

Platform Advocacy and the Threat to Deliberative Democracy

Abbey Stemler

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PLATFORM ADVOCACY AND THE THREAT TO DELIBERATIVE DEMOCRACY

ABBIE STEMLER*

ABSTRACT

Businesses have long tried to influence political outcomes, but today, there is a new and potent form of corporate political power—Platform Advocacy. Internet-based platforms, such as Facebook, Google, and Uber, mobilize their user bases through direct solicitation of support and the more troubling exploitation of irrational behavior. Platform Advocacy helps platforms push policy agendas that create favorable legal environments for themselves, thereby strengthening their own dominance in the marketplace. This new form of advocacy will have radical effects on deliberative democracy.

In the age of constant digital noise and uncertainty, it is more important than ever to detect and analyze new forms of political power. This Article will contribute to our understanding of one such new form and provide a way forward to ensure the exceptional power of platforms do not improperly influence consumers and, by extension, lawmakers.

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TABLE OF CONTENTS

I. DEFINING PLATFORM ADVOCACY	109
II. WHEN PLATFORM ADVOCACY BECOMES ASTROTURFING	113
A. The Differences Between Grassroots and Astroturf.....	114
1. The Consent Dimension.....	116
2. The Sincerity Dimension	118
B. Regulatory Environment of Grassroots Lobbying.....	120
III. UNRESTRAINED AND UNNOTICED	125
A. Behavioral Public Choice Theory and Platform Advocacy .	125
1. The Types of Consumer Vulnerabilities	126
2. The Means for Exploiting Consumer Vulnerabilities	130
B. A Perfect Storm for Influence	132
1. The Network Effect.....	132
2. Iteration.....	133
3. Little to No Cost.....	133
IV. PLATFORM ADVOCACY AND DELIBERATIVE DEMOCRACY	135
A. The Fundamentals of Deliberative Democracy	137
1. Reason-Giving	137
2. Accessibility.....	138
3. Filtering.....	138
V. CASE STUDY: FACEBOOK IN INDIA.....	140
VI. RECOMMENDATIONS	142
A. Disclaimer Notices	143
B. Outlawing Forced Action and Incentives	144
C. Embrace Technology to Filter	145
VII. CONCLUSION	146

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 opened your Uber app in New York City in June of 2015, you would have noticed an interesting choice among car options: “de Blasio.”³ If you slid to it, a message would appear: “See What Happens.”⁴ With a simple tap, you would see 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.”⁵ With the email link, it would be easy for you to send a message to stop the proposed bill.⁶

With this simple change to its interface,⁷ Uber caused a deluge of 17,000 emails to City Hall, demanding a stop to the proposed bill.⁸ Uber’s actions are a striking example of what this Article will define as “Platform Advocacy,” or the ability of internet-based platforms (like Uber, Facebook, Airbnb, and Twitter) to mobilize their users to influence lawmakers.⁹

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

2. Mark Zuckerberg, FACEBOOK (Sept. 21, 2017), <https://www.facebook.com/zuck/posts/10104052907253171>.

3. See RACHEL PIPAN & KELLY SHEEHAN, SEE WHAT HAPPENS: HOW A COMMUNICATIONS CAMPAIGN SAVED UBER BILLIONS 6 (2016), http://www.awpagesociety.com/attachments/bd406d9a80a3bc99f921e9c89d851b912bcdef7/store/6c6af73b0ab03635b8db18ba490ef6b3826c92a6f38f8b63904ac2a2247a/final_uber_case.pdf.

4. *Id.*

5. *Id.*

6. *Id.*

7. Carolyn Said, *Airbnb, Uber Cast Themselves as Saviors of the Middle Class*, S.F. 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 (Nov. 16, 2015), <https://www.skyword.com/contentstandard/marketing/tech-giants-as-lobbyists-politics-meets-the-sharing-economy/>.

8. Said, *supra* note 7; see 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.

9. Other ways to describe this phenomenon include “weaponizing” the apps or “grass-roots 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 and groups.” Kenneth T. Andrews & Bob Edwards, *Advocacy Organizations in the*

Platform Advocacy may take many forms from direct solicitation of user support to the more troubling exploitation of malleable user behavior. And, due to platforms' size and reach, Platform Advocacy can help these "modern monopolies"¹⁰ 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.¹¹ This Article will address that gap and make four unique contributions.

In Part I, this Article will define Platform Advocacy. Part II will place Platform Advocacy 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.¹² Astroturfing, an illegitimate form of grassroots advocacy, is designed to give the impression of widespread public support or opposition to a particular issue when such a concern may not broadly exist.¹³ Currently, there are no federal laws and only a smattering of state laws that address the potential threats of astroturfing in the context of Platform Advocacy.¹⁴ This leaves firms highly dependent on their sense of normative ethics to avoid exploiting their unique and powerful positions.¹⁵

U.S. Political Process, 30 ANN. REV. SOC. 479, 481 (2004). It is true that traditional media companies and many other businesses have used their position to advocate for certain political positions throughout history. See generally Benjamin I. Page, *The Mass Media as Political Actors*, 29 PS: POL. SCI. & POL. 20 (1996). However, what distinguishes Platform Advocacy from these activities is the scale, reach, and influence internet-based platforms have over their user bases.

10. The term "modern monopolies" was taken from the book, *Modern Monopolies*. ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY (2016).

11. There are, however, some excellent papers on the concept of e-democracy and e-legislating. See WILLIAM H. DUTTON & MALCOLM PELTU, OXFORD INTERNET INST., RECONFIGURING GOVERNMENT—PUBLIC ENGAGEMENTS: ENHANCING THE COMMUNICATIVE POWER OF CITIZENS 1, 8 (2007), <http://dx.doi.org/10.2139/ssrn.1295337>; K.K. Duvivier, *E-Legislating*, 92 OR. L. REV. 9, 10 (2013). In addition, Elizabeth Pollman's chapter on regulatory affairs in technology-based startups adds a valuable perspective on the political activities and strategies of platforms. Elizabeth Pollman, *The Rise of Regulatory Affairs in Innovative Startups*, in THE HANDBOOK OF LAW AND ENTREPRENEURSHIP IN THE UNITED STATES (D. Gordon Smith & Christine Hurt, eds., forthcoming 2018), <https://ssrn.com/abstract=2880818>.

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

13. *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.").

14. Grassroots lobbying is not considered "lobbying" under federal lobbying disclosure laws. State lobbying laws may regulate grassroots lobbying somewhat but in a piecemeal fashion. EDWARD T. WALKER, GRASSROOTS FOR HIRE: PUBLIC AFFAIRS CONSULTANTS IN AMERICAN DEMOCRACY 201 (2014); see *infra* Part II.

15. Mary Lyn Stoll, *Corporate Political Speech and Moral Obligation*, 132 J. BUS. ETHICS 553, 555 (2015). For a review of the ethical implications of Platform Advocacy, see Abbey Stemler, Todd Haugh, & Joshua Perry, *Code of the Platform* (2018) (paper on file with the authors).

In Part III, this Article will draw upon behavioral public choice theory to anticipate Platform Advocacy's power to influence and mobilize users to create favorable legal environments for platforms. Part III will briefly reflect on the history and future of platforms and argue that extreme network and data network effects magnify the potential for platforms to harm democratic institutions.

In Part IV, this Article will identify how Platform Advocacy may impair the necessary conditions for effective deliberative democracy.¹⁶ Deliberative democracy requires the thoughtful exchange of reasoning among citizens and lawmakers, relying 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 will provide guidance to 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 will contribute to our understanding of one such new form and provide a way to ensure that consumers, and by extension lawmakers, are not improperly influenced by platforms.

I. DEFINING PLATFORM ADVOCACY

Platform Advocacy is action taken by platforms to mobilize their users to directly influence lawmakers. To understand this definition, we first must identify the meaning of a platform.¹⁷

16. This Section follows and expands upon arguments made by Cass Sunstein about how filtered platform content can impair exposure to, exploration of, and deliberation about ideas. CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* (2009); *see also* CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 47 (2017) [hereinafter SUNSTEIN, *#REPUBLIC*].

17. MOAZED & JOHNSON, *supra* note 10, at 29. The term "platform" is used in multiple contexts. It can refer to a piece of technology (for example, an underlying computer system) or computing services (for example, Amazon Web Services). The term is also used among software as a service ("SaaS") companies (for example, Salesforce) that offer an internet-based application platform. These businesses, however, are still linear in that they are selling a product or service to consumers directly. *Id.* at 32–33. *See also* Tarleton Gillespie, *The Politics of 'Platforms,'* 12 *NEW MEDIA & SOCIETY* 347 (2010) (describing the evolution of the word "platform" in the technology

Since the Industrial Revolution and until recently, a majority of the world's most successful businesses (for example, Citigroup, Exxon, and General Electric)¹⁸ have incorporated a linear business model.¹⁹ That is, they primarily produce goods for, or provide services to, intermediaries and customers.²⁰ However, since the internet became available in our homes, workspaces, and pockets, a massive shift took place in the economy. The world's largest companies are now primarily built in whole, or in part, on platforms (for example, Apple, Amazon, Google,²¹ and Facebook) and are the titans of the twenty-first century.²²

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.²³ The first type is an exchange platform, which helps broker transactions between buyers and sellers by reducing search costs and standardizing terms of trade (for example, Uber, Airbnb, and Etsy).²⁴ The second is a maker platform, which involves users distributing some form of digital content (for example, Apple and YouTube).²⁵

Regardless of type, when users choose to use platforms, platforms can surveil and curate their experiences in unprecedented ways.²⁶ Thus, platforms are in a unique position to capture individual attention and manipulate behavior. Take for instance the popular accommodations app Airbnb. Airbnb controls a host's interaction with a potential guest. When a host receives a booking request, Airbnb dictates what information they see about the guest, how they can communicate (that is, only via the platform and only

context). "‘Platforms’ are ‘platforms’ not necessarily because they allow code to be written or run, but because they afford an opportunity to communicate, interact or sell." *Id.* at 351.

18. FINANCIAL TIMES, GLOBAL 500 JUNE 2007 RANKS 1 (2007), <http://im.ft-static.com/content/images/6aec81f8-2bd9-11dc-b498-000b5df10621.pdf>.

19. MOAZED & JOHNSON, *supra* note 10, at 22.

20. *Id.*

21. Google is now operated under the umbrella company, Alphabet. Alyssa Newcomb, *Google Now Under Umbrella Company Called Alphabet*, ABC NEWS (Aug. 10, 2015), <https://abcnews.go.com/Technology/google-now-umbrella-company-called-alphabet/story?id=32998419>.

22. Will Oremus, *Tech Companies Are Dominating the Stock Market as Never Before*, SLATE (July 29, 2016, 4:38 PM), http://www.slate.com/blogs/moneybox/2016/07/29/the_world_s_5_most_valuable_companies_apple_google_microsoft_amazon_facebook.html; see also Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J. (Nov. 13, 2010), <https://www.wsj.com/articles/SB10001424052748704635704575604993311538482>.

23. MOAZED & JOHNSON, *supra* note 10, at 43–44.

24. *Id.*

25. *Id.*

26. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1628 (2017).

with certain information up until a confirmed booking),²⁷ how they eventually get paid, and, to a degree, how much.²⁸

With a captivated, dependent, and unsuspecting user base, platforms become the masters of their digital domains. They are able to use their position to encourage and manipulate users to advocate on their behalf. Platform Advocacy can occur in various ways, but many cases follow a pattern. First, the platform designs the interface so that users must see information or cues about specific legislative, administrative, or other policy issues. The platform can provide this information in a way that piques curiosity and provokes emotions such as outrage. Second, the platform presents information in a light most favorable to it and avoids any suggestion of counterarguments. Third, the platform makes it effortless for users to act—for example, with “Email Now” buttons²⁹ and online petitions—thereby reducing the burdens of advocating on behalf of the company. To see 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!”³⁰ The image aimed to mobilize the public against two bills designed to prevent copyright infringement (the PROTECT IP Act (“PIPA”)³¹ in the Senate and the Stop Online Piracy Act (“SOPA”)³² in the House of Representatives).³³ Clicking the logo or blue link on the bottom would lead users to a page where they could *learn more* about the issue and sign a petition.³⁴ Google framed PIPA and SOPA as attempts by the government to censor people and “criminalize linking and the fundamental structure of the [i]nternet itself.”³⁵

27. For example, Airbnb blocks out phone numbers and email addresses. Bruce Upbin, *How Airbnb Hacked the Reach-Around Problem*, FORBES (Dec. 12, 2010), <https://www.forbes.com/sites/bruceupbin/2010/12/07/how-airbnb-hacked-the-reach-around-problem/>.

28. *Id.*

29. *See infra* Figure 1.

30. *Id.*; *see infra* notes 33–45 and accompanying text.

31. S. 968, 112th Cong. (2011).

32. H.R. 3261, 112th Cong. (2011).

33. *See* JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY 127 (2017).

34. Mike Masnick, *Google Goes Big with Its SOPA/PIPA Protests; Blacks out Logo*, TECHDIRT (Jan. 17, 2012, 10:00 PM), <https://www.techdirt.com/articles/20120117/21305017444/google-goes-big-with-its-sopapipa-protests-blacks-out-logo.shtml>.

35. Gautham Nagesh, *Google Chairman Says Online Piracy Bill Would “Criminalize” the Internet*, THE HILL (Dec. 12, 2011, 7:11 PM) (quoting Eric Schmidt, Google’s Executive Chairman), <http://thehill.com/policy/technology/198777-google-chairman-says-online-piracy-bill-would-criminalize-linking>; *see also* David Drummond, *Don’t Censor the Web*, GOOGLE: OFFICIAL BLOG (Jan. 17, 2012), <https://googleblog.blogspot.com/2012/01/dont-censor-web.html>. “Linking” in this context refers to a website connecting a user to another website through a hyperlink.

The image was viewed by 1.8 billion³⁶ people and was part of a larger campaign by other popular websites, such as Wikipedia and Reddit.³⁷ Due in part to Google's Platform Advocacy, 2,000 calls per second to Congress were attempted,³⁸ over 350 thousand emails were sent,³⁹ and 4.5 million people signed Google's petition.⁴⁰ As a result, Congress quickly withdrew the bills.⁴¹

FIGURE 1: GOOGLE'S HOMEPAGE DURING THE SOPA AND PIPA PROTEST⁴²



We can apply the typical Platform Advocacy pattern to Google's campaign. First, if users wanted to use Google's search service, they were forced to see the black box over the Google logo. This provocative image encouraged users to click to satisfy their curiosity. Second, Google framed the issue in terms of censorship as opposed to the enforcement of property rights and prevention of piracy.⁴³ This framing is understandable given the potentially

36. TAPLIN, *supra* note 33, at 127.

37. See Duvivier, *supra* note 11, at 66; Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 403–06 (2017).

38. Jenna Wortham, *With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscles*, N.Y. TIMES (Jan. 18, 2012), <https://www.nytimes.com/2012/01/19/technology/protests-of-anti-piracy-bills-unite-web.html>.

39. Chenda Ngak, *SOPA and PIPA Internet Blackout Aftermath, Staggering Numbers*, CBS NEWS (Dec. 19, 2012), <https://www.cbsnews.com/news/sopa-and-pipa-internet-blackout-aftermath-staggering-numbers/>.

40. *Id.*

41. TAPLIN, *supra* note 33, at 127.

42. This image was posted by Google on January 17, 2012 and can be found on Wikimedia Commons. *File:Google Doodle Censored 2.png*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:Google_Doodle_Censored_2.png (Jan. 18, 2012).

43. Jim Abrams, *PIPA and SOPA: What You Need to Know*, CHRISTIAN SCI. MONITOR (Jan. 19, 2012), <http://www.csmonitor.com/Technology/2012/0119/PIPA-and-SOPA-What-you-need-to-know>; Scott Cleland, *The Real Reasons Google Killed SOPA/PIPA*, FORBES (Jan. 24, 2012),

harmful impact PIPA and SOPA could have on Google's business model in terms of enforcement costs and liability.⁴⁴ But unless users took the initiative to research the objectives of the legislation or counterarguments to Google's position, users were not making an informed choice. Third, users could (and many did) simply sign the petition that Google designed to reduce the burdens of advocacy.⁴⁵

PIPA and SOPA were certainly controversial bills, and it is possible that individuals would have sided with Google's viewpoint 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. Moving forward, this Article explores this ability and its potential consequences.

II. WHEN PLATFORM ADVOCACY BECOMES ASTROTURFING

From the French Revolution to the #MeToo movement,⁴⁶ grassroots activities have shaped politics and society.⁴⁷ As suggested by the late William Safire, grassroots advocacy is "[t]he ultimate source of power" because it appears to capture the natural and independent will of the electorate.⁴⁸ Unfortunately, grassroots advocacy's "up-from-the-people" imagery, which envisions populist responses to the public's unmet needs and desires, is sometimes more myth than reality.⁴⁹ This myth is particularly true for grassroots

<https://www.forbes.com/sites/scottcleland/2012/01/24/the-real-reasons-google-killed-sopapipa/#34f44cf04530>.

44. Cleland, *supra* note 43.

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

46. ME TOO, <https://metoomvmt.org> (last visited Sept. 11, 2018).

47. Jon Van Til et al., *Grassroots Social Movements and the Shaping of History*, in HANDBOOK OF COMMUNITY MOVEMENTS AND LOCAL ORGANIZATIONS 362 (Ram A. Cnaan & Carl Milofsky eds., 2008).

48. WALKER, *supra* note 14, at 20; WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 289 (Oxford University Press 2008) (1968).

49. WALKER, *supra* note 14, 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").

forms of lobbying⁵⁰ because special interest groups and corporations are better equipped to fuel campaigns.⁵¹ While grassroots lobbying is effective,⁵² when it is orchestrated by businesses, its authenticity and thus its helpfulness for encouraging meaningful deliberation is reduced.⁵³ Further, this form of astroturfing mostly escapes a range of federal lobbying regulations designed to curtail the manipulation of citizens for political gains.⁵⁴

This Part first details the differences between grassroots lobbying and astroturfing and describes how Platform Advocacy can slip into the latter. 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 pin down,⁵⁵ it is not difficult to envision what is meant by the term. Images of groundswells

50. Contrary to grassroots lobbying, direct lobbying 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, <https://www.irs.gov/charities-non-profits/direct-and-grass-roots-lobbying-defined> (last updated Aug. 20, 2018).

51. WALKER, *supra* note 14, at 20–21. Walker identifies the field of consulting firms that offer services to create grassroots lobbying campaigns as “grassroots for hire.” *Id.* at 21.

52. See, e.g., Daniel E. Bergan, *Does Grassroots Lobbying Work? A Field Experiment Measuring the Effects of an E-Mail Lobbying Campaign on Legislative Behavior*, 37 AM. POL. RES. 327, 327 (2009) (finding that “lobbying by e-mail has a substantial influence on legislative voting behavior”).

53. For example, there are sincere beliefs among supporters of President Trump that protests by people who oppose President Trump’s policies are paid. Patrick J. Kiger, *Do Paid Protesters Really Exist?*, HOWSTUFFWORKS (May 30, 2017), <https://people.howstuffworks.com/do-paid-protesters-really-exist.htm>. And, President Trump stated he believed this to be true even though it was thoroughly discredited. Steve Contorno, *Trump Says Clinton and Obama Paid People to Cause Violence at His Rallies*, POLITIFACT (Oct. 20, 2016, 2:29 AM), <https://www.politifact.com/truth-o-meter/article/2016/oct/20/trump-says-clinton-and-obama-caused-violence-his-r/> (reporting that at the final presidential debate in 2016, President Trump stated, “‘I was wondering what happened with my rally in Chicago and other rallies where we had such violence. [Clinton is] the one, and Obama, that caused the violence. They hired people, they paid them \$1,500, and they’re on tape saying, be violent, cause fights, do bad things’”). This belief surrounding paid protestors delegitimizes arguments made by people who oppose President Trump and discourages respectful and meaningful debate.

54. Several states do regulate grassroots lobbying. For example, in the state of Washington, sponsors of grassroots lobbying campaigns who spend \$1,000 in three months or \$500 in any one month must report their activities to the state. WASH. REV. CODE ANN. § 42.17A.640 (2012). For a comprehensive overview of state regulations, see JEFFREY MILYO, INST. FOR JUSTICE, *MOWING DOWN THE GRASSROOTS: HOW GRASSROOTS LOBBYING DISCLOSURE LAWS SUPPRESS POLITICAL PARTICIPATION* 9–11 (2010), https://www.ij.org/images/pdf_folder/washington/mowing_down_the_grassroots.pdf.

55. See SAFIRE, *supra* note 48, at 289 (explaining the origins of the word “grassroots”); Ryan Sager, Opinion, *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.” Zellner,

of support for particular issues in the form of marches, petitions, letters, emails, and Twitter campaigns come to mind.⁵⁶ Clear examples include the Black Lives Matter movement of 2013 and the “resistance movement” triggered by the election of President Donald Trump.⁵⁷ Such activities are often difficult to ignore because they carpet mainstream media and capture 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. Organizations can covertly stimulate tweets and social media posts via bots and other techniques.⁵⁸ They can bury opposing viewpoints with clickbait and distractions.⁵⁹ For example, during the 2012 Mexican election, the Institutional Revolutionary Party used bots to create Twitter trends that fired up public interest about irrelevant issues and controversies in order to distract people from stories that were harmful to the party.⁶⁰

In an instant, organizations can disseminate calls-to-action to millions based on misleading information that can lead to actual protests.⁶¹ Such forms

supra note 12, at 362. At the time, he was referring to constituent mail generated by insurance companies. *Id.*

56. 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.” 26 CFR § 56.4911-2(b)(2) (2017). 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.” *Id.*

57. Joshua Holland, *Your Guide to the Sprawling New Anti-Trump Resistance Movement*, NATION (Feb. 6, 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*, CHI. TRIB. (Mar. 4, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-health-care-democrats-20170324-story.html>; see 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>.

58. See, e.g., Molly K. McKew, *How Twitter Bots and Trump Fans Made #ReleaseTheMemo Go Viral*, POLITICO MAG. (Feb. 4, 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); George Monbiot, *The Need to Protect the Internet from “Astroturfing” Grows Ever More Urgent*, GUARDIAN (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).

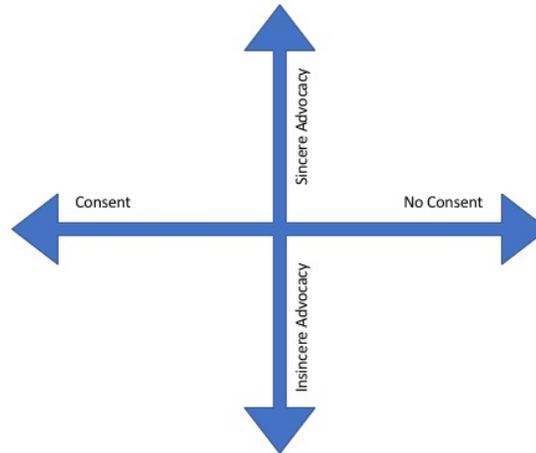
59. See, e.g., *Reply All: #112 The Prophet*, GIMLET MEDIA (Dec. 15, 2017), <https://gimlet-media.com/episode/112-the-prophet/>.

60. Emma Woollacott, *Why Fake Twitter Accounts Are a Political Problem*, NEWSTATESMAN (May 28, 2014), <http://www.newstatesman.com/sci-tech/2014/05/why-fake-twitter-accounts-are-political-problem>.

61. See, e.g., Maya Kosoff, *How Russia Secretly Orchestrated Dozens of U.S. Protests*, VANITY FAIR (Oct. 30, 2017), <https://www.vanityfair.com/news/2017/10/how-russia-secretly-or>

of manipulation and deception are harmful to public debate and consensus building, revealing 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 makes it challenging to identify universal characteristics; however, there are two main dimensions that can be used to assess the legitimacy of grassroots lobbying: consent and sincerity of beliefs.⁶² The following Sections assess and describe each of these dimensions at the individual user level in the context of Platform Advocacy.

1. *The Consent Dimension*

In order for Platform Advocacy to move toward authenticity, users must voluntarily give their consent before their names 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.

chestrated-dozens-of-us-protests (describing how Russian agents used Facebook to organize protests in order to encourage political division in the U.S.); Rebecca Shapiro, *Chobani Sues Alex Jones for Posting Vicious Fake News Stories*, HUFFINGTON POST (Apr. 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. L. & TECH. 1, 2 (2016).

62. See *supra* Figure 2.

Most egregiously, platforms can make it appear that users have given consent to advocacy even when they in fact have not. In this situation, there is zero transparency. For example, the *Wall Street Journal* (“WSJ”) reported that thousands of comments on federal agency websites are posted (most likely by bots) without the user’s permission.⁶³ This was particularly true during the lead-up to the Federal Communications Commission’s (“FCC”) controversial decision to repeal net-neutrality regulations put in place during President Barack Obama’s administration. According to the WSJ, more than seventy percent of comments related to the FCC rules were falsely submitted.⁶⁴ Though many of these comments came from a Russia-based mailing address,⁶⁵ platforms too have the same capability to use personal information in improper ways.⁶⁶ And, unlike other forms of Platform Advocacy, impersonating users in this way would likely be a felony.⁶⁷

Similar to pure lack of consent, situations where platforms give users no choice but to advocate on their behalf pushes advocacy toward astroturfing. For example, Uber could require a user to send a message to their lawmaker before they could get a ride. In this hypothetical situation, the user’s sincerity would be questionable. This is especially true since many platforms, such as Google, Facebook, and Uber, provide needed services (namely, information and transportation).

An easier and less sinister way platforms could reduce the consent dimension of advocacy is through punishment.⁶⁸ Punishments, such as denial of privileges, are common when users do not agree to certain terms and conditions. For example, YouTube could make viewers watch a short political message and then complete a simple poll before they could move on to their next cat video. That form of punishment would likely have a great impact on

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

64. *Id.*

65. Brian Fung, *FCC Net Neutrality Process “Corrupted” by Fake Comments and Vanishing Consumer Complaints, Officials Say*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.f65a3b3abcff.

66. This Article is in no way suggesting that the platforms discussed in this Article have intentionally submitted false comments.

67. 18 U.S.C. § 1001(a) (2012) (“[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 [five] years or, if the offense involves international or domestic terrorism (as defined in [S]ection 2331), imprisoned not more than [eight] years, or both.”).

68. For example, Facebook’s manipulation of voter behavior described in *infra* Part II.A.1.b could be an example of public shaming—a form of punishment. If your name was not listed on other’s pages because you did not vote, you may feel compelled to vote even though you do not wish to or have a particular affinity for any of the candidates.

political behavior.⁶⁹ Consent may also be improperly obtained when platforms exploit known flaws in decision making. As described in Part III, this manipulation is largely unrestrained and unnoticed, making it the most concerning method of Platform Advocacy.⁷⁰

From forged comments to the use of proverbial sticks and the exploitation of cognitive biases, platforms have a wide range of methods at their disposal to push the consent dimension of advocacy toward astroturfing. Further, the use of these methods is low-cost and effective because platforms mediate user interactions, which gives them power to control and influence behavior.⁷¹ But, as we will see, platforms can abuse this power, especially by those firms with questionable ethics.⁷²

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.⁷³ However, when the advocates do not actually hold the beliefs they agitate, advocacy trends toward astroturfing. There are several reasons why a user may not actually hold a position to which they *voluntarily* lend their name, time, and energy. The following Sections describe these reasons.

a. *Direct Incentives*

First, a person may voluntarily consent to advocate on behalf of a platform if the platform provides a wanted reward for the advocacy. Payment for protest in whatever form is classic astroturfing and immediately raises questions of legitimacy.⁷⁴ As with the use of direct incentives to get users’

69. The use of carrots, such as rewards and extra benefits, are assessed as a part of the sincerity dimension described in the Section below.

70. See *infra* Part III.

71. See Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1002–03 (2014) (describing how the “mediated consumer” is the consumer of the future in that they will “approach[] the marketplace through technology”).

72. Uber, for example, has had a number of ethical lapses. Kate Taylor, *40 of the Biggest Scandals in Uber’s History*, BUS. INSIDER (Nov. 24, 2017), <https://www.businessinsider.com/uber-company-scandals-and-controversies-2017-11> (linking to various articles related to Uber’s ethical lapses).

73. See *Carey v. Brown*, 447 U.S. 455, 467 (1980) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931))); Stacey D. Schesser, Note, *A New Domain for Public Speech: Opening Public Spaces Online*, 94 CAL. L. REV. 1791, 1792 (2006).

74. 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*

contact information or to recommend a product or service to a friend, platforms can easily use similar incentives in exchange for advocacy.⁷⁵

b. Concealment

The second way platforms 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.⁷⁶ The community leaders were often unaware of the bills' content or Intuit's interest in them, and when questioned, many of the leaders who advocated against the bill changed their minds.⁷⁷

In the Platform Advocacy context, in 2014, Lyft and Uber were in a heated battle with regulators after two bills⁷⁸ toughening ride-sharing requirements were introduced in the California statehouse.⁷⁹ Lyft partnered with Phone2Action, a company that facilitates contact between citizens and lawmakers, to capture the attention of its users.⁸⁰ With Phone2Action's help, Lyft successfully targeted its passengers and drivers to defeat portions of the bills that would require driver background checks and drug testing.⁸¹ Customers were never told, however, that the proposed bills could actually protect them.⁸²

Town Hall Protesters Are Being Paid, POLITICO (Feb. 24, 2017, 5:28 AM), <http://www.politico.com/story/2017/02/town-hall-protesters-paid-no-evidence-235321>; see *supra* note 53.

75. For example, Uber offers credits for referring others to the platform. *Earning Free Rides*, UBER, <https://help.uber.com/h/27ecd6af-4929-4c53-a81c-f9fbf2432fd4> (last visited Sept. 11, 2018). Airbnb does the same. *Airbnb Referral Program Terms and Conditions*, AIRBNB, <https://www.airbnb.com/help/article/2269/airbnb-referral-program-terms-and-conditions> (last updated May 10, 2018).

76. Liz Day, *TurboTax Maker Linked to "Grassroots" Campaign Against Free, Simple Tax Filing*, PROPUBLICA (Apr. 14, 2014, 9:33 AM), <https://www.propublica.org/article/turbotax-maker-linked-to-grassroots-campaign-against-free-simple-tax-filing>.

77. *Id.*

78. A.B. 2293, 2013–14 Leg., Reg. Sess. (Cal. 2014); A.B. 612, 2013–14 Leg., Reg. Sess. (Cal. 2013).

79. Carolyn Said, *Uber, Lyft, Airbnb Harness Users to Lobby Lawmakers for Them*, SFGATE (Jan. 11, 2015), <https://www.sfgate.com/business/article/Uber-Lyft-Airbnb-harness-users-to-lobby-6005562.php>.

80. *Id.*

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

82. The two bills Lyft "aggressively" lobbied against would have mandated more extensive background checks, insurance requirements, and drug testing. *Id.*; Josh Richman, *Uber, Lyft, Sidecar Fight to Block New California Regulations*, MERCURY NEWS (Aug. 12, 2016), <https://www.mercurynews.com/2014/08/13/uber-lyft-sidecar-fight-to-block-new-california-regulations/>; see also *supra* note 78. Since 2014, Lyft used Phone2Action's tools to modify their user interface and encourage people to contact their lawmakers in more than fifty states. *Lyft: Supporting*

c. Exploiting Cognitive Biases

Also discussed more fully in Part III, platforms can exploit known cognitive biases, such as herd behavior,⁸³ 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. Free Basics would give complimentary internet access to a limited number of websites throughout India.⁸⁴ 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 contacted their lawmakers about Free Basics, which in turn encouraged others to send messages to lawmakers.⁸⁵ This extreme example of exploiting the herding effect likely led to inauthentic support for the issue.

Government policies profoundly shape businesses; thus, it is well within businesses' rights to encourage their users to publicly support them in order to create favorable regulations. However, when the consent dimension of Platform Advocacy trends toward acquiescence or the sincerity dimension falls toward disingenuousness, Platform Advocacy can be detrimental to society.⁸⁶ The lack of a clear regulatory framework to protect citizens and lawmakers from such forms of astroturfing compounds these harms.

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 with the House Clerk.⁸⁷ After World War II, Congress passed

the Sharing Economy, PHONE2ACTION, https://phone2action.com/wp-content/uploads/2018/01/P2A_Client_Lyft_CaseStudy_Redesign_F2.pdf (last visited Sept. 11, 2018).

83. With herd behavior, people simply follow along with what other people do as opposed to using their own judgment. Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 993–94 (1992); Cass R. Sunstein, *Deliberative Trouble?*, 110 YALE L.J. 71, 82–83 (2000) (referring to herding as “informational cascades”). “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.” Leiser, *supra* note 61, at 5 (citing Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999)).

84. *See infra* Part V.

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

86. For a complete discussion of these harms, *see infra* Part IV.

87. CRAIG HOLMAN, PUB. CITIZEN, ORIGINS, EVOLUTION AND STRUCTURE OF THE LOBBYING DISCLOSURE ACT 2–3 (2006) (citing Stacie Fatka & Jason Miles Levien, Note, *Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution*, 35 HARV. J. ON LEGIS. 559, 569 (1998)), <http://www.consumerwatch.org/documents/Origins%20of%20Lobbying%20Disclosure%20Act.pdf>.

a comprehensive lobbying statute, the Federal Regulation of Lobbying Act of 1946 (“FRLA”),⁸⁸ aimed at further registration and disclosure of lobbying activities.⁸⁹ 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.⁹⁰ The FRLA, however, was repealed and replaced in 1995 by the Lobbying Disclosure Act (“LDA”),⁹¹ which did not contain a grassroots lobbying provision.⁹² According to the LDA’s legislative history, Congress was concerned that disclosure requirements related to grassroots lobbying would brush too closely against First Amendment protections.⁹³ Since 1995, several attempts were made at the federal level to require disclosure of payments and expenditures for grassroots or astroturf lobbying, but all failed.⁹⁴

88. Federal Regulation of Lobbying Act of 1946, ch. 753, 60 Stat. 839 (repealed 1995).

89. HOLMAN, *supra* note 87, at 2–3.

90. *United States v. Harriss*, 347 U.S. 612, 620, 623–24 (1954).

91. 2 U.S.C. §§ 1601–1614 (2012).

92. HOLMAN, *supra* note 87, at 8, 16.

93. GUIDE TO INTEREST GROUPS AND LOBBYING IN THE UNITED STATES 385 (Burdett A. Loomis et al. eds., 2012). Jeanne Woods testified on behalf of the American Civil Liberties Union and argued 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.” *Lobbying Disclosure Act of 1993: Hearing on H.R. 823 Before the Subcomm. on Admin. Law and Governmental Relations of H. Comm. on the Judiciary*, 103d Cong. 255 (1993) (statement of Jeanne M. Woods, Legislative Counsel, American Civil Liberties Union). There, however, is one major exception to this for 501(c)(3) organizations, which are non-profit organizations that are exempt from federal income taxes. The LDA imposes a disclosure requirement and a cap on grassroots lobbying for organizations that choose to lobby under Section 501(h) of the Internal Revenue Code, but this election is not required if the non-profit chooses not to participate in grassroots lobbying activities. I.R.C. § 501(h) (2012); NAT’L COUNCIL OF NONPROFITS, TAKING THE 501(H) ELECTION, <https://www.councilofnonprofits.org/taking-the-501h-election> (last visited Sept. 11, 2018); VENABLE LLP, ASSOC. OF CORP. COUNS., LOBBYING: WHAT DOES IT MEAN FOR 501(C)(3) ORGANIZATIONS? (2011), <http://www.acc.com/legalresources/quickcounsel/lwdimf501c3o.cfm?makepdf=1>.

94. A proposed amendment to 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.” S. 1, 110th Cong. § 220(a)(2) (as introduced to the Senate on Jan. 4, 2007). The amendment would have required lobbyists to register grassroots activity “[no] later than 45 days after a grassroots lobbying firm first is retained by a client to engage in paid efforts to stimulate grassroots lobbying.” *Id.* § 220(b)(2); *see also* Zellner, *supra* note 12, 365–67. Amendment No. 20 to the LDA struck down this proposal. 153 CONG. REC. S647–65 (daily ed. Jan. 17, 2007). There was concern that reporting requirements would have a “chilling effect” on constitutionally protected political speech. *Id.* at S649–650. The congressional record shows that lawmakers considered the term “grassroots lobbying” broader than necessary to protect Congress from “Astroturf campaigns,” and Senators reasoned that the Supreme Court would eventually rule it unconstitutional. *Id.* at S648; *see also* JACK MASKELL, CONG. RESEARCH SERV., RL33794, GRASSROOTS LOBBYING: CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS 2 (2008), https://www.everycrsreport.com/files/20080226_RL33794_49f42760dd1d784919ab547237248db6838c0791.pdf (describing the 109th and 110th Congresses’ attempts to regulate activities intended to stimulate grassroots lobbying).

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 lawmakers;⁹⁵ in others, it is based on the activity itself without regard to a spending threshold.⁹⁶ For states with spending thresholds, Platform Advocacy would rarely trigger disclosure requirements because platforms can engage in advocacy at little to no cost; computer code need only be changed once to alter user interaction with the platform, and transmission is effortless.⁹⁷ Even for the states that do require disclosure based on the advocacy itself, few people actually seek out disclosed information.⁹⁸ Thus, disclosure does little to deter artificially stimulated grassroots campaigns; if no one sees that a campaign is sponsored by a platform, they are unlikely to perceive it as inauthentic. In addition, those who seek out such information are more likely to be passionate about the opposing side of whatever is at issue. As a result, there will be little deliberation among the two sides.

Disclaimer notices detailing who sponsored a particular request for participation are more effective at curtailing the harms presented by Platform Advocacy, because the public can quickly assess the credibility of claims for themselves.⁹⁹ However, under the Bipartisan Campaign Reform Act of 2002,¹⁰⁰ disclaimer notices only apply to communications made by “political

95. CAL. GOV'T CODE § 86115(b) (West 2017) (imposing a \$5,000 threshold for grassroots lobbying expenditures in a calendar quarter); ME. REV. STAT. ANN. tit. 3, § 317 (2016) (imposing a \$15,000 threshold for indirect lobbying expenses per calendar month); N.M. STAT. ANN. § 2-11-6(I) (LexisNexis 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 ninety-day period for grassroots lobbying expenses).

96. FLA. STAT. ANN. § 11.045(2) (West 2014) (requiring reporting for any person who is employed and receives payment for lobbying); MO. REV. STAT. § 105.473 (West 2015) (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 (LexisNexis 2018) (requiring registration of any person employed by any other person in a representative capacity regarding legislation or state action).

97. If opportunity costs are not considered.

98. See DICK M. CARPENTER II, INST. FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 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 Zellner, *supra* note 12.

99. ROBERT WECHSLER, CITY ETHICS, INC., THE REGULATION OF LOCAL LOBBYING 62, 64–65 (2016), <http://www.cityethics.org/files/Regulation-of-Local-Lobbying-Robert-Wechsler.pdf>; Zellner, *supra* note 12, at 390, 394–95 (arguing that the *McConnell v. FEC*, 540 U.S. 93 (2003), 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” (emphasis added)).

100. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 36 and 52 U.S.C.).

committees,” which platforms are not,¹⁰¹ or “electioneering communication[s],” which are specifically limited to communications about clearly identified candidates for federal office and not policy issues at the heart of most grassroots campaigns.¹⁰² Furthermore, even if indirect pressure were 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.¹⁰³

Most states have disclaimer laws, but they are often 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.¹⁰⁴ The laws cover advertisements through traditional forums (for example, print, newspaper, and billboard), but many are opaque about disclosure requirements for internet advertisements.¹⁰⁵ Some states have a catch-all that encompasses the internet. For example, in 2014 the NCSL argued that under Idaho law, internet communications presumably fall

101. 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 [S]ection 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. § 30101(4) (2012).

102. 11 C.F.R. § 100.29(a) (2017). 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.

Id.

103. *See id.* § 110.11(f)(1)(i)–(ii). Even though the Federal Election Commission (“FEC”) has not determined 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*, WIRE (Sept. 22, 2017, 6:24 PM), <https://www.wired.com/story/why-facebook-will-struggle-to-regulate-political-ads/>.

104. Austin Graham, *Paid for by Whom? Disclaimer Requirements in the Digital Age*, NAT’L CONF. OF ST. LEGISLATURE BLOG (July 17, 2014), <http://www.ncsl.org/blog/2014/07/17/paid-for-by-whom-disclaimer-requirements-in-the-digital-age.aspx>.

105. *Id.*

under “any other type of general public political advertising.”¹⁰⁶ A dozen states have explicit disclaimer laws for internet advertisements.¹⁰⁷

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 to regulate them. The Federal Trade Commission’s (“FTC”) jurisdiction, as it relates to deceptive advertising, only applies to activities designed to make consumers purchase something but not to activities that make consumers contact their lawmakers.¹⁰⁸

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,¹⁰⁹ the substance of the election,¹¹⁰ or some combination thereof.¹¹¹ However, the impact of these laws has been limited because of the judicial protection afforded to political speech.¹¹² For example, in *Nevada Press Ass’n v. Nevada Commission on Ethics*,¹¹³ Nevada’s false statement law was ruled unconstitutional because it permitted punishment of protected First Amendment political speech, and its abbreviated dispute resolution procedures violated due process requirements.¹¹⁴ Furthermore, state statutes that were written before the modern internet may not be broad enough to encompass false statements and deceptive tactics

106. *Id.*; see, e.g., IDAHO CODE § 67-6614A (2014).

107. Megan Moore, St. Admin. and Veterans’ Aff. Interim Committee, Briefing on Laws Related to Campaign Advertising Disclaimers in Other States 5, 8 (2012), <http://leg.mt.gov/content/Committees/Interim/2011-2012/State-Administration-and-Veterans-Affairs/Meeting-Documents/April%202012/OTHER%20STATES%20ANON.pdf>.

108. 15 U.S.C. § 456(2) (2012). 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.” *Id.*

109. 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 (2016).

110. These laws prohibit false statements regarding candidates and political 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(a)(3) (2016).

111. COMMON CAUSE ET AL., DECEPTIVE PRACTICES 2.0: LEGAL AND POLICY RESPONSES 5 (2008), <https://www.commoncause.org/resource/deceptive-practices-2-0-legal-and-policy-responses/>.

112. 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>.

113. No. CV-S-02-1195-LDG (RJJ), 2005 U.S. Dist. LEXIS 4923 (D. Nev. Mar. 26, 2005).

114. *Id.* at *9–19.

online.¹¹⁵ Instead, for example, they might only prohibit communications via leaflets or phone calls.¹¹⁶

As a result of the insufficiency of federal regulations and patchwork of state rules, it is generally lawful for companies to directly or indirectly request users to advocate for a particular candidate or policy. However, with new forms of digital communication (for example, texts, emails, and online comment submissions), it is easier than ever before for individual voices to be influenced and *heard* by lawmakers.

III. UNRESTRAINED AND UNNOTICED

The previous Part identified, in broad strokes, how to detect astroturfing in the context of Platform Advocacy and described how such behavior is largely unregulated. This Part focuses on the subtler, yet perhaps most powerful and ethically dubious, aspects of Platform Advocacy. In particular, how in unique and unprecedented ways platforms can and do exploit cognitive biases among users. These shrewd forms of manipulation, which again are enabled by modern technology, can profoundly impact political participation.

To demonstrate these propositions, this Part first discusses the role of behavioral economics in the context of political participation. The remaining Section applies the insights of behavioral public choice theory to Platform Advocacy.

A. Behavioral Public Choice Theory 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.¹¹⁷ It suggests that citizens are rational and self-interested and that they make decisions to advance their own private interests in order to maximize utility.¹¹⁸ This often means that individuals may decide not to participate in democratic activities because the costs of participation outweigh the benefits.¹¹⁹ As a result, apathy molds the law around special

115. COMMON CAUSE ET AL., *supra* note 111, at 5.

116. *Id.*

117. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 3–9 (1962); *THE THEORY OF PUBLIC CHOICE—II* 13 (James M. Buchanan & Robert D. Tollison eds., 1984).

118. EAMONN BUTLER, *PUBLIC CHOICE—A PRIMER* 25 (2012).

119. *See, e.g.*, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 45–47 (1957); 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). Public choice theory is not the only way to look at political participation. People engage in the political process for a variety of reasons, including the “Kantian” desire to act in a way that you want other people to act. GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* 1–18 (1993); A.C. Ewing, *What Would Happen If Everybody Acted Like Me?* 28 *PHILOSOPHY* 16, 16 (1953); Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psycholog-*

interests.¹²⁰ However, when conceptions of what is in their or society's best interest are influenced by platforms and the barriers to action are low, people will more readily act without considering the pros and cons of their choices. The field of behavioral economics can shed light on why this is the case.¹²¹

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 paradigm)—whether or not these factors are psychological, sociological, anthropological, or others."¹²² The application of behavioral economics to public choice theory led to the development of behavioral public choice theory ("BPCT").¹²³

With the help of BPCT, we can see the confluence of both identification and exploitation of consumer vulnerabilities. The first Section below identifies some of these consumer vulnerabilities, and the second Section describes how platforms could 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

ical Analysis of the Causes of Voter Turnout, 64 J. SOC. ISSUES 525, 536 (2008); Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505, 592–93 (1982). For the sake of argument this Article focuses on the explanations provided by public choice theory and behavioral economics.

120. Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 919 (1994).

121. For an overview of behavioral economics and the law, see generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

122. Amitai Etzioni, *Behavioral Economics: Toward a New Paradigm*, 55 AM. BEHAV. SCIENTIST 1099, 1100 (2011). "Neoclassical economics" is a complex concept but often calls to mind the ideas that individuals are rational actors and make decisions based on what will maximize benefits for them. Christian Arnspurger & Yanis Varoufakis, *What Is Neoclassical Economics? The Three Axioms Responsible for Its Theoretical Oeuvre, Practical Irrelevance and, thus, Discursive Power*, 53 PANOECONOMICUS 5, 5, 13 (2006) (describing how neoclassical economics is misunderstood and defining the field).

123. 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 . . .").

to exert effort increases less than thoughtful behavior.¹²⁴ In the Platform Advocacy context, there are many ways platforms can encourage people to take political action.¹²⁵ This Section outlines four examples.

a. Intention Heuristic

Heuristics are mental shortcuts that allow people to quickly and efficiently make decisions; however, they can also introduce errors.¹²⁶ The intention heuristic is a proxy that leads people to believe that good things flow from good intentions and bad things flow from bad intentions.¹²⁷ Therefore, if people trust a platform, which they generally do,¹²⁸ they will think the policy positions of those platforms are good. Take Lyft, for example. It is generally viewed as the more ethical and “friendly company” when compared to Uber.¹²⁹ Therefore, when asked to support legislation protecting it, Lyft passengers are less likely to 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.¹³⁰

124. *Id.* at 203 (explaining how people rarely think 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. PSYCHOLOGIST 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.*

125. 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.” Lucas & Tasic, *supra* note 123, at 265. Take for instance the “antiforeign bias.” *Id.* at 203. 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 237 (quoting BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 36 (2007)).

126. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 7 (2011).

127. Jeffrey Friedman, *Popper, Weber, and Hayek: The Epistemology and Politics of Ignorance*, 17 CRITICAL REV. i, xx (2005); see also Lucas & Tasic, *supra* note 123, at 218–23.

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

129. Aarti Shahani, *In the Battle Between Lyft and Uber, the Focus Is on Drivers*, NPR (Jan. 18, 2016), <https://www.npr.org/sections/alltechconsidered/2016/01/18/463473462/is-uber-good-to-drivers-it-s-relative>; Olivia Solon, *Is Lyft Really the “Woke” Alternative to Uber?*, GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/technology/2017/mar/29/is-lyft-really-the-woke-alternative-to-uber>.

130. Friedman, *supra* note 127, at xx.

b. In-Group Bias

In-group bias is a well-documented phenomenon in which people tend to favor others like them (the “in-group”) over others (the “out-group”).¹³¹ 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 oneself). In-group bias is evident throughout politics.¹³² For example, in response to the same proposed California ridesharing legislation discussed in Part II,¹³³ Uber sent an email to users that 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.¹³⁴

Uber clearly wanted users to separate its innovative ride sharing service from the extant 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. Though not technically Platform Advocacy, because Facebook was not pushing its political agenda, in a concealed experiment Facebook noticeably increased users’ voting behavior by simply showing a user’s friends who had voted in an election.¹³⁵ The experiment 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 already voted.¹³⁶ Others were shown a link to polling places and the button, but not the profile pictures of their friends.¹³⁷ Users who saw friends that voted were 0.39% more likely to vote.¹³⁸ Although a small percentage, with Facebook’s 1.47 billion active

131. Brian Mullen et al., *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 EUR. J. SOC. PSYCHOL. 103, 104 (1992); see also Lucas & Tasic, *supra* note 123, at 234–37.

132. DONALD R. KINDER & CINDY D. KAM, US AGAINST THEM: ETHNOCENTRIC FOUNDATIONS OF AMERICAN OPINION 48–52 (2009); Lucas & Tasic, *supra* note 123, at 234.

133. See *supra* Section II.A.2.b.

134. 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/> (quoting the Uber email).

135. Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295, 295–96 (2012), <https://www.nature.com/articles/nature11421>; see also Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 335 (2014) (arguing that “digital gerrymandering” could easily flip an election).

136. Bond et al., *supra* note 135, at 295.

137. *Id.*

138. *Id.* at 295–96.

daily users, the increase shows how a simple manipulation of the interface could have a profound impact on in-group bias and voter behavior.¹³⁹

c. Action Bias

Action bias discourages careful deliberation and encourages fast action.¹⁴⁰ It stems from the visceral need to act after something bad happens or if one is simply bored.¹⁴¹ Action bias can occur when platforms stir up emotions and make it easy for users to do something about it. In Google's SOPA/PIPA campaign, for example, Google made people think the government was going to censor the web.¹⁴² This sparked outrage and encouraged millions of people to take the simple step to sign the online petition.

Furthermore, action bias can influence how lawmakers behave. If there is a public outcry of support for a particular policy, whether that support is real or manufactured, lawmakers may fail to take the time to properly deliberate and will, therefore, act rashly. Take for instance subliminal messaging in advertising in the mid-twentieth century. Despite clear evidence that subliminal messaging did not work, public outcry forced the FCC to consider whether or not it harmed the public interest.¹⁴³

d. Primacy Effect

Lastly, platforms can influence public perceptions through the primacy effect, which biases people toward information 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.¹⁴⁴ Platforms can also use this primacy effect to push a particular position. If they bury opposing information, platforms can unfairly bias people in favor of their position.¹⁴⁵

139. The authors of the study drive home this point by citing the fact that George Bush beat Al Gore in the 2000 U.S. 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 Sept. 25, 2018).

140. See Lucas & Tasic, *supra* note 123, at 231–32.

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

142. See *supra* Part I.

143. Calo, *supra* note 71, at 997.

144. Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcomes of Elections*, 112 PROC. OF THE NAT'L ACAD. OF SCI. E4512, E4512 (2015), <http://www.pnas.org/content/112/33/E4512.full.pdf?with-ds=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>.

145. In their article, Epstein and Robertson warned of the potential harm of such an effect since search rankings are controlled almost entirely by a single company, like Google. Epstein & Robertson, *supra* note 144, at E4513. Lucas Introna and Helen Nissenbaum also warned of the potential

2. *The Means for Exploiting Consumer Vulnerabilities*

As mentioned previously, platforms digitally mediate interactions.¹⁴⁶ Thus, through their design choices they create many opportunities to take advantage of “flaws in human decision-making to get individuals to choose one alternative [over] another.”¹⁴⁷ Often, platforms do this by encouraging users to buy goods or services. Ryan Calo identified this form of influence as “digital market manipulation,” which is a combination of “*personalization* with the intense *systemization* made possible by mediated consumption.”¹⁴⁸ Personalization involves analyzing massive amounts of consumer data to target users at a personal level.¹⁴⁹ Systemization refers to the use of technology to automatically customize digital interactions to prey on user vulnerabilities.¹⁵⁰ Calo’s conceptualization of personalization and systemization in the marketing context provide a useful backdrop for understanding how Platform Advocacy may track onto the sincerity and consent dimensions and trend toward astroturfing.

a. *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, Airbnb customizes emails and messages to make people feel more connected to the

harms of search engines on democracy. Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169, 169 (2000).

146. See *supra* note 71 and accompanying text.

147. Kevin Vallier, *On the Inevitability of Nudging*, 14 GEO. J.L. & PUB. POL’Y 817, 818 (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. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2009). 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.” *Id.*

148. Calo, *supra* note 71, at 1021.

149. *Id.*

150. *Id.*

platform and, therefore, more likely to support its particular position.¹⁵¹ Platforms can also influence voter behavior through “blending.”¹⁵² Blending involves taking a photograph of a user and putting it near a photograph of a politician. When a person’s face and a politician’s face are close together, cognitive biases, including the intent bias, are triggered.¹⁵³ These biases make an individual more likely to trust, and subsequently vote for, a politician.¹⁵⁴

“Persuasion profiling” is another example of personalization. It not only targets relevant advertisements to particular individuals, it presents information in a personalized way.¹⁵⁵ Based on a record of user behavior, platforms can determine which persuasion techniques (for example, appeals to authority, scarcity, and consensus) are most effective on that particular user.¹⁵⁶ Personalization capabilities made possible by digitally mediated interactions and access to user information can be very powerful.

Platforms can also use their own internal data to predict and target individuals who are most likely to advocate on the platforms’ behalf.¹⁵⁷ Mining data to find and subsequently ignite a sympathetic group of supporters is not in and of itself nefarious; however, it can skew how lawmakers perceive constituents’ concerns.¹⁵⁸

151. See e.g., Email from Airbnb to Abbey Stemler, Assistant Professor of Business Law and Ethics, Kelley School of Business, Indiana University (Jan. 11, 2018) (on file with the author); see also *Lessons Learned from Airbnb’s Email Specialist: An interview with Lucas Chevillard of Airbnb*, REALLY GOOD EMAILS (Jan. 5, 2016), <https://explore.reallygoodemails.com/lessons-learned-from-airbnb-s-email-specialist-6c8adb44c55>; Robin Nichols, *Customization and Personalization: Two Sides of the Same (Millennial) Coin*, AB TASTY BLOG (Jan. 8, 2018), <https://www.abtasty.com/blog/customization-and-personalization-two-sides-of-the-same-millennial-coin/>.

152. 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).

153. *Id.*

154. *Id.*

155. Eli Pariser, *Welcome to the Brave New World of Persuasion Profiling*, WIRED (Apr. 26, 2011, 12:00 PM), https://www.wired.com/2011/04/st_essay_persuasion_profiling/.

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

157. See Davey Alba, *Google and Facebook Still Reign Over Digital Advertising*, WIRED (July 29, 2017, 7:00 AM), <https://www.wired.com/story/google-facebook-online-ad-kings/>.

158. WALKER, *supra* note 14, at 12–13. As Edward T. Walker argued, public affairs consulting firms are skilled at mining data and targeting individuals with carefully crafted messages who are likely to participate in grassroots activity. *Id.* at 12–13, 155–91. Walker defined 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. Participants are most commonly higher-income individuals with the time and resources to be active. *Id.* at 23, 157. Walker suggested that these “individuals [are] already over-represented in the political system,” thereby “exacerbate[ing] participatory inequalities.” *Id.* at 11, 157; see also Henry E. Brady

b. Systemization

When the term was first coined in 1985, astroturf lobbying would have required incredible amounts of time and expense.¹⁵⁹ 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, methodically, and repeatedly reach out to individuals with little to no effort through digital communications—emails and texts—and interface design—pop-messages and click-through screens within the platform. And, as the Section below describes, these platforms are constantly improving their understanding of human behavior in order to exploit vulnerabilities more efficiently.

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 how this manipulation of behavior can create an ideal situation for platforms to impact the regulations that govern them.

1. The Network Effect

Platforms do not have the power to manipulate just a few users, they have the power to manipulate large segments of the general population. Airbnb, for example, has nearly as many users as the population of France, Italy, and Australia combined.¹⁶⁰ This is attributed to network effects. Simply stated, a network effect occurs when more people use a system more people will also want to use it.¹⁶¹ For example, the more people who list their homes on Airbnb, the more guests will be enticed to join the platform. This effect can produce unrestrained monopolies (for example, Airbnb for home

et al., *Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists*, 93 AM. POL. SCI. REV. 153, 154 (1999).

159. See *supra* notes 13, 55 (defining “astroturf lobbying” and explaining the origins of the term “astroturf”).

160. Reuters, *Airbnb CEO Invites Some Property Hosts to Executive Board Meetings*, FORTUNE (Mar. 7, 2017), <http://fortune.com/2017/03/07/airbnb-ceo-hosts/> (stating that Airbnb has an estimated 150 million users); see *Australia*, CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html> (last updated Aug. 24, 2018) (stating the population of Australia is 23,232,413); *France*, CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html> (last updated Aug. 30, 2018) (stating the population of France is 67,106,161); *Italy*, CIA, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html> (last updated Sept. 5, 2018) (stating the population of Italy is 62,137,802), <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html>.

161. Nicholas Economides, *Antitrust Issues in Network Industries*, in THE REFORM OF EC COMPETITION LAW 344, 345 (Ioannis Lianos & Ioannis Kokkoris eds., 2008).

sharing and Amazon for online shopping¹⁶²) and creates a fierce urgency to understand how to properly regulate them.

2. *Iteration*

Control over the design of the user interface not only allows 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 and improving the platforms to find the most effective methods of influence is unprecedented and may lead platforms to understand our behavior better than we understand ourselves.¹⁶³

The data network effect, similar to the network effect described above, supports this iterative process. The data network effect occurs when a product becomes better as users put more data into it, generally through machine learning.¹⁶⁴ Google, for example, greatly benefits from the data network effect—the more users who search, the better Google can fine tune its algorithms to produce meaningful results for users.¹⁶⁵

3. *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. 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—

162. Amazon captures fifty-one cents for every dollar spent online in the United States. TAPLIN, *supra* note 33, at 121.

163. Calo, *supra* note 71, at 1015 n.114. With A/B testing, platforms can use the “iterative method of using randomized controlled experiments to design user interfaces, products, and ads” to detect and quantify differences in consumer behavior. *Id.* For example, Facebook experimented on twenty-nine million users to determine whether people were 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 (2012), <https://arxiv.org/pdf/1206.4327.pdf>; Kashmir Hill, *10 Other Facebook Experiments On Users, Rated On A Highly-Scientific WTF Scale*, FORBES (July 10, 2014), <https://www.forbes.com/sites/kashmirhill/2014/07/10/facebook-experiments-on-users/#5016395b1c3d>.

164. Matt Turck, *The Power of Data Network Effects*, MATTTURCK (Jan. 4, 2016) <http://mattturck.com/2016/01/04/the-power-of-data-network-effects/>. “Machine learning” occurs when a computer can improve its capabilities by teaching itself certain skills—such as language processing and perception. Alex Hern, *Google Says Machine Learning Is the Future. So I Tried It Myself*, GUARDIAN (June 28, 2016), <https://www.theguardian.com/technology/2016/jun/28/google-says-machine-learning-is-the-future-so-i-tried-it-myself>.

165. Turck, *supra* note 164.

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/spez¹⁶⁶

This message affected users' experiences, but the cost to Reddit was minimal.¹⁶⁷ It also made it easier for Reddit's users to contact lawmakers, thereby lowering the burdens of their engagement. This Platform Advocacy was incredibly effective. On the whole, the Day of Action encouraged users to submit over 1.5 million comments to the FCC's website and around 3.5 million emails to members of Congress.¹⁶⁸

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.¹⁶⁹ Unsurprisingly, we can see the cause and effect of Platform Advocacy on actual policy.¹⁷⁰ Take for example ride-sharing, as reporter Karen Weise wrote: "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 has in place. Uber makes the rules; cities fall in line."¹⁷¹ 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.

Industries have always pushed their interests through lobbying and other forms of advocacy; however, the shape and impact of Platform Advocacy takes corporate strategy to a new level. As a consequence of Platform Advocacy and other factors, such as internet exceptionalism¹⁷² and federal laws that limit regulation of online companies,¹⁷³ platforms are unrestrained and

166. Angelica Cabral, *How Major Websites Are Marking Today's Net Neutrality Protest*, SLATE (July 12, 2017, 2:59 PM), 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).

167. Excluding opportunity costs related to lost advertising revenues.

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

169. See Kathryn Schulz, *What Calling Congress Achieves*, NEW YORKER (Mar. 6, 2017), <https://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves>.

170. This Article has already mentioned a few examples (Uber in New York, Google on SOPA and PIPA, and Lyft in California) and there are many others. See *supra* Introduction, Part I, Section II.A.2.b.

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

172. In the present day, internet exceptionalism drives regulators to craft new sets of laws to regulate online firms and transactions. Eric Goldman, *Third Wave of Internet Exceptionalism*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 165, 166–67 (Berin Szoka & Adam Marcus eds., 2010).

173. 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 (2012).

able to grow their dominance in the marketplace.¹⁷⁴ While Platform Advocacy has yet to clearly influence political spheres in deep and dramatic ways, regulators and users should not suffer from a lack of imagination. They must realize that Platform Advocacy not only exists, it can profoundly influence key assumptions within our democracy.

IV. PLATFORM ADVOCACY AND DELIBERATIVE DEMOCRACY

Moving on to the potential consequences of Platform Advocacy for democracy, this Part explains how Platform Advocacy can interfere with deliberation over values and policies among users and lawmakers.

In 1980, Joseph M. Bessette first identified the concept of deliberative democracy in the context of U.S. constitutional theory, which was later clarified by Cass R. Sunstein.¹⁷⁵ To understand the term, it is perhaps easiest to go back to the framing of the Constitution as explained in Sunstein's 1985 article.¹⁷⁶

Prior to the drafting of the Constitution, ideas of deliberative democracy emerged as a solution to the Antifederalists' concern that a large national government would reduce citizens' ability to participate in democracy and thus undermine civic virtue¹⁷⁷ and increase corruption.¹⁷⁸ The Antifederalists preferred a form of direct democracy, where individuals would debate and deliberate in small settings.¹⁷⁹

By contrast, the Federalists, led by James Madison, generally believed¹⁸⁰ that corrupt factions were a consequence of direct democracy¹⁸¹—

174. 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*, 67 EMORY L.J. 197 (2017). See also Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

175. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

176. See *id.* at 35–45.

177. *Id.* at 37.

178. *Id.* at 39.

179. See *id.* at 37 (explaining that the Antifederalists believed “representation was a necessary evil brought about by the impracticability of direct self-governance by the people” (citing H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 17–18 (1981))). We elect individuals to represent us despite the many opportunities for direct democracy in the United States via widespread use of public referenda at both the state and federal level. 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 that “[d]irect democracy is a more widespread and important practice in American government than is generally supposed”).

180. Rarely did the so-called Federalists speak with one voice. See Sunstein, *supra* note 175, at 38 n.42 (“Federalist thought is an amalgam of the ideas of numerous thinkers, many of whom disagreed with each other.”).

181. Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 104, 104–05 (Robert A. Goldwin & William A. Schambra eds., 1980).

where apathy was destined to occur and “common passion or interest will . . . be felt by a majority of the whole.”¹⁸² 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.”¹⁸³ A large republic, dependent on representation, would solve these populist concerns because representatives could better embody “the cool and deliberate sense of the community.”¹⁸⁴

Furthermore, the Federalists believed that representatives were more knowledgeable about public affairs because they exercised their power in an institutional setting, which would encourage collective reasoning.¹⁸⁵ As a result, representatives have a filtering effect that ensures decisions would be the result of study, debate, and reflection, not just popular sentiment.¹⁸⁶ “Indeed, the task of the legislator was 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.¹⁸⁷ These structural ideas for supporting deliberative democracy are replicated at all levels of government in the United States.¹⁸⁸

While one could argue that the Framers were perhaps motivated by privilege and paternalism, in light of the United Kingdom’s vote to leave the European Union and the nationalist passions that captured the U.S. electorate in 2016, the Framers’ concerns seem especially prescient.¹⁸⁹ Arguably, direct democracy fueled by populist rhetoric, recently and throughout history, led people to make decisions that go against their own self-interest.¹⁹⁰ Thus,

182. Sunstein, *supra* note 175, at 40 (quoting THE FEDERALIST NO. 10, at 59–60 (James Madison) (P. Ford ed. 1898)).

183. Bessette, *supra* note 181, at 104.

184. THE FEDERALIST NO. 63, at 415 (James Madison) (Howard Mumford Jones ed., 1961); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT I (1994).

185. BESSETTE, *supra* note 184, at 2; Sunstein, *supra* note 175, at 44.

186. Sunstein, *supra* note 175, at 48; THE FEDERALIST NO. 10, at 44 (James Madison) (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.” SUNSTEIN, #REPUBLIC, *supra* note 16, at 47; *see* Bessette, *supra* note 181, at 105–06.

187. Sunstein, *supra* note 175, at 46.

188. *Id.* at 47.

189. Edward Alden, *What Brexit Reveals About Rising Populism*, COUNCIL ON FOREIGN RELATIONS (June 29, 2016), <https://www.cfr.org/interview/what-brexite-reveals-about-rising-populism> (explaining how Brexit was marked by populism and euroskepticism).

190. For example, many U.S. citizens who voted for President Trump generally are not helped by President Trump’s policy positions, especially as they relate to taxes and healthcare. Amanda Taub, *Why Americans Vote ‘Against Their Interest’: Partisanship* N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/upshot/why-americans-vote-against-their-interest-partisanship.html>; Joshua Zeitz, *Does the White Working Class Really Vote Against Its Own Interests?*,

while decisions are motivated “by the people,” they were not actually “for the people.”¹⁹¹

As discussed in greater detail below, later ideas surrounding deliberative democracy moved beyond a focus on American constitutional design 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.¹⁹² In essence, this more global form of deliberative democracy is about the process that best brings about “the public use of reason.”¹⁹³

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.¹⁹⁴ It does, however, pinpoint the true threats Platform Advocacy can have on deliberative democracy. To do this, this Section examines some of the characteristics of deliberative democracy, as outlined by Amy Gutmann and Dennis F. Thompson,¹⁹⁵ and the role of the representative, as articulated by Sunstein.

1. *Reason-Giving*

According to Gutmann and Thompson, deliberative democracy requires citizen autonomy.¹⁹⁶ As equals, lawmakers and citizens should debate principles and policies with respect.¹⁹⁷ However, in the Platform Advocacy context, users exercise little autonomy, and there is no exchange of reasoning because many users simply parrot arguments. Thus, while users may be inspired to protest or contact friends and representatives, their reasoning is hollow. Arguments absent of thought or sincerity do not treat listeners on all sides of an issue with respect. They also do not lead to meaningful deliberation.

POLITICO MAG. (Dec. 31, 2017), <https://www.politico.com/magazine/story/2017/12/31/trump-white-working-class-history-216200>.

191. Christina Lafont, *Is the Ideal of Deliberative Democracy Coherent*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 3, 5 (Jose Luis Marti & Samantha Besson eds., 2017) (discussing the ideals of deliberative democracy).

192. *Id.* at 8.

193. James Bohman & William Rehg, *Introduction*, in DELIBERATIVE DEMOCRACY ix, x (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.

194. For a good overview, see DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS, *supra* note 191.

195. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY 3–7 (2004).

196. *Id.* at 3.

197. *Id.*

2. Accessibility

The second fundamental characteristic of deliberative democracy is accessibility. Deliberation should not only come from representatives, but “and by debating and deliberating citizens, and by their shaping a ‘public view’ of the common good and expressing a ‘public voice.’”¹⁹⁸ To effect this, individuals first must equally have “[t]he cognitive conditions of decision making” that allow a person to fully understand the argument.¹⁹⁹ In other words, reasoning must be void of manipulation.²⁰⁰ As detailed throughout this Article, platforms have the capabilities to influence and perhaps manipulate user opinion and behavior through framing and design choices. These capabilities can compromise accessibility at the user level.

Furthermore, without the ability to amplify opinions through a platform, certain groups will be denied access to public deliberation or treated as inferiors because they do not have the voices of millions backing them up.²⁰¹ Thus again, deliberative democracy will be compromised because the necessary power to influence largely rests in the hands of the few successful platforms. For example, consider a traditional cab company’s distinct disadvantage vis-à-vis Uber when trying to get all the individuals in its city who enjoy, use, and like taxis to collectively come together to fight against pro-ride-sharing legislation.

3. Filtering

The final tenant of deliberative democracy described here is that elective representatives and policymakers must play a filtering role. As Sunstein explained, representatives are:

accountable 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.²⁰²

198. Antonio Florida, *Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy* 36 (Sept. 4–7, 2013) (unpublished manuscript, 7th ECPR General Conference), <https://ecpr.eu/Filestore/PaperProposal/71d7f83c-3fe4-4b11-82a2-c151cd3769f4.pdf>.

199. Thomas Christiano, *The Significance of Public Deliberation*, in *DELIBERATIVE DEMOCRACY*, *supra* note 193, at 253.

200. GUTMANN & THOMPSON, *supra* note 195, at 4 (stating that “[t]o 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*, *supra* note 193, at 279.

201. Christiano, *supra* note 199, at 253.

202. Sunstein, *supra* note 175, at 46–47.

Deliberation by representatives falls on a spectrum—from blind reliance on constituent desires to action without constituent input. The ideal representatives would fall somewhere in between: They 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.²⁰³ However, that is a tall order for any representative, especially in light of the current realities described below.

The Founders, and even theorists in the late-twentieth century, could never have anticipated how digital technologies could manipulate and stimulate public outrage and pressure. Nor could they have anticipated the ability of citizens to directly express their views to lawmakers. Gone are the days when a town hall meeting, letter, or parade were the only ways to interact with a representative.²⁰⁴ Today, a constituent can effortlessly tweet, text, email, or post to a 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.²⁰⁵ Furthermore, because of the network effect described previously, 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 the creation of good and just policy.

Democracy depends on leaders who are responsive to the preferences of their constituents.²⁰⁶ However, when those preferences are manufactured through elite manipulation, lawmakers must be skeptical.²⁰⁷ Furthermore, if we allow Platform Advocacy to continue or grow unrestrained, lawmakers

203. Floridaia, *supra* note 198, at 32 (quoting Bessette, *supra* note 181, at 104).

204. Madisonian ideas of republicanism can also be easily classified as “romantic and outmoded,” especially in light of special interests and self-interest that pervade our current political system. Sunstein, *supra* note 175, at 76.

205. JACOB R. STRAUS & MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44509, 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 electronic communications have become the most common method of communication from Congress to constituents); Linton Weeks, *Politics in the Social Media Age: How Tweet It Is*, NPR (Oct. 29, 2010), <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); Karen Mossberger et al., *Connecting Citizens and Local Governments? Social Media and Interactivity in Major U.S. Cities*, 30 GOV’T INFO. Q. 351, 356 (2013) (finding that although social media tools are predominately used as one-way push strategies, representatives increasingly use them for open dialogue with citizens); *New Report Outlines How Congress and Citizens Interact on Social Media*, CONG. MGMT. FOUND. (Oct. 14, 2015), <http://www.congressfoundation.org/news/press-releases/1123-new-report-outlines-how-congress-and-citizens-interact-on-social-media>.

206. ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1–2 (1971).

207. James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225, 232–33 (2002).

may be unable to sift through the tweets, texts, petitions, and emails to discern preferences at all. As the next Part 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 the primary news source for forty-four percent of Americans.²⁰⁸ Facebook has incredible power in expected and unexpected ways. A 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 (that is, the stream of updates and posts that you see when you log on to the site).²⁰⁹ Some people viewed more positive posts and others saw more negative ones. This actually affected users' emotions—those users who were manipulated posted more positive or negative posts themselves depending on their experimental group.²¹⁰

Now, imagine what would happen if Facebook intentionally manipulated their 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 type of Platform Advocacy occurred in India as first described in Part II.²¹¹

Starting in 2014, Facebook worked on a project, called Internet.org, to bring the internet to millions of unconnected users in India.²¹² 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.²¹³ This, of course, had the added benefit of capturing the untapped Indian market, which would enable Facebook to continue its exponential growth.

However, the Telecom Regulatory Authority of India (“TRAI”) decided to consider whether India was going to promote net neutrality or allow telecommunication companies to provide free access to certain sites and not others.²¹⁴ The TRAI asked for public comment on the issue, which eventually

208. TAPLIN, *supra* note 33, at 4; Martin Beck, *Facebook Drives Nearly One-Fourth of All Referral Traffic*, MARKETING LAND (Jan. 26, 2015, 10:05 AM), <http://marketingland.com/facebook-drives-nearly-one-fourth-referral-traffic-115478>.

209. Adam D. I. Kramer et al., *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks*, 111 PROC. NAT'L ACAD. SCI. 8788, 8788 (2014).

210. *Id.* at 8789.

211. *See supra* Section II.A.2.c.

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

213. *Id.*

214. *Id.*

sent Facebook into full campaign mode to stop the threat to Internet.org, later repackaged as Free Basics.²¹⁵ As described by the *Guardian*, 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.²¹⁶

According to Facebook, sixteen million Indians sent emails to the TRAI encouraging it to allow Facebook to facilitate the free mobile internet service—an incredible response to say the least.²¹⁷ The TRAI eventually had to develop computer programs to sift through the avalanche of emails.²¹⁸ When they did, they discovered 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. The TRAI "worried that Free Basics' supporters were not 'making informed decisions' and chastised Facebook for reducing the consultation to a popularity contest."²¹⁹

After much debate, the TRAI decided to support net neutrality, which effectively shut down Facebook's hopes of capturing market share with Free Basics.²²⁰ 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."²²¹ 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 one service provider charging differential prices for content could damage the "architecture of the internet," which relies on openness and the ability to link content.²²²

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

216. Bhatia, *supra* note 212; 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>.

217. Bhatia, *supra* note 212.

218. *Id.*

219. *Id.*

220. *Id.*

221. Catherine Shu, *Facebook's "Save Free Basics in India" Campaign Provokes Controversy*, *TECH CRUNCH* (Dec. 17, 2015), <https://techcrunch.com/2015/12/17/save-free-basics/>; see Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016, *Gazette of India*, pt. III sec. 4 (Feb. 8, 2016) [hereinafter TRAI Memorandum], http://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf.

222. TRAI Memorandum, *supra* note 221, at 9.

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.²²³ 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 also led to several helpful insights about ways to uphold the key pillars of a healthy deliberative democracy: reason-giving, accessibility, and filtering. First, as it relates to filtering, the TRAI viewed the massive public interest in its request for public comment as suspect. Thus, the TRAI took steps to identify *authentic messages*, which involved creating computer programs to identify and discount form messages and to reject messages that did not respond to the questions presented. This filtering helped lawmakers sort out, to a degree, insincere messages and those given without consent. With the remaining messages the TRAI was better able to view and understand constituents’ reasoning.

Likewise, with respect to reason-giving, the TRAI was able to manage the public response to its decision through a clear articulation of *its* reasoning in the multi-page explanatory memorandum. Influenced but not determined by popular sentiment, the memorandum was an exemplar in reason-giving and filtering. It helped explain to the public the TRAI’s take on the pros and cons of its decision. Such reason-giving helped improve transparency and affirm the exchange of ideas and debate among constituents and representatives.

Lastly, regarding accountability, the TRAI directly called out Facebook for its Platform Advocacy and urged the platform to carefully avoid manipulating users.²²⁴ When government bodies recognize forms of manipulation, which reduce access to information, they should not stand idly by. By contrast, they must speak up, so that platforms realize there is zero tolerance for astroturfing forms of Platform Advocacy. This vigilance ensures that the power of Platform Advocacy will not drown competing voices, thus making the public forum accessible to all.

VI. RECOMMENDATIONS

In his piece on astroturfing, journalist Ryan Sager argued, “Organizing isn’t cheating. Doing everything in your power to get your people to show up is basic politics.”²²⁵ However, as explored in this Article, there is a fine line between convincing people to join your cause and using them as puppets.

223. *Id.* at 10.

224. Bhatia, *supra* note 212.

225. Ryan Sager, *Keep Off the Astroturf*, N.Y. TIMES (Aug. 18, 2009), <https://mobile.nytimes.com/2009/08/19/opinion/19sager.html?mcubz=3>.

This Section outlines three recommendations to improve democratic deliberation in the context of Platform Advocacy and briefly addresses corresponding First Amendment implications.²²⁶

A. *Disclaimer Notices*

If a platform decides to use its interface to push a particular political point, it should be required to provide notice to users that the positions are the opinions of the platform. Such disclaimers would promote access to information and could resemble disclaimers in endorsements, which require celebrities to disclaim they are being paid to endorse a product (for example, “#ad”),²²⁷ and election-related advertising, which requires sponsors to indicate who is “responsible for the content of this advertising.”²²⁸ For example, if Google wants to oppose online piracy laws through its platform, it would need to inform users that it has a vested business interest in seeing the legislation fail in some way before users sign a petition or are patched-through to their congressperson.

In the highly controversial opinion in *Citizens United v. FEC*,²²⁹ the Supreme Court held that the political speech of corporations is entitled to the same constitutional protections as natural persons.²³⁰ Therefore, the strict scrutiny standard applies to laws that may impair the political speech of corporations.²³¹ 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.²³²

While the Court in *Citizens United* found that an outright prohibition on speech close to an election was unconstitutional, the Court upheld disclaimer and disclosure requirements related to the source of funds for election-based advertisements.²³³ The Court reasoned that the government has a compelling

226. See *Citizens United v. FEC*, 558 U.S. 310, 432 (2010) (Stevens, J., concurring in part and dissenting in part) (“We have long since held that corporations are covered by the First Amendment”); *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).

227. FED. TRADE COMM’N, GUIDES CONCERNING THE USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING § 255.5, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf> (last visited Sept. 8, 2018).

228. *Advertising and Disclaimers*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/> (last visited Sept. 26, 2018).

229. 558 U.S. 310 (2010).

230. *Id.* at 340.

231. *Id.*

232. *Id.*

233. *Id.* at 367. The disclosure and disclaimer laws were included in the Bipartisan Campaign Reform Act. *Id.* at 366. Only Justice Thomas voted to hold the disclosure requirements unconstitutional. *Id.* at 480–85 (Thomas, J., concurring in part and dissenting in part).

interest in making sure the electorate can “make informed decisions and give proper weight to different speakers and messages.”²³⁴

Similarly, the Court has historically upheld disclaimer and disclosure laws related to astroturfing. Most notably, in *United States v. Harriss*,²³⁵ the Court upheld the disclosure requirements in the FRLA.²³⁶ 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.²³⁷ Under the “direct pressure,” activities requiring disclosure included an “artificially simulated letter campaign,” which is a classic example of astroturfing.²³⁸ The Court upheld those disclosure requirements based on principles of deliberative democracy. The Court stated:

[T]he American ideal of government by elected representatives depends to no small extent on [the ability 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.²³⁹

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.²⁴⁰

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’s interface (similar to accepting terms of service) to force such consumer action. To prevent the potential harms inherent in forced action, Congress should pass a federal law to prevent platforms from requiring users to contact any lawmaker or sign any petition before using a platform’s service. In addition, the law should prohibit platforms from

234. *Id.* at 371 (majority opinion).

235. 347 U.S. 612 (1954).

236. *Id.* at 628; see Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 812, 839–42 (1946); Zellner, *supra* note 12.

237. *Harriss*, 347 U.S. at 620, 623–24.

238. *Id.* at 620.

239. *Id.* at 625.

240. 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 marketplace of ideas concept, which ensures that the public has access to relevant information).

providing incentives to users for their advocacy, such as a monetary benefit, access to unique platform features, or eligibility for prizes.²⁴¹

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

C. *Embrace Technology to Filter*

Both disclaimer notices and outlawing forced action are citizen-facing recommendations. From the India case study,²⁴² however, we can identify several government-facing suggestions. These include: (1) share reasoning for policy decisions; (2) punish or shame platforms using Platform Advocacy inappropriately; and (3) use technology to enable filtering. All of these recommendations will help enhance deliberative democracy; however, developing technology to effectively filter insincere or compelled constituent speech will serve the dual purpose of filtering and identifying inappropriate Platform Advocacy when it occurs.

India's experience showed that simply discounting form messages and multiple messages from the same account is an effective first-line-of-defense filtering technique. However, we can learn from tools and analytics developed by platforms themselves to shake out the bots, fake accounts, and foreign governments that discredit their own platforms to better ensure Platform Advocacy is on the appropriate side of the sincerity and consent dimensions.²⁴³ For example, public comment websites could use CAPTCHA systems to ensure human activity and verify that constituents are who they say they are.²⁴⁴ They could also prohibit copy-and-pasting to ensure people write their own comments to some degree. Furthermore, governing bodies could improve their constituent-management systems to verify identities and cross-reference comments and messages in various forms to create a more accurate picture of constituent opinions.

241. Similarly, it is illegal to offer, solicit, or accept any monetary incentive for one's vote in a federal election. 18 U.S.C. § 597 (2012).

242. *See supra* Part V.

243. *See Hard Questions: What is Facebook Doing to Protect Election Security?*, FACEBOOK: NEWSROOM (Mar. 29, 2018), <https://newsroom.fb.com/news/2018/03/hard-questions-election-security/>.

244. CAPTCHA stands for "Completely Automated Public Turing Test To Tell Computers and Humans Apart." CAPTCHA: TELLING HUMANS AND COMPUTERS APART AUTOMATICALLY, www.captcha.net (last visited Nov. 2, 2018). CAPTCHA systems are designed to distinguish online input generated by machines and humans. *See id.*

VII. 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.”²⁴⁵ However, when a platform engages in astroturfing by reducing users’ consent for or sincerity of their advocacy, they corrupt Madison’s vision. Such forms of Platform Advocacy impede the exchange of ideas and provide platforms with the power to craft laws in their favor. Therefore, understanding why and when Platform Advocacy deserves legal intervention is necessary. With dynamic and increasingly powerful technologies, we must ensure we have institutions, procedures, and means “to check or moderate unreflective popular sentiments and to promote the rule of deliberative majorities”²⁴⁶ now more than ever before.

245. THE FEDERALIST NO. 10, *supra* note 186, at 44.

246. BESSETTE, *supra* note 184, at 1.