

**PLATFORM ADVOCACY AND THE THREAT TO
DELIBERATIVE DEMOCRACY**

*By Abbey Stemler**

This Article examines the new and unexplored influence that network based technology firms such as Facebook, Google, and Uber have on deliberative democracy. In particular, it explores how these platforms can mobilize their user bases through both the direct solicitation of user support and the more troubling exploitation of irrational behavior through design choices. Due to platforms size and reach, this “Platform Advocacy” can help modern monopolies create favorable legal environments for themselves, thereby strengthening their own dominance in the marketplace. In the age of social media, fake news, and information glut, it is more important than ever to detect and monitor new forms of political power. This Article contributes to our understanding of one such new form and provides a way forward to ensure that consumers, and by extension lawmakers, are not improperly influenced by the unique influence of platforms.

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Democracy cannot succeed unless those who express their choice are prepared to choose wisely.

—Franklin D. Roosevelt¹

I care deeply about the democratic process and protecting its integrity I don't want anyone to use our tools to undermine democracy. That's not what we stand for.

—Mark Zuckerberg²

INTRODUCTION

If you happened to turn on your Uber app in New York City in June of 2015, you would have noticed an interesting choice among the car options: “DE BLASIO.”³ If you slid to it, a message would have appeared: “See what happens.” With a simple tap, you would have seen a traditional Uber map with no cars or excessively long wait times and another message: “Take Action. This is what Uber will look like in NYC if Mayor de Blasio’s Uber cap bill passes.”⁴ With the email link and sample text provided, it would not have been hard for you to send a message to stop the proposed bill.⁵

¹ Franklin D. Roosevelt, *Message for American Education Week* (Sept. 27, 1938), <http://www.presidency.ucsb.edu/ws/?pid=15545>.

² Mark Zuckerberg, *Read Mark Zuckerberg’s Full Remarks on Russian Ads that Impacted the 2016 Elections* (Sept. 21, 2017), <https://www.cnn.com/2017/09/21/zuckerbergs-full-remarks-on-russian-ads-that-impacted-2016-election.html>.

³ See Rachel Papan & Kelly Sheehan, *What Happens: How a Communications Campaign Saved Uber Billions*, 2 http://www.awpagesociety.com/attachments/bd406d9a80a3bc99f921e9c89d851b912bcdef7/store/6c6af73b0ab03635b8db18ba490ef6b3826c92a6f38f8b63904ac2a2247a/final_uber_case.pdf.

⁴ *Id.*

⁵ *Id.*

With this simple change to its interface,⁶ Uber caused a deluge of 17,000 emails to flood City Hall and stop the proposed bill.⁷ Uber's actions are a striking example of what this Article defines as Platform Advocacy or the ability of Internet-based platforms (like Uber, Facebook, Airbnb, and Twitter, etc.) to mobilize their user bases to influence lawmakers.⁸

Platform Advocacy may take many forms from direct solicitation of user support to the more troubling exploitation of irrational user behavior through design choices. And, due to platforms size and reach, Platform Advocacy can help these modern monopolies⁹ create favorable legal environments for themselves, thereby strengthening their own dominance in the marketplace. Unfortunately, this new form of political power has received scant scholarly attention. This Article addresses this gap and makes four unique contributions.

First, in Part II, it sets Platform Advocacy, as defined in Part I, in context by asserting that when platforms use their position to “manufacture” spontaneous support through manipulation of user interfaces and exploitation of consumer biases, their activities are akin to astroturfing.¹⁰ Astroturfing is an illegitimate form of grassroots advocacy because it is designed to give the impression of broad public support or opposition to a particular issue, even when such a concern may not broadly exist.¹¹ Currently, there are no federal laws and a smattering of state laws that address the potential threats of astroturfing in the context of Platform

⁶ Carolyn Said, *Airbnb, Uber Cast Themselves as Saviors of the Middle Class*, SAN. FRAN. CHRON. (Nov. 10, 2015), <http://www.sfchronicle.com/business/article/Airbnb-Uber-We-are-the-saviors-of-the-middle-6620729.php>; see also Ted Karczewski, *Tech Giants as Lobbyists: Politics Meets the Sharing Economy*, CONTENT STANDARD (November 16, 2015), <https://www.skyword.com/contentstandard/marketing/tech-giants-as-lobbyists-politics-meets-the-sharing-economy/>.

⁷ Matt Flegenheimer, *De Blasio Administration Dropping Plan for Uber Cap, for Now*, N.Y. TIMES (July 22, 2015), https://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html?_r=0.

⁸ Other ways to describe this phenomenon include “weaponizing” the apps or “grassroots for hire.” Edward T. Walker, *The Uber-ization of Activism*, N.Y. TIMES (Aug. 6, 2015) https://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?_r=0. This Article adopts the definition of advocacy suggested by sociologists Kenneth Andrews and Bob Edwards. Advocacy (or an advocacy organization) is “either promoting or resisting social change that, if implemented, would conflict with the social, cultural, political, or economic interests or values of other constituencies or groups.” Kenneth Andrews & Bob Edwards, *Advocacy Organizations in the U.S. Political Process*, 30 ANN. REV. SOCIOLOGY 479, 485 (2004).

⁹ The term “modern monopolies” was taken from the book *Modern Monopolies* Alex Mozaed and Nicholas L. Johnson. MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY (2016).

¹⁰ Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 363 (2010).

¹¹ *Id.* at 362; Ramón Castellblanch, *Challenging Pharmaceutical Industry Political Power in Maine and Vermont*, 28 J. HEALTH POL., POL’Y & L. 109, 126 (2003) (“Astroturf lobbying is the top-down fabrication of the outpourings of letters, faxes, e-mails, phone calls, and personal visits characteristic of bottom-up grassroots campaigns.”).

Advocacy.¹² This leaves firms highly dependent on their sense of normative ethics to avoid exploiting their unique and powerful position.¹³

Second, in Part III, this Article draws upon behavioral public choice theory to anticipate Platform Advocacy's power to influence users and mobilize them to create favorable legal environments for platforms. It also briefly reflects on the history and future of platforms and argues that because of extreme network and data network effects, the potential for platforms to harm democratic institutions is magnified.

Third, in Part IV, this Article identifies how Platform Advocacy impairs the various conditions for deliberative democracy. Deliberative democracy requires the thoughtful exchange of reasoning among citizens and lawmakers. And it relies heavily on the cooling influence of representatives and their appointees to temper the passions of the public. Presumably, civil servants are better positioned to carefully study, deliberate, and make informed decisions about a myriad of policy issues than the average voter. However, when citizens are manipulated and lawmakers are inundated or confused by their direct messages, the mutual ability of both groups to deliberate is compromised.

Finally, in Parts V and VI, this Article provides some recommendations to prevent and mitigate the negative effects of Platform Advocacy. First by examining a case study from India's response to Facebook's campaign for universal limited Internet access. And second by offering several recommendations for lawmakers. These recommendations pay close attention to political speech protections under the First Amendment.

In the age of social media, fake news, and information glut, it is more important than ever to detect and monitor new forms of political power. This Article contributes to our understanding of one such new form and provides a way forward to ensure that consumers, and by extension lawmakers, are not improperly influenced by platforms.

I. DEFINING PLATFORM ADVOCACY

¹² Grassroots lobbying is not considered "lobbying" under federal lobbying disclosure laws. It may be regulated somewhat by state lobbying laws, but in a piecemeal fashion. EDWARD T. WALKER, *GRASSROOTS FOR HIRE: PUBLIC AFFAIRS CONSULTANTS IN AMERICAN DEMOCRACY*, 201 (2014).

¹³ Mary Lyn Stoll, *Corporate Political Speech and Moral Obligation*, 132 J. BUS. ETHICS 553 (2015). For a complete review of the ethical implications of Platform Advocacy, see Abbey Stemler & Kelly Eskew, *The Ethics of Digital Market Manipulation in the Sharing Economy* (2017) (paper on file with the authors).

Platform Advocacy is action taken by platforms to mobilize their user bases to directly influence lawmakers. To understand this definition, we first must identify the meaning of a platform.¹⁴

Since the Industrial Revolution and until recently, most of the world's most successful businesses (e.g. Citigroup, Exxon, General Electric, etc.¹⁵) have incorporated a linear business model.¹⁶ That is they primarily produce goods for or provided services to intermediaries and customers.¹⁷ However, since the Internet has become available in our homes, workspaces, and pockets, a massive shift has taken place in the economy. The world's largest companies are now largely built on platforms (e.g. Apple, Amazon, Google,¹⁸ Facebook, etc.) and have become the titans of the 21st century.¹⁹

In their book, *Modern Monopolies: What it Takes to Dominate the 21st-Century*, entrepreneurs Alex Moazed and Nicholas L. Johnson break down platforms into two main types.²⁰ The first type is an exchange platform—that helps broker transactions between buyers and sellers (e.g. Uber, Airbnb, Etsy). The second is a maker platform which involves one user distributing some form of digital content (e.g. Apple, YouTube). This article largely focuses on the former. These platforms facilitate transactions by reducing search costs and standardizing terms of trade.

Among the many things that make platforms interesting and potentially dangerous, is how much they mediate user interactions.²¹ Every screen a user interacts with is not only surveilled and analyzed by platforms, it is orchestrated by them. Thus, platforms are in a unique position to capture individual attention and manipulate behavior. Take for instance how Airbnb controls a host's interaction with a potential guest. When a host receives a booking request, Airbnb dictates what information she sees about the guest, what she can do in response (reject or accept),

¹⁴ MOAZED & JOHNSON, *supra* note 8 at 29. The term platform is used in multiple contexts. For example, the term can refer to a piece of technology (e.g. an underlying computer system) or computing services (e.g. Amazon Web Services). The term is also used among software as a service (SaaS) companies (such as Salesforce) that offer a “platform.” These businesses, however, are still linear in that they are selling a product or service to consumers directly. *Id.* at 32.

¹⁵ FINANCIAL TIMES, GLOBAL 500 JUNE 2007 RANKS (2007), <http://im.ft-static.com/content/images/6aec81f8-2bd9-11dc-b498-000b5df10621.pdf>.

¹⁶ ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY, 22 (2016).

¹⁷ ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY 22 (2016).

¹⁸ Google is now operated under the umbrella company Alphabet.

¹⁹ Will Oremus, *Tech Companies Are Dominating the Stock Market as Never Before*, SLATE (July 29, 2016), http://www.slate.com/blogs/moneybox/2016/07/29/the_world_s_5_most_valuable_companies_apple_google_microsoft_amazon_facebook.html.

²⁰ MOAZED & JOHNSON, *supra* note 8 at 43.

²¹ Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929643 (last visited Jul 13, 2017).

how she can communicate (only via the platform and only with certain information²²), how she eventually gets paid, and, to a degree, how much.

With a captivated, dependent, and unsuspecting user base, platforms become the masters of their digital domains. And, they can and do use this position to encourage and, at times, manipulate users to advocate on their behalf. This Platform Advocacy can occur in many ways, but most commonly it follows a typical pattern. First, the platform designs the interface so that users are forced to see information about a candidate or specific legislative, administrative, or other policy issue. This information can be presented in a way that peaks curiosity and provokes emotions such as outrage. Second, the platform presents information in a light most favorable to it and rarely presents counterarguments. Third, the advocacy promotes the interests of the platform itself. Fourth, platforms make it nearly painless for users to act—“just click this button to send a message” or “read from this script while we dial a number”—thereby reducing the burdens of advocating on behalf of the companies. To see an example of Platform Advocacy in action, we can turn to the day Google went dark.

On January 17, 2012, Google covered its logo in a black box and showed searchers a simple message: “Tell Congress: Please don’t censor the web!” (see Figure 1). The image was aimed at mobilizing the public about two bills that would restrict access to websites that hosted pirated content (The Protect Intellectual Property Act (PIPA) in the Senate and the Stop Online Piracy Act (SOPA) in the House of Representatives).²³ Clicking the logo or blue link would lead searchers to a page where they could “learn more” about the issue and sign a petition.²⁴ Google framed PIPA and SOPA as attempts by the government to censor people and “criminalize linking and the fundamental structure of the Internet itself.”²⁵

The image was viewed by 1.8 billion people and was part of a larger campaign by popular websites such as Wikipedia and Reddit.²⁶ Due in part to Google’s Platform

²² For example, phone numbers and email addresses are blocked out.

²³ JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY* 127 (2017); Tavaana, *The Fight Against SOPA and PIPA: The Power of Online Civic Organizing*, https://tavaana.org/en/content/fight-against-sopa-and-pipa-power-online-civic-organizing#_edn1.

²⁴ Mike Masnick, *Google Goes Big with it SOPA/PIPA Protests; Blacks Out Logo*, TECHDIRT, <https://www.techdirt.com/articles/20120117/21305017444/google-goes-big-with-its-sopapipa-protests-blacks-out-logo.shtml>.

²⁵ Gautham Nagesh, *Google Chairman Says Online Piracy Bill Would ‘Criminalize’ The Internet* (Dec. 12, 2011), <http://thehill.com/policy/technology/198777-google-chairman-says-online-piracy-bill-would-criminalize-linking> (quoting Eric Schmidt, Google’s Executive Chairman).

²⁶ TAPLIN *supra* note XX at 127.

Advocacy, Congress received 8 million calls, 4 million emails, and 10 million petition signatures, and the bills were withdrawn.²⁷



Figure 1: Google's Homepage During the SOPA and PIPA Protest

Applying the typical Platform Advocacy pattern to Google's campaign, we can see that 1) Google manipulated the interface users had to interact with in order to use the service by blacking out its logo and encouraging users to satisfy their curiosity by clicking on it. 2) It framed the issue in terms of censorship as opposed to the enforcement of property rights and prevention of piracy.²⁸ 3) Users were not informed about Google's objectives in opposing the legislation, i.e. to prevent harm to its business model both in terms of enforcement costs and potential liability.²⁹ 4) Google made it very easy for users to sign a petition with a short digital form; thereby, reducing the burdens of advocacy.³⁰

PIPA and SOPA were certainly controversial bills and it is possible that individuals would have sided with Google's position, independent of Google's Platform Advocacy. However, this example demonstrates how easy it is for Google, because of its position as a platform, to mobilize users. This ability and its potential consequences are what this Article explores.

²⁷ *Id.*

²⁸ Scott Cleland, *The Real Reasons Google Killed SOPA/PIPA*, FORBES (Jan. 24, 2012), <https://www.forbes.com/sites/scottcleland/2012/01/24/the-real-reasons-google-killed-sopapipa/#34f44cf04530>; Jim Abrams, *PIPA and SOPA: What You Need to Know*, CS MONITOR (Jan. 19, 2012), <http://www.csmonitor.com/Technology/2012/0119/PIPA-and-SOPA-What-you-need-to-know>.

²⁹ Cleland, *supra* note 52.

³⁰ Deborah Netburn, *Google Says 4.5 Million People Signed Anti-SOPA Petition Today*, LA TIMES (Jan. 18, 2012), <http://latimesblogs.latimes.com/technology/2012/01/google-anti-sopa-petition.html>.

II. WHEN PLATFORM ADVOCACY BECOMES ASTROTURFING

From the French Revolution to the #MeToo movement,³¹ grassroots activities have shaped politics and society.³² As suggested by the late William Safire, grassroots advocacy is “the ultimate source of power,” because it appears to capture the natural and independent will of the electorate.³³ Unfortunately, grassroots advocacy’s “up-from-the-people” imagery, which envisions populist responses to the public’s unmet needs and desires, is sometimes more of a myth than a reality.³⁴

This myth is particularly true for grassroots forms of lobbying³⁵ because campaigns are often fueled by special interest groups and corporations.³⁶ While grassroots lobbying has been proven effective,³⁷ when it is sponsored and professionalized, its authenticity, and thus its helpfulness, as it relates to producing positive democratic outcomes, is questionable. And what is more, this form of astroturfing mostly escapes a myriad of federal lobbying regulations designed to curtail the manipulation of citizens for political gains.³⁸

³¹ Wikipedia, *Me Too (hashtag)*, [https://en.wikipedia.org/wiki/Me_Too_\(hashtag\)](https://en.wikipedia.org/wiki/Me_Too_(hashtag)) (last visited Dec. 30, 2017).

³² See Jon Van Til, Gabor Hegyesi & Jennifer Eschweiler, *Grassroots Social Movements and the Shaping of History*, in HANDBOOK OF COMMUNITY MOVEMENTS AND LOCAL ORGANIZATIONS (Ram A. Cnaan & Carl Milofsky eds., 2008).

³³ WILLIAM SAFIRE, SAFIRE’S POLITICAL DICTIONARY 289 (Revised edition ed. 2008); WALKER *supra* note XX at 20.

³⁴ WALKER *supra* note XX at 20 (stating that grassroots advocacy “carries an ‘up-from-the-people’ meaning that is deeply rooted in American politics and culture, in which the porousness of the American state and rich traditions of civic organizing continually reaffirm the value of public engagement independent of the state and the marketplace”).

³⁵ Grassroots lobbying is in contrast to direct lobbying which involves companies or organizations “attempts to influence a legislative body through communication with a member or employee of a legislative body, or with a government official who participates in formulating legislation.” *“Direct” and “Grass Roots” Lobbying Defined*, IRS, (last revised March 8, 2017), <https://www.irs.gov/charities-non-profits/direct-and-grass-roots-lobbying-defined>.

³⁶ WALKER *supra* note XX at 20-21. Edward T. Walker identifies the field of consulting firms that offer services to create grassroots lobbying campaigns as “grassroots for hire.” *Id.*

³⁷ See e.g. Daniel E. Bergan, *Does Grassroots Lobbying Work?*, 37 AM. POL. RESEARCH 327, 327 (2009) (finding that “lobbying by e-mail has a substantial influence on legislative voting behavior”).

³⁸ Several states do regulate grassroots lobbying. For example, in the state of Washington, sponsors of grassroots lobbying campaigns who spend one thousand dollars in three month or five hundred dollars in any one month, must report their activities to the state. Wash. Rev. Code Ann. § 42.17A.640. For a comprehensive overview of state regulations see JEFFREY MILYO, *MOWING DOWN THE GRASSROOTS: HOW GRASSROOTS LOBBYING DISCLOSURE LAWS SUPPRESS POLITICAL PARTICIPATION*, https://www.ij.org/images/pdf_folder/washington/mowing_down_the-grassroots.pdf.

This Part first details the differences between grassroots lobbying and astroturfing and describes how Platform Advocacy can slip into the realm of astroturfing. It then briefly describes the regulatory environment surrounding these activities.

A. *The Differences Between Grassroots and Astroturf*

While the origins of the term “grassroots” are difficult to nail down,³⁹ it is not difficult to envision what is meant by the term. Images of groundswells of support for particular issues in the form of marches, petitions, and letter, email and Twitter campaigns come to mind.⁴⁰ And clear examples would be the Black Lives Matter movement begun in 2013⁴¹ and the “resistance movement” triggered by the election of President Donald Trump.⁴² Such activities are often hard to ignore because news of them carpets mainstream media as it captures public intrigue.

However, not all grassroots movements, and in particular grassroots lobbying campaigns, are what they seem. In today’s Internet-enabled environment, distinguishing natural from synthetic roots is more difficult than ever before.⁴³ Companies can covertly stimulate tweets and social media posts via bots and other

³⁹ SAFIRE, *supra* note XX at 289 (explaining the origins of the word “grassroots”). Ryan Sager, Op-Ed., *Keep Off the Astroturf*, N.Y. TIMES, Aug. 19, 2009, at A27. Texas Senator Lloyd Bentsen is credited with first using the term Astroturf in 1985 to refer to manufactured grassroots activities: “A fellow from Texas can tell the difference between grassroots and Astroturf.” At the time, he was referring to constituent mail generated by insurance companies. Zellner, *supra* note XX.

⁴⁰ The IRS defines “grass roots lobbying communication” as “any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.” This definition has three distinct elements: 1) the communication “[r]efers to specific legislation;” 2) “[r]eflects a view on such legislation;” and 3) “[e]ncourages the recipient of the communication to take action with respect to such legislation.” 26 CFR 56.4911-2(b)(2).

⁴¹ Wikipedia, *Black Lives Matter*, https://en.wikipedia.org/wiki/Black_Lives_Matter (last visited Dec. 30, 2017).

⁴² Joshua Holland, *Your Guide to the Sprawling New Anti-Trump Resistance Movement*, THE NATION, 2017, <https://www.thenation.com/article/your-guide-to-the-sprawling-new-anti-trump-resistance-movement/>; David Weigel, *Sidelined Democrats Let Grass Roots “Resistance” Lead the Way on Health Care Fight*, CHICAGO TRIBUNE, <http://www.chicagotribune.com/news/nationworld/politics/ct-health-care-democrats-20170324-story.html>; Eli Rosenberg, *Protest Grows ‘Out of Nowhere’ at Kennedy Airport After Iraqis Are Detained*, N.Y. TIMES (Jan. 28, 2017); <https://www.nytimes.com/2017/01/28/nyregion/jfk-protests-trump-refugee-ban.html>.

⁴³ Ryan Sager, Op-Ed., *Keep Off the Astroturf*, N.Y. TIMES, Aug. 19, 2009, at A27. Senator Bentsen is credited with first using the term Astroturf to refer to manufactured grassroots activities. At the time, he was referring to constituent mail generated by insurance companies. Zellner, *supra* note XX.

techniques.⁴⁴ They can bury opposing viewpoints with clickbait and distraction.⁴⁵ In an instant, they can disseminate calls-to-action to millions based on misleading information.⁴⁶ Such forms of manipulation and deception are harmful to public debate and consensus building, and reveal less the will of the people and more the will of the technically savvy. They therefore, can subvert the goals of a deliberative democracy as described in Part IV of this Article.

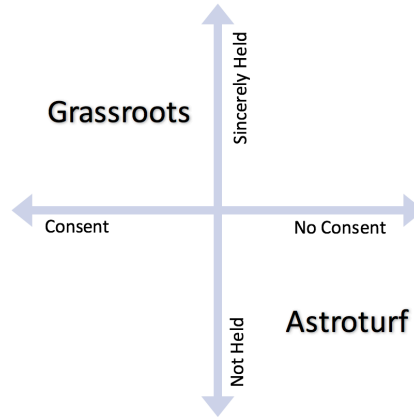


Figure 2

The wide-range of astroturfing activities make it challenging to identify universal characteristic; however, there are two main dimensions on which we can assess

⁴⁴ See e.g. Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleaseTheMemo Go Viral*, POLITICO (Feb. 04, 2018), <https://www.politico.com/magazine/story/2018/02/04/trump-twitter-russians-release-the-memo-216935> (discussing how a computational propaganda campaign largely driven by bots made a hashtag about a Republican-authored memorandum on improper FBI behavior go viral on Twitter); Emma Woollacott, *Why Fake Twitter Accounts are a Political Problem*, NEW STATESMAN, <http://www.newstatesman.com/sci-tech/2014/05/why-fake-twitter-accounts-are-political-problem> (describing how in the 2012 Mexican election, the Institutional Revolutionary party used bots to create Twitter trends); George Monbiot *The Need to Protect the Internet from ‘Astroturfing’ Grows Ever More Urgent* (Feb. 23, 2011), <https://www.theguardian.com/environment/georgemonbiot/2011/feb/23/need-to-protect-internet-from-astroturfing> (describing how companies attempt to manufacture online personas to simulate crowds of supporters).

⁴⁵ See e.g. PJ Vogt & Alex Goldman, *The Prophet*, (Dec. 15, 2017), <https://gimletmedia.com/episode/112-the-prophet/>.

⁴⁶ See e.g. Rebecca Shapiro, *Chobani Sues Alex Jones for Posting Vicious Fake News Stories* (April 25, 2017), http://www.huffingtonpost.com/entry/chobani-sues-alex-jones-fake-news_us_58feaec6e4b06b9cb9198b65 (describing a boycott of Chobani yogurt based on a YouTube video and tweets by Alex Jones, a well-known conspiracy theorist). Note that astroturfing as it applies to online activities is sometimes called “cyberturfing.” Mark Leiser defines cyberturfing as “a form of stealth marketing designed to appear to be as a kind of bottom-up activism that in reality is powered by someone else behind the scenes.” Mark Leiser, *AstroTurfing, ‘CyberTurfing’ and Other Online Persuasion Campaigns*, 7 EUR. J. LAW TECHNOL. 1, 2 (2016).

grassroots lobbying: consent and sincerity of beliefs (see Figure 2). Each of these dimensions is assessed at the individual user level in the context of Platform Advocacy and each is described below.

1. The Consent Dimension

In order for Platform Advocacy to move towards authenticity, users must voluntarily give their consent before their name or actions are associated with the platform's position. Unfortunately, there are several situations in which informed consent may be absent in the Platform Advocacy context. These range from pure lack of consent to improper influence.

Pure Lack of Consent. Starting with the most egregious behavior, platforms can make it appear that users have given consent to advocacy even when they have not. In this situation, there is zero transparency. For example, the *Wall Street Journal* ("WSJ") reports that thousands of comments on federal agency websites are posted (most likely by bots) without the user's permission.⁴⁷ This was particularly true during the lead-up to the Federal Communications Commission's controversial decision to repeal net-neutrality regulations put in place during President Obama's administration. According to the WSJ, more than 70% of comments related to the FCC rules were falsely submitted.⁴⁸ Unlike other forms of Platform Advocacy, mobilizing users without their consent and making false statements is a felony, yet this prohibition does not appear to deter the proponents and opponents of various federal regulations.⁴⁹

Coercion. Similar to pure lack of consent, situations where platforms give users no choice but to advocate on their behalf pushes advocacy towards astroturf. For example, if Uber required a user to send a message to her lawmaker before she could get a ride, a user could be considered under a form of duress.⁵⁰ Since many platforms such as Google, Facebook, and Uber provide needed services (namely information and transportation), conditioning their access on advocacy would clearly create artificial support.

While no platform has actually forced such action, it is well within the realm of possibility for platforms to do so, especially for those with questionable ethics.

⁴⁷ James V. Grimaldi, *Millions of People Post Comments on Federal Regulations. Many Are Fake*, WSJ (Dec. 12, 2017), <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188>.

⁴⁸ *Id.*

⁴⁹ 18 U.S.C. § 1001(a) (2006) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.").

⁵⁰ Note that there have been no documented instances of such forms of Platform Advocacy.

More easily, however, platforms can use sticks to manipulate user behavior. In these situations, we have to assess the severity of the punishment for inaction, such as public shaming or denial of privileges. The use of carrots, such as rewards and extra benefits, are assessed as a part of the authenticity dimension described in the subsection below.

Improper Influence. Consent may also be improperly obtained when platforms exploit known flaws in decision making. As described in Section III, this manipulation is largely unrestrained and unnoticed, making it the most concerning aspect of Platform Advocacy.

2. The Sincerity Dimension

A key ingredient to the effectiveness of grassroots advocacy is its authenticity. When large swaths of the population endogenously come together to advocate for or against a policy, lawmakers take notice because the “will of the people” is manifest. However, when the advocates do not actually hold the beliefs they espouse, advocacy trends towards astroturf. There are several reasons why a user may not actually hold a position that she *voluntarily* gives of her name, time, and energy to advocate for. These are described in turn below.

Direct Incentives. First, a person may voluntarily consent to advocate on behalf of a platform if the platform is providing a wanted incentive for the advocacy. Payment for protest in whatever form is classic astroturfing and immediately raises questions of legitimacy.⁵¹ As with the use of direct incentives to get users’ contact information or to recommend a product or service to a friend, platforms can easily use direct incentives for Platform Advocacy.

Concealment. The second way platforms can encourage people to advocate for positions they do not actually support is by concealing pertinent information, such as underlying motivations and opposing viewpoints. Though not a platform, take for instance Intuit’s campaign to stop proposed bills that would simplify federal tax filings. Intuit hired a public relations firm to encourage community leaders to speak out about the proposed bills.⁵² The community leaders were often unaware of the content of the proposed bills or Intuit’s interest, and when questioned, many of the leaders who advocated against the bill changed their minds.⁵³

⁵¹ Accusations of paid protestors since the election of President Donald Trump have been widespread, including by the President himself, but largely unfounded. Elana Schor, *No Evidence Town Hall Protesters Are Being Paid*, POLITICO (Feb. 24, 2017), <http://www.politico.com/story/2017/02/town-hall-protesters-paid-no-evidence-235321>.

⁵² Liz Day, *TurboTax Maker Linked to ‘Grassroots’ Campaign Against Free, Simple Tax Filing*, PROPUBLICA (April 14, 2014), <https://www.propublica.org/article/turbotax-maker-linked-to-grassroots-campaign-against-free-simple-tax-filing>.

⁵³ *Id.*

In the Platform Advocacy context, in 2014 in California, Lyft and Uber were in a heated battle with regulators after two bills toughening ride-sharing requirements were introduced in the California statehouse.⁵⁴ Lyft partnered with Phone2Action, a company that facilitates contact between citizens and lawmakers, to capture the attention of its users. With Phone2Action's help, Lyft successfully targeted passengers and drivers in its app to defeat portions of the bill that would require driver background checks and drug testing.⁵⁵ Customers were never told, however, how the proposed bill could actually protect them.⁵⁶

Exploiting Cognitive Biases. Also discussed more fully in Section III, platforms can exploit known cognitive biases such as herd behavior⁵⁷ to encourage users to take action even when they do not particularly care about an issue. For example, in India, Facebook attempted to mobilize its user base to encourage regulators to allow its Free Basics program, which would give free access to a limited number of websites throughout India.⁵⁸ After being forced to see information about Free Basics when logging on to Facebook, many users found that lingering on the information page too long caused Facebook to send a notification to all of the user's friends that they had contacted their lawmakers about Free Basics, which in turn encouraged others to send messages to lawmakers.⁵⁹ This extreme example of exploiting the herding effect would most definitely lead to inauthentic support for the issue.

Businesses are profoundly shaped by governmental policies; thus, it is well within their rights to encourage their users to publically support them in order to create favorable regulations. However, when the consent dimension of Platform Advocacy trends towards acquiescence or worse, or when the sincerity dimension

⁵⁴ Carolyn Said, *Airbnb, Uber Cast Themselves as Saviors of the Middle Class*, S.F. CHRON., <http://www.sfchronicle.com/business/article/Airbnb-Uber-We-are-the-saviors-of-the-middle-6620729.php>.

⁵⁵ When passengers turned on the Lyft app, they saw contact information for lawmakers and suggested language. *Id.*

⁵⁶ Since 2014, Lyft has used Phone2Action's tools to modify their user interface and encourage people to contact their lawmakers in more than fifty states. Phone2Action, *Case Study: Lyft* (2016), http://phone2action.com/wp-content/uploads/2017/04/P2A_CaseStudy-Lyft_Oct16_F.pdf.

⁵⁷ With herd behavior, people simply follow along with what other people do as opposed to using their own judgment. Sushil Bikhchandani, David Hirshleifer, & Ivo Welch, *A Theory of Fads, Fashion, Custom and Cultural Change as Informational Cascades*, 100 J. POLITICAL ECON. 992 (1992); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, 47 (2017). "A common error arising across various digital media platforms comes from our reliance on the repetition heuristic. We deploy this mental shortcut believing that more people report a claim, the greater its credibility." Mark Leiser, *AstroTurfing, 'CyberTurfing' and Other Online Persuasion Campaigns*, 7 EUR. J. LAW TECHNOL. 1, 5 (2016).

⁵⁸ See *infra* Section XX.

⁵⁹ Bhatia *supra* note XX. See also Matt Stempeck, *Are Uber and Facebook Turning Users Into Lobbyists?* HARV. BUS. REV. (Aug. 11, 2015), <https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists>.

tips towards disingenuousness, Platform Advocacy can be very detrimental for society.⁶⁰ Compounding these harms is the lack of a clear regulatory framework to protect citizens and lawmakers from such forms of astroturfing.

B. Regulatory Environment of Grassroots Lobbying

The federal government has regulated lobbying activities since 1876, when the House of Representatives first passed a resolution requiring lobbyists to register. After World War II, Congress passed a comprehensive lobbying statute, the Federal Regulation of Lobbying Act of 1946 (“The FRLA”), aimed at further registration and disclosure of lobbying activities.⁶¹ The FRLA included grassroots lobbying in its gamut. It required companies to disclose expenditures related to influencing Federal legislation through “direct communication” or with “direct pressure[]” on members of Congress.⁶² However, the FRLA was repealed and replaced in 1995 by the Lobbying Disclosure Act (LDA), which did not contain a grassroots lobbying provision.⁶³ According to the LDA’s legislative history, Congress was concerned that disclosure requirements related to grassroots lobbying would brush too close against First Amendment protections.⁶⁴

Since 1995, several attempts have been made at the federal level to require disclosure for payments and expenditures for astroturf lobbying; however, all have failed.⁶⁵ And while there is a disclosure requirement and a cap on spending for

⁶⁰ For a complete discussion of these harms, *see infra* Section IV.

⁶¹ Craig Holman, *Origins, evolution and structure of the lobbying disclosure act*, 11 PUBLIC CITIZ. (2006), <http://www.consumerwatch.org/documents/Origins%20of%20Lobbying%20Disclosure%20Act.pdf> (last visited Aug 31, 2017).

⁶² *Harris*, 347 U.S. at 620, 623-24.

⁶³ 2 U.S.C.A. § 1601 et seq.

⁶⁴ BURDETT A. LOOMIS, PETER L. FRANCA, & DARA Z. STROLOVITCH, *GUIDE TO INTEREST GROUPS AND LOBBYING IN THE UNITED STATES* 385 (2011). Jeanne Woods testified on behalf of the American Civil Liberties Union and argued that the disclosure requirements would “infringe[] [upon] the right of associational privacy and would likely deter many individuals and small groups from participating in the public debate. As presently drafted, we do not believe this measure would pass constitutional muster.” *Hearing on H.R. 823 Lobbying Disclosure Act of 1993 Before the Subcomm. On Admin. Law and Governmental Relations of H. Comm. On the Judiciary*, 103rd Cong. 255 (1993) (statement of Jeanne M. Woods, Legislative Counsel, American Civil Liberties Union).

⁶⁵ The original proposed text of the LDA included grassroots lobbying, defined as “the voluntary efforts of members of the general public to communicate their own views on an issue to Federal officials or to encourage other members of the general public to do the same.” *Lobbying Disclosure Act of 1995*, § 220(a)(17), S. 1, 110th Cong., 1st Sess. (2007) (codified as amended at 2 U.S.C.A. § 1601 et seq. (2007 West)). The LDA would have required grassroots lobbying activities to be registered “[n]ot later than 45 days after a grassroots lobbying firm first is retained by a client to engage in paid efforts to stimulate grassroots lobbying.” *Lobbying Disclosure Act of 1995*, § 220(b), S. 1, 110th Cong., 1st Sess. (2007) (codified as amended at 2 U.S.C.A. § 1601 et seq. (2007 West)). Amendment No. 20 to the LDA struck down this proposal. 153 Cong. Rec. D52-01 (Jan. 17, 2007), <https://www.congress.gov/crec/2007/01/17/CREC-2007-01-17-pt1->

501(c)(3) organizations that make the so-called “lobbying election” under 501(h) of the Internal Revenue Code, this election is not required.⁶⁶

In contrast to the dearth of federal regulations, many states require some sort of reporting or registration requirement for grassroots lobbying. The trigger for these disclosures varies dramatically. In some states, it is based on the amount spent to indirectly influence lawmakers⁶⁷ in others it can be based on the activity itself without regard to a spending threshold.⁶⁸ For states with spending thresholds, Platform Advocacy would rarely trigger disclosure because platforms can engage in it at little to no cost (changing computer code need only occur once and opportunity costs related to lost revenues are not taken into account). And, even for the states that do require disclosure based on the advocacy itself, few people actually seek out disclosed information; thus, disclosure does little to deter artificially stimulated grassroots campaigns.⁶⁹

Disclaimer notices detailing who a particular request for participation is sponsored by are more effective at curtailing the harms of astroturfing because the public can quickly assess the credibility of claims for themselves.⁷⁰ However, under the

PgS647.pdf. There was concern that reporting requirements would have the effect of chilling constitutionally protected political speech. *Id.* The congressional record shows that lawmakers were considered that the term “grassroots lobbying” was broader than necessary to protect Congress from “Astroturf campaigns” and Senators reasoned that it would likely be ruled unconstitutional by the Supreme Court with time. *Id.* See also *Grassroots Lobbying: Constitutionality of Disclosure Requirements*, EveryCRSReport.com (Feb. 26, 2008), <https://www.everycrsreport.com/reports/RL33794.html> (describing the 109th and 110th congresses’ attempts to regulate activities intended to simulate grassroots lobbying).

⁶⁶ 26 U.S.C.A. § 501(h); Venable, *Lobbying: What Does It Mean for 501(c)(3) Organizations?*, ASSOC. OF CORP. COUNSEL (Oct. 17, 2011), <http://www.acc.com/legalresources/quickcounsel/lwdimf501c3o.cfm>.

⁶⁷ CAL. GOV’T CODE § 86115(b) (1985) (imposing a \$5,000 threshold for grassroots lobbying expenditures in a calendar quarter); ME. STAT. tit. 3, § 317(E-1) (2011) (imposing a \$15,000 threshold for indirect lobbying expenses per calendar month); N.M. STAT. ANN. § 2-11-6(I) (2016) (imposing a \$2,500 threshold for advertising lobbying expenses in a calendar year); N.C. GEN. STAT. § 163A-285 (2017) (imposing a \$3,000 threshold for a 90 day period for grassroots lobbying expenses); Wash. Rev. Code § 42.17A.640 (2010) (imposing a \$1,000 threshold in a three month period, or a \$500 threshold in a one month period).

⁶⁸ FLA. LAWS § 11.045 (2012) (requiring reporting for any person who is employed and receives payment for lobbying); MO REV. STAT. § 105.473 (2010) (requiring reporting for anyone employed as an executive lobbyist, judicial lobbyist, elected local government official lobbyist, or legislative lobbyist); N.H. REV. STAT. ANN. § 15:1 (2009) (requiring registration of any person employed by any other person in a representative capacity regarding legislation or state action).

⁶⁹ See DICK M. CARPENTER II, INSTITUTE FOR JUSTICE, DISCLOSURE COSTS UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE 4 (2007), <http://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf> (arguing that disclosure does not make voters more trusting or better informed); see generally Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357 (2010).

⁷⁰ Robert Wechsler, *The Regulation of Local Lobbying*, CITY ETHICS, INC. (2016), <http://www.cityethics.org/files/Regulation-of-Local-Lobbying-Robert-Wechsler.htm>. Zellner

Bipartisan Campaign Reform Act, disclaimer notices only apply to communications made by “political committees,”⁷¹ which platforms are not, or “electioneering communications,” which are specifically limited to communications about clearly identified candidates for federal office and not policy issues at the heart of most grassroots campaigns.⁷² Furthermore, even if indirect pressure was subject to disclaimer notice requirements, platforms might avoid such requirements for ads that qualify as “small items” or displays, such as tweets and Facebook posts, which do not have to include disclaimer language.⁷³

Most states have disclaimer laws; however, they are both riddled with exceptions and outdated for the digital age. According to the National Conference of State Legislatures (“NCSL”), forty-two states have disclaimer laws for political advertisements.⁷⁴ The laws cover advertisements through traditional forums (print, newspaper, billboard, etc.), but many are either silent or opaque about disclosure requirements for Internet advertisements.⁷⁵ Some states have a catch-all that encompasses the Internet; for example, the NCSL argues that under Idaho law, Internet communications are presumably regulated under the catch-all “any

supra note XX at 390–95 (arguing that the *McConnell v. FEC* case suggests that “Congress can require identity disclosure because it will provide the public with meaningful information with which to evaluate Astroturf campaigns and that grassroots lobbying disclosure laws “simply seek to make available information that may be of political significance to curious citizens, but that is not readily accessible in the absence of such requirements”).

⁷¹ Political committees are defined as: “(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; or (B) any separate segregated fund established under the provisions of section 30118(b) of this title; or (C) any local committee of a political party which receives contributions aggregating in excess of \$5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of \$5,000 during a calendar year, or makes contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 during a calendar year.” 52 U.S.C.A. § 30101.

⁷² In addition, electioneering communications are those that are “publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party,” and “[i]s targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.” 11 C.F.R. § 100.29.

⁷³ 11 CFR 110.11(f)(1)(i) and (ii). Even though Federal Election Commission has been unable to determine whether digital ads qualify under the “small items” exception, Facebook has avoided requiring such disclaimers. Issie Lapowsky, *Why Facebook Will Struggle to Regulate Political Ads*, WIRED (Sept. 22, 2017), <https://www.wired.com/story/why-facebook-will-struggle-to-regulate-political-ads/>.

⁷⁴ Austin Graham, National Conference of State Legislatures, *Paid for by Whom? Disclaimer Requirements in the Digital Age*, NCSL Blog (July 17, 2017), <http://www.ncsl.org/blog/2014/07/17/paid-for-by-whom-disclaimer-requirements-in-the-digital-age.aspx>.

⁷⁵ *Id.*

other type of general public political advertising.” A dozen states, including Illinois and Nevada, have explicit disclaimer laws for Internet advertisements.⁷⁶

Lastly, if grassroots campaigns shift into astroturfing by relying on fake news stories or other deceptive propaganda, there is very little that can currently be done. The Federal Trade Commission’s jurisdiction as it relates to deceptive advertising only applies to activities designed to make consumers purchase something as opposed to make consumers contact a lawmaker.⁷⁷

States have tried to target fake news stories and other deceptive propaganda by implementing false statement laws and imposing standards for truth in political advertising. Most states have laws requiring truthfulness in statements relating to the voting process,⁷⁸ the substance of the election,⁷⁹ or some combination of both.⁸⁰ However, the impact of these laws has been limited because of the judicial protection afforded to political speech.⁸¹ For example, in *Nevada Press Association v. Nevada Commission on Ethics*, Nevada’s false statement law was ruled unconstitutional because it permitted the punishment of protected First Amendment political speech and its abbreviated dispute resolution procedures violated due process requirements.⁸² Furthermore, state statutes may not be written broadly enough to encompass false statements and deceptive tactics perpetrated through the Internet.⁸³

⁷⁶ Megan Moore, *State Administration and Veterans’ Affairs Interim Committee, Briefing on Laws Related to Campaign Advertising Disclaimers in Other States* (2012), <http://leg.mt.gov/content/Committees/Interim/2011-2012/State-Administration-and-Veterans-Affairs/Meeting-Documents/April%202012/OTHER%20STATES%20ANON.pdf>.

⁷⁷ The FTC has authority to regulate “persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C.A. § 45.

⁷⁸ These laws prohibit false statements regarding matters like registration qualifications, identification requirements, and polling place locations. For example, Virginia makes it a misdemeanor to “communicate to a registered voter, by any means, false information, knowing the same to be false, intended to impede the voter in the exercise of his right to vote. VA. CODE ANN. § 24.2-1005.1 (2007).

⁷⁹ These laws prohibit false statements regarding candidates and issues. For example, Alaska makes it a misdemeanor to knowingly make a communication that contains “false factual information relating to a candidate for an election.” ALASKA STAT. § 15.56.014 (2010).

⁸⁰ COMMON CAUSE ET AL., *DECEPTIVE PRACTICES 2.0: LEGAL AND POLICY RESPONSES 5* (2008), http://www.commoncause.org/research-reports/National_102008_Report_Deceptive_Practices_2-0.pdf.

⁸¹ See, e.g., *id.* at 6; Amy Sullivan, *Truth in Advertising? Not for Political Ads*, TIME (Sept. 23, 2008), <http://content.time.com/time/politics/article/0,8599,1843796,00.html>.

⁸² *Nev. Press Ass’n v. Nev. Comm’n on Ethics*, No. CV-S-02-1195-LDG (RJJ), 2005 U.S. Dist. LEXIS 4923, (D. Nev. Mar. 26, 2005).

⁸³ COMMON CAUSE ET AL., *DECEPTIVE PRACTICES 2.0: LEGAL AND POLICY RESPONSES 5* (2008), http://www.commoncause.org/research-reports/National_102008_Report_Deceptive_Practices_2-0.pdf.

Thus, generally, it is not illegal for companies to make direct or indirect requests of users to advocate for a particular candidate or policy. However, with new forms of digital communication (texts, emails, online comment submissions), it is easier than ever before for individual voices to be manipulated and *heard* by lawmakers.

III. UNRESTRAINED AND UNNOTICED

The previous section identified, in broad brushstrokes, how to detect astroturfing in the context of Platform Advocacy and described how such behavior is largely unregulated. This section focuses on the least legally questionable yet most powerful and ethically dubious aspects of Platform Advocacy. In particular, it shines a light on the unique and unprecedented ways platforms can and do exploit cognitive biases among users. These subtle forms of manipulation, which are enabled by the technological environments platforms create, can profoundly impact political participation.

A. Behavioral Economics and Platform Advocacy

Developed by Nobel Laureate James Buchanan and Gordon Tullock, Public Choice Theory applies the tools and methods of economic theory to politics and government.⁸⁴ It suggests that citizens are rational and self-interested,⁸⁵ and that they make decisions to advance their own private interests. This often means that individuals decide not to participate in democratic activities because the costs of participation do not outweigh the benefits.⁸⁶ As a result, apathy causes the law to be formed around special interests.⁸⁷ How then can platforms motivate so many users to voice their opinions on behalf of the platform? Especially when such advocacy often goes against the users' own self-interests? The answers lie in behavioral economics.

The field of behavioral economics rejects ideas of rational actors seeking to optimize their utility, and focuses instead on how "choice behavior diverges from the assumptions of neoclassical economics (and more generally the, neoclassical

⁸⁴ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); JAMES M. BUCHANAN & ROBERT D. TOLLISON, *THE THEORY OF PUBLIC CHOICE*, 13 (1984).

⁸⁵ EAMONN BUTLER, *PUBLIC CHOICE-A PRIMER*, 25 (2012).

⁸⁶ *See, e.g.*, Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 189 (1990); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). Public choice theory is not the only way to look at political participation. Some people do engage in the political process, and for a variety of reasons, including the "Kantian" desire to act in a way that you want other people to act. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 508 (1982).

⁸⁷ Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909 (1993).

paradigm)—whether or not these factors are psychological, sociological, anthropological, or others.”⁸⁸ The application of behavioral economics to public choice theory led to the development of behavioral public choice theory (BPCT).⁸⁹

With the help of BPCT, we can see the confluence of both identification and exploitation of consumer vulnerabilities. The first subsection below identifies some of these consumer vulnerabilities and the second subsection describes how, through mediation, platforms have the ability to exploit them.

1. The Types of Consumer Vulnerabilities

Becoming an informed political actor takes effort, and because of the relatively low personal stakes involved in political participation, the failure to exert effort increases irrational behavior.⁹⁰ In the Platform Advocacy context, there are many ways platforms can encourage people to irrationally take political action.⁹¹ Four are outlined below.

Intentions Heuristic. Heuristics are mental shortcuts that allow people to quickly and efficiently make decisions; however, they can also introduce errors. The intentions heuristic is a proxy that leads people to believe that good things flow from good intentions and bad things flow from bad intentions.⁹² Therefore, if people trust a platform, which they generally do,⁹³ they will think the policy

⁸⁸ Amitai Etzioni, *Behavioral Economics: Toward a New Paradigm*, 55 AM. BEHAVIORAL SCIENTIST 1099, 1100 (2011).

⁸⁹ Gary M. Lucas, Jr. & Slavisa Tasic, *Behavioral Public Choice and the Law*, 118 W. VA. L. REV. 199, 202 (2015) (“Behavioral public choice is both an extension of and a reaction to behavioral economics”).

⁹⁰ *Id.* at 203 (explaining how people rarely think that their vote will determine an outcome and the consequences of their voting choices will rarely impact them directly). The idea of effortful thinking to avoid irrational behavior is related to Daniel Kahneman’s work on the dual-process theory of cognition, which breaks down judgment into two systems: System 1 and System 2. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCHOL. 697 (2003). System 1 thinking deals with operations that are “automatic, effortless, associative, [and] implicit (not available to introspection).” *Id.* at 698. System 2 thinking, by contrast, deals with operations that are “slower, serial, effortful, [and] more likely to be consciously monitored and deliberately controlled.” *Id.*

⁹¹ In their 2015 Article, Gary Lucas and Slavisa Tasic provide a comprehensive overview of BPCT and present various “biases and heuristics that impair the judgment of political actors.” *Id.* at 265. Take for instance the “antiforeign bias.” If voters were rational, they would not support tariffs and protectionist trade policies; however, because voters are suspicious of people who are different from themselves, they “underestimate the economic benefits of interaction with foreigners.” *Id.* at 213 (citing BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 36 (2007)).

⁹² Jeffrey Friedman, *Popper, Weber, and Hayek: The Epistemology and Politics of Ignorance*, 17 CRITICAL REV. i, xx (2005). See also Lucas & Tasic *supra* note 58 at 218-223.

⁹³ Though opinions can be mixed on companies like Facebook and Google, generally platforms companies enjoy positive reputations. See Karsten Strauss, *The World’s Most Reputable Companies*, 2016, FORBES (Mar. 22, 2016),

position of those platforms are good. People will therefore not take the time to consider the costs and benefits of a given position, and will take action if it is sufficiently easy to do so.⁹⁴

In-Group Bias. In-group bias is a well-documented phenomenon in which people tend to favor people who are like them (the “in-group”) over others (the “out-group”).⁹⁵ There are several causes of in-group bias from genetics (human survival has depended on groups) to the positive effects on self-esteem (boosting the group, boosts ourselves), and you see in-group bias throughout politics.⁹⁶ For example, in response to the same proposed California ridesharing legislation discussed in the previous section, Uber sent an email to users that email read in part:

It’s time to take a stand. Next week, the California Senate Appropriations Committee will vote on AB 2293, a bill that would require companies like Uber to provide 20x the insurance that taxis must carry in California. This proposed legislation is part of a backroom deal by the insurance industry, taxi companies and trial attorneys, designed to funnel more premiums and fees to these already entrenched industries.⁹⁷

Uber clearly wants users to separate its innovative ride sharing service from the “entrenched” incumbent industries and create an us versus them mentality.

Platforms that rely on networks of users can also exploit the in-group bias by identifying friends who support the platforms’ positions. For example, in a concealed experiment, Facebook notably increased voting behavior of users by simply showing a user’s friends who had voted in an election.⁹⁸ The experiments showed some Facebook users a link to find their polling place, a button they could click to say “I voted,” and a sampling of profile pictures of their friends who had already voted. Others were shown a link to polling places and a button, but not the

<https://www.forbes.com/sites/karstenstrauss/2016/03/22/the-worlds-most-reputable-companies-2016/#f19adaf23389> (naming Google, Apple, Microsoft, and eBay among the world’s most reputable companies).

⁹⁴ *Id.*

⁹⁵ Brian Mullen, Rupert Brown, & Colleen Smith, *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 EUR. J. SOC. PSYCHOL. 103 (1992). See also Lucas & Tasic *supra* note 58 at 234-237.

⁹⁶ Donald R. Kinder & Cindy D. Kam, *Us Against Them: Ethnocentric Foundations of American Opinion* (2010); Lucas & Tasic *supra* note 58 at 234.

⁹⁷ Jon Fleischman, *CA Uber Users Get Email to Oppose Onerous California Bill*, BREITBART (Aug. 8, 2014), <http://www.breitbart.com/california/2014/08/08/ca-uber-users-get-email-to-oppose-onerous-california-bill/> (citing the Uber email).

⁹⁸ Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 7415 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3834737>. See also Johnathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 335 (2014) (arguing that “digital gerrymandering” could easily flip an election).

profile pictures of their friends. Users who were shown friends that voted were 0.39% more likely to vote.⁹⁹ While this increase was a small percentage, with Facebook's 180 million active daily users in the U.S., it shows how a simple manipulation of the interface could have a profound impact on in-group bias and an election.¹⁰⁰

Action Bias. The action bias discourages careful deliberation and encourages action.¹⁰¹ It stems from the visceral need to do something after something bad happens or if one is simply bored.¹⁰² Action bias can be seen when platforms stir up emotions and make it easy for users to do something about it (i.e. sign a petition, call their congressperson, etc.). For example, in Google's SOPA/PIPA campaign, Google made people think the government was going to censor the web. This sparked outrage and encouraged millions of people to take the simple step to sign an online petition.

Furthermore, the action bias can influence how lawmakers act. If there is a public outcry of support for a particular policy (whether that support be real or manufactured), lawmakers may fail to take the time to properly deliberate. For example, Lucas and Tasic write that "[p]roblems demand solutions" and they suggest that the Sarbanes-Oxley Act was largely a result of the action bias.¹⁰³ After Enron and WorldCom fell, Congress was eager to pass legislation in response, even though there was much evidence that the governance provisions in the Act would not be effective.¹⁰⁴

Primacy Effect. Lastly, platforms can influence public perceptions through the primacy effect, which biases people based on the information that they see first. As Robert Epstein and Ronald E. Robertson demonstrated, platforms that provide search functions (namely Google) can use the primacy effect to shift the preferences of undecided voters by twenty percent or more.¹⁰⁵ This primacy effect can also be

⁹⁹ Bond *supra* note 28 at 296.

¹⁰⁰ The authors of the study drive home this point by citing the fact that George Bush beat Al Gore in the 2000 US Presidential election by only 537 votes in Florida. *Id.* at 295. For Facebook statistics see *Our History*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited April 29, 2017).

¹⁰¹ Lucas & Tasic *supra* note 58 at 231-232.

¹⁰² Anthony Pratt & Richard Zeckhauser, *Action Bias and Environmental Decisions*, 21 J. RISK & UNCERTAINTY 45, 45 (2000).

¹⁰³ *Id.*

¹⁰⁴ Lucas & Tasic *supra* note 58 at 232 (citing Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1591-94 (2005)).

¹⁰⁵ Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcome of Elections*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES E4512 (2015), <http://www.pnas.org/content/112/33/E4512.full.pdf?withds=yes>. See also Robert Epstein, *How Google Could Rig the 2016 Election*, POLITICO (Aug 19, 2015), <http://www.politico.com/magazine/story/2015/08/how-google-could-rig-the-2016-election-121548>.

used by platforms attempting to push a particular position. If they hide or bury opposing information, people can be unfairly biased for the platform's position.¹⁰⁶

2. The Means for Exploiting Consumer Vulnerabilities

Platforms digitally mediate interactions.¹⁰⁷ Thus they have many opportunities to exploit the consumer vulnerabilities outlined above through their design choices, which can shape behavior by taking advantage of “flaws in human decision-making to get individuals to choose one alternative [over] another.”¹⁰⁸ In other words, design choices are the means by which platforms influence behavior.

Often, platforms use shaping to encourage users to buy goods or services. Professor Ryan Calo identifies this form of shaping as “digital marketing manipulation,” which is a combination of “*personalization* with the intense *systemization* made possible by mediated consumption.”¹⁰⁹ Personalization involves analyzing massive amounts of consumer data to target users at a personal level.¹¹⁰ Systemization refers to the use of technology to automatically customize digital interactions to prey on user vulnerabilities.¹¹¹ Calo's concept of digital market manipulation, provides a useful backdrop for demonstrating how terribly easy it is for platforms to cause users to behave irrationally in the Platform Advocacy context.

Personalization. The very same tactics used to get consumers to buy particular products can be used to shape their behavior as political actors. For example, platforms can influence voter behavior through the technique of “blending.”¹¹² Blending involves taking a photograph of a user and putting it near a photograph

¹⁰⁶ Epstein and Robertson warned in their Article of the potential harm of such an effect, since search rankings are controlled almost entirely by a single company, Google. *Epstein & Robertson supra* note 118 at E4513. Lucas Introna and Helen Nissenbaum also warned of the potential harms of search engines on democracy decades ago. *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC'Y 169 (2000).

¹⁰⁷ Ryan Calo, *Digital Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999) (describing “mediated consumers”).

¹⁰⁸ Kevin Vallier, *On the Inevitability of Nudging*, 14 GEO. J.L. & PUB. POL'Y 817 (2016) (citing Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not to Nudge*, 18 J. Pol. Phil. 123, 128 (2010)). As first explained by Richard Thaler and Cass Sunstein, design choices can be used to “nudge” people to make particular decisions. A nudge is a subtler form of influence than shaping and involves “any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives.” RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2009).

¹⁰⁹ Calo *supra* note 73 at 1021.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Lisa Marshall Manheim, *The Nudging Ballot? A Response to Professor Foley*, 89 N.Y.U.L. REV. ONLINE 65, 68-69 (2014) (discussing the technique of blending a photograph of a politician with a photograph of a user to make her more inclined to trust the politician).

of a politician. When a person's face and a politician's face are closer together, cognitive biases including the intent bias, are triggered. These biases make an individual more likely to trust (and subsequently vote for) a politician.¹¹³

“Persuasion profiling” is another example of personalization. It not only targets relevant advertisements to particular individuals, it presents information in a personalized way.¹¹⁴ Based on a record of user behavior, platforms can determine which persuasion techniques (i.e. appeals to authority, scarcity, consensus, etc.) are most effective with that particular user.¹¹⁵ Personalization made possible by digitally mediated interactions is highly unique to platforms and very powerful.

Platforms can also use their own internal data to predict and target those individuals who are most likely to advocate on the platforms' behalf.¹¹⁶ While mining data to find and subsequently ignite a sympathetic group of supporters is not in and of itself nefarious, it can skew what lawmakers perceive as the passions and interests of the public.¹¹⁷

Systemization. When the term was first coined in 1985, astroturf lobbying would have required incredible amounts of time and expense. A simulated letter writing campaign, for example, would have required cold-calling individuals or targeting them through newspaper advertisements and mailers. Now, platforms can automatically and methodically reach out to individuals with little to no effort through the use of highly-sophisticated algorithms and design choices. The technological capabilities of platforms make it easier than ever for them to systematically target and exploit consumer biases. And, as the section below describes, these platforms are constantly improving their understanding of human behavior in order to exploit vulnerabilities more efficiently.

¹¹³ *Id.*

¹¹⁴ Eli Pariser, *Welcome to the Brave New World of Persuasion Profiling*, WIRED (April 26, 2011), https://www.wired.com/2011/04/st_essay_persuasion_profiling/.

¹¹⁵ In fact, direct-marketing is essential to the business models of many platforms such as Facebook and Google. Maurits Kaptein & Dean Eckles, *Heterogeneity in the Effects of Online Persuasion*, 26 J. INTERACTIVE MARKETING 176 (2012).

¹¹⁶ See Davey Alba, *Google and Facebook Still Reign Over Digital Advertising*, WIRED (July 29, 2017), <https://www.wired.com/story/google-facebook-online-ad-kings/>.

¹¹⁷ As University of California Los Angeles sociology professor, Edward T. Walker argues, public affairs consulting firms are skilled at mining data and targeting individuals with carefully crafted messages who are likely to participate in grassroots activity. WALKER, *supra* note XX, at 12-13, 155-191. Walker defines a public affairs consultancy as a “professional service firm that contracts with an organizational client in order to manage the client's political and social environment strategically through campaigns that mobilize public participation, often in coordination with traditional forms of lobbying.” *Id.* at 23. These likely participants are most commonly higher-income individuals with the time and resources to be active. Walker suggests that these individuals are already over-represented in the political system and thus such forms of “grassroots for hire” “exacerbate participatory inequalities.” *Id.* at 11, 157. See also Henry E. Brady, Kay Lehman Schlozman & Sidney Verba, *Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists*, 93 AM. POLIT. SCI. REV. 153 (1999).

B. A Perfect Storm for Influence

The previous section showcased how platforms can subtly manipulate user behavior by exploiting known cognitive vulnerabilities. This section outlines why this ability can create an ideal situation for platforms to impact the regulations that govern them.

The Network Effect. First, platforms do not have the power to manipulate just a few users, they have the power to manipulate large swaths of their captive audiences. Airbnb, for example, has more users than the entire population France, Italy and Australia combined.¹¹⁸ This is because of the network effect. The network effect enables the rapid concentration of power where the winner takes all. It occurs when a good or service becomes more valuable as more people use it. For example, the more people that use a particular credit card company (Amex, Visa, etc.) the more merchants will take those cards and the more customers will have those cards. This effect can produce unrestrained monopolies (think of Airbnb for home sharing, Amazon for online shopping,¹¹⁹ etc.) and create a fierce urgency to understand how to properly regulate them.

Iteration. Control over the design of the user interface can not only allow platforms to systematically personalize user interactions to exploit biases, it can give platforms free reign to experiment on users to uncover even more vulnerabilities. This ability to keep iterating to find the most effective methods of influence is unprecedented and may lead platforms to understand us better than we understand ourselves.¹²⁰ For instance, “likes” on Facebook are an incredible predictor of personal attributes from sexuality to drug and alcohol use.¹²¹

¹¹⁸ Reuters, *Airbnb CEO Invites Some Property Hosts to Executive Board Meetings*, FORTUNE (2017), <http://fortune.com/2017/03/07/airbnb-ceo-hosts/> (stating that Airbnb has an estimated 150 million users).

¹¹⁹ Amazon captures fifty-one cents for every dollar spent online in the US. JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNED CULTURE AND UNDERMINED DEMOCRACY*, 121 (2017).

¹²⁰ With A/B testing, platforms can use the “iterative method of using randomized controlled experiments to design user interfaces, products, and ads” in order to notice differences in consumer behavior. Calo *supra* note 73 at note 114. For example, Facebook experimented on 29 million users to determine whether or not people would be more likely to click on ads by companies that are endorsed by their friends over companies that are not. Eylan Bakshy et. al., *Social Influence in Social Advertising: Evidence from Field Experiments*, Proceedings of the 13th ACM Conference on Electronic Commerce (2012), <https://arxiv.org/pdf/1206.4327.pdf>.

¹²¹ Michal Kosinski, David Stillwell & Thore Graepel, *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PNAS 5802 (2013), <http://www.pnas.org/content/110/15/5802.full.pdf>.

Iteration is supported by the data network effect, similar to the network effect described above. The data network effect occurs when a product becomes better the more data is put into it, generally through machine learning.¹²² Google, for example, benefits greatly from the data network effect—the more users who search, the better Google can fine tune its algorithms to produce meaningful results for consumers.¹²³

Little to No Cost. Since platforms can create activist-inspiring content at no real cost to themselves and then disseminate that content through company channels, it is difficult for users to realize that platforms are indirectly funding grassroots activity. Take the example of Reddit, an online news aggregator and discussion website, for instance. On July 12, 2017, the Day of Action for Net Neutrality, it manipulated its landing page to show a very slowly typed message that read:

The internet's less fun when your favorite sites load slowly, isn't it? Whether you're here for news, AMAs, or some good old-fashioned cats in business attire, the internet's at its best when you—not internet service providers—decide what you see online. Today, u/kn0thing and I are calling on you to be the heroes we need. Please go to battleforthenet.com and tell the FCC that you support the open internet.
—u/spez¹²⁴

This message affected users' experiences but barely cost Reddit anything. It also made it easier for Reddit's users to contact lawmakers; thereby, lowering the cost of their engagement. This Platform Advocacy was incredibly effective. On the whole, the Day of Action encouraged users to submit around two million comments to the Federal Communication Commission's website and around three and half million emails to members of Congress.¹²⁵

So what is the consequence of this low-cost, constantly improving, and widespread persuasive power? In one word: influence. We know lawmakers take notice when their constituents reach out to them and we know that platforms have every incentive to encourage limited regulation. Unsurprisingly, we can see the cause and effect of Platform Advocacy on actual policy.¹²⁶ Take for example, ride-

¹²² Matt Turck, *The Power of Data Network Effects*, MATTTURCK.COM (Jan. 4, 2016) <http://mattturck.com/2016/01/04/the-power-of-data-network-effects/>.

¹²³ *Id.*

¹²⁴ Angelica Cabral, *How Major Websites Are Marking Today's Net Neutrality Protest* (July 12, 2017), http://www.slate.com/blogs/future_tense/2017/07/12/how_major_websites_are_marking_today_s_net_neutrality_protest.html (describing the Platform Advocacy of a variety of other websites).

¹²⁵ Brian Feldman, *Net-Neutrality Protests Result in Millions of Comments to the Government Select All*, NY MAG (July 13, 2017), <http://nymag.com/selectall/2017/07/net-neutrality-protests-result-in-millions-of-comments.html>.

¹²⁶ This Article has already mentioned a few examples (Uber in New York, Google on SOPA

sharing, as reporter Karen Weise writes: “Each government, whether municipal or state, goes through its own process to craft rules, but in the end, officials generally codify the insurance coverage, background-check policies, and inspection protocols Uber already have in place. Uber makes the rules; cities fall in line.”¹²⁷ Lawmakers are influenced in precisely the ways we would expect and there is no natural limit to the pressure that can be exerted. As a result, platforms are creating legal environments in their favor.¹²⁸

While industry has always pushed its interests through lobbying and other forms of advocacy, the shape and impact of Platform Advocacy is profoundly different. As a consequence of it and other factors, such as internet exceptionalism and federal laws that limit regulation of online companies,¹²⁹ platforms are unrestrained and able to not only maintain but to grow their dominance in the marketplace. As the section below describes, this pattern should concern us because it can have a profound influence on key assumptions within our democracy.

IV. PLATFORM ADVOCACY AND DELIBERATIVE DEMOCRACY

The concept of deliberative democracy in the context of U.S. constitutional theory¹³⁰ was first identified in 1980 by Joseph M. Bessette¹³¹ and later clarified by Cass R. Sunstein.¹³² To understand it, it is perhaps easiest to go back to the framing of the U.S. Constitution as explained in Sunstein’s 1985 article.

and PIPA, Lyft in California, etc.) and there are many others. *See infra* Sections XX, XX.

¹²⁷ Karen Weise, This Is How Uber Takes Over a City, BLOOMBERG BUSINESSWEEK (June 23, 2015, 6:06 PM), <http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city>.

¹²⁸ For a detailed analysis of how platforms craft laws in their favor *see* Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 2 EMORY L.J. 197 (2017). *See also* Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

¹²⁹ For example, Section 230 of the Communications Decency Act provides interactive computer services with broad immunity for third-party behavior 47 U.S.C. § 230.

¹³⁰ “Deliberative democracy” can also refer to the field of political inquiry focusing on how to improve collective decision making by promoting deliberation among citizens. *See* Lincoln Dahlberg, *The Internet, Deliberative Democracy, and Power: Radicalizing the Public Sphere*, 3 INT’L J. MEDIA CULTURAL POLITICS 47 (2007); Elaine Santos, *What Is Deliberative Democracy?* (Feb. 15, 2012), <http://deldem.weblogs.anu.edu.au/2012/02/15/what-is-deliberative-democracy/> (last visited Jan. 21, 2018). For a thorough examination of the term *see* Antonio Florida, *Participatory Democracy Versus Deliberative Democracy: Elements For A Possible Theoretical Genealogy* (2013), <https://ecpr.eu/Filestore/PaperProposal/71d7f83c-3fe4-4b11-82a2-c151cd3769f4.pdf> (last visited Jan. 21, 2018).

¹³¹ *Deliberative Democracy: The Majority Principle in Republican Government* 104, in HOW DEMOCRATIC IS THE CONSTITUTION? (Robert A. Goldwin & William A. Schambra eds., 1980).

¹³² *Interest Groups in American Public Law*, 38 STANFORD L.R. 29 (1985).

In the lead up to the drafting of the Constitution, the concept of deliberative democracy emerged as a solution to the antifederalist concern that a large national government would reduce citizens ability to participate in democracy and thus undermine concepts of civic virtue¹³³ and increase corruption.¹³⁴ The antifederalists would have preferred a form of direct democracy where individuals would debate and deliberate in small settings.

By contrast, led by Madison, the federalists generally believed¹³⁵ that the problem of corrupt factions was not a result of the decline of civic virtue brought on by large government, but rather a consequence of direct democracy¹³⁶—where apathy was destined to occur and “common passion or interest [could] be felt by a majority of the whole.”¹³⁷ More specifically the federalists believed that “democracies were continually subject to tumult, disorder, and confusion; [and] that citizens often sacrificed their independent judgment to the pleasing promises of artful orators.”¹³⁸ A large republic, dependent on representation would solve these populist concerns because representatives could better embody “the cool and deliberate sense of the community.”¹³⁹

Furthermore, the federalists believed that representatives were more knowledgeable about public affairs because they exercise their power in an institutional setting, which encourages collective reasoning.¹⁴⁰ As a result, representatives have a filtering effect that “ensures informed and reflective decisions” and not just popular sentiment.¹⁴¹ “Indeed, the task of legislator was

¹³³ *Id.* at 37.

¹³⁴ *Id.* at 39.

¹³⁵ Rarely did the so-called federalists speak with one voice. *See id.* at footnote 42.

¹³⁶ Bessett, *supra* note XX, at 104-105. While there are many opportunities for direct democracy in the U.S. via widespread use of public referenda, at both the state and federal levels of government, people elect individuals to represent them. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 508 (1982) (stating “Direct democracy is a more widespread and important practice in American government than is generally supposed”).

¹³⁷ Sunstein, *supra* note XX, at 40 (quoting Hamilton et al., *supra* note XX, at XX).

¹³⁸ Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government* 104, in HOW DEMOCRATIC IS THE CONSTITUTION? (Robert A. Goldwin & William A. Schambra eds., 1980).

¹³⁹ ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST PAPERS, 384 (1961); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT, 1 (1984).

¹⁴⁰ SUNSTEIN *supra* note XX at 44; BESSETTE, *supra* note XX at 2.

¹⁴¹ SUNSTEIN *supra* note XX at 48; ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST WITH LETTERS OF “BRUTUS” 44 (Terence Ball ed., 2003). This belief is evident in the Constitution’s design: the Senate was meant to have a “cooling” effect on “popular passions;” the term limits for senators were designed to make deliberation more likely; and the electoral college was designed to ensure that the choice of president was based on the “combination of popular will and reflection on the part of representatives.” *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? (Robert A. Goldwin & William A. Schambra eds., 1980); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED

very close to the task of the citizen in the traditional republican conception” in the sense that the legislator should (and more practically could) be committed to civic virtue.¹⁴² These structural ideas for supporting deliberative democracy have been replicated at largely all levels of government in the United States.

While one could argue that the Framers were perhaps motivated by privilege and paternalism, in light of the election of the United Kingdom’s vote to leave the European Union and nationalist passions that captured the US electorate in 2016, the Framers’ concerns seem especially prescient. Arguably, direct democracy fueled by populist rhetoric has, at times and throughout history, lead the citizenry to make decisions that go against its own self-interest. Thus while decisions are motivated “by the people” they were not actually “for the people.”¹⁴³

As discussed in greater detail below, later ideas surrounding deliberative democracy have moved beyond a focus on American constitutional design to facilitate deliberation and expanded to the “decision procedure” that can help secure the best political outcomes by attaining “the free and reasoned assent” of lawmakers and citizens.¹⁴⁴ In essence, this more global form of deliberative democracy is about the process that best brings about “the public use of reason.”¹⁴⁵

A. *The Fundamentals of Deliberative Democracy*

This Section does not attempt to fully explore the complex theory behind deliberative democracy, though it is rich and illuminating.¹⁴⁶ It does however pinpoint the true threats Platform Advocacy can have on deliberative democracy. To do this, I examine some of the characteristics of deliberative democracy as outlined by Amy Gutmann and Dennis F. Thompson¹⁴⁷ and the role of the representative as articulated by Sunstein.

DEMOCRACY IN THE AGE OF SOCIAL MEDIA, 47 (2017).

¹⁴² Sunstein, *supra* note XX, at 46.

¹⁴³ Christina LaFont, *Is the Ideal of Deliberative Democracy Coherent* 5, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS (Jose Luis Marti & Samantha Besson eds., 2017) (discussing the ideals of deliberative democracy).

¹⁴⁴ *Id.* at 8. See also Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in DELIBERATIVE DEMOCRACY (James Bohman & William Rehg eds., 1997); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY (James Bohman & William Rehg eds., 1997) (political outcomes must be perceived as correct by constituents).

¹⁴⁵ James Bohman & William Rehg, *Introduction* x, in DELIBERATIVE DEMOCRACY (James Bohman & William Rehg eds., 1997) (quoting Immanuel Kant). “As a normative account of legitimacy, deliberative democracy evokes ideals of rational legislation, participatory politics, and civic self-governance. In short, it presents an ideal of political autonomy based on the practical reasoning of citizens.” *Id.* at ix.

¹⁴⁶ For a good overview see DELIBERATIVE DEMOCRACY (James Bohman & William Rehg eds., 1997).

¹⁴⁷ WHY DELIBERATIVE DEMOCRACY, 3-7 (2014).

1. Reason-Giving

According to Gutmann and Thompson, deliberative democracy requires that the objects of legislation be viewed with mutual respect and as autonomous agents, rather than passive players to be ruled.¹⁴⁸ As equals, lawmakers and citizens must exchange reasons that “appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject.”¹⁴⁹ However in the Platform Advocacy context, there is little reasoning exchanged. Most arguments are simply parroted by users. Thus while users may be inspired to protest or contact friends and representatives, their reasoning is hollow. Insincere arguments fall far short of treating listeners with mutual respect.

2. Accessibility

The second fundamental characteristic of deliberative democracy is accessibility. Deliberation should not only come from the deliberation of representatives, but “also in society, among and by debating and deliberating citizens, and by their shaping a ‘public view’ of the common good and expressing a ‘public voice.’”¹⁵⁰ To effect this, individuals must equally have “the cognitive conditions of decision making” that allow a person to understand both the issues and contents of arguments.¹⁵¹ Therefore, reasoning must be available and void of manipulation.¹⁵² As detailed throughout this Article, platforms have the capabilities to cloak issues at play and use framing and design choices to shape user opinions. These capabilities can compromise accessibility at the user level and limit lawmakers access to reasoned arguments and evidence as well. That is, if lawmakers are overwhelmed by a flood of consistent, pre-fabricated arguments, they may find that they do not have access to the whole or even a significant part of the reasoning behind a policy decision.

Access also relates to the opportunities of individuals to have their say.¹⁵³ If certain groups are denied access to public deliberation or treated as inferiors, deliberative democracy is compromised. In the Platform Advocacy context, this can occur

¹⁴⁸ *Id.* at 3.

¹⁴⁹ *Id.*

¹⁵⁰ Antonio Florida, *Participatory Democracy Versus Deliberative Democracy: Elements For A Possible Theoretical Genealogy* 36 (2013), <https://ecpr.eu/Filestore/PaperProposal/71d7f83c-3fe4-4b11-82a2-c151cd3769f4.pdf> (last visited Jan. 21, 2018) (quotes in original).

¹⁵¹ Thomas Christiano, *The Significance of Public Deliberation* 253, in *DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997)

¹⁵² *Id.* at 4 (stating “to justify imposing their will on you, your fellow citizens must give reasons that are comprehensible to you” and vice versa). See also Jack Knight & James Johnson, *What Sort of Equality Does Deliberative Democracy Require?* in *DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997).

¹⁵³ Thomas Christiano, *The Significance of Public Deliberation* 253, in *DELIBERATIVE DEMOCRACY* (James Bohman & William Rehg eds., 1997).

among the groups that do not have access to a large swath of platforms users to amplify their voice. A clear example of this would be the disadvantage of a traditional cab company to voice its support or opposition to ride-sharing legislation vis-à-vis Uber and its legion of connected users.

3. Filtering

A key tenant of deliberative democracy is the filtering role that representatives have. As Sunstein explains, representatives are:

[A]ccountable to the public; their deliberative task [is] not disembodied. The framers thus created political checks designed to ensure that representatives would not stray too far from the desires of their constituents. The result was a hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum.¹⁵⁴

In their roles, representative deliberation falls on a spectrum—from blind reliance on constituent desires to action without constituent input. The ideal representative would fall somewhere in between: she must be able to “understand and interpret the ‘deliberative sense of the community’” by researching issues, debating them, and avoiding the temptation to be swept up by popular and ill-informed passions.¹⁵⁵ However, that is a tall order for any representative, especially in light of current realities.

The founders and even theorists in the late 20th century could never have anticipated how digital technologies could manipulate and spark the passions and interests of the public. Nor could they have anticipated the ability of citizens to directly express their views made possible by the modern Internet—gone are the days when a town hall, letter, or parade were the only way to interact with a representative.¹⁵⁶ Today, a constituent can effortlessly tweet, text, email, or post to representative’s Facebook wall. While much of a representative’s social media and email may be monitored by staffers, there is a great deal of evidence to suggest that lawmakers take notice of aggregated public comments.¹⁵⁷ Furthermore, because of the network

¹⁵⁴ *Id.* at 46-47.

¹⁵⁵ Sunstein, *supra* note XX, at 32 (quoting Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government* 104, in *HOW DEMOCRATIC IS THE CONSTITUTION?* (Robert A. Goldwin & William A. Schambra eds., 1980).

¹⁵⁶ Madisonian ideas of republicanism can also easily classified as “romantic and outmoded” especially in light of special interests and self-interest that pervade our current political system. *Id.* at 76.

¹⁵⁷ CMF, *New Report Outlines How Congress and Citizens Interact on Social Media* (Oct. 14, 2015), <http://www.congressfoundation.org/news/press-releases/1123-new-report-outlines-how-congress-and-citizens-interact-on-social-media>; Jacob R. Straus & Matthew E. Glassman,

effect described above, platforms have enormous user bases, so even if only a small fraction of users participate in an advocacy campaign, policymakers must take notice or fear reelection trouble. These realities inhibit filtering and can negatively affect a representative's ability to create good and just policy.

Democracy depends on leaders being responsive to the preferences of their constituents.¹⁵⁸ However, when preferences are manufactured through elite manipulation, lawmakers must be skeptical.¹⁵⁹ Furthermore, if we allow Platform Advocacy to continue unrestrained, lawmakers may not be able to sift through the tweets, texts, petitions, and emails to discern preferences at all. As the next session explains, there are ways lawmakers can become more skilled at detecting and managing Platform Advocacy.

V. CASE STUDY: FACEBOOK IN INDIA

If you think of a modern monopoly, Facebook is surely one of the first companies that comes to mind. It is responsible for approximately twenty-five percent of all traffic on the Internet and is the primary news source for forty-four percent of Americans.¹⁶⁰ Facebook has incredible power in expected and unexpected ways. Case in point of the unexpected occurred in January of 2012. At that time, researchers ran an experiment to see how Facebook could influence people's emotions. They changed approximately 700,000 users' newsfeeds (the stream of updates and posts that you see when you log on to the site).¹⁶¹ Some people saw more positive posts and others saw more negative ones. This actually changed the

Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications* (2016), <https://fas.org/sgp/crs/misc/R44509.pdf> (finding that all 100 Senators and almost all Representatives have social media accounts and that electronic communications have become the most common method of communication from Congress to constituents); Karen Mossberger, Yonghong Wu & Jared Crawford, *Connecting Citizens and Local Governments? Social Media and Interactivity in Major U.S. Cities*, 30 Gov't Info. Quarterly 351 (2013) (finding that although social media tools are predominately used as "one-way push strategies," they are being increasingly used for open dialogue with citizens); Linton Weeks, *Politics in the Social Media Age: How Tweet It Is*, NPR (Oct. 29, 2010 10:00 AM), <https://www.npr.org/templates/story/story.php?storyId=130873983> (noting that candidates who interact with voters online are seen as more "authentic" than a candidate who relies on staff members to communicate with voters).

¹⁵⁸ ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

¹⁵⁹ James N. Druckman, THE IMPLICATIONS OF FRAMING EFFECTS FOR CITIZEN COMPETENCE (2001), <https://link.springer.com/content/pdf/10.1023/A:1015006907312.pdf> (last visited Jul 26, 2017).

¹⁶⁰ TAPLIN *supra* note 19 at 4; Martin Beck, *Facebook Drives Nearly One-Fourth of All Referred Traffic* (Jan. 26, 2015), <http://marketingland.com/facebook-drives-nearly-one-fourth-referral-traffic-115478>.

¹⁶¹ Adam D. I. Kramer, Jamie E. Guillory, & Jeffrey T. Hancock, *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks*, 111 PROCEEDINGS NAT'L ACADEMY SC. 8788 (2014).

emotions of the users—those users that were manipulated posted more positive or negative posts themselves depending on their experimental group.

Now imagine what would happen if Facebook intentionally manipulated consumer interface to not only nudge people to change their emotions, but to expressly encourage people to vote for a specific candidate or push for a particular policy. This is in fact the Platform Advocacy engaged in in India.

Starting in 2014, Facebook had been working on a project called Internet.org to bring the Internet to millions of unconnected users in India. Under the rhetoric of making “connectivity a human right,” Facebook encouraged Indian telecommunications companies to offer free data access to a suite of sites curated by Facebook, including the social networking site itself.¹⁶² This of course had the added benefit of capturing the untapped Indian market, which would enable Facebook to continue its breakneck growth.

However, the Telecom Regulatory Authority of India (TRAI) decided to consider whether or not India was going to promote net neutrality or allow telecommunication companies to provide free access to certain sites and not others. The TRAI asked for public comment on the issue, which eventually sent Facebook into full campaign mode to stop the threat to Internet.org, later repackaged as “Free Basics.”¹⁶³ As described by the Guardian newspaper, the platform manipulated its interface to encourage its users to influence the TRAI’s decision:

Every user in India who logged into Facebook was greeted with a special message from Facebook, which said: “Free Basics is a first step to connecting 1 billion Indians to the opportunities online. But without your support, it could be banned in a matter of weeks.” Below the message, a large purple button invited users to click and “send email” to the regulator.¹⁶⁴

According to Facebook, sixteen million Indians sent emails to the TRAI encouraging it to allow Facebook to facilitate the free mobile internet service.¹⁶⁵ An incredible response to say the least. The TRAI eventually had to develop

¹⁶² Rahul Bhatia, *The Inside Story of Facebook’s Biggest Setback*, THE GUARDIAN (May 12, 2016), <https://www.theguardian.com/technology/2016/may/12/facebook-free-basics-india-zuckerberg>.

¹⁶³ *Id.* See Aayush Soni, *India Deals Blow to Facebook in People-Powered ‘Net Neutrality’ Row*, THE GUARDIAN (Feb. 8, 2016), <https://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row>.

¹⁶⁴ Bhatia *supra* note 31. See also Matt Stempeck, *Are Uber and Facebook Turning Users Into Lobbyists?* HARV. BUS. REV. (Aug. 11, 2015), <https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists>.

¹⁶⁵ Bhatia *supra* note 31.

computer programs to sift out the avalanche of emails. When they did, they discovered that most of the comments in favor of Free Basics (likely populated by Facebook users) did not answer the questions proposed by the TRAI for comment. TRAI “worried that Free Basics’ supporters were not ‘making informed decisions’ and chastised Facebook for reducing the consultation to a popularity contest.”¹⁶⁶

After much debate, the TRAI decided to prohibit discriminatory tariffs and support net neutrality, which effectively shut down Facebook’s hopes of capturing market share with Free Basics.¹⁶⁷ In the TRAI’s explanatory memorandum, it detailed why net neutrality should be supported and presented a compelling case against Facebook’s simplistic message of “digital equality.”¹⁶⁸ Among the various arguments made by the TRAI to support net neutrality, none were presented to Facebook users by Facebook. For example, the TRAI stated that one service provider charging differential prices for content could damage the “architecture of the internet,” which relies on openness and the ability to link to content.¹⁶⁹ Furthermore, the TRAI was concerned about allowing providers to “define the nature of access,” which would shape users’ experiences and effectively censor the information they see.¹⁷⁰ Despite its lack of success with Platform Advocacy in this context, Facebook demonstrated its ability and willingness to use its platform to mobilize its user base to advocate on its behalf.

The TRAI case leads to several helpful insights about ways to uphold the key characteristics of a healthy deliberative democracy: reason-giving, accessibility, and filtering. First, the TRAI viewed the massive public interest in its request for public comment as suspect. This prompted the TRAI to take steps to identify “authentic messages,” which involved creating computer programs to identify and discount form messages and reject messages that did not respond to the questions presented. This filtering helped lawmakers uncover true constituent concerns and opinions.

Second, the TRAI directly called out Facebook for its Platform Advocacy and urged the platform to take care not to manipulate users. When government bodies recognize forms of manipulation, which reduce access to information, they must not stand naïvely or idly by. By contrast they must speak up, so that platforms realize there is zero tolerance for astroturfing forms of Platform Advocacy.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs for Data Services Regulations* (2016), http://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf [hereinafter TRAI Memorandum]; Catherine Shu, *Facebook’s “Save Free Basics in India” Campaign Provokes Controversy*, TECH CRUNCH (Dec. 15, 2015), <https://techcrunch.com/2015/12/17/save-free-basics/>.

¹⁶⁹ TRAI Memorandum at 9.

¹⁷⁰ *Id.* at 10.

Lastly, the TRAI was able to manage the public response to its decision through a clear articulation of its reasoning in its multi-page explanatory memorandum. This memorandum, widely reported on, but probably not widely read itself, helped educate the public about the pros and cons of the TRAI's decision. Such reasoning helps increase transparency and helps continue to inform and educate the electorate.

VI. RECOMMENDATIONS

This section outlines three recommendations to improve democratic deliberation in the context of Platform Advocacy. Each of these recommendations implicates the First Amendment because of the heightened scrutiny afforded to political, as opposed to commercial, speech.¹⁷¹ Therefore, the First Amendment concerns will be addressed throughout the section.

A. Disclaimer Notices

If platforms decide to use their interface to push a particular political point, then they should be required to provide notice to users that the positions are the opinions of the platform. Such disclaimers would promote access to information. They could be similar to how sponsors of election-related advertising must disclaim who is “responsible for the content of the advertising.”¹⁷² For example, if Google wants to oppose online piracy laws through its platform, it would need to inform users before they digitally sign a petition or are “patched-through” to their congressperson, etc. that Google has a vested business interest in seeing the legislation fail.

In its highly controversial opinion in *Citizens United v. FEC*, the Supreme Court held that the political speech of corporations is entitled to the same constitutional protections as natural persons.¹⁷³ Therefore, the strict scrutiny standard applies for determining constitutionality of laws that may impair political speech. This means the government must prove that the restriction, such as a disclaimer, furthers a compelling governmental interest and is narrowly tailored to achieve that interest.¹⁷⁴

While the Court in *Citizens United* found that outright prohibition on speech close to an election was unconstitutional, the court upheld disclaimer and disclosure

¹⁷¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–64 (1980) (distinguishing commercial and political speech); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (stating “[W]e have long since held that corporations are [covered by the First Amendment]”).

¹⁷² 2 U.S.C. § 441d(d)(2). See also 11 CFR 110.11(b)(1) (asserting that public communications in connection with a federal election must identify who paid for the message).

¹⁷³ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹⁷⁴ *Id.* at 898.

requirements related to the source of funds for election-based advertisements.¹⁷⁵ The court justified its decision by asserting that the government has a compelling interest in making sure the electorate can “make informed decisions and give proper weight to different speakers and messages.”¹⁷⁶

Similarly, the Court has historically upheld disclaimer and disclosure laws related to astroturfing. Most notably in *United States v. Harriss*,¹⁷⁷ which upheld the disclosure requirements in the FRLA.¹⁷⁸ As discussed previously, the FRLA required companies to disclose expenditures related to influencing Federal legislation through “direct communication” or with “direct pressure[.]” on members of Congress.¹⁷⁹ Among the “direct pressure” activities requiring disclosure included an “artificially simulated letter campaign,” which is a classic example of astroturfing.¹⁸⁰ The Court upheld those disclosure requirements based on principles of deliberative democracy. Chief Justice Warren wrote for the court stating:

. . . the American ideal of government by elected representatives depends to no small extent on [the ability of members of Congress] to properly evaluate [the myriad of pressures to which they are regularly subjected]. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.¹⁸¹

As supported by *Citizens United* and *Harriss*, disclaimer laws would further the compelling government interest of ensuring the marketplace of ideas; thereby, allowing citizens and their representatives to deliberate with necessary facts in hand.¹⁸²

B. Outlawing Forced Action and Incentives

Though platforms have yet to require users to reach out to lawmakers before they can continue to participate on a platform, it would only take a small modification to a user interface (similar to accepting terms of service) to force such consumer

¹⁷⁵ The disclosure and disclaimer laws were included in the Bipartisan Campaign Reform Act. *Id.* Only Justice Thomas voted to hold the disclosure requirements unconstitutional. *Id.* at 980-82 (Thomas, J., concurring in part and dissenting in part).

¹⁷⁶ *Id.* at 916.

¹⁷⁷ 34 U.S. 612 (1954).

¹⁷⁸ Ch. 753, 60 Stat. 839 (1946) (codified as amended at 2 U.S.C. §§ 261-70 (1994)) (repealed in 1995).

¹⁷⁹ *Harriss*, 347 U.S. at 620, 623-24.

¹⁸⁰ *Id.* at 620.

¹⁸¹ *Id.* at 625.

¹⁸² See William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. Legis. 32, 39 (2006) (discussing how disclosure comports with the market place of ideas concept, which ensures that the public has access to relevant information).

action. To prevent the potential harms inherent in such forced action, a federal law should be passed to prevent platforms from requiring users to contact any lawmaker or sign any petition before using a platform's service. In addition, platforms should be prohibited from providing any incentive to users for their advocacy, such as a monetary benefit, access to unique platform features, or eligibility for prizes.¹⁸³

The First Amendment analysis prohibiting such forced action and incentives would be similar to a disclaimer requirement. The government clearly has a compelling interest in helping lawmakers make informed decisions and accurately judging the opinions of their constituents. Congress could narrowly tailor its legislation to achieve that interest by identifying specific and unacceptable behavior.

C. Platform Neutrality

Platforms raise more complex questions than the trusts of the late 19th century because their influence extends well beyond economic power. As this Article has demonstrated, platforms can inspire public action through astroturfing, and legally there is very little to stop this form of Platform Advocacy. Therefore, more broadly, lawmakers should consider regulating to ensure "platform neutrality."¹⁸⁴ Platform neutrality would prevent platforms from "distorting either private commerce or the public sphere simply by virtue of their size, network power, or surveillance capacities."¹⁸⁵ This would mean that they would not be able to use their interface to push for one policy over another. Outlining the details of what specific platform neutrality legislation would like is beyond the scope of this Article; however, the justifications for such legislation can be explored.

Platforms have the same massive and captive audiences as Internet Service Providers (ISPs), such as Comcast or Verizon, who often have a monopoly or duopoly in any given market. Previously, the Federal Communications Commission (FCC) took steps to institute a net neutrality regime.¹⁸⁶ After much debate within the FCC and inside the judiciary, the FCC in 2015 issued its 2015 Open Internet Order, which classified the Internet as a Title II telecommunications

¹⁸³ Similar to how it is illegal to offer, solicit, or accept any "expenditure to any person, either to vote or withhold his vote" in a federal election 18 U.S. Code § 597.

¹⁸⁴ Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRES L. 487 (2016).

¹⁸⁵ *Id.* at 489.

¹⁸⁶ *Id.* at 499; Simone A. Friedlander, Note, *Net Neutrality and the FCC's 2015 Open Internet Order*, 31 Berkeley Tech. L.J. 905, 907-908 (2016) (the "net neutrality debate encompasses a range of concerns, including fears of ISPs blocking access to certain content for political, anti-competitive, or censorship reasons; vertically integrated companies favoring or only allowing access to their subsidiaries; and larger, more well-funded competitors denying market entry to smaller sites, services, and companies.").

service.¹⁸⁷ As such, it was subject to common carrier regulations that outlaw discrimination and blocking.¹⁸⁸ In its order, the FCC stated that a net neutrality regime is necessary because ISPs have the economic incentives and are capable of limiting the openness of the Internet.¹⁸⁹ This rule, however, was later changed under the Trump administration.¹⁹⁰ Regardless, platforms have the same incentives and capabilities to hamper the exchange of ideas and influence political processes as ISPs. As Frank Pasquale writes, “When a service has hundreds of millions of users, the acceptance of certain rules for it starts to seem less like overbearing state action than a virtual Magna Carta: rulers acceding to certain minimum standards of due process and inclusion.”¹⁹¹

CONCLUSION

Madison wrote in *The Federalist, No. 10* that democracy requires public views to be passed through “the medium of a chosen body of citizens, whose wisdom may best discern the true interests of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹⁹² However, when a platform engages in astroturfing by directly promoting grassroots activities, concealing relevant information, or exploiting known biases, it can interfere with Madison’s vision. Such forms of Platform Advocacy impede the exchange of ideas and deliberation and provide platforms with the power to craft laws in their favor. Therefore, understanding why and when Platform Advocacy deserves legal intervention is necessary. We must ensure that we have institutions and procedures to “check or moderate unreflective popular sentiments and to promote the rule of deliberative majorities.”¹⁹³ As stated by President Barack Obama at the Hiroshima Peace Memorial in 2016, “Technological progress without an equivalent progress in human institutions can doom us.”¹⁹⁴

¹⁸⁷ FED. COMM’NS COMM’N, FCC-15-24, *IN RE* PROTECTING AND PROMOTING THE OPEN INTERNET (Mar. 12, 2015) [hereinafter 2015 OPEN INTERNET ORDER]. For an excellent discussion of the debates leading up to the FCC’s decision, see *id.*

¹⁸⁸ 2015 OPEN INTERNET ORDER.

¹⁸⁹ *Id.* at ¶ 86.

¹⁹⁰ Brian Fung, *The FCC Just Voted to Repeal Its Net Neutrality Rules, In A Sweeping Act of Deregulation*, WASHINGTON POST (Dec. 17, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/?utm_term=.08c8596d93bc

¹⁹¹ Pasquale *supra* note 111 at 500-501.

¹⁹² ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST WITH LETTERS OF “BRUTUS”* 44 (Terence Ball ed., 2003).

¹⁹³ BESSETTE, *supra* note 87 at 1.

¹⁹⁴ *Text of President Obama’s Speech in Hiroshima, Japan*, N.Y. TIMES (May 27, 2016), https://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html?_r=0.