid President Trump’s Xenophobic Rhetoric*, SOUTHERN POVERTY L. CTR (Nov. 13, 2017), www.splcenter.org/news/2017/11/13/hate-crimes-rise-second-straight-year-anti-muslim-violence-soars-amid-president-trumps [<https://perma.cc/MU2C-J72J>] (noting a the number of hate crimes has risen higher than its been in a decade following the Trump election).

slurs towards a potential Airbnb renter. A screen shot of the exchange between the two revealed the host stating: “I hate you niggers, so I’m gonna cancel you,” “This is the South darling,” and “Find another place to rest your nigger head.”¹² The outrageous nature of some of the discrimination led to a public outcry for changes to Airbnb’s platform.¹³

In response to public pressure, Airbnb released, among other things, an antidiscrimination policy in September 2016 requiring users to agree to a “Community Commitment.”¹⁴ These changes were met with praise.¹⁵ Yet, questions remained about whether these moves were sufficient. Given Airbnb’s financial incentive to have as many hosts on its platform as possible and, thus, not regulate them too vigorously, would it be possible for the company to deter discrimination? Or should the government—using its enforcement powers under Title II of the Civil Rights Act or the Fair Housing Act and the same regimes that regulate discrimination in hotels and apartments—take charge of regulation? And if the latter, would those statutes suffice as currently drafted or would they need to be amended?

The few legal scholars who have written in this area suggest public accommodations in the sharing economy expose a “soft spot” in our discrimination laws where Title II may be

¹² Taryn Finley, *AirBnB Host Gets (Rightfully) Banned for Racist Messages*, HUFFPOST (June 2, 2016, 12:52 PM), https://www.huffingtonpost.com/entry/airbnb-banned-racist-messages_us_57504534e4b0c3752dcc9f24 [https://perma.cc/FF75-BLQF].

¹³ Tracey Lien, *Airbnb Tries to Fight Racism with Rule Changes*, L.A. TIMES (Sept. 8, 2016, 4:20 PM), <http://www.latimes.com/business/technology/la-fi-tn-airbnb-discrimination-20160908-snap-story.html> [https://perma.cc/VAN6-6F83].

¹⁴ See *The Airbnb Community Commitment*, AIRBNB (Oct. 27, 2016), <http://blog.airbnb.com/the-airbnb-community-commitment/> [https://perma.cc/REA3-D96K] (“[W]e’ll begin asking each host and guest to agree to the Airbnb Community Commitment, which says: I agree to treat everyone in the Airbnb community—regardless of their race, religion, national origin, ethnicity, disability, sex, gender identity, sexual orientation, or age—with respect and without judgment or bias.”); see also Norrinda Brown Hayat, *Trying to Appear “Not Too Black” on Airbnb Is Exhausting*, CNN (Nov. 4, 2016, 10:48 PM), <http://www.cnn.com/2016/09/12/opinions/too-black-rent-airbnb-hayat/index.html> [https://perma.cc/8AS9-HDA7] (“Among other actions, Airbnb’s plans to address discrimination on its site include developing a feature to help prevent hosts from rejecting one guest by alleging that their space is unavailable and then renting to another, by automatically blocking the calendar for subsequent reservation requests for that same trip. Airbnb also indicated that it would work with a team of engineers and designers to experiment with reducing the prominence of guest photos in the booking process.”).

¹⁵ See Noah Feldman, *Airbnb’s Anti-Discrimination Upgrade Gets It Right*, BLOOMBERG VIEW (Sept. 12, 2016, 9:00 AM), <https://www.bloomberg.com/view/articles/2016-09-12/airbnb-s-anti-discrimination-upgrade-gets-it-right> [https://perma.cc/N4T6-XEQ2]; see also Christina Cauterucci, *Airbnb’s New Anti-Discrimination Policy Is a Victory for Trans People*, SLATE (Sept. 9, 2016, 3:43 PM), http://www.slate.com/blogs/xx_factor/2016/09/09/airbnb_s_new_anti_discrimination_policy_is_a_victory_for_trans_people.html [https://perma.cc/438F-KCJ7].

eluded.¹⁶ Michael Todisco argues that “Airbnb users find themselves in a soft spot of the law: somewhere between the commercial sphere, where discrimination is strictly prohibited, and the intimate-relationship sphere, where discrimination, even if socially reviled, is beyond governmental reach.”¹⁷ Nancy Leong and Aaron Belzer also argue that our current public accommodations law is insufficient to cover discrimination by Airbnb hosts against would-be guests, that the sharing economy presents new issues that existing laws do not entirely capture and thus existing laws must be amended to address race discrimination in the sharing economy.¹⁸

These scholars’ concerns over the limits of Title II’s reach are largely derived from their interpretation of what is commonly referred to as the Mrs. Murphy exception.¹⁹ The Mrs. Murphy exception exempts from compliance any “establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.”²⁰

These scholars conclude that legislative fixes are necessary to make Title II’s application to public accommodations in the sharing economy explicit.²¹ This article takes an opposite view suggesting that Title II is applicable to the sharing economy presently and that the Mrs. Murphy exception is inapplicable to a large number of hosts. While legislative fixes to remove the Mrs. Murphy exception from Title II would be welcome, such amendments are highly unlikely in the current political climate. In the meantime, the

¹⁶ Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 123 (2015), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/03/67_Stan_L_Rev_Online_121_Todisco.pdf [<https://perma.cc/RZ2C-RVK5>]; see generally Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

¹⁷ Todisco, *supra* note 16, at 123.

¹⁸ See Leong & Belzer, *supra* note 16, at 1297.

¹⁹ See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605 (describing the “Mrs. Murphy” exemption); see also Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1) (2012) (Title II of the Civil Rights Act) (original “Mrs. Murphy” exemption); Fair Housing Act of 1968, Pub. L. No. 90-284, § 803(b)(2), 82 Stat. 81, 82–83 (codified as amended at 42 U.S.C. § 3603(b)(2) (2012)) (similar exemption applying to landlords also frequently referred to as the “Mrs. Murphy” exemption).

²⁰ 42 U.S.C. § 2000a(b)(1).

²¹ See Leong & Belzer, *supra* note 16, at 1322; Todisco, *supra* note 16, at 123. It is unclear whether the Communications Decency Act affords Airbnb the same protections that it has other platforms that merely post third-party listings such as Craigslist. See Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J.: CITY SQUARE (May 26, 2016), <http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy/> [<https://perma.cc/Q5CJ-ED96>].

risk of normalizing the exclusion of minorities from travel and citizenship writ large is much too great to leave this industry unregulated. Title II can be used now to chill discrimination in the sharing economy by those hosts not exempted by the exception.²²

This article makes three principle claims in support of the idea that Title II applies to hosts providing public accommodations in the sharing economy. First, the “duty to serve” in public accommodations regardless of race and articulated in Title II is centuries old, has withstood numerous advancements in public accommodations, including notably the advent of the railroads, and applies to the sharing economy now. Second, while the Mrs. Murphy exception offers a nuance to the application of Title II to public accommodations in the sharing economy, it will not affect a majority of listings. Third, the regulation of landlords under the Americans with Disabilities Act and the Fair Housing Act is instructive for how we might consider regulating Airbnb hosts under Title II.

This article proceeds in three parts. Part I traces the evolution of public accommodation law beginning with the innkeepers’ duty to serve at common law through the passage of Title II. Part I also surveys cases that have applied Title II to hotels, motels and bed-and-breakfasts to draw a parallel to the discrimination alleged against Airbnb hosts today. Part II outlines how modern travel accommodation sites operate in the sharing economy. Part II also explores the claims of discrimination that have been lodged against Airbnb and its hosts. The Part concludes by reviewing the current literature in this area, which argues for amending Title II and why that proposal is unlikely for the foreseeable future. Looking to discrimination cases under the Americans With Disabilities Act (ADA), Part III argues that courts are already in the practice of converting dwellings to public accommodations when they take on the character of a hotel. Part III also suggests that the Mrs. Murphy Boardinghouse exception is inapplicable when occupation is not concurrent and, as a result, a significant number of Airbnb hosts are captured by Title II as drafted. Part III concludes by

²² See Brentin Mock, *#AirBnBWhileBlack and the Legacy of Brown vs. Board*, CITYLAB (May 20, 2016), <https://www.citylab.com/equity/2016/05/brown-v-board-v-airbnb/483725/> [<https://perma.cc/H8T6-G6JS>]; *infra* Part III; The reader will naturally wonder whether Airbnb itself can be held liable under Title II for the discrimination by hosts using its platform. There are persuasive arguments for and against holding Airbnb liable. Guideposts for making these arguments and how courts might come down can be found in opinions such as *Chi. Lawyers’ Comm. for Civil Rights v. Craigslist*, 519 F.3d 666 (7th Cir. 2008) and *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012). This debate, however, is not the subject of this article.

proposing that federal and local governments look to the Fair Housing Act, which includes an identical Mrs. Murphy exception, for an example of how hosts can be regulated under Title II's current iteration. The associational deprivation that blacks experience when they are denied access to public accommodations in the modern sharing economy must be guarded against, lest American travel return to its segregated past.

I. THE EVOLUTION OF PUBLIC ACCOMMODATION LAW

This Part explores the evolution of our public accommodation laws, including tracing the lapses in the general duty to serve, which have previously arisen at times of national, political, and cultural strife.

A. *The Duty to Serve at Common Law*

The innkeeper had a duty to serve at common law, which can be traced back to sixteenth century England.²³ And at common law, a patron could not be excluded from an inn solely because of race, color, or creed.²⁴ In 1837, in the case *Markham v. Brown*, the Superior Court of New Hampshire directly addressed wrongful discrimination in the context of innkeepers.²⁵ There, an innkeeper was prohibited from excluding drivers of rival stage coach lines²⁶ from his establishment, a prohibition which could only be lifted if a driver engaged in some sort of misconduct.²⁷ The theory, was that “[p]roperty . . . become[s] clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”²⁸ In a Michigan supreme court

²³ See generally *White's Case*, 73 Eng. Rep. 343 (1558); see also *Jacobson v. N.Y. Racing Ass'n.*, 33 N.Y.2d 144, 149 (1973) (“At common law a person engaged in a public calling, such as an innkeeper or common carrier, was under a duty to serve without discrimination all who sought service.”); *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 168 (1982) (“We hold that the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places.”).

²⁴ Herman J. Herbert Jr., Comment, *The General Welfare Clauses in the Constitution of the United States*, 7 *FORDHAM L. REV.* 390, 427 (1938).

²⁵ See generally *Markham v. Brown*, 8 N.H. 523 (1837).

²⁶ “A four-wheeled horse-drawn vehicle formerly used to transport mail and passengers over a regular route.” *Stagecoach*, *AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1700* (5th ed. 2011).

²⁷ *Markham*, 8 N.H. at 531.

²⁸ *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (stating that “when private property is ‘affected with a public interest, it ceases to be *juris privati* only” (quoting Lord Chief Justice Hale, *De Portibus Maris*, 1 HARG. LAW TRACTS, 78)). Others, including most notably law professor James W. Fox, have already detailed the connection between access to public accommodations and the “reconstructed free citizenship” of blacks and I do not seek to repeat that work here. See generally James

case, *Day v. Owen*, the state court held that “a common carrier can not [sic] refuse to carry any person of legal conduct and intention upon the ground of any physical or personal quality or defect [including race], or to suit the preference or antipathies of other passengers.”²⁹ The law continued to move in this direction—requiring service regardless of race³⁰ even while sanctioning segregation until the end of the Civil War.³¹

There is evidence to suggest that the duty to serve regardless of a patron’s race in public accommodations began to reverse course in the late 1850s leading up to the Civil War.³² Cases decided after 1855, while acknowledging the duty to serve, also began to advance the notion that a provider of

W. Fox Jr., *Intimation of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 138 (2006) (calling for the overturning of the *Civil Rights Cases* still today and charging the Court, the legal system, and American society writ large with failing to appropriately appreciate the depth and breadth of the Reconstruction Amendments and the freedom and citizenship they created); see also James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 ST. LOUIS U. L.J. 451, 451, 461 (1998) (calling for a righting even now of the Court’s “blow to the fight for civil rights” in the *Civil Rights Cases* when it failed to acknowledge Congress’ right to regulate private acts of race discrimination, thus “emasculating . . . equal protection.”). It is worth noting that centuries ago the law first wrestled with the question of how much authority “the public, through its Government, can exert over commercial enterprises dealing with the public” and the result was a general duty to serve. Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 HAMLINE J. PUB. L. & POLY 1, 18 n.65 (2015).

²⁹ *Day v. Owen*, 5 Mich. 520, 523 (1858) (emphasis omitted).

³⁰ It is worth noting that regardless of the law, the custom in many places of public accommodation was still to deny service to blacks even in free northern states. According to historian Leon Litwack:

Racial segregation or exclusion . . . haunted the northern Negro in his attempts to use public conveyances, to attend schools, or to sit in theaters, churches, and lecture halls. But even the more subtle forms of twentieth-century racial discrimination had their antecedents in the ante bellum North: residential restrictions, exclusion from resorts and certain restaurants, confinement to menial employments, and restricted cemeteries. The justification for such discrimination in the North differed little from that used to defend slavery in the South: Negroes, it was held, constituted a depraved and inferior race which must be kept in its proper place in a white man’s society.

LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES* viii (1961).

³¹ Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283, 1344 (1996).

³² See Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender Class, Race, and the Road to Plessy, 1855–1914*, 13 L. & HIST. REV. 261, 264 (1995). There is some disagreement among scholars on this point. Welke notes (1) that those scholars, such as C. Vann Woodward, that focus on state and federal statutes tend to believe that the years between 1865 and 1890 were remarkably integrated; but (2) that others that assert that *Plessy v. Ferguson*, 163 U.S. 537 (1896), only confirmed what had, by the case’s deciding, become custom; and (3) that there is a third group of scholars, including Stephen J. Riegel, that look to the judge made law regarding common carriers to argue that “separate but equal” doctrine had been crystallizing in the decades before *Plessy* was decided. *Id.*

public accommodations must not tramp on the rights of other guests while serving all who wished to be served.³³ Segregation of passengers and guests offered itself as a solution to the dilemma of having a duty to serve one set of customers and to protect the right to associate freely of another set of customers.³⁴ Despite the ambiguity between practice and law, “no court ruling before the Civil War states that African-Americans are not entitled to be served in places of public accommodation.”³⁵

B. *The Civil Rights Act of 1875*

During Reconstruction, public accommodations law became a critical battleground in the fight to establish the parameters of the new nation.³⁶ Public accommodations laws were seen as “key to the implementation of reconstructed free citizenship” because “[r]acial subordination and segregation in public facilities, and especially in the most common facilities of railroads, streetcars, inns and theatres, was one of the most pervasive ways in which Whites asserted their racial power.”³⁷ Southern states, including “Texas, Louisiana, Mississippi, Florida, and South Carolina, all passed antidiscrimination laws during this period.”³⁸ Movement from the states ultimately encouraged Congress to pass its own bill, which became the Civil Rights Act of 1875.³⁹ Section 1 of the Act provided that:

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and

³³ *Id.* at 273 (“Like innkeepers, the common law required, with certain limited exceptions, that carriers accept all passengers who sought passage and paid established fare. It required carriers as well to protect the comfort and safety of their (other) passengers.”); *Day*, 5 Mich. at 527 (“[A]ccommodation of the mass of persons who have a right, and are in the habit of traveling on his boat” without comingling with blacks.).

³⁴ Singer, *supra* note 31, at 1349. (The customs of the North “along with the prevailing social mores, imposed substantial pressure on courts to interpret the newly codified rights of access in a manner that preserved the option of segregation—a practice that after all, had been declared by at least two Northern courts before 1865 to constitute ‘reasonable regulation’ of property consistent with a right to be served in an equal manner.”).

³⁵ *Id.*

³⁶ *Id.* at 1348 (“Starting in the 1840s, and continuing through the 1870s and 1880s, through *Plessy v. Ferguson* in 1896 and beyond, the law of public accommodations formed a central battleground in the fight to create a new nation after the Civil War.”).

³⁷ Fox, Jr., *supra* note 28, at 138.

³⁸ *Id.* at 137.

³⁹ See John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 PROLOGUE: J. OF NAT’L ARCHIVES 225 (1974).

applicable alike to citizens of every race and color, regardless of any previous condition of servitude.⁴⁰

The question of whether the Constitution afforded protection for discrimination in public accommodations continued to be debated after the 1875 Act was passed.⁴¹ Five years after its passage, the Supreme Court struck the 1875 Civil Rights Act down in the *Civil Rights Cases*.⁴² The *Civil Rights Cases* were five individual cases that were consolidated and jointly decided by the Court all concerning the denial of privileges in public places on the basis of race, color or previous servitude: *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston R.R.*⁴³ Two of the five cases, *Stanley* and *Nichols*, considered the legality of denying blacks access to hotels on the basis of their race under the Act.⁴⁴ Writing for the majority, Justice Bradley described the right to nondiscrimination as a “social” one for which the Constitution offered no protection in the absence of state action.⁴⁵ Justice Harlan, in his dissent, agreed that the Fourteenth Amendment did not reach inequalities in social rights.⁴⁶ He charged the majority instead with proceeding on grounds too narrow in their characterization of accommodations and privileges in facilities of public conveyances, inns and places of public amusement as social in the first instance and, thus, artificially sacrificing the substance and spirit of the Reconstruction amendments.⁴⁷ More specifically, Justice Harlan made the argument that the work of certain accommodations, though

⁴⁰ Civil Rights Act of 1875, ch.114, 18 Stat. 335, 336.

⁴¹ See James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493 (1965).

⁴² The Civil Rights Cases, 109 U.S. 3, 3–5 (1883). Two of the five cases considered the legality of denying blacks access to hotels on the basis of their race under the Act. *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 11, 22. See generally Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 Stan. L. Rev. 1205 (2014) (analyzing the Court’s distinction between social and civil rights). Bagenstos explains there was

consensus at the time that social equality was beyond the power of the law to achieve. For many during the Reconstruction era, the civil-rights/social-rights distinction served a function like the one that the structurally similar public-private distinction would later be understood to serve—to preserve a sphere of private, individual choice

where practices of race discrimination were outside of the purview of the law. *Id.* at 1212.

⁴⁶ *The Civil Rights Cases*, 109 U.S. at 26–27 (Harlan, J., dissenting).

⁴⁷ *Id.* at 26.

privately held, was so public that it was as if those accommodations were operated by the state.⁴⁸

The invalidation of the Civil Rights Act of 1875 had very real costs for blacks. In black communities throughout the country people reacted to the Court's decision in the *Civil Rights Cases* with dismay. They were keenly aware of what this meant for their lives.⁴⁹ African Americans were virtually excluded from mainstream travel in the United States for the next eight decades beginning when the Supreme Court struck down the Civil Rights Act of 1875⁵⁰ through the passage of the Civil Rights Act of 1964.⁵¹ As a result of the Nadir and Jim Crow laws that persisted in the country during this time, traveling intra- or interstate could be perilous for blacks.⁵²

⁴⁸ *Id.* at 38.

⁴⁹ See generally Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHICAGO-KENT L. REV. 1123 (1995).

⁵⁰ Welke, *supra* note 32, at 272 ("Before the Civil War, North and South, free and slave, the vast majority of people of color were excluded from participation in white American society. As Leon Litwack has noted, the system of segregation known as Jim Crow was born and firmly established in the North before the war. 'In virtually every phase of existence,' Litwack explains, 'Negroes found themselves systematically separated from whites. They were either excluded . . . or assigned to special 'Jim Crow' sections.'"); Civil Rights Act of 1875, ch. 114, 18 Stat. 335; see generally W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (2d ed. 1903).

⁵¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. See ALTON HORNSBY JR., ECON. POLICY INST., *LOOKING BACK ON THE FIGHT FOR EQUAL ACCESS TO PUBLIC ACCOMMODATIONS*, (2014), <http://www.epi.org/files/2014/Hornsby-07-02-2014a.pdf> [<https://perma.cc/5YF2-NSX8>]. The fight for equal access to public accommodations dovetailed with the fight for civil rights of the 1960s. Prior to the civil rights movement, however, the fight for equal access to public accommodations was marked by "a long history of temporary advancements precipitated by protest, followed by legal retrenchments at the hands of lawmakers and the courts," starting at the dawn of Reconstruction. *Id.* at 2. The Civil Rights Act of 1866 was the first national legislative action to provide equal access to public accommodations for all Americans. This act, "promoted African American citizenship and foreshadowed the 14th Amendment to the U.S. Constitution," was opposed in general, but especially in the former Confederate states. *Id.* at 4. The act was from the onset poorly enforced or ignored altogether and as soon as "Southern legislatures were restored to white Democratic control, public accommodations were segregated or forbidden to blacks by statutes." *Id.* Blacks continued to advocate for increased access. For example, between 1900 and 1906 in twenty-five cities, blacks engaged in "streetcar boycotts," which on occasion led to brief desegregation of the streetcars. *Id.* Even after the Supreme Court struck down the Civil Rights Act of 1875, black protest over access "was not stifled." *Id.* Blacks engaged in direct protest and legal challenges regarding the segregation of railroad cars. *Id.* Protests continued throughout the 1940s with the bus boycotts of Montgomery and into the 1960s with sit-ins at lunch counters and restaurants and perhaps, most notably, the March on Washington for Jobs and Freedom. *Id.* at 45.

⁵² COTTEN SEILER, *REPUBLIC OF DRIVERS: A CULTURAL HISTORY OF AUTOMOBILITY IN AMERICA* 110 (2008) ("A disproportionate number of black road narratives impress upon the reader the traveler's near-constant anxiety on unfamiliar roads."); see also *id.* (recounting Courtland Milloy's narrative recalling from his childhood that "so many black travelers were just not making it to their destinations"); Tanvi Misra, *These Jim Crow-Era Guides for Black Travelers Are Sadly Still Relevant*, CITYLAB (Oct. 30, 2015), <http://www.citylab.com/work/2015/10/these-jim-crow-era-guides->

Those blacks endeavoring to make a trip despite the potential danger were unwelcome in public accommodations throughout the country—not only in Southern states.⁵³ Between 1890 when the *Civil Rights Cases* were decided and about 1960, most hotels in the United States would not let blacks stay the night.⁵⁴ During this time blacks relied exclusively on word-of-mouth recommendations for locating potential resting places where they might safely stay. So widespread was this problem that by 1936, the *Negro Motorist Green Book* (the *Green Book*) had come into publication to aid black travelers in finding places where they could eat, sleep, or purchase gas free from discrimination.⁵⁵

The *Green Book* served both a practical purpose (providing details on how to travel safely) while also advancing a narrative of cultural uplift (including pictures of well-off black families with the means to afford a car and go on vacation).⁵⁶ This narrative was important in that it “mobilize[d] [black] midcentury audiences for social change” by calling for a day when such a book would not be needed, while also encouraging “black capitalism.”⁵⁷

for-black-travelers-are-sadly-still-relevant/413311/ [https://perma.cc/5Z2X-D6LX] (“[I]n many towns, black travelers were greeted with unthinkable violence or even death if they stayed past sundown.”).

⁵³ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 353 (2006). In recent years, interest in the narrative of the black travel guides has grown. In September 2015, New York Public Library’s Schomburg Center for Research in Black Culture digitized twenty-one volumes of the *Green Book*, from 1937 through 1964. See *The Green Book*, N.Y. PUB. LIBR. DIGITAL COLLECTIONS, <https://digitalcollections.nypl.org/collections/the-green-book/#?tab=about> [https://perma.cc/29PL-EPMH]. In 2010, Calvin Alexander Ramsey wrote a children’s book called *Ruth and The Green Book*, which tells the story of a young black girl in the 1950s embarking on a road trip with her family during which she learns that “black travelers weren’t treated very well in some towns.” CALVIN A. RAMSEY & GWEN STRAUSS, *RUTH AND THE GREEN BOOK* (2010). After an attendant at a gas station showed Ruth’s family the *Green Book*, Ruth could finally make a safe journey from Chicago to her grandma’s house in Alabama. *Id.* In 2016, Ramsey produced a film. See *THE GREENBOOK CHRONICLES* (Calvin Alexander Ramsey & Becky Wible Searles 2016). And when the National Museum of African American History and Culture opened in September 2016, it included an interactive exhibit on the *Green Book*. *National Museum of African American History and Culture Wins Gold MUSE Award for Interactive Exhibits*, NAT’L MUSEUM AFRICAN AM. HIST. & CULTURE (May 9, 2017), <https://nmaahc.si.edu/about/news/national-museum-african-american-history-and-culture-wins-gold-muse-award-interactive> [https://perma.cc/4GEK-5F39].

⁵⁴ See generally Myra B. Young Armstead, *Revisiting Hotels and Other Lodgings: American Tourist Spaces through the Lens of Black Pleasure-Travelers, 1880-1950*, 25 J. DECORATIVE & PROPAGANDA ARTS 137 (2005).

⁵⁵ See Meagen K. Monahan, *The Green Book: Safely Navigating Jim Crow America*, 20 GREEN BAG 2D 43, 43–46 (2016).

⁵⁶ Eve M. Kahn, *The ‘Green Book’ Legacy, a Beacon for Black Travelers*, N.Y. TIMES (Aug. 6, 2015), <https://www.nytimes.com/2015/08/07/arts/design/the-green-book-legacy-a-beacon-for-black-travelers.html> [https://perma.cc/UG7N-ERLM].

⁵⁷ SEILER, *supra* note 52, at 115. (“This dualism was not so novel” and other progressive black publications from *The Crisis* to *Ebony*, also “deployed rhetorics

C. *Title II of the Civil Rights Act of 1964*

By the mid-1960s, pressed to action by the Civil Rights Movement and international opinion generated as a result, the federal government began to consider an attempt at new civil rights legislation.⁵⁸ Both the Kennedy and Johnson Administrations actively lobbied for a civil rights bill that would include protections for black travelers.⁵⁹

When the Civil Rights Act of 1964 was ultimately passed, Title II of the legislation contained a prohibition on discrimination in public accommodations.⁶⁰ Unlike the earlier civil rights act, Title II did not rely solely on Congress's powers under the Thirteenth and Fourteenth Amendments.⁶¹ Having learned from the demise of the 1875 Act, Congress relied on its powers to regulate interstate business under the Commerce Clause when passing the 1964 Act.⁶² Specifically, and in contrast to the earlier civil rights law, Title II was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people," such as inns.⁶³ The primary purpose behind the passage of Title II was to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"⁶⁴ Title II provides that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.⁶⁵

There are four classes of business establishments covered by the statute: (1) hotels, (2) restaurants, (3) movie theaters and (4) any establishment located within one of the

affirming black communal struggle in society that 'spoke individualism' to the exclusion of other social philosophies.").

⁵⁸ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

⁵⁹ THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 171 (Robert Loevy ed., 1997).

⁶⁰ See Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 291 (2011).

⁶¹ See Steven D. Schwinn, *Civil Rights Act of 1964: Enduring and Revolutionary*, 14 INSIGHTS ON L. & SOC'Y 4 (2014).

⁶² Civil Rights Act of 1964 § 201(b) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . ."). Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 335-36.

⁶³ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250-51 (1964).

⁶⁴ *Id.* at 250 (quoting S. Rep. No. 872 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2370).

⁶⁵ Civil Rights Act of 1964 § 201(a).

previous three.⁶⁶ With respect to hotels, the statute excludes establishments “located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.”⁶⁷ This carveout is known as the “Mrs. Murphy” exception. Senator George Aiken of Vermont is attributed with first coining the term “Mrs. Murphy” to describe the exclusion when he argued that Congress should “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent their rooms to those they choose.”⁶⁸

Opponents of Title II argued that the proposed law violated what can be articulated as both the individual’s right of association⁶⁹ and “property rights.”⁷⁰ While it is unclear whether there is an exact constitutional source for the right to intimate association,⁷¹ in his article, *The Freedom of Intimate Association*, Kenneth Karst defined the right as a hybrid right born out of substantive due process, equal protection, and First Amendment jurisprudence.⁷²

The Court also articulated the right to intimate association in *Roberts v. U.S. Jaycees*.⁷³ There Justice Brennan opined it was a “fundamental element of personal liberty” and a protected right.⁷⁴ Jaycees was a national all-male organization that challenged state law forbidding discrimination on the basis of sex in public accommodations.⁷⁵ Jaycees argued that by requiring it to admit women to the

⁶⁶ *Id.* § 201(b)(1)–(4).

⁶⁷ *Id.* § 201(b)(1).

⁶⁸ *See id.*

⁶⁹ *See* Landsberg, *supra* note 28, at 5 (“The Attorney General of Virginia argued that the Ninth Amendment to the Constitution guaranteed ‘the right to discriminate in private business establishments such as those covered by the Civil Rights Law of 1964.’ The Attorney General of North Carolina argued that the Commerce Clause was not ‘designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination.’” (footnotes omitted)).

⁷⁰ *Heart of Atlanta Motel*, 379 U.S. at 282 (Douglas, J. concurring) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948)).

⁷¹ *City of Dallas v. Stanglin*, 490 U.S. 19, 23–24, 28 (1989) (Chief Justice Rehnquist, writing for the majority, noted that “[w]hile the First Amendment does not in terms protect a ‘right of association,’ our cases have recognized that it embraces such a right in certain circumstances.”); *see also* Collin O’Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 TEX. J. WOMEN & L. 231, 237 (1998).

⁷² *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).

⁷³ *See generally* *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

⁷⁴ *Id.* at 618. Udell argues that Justice Brennan consulted Karst’s article when writing *Jaycees* and that heavily informed his “hybrid” definition. *See* Udell, *supra* note 71, at 236–40.

⁷⁵ *Roberts*, 468 U.S. at 612, 614–15.

organization, the law infringed upon its members' right to free association.⁷⁶ In deciding whether the Jaycees members' rights to intimate association had been infringed, the Court determined the members' relationships were not sufficiently intimate to warrant constitutional protection.⁷⁷ The relationships did not resemble that of a family, which was critical to a relationship receiving constitutional protection.⁷⁸ According to the *Jaycees* Court, family relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."⁷⁹ By contrast, the Court noted that the Jaycees local chapters were large, unselective, and admitted members with very little reference to their background.⁸⁰ *Jaycees* represents the Court's recognition of limits to the right to free association.

Property law was also used by private owners of public accommodations to argue against the application of Title II.⁸¹ Property law generally affords owners of property used for personal consumption the right to choose "whether and with whom to share their property."⁸² Personal consumption property has been defined as "property that is designed and purchased for personal use."⁸³ "[C]onsumption property is presumed to foster intimate relations founded on familiarity, closeness, and trust."⁸⁴ This distinction between personal consumption property and commercial property is often justified by values of "individual

⁷⁶ *Id.* at 615.

⁷⁷ *Id.* at 619–21.

⁷⁸ *Id.*

⁷⁹ *Id.* at 620.

⁸⁰ *Id.* at 621.

⁸¹ See e.g., Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 67 (2016) ("In 2012, the Ninth Circuit Court of Appeals ruled that the Fair Housing Act did not apply to shared living situations and, hence, neither to advertisements seeking roommates. The decision was based on the privacy of relationships inside the home and the right to intimate association. In intimate locations, owners hold the prerogative to choose with whom to share their property. The sharing economy introduces short-term multiple rentals, thereby blurring the distinction between a business transaction and an intimate choice in a long-term roommate. This changes the meaning and function of intimacy in property law." (footnotes omitted)) Professor Joseph William Singer offers a historical view of the relationship between property law and the duty to serve noting that "from 1800 until 1865 . . . we see no diminishment of any kind in the scholarly or judicial support for the duty to serve despite the beginnings of classical conceptions of property and contract that would later attempt to marginalize the duty to serve." Singer, *supra* note 31, at 1348.

⁸² See Kreiczer-Levy, *supra* note 81, at 67; see also Gregory S. Alexander, *Intergenerational Communities*, 8 L. & ETHICS HUM. RTS. 21, 21 (2014).

⁸³ Kreiczer-Levy, *supra* note 81, at 68.

⁸⁴ *Id.* at 72.

autonomy, dignity, freedom, and privacy.”⁸⁵ Sharing one’s personal property with family members, friends and neighbors is consistent with this paradigm.⁸⁶ “This type of sharing [with family and friends] is considered to be part of the extended self”⁸⁷ And the home is the paradigmatic example of personal consumption property.⁸⁸ On the other hand, commercial property, which is defined by property exchanged for monetary value, is afforded none of these particular protections.⁸⁹

Historically, offering one’s home to the public transformed private property into commercial property.⁹⁰ As discussed above, however, the Mrs. Murphy exception blurred this private-turned-public distinction by taking “a property right belonging to the public—an easement of access to businesses open to the public with a concomitant duty on businesses to serve the public—and replac[ing] it with a business right to exclude”⁹¹ There the line remains drawn.

The right to intimate association and property rights are not absolute of course. The Mrs. Murphy exception contemplating the limits of both only protects the few operators who also occupy public accommodations with five or fewer units.⁹²

The first challenge to the breadth and application of the new law surprisingly came not from a small rooming house, but a large motel, in *Heart of Atlanta Motel, Inc. v. United States*. Heart of Atlanta motel had 216 rooms that were available to transient guests and it was easily accessible to four major highways.⁹³ The appellant solicited guests from outside of the state via various national advertising media, including magazines of national circulation.⁹⁴ With these facts before it, the Supreme Court, relying on the Constitution’s Commerce Clause, found that Title II applied and the hotel was an enterprise that had “a direct and substantial relation to the interstate flow of goods and people.”⁹⁵

⁸⁵ *Id.* at 71 (footnotes omitted); see also D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259 (2006).

⁸⁶ Krecizer-Levy, *supra* note 81, at 72.

⁸⁷ *Id.*

⁸⁸ See MARGARET JANE RADIN, REINTERPRETING PROPERTY 57 (2009) (arguing that the home is closely connected to personhood “because it is the scene of one’s history and future, one’s life . . .”).

⁸⁹ Krecizer-Levy, *supra* note 81, at 68.

⁹⁰ *Id.* at 89–90.

⁹¹ Singer, *supra* note 31, at 1295.

⁹² *Roberts*, 468 U.S. at 623.

⁹³ *Id.* at 243.

⁹⁴ *Id.* at 274.

⁹⁵ *Id.* at 250.

Despite the early opposition, relatively “widespread compliance” with the act followed in the years immediately after Title II’s passage.⁹⁶ There were outliers, however, with public places of lodging continuing to engage in discriminatory behavior prohibited by the act especially in times of upheaval in the country, in the aftermath of 9/11, for example.⁹⁷ At the federal level, historically, enforcement has been focused on large institutional actors.⁹⁸

In *United States v. Thomas d/b/a Best Western Scenic Motor Inn*, the United States’s complaint alleged that defendants violated Title II by discriminating against African Americans in the provision of public accommodations.⁹⁹ Specifically, the complaint alleged that defendants had engaged in a pattern or practice of denying African Americans “full and equal enjoyment of their goods, services, facilities, privileges, advantages, and accommodations.”¹⁰⁰ The discriminatory conduct included “instruct[ing] desk clerks to attempt to determine if prospective guests who called to make reservations were African Americans or other racial or ethnic minorities” and “deny[ing] a reservation to the caller [if they were believed to be African American] and inform[ing] the caller that no rooms were available when in fact rooms were available.”¹⁰¹ When, on rare occasions, defendants did rent rooms to African Americans, they “routinely rented rooms to those guests under less favorable terms and conditions than to white guests, including steering those guests to less desirable rooms, solely on the basis of [the guest’s] race, color or national origin.”¹⁰² “[D]efendants

⁹⁶ See Landsberg *supra* note 28, at 13.

⁹⁷ See *infra* notes 111–112 and accompanying text.

⁹⁸ There are just twenty-three Title II cases reported on the Department of Justice’s website, only five of which are against operators of hotels and motels and none against bed-and-breakfasts or individual renters. See *Housing and Civil Enforcement Section Cases*, DEP’T OF JUST., <https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#pa> (last updated Dec. 18, 2017) [<https://perma.cc/PB8L-YNBK>] (navigate to public accommodation cases).

⁹⁹ Plaintiff United States’ Complaint for Injunctive Relief, *United States v. Thomas*, No. 1:01CV000007 GH (E.D. Ark. Jan. 18, 2001), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-103> [<https://perma.cc/5YE2-GX26>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

On occasions when African Americans and other minorities were not denied lodging at the Best Western, defendants on their own or through their employees provided such guests inferior quality lodging when superior quality lodging was available and was provided to white guests. . . . To implement their discriminatory room assignment policies, defendants established a color coding system for room assignments. Red tabs signified “bad” or poorer quality rooms, and white tabs signified “good” or higher quality rooms. . . . Defendant Stephen Thomas changed room assignments on

established and implemented policies and procedures that denied lodging to African Americans and other minorities when in fact lodging was available.”¹⁰³ Defendants violated Title II by: (1) “direct[ing] their employees to deny African Americans and other minorities available rooms because such rooms could be rented to ‘better people’” and (2) “instruct[ing] their employees to provide false information to callers they concluded were minorities based on speech or accents.”¹⁰⁴ On at least one occasion, “Defendant Stephen Thomas observed individuals approach the motel from a vacant room overlooking the parking lot, telephoned employees working at the registration desk, and instructed them to deny rooms to African Americans and other prospective minority guests.”¹⁰⁵ The Department of Justice’s investigation revealed that “[t]he majority of prospective African American and other minority guests were illegally refused lodging at the Best Western based on their race, color, or ethnicity.”¹⁰⁶

In another case, *United States v. HBE Corporation d/b/a Adam’s Mark Hotels*, the United States claimed that the HBE Corporation, which does business as Adam’s Mark Hotels, violated Title II of the Civil Rights Act of 1964 by discriminating on the basis of race or color.¹⁰⁷ The United

the basis of race, color, and ethnicity in order to place African Americans and other minority guests in bad rooms. . . . Defendants instructed Best Western’s employees to flag the ethnicity or race of guests on reservation cards and registration log books. Specifically, defendants instructed employees to note “h.r.” or “high risk” for African American and other minority guests on the reservation cards in order to ensure that such guests would be placed in bad rooms. . . . In 1996, a group of African American guests attending a church revival in Batesville reserved three rooms at the Best Western. When one of the African American guests requested an extension of her group’s stay for an additional week, her request was denied. When the same guest requested that accommodations for her group be extended only through the weekend, that request was also denied. Defendant Stephen Thomas indicated to his employees that a folk festival, attended primarily by white people, was scheduled over that same weekend and that he did not want black guests at the motel at the same time as the white guests who would be attending the festival. Although enough rooms were available to accommodate the guest’s request to extend her group’s stay, Defendant Stephen Thomas falsely stated to her that the motel was booked for the weekend and that no rooms were available.

Consent Decree at ¶¶ 9–13, *U.S. v. Thomas*, (E.D. Ark. Sept. 27, 2001) [hereinafter Consent Decree], <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-369> [<https://perma.cc/7YVQ-2URN>].

¹⁰³ Consent Decree, *supra* note 102, at ¶ 5.

¹⁰⁴ *Id.* at ¶¶ 6–7.

¹⁰⁵ *Id.* at ¶ 8.

¹⁰⁶ *Id.* at ¶ 9.

¹⁰⁷ Revised Settlement Decree, *United States v. HBE Corp.*, No. 99-1604-CIV-ORL-22C (M.D. Fla. Nov. 6, 2000) [hereinafter HBE Settlement Decree], <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-606> [<https://perma.cc/WN2E-5GYE>].

States' complaint alleged "a pattern or practice of resistance to," and denial of, "the full and equal enjoyment by non-white persons" "of the goods, services, facilities, privileges, advantages, and accommodations" offered the Adam's Mark Hotels throughout the country.¹⁰⁸ The United States initiated the investigation based on events surrounding the Black College Reunion in Daytona Beach, Florida held in April 1999.¹⁰⁹ The Department of Justice's action followed a private class action lawsuit filed against the company claiming violations of Title II and other civil rights statutes.¹¹⁰

As a final example, in *Marriott International Settlement*, the United States alleged that in the wake of the 9/11 terrorist attacks on Washington D.C. and New York, the Des Moines Marriott engaged in discriminatory conduct against Arab Americans¹¹¹ by denying Arab Americans hotel rooms and access to banquet facilities when rooms and banquet facilities were available.¹¹² These three cases share common facts—major hotel chains' denial of accommodations to travelers because of their race, national origin, or both.

None of the cases on the Department of Justice's website involve smaller public accommodations such as bed-and-breakfasts, which close comparators to accommodations offered in the sharing economy both in scale and in type of conduct engaged in by discriminators. The Fair Housing Act

¹⁰⁸ Plaintiff United States' Complaint for Injunctive Relief at ¶¶ 8, 9, *United States v. HBE Corp.*, (M.D. Fla. Dec. 16, 1999), <https://www.justice.gov/crt/housing-section-documents-0> [<https://perma.cc/GM59-S973>].

¹⁰⁹ See HBE Settlement Decree, *supra* note 107.

¹¹⁰ *Id.*

¹¹¹ It is worth observing the timing of the discriminatory conduct.

¹¹² Settlement Agreement Between the United States, Midwest Federation of American Syrian- Lebanese Clubs, Marriot International, Inc., and City Center Development Limited Partnership, d/b/a the Des Moines Marriott, (Aug. 15, 2002), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-53> [<https://perma.cc/KVR7-3BLX>]. More specifically,

During the Spring and Summer of 2001, a representative of the Midwest Federation had several discussions with the Des Moines Marriott's Sales Manager about holding the Midwest Federation's 2002 convention at the hotel. In August 2001, the details were verbally finalized and on September 5, 2001, the Des Moines Marriott faxed a signed agreement to the Midwest Federation for the Midwest Federation's signature. The contract specified that the Midwest Federation had until September 20th to sign the agreement . . . On September 11, 2001, at approximately 2:30 pm, a Des Moines Marriott representative informed the Midwest Federation that the Des Moines Marriott had decided to revoke its offer to the Midwest Federation because another group wanted the space for the same weekend as the Midwest Federation.

Id. There was no other group that was definitely interested in hosting an event during that time frame. *Id.*

applies with equal force to those cases, a few of which are summarized below, they appear to be litigated at the state level in local courts and before commissions relying on local statutes that are worded similarly to the federal law.¹¹³ *In the Matter of: Todd Wathen and Mark Wathen and Walder Vacuflo, Inc.*, the Illinois Human Rights Commission (Illinois Commission) found that “Complainants have proved by a preponderance of the evidence a *prima facie* case of unlawful discrimination based upon . . . denial of the full and equal enjoyment of [a] place of public accommodation . . .”¹¹⁴ In *Wathen*, Complainants alleged that, when a bed-and-breakfast refused to host their same-sex civil union ceremony, they had been denied their equal enjoyment of a public accommodation facility due to their homosexual orientation.¹¹⁵ Respondent bed-and-breakfast owners argued that their facilities were not “a place of public accommodation.”¹¹⁶ The Illinois Commission found it relevant that “Respondent offered to the public sleeping accommodations and breakfast meals and advertised its services on its website . . . Respondent served approximately 1,200 guests per year and hosted 49 opposite-sex weddings in 2011.”¹¹⁷

¹¹³ Language found in several state public accommodation statutes closely mirrors the language of Title II. See Julie A. Moegenburg, *Freedom of Association and the Private Club: The Installation of a “Threshold” Test to Legitimize Private Club Status in the Public Eye*, 72 MARQ. L. REV. 403, 424 (1989) (noting how state public accommodation statutes are patterned after Title II of the Civil Rights Act of 1964).

¹¹⁴ Recommended Liability Determination at 8, *In re Wathen and Vacuflo, Inc.*, ALS No. 11-0703C (IHRC Sept. 15, 2015) [hereinafter Recommended Liability Determination], <http://www.peacock-panache.com/wp-content/uploads/2017/06/Wathen-liability-determination.pdf> [<https://perma.cc/74CP-ESM8>].

¹¹⁵ *Id.*; see also Andrew Maloney, *Men Denied Service Get \$30k Award*, CHI. DAILY L. BULL. (Nov. 29, 2016, 2:26 PM), <http://www.chicagolawbulletin.com/Archives/2016/11/29/30K-gay-bias-B-B-11-29-16.aspx> [<https://perma.cc/FPK7-W9J8>]; see also Vikki Ortiz Healy, *Ruling Sides with Same-sex Couple Turned away by Bed-and-Breakfast*, CHI. TRIB. (Sept. 17, 2015, 6:11 PM), <http://www.chicagotribune.com/news/local/politics/ct-lgbt-business-services-decision-met-20150917-story.html> [<https://perma.cc/69B2-U5PH>].

¹¹⁶ See Recommended Liability Determination, *supra* note 114, at 8.

¹¹⁷ *Id.* at 4. On February 15, 2011, one of the complainants inquired of Respondent whether it would begin allowing same sex civil unions on June 1 when those unions were scheduled to become legal in the State of Illinois. *Id.* at 5. Respondent replied that it did not plan to do so and that it only allowed “weddings” on its premises. *Id.* at 5. When Complainants pressed further and raised the specter of discrimination, Respondent replied, “We will never host same-sex civil unions. We will never host same-sex weddings even if they become legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If this is discrimination I guess we unfortunately discriminate.” *Id.* at 5 (emphasis omitted). Respondent later changed its website to reflect that it did not allow civil unions. *Id.* at 7. The Commission found that Complainants proved by a preponderance of the evidence a *prima facie* cases of unlawful discrimination based on denial of a place of public accommodation. *Id.* at 8.

Similar arguments were made in a Hawaii case, *Cervilli v. Aloha Bed and Breakfast*, where “a for-profit, commercial business establishment [failed] to provide accommodations at a bed and breakfast to a lesbian couple because of their sexual orientation, in violation of Hawaii’s law prohibiting discrimination in public accommodations.”¹¹⁸ The complaint noted that the defendant “offers bed and breakfast services to the general public,” operates as a sole proprietor, and “remits . . . transient accommodations tax in connection with [d]efendant’s provision of transient accommodations.”¹¹⁹ The complaint also noted that “[d]efendant advertises its bed and breakfast services to the public through a wide range of outlets, including several Internet web sites used by the general public to locate bed and breakfast facilities” such as Frommer’s Travel Guides, TripAdvisor, Yahoo! Travel, and bnbHawaii.com.¹²⁰ It was also noted in the complaint that [d]efendant’s own website specified a “two-person occupancy limit per room; a required three-night minimum stay; and the daily rates to rent the rooms” and “pictures.” Plaintiffs complained to the Hawaii Civil Rights Commission (Hawaii Commission).¹²¹ During the Hawaii Commission’s investigation, the owner admitted that she had refused to rent to the couple because they were lesbians.¹²² The court held that defendant had discriminated in violation of the law.¹²³

What is clear from the bed-and-breakfast cases is that they are public accommodations despite the fact that owners may

¹¹⁸ Complaint for Injunctive Relief, Declaratory Relief, & Damages at 2, *Cervilli v. Aloha Bed & Breakfast*, No. 11–1–3103–12 ECN, (Haw. Cir. Ct. 1st Cir. Dec. 2011) [hereinafter *Cervilli Complaint*], https://www.lambdalegal.org/sites/default/files/cervilli_hi_20111219_complaint.pdf [<https://perma.cc/WCX5-NHVX>].

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.* at 4–5.

¹²¹ *Id.* at 4. HRS § 489-3 states that “[u]nfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of . . . sexual orientation . . . are prohibited.” HAW. REV. STAT. ANN. § 489-3 (West 2017). Under § 489-2 a “[p]lace of public accommodation” is a “business” and an “accommodation . . . whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.” HAW. REV. STAT. ANN. § 489-2 (West 2017). Defendant in *Cervilli* was also found to be a public accommodation because it as “[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests.” § 489-2 (definition of “place of public accommodation”).

¹²² *Cervilli Complaint*, *supra* note 118, at 8.

¹²³ Order Granting Plaintiffs’ and Plaintiff-Intervenor’s Motion for Partial Summary Judgment for Declaratory and Injunctive Relief and Denying Defendant’s Motion for Summary Judgment, *Cervilli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN, (Haw. Cir. Ct. 1st Cir. Apr. 15, 2013), http://www.lambdalegal.org/sites/default/files/2013-04-15_-_cervilli_order.pdf [<https://perma.cc/3ASZ-JHGF>].

live in them (unless they are fewer than five rooms) and that discrimination against members of protected classes by them is prohibited under the act or similarly worded local statutes.

II. BIAS IN THE MODERN SHARING ECONOMY

In this Part, the article explores the differences and similarities between traditional forms of sharing, like bed-and-breakfasts, and modern forms, like Airbnb. Further, the article discusses evidence of bias in the sharing economy, using Airbnb hosts as an example.

A. *Defining the Modern Sharing Economy*

Sharing assets has been possible for many years.¹²⁴ In many cases, transaction costs made sharing appear more cumbersome than it was worth.¹²⁵ The availability of the Internet, however, has substantially reduced the transaction costs associated with sharing, making it easier than ever to borrow what you do not have and lend what you are not using.¹²⁶ The Internet allows companies to more easily tap into these otherwise personal assets through the use of Web- and app-based platforms that connect buyers and sellers of goods,

¹²⁴ Bed-and-breakfasts, timeshares, and car pools are just a few examples of the types of goods that we have historically shared. What distinguishes goods offered on the sharing economy from their predecessors like car pools, timeshares, and bed-and-breakfasts, is really on the transactional side. See Cosmo Landesman, *There's Nothing New About the Sharing Economy—it's the Swinging Sixties All over Again*, SPECTATOR (Nov. 12, 2016, 10:00 AM), <https://blogs.spectator.co.uk/2016/11/theres-nothing-new-sharing-economy-swinging-sixties/> [<https://perma.cc/9JZD-T32U>]. The reduction in transaction costs makes sharing on a larger scale possible because it is cheaper and easier than ever. See *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <https://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<https://perma.cc/9PZQ-UZFJ>].

¹²⁵ *Id.* Robin Chase, co-founder of Zipcar, describes in her book *Peers Inc.*, how instrumental companies like hers are to making sharing possible. ROBIN CHASE, PEERS INC.: HOW PEOPLE AND PLATFORMS ARE INVENTING THE COLLABORATIVE ECONOMY AND REINVENTING CAPITALISM 36 (2015). She writes:

Think about what it takes to forge a resilient, frictionless platform for peer-to-peer car sharing. Acquiring the appropriate group insurance is at best a year-long effort (and at worst five years and counting in the United States) that no individual or insurance company would ever undertake for just one person's policy . . . Few individuals have the skill and the capital to build the Apple iOS and Google Android apps that enable people to find and rent a car quickly . . .

Id.

¹²⁶ *Id.* at 46.

labor, and services.¹²⁷ These transactions between buyers and sellers are often referred to as “peer to peer” transactions.¹²⁸

Sharing platforms in particular make excess capacity accessible in three major ways; they either (1) slice capacity (where an idea like car ownership is divided into smaller increments of time), (2) aggregate capacity (where assets that were individually too small to bother with are added together into something reliable and consistent), or (3) open capacity (where a service like Google Maps is opened up to others so they can generate new services or products from the excess capacity).¹²⁹ Together, this makes the new so-called “sharing economy.”¹³⁰

The type of assets and services offered through the sharing economy are vast and diverse ranging from taxi alternatives, delivery services, personal property sales, and home rental.¹³¹ Companies offering the services range from explicitly commercial to free exchanges.¹³²

The type of exchange offered in the sharing economy is seen as beneficial for several reasons.¹³³ First, owners make money from underused assets.¹³⁴ Second, renters benefit from only having to pay for assets when they need them.¹³⁵ Finally, there are environmental benefits as well. For example, there are fewer cars on the street because of car shares like Zipcar.¹³⁶

As for public accommodations offered through the sharing economy, they open capacity by allowing individuals to monetize extra rooms in their homes by offering them to the public as hotel rooms, or more aptly, bed-and-breakfast-style rooms.¹³⁷ Using websites and apps on mobile devices, a guest can connect with a host to rent either a room, or an entire apartment or home, for short- and long-term periods.¹³⁸ In

¹²⁷ *Id.* at 36. (“[P]latforms [] make it simple for peers to participate and to exploit the excess capacity identified” by: (1) “establish[ing] and enforc[ing] contracts;” (2) “routinizing the logistics of the transaction such as when and where to pick up a car, refueling and dropping off,” and (3) “set[ting] penalties for bad behavior Peers choose to participate on platform because a bigger entity (the Inc) has spent lots of time and money turning something complex and expensive into something simple and inexpensive.”).

¹²⁸ STEVEN HILL, *RAW DEAL: HOW THE “UBER ECONOMY” AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS* 39 (2015).

¹²⁹ *Id.*

¹³⁰ *Id.* at 40.

¹³¹ *Id.* at 39.

¹³² RACHEL BOTSCHAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* xv (2010).

¹³³ *Id.* at xx-xxi, 49–51, 97–100.

¹³⁴ *Id.* at xviii.

¹³⁵ *Id.* at 97–103.

¹³⁶ *Id.* at 74.

¹³⁷ *Id.* at ix–x.

¹³⁸ *Id.*

virtually all cases, including through Airbnb, a host is furnished with the guest's first name, a picture, and other personal information before accepting or denying any request.¹³⁹ Some of these sites encourage guests to share as much information as possible with their prospective hosts to increase their odds of acceptance, and in an effort to build "community" with one another.¹⁴⁰

B. Airbnb: The Paradigmatic Modern Public Accommodation

Airbnb¹⁴¹ is the poster child for what is possible in the modern sharing economy.¹⁴² Airbnb's superstar status originates with its "cataclysmic" rise and staying power.¹⁴³ Airbnb started with one room in one city.¹⁴⁴ In 2017, Airbnb boasted 4 million listings in 191 countries with a valuation of \$31 billion dollars.¹⁴⁵ The sheer number of Airbnb's listings means that it offers quadruple the options than the largest traditional hotel chain, Marriott.¹⁴⁶ The company is pursuing an even larger share of the market in years to come.¹⁴⁷ Airbnb

¹³⁹ *Id.*

¹⁴⁰ See Jun Li, Dennis Zhang & Ruomeng Cui, *A Better Way to Fight Discrimination in the Sharing Economy*, HARV. BUS. REV. (Feb. 27, 2017), <https://hbr.org/2017/02/a-better-way-to-fight-discrimination-in-the-sharing-economy> [<https://perma.cc/57G3-9KLS>]. All of this sharing is largely thought to be good. With respect to individual transactions, sharing information makes the renter feel more comfortable with the owner and the owner feel more comfortable with the renter. And at a larger level, sharing democratizes consumption and entrepreneurship.

¹⁴¹ Co-founder Nathan Blecharczyk has said that the name Airbnb came from "the idea that with the Internet and a spare room, just about anyone could become an innkeeper." MARK PETERSON, SUSTAINABLE ENTERPRISE: A MACROMARKETING APPROACH 227 (2013).

¹⁴² HILL, *supra* note 128, at 41.

¹⁴³ It was October 2007 when Airbnb's CEO, Brian Chesky, and his roommate (soon to be business partner), Blecharczyk, shared their own San Francisco apartment for the first time with three strangers attending an industrial design conference. That first week they made \$1,000. From there, they moved to Denver. Barack Obama was speaking at 75,000 seat arena and only 40,000 hotel rooms were available. By early 2008 the business had a website. "By April 2010, Airbnb.com had 85,000 registered users and more than 12,000 properties in 3,234 cities across 126 countries of the world." PETERSON, *supra* note 141, at 227.

¹⁴⁴ Max Chafkin, *Can Airbnb Unite the World?*, FAST COMPANY (Jan. 12, 2016), <https://www.fastcompany.com/3054873/can-airbnb-unite-the-worldqreeee> [<https://perma.cc/RZ3W-QJBV>].

¹⁴⁵ Avery Hartmans, *Airbnb Now Has More Listings Worldwide Than the Top Five Hotel Brands Combined*, BUS. INSIDER (Aug. 10, 2017, 1:00 PM), <http://www.businessinsider.com/airbnb-total-worldwide-listings-2017-8> [<https://perma.cc/5JBX-U6YT>].

¹⁴⁶ Chafkin, *supra* note 144. In 2016, Marriott had just over 1 million units. *Id.*

¹⁴⁷ Airbnb intends to grow its market share by recruiting more hosts and offering more services in the years to come. For example, in 2016, the company started piloting a project to package three-day stays in San Francisco with airport transfers,

is not alone in the sharing economy's travel hosting market. Other sites such as HomeAway,¹⁴⁸ OneFineStay,¹⁴⁹ and KidandCo,¹⁵⁰ offer similar travel-related hosting services.

In its infancy, there were questions in the minds of local government officials, in particular, about what Airbnb's true identity was. Should Airbnb be regulated as a home or a hotel, both or neither?¹⁵¹ For its part, Airbnb contributed to the ambiguity.¹⁵² And one can understand why—increased regulation is cumbersome and costly, and can be difficult to navigate.

After a time, however, it was clear that Airbnb had become the canonical modern public accommodation. Airbnb began partnering with airlines and credit card companies to be part of their points and rewards programs.¹⁵³ And tellingly, after coming under some pressure in some of its largest markets, such as San Francisco and New York, Airbnb agreed to require its hosts to comply with some regulation by collecting hotel taxes.¹⁵⁴ Its attempt to strike a deal with the

meals, and day trips. *Id.* And with the addition of services like these, Airbnb projects that by 2020 it will make \$10 billion a year. *Id.* In November 2016, Airbnb unveiled “Experiences” feature at its host conference in Los Angeles. See Seth Porges, *Airbnb Is Moving Beyond Room Rentals and into Full-Trip Experiences*, FORBES (Nov. 17, 2016), <https://www.forbes.com/sites/sethporges/2016/11/17/at-company-conference-airbnb-announces-moves-beyond-room-rentals-into-full-trip-experiences/#75e5ae082d50> [<https://perma.cc/PCS8-RC2F>]. Experiences is a full-service travel program that will allow guests to “[b]ook hundreds of experiences designed and led by local experts,” using “one app.” *Welcome to the World of Trips*, AIRBNB, <https://www.airbnb.com/new> [<https://perma.cc/2KKC-XXYN>].

¹⁴⁸ HOMEAWAY, <https://www.homeaway.com/> [<https://perma.cc/DE4N-MX2N>] (“upgrade to a whole vacation”).

¹⁴⁹ ONEFINESTAY, <https://www.onefinestay.com> [<https://perma.cc/8V7A-76ST>] (“[e]njoy the finest homes and service all around the world”).

¹⁵⁰ KID&COE, <https://www.kidandcoe.com/> [<https://perma.cc/BW8C-NJGU>] (“book your perfect family vacation”).

¹⁵¹ See Emily Badger, *Why We Can't Figure out How to Regulate Airbnb*, WASH. POST (Apr. 23, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/?utm_term=.862d74c945ec [<https://perma.cc/DC8A-9QFL>]; The Times Editorial Board, *How to Regulate Airbnb and 'Homesharing'*, L.A. TIMES (June 22, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-homesharing-law-20160622-snap-story.html> [<https://perma.cc/X9U4-DKV5>]; Kate Benner, *Airbnb Sues over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0 [<https://perma.cc/F6M6-PEXT>].

¹⁵² See Alison Griswold, *The Dirty Secret of Airbnb is that it's Really, Really White*, QUARTZ (June 23, 2016), <https://qz.com/706767/racist-hosts-not-hotels-are-the-greatest-threat-to-airbnbs-business/> [<https://perma.cc/8DBP-AR5L>].

¹⁵³ Delta frequent fliers can earn airline points for Airbnb stays. *Delta, JetBlue Dive Deeper into "Sharing Economy"*, TRAVELSKILLS (Nov. 2, 2016), <http://travelskills.com/2016/11/02/delta-jetblue-sharing-economy/> [<https://perma.cc/4BKX-G5HQ>]. American Express customers can also use points to book Airbnb. *Airbnb*, AM. EXPRESS, <https://www.americanexpress.com/ph/network/content/airbnb.html> [<https://perma.cc/KHV7-EGYV>].

¹⁵⁴ Emily Badger, *Airbnb is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), <https://www.washingtonpost.com/news/>

largest union of hotel housekeepers is another sign that Airbnb operates more like a hotel than a home.¹⁵⁵ Each of these moves has helped to solidify Airbnb's position as a legitimate public accommodation whether the company intended that result or not.¹⁵⁶

Yet, even while Airbnb submitted its hosts to some regulation, it feigned ignorance to whether they should be subjected to regulation for discrimination.¹⁵⁷ Early iterations of Airbnb's website barely mentioned discrimination at all.¹⁵⁸

C. Evidence of Bias by Airbnb Hosts

There is evidence that some Airbnb hosts discriminate based on race. In January 2016, Edelman, Luca, and Svirsky released findings from their paper "Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment," which revealed "that requests from guests with distinctively African American names are roughly 16 [percent] less likely to be accepted than identical guests with distinctively White names."¹⁵⁹ The experiment consisted of inquiring into the availability of 6,400 listings on Airbnb in five major American cities—Baltimore, Dallas, Los Angeles, St. Louis, and Washington D.C.¹⁶⁰ All of the requests were identical except for

wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-incl-uding-washington/?utm_term=.f6235c68ad01 [https://perma.cc/DX2S-Y54D]; see also *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB [https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available [https://perma.cc/QHY4-4D3Z]] (listing the cities where hotel taxes are collected by Airbnb on behalf of hosts).

¹⁵⁵ Airbnb unsuccessfully attempted to form an alliance with the Services Employees International Union to have its hosts only employ unionized home cleaners who would be paid no less than \$15 per hour. The deal ultimately fell apart because housing advocates alleged it legitimized home-sharing at the expense of affordable housing. See Elizabeth Dwoskin, *Airbnb is Forming an Alliance with One of the Nation's Biggest Labor Unions*, WASH. POST (Apr. 18, 2016), [https://www.washingtonpost.com/news/the-switch/wp/2016/04/18/airbnb-is-forming-an-alliance-with-one-of-the-nations-biggest-labor-unions/?utm_term=.18b68fecdb90 [https://perma.cc/LC89-YQ6G]]; see also Brian Mahoney, *SEIU, Unite Here Meet over Proposed Airbnb Deal*, POLITICO (Apr. 19, 2016, 10:00 AM), [http://www.politico.com/tipsheets/morning-shift/2016/04/seiu-unite-here-meet-over-proposed-airbnb-deal-213839 [https://perma.cc/VR9W-3548]].

¹⁵⁶ *Accessible Lodging*, ADA NAT'L NETWORK, [https://adata.org/factsheet/accessible-lodging [https://perma.cc/SF6B-PEW6]] (noting how federal regulations require places of lodging to ensure that a facility and its amenities be accessible to those with disabilities).

¹⁵⁷ See Vauhini Vara, *How Airbnb Makes It Hard to Sue for Discrimination*, NEW YORKER (Nov. 3, 2016), [https://www.newyorker.com/business/currency/how-airbnb-makes-it-hard-to-sue-for-discrimination [https://perma.cc/8C6P-XV2T]].

¹⁵⁸ *What is Airbnb?*, AIRBNB (Dec. 16, 2009), [http://www.airbnb.com:80/about [https://perma.cc/H9JA-8SJE]].

¹⁵⁹ See Edelman, Luca & Svirsky, *supra* note 7, at 1.

¹⁶⁰ *Id.* at 2, 6.

the names they gave their make-believe travelers.¹⁶¹ Some requests were made using African American-sounding names like Jamal or Tanisha and others had stereotypically Caucasian-sounding names like Meredith or Todd.¹⁶² The Edelman study found “widespread discrimination against guests with distinctively African-American names.”¹⁶³ Requests from guests with distinctively African American names received a positive response approximately 42 percent of the time compared to the approximately 50 percent positive response rate for white guests.¹⁶⁴ The study’s authors asserted that this discrepancy amounted to an approximately 16 percent penalty for being African American.¹⁶⁵ The Edelman study found this penalty particularly notable when comparing Airbnb to “the discrimination-free setting of competing short-term accommodation platforms such as Expedia.”¹⁶⁶

According to the Edelman study, the differences in acceptance rates based on race persist whether the hosts are African American or white, male or female.¹⁶⁷ And, importantly for our discrimination laws, this difference persisted whether or not the host shared the property with the guest, the host was experienced (with many properties listed or not), or the property was “cheap or expensive.”¹⁶⁸ It appears from the Edelman study that many Airbnb hosts discriminate against African Americans, and do so frequently. The Edelman study argued that Airbnb could revise its platform to reduce this discrimination by concealing guests’ names, by moving the entire platform in the direction of the “Instant Book” option currently available, or both.¹⁶⁹

In the spring of 2016, anecdotal evidence of discrimination began to emerge from black potential Airbnb guests who had been denied the opportunity to book a listing, presumably because of their race. Quirtina Crittenden suspected

¹⁶¹ *Id.* at 3–7.

¹⁶² *Id.* at 3, 36.

¹⁶³ *Id.* at 3 (The names the Edelman group selected were based on a list of distinctively white and African American names drawn from a Bertrand and Mullainathan study that was conducted in 2004 in the employment context. The original list was compiled with data regarding the frequency of names on birth certificates of babies born between 1974 and 1979 in Massachusetts.) *Id.* at 9.

¹⁶⁴ *Id.* at 10.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 22. “Instant Book” on Airbnb mirrors a more traditional hotel booking system where hosts accept guests without pre-screening them. *See supra* note 139 and accompanying text.

that an Airbnb host had discriminated against her after she attempted to book a listing, was denied and then checked back later only to find the dates for the same listing still available.¹⁷⁰ Crittenden posted the tales of her denials on social media using the hashtag #AirbnbWhileblack.¹⁷¹ Crittenden was not alone. For example, @aksala13 posted: “I’ve tried to use @Airbnb... Funny how the dates I request are ALWAYS booked even when they show as ‘available’. #fuckem #AirbnbWhileBlack.”¹⁷² @jbovie posted: “I’ll say that despite having good reviews on Airbnb, my hit rate for a place is roughly [one] reservation for every [four] tries. #AirbnbWhileBlack.”¹⁷³ @ScottyLiterati posted: “#AirbnbWhileBlack In the US, I only use Instant Book which auto- accepts requests. It spares me the BS excuses. Never any trouble abroad tho!”¹⁷⁴ And @lexbthinking posted: “When you have to [use Airbnb] have the most Caucasian looking and most generic sounding named friend to make the requests #AirbnbWhileBlack.”¹⁷⁵ The #AirbnbWhileBlack movement continued to expand in the months after Crittenden’s story was first covered.¹⁷⁶

¹⁷⁰ Maggie Penman, Shankar Vedantam, & Max Nesterak, *#AirbnbWhileBlack: How Hidden Bias Shapes the Sharing Economy*, NPR: HIDDEN BRAIN (Apr. 26, 2016, 12:10 AM), <http://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy> [<https://perma.cc/R4S4-HTUD>] (Quirtina Crittenden reports conducting her own experiment where she shortened her name to “Tina” and replaced her profile photograph with a picture of a landscape. She has not had problems renting on Airbnb since the NPR article.).

¹⁷¹ On April 29, 2016, following its story on Crittenden’s experiences, NPR hosted a Twitter chat on the topic on #Airbnbwhileblack. See Leah Donnell, *Code Switch and Hidden Brain Teamed Up for an #AirbnbWhileBlack Twitter Chat*, NPR: CODE SWITCH (Apr. 29, 2016, 12:10 PM), <http://www.npr.org/sections/codeswitch/2016/04/29/476164589/join-us-at-noon-today-for-an-airbnbwhileblack-twitter-chat> [<https://perma.cc/YHY9-6HPT>].

¹⁷² Ak (@aksala13), TWITTER (Apr. 29, 2016, 10:56 AM), <https://twitter.com/aksala13/status/726107877958635521> [<https://perma.cc/RJP3-TXVM>].

¹⁷³ Aja Romano, *Airbnb Has a Discrimination Problem. Ask Anyone Who’s Tried to #Airbnbwhileblack.*, VOX (May 6, 2016, 10:00 AM), <http://www.vox.com/2016/5/6/11601180/airbnbwhileblack-racism> [<https://perma.cc/TY5T-Q7PC>].

¹⁷⁴ Ess (@ScottyLiterati), TWITTER (Apr. 29, 2016, 10:49 AM), <https://twitter.com/ScottyLiterati/status/726106174316269568> [<https://perma.cc/784X-65YW>].

¹⁷⁵ See Penman, Vedantam & Nesterak, *supra* note 170.

¹⁷⁶ A coalition critical of Airbnb, ShareBetter, aired an ad featuring Crittenden and calling for changes to Airbnb’s operations on cable networks in Philadelphia and New York during the Democratic National Convention. See Kenneth Lovett, *Airbnb Battle Heads to Democratic National Convention*, N.Y. DAILY NEWS (July 25, 2016, 4:00 AM), <http://www.nydailynews.com/news/politics/lovett-airbnb-battle-heads-democratic-national-convention-article-1.2724368> [<https://perma.cc/NXD9-WKYM>]. ShareBetter also purchased a full-page ad in *USA Today* on Monday, July 25, 2016, the first day of the convention. *Id.* ShareBetter had individuals passing out printed materials outside of the convention and stationed a truck in downtown Philadelphia, which played videos detailing Airbnb’s discrimination. *Id.*

On May 17, 2016, Gregory Selden filed the first lawsuit alleging race discrimination by Airbnb.¹⁷⁷ Plaintiff, Gregory Selden, alleged that in March 2015 he inquired about the availability of an Airbnb listing in Philadelphia, Pennsylvania, and the host told him that the listing was not available.¹⁷⁸ Continuing his search for an accommodation, Selden came across the same listing, which appeared to still be available.¹⁷⁹ Selden grew suspicious that he had been discriminated against and created two “imitation” Airbnb profiles: one under the name “Jessie” and another under the name “Todd.”¹⁸⁰ Jessie had the same demographic information as Selden.¹⁸¹ On the same day that Selden was rejected, the host accepted both imitation potential guests.¹⁸² Selden alerted Airbnb to the discriminatory treatment that he received when trying to reserve a unit on Airbnb’s website and his communications went unanswered.¹⁸³ Silence from Airbnb prompted the lawsuit.¹⁸⁴ In November 2016, Airbnb moved the federal district court to dismiss the case and send it to mandatory arbitration.¹⁸⁵ The result in *Selden* foreshadows the problems with leaving regulation of discriminating landlords to Airbnb.¹⁸⁶

As evidence of bias on Airbnb’s platform became publicized, the company’s position on discrimination by its hosts evolved. Airbnb issued increasingly strong statements decrying bias in its online “community.”¹⁸⁷ In November 2016

¹⁷⁷ Hope King, *Airbnb Sued for Discrimination*, CNN TECH (May 18, 2016, 4:56 PM), <http://money.cnn.com/2016/05/18/technology/airbnb-lawsuit-discrimination/> [<https://perma.cc/B8FZ-R932>].

¹⁷⁸ Class Action Complaint at 5, *Selden v. Airbnb, Inc.*, No. 1:16-cv-00933, 2016 WL 6476934 (D.D.C. Nov. 1, 2016) [hereinafter *Selden Complaint*].

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 6.

¹⁸¹ *See* Griswold, *supra* note 152.

¹⁸² *Id.*

¹⁸³ *See Selden Complaint, supra* note 178, at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ In February 2017, the United States Court of Appeals for the District of Columbia granted Airbnb’s motion to dismiss by holding that the district court’s order compelling arbitration and staying litigation pending arbitration is not appealable. *See Selden v. Airbnb, Inc.*, 681 F. App’x 1 (D.C. Cir. 2017). Last month, the U.S. Supreme Court denied Selden’s petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *See Selden v. Airbnb Inc.*, 138 S. Ct. 222 (2017).

¹⁸⁷ On September 8, 2016, Airbnb issued a thirty-two-page report, “*Airbnb’s Work to Fight Discrimination and Build Inclusion*,” that indicated the company was committed to making “a series of product and policy changes that will help fight discrimination and bias.” LAURA W. MUPRHY, AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 10 (Sept. 8, 2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf [<https://perma.cc/D5UJ-HMS9>]. In November 2016, Airbnb sent an email requesting that all users agree to a “Community Commitment.” *See* Madison Malone Kircher, *Airbnb Will Now Require Hosts to Agree to Anti-Discrimination Policy*,

(the same week it moved to have *Selden* dismissed), Airbnb released its first antidiscrimination policy.¹⁸⁸ The policy included, among other things, Airbnb’s plans to: (1) develop a feature that would prevent hosts from rejecting one guest in favor of another by alleging that their space is not available—the feature will automatically block the calendar for subsequent reservation requests for the same trip—and (2) work with a team of engineers and designers to experiment with reducing the prominence of guest photos in the booking process.¹⁸⁹ Notably, Airbnb stopped short of requiring its hosts to “serve all” as is the standard for public accommodations offered outside of the sharing economy.¹⁹⁰

III. TITLE II CAN REACH THE MODERN SHARING ECONOMY; THE ADA AND TITLE VIII OFFER MODELS

In this Part, the article seeks to demonstrate how Title II, as currently drafted, permits enforcement against a significant majority of individual Airbnb hosts without legislative reform. Case law regarding the classification of “public accommodations” under the Americans With Disabilities Act (ADA) suggests that courts have already moved in the direction of reclassifying dwellings as public accommodations when they resemble hotels. Moreover, ADA case law suggests that utilizing dwellings as a transient rental for only part of the time, does not implicate the Mrs. Murphy exception. This Part also explores how Title VIII of the Civil Rights Act—the Fair Housing Act—serves as an example of how government agencies and non-profits might investigate and enforce liability against sharing economy hosts under Title II.

SELECT/ALL (Nov. 1, 2016, 11:49 AM), <http://nymag.com/selectall/2016/11/new-airbnb-mandatory-anti-discrimination-policy-for-hosts.html> [<https://perma.cc/7Q9G-YN26>]. More specifically, hosts who decline a guest based on discrimination or post a listing with discriminatory language, “will be forced to edit the listing or else face suspension.” *Id.* This is a significant improvement from Airbnb’s previous policy and public position on bias on its site. Yet, these changes are not likely to eradicate the discrimination that black users are facing.

¹⁸⁸ Deborah M. Todd, *Airbnb Revamps Anti-Discrimination Policy*, REUTERS (Sept. 8, 2016), <https://www.reuters.com/article/us-airbnb-discrimination/airbnb-revamps-anti-discrimination-policy-idUSKCN11E2H0> [<https://perma.cc/NFC6-3SH4>].

¹⁸⁹ See MURPHY, *supra* note 187 (Airbnb’s report acknowledged the ways in which hosts have used its platform to discriminate against African American would-be guests and released its new anti-discrimination policies.).

¹⁹⁰ Airbnb could have required all of its hosts to use its Instant Book feature, where “listings don’t require approval from the host before they can be booked.” See What is Instant Book?, Airbnb, <https://www.airbnb.com/help/article/523/what-is-instant-book> [<https://perma.cc/635T-DXP4>]. Also, guests can “filter” their search “to only view listings that are available through Instant Book.”

A. *Dwellings as Public Accommodations Under the ADA*

Legislative reform is not necessary to hold a significant number of individual Airbnb hosts renting out dwellings that they are not occupying accountable under Title II at present. That courts have already indicated a willingness to define dwellings that are “virtually indistinguishable from [] hotel[s]” as public accommodations under the ADA, which governs discrimination against persons with disabilities in public accommodations, suggests individual dwellings offered for short-term rental in the modern sharing economy are within Title II’s reach.¹⁹¹ For example, under the ADA, courts have held that condominium buildings may be covered as places of public accommodation, and thus subject to liability for discrimination, if they operate as places of lodging.

Determining whether a particular condominium facility is a place of public accommodation under the ADA depends on the extent to which it shares characteristics normally associated with a hotel, motel, or inn.¹⁹² Courts tend to consider the temporal aspects of the rental, as well as the amenities provided. For example, in *Kromenhoek v. Cowpet Bay West Condominium Association*, the court considered evidence that the condominium unit in question had been advertised for a short-term rental on a public webpage as probative of whether it was a public accommodation.¹⁹³ Other housing units that have been found to be public accommodations include trailers, camp dorm rooms, and seasonal accommodations.¹⁹⁴

In *Access 4 All, Inc. v. Atlantic Hotel Condominium Association*, the court considered the fact that individual unit owners were likely to rent out the units for public use when finding the application of the ADA’s requirements for public accommodations.¹⁹⁵ Importantly, the *Access 4* court was persuaded by the fact that “[d]efendants have created a ‘unique’ entity to earn profits from hotel-like operations while

¹⁹¹ *Access 4 All, Inc. v. The Atl. Hotel Condo. Ass’n, Inc.*, No. 04-61740-CIV-COHN, 2005 WL 5643878, at *13 (S.D. Fla. Nov. 23, 2005).

¹⁹² See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 301, 104 Stat. 327, 354 (codified as amended at 42 U.S.C. § 12181(7) (2012)).

¹⁹³ See *Kromenhoek v. Cowpet Bay W. Condo. Ass’n*, 77 F. Supp. 3d 454, 457 (D.V.I. 2014).

¹⁹⁴ See generally I. J. Schiffres, Annotation, *What Businesses or Establishments Fall Within State Civil Rights Statute Provisions Prohibiting Discrimination*, 87 A.L.R.2d 120 §§ 5, 7 (1963).

¹⁹⁵ See *Access 4 All, Inc.*, 2005 WL 5643878, at *54.

seeking to insulate themselves from ADA compliance by designating hotel rooms as condominium units”¹⁹⁶

Thus, whether a unit that might ordinarily be considered a home can transform into a public accommodation under the ADA is a fact-based analysis that depends on the temporal aspects of the rental, amenities provided, and other factors that may or may not suggest that the accommodations offered are in fact public accommodations. Both the *Kromenhoek* and the *Access 4* opinions suggest that the fact that a host occupies the property part of the time, but not congruently with the guest, is not dispositive of whether it is a public accommodation under the ADA. This reading of the ADA case law combined with the fact that the Mrs. Murphy exemption, as with all exemptions under the act, should be read narrowly¹⁹⁷ is encouraging for consumers seeking to have Airbnb hosts covered by Title II.

B. *The Fair Housing Act as a Model of Enforcement*

Title II’s potential application in the sharing economy, begs the questions of how it will be enforced and by whom. The volume of transactions that occur in the sharing economy raises appropriate concerns about the ability of the current system to handle the potential uptick in complaints. In 2016, Airbnb had 15,000 hosts in New York City alone.¹⁹⁸ At least one commentator has questioned whether efforts to enforce Title II against individual hosts in the sharing economy would be so inefficient, labor intensive, and costly as to caution against doing so.¹⁹⁹ Regulation of landlords under Title VIII of the Civil Rights Act of 1968, the Fair Housing Act (FHA), is thus instructive as a model.

There is a robust regulatory scheme set up to enforce the FHA.²⁰⁰ The Department of Justice successfully brings cases against individuals and small companies renting personal property including, in some cases, privately-owned,

¹⁹⁶ *Id.* at 13.

¹⁹⁷ Henry Grabar, *The Civil Rights Act Exempts Racist Bed-and-Breakfasts. Does That Cover Airbnb?*, SLATE (2016), http://www.slate.com/blogs/moneybox/2016/06/08/the_airbnb_racial_discrimination_lawsuit_will_hinge_on_whether_airbnb_is.html [<https://perma.cc/U85D-7WK3>].

¹⁹⁸ Christina Chaey, *Airbnb Study Says Airbnb Is Great for New York’s Economy*, FAST COMPANY (Oct. 22, 2013), <https://www.fastcompany.com/3020347/fast-feed/airbnb-study-says-airbnb-is-great-for-new-yorks-economy> [<https://perma.cc/DJ3H-HWYV>].

¹⁹⁹ Todisco, *supra* note 16, at 123–24.

²⁰⁰ See Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–19, 3631 (2012)).

single homes under 42 USC § 3604.²⁰¹ The U.S. Department of Housing and Urban Development (HUD) also investigates and conciliates fair housing cases itself.²⁰² Further, HUD delegates its authority to a number of public and private non-profit agencies in its Fair Housing Initiative Program to develop programs to prevent and eliminate housing discrimination.²⁰³ State and local governments are also a part of HUD's fair housing enforcement matrix, many of which participate in HUD's Fair Housing Assistance Program, to administer their laws that are consistent with the federal Fair Housing Act. State and local courts and commissions spend considerable amount of their own resources adjudicating fair housing matters.²⁰⁴ In Washington, D.C., for example, the District of Columbia's Office of Human Rights and Office of the Attorney General, coordinate prosecution of fair housing discrimination cases.²⁰⁵ A similar scheme could be orchestrated by DOJ, the Consumer Financial Protection Bureau (CFPB) and local consumer organizations to investigate discrimination in public accommodations offered in the sharing economy and force Title II against non-exempt wrongdoers.

CONCLUSION

Title II of the Civil Rights Act applies to a significant majority of hosts offering public accommodations in the sharing economy even in light of the Mrs. Murphy exception. There are good reasons to amend Title II to remove the Mrs. Murphy exception, of course, including the fact that its very existence continues to signal that discrimination in some (even limited number) public accommodations is acceptable. The exception was rooted in racism and its modern-day proponents use it to perpetuate racism today. Yet, applying Title II to the sharing economy presently and moving forward with such an

²⁰¹ 42 U.S.C. § 3604. While the Mrs. Murphy exception found in Title II predates the passage of the FHA and its identical exception, the latter has been more hotly litigated and debated in the years since its passage than the former. *See* Walsh, *supra* note 19, at 607. As mentioned in Part I, some commentators have questioned whether the fact that some commercial hosts live in these homes, even if infrequently, is enough to bring them within the Mrs. Murphy exception. *See supra* Part I. The answer here should plainly be no.

²⁰² *Fair Housing Act Enforcement Activity*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement [https://perma.cc/5EFP-F4MD].

²⁰³ *Fair Housing Programs*, U.S. DEP'T HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/partners [https://perma.cc/7NKN-3C28].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

amendment are not mutually exclusive. Airbnb hosts can be regulated under Title II in a manner that does not run afoul of the Mrs. Murphy exception without rendering the entire statute impotent. Failing to apply Title II to sharing economy hosts now disregards the rights of black travelers to access public accommodations offered in the sharing economy, thereby undoing five decades of advancements in the public accommodations arena. Meanwhile, while we await legislative reform, we will have normalized the absence of blacks (and members of other protected classes) from a fast emerging segment of the public accommodation marketplace and upended the dignity gained by those groups with Title II's passage.