

PLATFORM ADVOCACY AND THE THREAT TO DEMOCRACY

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Democracy cannot succeed unless those who express their choice are prepared to choose wisely.
—Franklin D. Roosevelt¹

Introduction

If you happened to turn on your Uber app in New York City in June of 2015, you might have noticed an interesting choice among the car options: “DE BLASIO.”² If you slid to it, a message would have appeared: “See what happens.” A tap would reveal an Uber map with long wait times or no available cars and a message stating: “Take Action. This is what Uber will look like in NYC if Mayor de Blasio’s Uber cap bill passes.”³ You then would have been encouraged to email your local politicians (link provided).⁴ This simple change to the Uber interface was effective.⁵ Playing to their fear that they might be inconvenienced, consumers sent approximately 17,000 emails to City Hall and stopped the proposed bill.⁶

Uber’s campaign is a striking example of what this Article defines as Platform Advocacy or the ability of platforms (like Facebook, Airbnb, and Twitter) to mobilize their user bases to influence lawmakers.⁷ This gives tech giants the power to impact democratic outcomes and strengthen their own dominance in the marketplace. While it has yet to be fully and overtly exploited, the potential for unregulated use of this power raises serious questions for society. How does this twist the “rational” behavior of citizens under public choice theory? Are there ways to curtail this power to ensure deliberative democracy? If so, how do we balance freedom of expression and regulation?

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

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

³ *Id.*

⁴ *Id.*

⁵ 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.

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

⁷ Other ways to describe this phenomenon include “weaponizing” the apps or “grassroots for hire.” Edward T. Walker, *The Uber-ization of Activism*, N.Y. TIMES (Aug. 6, 2015) https://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?_r=0. This Article adopts the definition of advocacy suggested by sociologists Kenneth Andrews and Bob Edwards. Advocacy (or an advocacy organization) is “either promoting or resisting social change that, if implemented, would conflict with the social, cultural, political, or economic interests or values of other constituencies or groups.” Kenneth Andrews and Bob Edwards, *Advocacy Organizations in the U.S. Political Process*, 30 ANN. REV. SOCIOLOGY 479, 485 (2004).

This Article takes aim at these questions in an effort to increase awareness of the power of the platform to influence public choice and affect democratic outcomes. Part I outlines the rise of the platform and its distinguishing features. Part II focuses on examples of Platform Advocacy in action—including Facebook’s manipulation of its user interface to influence net neutrality policies in India; Lyft’s mobilization of its user base to avoid regulations in San Francisco; and Google’s logo blackout and petition designed to defeat the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA) bills. Part III draws upon behavioral public choice theory to anticipate Platform Advocacy’s power to influence users and mobilize them to create favorable legal environment for platforms. Part IV details the consequences of such power on notions of deliberative democracy, particularly when Platform Advocacy can be considered astroturfing. It concludes by offering specific recommendations for mitigating the potential harms of Platform Advocacy while preserving necessary aspects of political speech under the First Amendment.

This Article contributes to the field of behavioral law and economics and technology law by anticipating the unrestrained and potentially harmful activities of platforms. It is imperative that we begin to understand how Platform Advocacy could operate in order to ensure that consumers, and by extension lawmakers, are not improperly influenced by the power of the platform.

I. The Rise of the Platform

Since the Industrial Revolution and until recently, most of the world’s most successful businesses have incorporated a linear business model.⁸ Think of the majority of the largest companies in the aughts—Citigroup, ExxonMobil, General Electric, and Shell Oil.⁹ These firms made their billions by creating goods and services that flowed directly from the firm to distributors or customers.¹⁰ However, since the Internet has become available in our homes and in our pockets, a massive shift has taken place in the economy. The world’s five largest companies are now largely built on platforms (Alphabet (the parent company of Google), Amazon, Apple, Facebook, and Microsoft)¹¹ that create powerful path dependencies between consumers and producers.¹²

⁸ ALEX MOAZED & NICHOLAS L. JOHNSON, MODERN MONOPOLIES: WHAT IT TAKES TO DOMINATE THE 21ST-CENTURY ECONOMY, 22 (2016).

⁹ *Global 500 June 2007*, FINANCIAL TIMES, <http://im.ft-static.com/content/images/6aec81f8-2bd9-11dc-b498-000b5df10621.pdf>; Jonathan Taplin, *Is It Time to Break Up Google?*, N.Y. TIMES (April 22, 2017), https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html?_r=0.

¹⁰ MOAZED & JOHNSON, *supra* note 8, 22.

¹¹ By market capitalization. Will Oremus, *Tech Companies Are Dominating the Stock Market as Never Before*, SLATE (July 29, 2016), http://www.slate.com/blogs/moneybox/2016/07/29/the_world_s_5_most_valuable_companies_apple_google_microsoft_amazon_facebook.html. Though not always in the top five, these companies consistently rank in the top ten. These companies are also among the top ten most powerful brands save Amazon, which is number twelve. *The List*, Forbes, <https://www.forbes.com/powerful-brands/list> (last visited April 13, 2017).

¹² See Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRES L. 369, 376-377 (2016).

A platform company facilitates the exchange of value—whether it be the exchange of ad dollars for access to users on Facebook or the exchange of cash for a Beanie Baby collectable on eBay.¹³ Platforms create the digital space for networks to grow—reducing transaction costs and allowing people to easily interact and transact.¹⁴ Unlike traditional firms, Platforms do not acquire or create the products, services, or eyeballs to be sold, they simply connect people to them.¹⁵

In their book, *Modern Monopolies: What it Takes to Dominate the 21st-Century*, entrepreneurs Alex Moazed and Nicholas L. Johnson further break down platforms into two main types.¹⁶ The first type is an exchange platform—that helps broker transactions between buyers and sellers (Uber, Airbnb, Etsy) and connect people socially (Skype, Facebook). The second is a maker platform which involves one user distributing some form of digital content (Apple, YouTube). Either type of platform benefits from network and data network effects.

The network and data network effects enable the rapid concentration of power where the winner takes all. The standard network effect involves a good or service becoming more valuable as more people use it. For example, the more people that use a particular credit card company (Amex, Visa, etc.) the more merchants will take those cards and the more customers will have those cards. Similarly, the data network effect occurs when a product becomes better the more data is put into it, generally through machine learning.¹⁷ Google, for example, benefits greatly from the data network effect—the more users who search, the better Google can fine tune its algorithms to produce meaningful results for consumers.¹⁸ Combined, these effects produce unrestrained monopolies (think of Airbnb for home sharing, Amazon for books etc.) and create a fierce urgency to understand how to properly regulate them.¹⁹

While there is a perception that Internet-based activities allow for competition in its purest form, the truth is that competition is not simply a “click-away,” instead alternatives are demonstrably worse than incumbents as the incumbent’s “self-reinforcing data advantage grows.”²⁰ Think about the failure of Google+, Google’s attempt to compete with Facebook for social-networking. Google tried to compete with Facebook and failed because as one former

¹³ MOAZED & JOHNSON, *supra* note 8 at 29. The term platform is used in multiple contexts. For example, the term can refer to a piece of technology (e.g. an underlying computer system) or computing services (e.g. Amazon Web Services). The term is also used among software as a service (SaaS) companies (such as Salesforce) that offer a “platform.” These businesses, however, are still linear in that they are selling a product or service to consumers directly. *Id.* at 32.

¹⁴ Transaction costs include search costs, standardizing terms of trade, and distilling vast amounts of information.

¹⁵ Many of today’s largest technology companies exclusively make their money off of platforms, while others have a mix of revenue streams. For example, while Apple and Microsoft actively hardware and software according to a linear business model, but much of their current (and future) success comes from platforms. For example, Apple’s iOS platform, iTunes, and the App Store connect buyers and sellers of digital content (programs, apps, and music). *Id.* at 6.

¹⁶ MOAZED & JOHNSON, *supra* note 8 at 43.

¹⁷ Matt Turck, *The Power of Data Network Effects*, MATTURCK.COM (Jan. 4, 2016) <http://mattturck.com/2016/01/04/the-power-of-data-network-effects/>.

¹⁸ *Id.*

¹⁹ Amazon captures fifty-one cents for every dollar spent online in the US. JONATHAN TAPLIN, *MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNED CULTURE AND UNDERMINED DEMOCRACY*, 121 (2017).

²⁰ FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION*, 83 (2015).

Google+ employee stated, “It’s like you have this grungy night club and people are having good time and you build something next door that’s shiny and new, and technically better in some ways, but who wants to leave?”²¹ The network and data network effects keep users drawn to a particular platform, which makes the platform more powerful, and, as demonstrated in the sections below, this power cannot only help platforms make substantial profits, it can also give them the ability to influence consumers to politically maintain their own dominance.

II. Platform Advocacy in Action

Developed by Nobel Laureate James Buchanan and Gordon Tullock, Public Choice Theory applies the tools and methods of economic theory to politics and government.²² It suggests that citizens are rational and self-interested.²³ They make decisions to advance their own private interests, which oftentimes means they decide not to participate in democracy because the costs of participation do not outweigh the benefits.²⁴ This apathy causes the law to be formed around special interests.²⁵ However, what happens when corporations can trigger consumers’ emotions and alter the perception of their self-interests? The answer is: *People will act*. This section highlights three examples of how the self-interest calculus changes when platforms encourage their captured audience (consumers) to advocate on their behalf.

A. Facebook

If you think of a modern monopoly, Facebook is surely one of the first companies that comes to mind. It is responsible for approximately twenty-five percent of all traffic on the Internet and is the primary news source for forty-four percent of Americans.²⁶ Facebook has incredible power in expected and unexpected ways. Case in point of the unexpected occurred in January of 2012. At that time, researchers ran an experiment to see how Facebook could influence people’s emotions. They changed approximately 700,000 users’ newsfeeds (the stream of updates and posts that you see when you log on to the site).²⁷ Some people saw more positive posts and others saw more negative ones. This actually changed the emotions of the users—those users that were manipulated posted more positive or negative posts themselves depending on their experimental group.

²¹ Seth Fiegerman, *Inside the Failure of Google+, a Very Expensive Attempt to Unseat Facebook*, Mashable (Aug. 2, 2015), <http://mashable.com/2015/08/02/google-plus-history/#WFvSGM9QCsqh>.

²² JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); JAMES M. BUCHANAN & ROBERT D. TOLLISON, *THE THEORY OF PUBLIC CHOICE*, 13 (1984).

²³ EAMONN BUTLER, *PUBLIC CHOICE-A PRIMER*, 25 (2012).

²⁴ See, e.g., Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 189 (1990); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). Public choice theory is not the only way to look at political participation. Some people do engage in the political process, and for a variety of reasons, including the “Kantian” desire to act in a way that you want other people to act. Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 508 (1982).

²⁵ Jonathan R. Macey, *Admin Agency Obsolesce and Interest Grow*

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

²⁷ Adam D. I. Kramer, Jamie E. Guillory, & Jeffrey T. Hancock, *Experimental Evidence of Massive-Scale Emotional Contagion through Social Networks*, 111 PROCEEDINGS NAT’L ACADEMY SC. 8788 (2014).

Another disturbing example of Facebook’s unexpected power occurred in 2010 when researchers conducted an experiment to see if Facebook could influence voter participation in the mid-term elections.²⁸ The experiments showed some Facebook users a link to find their polling place, a button they could click to say “I voted,” and a sampling of profile pictures of their friends who had already voted. Others were shown a link to polling places and a button, but not the profile pictures of their friends. Users who were shown friends that voted were 0.39% more likely to vote.²⁹ While this increase was a small percentage, with Facebook’s 180 million active daily users in the U.S., it shows how a simple manipulation of the interface could have a profound impact on an election.³⁰

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

Since 2014, Facebook had been working on a project called Internet.org to bring the Internet to millions of unconnected users in India. Under the rhetoric of making “connectivity a human right,” Facebook encouraged Indian telecommunications companies to offer free data access to a suite of sites curated by Facebook, including the social networking site itself.³¹ This of course had the added benefit of capturing the untapped Indian market, which would enable Facebook to continue its breakneck growth rate.

However, the Telecom Regulatory Authority of India (TRAI) decided to consider whether or not India was going to promote net neutrality or allow telecommunication companies to provide free access to certain sites and not others. The TRAI asked for public comment on the issue, which eventually sent Facebook into full campaign mode to stop the threat to Internet.org, later repackaged as “Free Basics.”³² As described by the Guardian newspaper the platform manipulated its interface to encourage its users to influence the TRAI’s decision:

Every user in India who logged into Facebook was greeted with a special message from Facebook, which said: “Free Basics is a first step to connecting 1 billion Indians to the opportunities online. But without your support, it could be banned in a matter of weeks.” Below the message, a large purple button invited users to click and “send email” to the regulator. If this was not intrusive enough, many users complained that even if they

²⁸ Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 7415 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3834737>. See also Johnathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 335 (2014) (arguing that “digital gerrymandering” could easily flip an election).

²⁹ Bond *supra* note 28 at 296.

³⁰ The authors of the study drive home this point by citing the fact that George Bush beat Al Gore in the 2000 US Presidential election by only 537 votes in Florida. *Id.* at 295. For Facebook statistics see *Our History*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited April 29, 2017).

³¹ Rahul Bhatia, *The Inside Story of Facebook’s Biggest Setback*, THE GUARDIAN (May 12, 2016), <https://www.theguardian.com/technology/2016/may/12/facebook-free-basics-india-zuckerberg>.

³² *Id.* See Aayush Soni, *India Deals Blow to Facebook in People-Powered ‘Net Neutrality’ Row*, THE GUARDIAN (Feb. 8, 2016), <https://www.theguardian.com/technology/2016/feb/08/india-facebook-free-basics-net-neutrality-row>.

declined to send the message, merely lingering on the page caused Facebook to send all their friends a notification indicating they had written to the regulator.³³

According to Facebook, sixteen million Indians sent emails to the TRAI encouraging it to allow Facebook to facilitate the free mobile internet service.³⁴ The TRAI had to develop programs to sift out the avalanche of emails. When they did, they discovered that most of the comments in favor of Free Basics (likely populated by Facebook users) did not answer the questions proposed by the TRAI for comment. TRAI “worried that Free Basics’ supporters were not ‘making informed decisions’ and chastised Facebook for reducing the consultation to a popularity contest.”³⁵

After much debate, the TRAI decided to prohibit discriminatory tariffs and support net neutrality, which effectively shut down Facebook’s hopes capturing market share with Free Basics.³⁶ 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.”³⁷ Among the various arguments made by the TRAI to support net neutrality, none were presented to Facebook users by Facebook. For example, the TRAI stated that one service provider charging differential prices for content could damage the “architecture of the internet,” which relies on openness and the ability to link.³⁸ Furthermore, the TRAI was concerned that by allowing providers to “define the nature of access” they would shape users’ experiences and effectively censor the information they see.³⁹ Despite its lack of success, Facebook demonstrated its ability and willingness to use its platform to mobilize its user base to advocate on its behalf.

B. Lyft

In 2014, car sharing giants, Lyft and Uber, were in a heated battle with regulators after two bills toughening ride sharing-requirements were introduced in the California statehouse.⁴⁰ Lyft partnered with Phone2Action to capture the attention of users. Phone2Action is a startup company that facilitates contact between citizens and lawmakers.⁴¹ It offers a suite of services to

³³ Bhatia *supra* note 31. See also Matt Stempeck, *Are Uber and Facebook Turning Users Into Lobbyists?* HARV. BUS. REV. (Aug. 11, 2015), <https://hbr.org/2015/08/are-uber-and-facebook-turning-users-into-lobbyists>.

³⁴ Bhatia *supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Telecom Regulatory Authority of India, *Prohibition of Discriminatory Tariffs for Data Services Regulations* (2016), http://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf [hereinafter TRAI Memorandum]; Catherine Shu, *Facebook’s “Save Free Basics in India” Campaign Provokes Controversy*, TECH CRUNCH (Dec. 15, 2015), <https://techcrunch.com/2015/12/17/save-free-basics/>.

³⁸ TRAI Memorandum at 9.

³⁹ *Id.* at 10.

⁴⁰ Carolyn Said, *Uber, Lyft, Airbnb Harness Users to lobby Lawmakers for Them*, SAN FRANCISCO CHRONICLE (January 11, 2015), <http://www.sfgate.com/business/article/Uber-Lyft-Airbnb-harness-users-to-lobby-6005562.php>. For a description of the proposed legislation see Jon Brooks, *Once Friendly Territory, California Looks to Toughen Rules for Uber, Lyft*, KQED (June 17, 2014), <https://ww2.kqed.org/news/06/17/2014/Uber-Lyft-Insurance-crack-down/>.

⁴¹ Said *supra* note 40.

platforms to lower the barriers to advocacy, including patch-through calling, petitions, and real-time views of campaign progress.⁴²

With the help of Phone2Action, Lyft targeted passengers and drivers both in the app and via email to defeat the ridesharing legislation.⁴³ They provided relevant contact information for lawmakers and suggested language on messages inside the user interface.⁴⁴ Ultimately, the bill supporting background checks and drug testing failed and the insurance bill was modified to appease Uber and Lyft.⁴⁵ Since 2014, Lyft has used Phone2Action's tools to manipulate their user interface and encourage people to contact their lawmakers in more than fifty states.⁴⁶

C. Google

On January 17, 2012 Google went dark. It covered its logo in a black box and showed searchers a simple message: "Tell Congress: Please don't censor the web!" (see Figure 1). The image was aimed at mobilizing the public about two bills that would restrict access to websites that hosted pirated content (The Protect Intellectual Property Act (PIPA) in the Senate and the Stop Online Piracy Act (SOPA) in the House of Representatives).⁴⁷ Clicking the logo or blue link would lead searchers to a page where they could "learn more" about the issue and sign a petition.⁴⁸ Google framed PIPA and SOPA as attempts at by the government to censor people and "criminalize linking and the fundamental structure of the Internet itself."⁴⁹

The image was viewed by 1.8 billion people and was part of a larger campaign by popular websites such as Wikipedia and Reddit.⁵⁰ Presumably due in part to Google's Platform Advocacy, Congress received 8 million calls, 4 million emails, and 10 million petition signatures, and the bills were withdrawn.⁵¹

⁴² *Communicating with Officials*, PHONE2ACTION, <http://phone2action.com/products/communicating-with-officials/>; *Advocacy Live*, PHONE2ACTION, <http://phone2action.com/products/advocacy-live/>.

⁴³ Said *supra* note 40.

⁴⁴ "Of the people emailed, 28% took action by contacting their legislator to voice opposition against the legislation. That conversion rate is 14x the normal conversion rate for an advocacy-related email." *Case Study: Lyft*, PHONE2ACTION, http://phone2action.com/wp-content/uploads/2017/04/P2A_CaseStudy-Lyft_Oct16_F.pdf.

⁴⁵ *Id.*

⁴⁶ PHONE2ACTION *supra* note 44. Phone2Action is consistently making it easy for users to voice their "opinions." In 2017, it won an award for product of the year from a political consulting online journal, Campaign & Elections, for its Amazon Alexa skill that made "hands-free civic engagement possible." Gerardo Gomex, *C&E Product of the Year: Our Amazon Alexa Skill* (May 9, 2017), <http://phone2action.com/blog/2017/amazon-alexa-skill/>.

⁴⁷ TAPLIN *supra* note 19 at 127; *The Fight Against SOPA and PIPA: The Power of Online Civic Organizing*, https://tavaana.org/en/content/fight-against-sopa-and-pipa-power-online-civic-organizing#_edn1.

⁴⁸ Mike Masnick, *Google Goes Big with it SOPA/PIPA Protests; Blacks Out Logo*, TECHDIRT, <https://www.techdirt.com/articles/20120117/21305017444/google-goes-big-with-its-sopapipa-protests-blacks-out-logo.shtml>.

⁴⁹ Gautham Nagesh, *Google Chairman Says Online Piracy Bill Would 'Criminalize' The Internet* (Dec. 12, 2011), <http://thehill.com/policy/technology/198777-google-chairman-says-online-piracy-bill-would-criminalize-linking> (quoting Eric Schmidt, Google's Executive Chairman).

⁵⁰ TAPLIN *supra* note 19 at 127; *The Fight Against SOPA and PIPA: The Power of Online Civic Organizing*, https://tavaana.org/en/content/fight-against-sopa-and-pipa-power-online-civic-organizing#_edn1.

⁵¹ *Id.*



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

All of the examples described above demonstrate the four characteristics of Platform Advocacy. First, the platform manipulates a consumer interface so that consumers are forced to see information about a candidate or specific legislative, administrative, or other policy issue. This information is typically presented in a way that peaks curiosity and provokes emotions such as outrage. Second, unsurprisingly, the platform presents information in a light most favorable to it and never presents counterarguments. Third, the advocacy promotes the interests of the platform itself. Fourth, platforms make it nearly painless for users to act—“just click this button to send a message” or “read from this script while we dial a number.” Thereby reducing the burdens of advocating on behalf of the companies.

Applying these four characteristics to Google’s campaign against PIPA and SOPA one can easily see Platform Advocacy in action. Google manipulated its interface by blacking out its logo and encouraging users to satisfy their curiosity by clicking on it. It also framed the issue in terms of censorship as opposed to the enforcement of property rights and prevention of piracy.⁵² Users were not informed about Google’s objectives in opposing the legislation, i.e. to prevent harm to its business model both in terms of enforcement costs and potential liability.⁵³ Finally, Google made it very easy for users to sign a petition with a short digital form; thereby, reducing the burdens of advocacy.⁵⁴

Public choice theory expects citizens to act rationally in order to maximize utility. As mentioned above, this typically means people will not engage in the political process, and if they

⁵² Scott Cleland, *The Real Reasons Google Killed SOPA/PIPA*, FORBES (Jan. 24, 2012), <https://www.forbes.com/sites/scottcleland/2012/01/24/the-real-reasons-google-killed-sopapipa/#34f44cf04530>; Jim Abrams, *PIPA and SOPA: What You Need to Know*, CS MONITOR (Jan. 19, 2012), <http://www.csmonitor.com/Technology/2012/0119/PIPA-and-SOPA-What-you-need-to-know>.

⁵³ Cleland *supra* note 52.

⁵⁴ Deborah Netburn, *Google Says 4.5 Million People Signed Anti-SOPA Petition Today*, LA TIMES (Jan. 18, 2012), <http://latimesblogs.latimes.com/technology/2012/01/google-anti-sopa-petition.html>.

do they are motivated by some sort of rational self-interest.⁵⁵ However, when conceptions of what is in their or society’s best interest are influenced by platforms and the barriers to action (i.e. contacting a congressperson) are low, people will more readily act without considering the pros and cons of their choices. As detailed in the next section, the field of behavioral economics can shed light on why this is the case.⁵⁶

III. Unrestrained and Unnoticed

Behavioral economics rejects neoclassical 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.”⁵⁷ The application of behavioral economics to public choice theory led to the development of behavioral public choice theory (BPCT). BPCT presents the best framework for understanding irrational behavior in the context of Platform Advocacy.⁵⁸

With the help of BPCT, we can see the confluence of both identification and exploitation of consumer vulnerabilities. The first subsection below identifies some of these consumer vulnerabilities and the second subsection describes how through mediation platforms enormous control over what information users see and how they interact with it. This control over the design of the user interface can not only allow platforms to personalize user interactions to exploit biases, it can give platforms free reign to experiment on its users to uncover even more vulnerabilities thus creating a powerful self-reinforcing cycles to impair the decision-making ability of users.

D. BPCT and Irrational Behavior

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.”⁵⁹ For example, they discuss the “antiforeign bias.” If voters were rational, they would not support tariffs and protectionist trade policies; however, because voters are suspicious of people who are different from themselves, they “underestimate the economic benefits of interaction with

⁵⁵ Note that there are other non-self-interested theories as to why people participate in the democratic process. These include the expressive theory of voting, Kantian ethics, and personal characteristics among others. GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993); Alfred Cyril Ewing, *What Would Happen if Everybody Acted like Me?* 28 *PHILOSOPHY* 16 (1953); Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout*, 64 *J. SOC. ISSUES* 525 (2008). For the sake of argument this Article focuses on the explanations provided by public choice theory and behavioral economics.

⁵⁶ For an overview of behavioral economics and the law see Christine Jolls et al. *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998).

⁵⁷ Amitai Etzioni, *Behavioral Economics: Toward a New Paradigm*, 55 *AM. BEHAVIORAL Scientist* 1099, 1100 (2011).

⁵⁸ 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”).

⁵⁹ *Id.* at 265.

foreigners.”⁶⁰ The biases and heuristics uncovered by the BPCT literature are exacerbated by the fact that people have less incentive to behave rationally in “their capacity as political actors than in their capacity as market actors.”⁶¹

Becoming an informed political actor takes effort and because of the relatively low personal stakes involved in political participation, the failure to exert effort increases irrational behavior (i.e. a deviation from rational expectations).⁶² In the Platform Advocacy context, there are many ways platforms can trigger people to take a political action. Three are outlined below.

Intentions Heuristic. Heuristics are mental shortcuts that allow people to quickly and efficiently make decisions; however, they can also introduce errors. The intentions heuristic is a proxy that leads people to believe that good things flow from good intentions and bad things flow from bad intentions.⁶³ Therefore, if people trust a platform, which they generally do, they will usually think the policy position of those platforms are good.⁶⁴ People will therefore not take the time to consider the costs and benefits of a given position, and will take action if it is sufficiently easy to do so.⁶⁵

In-Group Bias. In-group bias is a well-documented phenomenon in which people tend to favor people who are like them (the “in-group”) over others (the “out-group”).⁶⁶ There are several causes of in-group bias from genetics (human survival has depended on groups) to the positive effects on self-esteem (boosting the group, boosts ourselves), and you see in-group bias throughout politics.⁶⁷ For example, in response to the same proposed California ridesharing legislation discussed in the previous section, Uber sent an email to users. The email read in part:

It’s time to take a stand. Next week, the California Senate Appropriations Committee will vote on AB 2293, a bill that would require companies like Uber to provide 20x the insurance that taxis must carry in California. This proposed legislation is part of a

⁶⁰ *Id.* at 2013 (citing BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 36 (2007)).

⁶¹ *Id.* at 203 (explaining how people rarely think that their vote will determine an outcome and the consequences of their voting choices will rarely impact them directly).

⁶² *Id.* The idea of effortful thinking to avoid irrational behavior is related to Daniel Kahneman’s work on the dual-process theory of cognition, which breaks down judgment into two systems: System 1 and System 2. Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 *AM. PSYCHOL.* 697 (2003). System 1 thinking deals with operations that are “automatic, effortless, associative, [and] implicit (not available to introspection).” *Id.* at 698. System 2 thinking, by contrast, deals with operations that are “slower, serial, effortful, [and] more likely to be consciously monitored and deliberately controlled.” *Id.*

⁶³ Jeffrey Friedman, *Popper, weber, and Hayek: The Epistemology and Politics of Ignorance*, 17 *CRITICAL REV.* i, xx (2005). See also Lucas & Tasic *supra* note 58 at 218-223.

⁶⁴ Though opinions can be mixed on companies like Facebook and Google, generally platforms companies enjoy positive reputations. See Karsten Strauss, *The World’s Most Reputable Companies, 2016*, *FORBES* (Mar. 22, 2016), <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).

⁶⁵ *Id.*

⁶⁶ Brian Mullen, Rupert Brown, & Colleen Smith, *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 *EUR. J. SOC. PSYCHOL.* 103 (1992). See also Lucas & Tasic *supra* note 58 at 234-237.

⁶⁷ Donald R. Kinder & Cindy D. Kam, *Us Against Them: Ethnocentric Foundations of American Opinion* (2010); Lucas & Tasic *supra* note 58 at 234.

backroom deal by the insurance industry, taxi companies and trial attorneys, designed to funnel more premiums and fees to these already entrenched industries.⁶⁸

Uber clearly wants users to separate its innovative ride sharing service from the “entrenched” incumbent industries and create an us versus them mentality. This plays well into the in-group bias.

Platforms that rely on networks of users can also exploit the in-group bias by identifying friends who support the platforms’ positions. Think again of the impact Facebook had on voting behavior when it showed users a sampling of their friends who had voted. People want to be a part of a group and support their group’s positions.

Action Bias. The action bias discourages careful deliberation and encourages action.⁶⁹ It stems from the visceral need to do something after something bad happens or if one is simply bored.⁷⁰ Action bias can be seen when platforms stir up emotions and make it easy for users to do something about it (i.e. sign a petition, call their congressperson, etc.). For example, in Google’s SOPA/PIPA campaign, Google made people think the government was going to censor the web. This sparked outrage and encouraged millions of people to take the simple step to sign an online petition.

Furthermore, the action bias can influence how lawmakers act. If there is a public outcry of support for a particular policy (whether that support be real or manufactured), lawmakers may fail to take the time to properly deliberate. Lucas and Tasic write that “[p]roblems demand solutions” and they suggest that the Sarbanes-Oxley Act was largely a result of the action bias.⁷¹ After Enron and WorldCom fell, Congress was eager to pass legislation in response, even though there was much evidence that the governance provisions in the Act would not be effective.⁷²

E. BPCT and Mediated Users

When the lens of BPCT is applied to highly mediated users, meaning their interactions occur through a digital platform where they can be monitored and perhaps manipulated, the potential for irrational behavior intensifies.⁷³ To understand why it is easier to exploit biases via platforms, we must first turn to the research on “nudging” as described by Richard Thaler and Cass Sunstein.⁷⁴ A nudge “is 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.”⁷⁵ Nudges can be used to shape behavior when they are designed to take advantage

⁶⁸ Jon Fleischman, *CA Uber Users Get Email to Oppose Onerous California Bill*, BREITBART (Aug. 8, 2014), <http://www.breitbart.com/california/2014/08/08/ca-uber-users-get-email-to-oppose-onerous-california-bill/> (citing the Uber email).

⁶⁹ Lucas & Tasic *supra* note 58 at 231-232.

⁷⁰ Anthony Pratt & Richard Zeckhauser, *Action Bias and Environmental Decisions*, 21 J. RISK & UNCERTAINTY 45, 45 (2000).

⁷¹ *Id.*

⁷² Lucas & Tasic *supra* note 58 at 232 (citing Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1591-94 (2005)).

⁷³ Ryan Calo, *Digital Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999) (describing “mediated consumers”).

⁷⁴ RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2009).

⁷⁵ *Id.* at 6.

of “flaws in human decision-making to get individuals to choose one alternative [over] another.”⁷⁶ This is known as shaping and platforms do it all the time.

Shaping is particularly present in digital marketing, which Professor Ryan Calo calls “digital marketing manipulation.” He defines it as a combination of “*personalization* with the intense *systemization* made possible by mediated consumption.”⁷⁷ Personalization and systemization involves analyzing massive amounts of consumer data to automatically target users at a personal level and potentially prey on their vulnerabilities.

Platforms monitor every click and interaction sometimes across multiple devices and services and are able to uncover useful patterns on global and individual levels. For instances, “likes” on Facebook are an incredible predictor of personal attributes from sexuality to drug and alcohol use.⁷⁸ Or take “persuasion profiling,” which is used to not only target specific advertisements to particular individuals, but to present that information in a particular way, depending on the viewer.⁷⁹ Influence strategies such as scarcity, appeals to authority, or consensus can be tailored to individual users.⁸⁰

Data used to predict and ultimate influence behavior comes not only from observation but from experimentation. With A/B testing, platforms can use the “iterative method of using randomized controlled experiments to design user interfaces, products, and ads” in order to notice differences in consumer behavior.⁸¹ For example, Facebook experimented on 29 million users to determine whether or not people would be more likely to click on ads by companies that are endorsed by their friends over companies that are not.⁸²

The very same tactics used to get consumers to buy particular products can be used to change their behavior as political actors. For example, platforms could shape voter behavior through the technique of “blending,” which involves taking a photograph of a user and putting it close to a photograph of a politician. When a person’s face and a politician’s face are closer together, cognitive biases including the intent bias are triggered, which makes people more inclined to trust the politician.⁸³ Platforms also have the ability to systematically predict and target those users who are likely to both agree with the platform’s position and take action on behalf of the platform. This can harm democracy by activating less than a representative sample of public opinion and exacerbate participatory inequalities.⁸⁴

⁷⁶ Kevin Vallier, *On the Inevitability of Nudging*, 14 GEO. J.L. & PUB. POL’Y 817 (2016) (citing Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not to Nudge*, 18 J. Pol. Phil. 123, 128 (2010)).

⁷⁷ Calo *supra* note 73 at 1021.

⁷⁸ Michal Kosinski, David Stillwell & Thore Graepel, *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PNAS 5802 (2013), <http://www.pnas.org/content/110/15/5802.full.pdf>.

⁷⁹ Eli Pariser, *Welcome to the Brave New World of Persuasion Profiling*, WIRED (April 26, 2011), https://www.wired.com/2011/04/st_essay_persuasion_profiling/.

⁸⁰ Maurits Kaptein & Dean Eckles, *Heterogeneity in the Effects of Online Persuasion*, 26 J. INTERACTIVE MARKETING 176 (2012).

⁸¹ Calo *supra* note 73 at note 114.

⁸² Eylan Bakshy et. al., *Social Influence in Social Advertising: Evidence from Field Experiments*, Proceedings of the 13th ACM Conference on Electronic Commerce (2012), <https://arxiv.org/pdf/1206.4327.pdf>.

⁸³ 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).

⁸⁴ EDWARD T. WALKER, GRASSROOTS FOR HIRE: PUBLIC AFFAIRS CONSULTANTS IN AMERICAN DEMOCRACY, 13 (2014).

Combining the research on BPCT and digital marketing manipulation, we can easily see how platforms can use their unique position to influence the political process. Because all interaction is mediated through the platform, simple tweaks to the user interface can exploit these known biases. Furthermore, platforms can discover new biases through a wide range of experiments on their user base. This is unsettling because modern ideas of agency and choice suggest that people are masters of their own fate, particularly as constituents and voters. However, when dependent on and mediated by platforms, consumers may lack the ability to know they are being manipulated or at the very least presented with an incomplete picture of an issue.

IV. Mitigating Harms to Democracy

Deliberation is central to the principles of a republic.⁸⁵ As Cass Sunstein explains, the Framers had aspirations of creating a deliberative democracy as evidenced in their design choices: 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 make sure that the choice of president was based on the “combination of popular will and reflection on the part of representatives.”⁸⁶ These procedures and institutions are designed to reflect “the cool and deliberate sense of the community.”⁸⁷

Principally the citizenry reflects and deliberates through their representatives. We hope that representatives are more knowledgeable about public affairs because they exercise their power in an institutional setting which encourages collective reasoning.⁸⁸ Representatives have a filtering effect that “ensure[s] informed and reflective decisions” and not just popular sentiment.⁸⁹ However, when elected-officials are inundated with requests from voters who are provoked by platforms (consciously or unconsciously) and have, perhaps, insufficient understanding of the complexity of issues, the freedom of lawmakers to deliberate is severely compromised.⁹⁰

As seen in previous sections of this Article, Platform Advocacy may take many forms from direct solicitation of user support to the more troubling exploitation of irrational user behavior through design choices. Regardless, Platform Advocacy is a form of “grassroots

⁸⁵ Though it should be noted that there are many opportunities for direct democracy in the U.S. with the widespread use of public referenda. Lowenstein, *supra* note 24 at 508 (stating “Direct democracy is a more widespread and important practice in American government than is generally supposed”).

⁸⁶ CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA, 47 (2017).

⁸⁷ ALEXANDER HAMILTON, JAMES MADISON, AND JOHN JAY, THE FEDERALIST PAPERS, 384 (1961); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT, 1 (1984).

⁸⁸ SUNSTEIN *supra* note 86 at 44; BESSETTE, *supra* note 87 at 2.

⁸⁹ SUNSTEIN *supra* note 86 at 48.

⁹⁰ As Cass Sunstein explains, the proof that the Framers had aspirations of creating a deliberative democracy are apparent in their design choices: 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 elector college was designed to make sure that the choice of president was based on the “combination of popular will and reflection on the part of representatives.” SUNSTEIN *supra* note 86 at 47. The republic was designed to “ensure informed and reflective decisions” and not just popular sentiment. *Id.* at 48.

lobbying,” which is a concept that is rooted in ideas of community and citizen engagement.⁹¹ It involves encouraging the public to contact lawmakers in person, through the mail, over the phone, or online to voice their opinions.⁹² Grassroots lobbying has been proven effective and is “central to interest groups’ repertoires for gaining influence.”⁹³

When platforms use their position to “manufacture” spontaneous support through manipulation of user interfaces and exploitation of consumer biases their activities can be considered astroturfing.⁹⁴ Astroturfing is an illegitimate form of grassroots advocacy because it is designed to give the impression of broad public support or opposition to a particular issue, even when such a concern may not exist.⁹⁵ Currently, there are no federal laws that addresses the potential threats of astroturfing or any other forms of Platform Advocacy.⁹⁶ This leaves firms dependent on their sense of normative ethics to avoid utilizing their Platform Advocacy in ways that could manipulate users.⁹⁷

V. Recommendations

This section outlines three recommendations to improve democratic deliberation in the context of Platform Advocacy. Each of these recommendations implicates the First Amendment because of the heightened scrutiny afforded to political, as opposed to commercial, speech.⁹⁸ Therefore, the First Amendment concerns will be addressed throughout the section.

A. Disclosure

If platforms decide to use their interface to push a particular political point, then they should be required to provide notice to users that the positions are the opinions of the platform. This disclosure could be similar to how sponsors of election-related advertising must disclaim

⁹¹ WALKER *supra* note 84 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”).

⁹² Grassroots lobbying is in contrast to direct lobbying which involves companies or organizations “attempts to influence a legislative body through communication with a member or employee of a legislative body, or with a government official who participates in formulating legislation.” “*Direct*” and “*Grass Roots*” Lobbying Defined, IRS, (last revised March 8, 2017), <https://www.irs.gov/charities-non-profits/direct-and-grass-roots-lobbying-defined>.

⁹³ *Id.* at 9; Daniel E. Bergan, *Does Grassroots Lobbying Work?*, 37 AM. POL. RESEARCH 327, 327 (2009) (finding that “lobbying by e-mail has a substantial influence on legislative voting behavior”).

⁹⁴ Lloyd Hitoshi Mayer, *What Is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 559 (2008).

⁹⁵ Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 362 (2010); 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.”).

⁹⁶ Grassroots lobbying is not considered “lobbying” under federal lobbying disclosure laws. It may be regulated somewhat by state lobbying laws, but in a piecemeal fashion. WALKER *supra* note 84 at 201.

⁹⁷ Mary Lyn Stoll, *Corporate Political Speech and Moral Obligation*, 132 J. BUS. ETHICS 553 (2015).

⁹⁸ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561–64 (1980) (distinguishing commercial and political speech); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (stating “[W]e have long since held that corporations are covered by the First Amendment”).

who is “responsible for the content of the advertising.”⁹⁹ For example, if Google wants to oppose online piracy laws through its platform, it would need to inform users before they digitally sign a petition or are “patched-through” to their congressperson, etc. that Google has a vested business interest in seeing the legislation fail.

In its highly controversial opinion in *Citizens United v. FEC*, the Supreme Court held that the political speech of corporations is entitled to the same constitutional protections as natural persons.¹⁰⁰ Therefore, the strict scrutiny standard applies for determining constitutionality of laws that may impair political speech. This means the government must prove that the restriction, such as a disclosure rule, furthers a compelling governmental interest and is narrowly tailored to achieve that interest.¹⁰¹

While the Court in *Citizens United* found that 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.¹⁰² The court justified its decision by asserting that the government has a compelling interest in making sure the electorate can “make informed decisions and give proper weight to different speakers and messages.”¹⁰³

Similarly, the Court has historically upheld disclaimer and disclosure laws related to astroturfing. Most notably in *United States v. Harriss*,¹⁰⁴ which upheld the disclosure requirements in the Federal Regulation of Lobbying Act (FRLA).¹⁰⁵ The FRLA required companies to disclose expenditures related to influencing Federal legislation through “direct communication” or with “direct pressure[]” on members of Congress.¹⁰⁶ Among the “direct pressure” activities requiring disclosure included an “artificially simulated letter campaign,” which is a classic example of astroturfing.¹⁰⁷ The Court upheld those disclosure requirements based on principles of deliberative democracy. Chief Justice Warren wrote for the court stating:

. . . the American ideal of government by elected representatives depends to no small extent on [the ability of members of Congress] to properly evaluate [the myriad of pressures to which they are regularly subjected]. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.¹⁰⁸

As supported by *Citizens United* and *Harriss*, disclosure laws would further the compelling government interest of ensuring the marketplace of ideas; thereby, allowing citizens

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

¹⁰⁰ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

¹⁰¹ *Id.* at 898.

¹⁰² The disclosure and disclaimer laws were included in the Bipartisan Campaign Reform Act. *Id.* Only Justice Thomas voted to hold the disclosure requirements unconstitutional. *Id.* at 980-82 (Thomas, J., concurring in part and dissenting in part).

¹⁰³ *Id.* at 916.

¹⁰⁴ 34 U.S. 612 (1954).

¹⁰⁵ Ch. 753, 60 Stat. 839 (1946) (codified as amended at 2 U.S.C. §§ 261-70 (1994)) (repealed in 1995).

¹⁰⁶ *Harris*, 347 U.S. at 620, 623-24.

¹⁰⁷ *Id.* at 620.

¹⁰⁸ *Id.* at 625.

and their representatives to deliberate with necessary facts in hand.¹⁰⁹ Furthermore, drawing boundaries around which forms of Platform Advocacy require disclosure should not be an insurmountable challenge if lawmakers utilize the definition of Platform Advocacy defined in Section II and provide a clear way to identify platforms from other firms.

B. Outlawing Forced Action and Incentives

Though platforms have yet to require users to reach out to lawmakers before they can continue to participate on a platform, it would only take a small modification to a user interface (similar to accepting terms of service) to force such consumer action. To prevent the potential harms inherent in such forced action, a federal law could be passed that would prevent platforms from requiring users to contact any lawmaker or sign any petition before using a platform's service. In addition, platforms could be prohibited from providing any incentive to users for their advocacy, such as a monetary benefit, access to unique platform features, or eligibility for prizes.¹¹⁰

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

C. Platform Neutrality

More broadly, law makers should consider regulating to ensure “platform neutrality.”¹¹¹ Platform neutrality would prevent platforms from “distorting either private commerce or the public sphere simply by virtue of their size, network power, or surveillance capacities.”¹¹² This would mean that they would not be able to use their consumer interface to push for one policy over another. Outlining the details of what specific platform neutrality legislation would like is beyond the scope of this Article; however, the justifications for such legislation can be explored.

Platforms raise more complex questions than the trusts of the late 19th century, because their power extends well beyond economic power. We have seen how they can enable public action through their ability to manipulate user interfaces, and legally there is very little to stop them from doing so. They have massive and captive audiences similar to Internet Service Providers (ISPs), like Comcast or Verizon, who often have a monopoly or duopoly in any given market.

¹⁰⁹ See William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. Legis. 32, 39 (2006) (discussing how disclosure comports with the market place of ideas concept, which ensures that the public has access to relevant information).

¹¹⁰ Similar to how it is illegal to offer, solicit, or accept any "expenditure to any person, either to vote or withhold his vote" in a federal election 18 U.S. Code § 597.

¹¹¹ Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRES L. 487 (2016).

¹¹² *Id.* at 489.

In the context of ISPs, the Federal Communications Commission (FCC) has taken steps to institute a net neutrality regime.¹¹³ After much debate within the FCC and inside the judiciary, the FCC in 2015 issued its 2015 Open Internet Order, which classified the Internet as a Title II telecommunications service.¹¹⁴ As such it is subject to common carrier regulations that outlaws discrimination and blocking.¹¹⁵ In its order the FCC stated that a net neutrality regime is necessary because ISPs have the economic incentives and are capable of limiting the openness of the Internet.¹¹⁶

Similarly, platforms have the incentive and capability to hamper the exchange of ideas and influence political processes. As Frank Pasquale writes, “When a service has hundreds of millions of users, the acceptance of certain rules for it starts to seem less like overbearing state action than a virtual Magna Carta: rulers acceding to certain minimum standards of due process and inclusion.”¹¹⁷

Platform neutrality would prevent the insidious exploitation of consumer biases. It could also have the added benefit of going beyond addressing harms caused by Platform Advocacy and prevent such things as search engine manipulation. Robert Epstein and Ronald E. Robertson demonstrated how they could manipulate a search engine to shift the preferences of undecided voters by twenty percent or more.¹¹⁸ This search engine manipulation effect (SEME) is based on the well-documented primacy effect—people are biased toward what they see first. Epstein and Robertson warned in their Article of the potential harm of such an effect, since search rankings are controlled almost entirely by a single company, Google.¹¹⁹

Conclusion

Unlike traditional forms of lobbying, platforms today have the unique ability to influence consumer decisions because of the personalized, intimate, and dependent interactions that occur on platforms. Platforms can use their position to frame issues, trigger irrational behavior, and mobilize their user base in ways that hamper the exchange of ideas and deliberation. The ability

¹¹³ *Id.* at 499; Simone A. Friedlander, Note, *Net Neutrality and the FCC’s 2015 Open Internet Order*, 31 Berkeley Tech. L.J. 905, 907-908 (2016) (the “net neutrality debate encompasses a range of concerns, including fears of ISPs blocking access to certain content for political, anti-competitive, or censorship reasons; vertically integrated companies favoring or only allowing access to their subsidiaries; and larger, more well-funded competitors denying market entry to smaller sites, services, and companies.”).

¹¹⁴ FED. COMM’NS COMM’N, FCC-15-24, *IN RE* PROTECTING AND PROMOTING THE OPEN INTERNET (Mar. 12, 2015) [hereinafter 2015 OPEN INTERNET ORDER]. For an excellent discussion of the debates leading up to the FCC’s decision, *see id.*

¹¹⁵ 2015 OPEN INTERNET ORDER.

¹¹⁶ *Id.* at ¶ 86.

¹¹⁷ Pasquale *supra* note 111 at 500-501.

¹¹⁸ Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcome of Elections*, 112 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES E4512 (2015), <http://www.pnas.org/content/112/33/E4512.full.pdf?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>.

¹¹⁹ Epstein & Robertson *supra* note 118 at E4513. Lucas Introna and Helen Nissenbaum also warned of the potential harms of search engines on democracy decades ago. *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169 (2000).

to manipulate consumers gives dominant firms even more power to influence laws in their favor, thus understanding why and when Platform Advocacy deserves legal intervention is necessary.

In his speech at the Hiroshima Peace Memorial in 2016, President Obama stated “Technological progress without an equivalent progress in human institutions can doom us.”¹²⁰ We are only beginning to understand the power of Platform Advocacy. Therefore, we must ensure that we have institutions and procedures to “check or moderate unreflective popular sentiments and to promote the rule of deliberative majorities.”¹²¹

¹²⁰ *Text of President Obama’s Speech in Hiroshima, Japan*, N.Y. TIMES (May 27, 2016), https://www.nytimes.com/2016/05/28/world/asia/text-of-president-obamas-speech-in-hiroshima-japan.html?_r=0.

¹²¹ BESSETTE, *supra* note 87 at 1.