
VOTING FOR CONSENT

MEG JONES* & PAUL OHM**

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* Provost's Distinguished Associate Professor, Georgetown University.

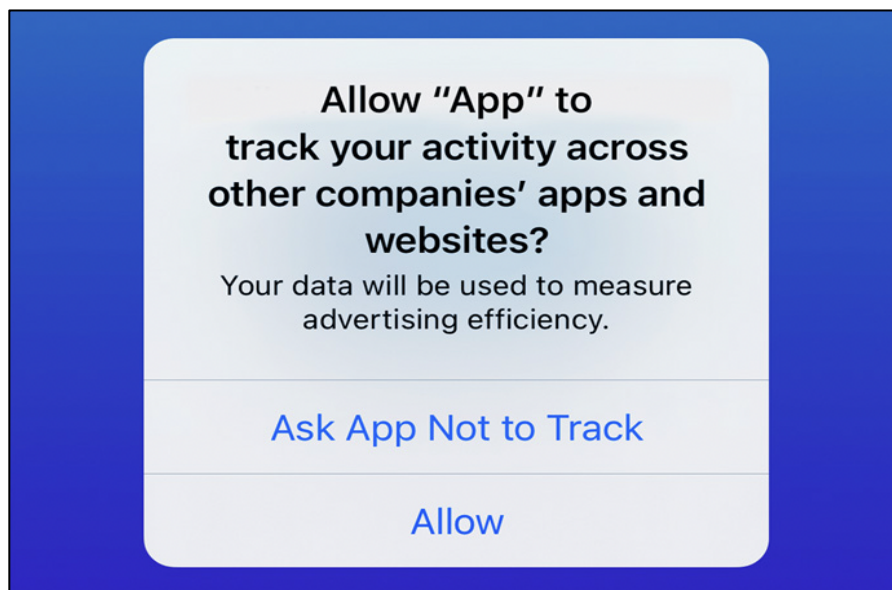
** Professor of Law, Georgetown University Law Center. The authors thank the editors of the *Boston University Law Review* and the other symposium participants. We give special thanks to Woody Hartzog for including us in this very special issue.

I. THE GREAT ELECTION OF 2021

While we wait for Congress to finally pass data-protection legislation or the Supreme Court to decide the contemporary contours of Section 230, it's worth recounting one of the most important and overlooked tech policy shifts in recent years: the Great Election of 2021. The Great Election of 2021 has understandably been overshadowed by other election concerns. Nonetheless, the story is one of direct choices by the people that sent a clear message resulting in structural changes to the systems that run their lives.

We are, of course, referring to the choice users made to send a blow to surveillance capitalism by voting to "Ask App not to Track" when Apple initiated the 14.5 operating system update, and directly presented users with the option to limit third-party tracking.¹

Figure 1. Ask App Not to Track.²



In this Article, we challenge the framing of this change as simply yet another tired example of "individual consent," a policy tool long discarded by privacy scholars. Instead, we consider the potential for reimagining the familiar consent box as a more powerful form of direct democracy, using lessons from voting regulation in other contexts.

¹ Brian X. Chen, *To Be Tracked or Not? Apple Is Now Giving Us the Choice.*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/04/26/technology/personaltech/apple-app-tracking-transparency.html> (describing Apple's App Tracking Transparency proposal).

² Screenshot of Ask App Not To Track Request from an Apple iPhone.

A. *Apple Versus Facebook*

If, and only if, you were a regular reader of the physical *New York Times* or *Wall Street Journal*, you would have seen these full page ads that ran in December 2020:

Figure 2. Facebook Ad.³

We're standing up to Apple for small businesses everywhere

At Facebook, small business is at the core of our business. More than 10 million businesses use our advertising tools each month to find new customers, hire employees and engage with their communities.

Many in the small business community have shared concerns about Apple's forced software update, which will **limit businesses' ability to run personalized ads and reach their customers effectively.**

Forty-four percent of small to medium businesses started or increased their usage of personalized ads on social media during the pandemic, according to a new Deloitte study. Without personalized ads, Facebook data shows that the **average small business advertiser stands to see a cut of over 60% in their sales for every dollar they spend.**

While limiting how personalized ads can be used does impact larger companies like us, these changes will be devastating to small businesses, adding to the many challenges they face right now.

Small businesses deserve to be heard.
We hear your concerns, and we stand with you.

Join us at fb.com/SpeakUpForSmall

FACEBOOK
f i g o

³ Facebook, *We're Standing Up to Apple for Small Businesses Everywhere* (illustration), in Jack Nicas & Mike Isaac, *Facebook Takes the Gloves Off in Feud with Apple*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/2020/12/16/technology/facebook-takes-the-gloves-off-in-feud-with-apple.html>.

They read “We’re standing up to Apple for small businesses everywhere . . . Apple’s forced software update . . . [would] limit businesses’ ability to run personalized ads and reach their customers effectively.”⁴ According to the ad, the iOS 14.5 update would decrease sales by 60% for every dollar spent on advertising.⁵

The next day, Facebook ran ads in the same print newspapers with the title “Apple vs. the free internet” claiming that the update would “change the internet as we know it—for the worse.”⁶ The ad argued that Apple’s forced update would mean content providers (like “cooking sites and sports blogs”) would need to start charging subscriptions fees and in-app purchases, reducing the quality of free content.⁷ The ads ended, “We hear your concerns and we stand with you.”⁸

Facebook took to the offensive after Apple announced it would change the opt-out default for data sharing on iPhone iOS 14.5.⁹ Once iPhone users updated their phones, a box presented a choice the first time an app was opened.¹⁰ The box asked whether the user would “allow” the app to share data with other companies or “ask app not to track.”¹¹ The change was part of the App Tracking Transparency program that *requires* the user to select between two options in a pop-up.¹² But by changing the consent code, Apple went after Facebook’s bottom line.

Facebook, which garners nearly 20% of all digital advertising dollars, attributes its advertising success to superior targeting derived from extensive data collection.¹³ Similarly, Google, commanding about 40% of ad spending, also relies heavily on user data.¹⁴ Both companies accumulate user data not only through their services and apps (like Instagram or YouTube for Google) but also through widespread integration across various websites and services (such as the

⁴ Jack Nicas & Mike Isaac, *Facebook Takes the Gloves Off in Feud with Apple*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/2020/12/16/technology/facebook-takes-the-gloves-off-in-feud-with-apple.html> (detailing Facebook’s campaign against App Tracking Transparency program).

⁵ *Id.*

⁶ Luke Dormehl, *Full-Page Facebook Ad Accuses Apple of Changing the Internet for the Worse [Updated]*, CULT MAC (Dec. 17, 2020, 4:18 AM), <https://www.cultof-mac.com/730598/full-page-facebook-ad-accuses-apple-of-changing-the-internet-for-the-worse/> [<https://perma.cc/56D7-ZJJS>].

⁷ *Id.*

⁸ Nicas & Isaac, *supra* note 4.

⁹ APPLE, A DAY IN THE LIFE OF YOUR DATA 9 (2021) (summarizing extent of data collection and announcing new privacy standards including App Tracking Transparency program).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Companies with the Largest Share of Digital Advertising Revenue Worldwide in 2023*, STATISTA (Aug. 29, 2023), <https://www.statista.com/statistics/290629/digital-ad-revenue-share-of-major-ad-selling-companies-worldwide/>.

¹⁴ *Id.*

Facebook “Like” button or Google Analytics). Unlike Facebook, Google and Apple hold more fundamental control in the tech ecosystem, owning key hardware (like phones and computers) and software (such as operating systems and web browsers). This control places them at the foundational layers of network infrastructure, while Facebook is more vulnerable, perched higher up in this structure.¹⁵ Apple’s decision to alter its data-sharing default settings showcased its considerable influence over companies like Facebook, highlighting the power dynamics in user data control and privacy practices.

Facebook was not wrong about the impact of Apple’s iOS update. A study released a month after Apple began asking users about tracking reported that 96% of iPhone users “ask[ed] app not to track,” meaning only 4% opted to allow apps to track their activity across other companies’ apps and websites.¹⁶ Later that same year, in October, Facebook announced a dramatic rebrand as Meta that would focus on building a new network infrastructure, an immersive virtual metaverse.

B. *Three Models of Consent*

Consent has been central to privacy and data protection laws around the world. Yet, study after study shows (and has shown for decades) how ill-equipped people are to consent to these data arrangements. In 1997, when only 36% of adults went online at all,¹⁷ 72% of Americans surveyed agreed new laws were needed to protect privacy on the Internet.¹⁸ By 2005, 80% of Americans knew they were being tracked across sites but 85% did not agree to accept the everyday collection and sharing scenarios when presented with such a tracking request.¹⁹ A 2008 study estimated it would take 244 hours a year to read all of the privacy policies one was supposed to agree to.²⁰ Even if one were able to

¹⁵ Interview with Michael Veale, Lecturer in Digit Rts. & Reguls., Univ. Coll. of London, on BBC Newsnight (May 14, 2021).

¹⁶ Samuel Axon, *96% of US Users Opt Out of App Tracking in iOS 14.5, Analytics Find*, ARS TECHNICA (May 7, 2021, 2:59 PM), <https://arstechnica.com/gadgets/2021/05/96-of-us-users-opt-out-of-app-tracking-in-ios-14-5-analytics-find/> [<https://perma.cc/3WNA-TGEZ>]. These figures represent a study by an analytics firm one month after Apple began requiring its ATT policy. *Id.*

¹⁷ Susannah Fox, *The Internet Circa 1998*, PEW RSCH. CTR. (June 21, 2007), <https://www.pewresearch.org/internet/2007/06/21/the-internet-circa-1998/> [<https://perma.cc/T5PR-XZ8B>].

¹⁸ Jim Pitkow et al., *GVI’s 8th WWW User Survey*, GA. INST. TECH.: GRAPHIC, VISUALIZATION, & USABILITY CTR. (1997), https://www.cc.gatech.edu/gvu/user_surveys/survey-1997-10/ [<https://perma.cc/2Z3X-U7E2>] (detailing how 39% strongly agreed and 33% somewhat agreed).

¹⁹ Joseph Turow, *Americans and Marketplace Privacy: Seven Annenberg National Surveys in Perspective*, in THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 151, 160-61 (Evan Selinger, Jules Polonetsky & Omer Tene eds., 2018).

²⁰ Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL’Y FOR INFO. SOC’Y 543, 553-68 (2008) (calculating theoretical time required

find that time, the language of privacy policies is complex, serving legal ends, not informational ends.²¹ And if one were to find the time and come to understand all these policies, there is no way to negotiate or change the terms and often no alternative site, service, or app to choose.²² These conditions define the “privacy self-management problem” and result in the “consent dilemma.”²³

As such, privacy scholars and advocates largely abandoned consent long ago as inherently flawed and have instead invested in legal and technical defaults that promote particular social structures and projects, what Professor Salomé Viljoen calls “data relations.”²⁴ Viljoen asks that we focus on the collective operations of datafication and injustices beyond the individual control or economic fairness.²⁵ Viljoen showcases the data-relations concept by asking, “what’s wrong with the U.S. military purchasing location data from a Muslim prayer app?”²⁶ Neither individual control nor economic unfairness accounts for the “significance of the data flow between Muslim Pro and the US military[] . . . [that] drafts users—faithful Muslims—into the project of their

to read all privacy policies individuals encounter on websites throughout year and its economic impact).

²¹ Woodrow Hartzog, *User Agreements Are Betraying You*, ONEZERO (June 5, 2018), <https://onezero.medium.com/user-agreements-are-betraying-you-19db7135441f> (“Whatever function the privacy policy was originally meant to serve, it became the default system for informing users about how their data would be used. . . . To this day, these agreements largely exist to legally protect companies and not to fully inform users in an intelligible way.”).

²² See Frederik J. Zuiderveen Borgesius, Sanne Kruikemeier, Sophie C. Boerman & Natali Helberger, *Tracking Walls, Take-It-or-Leave-It Choices, the GDPR, and the ePrivacy Regulation*, 3 EUR. DATA PROT. L. REV. 353, 353-55 (2017) (proposing solutions to tracking walls requiring users to agree to service provider’s privacy policy without opportunity to negotiate to access service); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 176-77 (2012) (describing form contracts and unique risk and sensitivity of privacy waivers).

²³ Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1880-82 (2013) (describing shortcomings of current policy approach of self-management to protect user data privacy where users control their individualized consent to services’ data policies).

²⁴ See Salomé Viljoen, *A Relational Theory of Data Governance*, 131 YALE L.J. 573, 603 (2021) (evaluating theories of data governance by examining how data structures shape relations).

²⁵ *Id.* at 579 (“Properly representing the population-level interests that result from data production in the digital economy will require far more collective modes of ordering this productive activity.”).

²⁶ *Id.* at 581 n.9 (citing Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, VICE NEWS (Nov. 16, 2020, 10:35 AM), <https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x> [<https://perma.cc/2537-WZKP>]); see Salomé Viljoen, *Data Relations*, LOGIC(S) (May 17, 2021) [hereinafter Viljoen, *Data Relations*], <https://logicmag.io/distribution/data-relations/> [<https://perma.cc/MCF5-SNN3>] (analyzing Vice News article detailing U.S. military using Muslim app to track location data).

fellow Muslims' oppression."²⁷ Default debates allow us to argue over collective relations, systems, and realities in a way that choice alone has not (at least not yet).

Computer software and hardware come with technological defaults, which are essentially preset values that users can customize according to their preferences. Professor Ian Kerr pointed out these factory presets are designed to be modified by consumers, "many of whom never knew that these presets could be changed, nor had any reason to change them."²⁸ While defaults can be changed depending on the preferences of the user, people rarely change defaults.²⁹ Too often default settings hide buried under layers of clicks and dashboards and require a number of unapparent steps to alter. Today, manipulative default settings may be labeled "dark patterns" and potentially actionable as unfair or deceptive trade practices.³⁰

On computers, we experience three basic consent models, each of which furthers a different worldview and economic model. The most familiar in the United States is the opt-out mode that furthers surveillance capitalism.³¹ The opt-out default is set to collect and share any and all data that can be collected and shared.³² The box that promotes this default tells the user that the site collects data and that if the user would like more information they can click to another screen.³³

²⁷ Viljoen, *Data Relations*, *supra* note 26.

²⁸ Ian Kerr, *The Devil Is in the Defaults*, 4 CRITICAL ANALYSIS L. 91, 98 (2017).

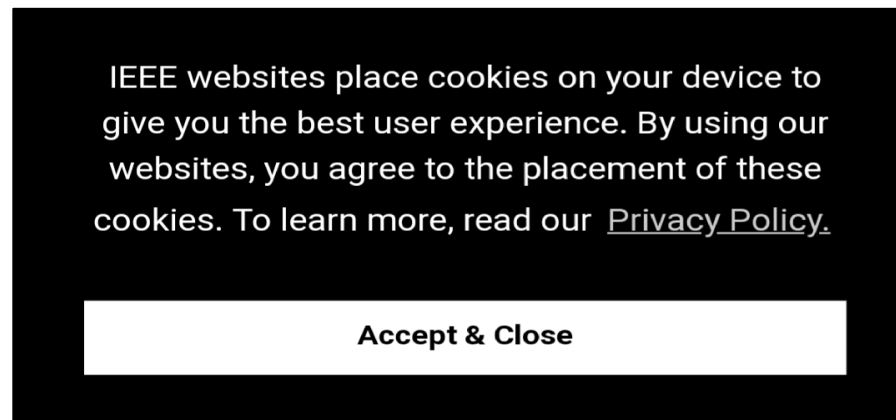
²⁹ See *id.* (describing "default effect" as psychological barrier reducing likelihood of consumers changing presets).

³⁰ Harry Brignull, *Bringing Dark Patterns to Light*, Speech at the Federal Trade Commission's Dark Patterns Workshop (Apr. 29, 2021) (transcript available at <https://harrybr.medium.com/bringing-dark-patterns-to-light-d86f24224ebf>).

³¹ See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 294-95 (2019) (describing users navigating obscure pages to opt out of cookies as method of behavior modification); see, e.g., 16 C.F.R. § 313.7 (2009) (requiring certain financial institutions to maintain opt-out notice and method when disclosing consumer data to third parties).

³² See Geoffrey Xiao, Note, *Bad Bots: Regulating the Scraping of Public Personal Information*, 34 HARV. J.L. & TECH. 701, 721-22 (2021) (describing practice of opt-out consent as setting default to data collection unless user affirmatively objects to policy).

³³ See *id.* at 722 (including precollection notice as feature of opt-out consent); see, e.g., 16 C.F.R. § 313.7 (requiring institutions to provide notice to consumers of data collection practices).

Figure 3. Opt-Out Default.³⁴

Some offer the opportunity to go to another screen where users then uncheck boxes on a list of types of data collection.

The default is collection and people rarely take the additional time to navigate to these other pages and dashboards.³⁵ A box is a luxury under this model, in fact. Before regulation from the European Union, most U.S. sites just mentioned data collection in their terms of service or privacy policy (many of which didn't exist until California state law required such disclosures).³⁶

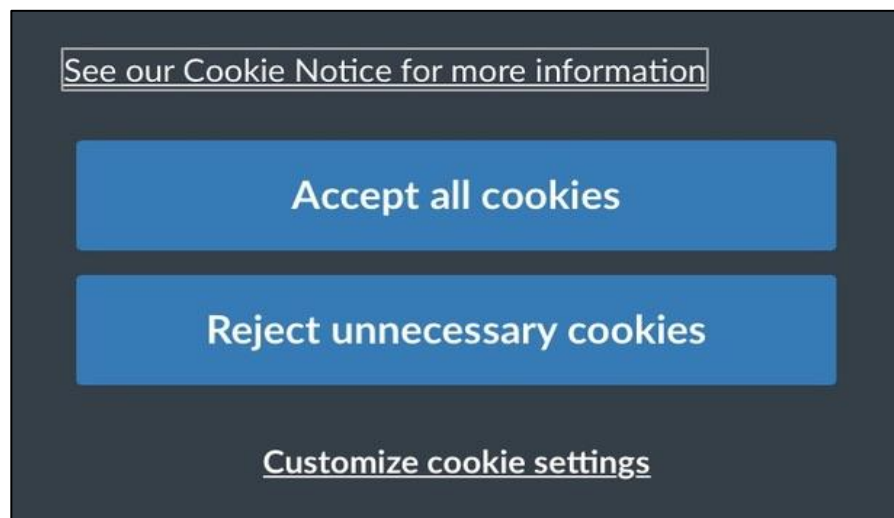
An opt-in default by contrast is one that requires the user to do something proactive, like change a toggle or check a box, to trigger data collection and to allow data sharing.³⁷

³⁴ Screenshot of an opt-out user interface box from an Apple iPhone.

³⁵ See Michelle Faverio, *Key Findings About Americans and Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), <https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/> [<https://perma.cc/QZ2Q-XH3N>] (finding 56% of Americans say they always or almost always click "agree" without reading privacy policies, and 22% of Americans say they do this sometimes).

³⁶ See generally CAL. CIVIL CODE § 1798.100 (West 2023); Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC, 2016 O.J. (L 119) [hereinafter GDPR].

³⁷ Xiao, *supra* note 32, at 722-23 (comparing opt-in and opt-out defaults).

Figure 4. Opt-In Default.³⁸

An opt-in model also furthers a particular set of political goals and structures, in this case the weakening of massive surveillance capitalism platforms like Google and Facebook, the demise of third-party data brokers, and the preference for subscription and contextual advertising business models.³⁹ The opt-in model has become mandatory for those operating under EU data-protection law, which redefined consent in 2018 as freely given, specific, informed, unambiguous, revocable, and presented in clear and plain language separate from other matters.⁴⁰ In implementing the new consent rule against Google and Facebook (resulting in fines totaling over €200 million), the French data protection agency made European consent simple: it must be as easy to say yes as it is to say no. The agency explained:

[T]he websites facebook.com, google.fr and youtube.com offer a button allowing the user to immediately accept cookies. However, they do not provide an equivalent solution (button or other) enabling the Internet user

³⁸ Screenshot of an opt-in user interface box from an Apple iPhone.

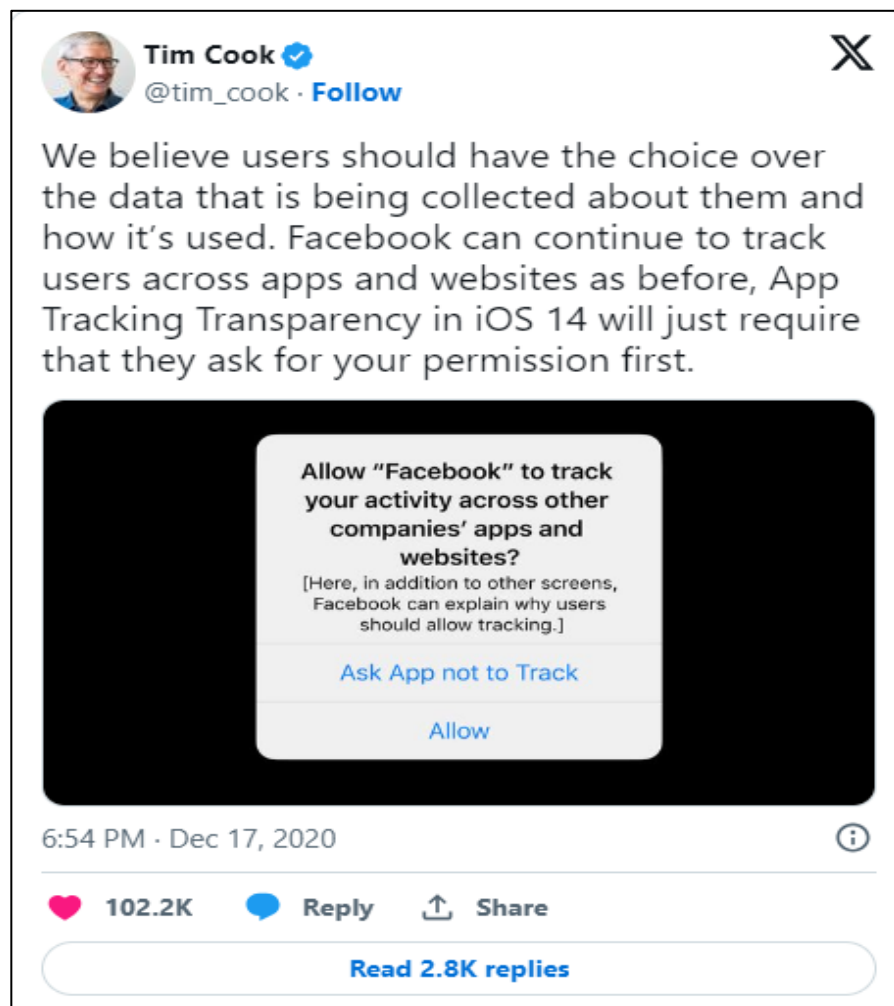
³⁹ See ZUBOFF, *supra* note 31, at 240–41 (describing surveillance capitalism as overwhelming notions of consent when industry methods of collecting data are “unauthorized, unilateral, gluttonous, secret, and brazen”).

⁴⁰ GDPR, *supra* note 36, at art. 4(11) (“Consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.”).

to easily refuse the deposit of these cookies. Several clicks are required to refuse all cookies, against a single one to accept them.⁴¹

The last model forces a user to choose settings before a system can be used, and we will refer to it as forced choice. Apple did not actually set up a system that furthered more privacy, but forced users to choose whether they wanted to maintain the status quo.

⁴¹ Press Release, Commission Nationale de l'Informatique et des Libertés, Cookies: The CNIL Fines Google a Total of 150 Million Euros and Facebook 60 Million Euros for Non-Compliance with French Legislation (Jan. 6, 2022), <https://web.archive.org/web/20220106081310/https://www.cnil.fr/en/cookies-cnil-fines-google-total-150-million-euros-and-facebook-60-million-euros-non-compliance>.

Figure 5. Forced Choice.⁴²

Over the spring of 2021, Facebook's ad campaign against Apple expanded to television.⁴³ When Covid-19 swept across the world in 2020, many broken infrastructures were revealed and forced into focus. Like many tech companies, Facebook appeared immune to the economic impact of Covid-19. At the end of

⁴² Tim Cook (@tim_cook), X (Dec. 17, 2020, 6:54 PM), https://twitter.com/tim_cook/status/1339720611313065984 [<https://perma.cc/BTK8-D5J4>].

⁴³ Jeff Beer, *This New Facebook Ad Targets the Only People Left Who Actually Like the Brand*, FAST CO. (Feb. 27, 2021), <https://www.fastcompany.com/90609058/this-new-facebook-ad-targets-the-only-people-left-who-actually-like-the-brand> [<https://perma.cc/6H3H-VAKJ>] (advertising Apple's new privacy policies as harmful to small businesses).

2020 its revenue was up 22%, pulling in almost \$86 billion, and profits were up 58% at \$29 billion.⁴⁴ Small businesses were responsible for 75% of ad revenue.⁴⁵ The company's new ads played a haunting rendition of "I Will Survive" while nostalgic images of businesses threatened by the Covid-19 lockdown policies called the viewer to action.⁴⁶ "In the next three months, almost half of those small businesses, they could close if people don't do something. We have to keep our communities together. That's how we get through this."⁴⁷ These ads played on the sentiment expressed by Facebook CEO Mark Zuckerberg at the company's earnings call in the summer of 2020 when he explained:

That's why I am often troubled by the calls to go after internet advertising, especially during a time of such economic turmoil like we face today with Covid. . . . [T]he much bigger cost of such a move would be to reduce the effectiveness of ads and opportunities for small businesses to grow. This would reduce opportunities for small businesses so much that it would probably be felt at a macro-economic level. Is that really what policymakers want in the middle of a pandemic and recession?⁴⁸

Zuckerberg's arguments are certainly outdated in some ways (and increasingly criticized as unfounded), but he's arguing about data relations. Meanwhile Apple CEO Tim Cook appears a trailblazer, taking swings at surveillance capitalism and the attention economy, but doing so using a now arcane notion in privacy: consent.

C. *Consent Box Potential*

Despite years of consent theater,⁴⁹ Apple's successful application of consent for its billion worldwide users suggests we should not give up on the powerful little box. We should reimagine it as an opportunity for collective direct action. Beyond considering whether a default is hard enough to change to constitute a

⁴⁴ Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2020 Results (Jan. 27, 2021), <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx> [<https://perma.cc/7CD5-3PW4>] (reporting financial results for fourth quarter and full year, 2020).

⁴⁵ Beer, *supra* note 43 ("Small business accounts for nearly 75% of Facebook's \$70 billion annual ad revenue . . .").

⁴⁶ *See id.* ("[T]he brand launched a tear-jerker ad . . . featuring a soft emo cover of 'I Will Survive' by Lykke Li [] celebrating a beloved New York neighborhood restaurant . . .").

⁴⁷ Facebook TV Spot, 'Survive,' iSPOT.TV (Aug. 24, 2020), <https://www.ispot.tv/ad/neOT/facebook-survive> [<https://perma.cc/DHP5-9LAR>].

⁴⁸ Beer, *supra* note 43 (quoting Mark Zuckerberg, CEO Facebook, Inc., Remarks at Second Quarter 2020 Results Conference Call 2 (July 30, 2020), https://s21.q4cdn.com/399680738/files/doc_financials/2020/q2/FB-Q2'20-Earnings-Transcript.pdf).

⁴⁹ Cory Doctorow, *Consent Theater*, ONEZERO (May 20, 2021), <https://onezero.medium.com/consent-theater-a32b98cd8d96> [<https://perma.cc/4ESN-9L5W>] (describing challenge of data-privacy policy as European agencies regulate and tech companies define consent).

dark pattern in consumer protection, what if we harnessed the power of the pop-up box to institute meaningful participation in technical design?

For many years in privacy scholarship, the default debate and the decline in support for consent as a policy tool was driven by fairly damning behavioral economics. The consent dilemma tells us people cannot make educated decisions about their own risks and opportunities—they could not accurately understand the transaction being presented to them. But, the Great Election of 2021 seems to suggest users are capable of understanding the data relations of “big tech” and voting to *not* participate in projects of their own exploitation and subjugation.

What could the consent box be if we disentangled data collection from consumer rhetoric?⁵⁰ What if we considered the ways individuals often withhold consent as a means to change a system from which they might not personally suffer or may even benefit? What if instead of trying to get the public to turn on Apple in an attempt to drive the company to change its planned iOS update, Facebook had launched a campaign to get users to opt in? Unlike other areas of life, we shouldn’t keep consent around because it’s the only morally justifiable way to arrange data relationships. We should keep it around because it’s a very powerful and simple tool when everything else breaks.

II. VOTING FOR CONSENT

The nearly universal disdain that privacy scholars have shown for user consent seems out of step with the veneration we give in other areas to giving voice to individuals and to honoring their choices. Voting is the bedrock of democracy, and we devote great amounts of time, energy, and money protecting the right of citizens to vote in regular elections. Especially in a time of ceaseless attacks on election integrity, scholars and policymakers are intently debating how to protect and defend free and fair elections.

We ask individuals to vote in other contexts beyond democratic elections, for example as shareholders in proxy voting for corporate governance and as workers deciding whether to form a labor union.

Comparing these venerable systems to online consumer consent might seem inapt, however, because these elections are such a far cry from what happens in browsers, mobile apps, and social media sites. Instead of the self-regulatory, dark-patterns-infested cesspool of online cookie banner boxes, the voting in these other contexts is formal, regulated, and heavily scrutinized. Rather than decide that these contexts are too unrelated to bear the weight of the comparison, we wonder if we could make consent more like voting. Could “consent” for consumer preferences be recast as “elections” for consumer voice? Let us first review how voting operates in these contexts.

⁵⁰ See generally MEG LETA JONES, *THE CHARACTER OF CONSENT: THE HISTORY OF COOKIES AND THE FUTURE OF TECHNOLOGY POLICY* (forthcoming June 2024).

A. *Voting in Democratic Elections*

What follows is an abbreviated tour through three very complex areas of law and public policy. We confess not to be experts in elections, corporate governance, or labor law, and we hope this provocation invites those with more expertise to respond. But a short survey of the rules in these areas will sketch a possible future for reimagining consumer consent.

First, let us consider the rules around democratic elections. In the United States, the details of voting and ballots are handled primarily under state law.⁵¹ These laws govern everything from ballot access⁵² and election administration,⁵³ to post-tally contests⁵⁴ and election results.⁵⁵

One area of election regulation that might serve as a model or template for the kind of consumer voting we have in mind is the area governing state initiatives. Twenty-six states give constituents the right to vote on new laws in the form of ballot initiatives.⁵⁶ Although the details vary, it is generally true that any voter in a state may begin the process to propose a ballot initiative. The proposer must establish sufficient popular support for putting the issue to the voters, usually by attaining a certain number of signatures from eligible voters.⁵⁷

Consider one seemingly esoteric detail about how ballot initiatives are regulated in California, the state that votes on and enacts the largest number of them. California Elections Law requires the Attorney General to summarize all

⁵¹ See U.S. CONST. art. I, § 4, cl. 1 (authorizing states' control over times, places, and manner of holding elections, within congressional restraints). See generally ELECTION L. PROGRAM, ELECTION LAW MANUAL (Alexandra Amado ed., 2d ed. 2022), https://www.electionlawprogram.org/_data/assets/pdf_file/0025/83833/ELM_Fall_22.pdf (providing overview of election law in United States).

⁵² See ELECTION L. PROGRAM, *supra* note 51, at 20-21 (noting common requirements for candidate ballot access include age, residency, and citizenship). States may set additional criteria that a candidate must meet, as well as criteria that disqualifies aspiring candidates. *Id.*; see, e.g., IND. CODE § 3-8-1-5 (2023) (disqualifying aspiring candidates convicted of felonies).

⁵³ See ELECTION L. PROGRAM, *supra* note 51, at 117 ("Some of the responsibilities states undertake in election administration include: 1) ballot creation, 2) absentee voting, 3) polling place selection, 4) poll worker selection and training, 5) voting technology selection, and 6) as necessary, rescheduling an election because of a disaster or emergency.").

⁵⁴ *Id.* at 182-94 (detailing general recount procedures and surveying states' various approaches to such procedures).

⁵⁵ *Id.* at 182, 228-31, 234 (describing how state courts frequently play pivotal role in election contests and certification, despite authority of state legislatures to set procedures for such events).

⁵⁶ *Id.* at 64 (explaining citizens may get measures onto ballot through initiative, referendum, or recall). For a list of the twenty-six states, see *Initiative and Referendum States*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-states> (Mar. 15, 2023) (listing states authorizing ballot initiatives).

⁵⁷ See, e.g., ARK. CONST. art. V, § 1 (requiring "[e]ight per cent of the legal voters" to propose law); ARIZ. CONST. art. XXI, § 1 (requiring 15% of number of people who voted in most recent gubernatorial election to propose amendment to state constitution).

ballot initiatives in 100 words or less.⁵⁸ The law requires that this summary be “a true and impartial statement of the purpose of the measure” and “shall neither be an argument, nor be likely to create prejudice, for or against the proposed measure.”⁵⁹ These summaries tend to be watched closely by supporters and opponents of the initiatives, and many lawsuits have been filed to challenge summaries that have been written in the past.⁶⁰

In recent decades, much attention has been paid to ballot design. The infamous “butterfly ballot” in Palm Beach, Florida is believed to have confused thousands of voters in the contested 2000 presidential election of George Bush and Al Gore.⁶¹ As recently as 2018, a ballot in Broward County, Florida placed one race’s choices—for U.S. Senate—at the bottom of a very long column of instructions in three languages, which may have caused some voters to skip to column number two.⁶²

These fine-grained, closely watched, government-administered, heavily contested procedures, all backed by relatively clear substantive standards, are the mirror image of the status quo approach to “dark patterns” that have been a central focus in consumer protection and data protection law for the past few years. Both U.S. and European regulators have repeatedly pointed to prohibitions against dark patterns as a key way to improve legacy notice-and-

⁵⁸ CAL. ELEC. CODE § 9004 (2023) (setting forth Attorney General’s duties for pending ballot initiatives and timelines).

⁵⁹ CAL. ELEC. CODE § 9051(e) (2023).

⁶⁰ Ben Christopher, *Critics Demand Fairer Prop Ballot Labels and Summaries, But Lawsuits Tend To Flame Out*, CALMATTERS (Aug. 7, 2020), <https://calmatters.org/politics/2020/08/california-proposition-descriptions-lawsuits-attorney-general/> [<https://perma.cc/X7AD-E6PN>] (reporting rising contention of ballot summaries and court’s deference to Attorney General).

⁶¹ Jonathan N. Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 AM. POL. SCI. REV. 793, 793-94, 803-04 (2001) (analyzing Florida election data and concluding more than 2,000 Democratic voters mistakenly voted for third-party candidate Pat Buchanan).

⁶² Nathaniel Rakich, *Something Looks Weird in Broward County. Here’s What We Know About a Possible Florida Recount.*, FIVETHIRTYEIGHT (Nov. 9, 2018, 12:20 PM), <https://fivethirtyeight.com/features/something-looks-weird-in-broward-county-heres-what-we-know-about-a-possible-florida-recount/> [<https://perma.cc/CJ3T-UNGV>] (theorizing poor ballot design may be partially responsible for undervoting in 2018 Florida senate election results).

choice rules.⁶³ Still, commentators have noted conflicting definitions and lingering confusion about what makes a pattern “dark.”⁶⁴

Where dark patterns leave most of the decision-making with the companies, who stand to benefit or suffer greatly based on the result, ballots and initiative summaries are handled by government officials.⁶⁵ And unlike the vague, confusing definition of a dark pattern, state election laws and regulations are detailed and specific, going so far as to define the type and size of font and the spacing of the print on a ballot.⁶⁶

B. *Proxy Voting in Corporate Governance*

As with democratic elections, shareholder voting rights are governed by a mix of state and federal laws, as well as corporate bylaws. All states extend to shareholders the right to vote on important matters, such as selecting the Board of Directors or approving mergers.⁶⁷ Shareholders are not entitled to vote on day-to-day operations of the company, however.⁶⁸

Voting typically takes place by asking shareholders to assign the right to cast their votes to a “proxy,” so this process is often referred to as proxy voting.⁶⁹ For public companies, the U.S. Securities and Exchange Commission (“SEC”) regulates the proxy process.⁷⁰

As with democratic elections, proxy voting often gives shareholders the ability to offer their own proposals to put before the voting whole.⁷¹ In recent

⁶³ See generally EUR. DATA PROT. BD., GUIDELINES 03/2022 ON DECEPTIVE DESIGN PATTERNS IN SOCIAL MEDIA PLATFORM INTERFACES: HOW TO RECOGNISE AND AVOID THEM, VERSION 2.0 (2023), https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022-deceptive-design-patterns-social-media_en [<https://perma.cc/2AEW-REQ5>] (noting that addressing dark patterns furthers GDPR’s goals); FED. TRADE COMM’N, BRINGING DARK PATTERNS TO LIGHT (2022) [hereinafter FTC REPORT], <https://www.ftc.gov/reports/bringing-dark-patterns-light> [<https://perma.cc/ET2M-EY9H>] (noting how monitoring dark patterns furthers FTC’s goal of protecting consumers).

⁶⁴ Arunesh Mathur, Jonathan Mayer & Mihir Kshirsagar, *What Makes a Dark Pattern . . . Dark?*, CHI CONF. ON HUM. FACTORS COMPUTING SYS., May 8-13, 2021, at 1, 1 (noting gaps in literature on what designs constitute dark patterns pose regulatory issues).

⁶⁵ FTC REPORT, *supra* note 63, at 2.

⁶⁶ See, e.g., VA. STATE BD. ELECTIONS, BALLOT STANDARDS (2022), <https://www.elections.virginia.gov/media/formswarehouse/election-management/ballots/2022-08-SBE-Ballot-Standards-and-Verification-Procedures.pdf> [<https://perma.cc/NH32-PRG6>] (prescribing minimum 10-point font size but recommending 12-point or larger as best practice).

⁶⁷ 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 13:1 (3d ed. 2023).

⁶⁸ Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 844 (2005).

⁶⁹ COX & HAZEN, *supra* note 67, at § 13:26.

⁷⁰ 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 10:3 (6th ed. 2009).

⁷¹ 17 C.F.R. § 240.14a-8 (2020).

years, many proposals under the banner of “environmental, social, and governance” (“ESG”) have been voted on through this process.⁷²

The SEC and state officials play an active role in monitoring proxy voting for compliance with the rules. Much of their focus is on the “proxy solicitation information,” the bundle of printed materials that get sent to every voting shareholder, which must fairly disclose all material information.⁷³

C. Labor Voting

The final point of comparison is the system used to allow workers to form unions under labor law. The National Labor Relations Act of 1935 (“NLRA”) established the right of employees to form unions and engage in collective bargaining.⁷⁴ Elections to form a union are governed by the National Labor Relations Board (“NLRB”).⁷⁵

As in our other two case studies, elections to decide whether to unionize are subject to detailed and prescriptive rules, set forth in both the NLRA and in NLRB regulations promulgated under that law. These rules prescribe, for example, that an election must be held once 30% of a company’s employees petition the NLRB.⁷⁶ Once triggered, a majority of votes cast decides whether the union is formed.⁷⁷

Labor union elections are hotly contested episodes, when both management and organizers have the incentive to persuade or pressure voting employees. The NLRB’s regulations govern permissible forms of advocacy, pressure, and influence that may be used during an election or labor-petition drive. Employers may not interfere with their employees’ freedom of choice; if the NLRB finds unlawful interference, it may order a new election.⁷⁸ Similarly, elections can be set aside if union representatives interfere, for example through unlawful intimidation.⁷⁹

⁷² Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020).

⁷³ COX & HAZEN, *supra* note 67, at § 13:28 (describing proxy voting procedures).

⁷⁴ 29 U.S.C. §§ 151-169.

⁷⁵ *Id.* § 153.

⁷⁶ St. Louis Indep. Packing Co., 169 N.L.R.B. 1106, 1107 (1968) (“We are persuaded that when 30 percent of the employees in a bargaining unit have indicated a desire to be represented by one or the other or two unions . . . the petitioning unions have demonstrated enough employee interest in their attaining representative status to warrant holding an election.”).

⁷⁷ 29 U.S.C. § 159(a) (1935) (mandating initial terms of union formation).

⁷⁸ *Id.* § 158(a) (prohibiting employers from exerting coercive pressures on union vote or retaliating after vote).

⁷⁹ 29 U.S.C. § 158(b) (1935) (preventing unions from engaging in coercive or retaliatory tactics).

D. *Reimagining Consent as Voting*

Let's reimagine confusing, dark-patterns-laden, manipulative user consent in ways that give consumers voice and power. This is a new and admittedly unorthodox idea, and we have not yet figured out the finest details; our goal at this early stage is to spark a conversation about the approach, rather than offer a fully realized proposal. What should we borrow from democratic elections, proxy voting, and labor elections?

1. What Must Be Decided by Election?

Not everything should be subject to the admittedly heavy and formal system we have in mind. It is only worth spinning up the processes, guardrails, advocacy, and enforcement when important decisions are being decided. Companies should be free to make tweaks to their UI, engage new partners, or develop new products and services, without seeking the consent of their users. We propose, however, that for important decisions implicating significant rights or interests of consumers, a company must first ask consumers whether they consent by holding a formal, regulated, and federally overseen election. This won't happen under today's laws, of course. We need a new piece of legislation (or at the very least, a new set of regulations) to create the kind of system we have in mind.

This echoes in some ways a proposal one of us made a decade ago, that companies making significant and unexpected changes to their data handling practices should be obligated to change the name of their product or service.⁸⁰ Both mandatory brand name changes and mandatory consumer elections should be reserved for the most consequential decisions.

Consider some examples. The new rules we have in mind might require a formal user election in cases like the following:

- As with Apple's ATT, the first time a user launches an app or joins a website, they must be given the forced choice of deciding which information sharing policies they want to opt into and out of.
- Any time a company departs from prior policies or practices governing the way they use or share personal information, they first must hold an election. This will mirror the General Data Protection Regulation's ("GDPR") purpose limitation principle, which obligates companies to

⁸⁰ Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907, 945 (2013) (proposing company must bind its brand name to particular set of privacy policies and must change name if it dramatically changes those policies, thus giving users notice of change and preventing undetected decline in privacy). Although no government body has ever enacted this rule, at least not to our knowledge, it seems fitting that Elon Musk has unwittingly embraced the proposal, simultaneously changing the fundamental nature of the service formerly known as Twitter, while increasing the salience of his decisions by choosing to rebrand as X!

seek legitimate bases—such as meaningful user consent—for new uses.⁸¹

- Any time a platform engages in a significant redesign that implicates certain user rights or interests, they will need the approval of their users. For example, any social media company that contemplates a design change that will make their service significantly more addictive will need to hold an election.
- For platforms and online services “directed to children,”⁸² elections might require the participation of the users’ parents. Parents might be asked to vote on any data sharing that might occur.

Another source for election topics might be the users themselves, as an expression of direct democracy. Just as citizens can put initiatives on state ballots, shareholders can call for proxy votes without board approval, and workers can call to form a union against the wishes of their employers, so too should users be given the right to initiate proposals for election. As with the voting systems currently existing, minimum numerical thresholds should be met for a user-initiative proposal to be put to the vote.

2. What Rules Should Govern These Elections?

The new statute or regulation we are contemplating should prescribe the rules that govern these consumer consent elections. These rules should draw inspiration from the three analogies described above.

Ballot design is one area that would represent the greatest improvement from the status quo of consent mechanisms. The way we design ballots in other contexts to try to elicit the unconfused, unmanipulated will of the voter is the exact opposite of our mostly unproductive attempts to get companies to stop using dark patterns. Our proposal would transform the design of user choice into a truly collaborative enterprise. It might echo what happens in the California Initiative process,⁸³ with placing a government agency in charge of choosing details from the wording and design down to the font size of the ballot, while still giving the most directly affected parties a chance to weigh in.

Other rules will need to be hammered out, but once again, the three contexts above can be our guide. As with labor law, the rules should govern how much companies can do to reach beyond the ballot to advocate for one outcome. As with corporate governance, consumers might be able to assign their decisions to

⁸¹ See generally GDPR, *supra* note 36 (enacting European Union’s GDPR, which included many data privacy regulations, most notably one requiring user consent to collect data).

⁸² Children’s Online Privacy Protection Rule, 16 C.F.R. § 312.2 (defining when website or part of website is “directed to children”).

⁸³ The California Initiative process allows citizens to propose laws and state constitutional amendments without executive or legislative support. See *Ballot Initiatives*, STATE CAL. DEP’T JUST., <https://oag.ca.gov/initiatives> [<https://perma.cc/5ZPB-JTX8>] (last visited May 14, 2024).

proxies, such as nonprofit civil society groups or trade associations. As with all three of these, the rules should clearly prescribe when and for how long the voting takes place.

Perhaps the rules should vary based on the importance of the decision being put forward. The rules might set out a sliding scale of formality and oversight, with small decisions being left as mostly self-regulatory exercises and larger decisions being subject to much stricter decisions.

3. Who Oversees the Elections?

A government agency should be assigned to oversee these elections, the way the Federal Election Commission (“FEC”) and state Secretaries of State oversee democratic elections; the SEC and state regulators oversee proxy voting; and the way the NLRB (and its regional offices) oversee labor-union voting. The Federal Trade Commission (“FTC”) is one obvious choice to play this role, as it has long been responsible for enforcing rules around deceptive advertising and marketing practices and data-privacy frameworks for technology, and because it is at the forefront of policing dark patterns.⁸⁴ Other agencies can also be given a lead role in specific sectors, such as the Consumer Financial Protection Bureau (“CFPB”) for consumer finance or the Federal Communications Commission (“FCC”) for telecommunications companies.

4. What Happens After the Election?

One question that might seem to have an obvious answer but actually might not be so straightforward: What must a company do with the results of an election? If the question presented on the ballot asks each user to consent to a particular, and potentially objectionable, new use of their data, is each user “voting” only for their own individual preference, or is the “polity” deciding as a group? And if we’re in the latter, more democratic mode, does the majority rule, or will votes on some issues require a supermajority? What should one make of the Great Election of 2021, when individual users were ostensibly deciding each for themselves, although the lopsided result might have suggested the need for a more complete rule?

We do not have fixed opinions about these questions. We see arguments in favor of letting each user decide for themselves, free of the manipulative-dark-patterns nonsense of the current system; but we could also get behind a majority-rules or supermajority-rules system, giving users an opportunity to deliberate with one another about the design and shape of these important platforms. The best answer may be different for different types of companies and different types of questions. We simply flag this important issue as one for further discussion.

⁸⁴ See *Privacy and Security*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/privacy-security> [<https://perma.cc/B9RE-AGMQ>] (last visited May 14, 2024) (compiling descriptions of FTC’s many privacy-protecting regulations, including consumer privacy and compliance for new technology).

Whether users are deciding for themselves or collectively, we think these elections will have second-order beneficial effects by providing more information about what users want. Because these elections will be subject to rules designed to elicit comprehension and choice, and because they will be overseen, they will provide a cleaner, less contestable picture of “revealed preferences.” Regulators will better understand the scope and extent of user attitudes that are just guessed at today. Researchers will have access to a rich set of data to build into their models. Lawmakers will have a new input for prioritizing their work.

E. *The Limits of Voting*

No voting system is perfect. Each of the three systems we hold out as models has its fair share of critics. Democratic voting is riddled with credible allegations of disenfranchisement, even ignoring the recent trend toward the more conspiratorial.⁸⁵ Critics charge that proxy voting is tilted to favor management and to put barriers in front of shareholder organizing.⁸⁶ Labor voting is criticized for being slow and bureaucratic.⁸⁷

We also don’t want to give too much credit to Apple and Tim Cook. Although the Election of 2021 is our springboard and inspiration, we are clear-eyed about the cynical (and plausible) explanation that Apple saw and took an opportunity to beat up on a vulnerable competitor.

But for us, this all boils down to a “compared to what?” question. Although people criticize elections, proxy votes, and union ballots, they get to direct these criticisms toward the reform of systems of rules that purport to try to represent the will of voters. And although Tim Cook and Apple may have been cynically trying to harm a competitor, the users were still given the chance to express their will.

CONCLUSION

The community of privacy scholars was not wrong to try to kill consent and notice-and-choice. They fairly criticized a manifestly broken system that had for years supported managerialism, fueled privacy harms, and supported information and surveillance capitalism.

⁸⁵ Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1641-46 (2012) (discussing Supreme Court’s justifications for upholding felon disenfranchisement).

⁸⁶ Ronald J. Gilson, Lilli A. Gordon & John Pound, *How the Proxy Rules Discourage Constructive Engagement: Regulatory Barriers to Electing a Minority of Directors*, 17 J. CORP. L. 29, 30 (1991) (highlighting barriers to effective use of proxy process and proposing solutions).

⁸⁷ Mitchell Clark & Zoë Schiffer, *Amazon CEO Says Unions Are ‘Slower and More Bureaucratic’ in Leaked Employee All-Hands*, VERGE (Apr. 20, 2022), <https://www.theverge.com/2022/4/20/23033881/amazon-ceo-andy-jassy-union-coments-elections-all-hands>.

But by looking outside the field for inspiration, we have begun to sketch a new role for a new kind of consent. We should reconceptualize consent as voting, replace cookie banners with ballots, and exchange self-regulators for election monitors and government overseers. Doing so will increase the legitimacy of proposals coming from the privacy project, by backing them with the will of the users. It will invite ordinary citizens and their advocates to the design table. It will build dialogue between companies and users, and maybe someday cooperation and trust.