

The Fiduciary Role of Access Platforms

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12.1 INTRODUCTION

Peer-to-peer platforms are becoming an important force in today's economy.¹ Companies such as Airbnb, Turo, Eatwith, and Uber are global market actors, generating millions of transactions, in multiple jurisdictions across the globe.² These companies connect individuals and small businesses and mediate transactions between owners and renters, service providers and service recipients.³ Owners rent out their homes, cars, bikes, and personal possessions to renters who prefer access to ownership, and people offer nonprofessional services, including driving and cooking meals, as an alternative to established industries. These transactions do not simply happen. Instead, they are rather heavily controlled by the platform itself.⁴

Despite their clear importance and their market influence, the legal role of peer-to-peer platforms (or access platforms as I refer to them) remains elusive. What is the function of access platforms as private law actors? How should private law jurisprudence conceptualize their role? I argue that access platforms are best conceptualized as market-constituting fiduciaries, a term I introduced before⁵ and develop in this chapter.

¹ Liran Einav et al., *Peer to Peer Markets*, 8 ANN. REV. ECON. 615 (2016).

² See, e.g., Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>. Also see Mansoor Iqbal, *Uber Revenue and User Statistics* (2018), BUSINESS OF APPS (Feb. 27, 2019), <http://www.businessofapps.com/data/uber-statistics/>.

³ Einav et al., *supra* note 1.

⁴ Guido Smorto, *Protecting the Weaker Parties in the Platform Economy*, in CAMBRIDGE HANDBOOK ON LAW AND REGULATION OF THE SHARING ECONOMY (Nestor Davidson et al. eds. 2018); Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCIENCE & TECHNOLOGY (2016).

⁵ SHELLY KREICZER-LEVY, *DESTABILIZED PROPERTY: PROPERTY LAW IN THE SHARING ECONOMY* (Cambridge University Press 2019).

Access platforms operate as a global, transnational market, and the conceptualization of their legal role is a transnational legal problem.⁶ However, the current legal response remains sporadic. Most often, regulation occurs at the local level, focusing on the characteristics of a particular town or city, and generally addressing the social impacts of access economy activity. Other legal questions that scholars address include industry-specific regulation, taxes, antidiscrimination law, and employment law.⁷

Yet, questions of regulation remain partial and incomplete without a prior conceptualization of the legal role of these platforms in their relations to their users. It is a global and normative challenge. What role do platforms serve in transactions among peers? What responsibilities does this role entail? In the absence of a legal conceptualization, access platforms self-regulate and opt for minimal duties set in their terms of service. The emerging processes of transnational legal ordering thus mix self-regulation with sporadic, concrete state or local regulation in several jurisdictions.⁸ This mixture of hard and soft law does not constitute anything like a settled transnational legal order, but rather reflects ongoing disputes about how to conceptualize and respond to companies that create a transnational regulatory challenge. In this chapter, I address the jurisprudential challenge of how to conceptualize the problem that access platforms pose, assessing the normative consequences of framing this transnational problem in fiduciary terms.

Relatively few works focus on the responsibilities of platforms toward their users. Some have argued that access platforms mediate transactions, much like real estate brokers.⁹ The parties to the transaction transfer a resource, be it property or a service, and the platform simply facilitates the transaction by lowering transaction costs. Platforms should thus be accountable only in their function as brokers.¹⁰ However, this conceptualization does not account for the various additional functions performed by these platforms, including developing search algorithms, creating and

⁶ Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VIRGINIA J. INT'L L 252 (2006) (discussing the need of national courts "to participate in implementing effective regulatory strategies for global markets.")

⁷ Rashmi Dyal-Chand, *Regulating Sharing*, 90 TUL. L. REV. 241 (2015); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J. L. SCI & TECH. 413 (2015); Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHICAGO L. REV. DIALOGUE 16 (2015).

⁸ See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 5 (Terrence C. Halliday & Gregory Shaffer eds. 2015) (providing framework for assessing transnational legal ordering through normative settlement at transnational, national, and local levels); Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, in TRANSNATIONAL FIDUCIARY LAW (2023).

⁹ Jamilla Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remediating Housing Discrimination in the Modern Sharing Economy*, CITY SQUARE (May 26, 2016), <http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remediating-housing-discrimination-in-the-modern-sharing-economy/>.

¹⁰ *Id.*

enforcing rules of conduct, overseeing activity, establishing categories for action, and affecting prices. Put differently, it does not account for the power of access platforms in shaping transactions and creating market norms.

A different set of arguments engages with the power of platforms more fully, but these accounts do not account for the conceptualization of access platforms' role in private law. Moreover, these accounts typically group access platforms in peer-to-peer markets together with other online giants such as Facebook, Google, and Amazon.¹¹ Indeed, access platforms share important attributes with online platforms that serve as a digital infrastructure for activity. All these different platforms – Google, Facebook, Airbnb, and Uber – control a virtual space and access to an activity. Yet, there are important analytical differences. Facebook and Google involve content creation and users' information, but they do not involve the transfer of a resource, property, or service, in the real, offline world. Access platforms, on the other hand, create the infrastructure for offline trades and effectively constitute new forms of markets that are based on disaggregated consumption.¹² These platforms mediate transactions, and redefine consumption of goods and services.

Against this background, I argue that access platforms are best characterized in private law as *market-constituting fiduciaries*. The argument relies on new developments in the theory of fiduciary law – in particular, the idea of a fiduciary relationship as a category for thinking through problems arising from the entrustment of discretionary authority.¹³ The market-constituting fiduciary concept provides a normative solution to a transnational problem that could apply in various common law and civil law jurisdictions.

Moreover, the concept responds to the double function of access platforms: They perform services for both service users and service providers. Following the distinction by Paul Miller and Andrew Gold, this role resembles traditional service platforms,¹⁴ though it is not a perfect fit as I explain in Section 12.3. In addition, access platforms create a market and shape its norms. This role generates responsibilities to the participants in this market, and explains why, for example, the platform should be responsible for the discriminatory actions of its participants. Some scholars have argued in favor of such a responsibility, and this chapter provides a much-needed legal basis for this obligation. Other obligations include the duty to give prior notice before pulling out from an area of activity, and the duty to create

¹¹ NICK SRNICEK, *PLATFORM CAPITALISM* (2017); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Tradition*, 39 *CARDOZO L. REV.* (2018); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 *U.C. DAVIS L. REV.* 1183 (2016).

¹² Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 *OHIO ST. L.J.* 901 (2015).

¹³ Hanoch Dagan, *Fiduciary Law and Pluralism*, in *OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan J. Criddle et al. eds. forthcoming 2019).

¹⁴ Paul B. Miller and Andrew S. Gold, *Fiduciary Governance*, 57 *WM. & MARY L. REV.* 513 (2015).

and maintain fair entry and exit rules. All these implications of the duty of loyalty are discussed in Section 12.3.

The chapter continues as follows. Section 12.2 presents access platforms and their impact on transnational markets. It also discusses the most notable attempts to conceptualize their legal role, and it argues that these conceptualizations are either too narrow or do not account for the full set of activities and functions of access platforms. Section 12.3 discusses fiduciary law, its expansion in recent years in common and civil law jurisdictions, and the possible problems with applying fiduciary law to access platforms. Section 12.4 develops the concept of market-constituting fiduciaries and details its legal and transnational implications. Concluding remarks follow.

12.2 ACCESS PLATFORMS

Access platforms are a particular type of an online platform. Online platforms are broadly defined as a digital infrastructure that enables different groups to interact with one another.¹⁵ This broad definition includes peer-to-peer access platforms, such as Airbnb and Uber, along with other powerful digital platforms, most commonly Google, Facebook, and Amazon.¹⁶ Platforms function as intermediaries that host users' activities. They are therefore in a unique position to collect, record, and store data. In addition, platforms actively dictate the rules of interaction (like cancellation policies or prices), set up a reputation system, manipulate products, and manage services.¹⁷

Access platforms are a particular type of platform. They mediate transactions that take place offline among peers. These platforms represent an important part of the sharing economy. The sharing economy is defined as collaboration in the use of products and services, simplified and redefined by technological advances.¹⁸ It creates peer markets that allow owners to rent out assets such as cars, homes, bikes, or offer services to strangers.¹⁹ This type of consumption pattern has turned into a global, billion-dollar industry that has been described by proponents as being "as big as the industrial revolution." Access platforms include giants like Airbnb and Uber, as well as other peer-to-peer platforms such as Eatwith, Taskrabbit, Turo, and the like.

¹⁵ SRNICEK, *supra* note 11.

¹⁶ *Id.*

¹⁷ SRNICEK, *supra* note 11.

¹⁸ RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION xv (2010).

¹⁹ Peer-to-peer (P2P) markets are markets where trade occurs between peers. See, e.g., Anindya Ghose et al., *Reputation Premiums in Electronic Peer-to-Peer Markets: Analyzing Textual Feedback and Network Structure*, 3 ACM SIGCOMM WORKSHOP ON ECON. OF PEER-TO-PEER SYSTEMS (2005).

Access platforms are transnational companies; they operate in a variety of legal jurisdictions.²⁰ Although their activity is comparable throughout jurisdictions, their policies are occasionally adaptable to local regulation requirements, ranging from local government to state regulation.²¹ A prominent example is Airbnb's cooperation with local governments in collecting and remitting tourist taxes across the globe.²² In other instances, when the access activity is deemed illegal, the activity may still continue but in the shadow of the law and be subject to a fine.²³

Most jurisdictions are interested in the social impacts of the activity. There is very limited interest in platforms' obligations toward various users. One of the main questions that have occupied courts is whether Uber is an employer of its drivers.²⁴ The French labor department addressed similar problem by introducing corporate social responsibility guidance rules for platforms.²⁵ In another context, the US Court of Appeals for the Third Circuit determined that Amazon is a seller for the purpose of product liability law in Pennsylvania.²⁶ The case was later granted rehearing en banc but finally settled out of court. Although Amazon is not an access platform, the ruling may be further extended to other platforms. Nonetheless, these are sporadic rulings designed to address a concrete issue.

In the absence of a legal conceptualization, the relationship between access platforms and their users, of both parties to the transaction, is dominated by the platform's terms of service. In effect, access platforms self-regulate this relationship.²⁷ Considering their global reach, one might argue that they effectively engage in transnational legal ordering whenever a concrete regulatory rule does not apply.²⁸

Access platforms hold considerable power over their users, both casual and frequent. They employ a unique position to manipulate transactions and frequency of use. Consider, for example, Airbnb's recommendations to its hosts that they "show personality, not personal items." Airbnb blog explains to hosts that personal items and personal photos will not make a guest feel comfortable.²⁹ Airbnb also nudges hosts to become more professional. Take the case of Jill Bishop. Jill only enjoyed hosting guests who were willing to interact with her, but Airbnb began requiring her

²⁰ See *supra* note 1–2 and accompanying text.

²¹ For Airbnb see Shelly Kreiczer-Levy, *The Changing Vision of the Home* in *STUDIES IN HOUSING LAW* (Michel Vols & Julian Sidoli eds. 2017).

²² *Id.*

²³ <https://www.oyster.com/articles/where-is-uber-banned-around-the-world/>.

²⁴ See, e.g., *Uber BV v. Aslam* [2018] EWCA Civ 2748.

²⁵ <https://www.jdsupra.com/legalnews/france-s-department-of-labor-issues-92146/>.

²⁶ *Oberdorf v. Amazon* No. 18-1041 (3rd Cir. 2019).

²⁷ See *infra* notes 100 and accompanying text.

²⁸ Evan Fox-Decent, Chapter 11.

²⁹ Meredith Baer, *Attract More Guests: Ten Simple Tips from Home Staging Expert Meredith Baer*, AIRBNB, INC. (Apr. 17, 2014), <https://blog.atairbnb.com/attract-guests-10-simple-tips-home-staging-expert-meredith-baer/>.

to host people who were just looking for a place to stay.³⁰ These policies nudges users into a particular form of property use and property design.

In addition, there are significant information asymmetries between the platform and its users. Various rules of conduct are enforced by strict, algorithmic enforcement.³¹ Users cannot negotiate with the platforms. Another feature of access platforms' activity involves the reputation mechanism. Reviews by users and owners are the backbone of access platforms. Nonetheless, reviews are highly sensitive to manipulation. They are not only susceptible to bias by other users, but also vulnerable to algorithmic manipulation by the platforms.³²

Furthermore, users are dependent on the ability to continue to use a given platform. While some users only use a platform rarely, others are frequent users who depend on its continued activity. They are thus exposed to immediate changes, making access an inherently risky choice. The case of Uber's and Lyft's operation in Austin, Texas, provides a good example. Once the city decided to maintain strict regulation of ridesharing businesses, Uber and Lyft pulled out of the city immediately, within a couple of days.³³ Users, both drivers and passengers, who were dependent on the activity for their livelihood or day-to-day operations had no time to adjust to the change. In this particular case, though, market forces prevailed, and alternative platforms quickly stepped in.³⁴ Nonetheless, this example exposes the risk that every user undertakes in choosing to participate in a peer-to-peer market dominated by a powerful platform.

A final concern involves the network effect. Platforms rely on two-sided network effects: The more owners or service providers use a platform, the higher is the value of using the platform for the users.³⁵ As the platform gets stronger, users are less likely to exit the service and choose a competitor.

All these problems point to the power imbalance between platforms and their users (both parties to the transaction), and to an inherent dependency of the latter on the former's services. The legal relations between the platform and its users are

³⁰ Katie Benner, *Airbnb Tries to Behave More Like a Hotel*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/technology/airbnbs-hosts-professional-hotels.html>.

³¹ SRNICEK, *supra* note 11.

³² Sarah Hijian et al., *Algorithmic Bias: From Discrimination Discovery to Fairness-Aware Data Mining*, 22 PROC. ACM SIGKDD INT'L CONF. ON KNOWLEDGE DISCOVERY & DATA MINING 2125 (2016).

³³ Alex Hem, *Uber and Lyft Pull Out of Austin after Locals Vote against Self-Regulation*, GUARDIAN (May 9, 2015), <https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation>.

³⁴ Dan Solomon, *One Year after Fleeing Austin, Uber and Lyft Prepare a Fresh Invasion*, WIRED (July 5, 2017), <https://www.wired.com/2017/05/one-year-fleeing-austin-uber-lyft-prepare-fresh-invasion/>.

³⁵ See, e.g., Michal S. Gal, *The Power of the Crowd in the Sharing Economy*, in LAW & ETHICS HUMAN RIGHTS (forthcoming 2018); David Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POLICY INTERNATIONAL 151 (2007).

governed by a standard contract, the terms of service offered by the platform to which the user simply agrees.³⁶ The contract is nonnegotiable. This framework characterizes the platform as a mere service provider, and it does not sufficiently account for the significant power of the platform to shape transactions and set market norms.

Indeed, access platforms shape norms in the labor, real estate, and hospitality markets. They present a clear example to the dominance of a private actor that shapes market norms across various jurisdictions through the use of contract law and through the design of the market itself. In this sense, they are creating legal orders³⁷ – that is, access platforms are generating norms that may be formalized into legal texts and that affect legal practice. These legal orders may span state boundaries, as access platforms constitute and govern transnational markets through contract. Thus, platforms are not merely hosting a market for services that (potentially) are regulated; instead, they are norm creators in their own right.

Some argue that platforms serve as the employers of service providers, and in particular, that Uber is the employer of its drivers.³⁸ This characterization is only applicable to service-oriented (rather than property-oriented) platforms, and it only addresses the role of the platform toward one party of the transaction, service providers, and not toward users of the platform more generally.

A different characterization of platforms has its foundation in administrative law. Sabeel Rahman argues that certain platforms function as public utilities because they hold private power over a vital service that makes our social infrastructure. This definition groups access platforms with other internet platforms such as Facebook, Google, and Amazon.³⁹ The public utilities approach argues in favor of imposing public law duties on certain platforms. In particular, Rahman characterizes access platforms as marketplaces or clearinghouses that influence wages, prices, and standards, and should therefore be regulated as public utilities.⁴⁰ Indeed, access platforms hold the power to regulate transactions, determine entry and exit, and manipulate use. However, not all access economy platforms offer an essential service that is part of our social infrastructure. Airbnb offers guests a luxury service, and they have other available choices. Rahman indeed acknowledges that access economy platforms are only partial utilities.

Another approach works within private law. Jack Balkin has famously argued that Google, Facebook, and Uber are information fiduciaries. An information fiduciary

³⁶ Guido Noto La Diega & Luce Jacovella, *UBERTRUST: How Uber Represents Itself to Its Customers Through Its Legal and Non-Legal Documents*, 5 J. CIVIL & LEGAL SCIENCES 199 (2016).

³⁷ Halliday & Shaffer, *supra* note 8; Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L. J. 471 (2005).

³⁸ Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 COMP. LAB. L. & POL'Y J. 653 (2016).

³⁹ Rahman, *supra* note 11, at 1626.

⁴⁰ *Id.* at 1667.

is “a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship.”⁴¹ Balkin argues that users entrust platforms with sensitive information because platforms present themselves as trustworthy. These platforms take on fiduciary responsibilities regarding this information.⁴² Balkin’s analogy to a fiduciary relationship is incredibly helpful.⁴³ However, it does not account for the particular role of access platforms in creating a market and shaping its norms. The information fiduciary argument has been criticized as ambiguous, failing to address structural power and abandoning more robust public regulation.⁴⁴ Balkin’s argument and its corresponding critique target information fiduciaries, platforms that offer a service in exchange for the user’s information.⁴⁵ While this discussion is extremely important, when it comes to access platforms, it fails to engage with their market-constituting function and the duties it entails in private law. Furthermore, unlike Balkin’s claim, my argument is not skeptical of public regulation as an important, additional tool in the legal treatment of platforms.

Both of these important approaches, the public utilities and the information fiduciary conceptualization, address power relations, and both group access economy platforms together with other online platforms such as Facebook and Google. In what follows, I seek to expand on the idea of power in private law, and the use of the fiduciary concept.

12.3 FIDUCIARY RELATIONS

Fiduciary law is a complex legal field. Its definition and boundaries are controversial. At its core, fiduciary law concerns discretionary power that the fiduciary holds over the interests of another party, the beneficiary.⁴⁶ Power and vulnerability are thus the foundation of the fiduciary relationship. Beneficiaries are vulnerable because someone else acts in their name, for which purpose they must pass on their autonomy, at least partly.⁴⁷ This power imbalance may deter beneficiaries from entering into fiduciary relationship. The law thus regulates these relationships in order to provide protection and make sure these important social relationships exist

⁴¹ Balkin, *supra* note 11, at 1209.

⁴² *Id.* at 1221.

⁴³ Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017).

⁴⁴ Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

⁴⁵ *Id.*

⁴⁶ Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969 (2013).

⁴⁷ Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LAW Q. REV. 608 (2014).

and succeed.⁴⁸ Although its legal foundation differs, the concept of fiduciary applies both in civil law and in common law systems.⁴⁹ For this reason, it is a particularly promising venue for normatively conceptualizing platforms that operate in global markets.

The source of a fiduciary authority may be contractual and based on consent, or otherwise legally mandated based on the particular kind of relationship.⁵⁰ The most important normative implication of a fiduciary relationship is the duty of loyalty imposed on the fiduciary.⁵¹ This duty often means that the fiduciary has to promote the beneficiary's interests and not her own,⁵² or at least prioritize their interests.⁵³ More specific requirements of fiduciaries include deliberation, conscientiousness, and responsiveness to new information.⁵⁴

The concept of a fiduciary relationship is traditionally applied to trusts, an agency, or a corporation and specifically to professionals who control others' interests such as lawyers, doctors, and investors.⁵⁵ Nonetheless, this concept has been steadily broadened to account for new types of power-centered relationships.⁵⁶ As Tamar Frankel argues, recognizing new fiduciary roles depends on "the terms of their services, their entrustment of property or power, the temptation that they face, and the ability of individuals and institutions as well as the market to control these power holders and their temptation to abuse the trust in them."⁵⁷ Two of the most familiar, and controversial, developments include the fiduciary role of the state and the fiduciary role of parents.⁵⁸

Fiduciary roles may differ. Paul Miller and Andrew Gold distinguish between two types of fiduciary relationships: service and governance. Whereas traditional service fiduciaries "manages the affairs or property of persons," governance fiduciaries advance abstract purposes.⁵⁹ The latter includes, but is not limited to, charitable trusts and state-owned public purpose corporations.⁶⁰ In these cases, according to

⁴⁸ Tamar Frankel, *The Rise of Fiduciary Law* (August 22, 2018) (Boston Univ. School of Law, Public Law Research Paper No. 18-18), available at <https://ssrn.com/abstract=3237023>.

⁴⁹ Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 *QUEEN'S L. J.* 391 (2014).

⁵⁰ Miller, *supra* note 46; Victor Brudney, *Contract and Fiduciary Duty*, 38 *BCL REV.* 595 (1997).

⁵¹ Miller, *supra* note 46; Smith, *supra* note 47; Eithan J. Leib & Stephen R. Gallob, *Fiduciary Political Theory: A Critique*, 125 *YALE L.J.* 1820 (2016).

⁵² Miller, *supra* note 46, at 972.

⁵³ Leib & Gallob, *supra* note 51, at 1826.

⁵⁴ *Id.* at 1824.

⁵⁵ Miller, *supra* note 46.

⁵⁶ TAMAR FRANKEL, *FIDUCIARY LAW* 53 (2011).

⁵⁷ *Id.*

⁵⁸ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 *VA. L. REV.* 2401 (1995); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 *AM. J. INT'L. L.* 295 (2013). For a critique see, e.g., Seth Davis, *The False Promise of Fiduciary Government*, 89 *NOTRE DAME L. REV.* 1145 (2014).

⁵⁹ Miller & Gold, *supra* note 14.

⁶⁰ *Id.*

the argument, there is a duty of loyalty to purposes, and not to people.⁶¹ I will return to this distinction in Section 12.3.

Access platforms share important similarities with fiduciaries, but they do not comfortably fit the category. Indeed, access platforms hold considerable power over their users. They broker transactions, consult over terms of agreements, and provide a matching algorithm that connects the parties, and manages the type of transactions performed. Platforms also manipulate use, nudge the behavior of users, and offer safety measures and a reputation system. These functions affect users' choices and limit their autonomy. Despite these high levels of involvement, access platforms are different from traditional fiduciaries in two key ways. First, access do not act in the users' name.⁶² Unlike lawyers and investors, platforms do not make the decision for their users; they only structure, oversee, advise, and nudge choices. Second, platforms currently promote their own interests first and foremost, and do not prioritize the interests of users.⁶³

Access platforms therefore perform the function of service fiduciary to some extent, but they also perform additional functions that are not currently captured in scholarship. They create the platform that hosts the activity, the acceptable norms, the rules of exit and entry to the activity, and guide the level of participation. Consequently, I argue that the best conceptualization for role of access platform is as market-constituting fiduciaries.

12.4 MARKET-CONSTITUTING FIDUCIARIES

The distinction between service fiduciaries and governance fiduciaries mentioned earlier is important, as it recognizes the different functions that fiduciaries perform.⁶⁴ An additional function that is not captured by this distinction is the particular role of access platforms in creating a market and regulating its activities. This function represents a unique position of power in private law, one that controls the interests of participants on both ends of the transaction. This function includes promoting purposes, the purpose of creating, maintaining and regulating the market. However, unlike governance fiduciaries, the purpose is not detached from the interests of concrete individuals who participate in this market. It is not an abstract purpose.⁶⁵

Participants in peer-to-peer markets hosted and created by access platforms have two types of interests. They have specific interests regarding the service they receive and more general interests concerning their continued participation in the market.

⁶¹ *Id.*

⁶² *Cf.* Smith, *supra* note 47.

⁶³ Balkin, *supra* note 11, at 1227.

⁶⁴ Miller & Gold, *supra* note 14.

⁶⁵ *Id.* at 517 (discussing governance fiduciaries as promoting abstract purposes).

I, therefore, suggest conceptualizing access platforms as *market-constituting fiduciaries*.⁶⁶ This concept unites two distinguishable roles that respond to the double function of access platforms. The *first* role responds to the service-performing function of access platforms. Platforms give advice to users on how to present their service or property, offer a search engine, and provide the matching algorithm. In this sense, access platforms function as the new professionals and therefore owe a duty of loyalty to users at both ends of the transaction. Section 12.4.2.1 explains the legal implications of this role.

The *second* role responds to their function as creators of the market, or in other words, market-constituting fiduciary. Peer to peer transactions took place even before the access economy.⁶⁷ People gave each other rides; carpooled, borrowed, and loaned cars; spare rooms, books, and drills.⁶⁸ However, the activity was on a much smaller scale; it was based mostly on familiar social networks or other search conventions. In contrast, platforms in the access economy provide an organized system that facilitates multiple transactions among strangers. The platform not only provides the search algorithm, but also enforces rules of conduct and creates certain standards. Standards are technologically enforced, either strictly or by nudging users. Platforms constitute the market: the infrastructure for engaging in the activity, the code of acceptable behavior, and the rules of participation in this activity. Access platforms thus owe a duty of loyalty toward all market participants.

One could argue that these features establish public law obligations. An access platform is a private actor that creates a space for economic activity that it controls and dictates its conditions. According to this view, the platform creates legal norms and establishes a legal authority as a public fiduciary.⁶⁹

In contrast, my argument relies on the conceptualization of market-constituting actors as private law fiduciaries. The fiduciary concept deals with authority-related power relations in private law. As such, private law allows us to think of this kind of dominance that the role of constituting a market creates. Hanoch Dagan suggests we conceive of fiduciary law as a category of thinking that includes very different fiduciary types, but that “their structural similarities could facilitate learning and cross-fertilization.”⁷⁰ These similarities are relationships of dependence and vulnerability that are legally constituted or facilitated, wherein “one party is subject to the authority entrusted to another.”⁷¹ Viewed as a category of thinking, private fiduciary

⁶⁶ I first introduce this concept in my book, KREICZER-LEVY, *supra* note 5, but it is significantly developed here.

⁶⁷ Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004).

⁶⁸ Cf. Jun-E Tan, *The Leap of Faith from Online to Offline: An Exploratory Study of Couchsurfing.org*, in TRUST AND TRUSTWORTHY COMPUTING 367, 371 (Alessandro Acquisti et al. eds. 2010).

⁶⁹ See Fox-Decent, Chapter 11.

⁷⁰ Dagan, *supra* note 13 at 5.

⁷¹ *Id.* at 14.

law addresses power and vulnerability in authority relations, such as the market-constituting fiduciary. In this sense, fiduciary law serves as a normative concept that fills gaps; legal gaps, not just regulatory gaps, and more importantly, conceptual gaps.⁷² It allows us to think about the duties of actors who constitute a market. Section 12.4.2 explains the legal implications of this role.

12.4.1 *The Service Role of Access Platforms*

Platforms perform services for users, both owners and renters, service providers and service receivers. They control or provide advice on central aspects of the transaction. Uber sets the price for each ride, and it obligates the driver to use a mapping service in determining their routes.⁷³ Airbnb guides hosts and allows them to choose from a list of options regarding their cancellation policy.⁷⁴ Some of the terms of the transaction between the parties are thus structured by the platform. In addition, platforms are involved in the frequency of use,⁷⁵ and the type of transaction the user chooses.⁷⁶ Airbnb pushes hosts to operate like hotels.⁷⁷ Uber manipulates access to a service. As Ryan Calo and Alex Rosenblat explain:

Uber may also be manipulating consumer access to various tiers of service. Uber offers a variety of services under its umbrella, with variations in price and quality of service. Anecdotally speaking, for some consumers, the cheaper service uberPool appears as a default, requiring the consumer to overcome default bias in search of another option. For other consumers, perhaps those that Uber somehow understands to be better resourced or who potentially have a habit of preferring one tier of service to another, the more expensive uberX appears as a default.⁷⁸

Access platforms thus hold systematic power over their participants.⁷⁹ This power builds on the contract that all users simply accept when they first sign into the platform.⁸⁰ Participants grant the company authority over various terms of their own transactions with others. Indeed, as previously mentioned, in many cases, participants still make their own choices, unlike beneficiaries in a trust, for example.⁸¹ However, this choice is structured; access platforms consult, nudge, and oversee activity.

⁷² FRANKEL, *supra* note 56, at 101.

⁷³ Calo & Rosenblat, *supra* note 43 at 1630.

⁷⁴ <https://www.airgms.com/airbnb-cancellation-policy/>.

⁷⁵ Calo & Rosenblat, *supra* note 43.

⁷⁶ Benner, *supra* note 30.

⁷⁷ See *supra* notes 29–30 and accompanying text.

⁷⁸ Calo & Rosenblat, *supra* note 43 at 1659.

⁷⁹ Calo & Rosenblat, *supra* note 43.

⁸⁰ Uri Benoliel & Shmuel L. Becher, *The Duty to Read the Unreadable*, 60 BOSTON COLLEGE L. REV. 2255 (2019).

⁸¹ Hosts on Airbnb determine the price of a daily stay. Hosts and users choose the parties to the transaction (<https://www.airbnb.com/help/article/52/pricing-your-listing>).

Access platforms are responsible for a service based on the reasonable expectations of the users when entering the service. Users, on both sides of the transaction, trust the platform to present them with the most suitable search result, allow them to determine the use of their property within reason, and craft a transaction that is reasonable to both parties.⁸² Users, both the owners-providers and the users-consumers, are vulnerable because the platform controls all aspects of their participation in the given market, including entry and exit. These platforms have the expertise and control of the process that the user simply does not possess, and they thus hold discretionary power over their interests.

A possible concern of this function is the multiple beneficiaries' problem. This problem was first voiced against the use of the fiduciary concept in public law, and more specifically, against the claim that public officials are fiduciaries.⁸³ In a nutshell, the claim is that the duty of loyalty does not allow a fiduciary to serve two beneficiaries with conflicting interests. Access platforms, if perceived as fiduciaries, serve multiple beneficiaries. First of all, directors of access platforms owe a fiduciary duty to their shareholders.⁸⁴ Shareholders' interests often conflict with the protection of users and the market-constituting role.⁸⁵ Indeed, this potential conflict is quite common in more traditional fiduciary relations. Banks, for example, may owe a fiduciary duty not only to shareholders but also to those who use their services.⁸⁶ To address this problem, the legislature can create a new category of companies where certain purposes and roles are prioritized against certain shareholders' interests.⁸⁷

Second, and more importantly, if platforms were fiduciaries of both providers and users, they would be torn between conflicting interests. Providers and users have different agendas. In matters of profit, frequency of use, cancellation policy, safety and oversight, these two groups may have different and conflicting interests.

The most important response to this critique is that applying the fiduciary concept to access platforms is not designed to address possible conflicts between users and owners, service providers and service receivers. It is not designed to address conflicts over prices, the safety of the property or service, or the need to compensate for damages. Rather, the argument focuses on consumers: All possible users, including

⁸² Cf. Balkin, *supra* note 11 (arguing that users trust platforms with their information).

⁸³ Davis, *supra* note 58, at 1160–63.

⁸⁴ Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403 (1983).

⁸⁵ Khan & Posen, *supra* note 44.

⁸⁶ Mark Budnitz, *The Sale of Credit Life Insurance: The Bank as Fiduciary*, 62 N.C.L. REV. 295 (1984). For the complex fiduciary role of banks, see Andrew F. Tuch, *The Weakening of Fiduciary Law* in RESEARCH HANDBOOK ON FIDUCIARY LAW 354 (D. Gordon Smith & Andrew S. Gold eds. 2018).

⁸⁷ Cf. public benefit corporations in Delaware. Del. Code Ann. tit. 8, § 365(a) (2017) (effective Aug. 1, 2013).

owners' or providers', are vulnerable to platform power. There are shared interests to both groups that involve their dependency on the platform's activity, including the matching algorithms, search results, and the structure of the reviews. These interests take precedent over any concrete conflict and are the core concern of platform power. Consider an analogy to the problem in public fiduciary law. Supporters of public fiduciary theory argue that conflicts among beneficiaries frequently occur in the context of more traditional fiduciaries.⁸⁸ Moreover, as opposed to public authorities, platforms are private actors, much like administrators of pension funds that may serve diverse classes of beneficiaries.⁸⁹ Evan Criddle and Evan Fox-Decent explain that in public fiduciary theory, "the fiduciary owes not only discrete 'first-order' duties to the beneficiary, but also wider 'second-order' duties to the broader public or to public purposes."⁹⁰ The dual commitment argument successfully navigates possible conflicting interests. In this respect, protecting all users' vulnerabilities could be construed as the second-order duties of all platforms. These second-order duties lead us directly to the most important function of access platform as fiduciaries: the constitution of the market.

12.4.2 *The Market-Constituting Role of Access Platforms*

Access platforms do not simply provide a service of brokering, consulting, and constructing the terms of the transaction. They constitute the market itself, structure its activity, determine its rules, and manage its participants. Peer-to-peer platforms create a marketplace for the exchange of goods or services. Yet, unlike eBay where the good is sold, these exchanges are based on short-term rentals and require more coordination and often face-to-face interaction.⁹¹ These platform-hosted markets employ their own rules and conventions that may differ from traditional markets. Some of the rules are governed by the platforms' terms of service that are nonnegotiable and must be accepted when entering the market.⁹² Other rules are fashioned as recommendations and suggestions,⁹³ and yet others are conventions of use that develop over time.

The platform creates and controls the market in several important ways. First, the platform can withhold entry and force exit from its activity. It controls participation

⁸⁸ Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in FIDUCIARY GOVERNMENT 67 (Evan J. Criddle et al. eds. 2018).

⁸⁹ EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2012) at 161–64.

⁹⁰ Criddle & Fox-Decent, *supra* note 88.

⁹¹ Samuel P. Fraiberger and Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* (Working Paper, 2015), <https://conference.nber.org/conferences/2015/EoDs15/FraibergerSundararajanNBERDigitization0306.pdf>.

⁹² La Diega & Jacovella, *supra* note 36.

⁹³ See, e.g., Baer, *supra* note 29.

in the market through its terms of service.⁹⁴ Second, the market is defined and structured by the platform. Access platforms determine the mechanism for closing a deal, and the terms that the parties can and cannot negotiate. They nudge users into a desired level and frequency of use.⁹⁵ Access platforms also create the evaluation mechanism by establishing and managing a system of reviews.⁹⁶ Third, platforms affect the style and marketing of products and services in the market. Airbnb influences hosts' behavior in their home, the house's style and décor, and their interactions with guests.⁹⁷ It therefore impacts the level of intimacy and privacy in property use.⁹⁸ Fourth, access platforms create the conditions that shape users' behavior by controlling and designing the review mechanism. Because reviews (of both parties to the transaction) are important for future transactions and affect profitability,⁹⁹ participants will likely adopt the behavior and manners that will be best perceived and appropriately ranked by the other party to the transaction.

Creating and managing the market yields responsibility and accountability toward participants. In this capacity, platforms exercise discretionary control over the interests of market participants. Access platforms control participation, performance, and level of use in the market. This control is both general and specific. Platforms control the market for all participants with its general rules of conduct, reputation mechanism, and manipulation of use. This control creates a general responsibility for its role as a market constituter. Platforms also control individuals and may determine an individual's ability to enter and exit the activity, or influence an individual or group's participation. This control constitutes a more specific responsibility toward concrete participants. Based on this concept, then, access platforms represent a fiduciary-type, and they owe users of both ends of the transaction a duty of loyalty.

The concept of market-constituting fiduciary can be placed between two competing understandings of access platforms. The platforms typically argue that they are merely technological companies, offering the innovative tools that allow users to

⁹⁴ Airbnb declares, for example, that it will ban users who discriminate from the platform. See <https://www.airbnb.com/help/article/1523/general-questions-about-the-airbnb-community-commitment>. Uber has a similar policy. See <https://www.uber.com/legal/policies/non-discrimination-policy/en/>. These policies are examples that demonstrate that platforms are gatekeepers for the activity.

⁹⁵ See *supra* notes 29–30 and accompanying text. Also see <https://blog.atairbnb.com/guide-to-hosting-success/>.

⁹⁶ As previously mentioned, online reviews are highly susceptible to manipulation by the platform and users. See Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017); Hijian et al., *supra* note 32.

⁹⁷ See sources at note 95.

⁹⁸ Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy* 43 PEPP. L. REV. 61 (2015).

⁹⁹ *Id.*

connect.¹⁰⁰ This understanding reduces the role of access platforms to mere facilitators. A slight variation of this position, which was declared by Airbnb, is that the platform creates a community of hosts.¹⁰¹

At the other end of the spectrum, some argue that access platforms are heavily involved in the transaction to the extent that some of these companies are de facto employers of service providers.¹⁰² This argument is only relevant to some of the access platforms, and it applies to the legal relationship between the platform and service providers, and not to the service recipients.

In similar vein, a ruling by the Third Circuit determined that Amazon is a seller for the purpose of product liability law.¹⁰³ The court supported its decision by emphasizing Amazon's control over the transaction between the vendor and the customer. However, it is clear that the platform does not actually sell the product. A better conceptualization relies on platforms' responsibilities in creating and managing the market.

This is the contribution of the market-constituting fiduciary concept. It does not contend that platforms control users' activity entirely, as the employer or seller conceptualization may suggest, nor does it belittle the role of the platform, as the technological-facilitation argument implies. Instead, the conceptualization discerns the concrete function of access platforms and draws the normative implications of this control.

The market-constituting fiduciary structures the market and controls its features, but it also works under the implied agreement of market participants. As participants have no control over the conditions and market and very little knowledge of its design, the implied agreement between platforms and their users is that the fiduciary will construct a market that is stable, open, and fair. The main implication of the duty of loyalty of market-constituting fiduciaries is that access platforms have to respect the interests of their users and their expectation of a stable, open, and fair market for all participants. There are three concrete implications to the duty of loyalty: the duty to mitigate discrimination, the duty to provide prior notice before pulling out from a given area, and the duty to create fair entry and exit rules.

12.4.2.1 Discrimination

The first implication concerns the access platforms' legal responsibility for the discriminatory choices of their users. There are numerous reports of racial and

¹⁰⁰ See Uber's Terms of Service as cited in *Uber v. Aslam*, *supra* note 38: "The Services constitute a technology platform that enables users . . . to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third party providers."

¹⁰¹ http://collaborativeconomy.com/wp/wp-content/uploads/2016/01/OxfordSB_AirbnbCase_vf_posted_final.pdf.

¹⁰² *Uber v. Aslam*, *supra* note 38.

¹⁰³ *Oberdorf v. Amazon* No. 18-1041 (3rd Cir. 2019).

gender discrimination in collaborative consumption enterprises. Airbnb opens up the home to strangers, enabling people to engage in interactions with individuals from different backgrounds. However, studies have found that users with names that sound African American were 16 percent less likely to be accepted as guests than users with names that sound white.¹⁰⁴ There is additional anecdotal evidence of cases where a host rejected a guest based on discriminating factors.¹⁰⁵ Airbnb is not alone. There are reports of discriminating practices in other sharing economy platforms.¹⁰⁶

The first question is whether discrimination in the sharing economy is legally prohibited. According to American law, businesses that are open to the public cannot discriminate against protected classes.¹⁰⁷ However, renting out private and personal possessions on occasion may not be an instance of public accommodation. This argument builds on the distinction between places that are personal and private, and places that are open to the public.¹⁰⁸ Sharing personal possessions can be legally classified as working within a personal, private sphere and therefore remain unaffected by antidiscrimination laws. In previous work, I have argued in favor of amending antidiscrimination laws and expanding their scope to sharing economy projects.¹⁰⁹

This chapter involves a different question. It asks whether access platforms have a responsibility to oversee, control, and mitigate discrimination practiced by their users through elements of design. There is no easy or obvious answer. In order to establish such a legal duty, one must first conceptualize the legal role of platforms, and explain how this legal role entails responsibilities in the realm of discrimination. Some scholars argue that Airbnb is in fact a de facto real estate broker¹¹⁰ or a chain of hotels.¹¹¹ Others argue that platforms are responsible for the discriminatory choices of their users simply because they have the ability to control

¹⁰⁴ Benjamin G. Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017).

¹⁰⁵ See, e.g., Cheyenne Roundtree, "I Wouldn't Rent to You If You Were the Last Person on Earth": Trump-Supporting Airbnb Host Cancels Woman's Booking During Snowstorm Because She Is Asian, MAIL ONLINE (Apr. 8, 2017), <http://www.dailymail.co.uk/news/article-4392494/Woman-denied-Airbnb-snowstorm-Asian.html>.

¹⁰⁶ Leong & Belzer, *supra* note 96; Tamar Kricheli Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, 2 SCI. ADVANCES 1 (2016); Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 SETON HALL L. REV. 393 (2017).

¹⁰⁷ See Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215 (1978).

¹⁰⁸ Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1448 (1995).

¹⁰⁹ Kreiczer-Levy, *supra* note 98; Shelly Kreiczer-Levy, *Share, Own, Access* 36 YALE L. & POL'Y REV. 155 (2017).

¹¹⁰ Jefferson-Jones, *supra* note 9.

¹¹¹ Leong & Belzer, *supra* note 96.

discrimination.¹¹² These characterizations are rather narrow in scope. They either avoid the legal foundation for the platforms' responsibility altogether or circumvent the challenge by equating companies with familiar industries. The legal foundation is important. The conceptualization of platforms must address the new activity and inner workings of these markets, and provide a broad conceptualization that fits a category of access platforms, rather than one single example.

Platforms' role as market-constituting fiduciaries explains why platforms should be involved in antidiscrimination regulation in the first place. Although the platform itself may not discriminate, it does have a responsibility toward users, market participants, to create an open and fair market, and mitigate discrimination among its users. As access platforms constitute a market through their algorithm design and terms of service agreement, they control users' behavior to an extent. Users have reasonable expectations that platforms will create the conditions of an open market that is a viable option for users from different backgrounds. It is the control over the various elements of users' behavior and over the structure of the market itself that creates a duty to constitute a fair market. The duty of loyalty thus ensures that users, both active and potential users, may fairly participate in the market. Access platforms can use the design of certain features in order to mitigate discrimination.¹¹³ A possible technique (that I do not necessarily endorse) is to close off the option to rent out a home, once the host has refused to rent it to a guest from a protected class. Using its design to mitigate discrimination is the platforms' responsibility toward market participants.

Moreover, the markets constituted are often characterized and branded as promoting diversity and openness.¹¹⁴ These markets have distinct features that create alternatives to property ownership, and create new opportunities in other industries. Discrimination excludes protected classes from participation in these alternative markets. In addition, peer-to-peer markets become a significant economic phenomenon and are beginning to transform traditional transactions in established industries.¹¹⁵ Commercial companies are attempting to mimic the types of transaction, the structure of the market, and forms of engagement in an effort to capitalize on the current momentum. Norms that are shaped and formed in peer-to-peer markets thus trickle to traditional markets. For this reason, constituting a market demands wider social and economic responsibility.

Access platforms have already assumed responsibility in response to public opinion, and they have implemented several voluntary steps that address discrimination. Airbnb commissioned a report to review its policies and suggest ways to address these

¹¹² Renan Barzilay & Ben-David, *supra* note 106.

¹¹³ *Cf.* discrimination by design, *id.*

¹¹⁴ Kreitzer-Levy, *supra* note 98.

¹¹⁵ Jeremiah Owyang, *Infographics: Growth of Sharing in the Collaborative Economy*, WEB STRATEGIST (Nov. 19, 2015), <http://www.web-strategist.com/blog/2015/11/19/growth-of-sharing-in-the-collaborative-economy-top-categories-and-forecasts-infographics/>.

problems.¹¹⁶ The report suggested a new “Community Commitment” policy, declaring: “By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias.” This commitment went into immediate effect. Similarly, Uber released a community commitment that states that “when you use Uber you will meet people who may look different or think differently from you. Please respect those differences. We want everyone to feel welcome when they use Uber.”¹¹⁷ It also prohibits discrimination.¹¹⁸

A community commitment is important, but it does not effectively curtail discrimination on its own. Airbnb’s commissioned report also recommended reducing the prominence of personal photos and replacing them with objective information.¹¹⁹ In addition, it encourages increasing the “Instant Booking” feature that does not require the host’s approval prior to the booking.¹²⁰ Airbnb did not endorse these latter steps. These suggestions conflict with other features of the market, and they merit a holistic discussion that exceeds the scope of this chapter.¹²¹

12.4.2.2 Prior Notice

Participants in peer-to-peer markets are dependent on the access platform for their continuing activity. They expect a certain level of stability in the market. If the platform relocates, ceases to exist, or bars entry, users will lose the ability to continue to use the platform that serves as a steady source of income or as an alternative form of consumption. Let us revisit the case of Uber’s and Lyft’s operation in Austin, Texas. After the residents voted to maintain strict regulation of ridesharing businesses, both companies withdrew from activity in the city at once.¹²² Drivers and riders lost, almost immediately, a source of income and a valued form of transportation.¹²³

I argue that access platforms owe a weak form of market stability to their users. The duty of loyalty includes the obligation to give proper notice before shutting down the platform’s activity in a given area. This is a reasonable expectation of a

¹¹⁶ LAURA W. MURPHY, AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION: A REPORT SUBMITTED TO AIRBNB (2016), https://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion_09292016.pdf.

¹¹⁷ <https://www.uber.com/legal/community-guidelines/us-en/>.

¹¹⁸ <https://www.uber.com/legal/policies/non-discrimination-policy/en/>.

¹¹⁹ MURPHY, *supra* note 116.

¹²⁰ *Id.*

¹²¹ KREICZLER-LEVY, *supra* note 5.

¹²² Hern, *supra* note 33.

¹²³ In this particular case, there were other companies that stepped in. See Solomon, *supra* note 34.

market constituter. This obligation provides a safety net that protects users from a sudden change of practices. However, this is not an obligation to continue an activity when it is not profitable, but rather to give prior notice of a few weeks so that users can prepare themselves and search for an alternative. Although this requirement will probably result in a higher premium for consumers, it is required in order to allow users to plan ahead and make peer-to-peer markets a more secure choice.

12.4.2.3 Fair Entry and Exit Rules

The duty of loyalty of market-constituting fiduciaries includes fairness in fashioning entry and exit rules. A fair and stable market is not defined simply by the continued activity of the platform. It is more important to provide individual stability. In other words, it is important to ensure that individual users or groups will not be arbitrarily banned from activity. Platforms may decide to suspend or ban users that do not comply with its policies. Users risk losing access to a market, a pool of resources, if the platform bars entry or forces exit.

The duty also includes transparency of practices and decision-making processes of exit-forcing decisions. Before an access platform decides to bar a user from participating in its market, it has to conduct a fair process, one that allows the user to be heard. Remember the problem of discrimination. If a platform concludes that a user discriminates against a protected class, it may decide to ban the user from further activity. It is definitely important to protect against antidiscrimination, as I argued in Section 12.4.2.2. Nonetheless, in the realm of algorithmic governance and regulation, platforms have tremendous power to control participation and exclude individuals and groups. Some level of procedural justice is required, including the right to be heard and the duty to provide a detailed explanation for the decision to exclude.¹²⁴

* * *

Market-constituting fiduciaries owe a duty of loyalty to market participants, one that is tailored specifically to their function of creating and maintaining the market. The three obligations discussed here: Fair entry and exit rules, prior notice, and anti-discrimination policies are all examples of the kind of implications that this duty of loyalty entails. These obligations build on users' expectation of a fair, open, and stable market. This rationale may support additional obligations. The implications of the duty of loyalty will be developed over time and hopefully respond to new challenges.

¹²⁴ Cf. S. Umit Kucuk, *Consumerism in the Digital Age*, 50 J. CONS. AFFAIRS 515 (2016) (discussing consumer vulnerabilities in the digital age).

Access platforms shape market norms across the globe. State and local governments in common and civil law target their activity when it affects the community, but their legal obligations toward various users has not been properly discussed and developed. The market-constituting fiduciary presents a normative legal construct that fits different jurisdictions.

12.5 CONCLUSION

Access platforms are transnational firms with a growing impact on markets and social interactions. While markets are changing and expanding, the law seems to lag behind. In lieu of traditional legal institutions, access platforms begin to develop their own rules and self-regulate their relations with users. This chapter suggests a normative solution to this problem, one that can be adopted and implemented in various jurisdictions.

This chapter builds on fiduciary law's focus on power and vulnerability as a category of thinking, and it promotes a new concept: the market-constituting fiduciary. This concept accounts for access platforms' function as creators of the markets, responsible for shaping, constructing, and executing its rules. The market-constituting fiduciary concept responds, first and foremost, to the dependence and vulnerability of market participants on both ends of the transaction to platform power. Their participation in the market depends on the access platform. This concept presents a normative solution to a transnational problem that can be implemented through private law rules of different legal systems. It conceives of a new form of fiduciary duty that can be applied transnationally to transnational actors. It can be supplemented by other regulatory and conceptual efforts to address all of the implications of access platforms' activity.