# WHEN THE SOAPBOX TALKS: PLATFORMS AS PUBLIC UTILITIES

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Soapboxes are frequently used to illustrate the utility of modern-day informational platforms. The Supreme Court in *Reno v. ACLU* described chat rooms as allowing "any person with a phone line [to] become a town crier with a voice that resonates farther than it could from any soapbox." However, the legal literature rarely goes further in the comparison than conjuring the idyllic scene of a soapbox orator in the classic town square. Instead, scholars focus more often on the shift from mass media to "many-media" and how to update laws to fit mass media's regulatory environment to the present day, including First Amendment concerns and extending liability to platforms.

These comparisons miss half the story. Comparisons to mass media rightly capture the concentration of corporate power inherent in mass media and present in modern-day platforms. The comparisons, however, miss the amplification, portability, and affordability for the speaker in both the soapbox and social media eras. Overlooking these eras' shared democratization of speech, the current literature fails to acknowledge the public and democratic aspects of the control of speech in the soapbox era. The literature thus fails to consider the same types of controls for speech on informational platforms today and whether sustaining democratic discourse demands these controls. This Essay addresses this deficiency by making a robust comparison to the soapbox era, arguing that informational platforms are public utilities, and exploring policy responses that provide public, democratic control of speech on informational platforms.



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## INTRODUCTION

Before the broad adoption of corrugated cardboard, soap and other goods were shipped in sturdy, wooden boxes.[1] Discarded after fulfilling their designed function, the boxes were readily available for other uses.[2] Persons with something to say to the people around them found these boxes to be sturdy, portable, and sometimes free platforms on which they could amplify their opinions about the social and political issues of the day.[3] And listeners, often of modest means and looking for free entertainment, would freely give their attention.[4] Now, informational platforms, such as Facebook and Twitter, are the soapboxes of the present, offering similar features of amplification, portability, and affordability for the speaker and free entertainment for the masses.[5]

Unlike the discarded shipping containers of a century ago, however, today's platforms were originally designed to be platforms for communication.[6] Today's platforms have not been discarded and instead continue to serve their designed function, connecting billions of people

1. Mary Anne Trasciatti, *Athens or Anarchy? Soapbox Oratory and the Early Twentieth-Century American City*, BLDGS. & LANDSCAPES, Spring 2013, at 44.

2. *Id.*

3. *Id.*; *Speakers' Corner*, ROYAL PARKS, https://www.royalparks.org.uk/parks/hyde-park/things-to-see-and-do/speakers-corner [https://perma.cc/XD8Y-HN6T] (last visited Feb. 7, 2022).

4. *See* Trasciatti, *supra* note 1, at 46.

5. Other platforms that may also be relevant include YouTube, Nextdoor, Instagram, and perhaps others. Note that listeners on social platforms do not pay at the point of use, but they do provide value to the social platforms in their attention and personal information. Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 1001 (2018).

6. *See, e.g.*, Sabrina Barr, *When Did Facebook Start? The Story Behind a Company That Took Over the World*, INDEPENDENT (Aug. 23, 2020, 6:29 AM), https://www.independent.co.uk/life-style/gadgets-and-tech/facebook-when-started-how-mark-zuckerberg-history-harvard-eduardo-saverin-a8505151.html; Nicholas Carlson, *The Real History of Twitter*, BUS. INSIDER (Apr. 13, 2011, 12:30 PM), https://www.businessinsider.com/how-twitter-was-founded-2011-4 [https://perma.cc/V8TS-QN7U].

and generating profits and wealth for their owners.[7] With that ownership comes control of the platform, including the ability for owners to use the platform themselves.[8]

Informational platforms also simultaneously function as the modern public square.[9] Users rely on informational platforms for the infrastructure to speak and listen, with platforms providing communications from other users and advertisers. Because informational platforms rely on advertising dollars for revenue, they are rewarded when they deliver more user engagement and attention to advertisers.[10] And unlike the nostalgic town square of the soapbox oratory era, or even the more recent shopping mall version,[11] the digital public square can be—and often is—tailored to each user by both the actions of the user and the platform.[12]

This Essay is about how the control of amplification and access constrains public speech, how the constraints on public speech are consolidated in the owners of informational platforms, and whether and to what extent these platforms should have the power to constrain speech. Informational platforms have been implicated in election interference,[13]

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7. *See, e.g.*, Alex Wilhelm & Natasha Mascarenhas, *Ad Revenues and E-commerce Boom Boost Facebook Earnings but US Users Down from COVID Surge*, TECHCRUNCH (Oct. 29, 2020, 3:43 PM), https://techcrunch.com/2020/10/29/facebook-q3-2020-earnings-snap/ [https://perma.cc/JR73-TUJ8]; Kirsten Korosec & Natasha Mascarenhas, *Twitter Revenue Rises 14%, but User Growth Fails to Impress*, TECHCRUNCH (Oct. 29, 2020, 4:00 PM), https://techcrunch.com/2020/10/29/twitter-revenue-rises-14-but-user-growth-fails-to-impress/ [https://perma.cc/4F5E-6ES4].

8. *See, e.g.*, Allan Smith, *Twitter Slaps Warning Label on Trump Tweet for Violating 'Election Integrity' Rules*, NBC NEWS (Aug. 23, 2020, 1:32 PM), https://www.nbcnews.com/politics/donald-trump/twitter-slaps-warning-label-trump-tweet-violating-election-integrity-rules-n1237803 [https://perma.cc/77TN-AXTL].

9. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) ("North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

10. *See* Julian Morgans, *Your Addiction to Social Media Is No Accident*, VICE (Mar. 17, 2017, 10:09 PM), https://www.vice.com/en_us/article/vv5jkb/the-secret-ways-social-media-is-built-for-addiction [https://perma.cc/5R8U-V9RY].

11. *See, e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85, 87 (1980).

12. Chris Taylor, *Algorithms Control Your Online Life. Here's How to Reduce Their Influence*, MASHABLE (Aug. 31, 2020), https://mashable.com/article/how-to-avoid-algorithms-facebook-youtube-twitter-instagram/ [https://perma.cc/NTQ5-KHXW].

13. Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html [https://perma.cc/4PZH-VKCA].

cyberbullying,[14] misinformation,[15] and genocide,[16] among other ills.[17] These platforms have attempted to address these ills.[18] At times, these efforts have created their own sets of problems, such as when content moderators suffer PTSD and depression.[19] Importantly, platforms'

14. MONICA ANDERSON, PEW RSCH. CTR., A MAJORITY OF TEENS HAVE EXPERIENCED SOME FORM OF CYBERBULLYING (2018), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2018/09/PI_2018.09.27_teens-and-cyberbullying_FINAL.pdf [https://perma.cc/WV26-4ZB9].

15. *See, e.g.*, Stephanie Kulke, *Social Media Contributes to Misinformation About COVID-19*, NW. NOW (Sept. 23, 2020), https://news.northwestern.edu/stories/2020/09/social-media-contributes-to-misinformation-about-covid-19/ [https://perma.cc/CSZ5-V2WT].

16. Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html [https://perma.cc/2U8J-X9XS].

17. *See, e.g.*, Jennifer Emily, *Assault by Twitter? Guilty Plea Expected in Attack Targeting Dallas Author Kurt Eichenwald*, DALL. MORNING NEWS (Dec. 13, 2019, 3:08 PM), https://www.dallasnews.com/news/crime/2019/12/13/assault-by-twitter-guilty-plea-expected-in-attack-targeting-dallas-author-kurt-eichenwald/ [https://perma.cc/XEY7-E722] (discussing Twitter message that triggered epileptic seizure); Donie O'Sullivan, *Facebook Says It's Policing Its Platform, but It Didn't Catch a Livestream of a Massacre. Why?*, CNN (Mar. 15, 2019, 2:21 PM), https://www.cnn.com/2019/03/15/tech/facebook-new-zealand-content-moderation/index.html [https://perma.cc/MH4M-8Y2P] (discussing a livestream of a mass murder on Facebook); Jane Wakefield, *TikTok Tries to Remove Widely Shared Suicide Clip*, BBC NEWS (Sept. 8, 2020), https://www.bbc.com/news/technology-54069650 [https://perma.cc/6K25-Z6GF] (discussing TikTok's attempt to remove a suicide video, as well as other platforms' histories involving self-harm content).

18. *See, e.g.*, Sheera Frenkel & Mike Isaac, *Facebook 'Better Prepared' to Fight Election Interference, Mark Zuckerberg Says*, N.Y. TIMES (Sept. 13, 2018), https://www.nytimes.com/2018/09/13/technology/facebook-elections-mark-zuckerberg.html [https://perma.cc/K8K4-Y7H7]; Elizabeth Culliford, *Twitter Expands Misinformation Rules Ahead of U.S. Election*, REUTERS (Sept. 10, 2020, 12:06 PM), https://www.reuters.com/article/us-usa-election-twitter/twitter-expands-misinformation-rules-ahead-of-u-s-election-idUSKBN2612XS [https://perma.cc/5ZFA-89X2]; Casey Newton, *The Trauma Floor: The Secret Lives of Facebook Moderators in America*, VERGE (Feb. 25, 2019, 8:00 AM), https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona [https://perma.cc/JC8Z-YFQD] (noting Facebook added thousands of new content moderators, mostly hired through contractors); Ed Ho, *Our Latest Update on Safety*, TWITTER (Mar. 1, 2017), https://blog.twitter.com/en_us/topics/product/2017/our-latest-update-on-safety.html [https://perma.cc/N4YK-DS3A].

19. Casey Newton, *Facebook Will Pay $52 Million in Settlement with Moderators Who Developed PTSD on the Job*, VERGE (May 12, 2020, 3:39 PM), https://www.theverge.com/2020/5/12/21255870/facebook-content-moderator-settlement-scola-ptsd-mental-health [https://perma.cc/L869-HJJ5]; Elizabeth Dwoskin, Jeanne Whalen & Regine Cabato, *Content Moderators at YouTube, Facebook and Twitter See the Worst of the Web – and Suffer Silently*, WASH. POST (July 25, 2019), https://www.washingtonpost.com/technology/2019/07/25/social-media-companies-are-outsourcing-their-dirty-work-philippines-generation-workers-is-paying-price/ [https://perma.cc/7VW5-KLKK].

responses are not motivated by the threat of liability for their users' posts because Section 230 of the Communications Decency Act protects intermediaries from this liability and also provides them with broad powers to police their own platforms.[20] Rather, their motivations likely are mixed, ranging from seeking to wield their power responsibly to responding to market and public pressures to attempting to forestall formal regulation.[21]

Separate from experiments in self-regulation,[22] proposed solutions for these ills include regulating social platforms like public utilities,[23] using antitrust law to break up the platforms,[24] applying principles from common-carrier or places-of-public-accommodation law,[25] or curbing liability protections.[26] Other options include creating a public option or requiring a degree of portability between platforms. The right solution—or mix of solutions—must address the unique harms created when the constraints on speech are exceedingly consolidated.

This Essay has two parts. Part I compares the soapbox platform and soapbox oratory to informational platforms. In doing so, Part I defines informational platforms, explains why this comparison is worthwhile, and details the key similarities and differences between soapbox oratory and informational platforms. In discussing the key similarities and differences, Part I describes and applies Lawrence Lessig's modalities of regulation. Part II argues that informational platforms should be regulated like public utilities. To that end, Part II explains K. Sabeel Rahman's infrastructural

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20. 47 U.S.C. § 230; *see also* Allison Zakon, Comment, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1107, 1119–20.

21. *See, e.g.*, Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK (May 5, 2021), https://www.facebook.com/notes/751449002072082/ (noting that in deciding to create a content Oversight Board, Facebook considered how to make the world better and balance people's ability to speak with the harm that that freedom might create).

22. Facebook recently gave some of its power over content moderation to an independent oversight board. Nick Clegg, *Welcoming the Oversight Board*, META: NEWSROOM (May 6, 2020), https://about.fb.com/news/2020/05/welcoming-the-oversight-board/ [https://perma.cc/9DA6-7KBG].

23. Dipayan Ghosh, *Don't Break Up Facebook — Treat It Like a Utility*, HARV. BUS. REV. (May 30, 2019), https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility [https://perma.cc/X4RJ-6JA9].

24. Chris Hughes, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html [https://perma.cc/VR4E-BZ73].

25. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring).

26. Ryan Tracy & Brent Kendall, *DOJ to Seek Congressional Curbs on Immunity for Internet Companies*, WALL ST. J. (Sept. 23, 2020, 9:46 PM), https://www.wsj.com/articles/doj-to-seek-congressional-curbs-on-immunity-for-internet-companies-11600862403 [https://perma.cc/5S2G-TV7H].

regulation approach, applies the approach to informational platforms, and determines that informational platforms do provide infrastructural resources. Part II also offers potential policy responses consistent with the public utility approach, including firewalls, public obligations, and public options.

## I. COMPARING THE SOAPBOX AND INFORMATIONAL PLATFORMS

Informational platforms such as Facebook, Google, and Twitter are often compared to the mass media of the twentieth century, a model characterized by few speakers and large audiences.[27] After all, much of the disruption created by informational platforms impacted the mass media model.[28] Even though the mass media model and related regulatory changes receive criticism,[29] the contours of the policy questions are mostly understood.[30] The many-to-many communication enabled by informational platforms democratized the communication power previously concentrated in mass media while also creating policy uncertainties.[31]

This Part draws out the comparison between informational platforms and soapbox oratory that is sometimes made in the law.[32] In doing so, this Part defines an informational platform, argues that this comparison is worthwhile, and details the key similarities and differences between soapbox oratory and informational platforms. In examining the key differences, this Part utilizes Lawrence Lessig's modalities of regulation to frame the contrast and its consequences.

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27. *See, e.g.*, Balkin, *supra* note 5, at 984 (citing "newspapers, publishing houses, and broadcast media like radio, television and cable").

28. *See* A.W. Geiger, *Key Findings About the Online News Landscape in America*, PEW RSCH. CTR. (Sept. 11, 2019), https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/ [https://perma.cc/3ZLF-8YP8] (showing an increase in the number of Americans who prefer to get their news online and a decrease in the number of Americans who prefer TV and print).

29. *See, e.g.*, Jay D. Hmielowski, Michael A. Beam & Myiah J. Hutchens, *Structural Changes in Media and Attitude Polarization: Examining the Contributions of TV News Before and After the Telecommunications Act of 1996*, 28 INT'L J. PUB. OP. RSCH. 153, 154–57 (2015).

30. *See, e.g.*, T. BARTON CARTER, MARC A. FRANKLIN & JAY B. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE: REGULATION OF ELECTRONIC MASS MEDIA (2008).

31. Balkin, *supra* note 5, at 985–86.

32. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.").

### *A. Defining Informational Platforms*

Informational platforms connect content creators with content consumers through an online interface.[33] Informational platforms also connect advertisers with content consumers.[34] Informational platforms may facilitate other exchanges, such as the sale of goods or services, but at their core is the exchange of information. Examples of informational platforms include Facebook, Twitter, YouTube, Reddit, Nextdoor, Instagram, and TikTok, among others. This Essay focuses on dominant informational platforms and thus uses "informational platform(s)" to mean the dominant platforms of Facebook and Twitter.[35]

### *B. Comparing Informational Platforms to Soapbox Oratory Is Worthwhile*

As policymakers grapple with how to regulate informational platforms, picking the right analogy is essential for understanding the nature of the policy uncertainties and implementing needed solutions. Comparing informational platforms to soapbox oratory is not borne of nostalgia or a longing to return to the soapbox era. Instead, this comparison is better than a comparison to the mass media era because the mass media era lacks features that the current era and the soapbox era share. Communication in the soapbox era is a better historical antecedent because speech was more democratized than it was in the mass media era. Furthermore, speakers and listeners had more agency in the soapbox era than in the mass media era. In this way, informational platforms are a new iteration of the democratization of speech that existed in the soapbox oratory era. Understanding the fundamental similarities and differences between informational platforms and soapbox oratory can help better inform responses to the uncertainties created by this most recent democratization of speech.

### *C. Soapbox Oratory and Informational Platforms*

While soapbox oratory and informational platforms share certain features, critical differences exist. Key similarities include ease of access and departure for both speaker and listener, the speaker's improved reach and dynamic relationship with the audience, the trade of the listener's

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33. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1669 (2018).

34. Balkin, *supra* note 5, at 1009.

35. Focusing on dominant platforms follows from the analysis of the platforms as infrastructural. Note, though, that a firm may be dominant in other analyses, such as antitrust, but not necessarily infrastructural, as detailed below.

attention for both education and entertainment combined with the listener's usual transitory state, and concerns of listener manipulation or incitement. Key differences include how speech is disciplined and controlled and the concentration of this discipline and control.

### 1. KEY SIMILARITIES

In the soapbox era,[36] the ease of access for both speaker and listener derived primarily from the combination of the industrializing city and the availability of sturdy, portable, and often discarded shipping containers.[37] The industrializing city, with both its increasing population and bustling routine, created the potential for audiences in public spaces, and the availability and portability of soapboxes allowed speakers to move their platforms where audiences likely would be.[38] Both speakers and passersby could easily depart from the interaction if needed or desired.[39] Soapboxes improved a speaker's oratorical range and drew the interest of passersby while at the same time the informal nature of the space invited audience participation, creating a "reciprocal, dynamic relationship that dr[ew] upon both shared knowledge and new ideas."[40]

In the same way, and often to a greater extent, informational platforms provide ease of access and departure for both a content creator and an information consumer while vastly improving the speaker's reach. Living in a city was as essential to many people's livelihoods in the second Industrial Revolution as owning a smartphone and having internet access is today.[41] And even though access to informational platforms requires

36. The soapbox era generally can be understood as beginning in the late nineteenth century and ending in the 1920s. Trasciatti, *supra* note 1, at 43. As cities developed in the early twentieth century, soapbox oratory adapted stump speaking—the practice of political canvassers traveling around the United States making speeches from atop tree stumps—to the urban environment. *Id.* at 43–45. The development and adoption of the radio in the 1920s led to the end of the soapbox era. *Id.* at 62.

37. *Id.* at 44. Orators also would use the back of horse-drawn wagons ("cart-tail orators") and later the back of automobiles as mobile platforms for addressing crowds. *Id.* at 46, 52. Soapboxing is used throughout, but wagons and automobiles are not categorically different from the soapbox concept, with the differences in degree relating mostly to mobility. *See id.* at 52.

38. *See id.* at 44.

39. *Id.* at 45–46.

40. *Id.* at 49–50.

41. *Compare Slums, Large-Scale Housing and Decentralization*, *in* THE PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP 174 (John M. Gries & James Ford eds., 1932) (discussing the importance of housing proximate to employment), *with* Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/ [https://perma.cc/6JDZ-

some resources, mobile computing and internet access are affordable and widespread.[42] Departing from the interaction is as easy as a swipe of the thumb or the press of a button.[43] Further, the speaker's range is vast, with the ability to communicate with any of the billions of people who have access to the internet and the platform.[44] Finally, a dynamic relationship is part of informational platform design; engagement between speaker and listener is often desired and sought.[45]

Two other similarities between soapboxes and informational platforms are that listeners trade their attention for education and entertainment, and this trade frequently occurs in the transitory periods of life.[46] The soapbox orator's goal was to "make an audience out of disparate denizens of the city, all of whom have the option of walking away without consequence."[47] Passersby, often of modest means, would gladly trade

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8MMJ] (reporting that smartphones are essential to enabling internet access across income levels).

42. *See* MONICA ANDERSON, PEW RSCH. CTR., MOBILE TECHNOLOGY AND HOME BROADBAND 2019, at 2–4, 8 (2019), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2019/06/PI_2019.06.13_Mobile-Technology-and-Home-Broadband_FINAL2.pdf [https://perma.cc/57X8-TUME] (showing eighty-one percent of Americans own a smartphone); Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), https://pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/XRG4-HTHX].

43. Even though this accurately describes the physical ease with which one can exit an interaction on a modern platform, this sentiment likely understates the psychological aspect. Smartphone use, which often includes accessing informational platforms, may be addicting, thus complicating the determination of how easy it is for users to exit interactions. Coral Murphy, *You Might Just Be Addicted: Smartphone Use Physically Affects Your Brain, Study Says*, USA TODAY (Feb. 20, 2020, 10:12 AM), https://www.usatoday.com/story/tech/2020/02/19/addiction-how-smartphone-use-can-affect-your-brain/4809590002/ [https://perma.cc/NA29-57QQ]. Additionally, the profit motive of private platforms incentivizes the design to be addictive. Balkin, *supra* note 5, at 997.

44. Max Roser, Hannah Ritchie & Esteban Ortiz-Ospina, *Internet*, OUR WORLD IN DATA, https://ourworldindata.org/internet [https://perma.cc/N4SS-3Q23] (last visited Feb. 6, 2020) (stating that 3.4 billion people had internet access worldwide as of 2016). Now, internet access does not necessarily mean platform access; censorship or other issues may impede access to platforms. Also, in some countries, the platform is the internet. Leo Mirani, *Millions of Facebook Users Have No Idea They're Using the Internet*, QUARTZ (Feb. 9, 2015), https://qz.com/333313/milliions-of-facebook-users-have-no-idea-theyre-using-the-internet/ [https://perma.cc/UCJ6-ZYS8].

45. Facebook and Twitter have different methods for showing approval, commenting on the posted content, and amplifying the posted content.

46. The Essay sometimes uses "listener" in this comparison because listening is the focus of this comparison. Informational platform listeners are doing so through an application or webpage that they navigate in the same way a passerby navigates the street; the informational platform has connected speaker and listener in the same way the city infrastructure has, but the informational platform also relies on the speaker for content to make the connection meaningful.

47. Trasciatti, *supra* note 1, at 45.

their attention for education and entertainment so long as the speaker could keep their interest.[48] The better the speaker's voice, presence, and ability to create a "vibrant scene that engaged the senses," the better the speaker would be at creating and holding an audience.[49] Speakers also needed to be aware of the tastes and preferences of the neighborhoods where they spoke; what might play well in a working-class neighborhood would receive little interest in a middle-class area.[50] Even though Union Square in New York City and Washington Square Park in Chicago became destinations for soapboxing,[51] many times the experience in other locations was more impromptu and transitory.[52] Assembled audience members would take "their leave and commence their prior activities" at the conclusion of the speech.[53]

Similarly, creators on informational platforms seek to engage internet users who have numerous options and easy exit from the interaction.[54] At the same time, internet users willingly trade their attention for worthwhile education and entertainment.[55] Worthwhile content depends in large part on the creator's ability to operate within the digital infrastructure of the informational platform in the same way the soapboxer's attention-keeping depended on their ability to operate within the physical infrastructure of the city. Finally, even though informational platform users may at times seek content intentionally (like the soapboxing destinations in New York and Chicago),[56] mostly these users are internet passersby in a transitory period of their virtual or physical lives.[57]

The last key similarity between soapboxes and informational platforms is the concern that they could be used to cause mass incitement

48. *See id.* at 45–46.

49. *See id.* at 46.

50. *Id.* at 46–47.

51. *Id.* at 54, 56.

52. *See id.* at 51.

53. *Id.*

54. Influencers are the paradigmatic example. *See* Andrew V. Morris, III, Jocelyn A. Merced & Ellen M. Zavian, *Under the Influence*, ACC DOCKET (Feb. 11, 2021), https://www.accdocket.com/under-influence [https://perma.cc/TU8Y-DGUV].

55. *Cf. Teens and Social Media Use: What's the Impact?*, MAYO CLINIC (Feb. 8, 2022), https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/teens-and-social-media-use/art-20474437 [https://perma.cc/B9MX-JAJ5].

56. *See, e.g.*, Greg Murphy, *Twitter Changes the Live TV Sports Viewing Experience*, TWITTER: MKTG. (Jan. 18, 2018), https://marketing.twitter.com/en/insights/twitter-changes-the-live-tv-sports-viewing-experience [https://perma.cc/2BFD-YEVH] (noting that, compared to other social media platforms, Twitter sees an increase in unique visitors during live sports).

57. *Cf.* Frank Newport, *Most U.S. Smartphone Owners Check Phone at Least Hourly*, GALLUP (July 9, 2015), https://news.gallup.com/poll/184046/smartphone-owners-check-phone-least-hourly.aspx [https://perma.cc/9UFG-AJP8] (noting that eighty-one percent of smartphone owners keep their devices near them throughout the day and that nearly three out of four smartphone owners check their phones at least once an hour).

or manipulation. In the 1920s—late in the soapbox era—radical orators, deriding capitalism or war, became associated with soapboxing and were "identified as a dangerous and disruptive element in the urban landscape."[58] At the same time, critics of soapboxing used academic research about persuasion directed toward the masses and Walter Lippman's *Public Opinion*, which cast doubt on the political judgment of citizens, to cast soapbox orators as "devious manipulators who commandeered city streets and used persuasive techniques to incite the mob."[59] The masses of this era, not faring much better than the orators, were regarded as "docile conformists subjected to influences that shaped their behavior and values in ways they barely realized."[60]

Informational platforms generate similar concerns about the potentially disruptive posture of creators and the inability of listeners to rationally digest the buffet of accessible information. One aspect of the Facebook/Cambridge Analytica scandal, in which a voter-profiling company acquired the private information of millions of Facebook users that was then used to target and tailor campaign messages,[61] was that content creators used the informational platform not to educate, entertain, or persuade, but rather to manipulate.[62] Concerns also exist about a

58. Trasciatti, *supra* note 1, at 59–60. Other factors contributing to this radical association include women's suffrage speakers no longer needing to argue for the Nineteenth Amendment, which was passed in 1920, and the adoption of broadcast radio for mainstream politics. *Id.* at 60. Soapbox preaching continued, but that did not prevent the association of soapbox speaking with radical ideas. *Id.*

59. *Id.* at 61.

60. *Id.* at 61–62.

61. Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/4DVU-6PM3]; Harry Davies, *Ted Cruz Using Firm that Harvested Data on Millions of Unwitting Facebook Users*, GUARDIAN (Dec. 11, 2015, 5:22 PM), https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data.

62. *See* Marcello Ienca & Effy Vayena, *Cambridge Analytica and Online Manipulation*, SCI. AM.: OBSERVATIONS (Mar. 30, 2018), https://blogs.scientificamerican.com/observations/cambridge-analytica-and-online-manipulation/ [https://perma.cc/ZC9V-7G3T].

creator's distribution of misinformation[63] or fake news.[64] Another concern—and another aspect of the Facebook/Cambridge Analytica scandal—is that listeners can be profiled and then receive a persuasively tailored message that can be convincing without raising suspicion.[65] Also, research into human psychology suggests listeners can be nudged toward a behavioral outcome unknowingly.[66]

The above comparison confirms Justice Stevens's intuition that chat rooms, the precursor to today's informational platforms, enable the same sort of behaviors soapboxes enabled in their day.[67] In both eras, speakers have easy access to a relationship with listeners that is dynamic, as well as educational, entertaining, or manipulative. These shared characteristics and enabled behaviors show that the soapbox era is more useful than the mass media era in the comparison to informational platforms. Further, the key differences that do emerge from the comparison are more helpful in formulating policy responses.

### 2. KEY DIFFERENCES

As detailed above, many features of soapbox oratory echo in informational platforms. Critical differences exist, however, in how speech is disciplined and controlled. Further, the difference in the capacity to discipline and control speech is one of category, not degree. This Section details the discipline and control of speech in the soapbox era and introduces Lawrence Lessig's modalities of regulation. Then, this Section employs Lessig's approach to describe how the actors affecting speech also affect each other; uses the modalities framework to contrast soapbox

63. *See, e.g.*, GLOB. ENGAGEMENT CTR., U.S. DEP'T OF STATE, GEC SPECIAL REPORT: PILLARS OF RUSSIA'S DISINFORMATION AND PROPAGANDA ECOSYSTEM (2020), https://www.state.gov/wp-content/uploads/2020/08/Pillars-of-Russia%E2%80%99s-Disinformation-and-Propaganda-Ecosystem_08-04-20.pdf [https://perma.cc/T469-66QP]; Bobby Allyn, *Study Exposes Russia Disinformation Campaign that Operated in the Shadows for 6 Years*, NPR (June 16, 2020, 2:36 PM), https://www.npr.org/2020/06/16/878169027/study-exposes-russia-disinformation-campaign-that-operated-in-the-shadows-for-6- [https://perma.cc/UA5Y-723A]; Kai-Cheng Yang, Francesco Pierri, Pik-Mai Hui, David Axelrod, Christopher Torres-Lugo, John Bryden & Filippo Menczer, *The COVID-19 Infodemic: Twitter Versus Facebook*, BIG DATA & SOC'Y, Jan.–June 2021, at 1–2.

64. Mark Travers, *Facebook Spreads Fake News Faster than Any Other Social Website, According to New Research*, FORBES (Mar. 21, 2020, 10:38 AM), https://www.forbes.com/sites/traversmark/2020/03/21/facebook-spreads-fake-news-faster-than-any-other-social-website-according-to-new-research/?sh=65f581136e1a.

65. *See* Ienca & Vayena, *supra* note 62.

66. *See generally* Cass R. Sunstein, *Nudges.gov: Behaviorally Informed Regulation*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 719 (Eyal Zamir & Doron Teichman eds., 2014).

67. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

oratory with informational platforms; and explores consequences of these key differences.

*a. Discipline and Control of Speech in the Soapbox Era*

City planners, police, and private citizens were the main parties attempting to discipline and control soapbox orators.[68] Early twentieth-century city planners relied on design "to create social order out of perceived chaos" while remedying problems of "insufficient open space, slums, and congestion."[69] City planning in this era was influenced by the City Beautiful philosophy,[70] a philosophy that viewed aesthetic deficiencies as signs of "political dysfunction and moral decay."[71] As a remedy, city planning sought to use "architectural beauty and grandeur as a means to instill civic pride among residents, which, in turn, was supposed to generate moral virtue."[72] One commentator on the City Beautiful philosophy thought a fair critique of the approach was that it was an "elitist top-down approach that expressed self-interested anxieties about polyglot urban democracy and a desire to impose their own vision of an orderly metropolis on immigrants and workers in the hope of asserting social control."[73] How effective this design philosophy was in influencing soapbox oratory is unclear,[74] but the important point is that city planners had the power to influence where and how soapbox orators operated by designing the built environment.

Soapboxing was increasingly regulated in the twentieth century, and orators who did not obtain a permit risked arrest and police violence.[75] Federal wartime laws such as the Espionage Act of 1917 and the Sedition Act of 1918 made speaking on a number of topics subject to hefty fines and lengthy imprisonment.[76] The city of Spokane, Washington, made street speaking illegal in the downtown area where listeners were likely to

68. *See* Trasciatti, *supra* note 1, at 44–45.

69. *Id.* at 52.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 53 (quoting CARL SMITH, PLAN OF CHICAGO: DANIEL BURNHAM AND THE REMAKING OF THE AMERICAN CITY 15 (2006)).

74. New York, even though it did not adopt a formal plan based on City Beautiful principles, built a number of buildings consistent with the aesthetic, such as the New York Public Library and Grand Central Station. *Id.* at 56–57. The *New York Times* described street speaking around these sorts of buildings as a latter-day Athens. *Id.* at 57. By contrast, Spokane also had a City Beautiful movement but was hostile to street speakers. *Id.* at 58. This difference, however, may be more a product of changing trends with respect to those who used soapboxes and public spaces to speak. *Id.* at 58–59.

75. *Id.* at 54, 56.

76. *Id.* at 60.

be.[77] In response, the Industrial Workers of the World convinced migratory workers from around the country to travel to Spokane, get arrested for soapboxing, and ultimately overload the city's prison and trial resources.[78] As a result, Spokane's law remained on the books but went unenforced.[79] In Chicago, rather than restrict speech completely, the police enforced a strict cutoff time for orators, treating the permitted regular performances as "safety valve[s] that kept the economic and political dissatisfactions of individuals from coalescing into serious social problems through regular catharsis."[80] The Spokane and Chicago examples show that public actors, operating under the authority and legitimacy of the state, wielded power to affect the speech of soapbox orators.

Private citizens also played a role in disciplining and controlling the speech of soapbox orators. Their actions ranged from heckling to violence, including threats of public lynching.[81] In New York during World War I, as a response to the perceived anti-American rhetoric of soapboxers, citizens were called to "take to the streets and argue against them"[82]—in effect, becoming the era's keyboard warriors. In a more violent call, a veterans magazine advocated beating up soapboxers as a therapeutic response to the failure to find work.[83] More violence was encouraged by a cartoon in *Life* titled "A Remedy for the Soap-Box Traitor," which depicted a soapboxer speaking with his back to a lamppost, then being strung up on the lamppost and lynched.[84] The effect of these actions made "city streets off limits as spaces for questioning the status quo in any meaningful way."[85] The key point here is that private citizens, sometimes encouraged by other citizens or the press, had power to discipline and control the speech of soapboxers.

### *b. Modalities of Regulation*

City planners, police and lawmakers, and private citizens all affect soapbox orators, but they also affect one another. Lawrence Lessig's four modalities of regulation help illustrate the relationship of these actors to soapboxers and to one another. Lessig's theory also helps structure the contrast with informational platforms below.

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77. *Id.* at 58.
78. *Id.* at 59.
79. *Id.*
80. *See id.* at 55.
81. *See id.* at 60–61.
82. *Id.* at 60.
83. *Id.* at 61.
84. *Id.* at 60.
85. *Id.* at 61.

The four modalities are architecture, law, norms, and the market; the modalities are the ways a behavior, like soapbox oratory, is constrained.[86] Architecture focuses on the burdens of a built environment.[87] A city planner's choice to make wider sidewalks may facilitate more passersby such that an orator has a better chance of forming an audience. Notably, architecture's constraints, unlike those of the other modalities, are self-executing, meaning the "execution [of] the constraint takes care of itself" without the need for police or peers.[88] Law considers the legal rules related to a behavior,[89] such as the zoning-based ban on soapboxing in Spokane and the curfew in Chicago. Norms involve the social standards of the relevant community.[90] A norm of free speech might have helped communities to tolerate soapboxing, but once soapboxing became associated with radical politics or anti-American sentiment, communities responded with considerable sanction. The market constraint acts through the price of an activity.[91] More expensive mobile platforms would increase the burden to soapboxers, likely reducing the activity's prevalence.

Importantly, the modalities are also dynamically related, influencing one another to varying degrees.[92] City planners, police and lawmakers, and private citizens also affect one another. A city planner's design choices may make it impossible for laws restricting soapboxing to be made or enforced.[93] In the same way, a city planner's design might make it more difficult for private citizens to enforce norms.[94] The law might mandate a certain street width or building height, influencing the city planner's design options. The government might create a norm of skepticism or leeriness toward public speakers by funding a public awareness campaign on the dangers of persuasive techniques employed by orators.[95] Finally, a norm of respect for free speech or public gatherings held by private citizens would constrain the options for both a city planner and a lawmaker.

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86. LAWRENCE LESSIG, CODE 123 (2d ed. 2006). Lessig also discusses the timing of constraints (ex post versus ex ante), how the constraints are perceived (indirect versus direct), and how the constraints are executed (self-executing vs. non-self-executing). *Id.*

87. *Id.* at 121–23 (applying the concept to cyberspace).

88. *Id.* at 342.

89. *Id.* at 122.

90. *Id.*

91. *Id.*

92. *Id.* at 124, 130. Because the price of using the respective platforms is negligible at the point of use, the market constraint is not addressed in the below discussion.

93. A zoning-based law may be impossible if the city's design is incompatible with the approach. And the police may not be able to enforce a law banning soapboxing if the city's design provides for easy escape.

94. Consider a public space with one dominant focal point. Control of this position would make the attempts to counteract the soapboxer through heckling and counterargument more difficult.

95. *Cf.* LESSIG, *supra* note 86, at 130 (explaining a similar example).

*c. Contrasting Informational Platforms with Soapbox Oratory*

Speech on informational platforms encounters the same types of constraints as soapbox oratory. However, the constraints are not separately controlled; instead, the owners of informational platforms function simultaneously as city planner, lawmaker, and enforcer.[96] The owners also, at times, play the role of private citizen, which they share with their users.[97] Because of this consolidation of roles, informational platforms unilaterally control the amplification of and access to public speech, meaning that, broadly speaking, the soapbox talks. This consolidation is a key difference between soapbox oratory and informational platforms. Additional key differences include the shift from publicly accountable decision-makers to private deciders, as well as the goals these private deciders consider.

Informational platform owners control both how their digital spaces are designed and the rules that govern behavior in those spaces; they are both architect and lawmaker. Twitter's character limit on tweets and Facebook's "like" button are some of the more famous design constraints and elements.[98] The most important design element is how the information is ordered because it affects both the reach of a creator's message and how a listener navigates information. The organizing algorithm is self-executing and mostly indiscernible to creators and listeners.[99] For example, Facebook's News Feed and Twitter's Timeline have changed from being reverse chronological arrangements to being algorithmically curated.[100] In a reverse chronological arrangement, recency is the

96. The public law governing informational platforms, such as § 230, can change, but in practice the policies and standards of informational platforms—their private law—are the key constraints on speech. *See* Robert Yablon, *Political Advertising, Digital Platforms, and the Democratic Deficiencies of Self-Regulation*, 104 MINN. L. REV. HEADNOTES 13, 15 (2020); *see generally* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (providing a robust analysis of how platforms moderate online speech).

97. Times when platform owners act like private citizens notwithstanding, platform users are the modern analog to private citizens of the soapbox era, but they have less power because the relationship between the modalities is different. Because platform owners wield more power more easily, sanction by private citizens is comparably less potent.

98. Aliza Rosen, *Tweeting Made Easier*, TWITTER: BLOG (Nov. 7, 2017), https://blog.twitter.com/en_us/topics/product/2017/tweetingmadeeasier.html [https://perma.cc/Y3TT-H6Q8]; Victor Luckerson, *Here's How Facebook's News Feed Actually Works*, TIME (July 9, 2015), https://time.com/collection-post/3950525/facebook-news-feed-algorithm/ [https://perma.cc/7CJV-5VRT].

99. *See* Katharine Schwab, *How ProPublica Became Big Tech's Scariest Watchdog*, FAST COMPANY (Feb. 16, 2018), https://www.fastcompany.com/90160486/how-propublica-became-big-techs-scariest-watchdog; *see generally* FRANK PASQUALE, THE BLACK BOX SOCIETY (2015).

100. *See* Luckerson, *supra* note 98; Mark Tonkelowitz, *Interesting News, Any Time You Visit*, FACEBOOK: BLOG (Sept. 20, 2011, 12:30 PM),

organizing feature.[101] For the curated version, the algorithm considers recency, user preferences and history of engagement, the type of post, and popularity, along with other factors, to organize the listener's experience.[102]

At the same time that they act as architects of their platforms, informational platform owners create private law in the policies and standards that constrain user behavior. Facebook uses its Community Standards to determine whether content is allowed on the site.[103] The standards cover harassment, violence, hate speech, and misinformation, among other categories of speech.[104] The standards are enforced by thousands of content moderators and may eventually be enforced by artificial intelligence.[105] Recently, Facebook has created an independent Oversight Board to review significant content decisions.[106] Twitter has similar private law in its Rules and Policies.[107]

As an example of private lawmaking and enforcement, consider Twitter's temporary suspension of the *New York Post*'s account because its tweets included hacked and private information originally published by the newspaper in an article about the potentially controversial activities of Hunter Biden, son of then-candidate President Biden.[108] Twitter also blocked other users from sharing links to the *New York Post*'s website.[109] After public outcry, Twitter narrowed its hacked information policy to

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[https://web.archive.org/web/20110925211838/http://blog.facebook.com/blog.php?post=10150286921207131]; Owen Williams, *Twitter Is Now Turning on Its New Algorithmic Timeline for Everyone*, TNW (Mar. 17, 2016, 11:55 AM), https://thenextweb.com/twitter/2016/03/17/twitter-quietly-turned-new-algorithmic-timeline-everyone/ [https://perma.cc/MLV6-ZDC4].

101. Luckerson, *supra* note 98.

102. *Id.*; Williams, *supra* note 100.

103. *Facebook Community Standards*, META: TRANSPARENCY CTR., https://www.facebook.com/communitystandards/ [https://perma.cc/2M4F-GQH8] (last visited Feb. 10, 2022); Issie Lapowsky & Steven Levy, *Here's What Facebook Won't Let You Post*, WIRED (Apr. 24, 2018, 5:00 AM), https://www.wired.com/story/heres-what-facebook-wont-let-you-post/ [https://perma.cc/CDZ8-EQRF].

104. Lapowsky & Levy, *supra* note 103.

105. *Id.*

106. Clegg, *supra* note 22; *see also* Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2425–27 (2020); *Announcing the Oversight Board's First Case Decisions*, OVERSIGHT BD. (Jan. 2021), https://oversightboard.com/news/165523235084273-announcing-the-oversight-board-s-first-case-decisions/ [https://perma.cc/GLE5-V5NQ].

107. *See Rules and Policies*, TWITTER: HELP CTR., https://help.twitter.com/en/rules-and-policies [https://perma.cc/2ABT-D6ZS] (last visited Feb. 1, 2022).

108. Elizabeth Lopatto, *In Its Latest Confusing Decision, Twitter Reinstates the New York Post*, VERGE (Oct. 30, 2020, 8:05 PM), https://www.theverge.com/2020/10/30/21542801/twitter-lifts-ny-post-ban-policy-changes [https://perma.cc/B6E4-4WET].

109. *Id.*

restrict only hackers themselves or those working in concert with them from posting hacked information.[110] Facebook's response to the article was to limit its reach until third-party fact-checkers could vet the article.[111] The public concern over Twitter's decision centered on the notion that publishing hacked information had long been part of the journalist's role in society and that journalists had used Twitter to publish hacked information in the past.[112] Even though changes in these private rules or their private enforcement are criticized for being ad hoc or arbitrary and the public can pressure the platforms to change their rules, standards, or policies, the ultimate control of this private law rests with the platform owners. Importantly, this control can be exercised in tandem with the architectural control mentioned above.

Another soapbox-era role informational platforms take on is that of a private citizen. As mentioned, private citizens still play a role, even if a diminished one, in the informational platform era by engaging with content creators and other users on the platforms, as well as by speaking on their own. The platform owners also can function like private citizens when they engage with specific content through labeling or other concurrent messaging.[113] For example, Twitter accompanied President Trump's tweets with notes of caution that warned of potentially misleading information regarding COVID-19 and election integrity.[114]

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110. *Id.*

111. Adi Robertson, *Facebook and Twitter Are Restricting a Disputed New York Post Story About Joe Biden's Son*, VERGE (Oct. 14, 2020, 12:19 PM), https://www.theverge.com/2020/10/14/21515972/facebook-new-york-post-hunter-biden-story-fact-checking-reduced-distribution-election-misinformation.

112. Lopatto, *supra* note 108; Andy Greenberg, *Twitter's 'Hacked Materials' Rule Tries to Thread an Impossible Need*, WIRED (Oct. 16, 2020, 2:03 PM), https://www.wired.com/story/twitter-hacked-materials-rule-change-impossible-needle/ [https://perma.cc/8QVD-ZNBF].

113. For instance, labels have been used to frame or counterbalance a user's speech. Facebook and Twitter labeled President Trump's election-related tweets as "disputed" or added a note that ballot counting would continue for days or weeks. For analysis of whether these actions do enough to protect democracy, see Geoffrey A. Fowler, *Twitter and Facebook Warning Labels Aren't Enough to Save Democracy*, WASH. POST (Nov. 9, 2020), https://www.washingtonpost.com/technology/2020/11/09/facebook-twitter-election-misinformation-labels/ [https://perma.cc/MV99-79QE].

114. John Bowden, *Twitter Labels Trump Tweet on Coronavirus Immunity as 'Misleading,'* THE HILL (Oct. 11, 2020, 4:19 PM), https://thehill.com/policy/technology/520550-twitter-labels-trump-tweet-on-coronavirus-immunity-as-misleading [https://perma.cc/R7ML-S2GB]; Isabella Jibilian, *Twitter Labels 5 of Trump's Tweets on Wednesday as 'Disputed' and Possibly 'Misleading,'* BUS. INSIDER (Nov. 4, 2020, 1:32 PM), https://www.businessinsider.com/trump-twitter-tweets-election-results-voting-labeled-disputed-possibly-misleading-2020-11 [https://perma.cc/H5JZ-K72Q].

Facebook labeled a post by President Trump that alleged issues with voting by mail in a similar fashion.[115]

The platforms also have applied labels to general topics for all users, not just influential ones. For posts about COVID-19, Twitter added labels for tweets that contain disputed information, and Facebook added labels with a link to the CDC to any post about COVID-19.[116] Twitter also alerts users to the contentious "vibe" of a conversation and prompts its users to "[r]emember the human," among other similar labels.[117] Finally, platform owners are able to speak on their platforms without their speech serving as a response or a label to another user's content. This occurs either when representatives of the company post on the platform or when messages from the platform are embedded where user content normally would appear, such as a reminder for a voter registration deadline or Election Day.[118] Recognizing that platforms have the power to act as private citizens in addition to their roles as architect and lawmaker means that, unlike in the soapbox era, the constraints on public speech are consolidated in private controllers.

Focusing on the ultimate control of the rules that constrain user conduct illuminates the public nature of laws governing soapbox oratory and the private nature of the rules governing speech on informational platforms. If members of the public disagreed with the laws governing soapboxers, they had the option of lodging their complaints with elected officials, voting for a more preferred candidate, or, if warranted, filing a First Amendment claim. If they disagree with the rules governing conduct on informational platforms, they lack the same options. The public could lodge complaints with the platform but would not have the threat of the

115. Rebecca Klar, *Twitter, Facebook Label Trump Posts on Pennsylvania Mail-in Ballots*, THE HILL (Nov. 3, 2020, 9:57 AM), https://thehill.com/policy/technology/524174-twitter-facebook-label-trump-posts-on-pennsylvania-mail-in-ballots [https://perma.cc/2S8G-X3W3].

116. Kari Paul, *Twitter Targets Covid Vaccine Misinformation with Labels and 'Strike' System*, GUARDIAN (Mar. 1, 2021, 6:05 PM), https://www.theguardian.com/technology/2021/mar/01/twitter-coronavirus-vaccine-misinformation-labels [https://perma.cc/5KEA-DGD2].

117. Jenna Romaine, *New Twitter Feature Warns You when You Are Entering an 'Intense' Conversation*, THE HILL (Oct. 7, 2021), https://thehill.com/changing-america/enrichment/arts-culture/575727-new-twitter-feature-warns-you-when-you-are-entering [https://perma.cc/954H-MWWE].

118. Mark Zuckerberg, FACEBOOK (Oct. 29, 2020), https://www.facebook.com/zuck/posts/10112514878225511; Hannes Grassegger, *Facebook Says Its 'Voter Button' Is Good for Turnout. But Should the Tech Giant Be Nudging Us at All?*, GUARDIAN (Apr. 15, 2018, 3:00 AM), https://www.theguardian.com/technology/2018/apr/15/facebook-says-it-voter-button-is-good-for-turn-but-should-the-tech-giant-be-nudging-us-at-all [https://perma.cc/DV7V-NM53]; *Why Am I Seeing Reminders About Voting and Elections on Facebook?*, FACEBOOK: HELP CTR., https://www.facebook.com/help/1519550028302405 [https://perma.cc/3EYU-X2SE] (last visited Nov. 22, 2020).

ballot box looming in the background. Any First Amendment claims are precluded because the platforms are private actors.[119] The public always has the option to not use a platform but may feel locked in, as network effects and immobile data functionally prevent persons from exercising the option to walk.[120] In other words, the public has the choice to speak by the rules or speak and not be heard.

Another consequence of the difference between public and private control is that the actors serve different ends. Architectural and lawmaking controls in the soapbox era served a public end, considering diverse factors that contribute to communal flourishing.[121] Architectural and lawmaking controls in the informational platform era serve the private end of profit.[122] Owners of informational platforms might consider similar factors as public actors, but nothing compels them to make that consideration.[123]

In summary, this Part defined informational platforms as online interfaces where parties exchange content and attention. It also argued that the comparison to soapbox oratory is worthwhile and captures the democratization of speech and user agency that comparisons to mass media miss. This Part also explored the key similarities and differences between soapbox oratory and informational platforms, drawing on Lessig's modalities of regulation to frame the discussion of key differences. Ultimately, in contrast to the soapbox era, the constraints on, amplification of, and access to public speech are privately controlled for private ends by owners of informational platforms.

## II. INFORMATIONAL PLATFORMS AS PUBLIC UTILITIES

The private consolidation of the powers to affect and constrain speech described above raises two questions: First, is this consolidation acceptable in a democratic society? Second, if the consolidation is not acceptable, then how best can the consolidation be reversed or the deleterious effects mitigated? In this analysis, a democratic society is a society that provides opportunities for effective participation, equality in voting, attainment of enlightened understanding, exercise of control over

119. Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/ [https://perma.cc/2KHW-W5WR].

120. *But see* Catherine Tucker, *Why Network Effects Matter Less Than They Used To*, HARV. BUS. REV. (June 22, 2018), https://hbr.org/2018/06/why-network-effects-matter-less-than-they-used-to [https://perma.cc/C58X-MKS6].

121. *See generally* Charles M. Kneier, *Municipal Functions and the Law of Public Purpose*, 76 U. PA. L. REV. 824 (1928) (discussing controversial expansions of municipal functions in the early twentieth century).

122. Balkin, *supra* note 5, at 990.

123. *See, e.g.*, Zuckerberg, *supra* note 21.

the agenda, and the inclusion of adults.[124] K. Sabeel Rahman's infrastructural regulation approach, which modernizes public utility principles developed in the Progressive Era for the twenty-first century, helps guide the analysis of these two questions.[125] This Part explains Rahman's infrastructural regulation approach and applies this approach to informational platforms. In doing so, this Part argues that the informational platforms provide an infrastructural service and pose a threat to democracy.

### *A. Infrastructural Regulation Approach*

The infrastructural regulation approach extracts principles and features from Progressive Era public utility regulation. Public utility regulation developed as a response to one iteration of the "Curse of Bigness," as described by future Supreme Court Justice Louis Brandeis in 1913.[126] Brandeis focused on how the concentration of power in financial firms and firms' relationships with railroad tycoons affected economic opportunity and liberty.[127] For some bigness problems, the solution was straightforward, if difficult to implement: use antitrust principles to break up companies that were too big, leaving market competition to provide a check to the threat that these companies might otherwise pose to economic opportunity and liberty.[128] In some instances, however, breaking up a company would not enable market competition.[129] So breaking up the company would not be effective, and if the company provided an essential good or service, private actors would retain concentrated power over a societal necessity.[130] This iteration of bigness spurred the development of the public utility concept and approach.[131]

Common threads woven through these Progressive Era approaches to bigness included not only concerns about economic efficiency and an effective market mechanism, but also concerns about making private power publicly accountable and promoting "public values such as access,

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124. ROBERT A. DAHL, ON DEMOCRACY 37–38, 41–42 (1998) (detailing the criteria for a democratic process and asserting that the process is applicable to the government of the state).

125. *See generally* Rahman, *supra* note 33.

126. LOUIS D. BRANDEIS, *The Curse of Bigness*, *in* THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 99 (Osmond K. Fraenkel ed., 1935). Brandeis believed that large-scale production and distribution were not consistent with competitive markets. *Id.* at 100.

127. Rahman, *supra* note 33, at 1628.

128. *Id.* at 1630–31.

129. *Id.* at 1632 ("[I]n many instances, the good or service in question required a consolidated mode of production and distribution, whether because of economies of scale or because of social importance of the good in question, or both.").

130. *Id.* at 1635.

131. *Id.* at 1632.

equity, and innovation."[132] The public utility approach sought to accomplish these goals through some combination of establishing accounting standards, providing state oversight, and requiring firms to provide their services universally, set reasonable prices, and buy goods and services at an acceptable price.[133] The industries in which the public utility concept developed were transportation (with railroads) and communication (with telegraph and telephone infrastructure).[134] Notably, one of the concerns about the potential monopolization of communication infrastructure was a fear of "tainted transmission of news and information."[135]

The infrastructural regulation approach guides the identification of an infrastructural good or sector and guides the best policy response once an infrastructural good or sector is identified. Rahman identifies three features that, when present, indicate an infrastructural good or sector: "the economics of *production*; the *downstream uses* of the good or service; and the degree to which the good or service is a necessity that makes its users particularly *vulnerable* to exploitation."[136] This Section explains each feature and evaluates informational platforms for that feature. Ultimately, this Section shows that informational platforms provide an infrastructural service and that the private control of this service makes both users and democracy vulnerable.

The economics-of-production feature focuses on whether the production of a good or service tends to be undersupplied or concentrated in a few providers.[137] The paradigmatic undersupplied good is the public good, which is a non-rival and non-excludable good such as roads.[138] Natural monopolies, such as water, electricity, and gas, are typical examples of sectors that tend toward concentration; these monopolies develop in sectors with "high sunk costs, high barriers to entry, and increasing returns to scale."[139]

On first impression, informational platforms do not seem similar to roads—with their attendant complexities of funding, creating, and maintaining a connected system in the physical world—or water, gas, or electrical companies, with their high sunk costs and barriers to entry that naturally insulate these utilities from competition. Network effects,

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132. *Id.* at 1634.

133. *Id.* at 1635–36.

134. *Id.*

135. *Id.* at 1636.

136. *Id.* at 1641.

137. *Id.* at 1641–42.

138. *Id.* Note that in the infrastructural regulation approach, a public good "compris[es] the basic *infrastructure* of modern society," which is more than simply non-rival and non-excludable. *Id.* at 1641.

139. *Id.* at 1642.

however, create similar barriers to entry and increasing returns to scale like these natural monopolies.[140]

Users of Facebook or Twitter, like customers of a water or electrical company, can obtain a similar service from a different company only if the users uproot themselves from their established networks or communities. Finding a new electrical company is possible, but it typically also means moving a significant distance to escape the electrical company's service area; moving likely will sever ties with the person's original community. Finding a new informational platform is also possible, but it similarly involves severing ties to the person's developed network on the original platform. Thus, this user stickiness discourages creation of new platforms and locks in dominant platforms as the default choice for new users. In this way, the service that informational platforms provide tends to be concentrated in a few providers; therefore, the economics of production feature is present.

The second feature, downstream uses, looks to whether and to what extent a good or service enables the development of other activities, goods, and services.[141] Downstream uses, as applied here, include uses enabled by social infrastructure, such as the rule of law or access to information.[142] Maximizing these downstream activities requires managing the enabling good or service as a commons, with open, non-discriminatory, and easy access.[143]

The third feature considers whether the good or service is a necessity that makes users of the good or service vulnerable to those who control its provision.[144] If a good or service is critical to enabling a wide range of other activities, private control of the good or service enables only the activities approved by the private controllers and makes users vulnerable to exploitation when engaging in an approved activity because of the lack of alternatives.[145]

Informational platforms easily satisfy the downstream uses requirement because they enable communication, transactions, and access to information. These benefits are critical to many human endeavors, including attaining enlightened understanding, which is essential to a democratic society.[146] Informational platforms also satisfy the necessity and vulnerability feature because participating in public discourse requires

140. *Id.*

141. *Id.*

142. *Id.* at 1642–43. The social aspect of infrastructure broadens the meaning of infrastructure from how it is used in traditional public utility analysis. *See id.*

143. *Id.* at 1642.

144. *Id.* at 1643.

145. *Cf. id.* at 1643–44.

146. *See id.* at 1669.

using the platform services.[147] This makes users vulnerable in two ways. First, users are vulnerable because they may be excluded from public discourse on the whim of a private owner through expulsion from the platform or censorship of the user's communication. Second, users are vulnerable because they may be excluded from public discourse—and imperceptibly so—through the interface's design and architecture. Users may think they are gaining enlightened understanding by engaging with others on the platforms when they are actually being served the information and discourse that will maximize engagement, regardless of whether it represents public discourse. This potential distortion of public discourse threatens users' ability both to effectively participate in the public discourse and to gain an enlightened understanding. The power of platforms to exclude persons from the public discourse, either explicitly or imperceptibly, threatens democracy.

These two features are also illustrated by the comparison between soapboxes and informational platforms. The soapbox enabled an orator's speech, and as discussed, speech enables numerous downstream uses. Even though soapbox orators are usually associated with political speech, soapboxers also preached, entertained, and educated.[148] And the constraints on their speech were distributed among public and private actors. Generally, no one actor could prevent speech or set the price to speak. For informational platforms, users engage in a similar array of activities enabled by speech, but the constraints are concentrated in the private owners of the platforms. Platform owners are able to decide who speaks and the price one must pay to speak.[149] This demonstrates the vulnerability of users when they engage in the activities enabled by the service that informational platforms provide.

This Section has shown that informational platforms provide an infrastructural service because the provision of the service tends to be concentrated in a few providers, the service enables many downstream uses, and users are vulnerable to exclusion and manipulation. This vulnerability also makes democracy vulnerable because users may not be able to effectively participate in democratic society or gain an enlightened

147. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) ("Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.") (citation omitted).

148. *See* Trasciatti, *supra* note 1, at 55.

149. Note that the price demanded is not in money but in data and attention. *See* Rahman, *supra* note 33, at 1645.

understanding. The next Section discusses responses to the infrastructural nature of informational platforms and addresses how those responses affect democracy.

### *B. Infrastructural Policy Responses to Informational Platforms*

On finding that a good or service is infrastructural, Rahman identifies three main policy responses: firewalls, public obligations, and public options. Deciding which response is best is context-specific, and, importantly, the responses are not mutually exclusive.[150] As discussed, informational platforms control the constraints on public speech, and the deleterious effects on democracy include preventing persons from effectively participating in public discourse and from gaining an enlightened understanding. This is the relevant context to consider when deciding appropriate policy responses. Effective responses must address the consolidation of constraints on speech or seek to mitigate the risk to participation and understanding in democratic society. This Section explains each response and describes how each might be applied to informational platforms. In doing so, this Section also details how the responses impact the consolidation of constraints on public speech and the harms to democracy associated with that consolidation.

#### 1. FIREWALLS

Firewalls work to "limit a comingling of business models" by restricting the activities of firms that provide infrastructural goods.[151] For example, deposit banks might be prevented from also conducting investment banking so as to shield the infrastructural "boring" banking from riskier asset securitization.[152] This approach keeps providers of core banking services focused on providing those services and prevents the provision of these core services from being exposed to the heightened risk of an investment bank.[153]

One firewall solution is to limit aspects of the design and architectural roles of platform owners. The architecture of informational platforms is easily changed, can be tailored to each user, and is determined almost exclusively by the platform owners, unlike the city streets of the soapbox era. Users, both speakers and listeners, can be made functionally lost in a town of familiar faces, with little chance to sensibly navigate the built environment. Some platforms allow users to opt in to a more navigable reverse chronological experience, but even those changes will sometimes

150. *Id.* at 1647.
151. *Id.* at 1645.
152. *See id.* at 1660–61.
153. *See id.* at 1660.

revert back to the algorithm design after a while.[154] Algorithms can use popularity and recency to place users in the day's most trending and timely discussions, and users might prefer an algorithm that brings them to the busiest street automatically.[155] Still, the algorithm may also consider factors unique to each user as it determines what information to serve the user, creating risks of addiction, echo chambers, and radicalization.[156] And it is unlikely to be in the platform owner's interest to disclose exactly how the algorithm works, although disclosure would at least give users some understanding of how the information they consume is organized.[157]

Thus, a firewall solution would separate the provision of a speech platform from the ability to organize the information generated from that speech based on a user's unique characteristics. Because basic algorithms can be useful in sifting through unmanageable amounts of information, banning algorithms altogether would go too far. Under this proposal, the algorithms would not draw on characteristics of users to match them with content and the platforms should communicate to users exactly how the information is organized, like a city map. Further, the user should have the option of choosing reverse chronological order.[158]

This firewall greatly diminishes the architectural and design power of platform owners by eliminating tailoring power and shifting some design choice to platform users. It also shifts the decision-making of what an acceptable basic algorithm is to the public sphere. In this way, the control of constraints more closely approximates the control found in the soapbox era because users can understand and choose how to navigate the built environment. Moreover, the manner in which that environment is constructed—by determining the basic algorithm—is at least partly responsive to public deliberations and decisions. This firewall also promises to remedy the harms to effective participation in public discourse

154. Brad Stephenson, *How to Use Twitter's Algorithmic Timeline*, LIFEWIRE (Mar. 16, 2020), https://www.lifewire.com/how-to-use-twitter-timeline-algorithm-4174499 [https://perma.cc/AZ4T-9Y3P].

155. *See, e.g.*, Paige Cooper, *How the Facebook Algorithm Works in 2021 and How to Make It Work for You*, HOOTSUITE (Feb. 10, 2021), https://blog.hootsuite.com/facebook-algorithm/ [https://perma.cc/K5PY-SAZR].

156. *Id.*; *see* Paul Lewis, *'Our Minds Can Be Hijacked': The Tech Insiders Who Fear a Smartphone Dystopia*, GUARDIAN (Oct. 6, 2017, 1:00 AM), https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia [https://perma.cc/G7AF-C8H4].

157. *See* Ben Smith, *A Former Facebook Executive Pushes to Open Social Media's 'Black Boxes*,*'* N.Y. TIMES (Jan. 2, 2022), https://www.nytimes.com/2022/01/02/business/media/crowdtangle-facebook-brandon-silverman.html [https://perma.cc/K952-ZDZR] (detailing proposed transparency legislation and how Facebook shut down an internal project that tracked engagement on the platform).

158. Note that knowing how the information is organized and being able to choose certain options are complementary aspects of the firewall response and are more like public obligations—discussed *infra* Section II.B.2—than a firewall.

and encourage the attainment of enlightened understanding by mitigating the distortion of public discourse.

### 2. PUBLIC OBLIGATIONS

The second policy response is imposing public obligations on providers of infrastructural goods and services.[159] For railroads in the Progressive Era, this took the form of requiring firms to provide nondiscriminatory access and comparable pricing to all customers.[160] In the net-neutrality context,[161] an obligation of nondiscrimination is imposed because otherwise a company that both creates and delivers content could decide to preference its content by either throttling other content providers or charging competitors more for access to its content delivery infrastructure.[162] The exact obligations are context-dependent but might also include fair pricing requirements or "affirmative obligations to serve underserved communities."[163]

In addition to the complementary public obligations discussed in the firewall section, public obligations for informational platforms could require an appeals process for content censorship[164] or impose information fiduciary requirements on platforms.[165] A public obligation to provide an appeals process with a publicly decided minimum of due process would temper the lawmaking and enforcement powers that are currently concentrated in platform owners.[166] The appeals process also would alleviate harms associated with being explicitly removed from public discourse on the whim of a private owner because the neutral process would ensure that nonarbitrary reasons justify any censorship.

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159. Rahman, *supra* note 33, at 1646.

160. *Id.* (explaining the emergence of "common carrier" requirements).

161. Internet providers, in theory, could separate the internet into different tiers, like cable channels, and offer varying degrees of access to the internet depending on a customer's willingness to pay. Instead, under net neutrality, internet providers must treat content equally and compete for customers on how well they deliver internet services. For more information on net neutrality, see Klint Finley, *The WIRED Guide to Net Neutrality*, WIRED (May 5, 2020, 7:00 AM), https://www.wired.com/story/guide-net-neutrality/ [https://perma.cc/KD7X-ENJA].

162. *See* Rahman, *supra* note 33, at 1652.

163. *Id.* at 1646.

164. *See supra* note 106 and accompanying text.

165. Balkin, *supra* note 5, at 1006–09. *But see* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

166. For an example of what the minimum due process required in censorship decisions might look like, see Jonathan Zittrain, *A Jury of Random People Can Do Wonders for Facebook*, ATLANTIC (Nov. 14, 2019), https://www.theatlantic.com/ideas/archive/2019/11/let-juries-review-facebook-ads/601996/ [https://perma.cc/YV94-JNZH]. Zittrain argues for juries to be used in deciding whether political ads are truthful, but the idea could be extended to other censorship decisions as well. *Id.*

Obliging informational platforms to act as information fiduciaries would require them to perform duties of care, confidentiality, and loyalty.[167] The duties of care and confidentiality require that platforms protect data and share it only with trusted third parties willing to abide by the same fiduciary duties.[168] The duty of loyalty requires platforms to avoid conflicts of interest with their users while not self-dealing at the expense of those users.[169] This fiduciary approach augments the ends to which informational platforms exercise their concentrated power instead of attempting to structurally separate that concentrated power.[170] Assuming the democratic values described above would be considered in the interest of platform users, this approach would work to protect users' ability to participate and gain understanding in democratic society.

Another variety of public obligations focuses on the market constraint from Lessig's modalities. The above discussion of Lessig's modalities treated the market constraint the same now as it was treated in the soapbox era because the point-of-use cost to the user for access is little to nothing in both cases. However, the staggering disparity between the market value of a soapbox-era platform and a modern platform suggests modern users are paying much more for access than orators of the soapbox era. Much of the value of modern platforms comes from matching users with relevant advertisements.[171] To do this well, platforms are incentivized to collect user characteristics and track user behavior as much as technology allows.[172] The modern platform is a soapbox that stalks.[173] Users pay, with their data and attention, to access the modern platform; this price is considerably higher than in the soapbox era while at the same time being indeterminable at the point of access. Importantly, the market constraint is as self-enforcing and as scarcely perceived as the architectural constraint addressed above. Modern users can hardly perceive the connection between the information collected by the platform and how it affects both the content and advertisements served to them and their subsequent behavior.

A public obligation response would require that informational platforms provide a basic, no-frills version of their service that does not track user data or use such data to target users with content or

167. Balkin, *supra* note 5, at 1008.

168. *Id.*

169. *Id.* at 1009.

170. *Id.* ("The goal, in other words, is to ameliorate or forestall the conflict of interest by requiring companies to act in good faith, forbidding them from manipulating or harming their end-users to increase their profits, requiring them to vet and oversee contractual partners with whom they share data, and preventing them from giving access to third-parties who will manipulate or harm their end-users.").

171. *See id.*

172. *See id.* at 990–91.

173. *Id.* at 993.

advertisements. As a complementary option, informational platforms would be required to provide a paid option for access to the full service that also does not track user data or use such data for targeted content or advertisements. Important questions emerging from this option include how the price can be determined—the cost of providing the platform service plus either an appropriate profit or the cost of losing access to the data—and whether the public or the platforms should answer the pricing question.[174] Regardless of those answers, obliging informational platforms to offer a paid version informs users of the value of their information, data, and attention. With more options and clearer terms of the bargain, users can better decide how to engage with informational platforms. This approach limits the architecture and design power of platforms because platforms would have less information to curate a user's experience; it provides users the option to participate in a less distorted public discourse; and it ultimately affords users a better chance to participate in democratic society and gain enlightened understanding.

The final public obligation to consider is one of portability and interoperability. This obligation would require users to be able to move their information from one platform to another—portability. It also would require informational platforms to allow user content from competing platforms to appear on their own platform and reciprocally allow user content from their platform to appear on the competitor's platform—interoperability. Portability and interoperability would soften network effects and loosen the stickiness between user and platform by allowing users to try other platforms without risking the loss of their existing connections or being required to start from scratch. This obligation does not affect the consolidation of constraints on speech, but rather incentivizes and enables competitors to enter the informational platform market with the hope that increased consumer choice will bend informational platform behavior toward the public interest, including democratic values.

### 3. PUBLIC OPTION

The final policy response is providing a public option—a state-sponsored, plain-featured equivalent of the good or service.[175] Examples of public options include Medicare for seniors' health insurance, Social Security for a basic pension, or the U.S. Post Office for transporting

174. For a discussion of the history of the "just price" concept and its role in the public utility concept, see William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721 (2018).

175. Rahman, *supra* note 33, at 1646.

parcels and packages.[176] Examples of recent public option debates include whether the government should provide a public option for health insurance and whether the U.S. Post Office should provide basic banking services.[177] Public options respond to the private provision of an infrastructural good or service in two ways. First, the public has mechanisms, such as elections, public pressure, administrative procedures, and the courts, by which it can influence the public controllers of the resource.[178] Second, providing a good or service necessarily creates market competition with the private incumbent firms.[179] By allowing consumers more choice, the public option would force private providers to compete over service offerings and price.[180]

In the informational platform context, this response would provide a free, basic alternative to private informational platforms. A public option would mean platform decisions would shift from being private, with the public having little influence on them, to being responsive to the public through governmental institutions and elections. As in the soapbox era, during which architectural decisions and lawmaking and enforcement were responsive to citizens, a public option would similarly shift the now-private decisions to the public sphere. For architecture, the decision of what a basic alternative includes would be decided in the open. For lawmaking and enforcement, because the moderator would be a government actor, the First Amendment would be implicated, and other moderation decisions would be responsive to the public. A public option also would mean competition for private informational platforms, creating incentives for them to improve the terms of the relationship and their service and product offerings. Simply creating a public option, however, likely would not create enough competition because network effects and the ensuing sticky user-platform relationship would make it unlikely that users would move platforms just because there was another option.[181]

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176. *Id.*; Ganesh Sitaraman & Anne L. Alstott, *When Millions Can't Afford to Retire, the U.S. Needs a Better Option*, ATLANTIC (July 11, 2019), https://www.theatlantic.com/ideas/archive/2019/07/public-option-can-ease-retirement-crisis/593722/ [https://perma.cc/NJU9-446P].

177. Margot Sanger-Katz, *The Difference Between a 'Public Option' and 'Medicare for All'? Let's Define Our Terms*, N.Y. TIMES (Feb. 19, 2019), https://www.nytimes.com/2019/02/19/upshot/medicare-for-all-health-terms-sanders.html [https://perma.cc/2E83-NV8D]; Daniel Moritz-Rabson, *What is Postal Banking? Progressive Bank System Could Benefit Communities of Color*, NEWSWEEK (May 30, 2019, 3:10 AM), https://www.newsweek.com/postal-banking-what-1438341 [https://perma.cc/XL7X-GTK4].

178. Rahman, *supra* note 33, at 1646.

179. *Id.* at 1646–47.

180. *Id.*

181. *See, e.g.*, Drew Harwell & Rachel Lerman, *Conservatives Grumbling About Censorship Say They're Flocking to Parler. They Told Us So on Twitter.*, WASH. POST

Thus, the public obligation of portability and interoperability, as discussed above, also would be required to unlock the advantages of a public option.

Like the discussion of the effects of portability and interoperability above, offering a public option would not target the consolidation of constraints directly, but rather would create competitive pressures on existing platforms by ensuring that individuals could participate in discourse removed from profit motives that might sacrifice democratic values to private ends.

## CONCLUSION

This Essay provided a robust comparison of informational platforms to soapbox oratory. This comparison highlighted similarities between how soapboxes and informational platforms function in society. The comparison also analyzed the key difference—that owners of informational platforms have significantly more control over constraints on speech than did any class of actors in the soapbox era.

Next, this Essay argued that informational platforms should be regulated like public utilities because of their infrastructural nature. Informational platforms possess the economics of production feature that concentrates the provision of the service in a few providers. Informational platforms also enable numerous downstream uses, and because many of those uses are necessities, users are vulnerable to exploitation and public discourse is vulnerable to distortion. Further, beyond the harm these vulnerabilities pose to users, democracy is also at risk because users cannot effectively participate in democratic society or gain an enlightened understanding.

Part II also identified and explored different policy responses to the infrastructural nature of informational platforms, including firewalling the organization of information from the provision of the speech platform; obliging informational platforms to provide either a paid or free, but basic, option that does not collect user data; obliging informational platforms to provide portability and interoperability; and competing with informational platforms through establishing a public option for the provision of public speech.

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(Nov. 23, 2020), https://www.washingtonpost.com/technology/2020/11/23/parler-conservatives-still-on-twitter/ [https://perma.cc/JAM8-G9UP].