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## Informed Consent:

# The Marketplace of Ideas as an Imperative for Free and Open Elections

By Jayson Michael Warren<sup>1</sup>

The peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

—John Stuart Mill, *On Liberty*

*Consent* has underpinned core aspects of Western civilization for millennia. Whether ancient Greece's earliest machinations of democracy, the Magna Carta's advent of consultative government, or the Truman Doctrine's affirmation of the collective right of self-determination, *consent of the governed* is widely regarded as a fundamental element of any legitimate government. Likewise, just as there exists a prerequisite of unanimity to consensually enact a binding contract in business, societal forces such as the #MeToo movement have demonstrated how fundamental *consent* is to nearly every facet of interpersonal dynamics and social stability (e.g., consent cannot be given under duress, consent must be reestablished when facing new terms/information, consent can be revoked). Medical practitioners, in their efforts to actualize the Hippocratic ideal of *do no harm*, take this concept one step further by implementing *informed consent*: the procedural education of a patient "about the risks, benefits, and alternatives of a given procedure or intervention."<sup>2</sup> Yet this raises the question: Why is the normative expectation of informed consent unique to the medical community? Should not all consent be informed?

## Problem Framing

In the absence of a compelling argument for mis/disinformed consent (a position antithetical and ethically anathema to consent's nature), operationalizing informed consent within the broader context of *consent of the governed* sheds perspective on the unique challenges presented by social media/big data. This is particularly true with regards to elections, the primary mechanism by which a populace's consent is given or revoked. On the one hand, these firms are privately owned and made possible by the personal innovation of individuals who have the right to choose how they utilize the privileges of their patent(s). At the same time, private businesses are expected to adhere to certain nondiscrimination standards in conducting their business (e.g., Americans with Disabilities Act, Civil Rights Act) and they are explicitly limited in their corporate ability to wield their resources in the political

arena (e.g., Bipartisan Campaign Reform Act). To reconcile these dueling realities, it is imperative that the United States regulate social media and big data as utilities and/or common carriers.

### **This Is Not a Market Failure—It Is a Matter of Institutionalized Power**

To be clear, such a policy recommendation should not be misconstrued as stemming from a market failure. To the contrary, this seeks to address the countervailing force of institutionalized power. After all, a truly free-market approach to engaging the electoral process would allow for unlimited campaign contributions—but this is rightfully prohibited because such conditions have oligarchic implications and adverse effects on representative government. Yet, in light of the twenty-first century's global commodification of information, it is time to consider the corollaries between monetary influence and informational influence in the context of elections. For example, if an individual in the top 1 percent of income cuts a campaign contribution check in excess of \$109,500,<sup>3</sup> he or she is violating the Federal Election Campaign Act. However, there is no recourse if Meta Platforms Inc. (Facebook) and Alphabet Inc. (Google) leverage the potential energy of their respective \$427 billion and \$1.43 trillion apparatuses to steer voters toward a candidate, party, or policy (e.g., promoting positive narratives, suppressing negative publicity, censoring alternative viewpoints).<sup>4</sup> In that same vein, social media/big data firms' impunity within political discourse is all the more unjustifiable considering for-profit broadcasters (e.g., cable television, radio) are not only restricted in their ability to donate free air time to candidates but are also mandated by the Federal Communications Commission (FCC) to abide by impartiality measures (e.g., equal opportunity, reasonable access, no censorship, disclosure of sponsorship).<sup>5</sup> This regulatory gap is a direct threat to democratic ideals and informed consent.

### **This Is Not a Hypothetical—It Is a Current Reality**

However, this issue must be understood not as a potential threat to democracy but rather as an ongoing threat. In the wake of the 2016 US presidential elections and the Kremlin-backed campaigns of the Internet Research Agency, bipartisan and societal outcries emerged for social media/big data platforms to eradicate the scourge of mis/disinformation on the grounds it undermines faith in institutions and electoral processes. The platforms answered the call. For example, Google and Facebook launched fact-checking grants (\$6.5 million and \$1 million, respectively) which partly fueled the 200 percent increase in fact-checking organizations during the Trump era.<sup>6</sup> They also began flagging content and changing the ways in which the end user interacts with the data presented (if said user sees the data at all).

Regrettably for the nation's political discourse, these changes seem to disproportionately affect those espousing conservative positions. There are instances of Facebook ostensibly weaponizing fact-checking to discredit right-leaning voices, such as their use of Snopes.com to fact-check *The Babylon Bee's* satirical report about CNN purchasing an industrial washing machine to spin

the news.<sup>7</sup> Then there are more surreptitious occurrences. From 2016–20, it was commonplace to encounter the false Russia collusion narrative “feedback loop.”<sup>8</sup> Yet, when fundamentally identical claims were made in 2020, Facebook blocked “stop the steal” content.<sup>9</sup> Despite the US Postal Service’s documented ballot mishandlings and failure to comply with federal court orders seeking to ensure ballots were counted,<sup>10</sup> questioning the USPS’s readiness for vote-by-mail was consistently labeled disinformation. (Ironically, it was acceptable weeks later to connect the USPS’s mishandling of cards and presents with a ruined holiday season.)

Worse still, social media and big data appear to engage in campaigning. Reddit deleted millions of pro-Trump postings in 2019–20.<sup>11</sup> Meanwhile, the Hunter Biden laptop scandal was algorithmically suppressed on Facebook and banned on Twitter leading up to the 2020 election.<sup>12</sup> And this behavior extends past the most recent election. In 2016, Google manipulated its search engine in favor of Hillary Clinton—a malevolence outed by Harvard PhD (and registered Democrat) Robert Epstein during testimony to the US Senate.<sup>13</sup> In short, potential and actual harms are becoming normalized.

### **This Is Not a Russian Interference Issue—It Is a National Security Vulnerability**

These disproportionately partisan interventions emerged during the 2016 fixation on Russia. Since then, social media/big data and elements of academia have made a concerted effort to portray mis/disinformation as a uniquely conservative problem.<sup>14</sup> Aside from being intellectually disingenuous, this tendency unnecessarily exposes the United States to other great power competitors’ malign activities, considering that the US intelligence community assessed that China and Iran sought a Biden administration.<sup>15</sup> Consequently, with foreign adversaries advancing multiple candidates, there emerges an inextricable connection between a fair marketplace of ideas and the possibility for informed consent of the governed.

### **Proposed Policy Mechanism**

To address these issues, social media/big data need to be conceptualized as a *global commons* or *common pool resource* due to the scope of their reach and societal impact.<sup>16</sup> Once framed accordingly, Elinor Ostrom’s Nobel-winning research on designing hybrid public-private institutions to address collective action problems becomes relevant—especially her overarching themes: a well-defined pool of participants and multifaceted accountability/sanctions.<sup>17</sup>

### **Defining the Participants**

The aforementioned does not discuss inauthentic accounts (e.g., spam bots, trolls) on axiomatic grounds: these should not exist. By regulating social media/big data as utilities, users should be required to verify their identities prior to gaining access to services; minors can gain access by verifying via parent/guardian identity. Companies can adhere to a similar procedure and those with

a legitimate need for bots (e.g., customer service directories, FAQs) can apply for permission to automate their profiles. Such an approach would unilaterally disrupt the majority of inauthentic coordinated behavior, reduce the virality of mis/disinformation campaigns, secure the national security vulnerability, and avoid creating burdensome platform-specific tactics to identify inauthenticity after it is online.<sup>18</sup>

## **Multifaceted Accountability/Sanctions**

With the preponderance of inauthentic accounts undermined, attention should then shift to legitimate accounts. Ostrom stresses the need for participants to collaborate on accountability, which to social media/big data's credit they have attempted crowdsourced mechanisms to fight mis/disinformation.<sup>19</sup> However, given that most mis/disinformation originates from the left and right extremities of the political spectrum,<sup>20</sup> expecting the environment to self-regulate is naive.

Unfortunately, as demonstrated during problem framing, the platforms are proving they cannot self-regulate with impartiality, thereby raising the ancient question of Roman poet Juvenal: *Who will watch the watchers?* But watching is contingent on observability. Social media/big data should be required to disclose their interventions (e.g., fact checking, algorithmic suppression) in a publicly available repository at the time of implementation. Currently, social media/big data lack transparency in rejecting ads and removing content,<sup>21</sup> which challenges not only free expression but the law itself.<sup>22</sup> Making this data accessible to users, researchers, and journalists will enable multifaceted accountability.

It will also enable oversight from independent regulatory agencies (e.g., Federal Election Commission, FCC), which will be the necessary conduit to enact common carrier policies. The abuse of deplatforming and demonetization is a disturbing trend among social media/big data that must end for the sake of informed consent and an equally accessible political discourse. It is contrary to a free society to use these coercive instruments for partisan purposes (e.g., it is legally and morally indefensible to deplatform Donald Trump but allow the Taliban access and the Russian Ministry of Defense's posts regarding its unlawful Ukraine invasion<sup>23</sup>). Deplatforming and demonetization should undeniably be an option on the graduated sanctions spectrum, but legitimate accountability must have reciprocity and those subjected deserve accessible third-party arbitration to either uphold suspensions or censure the platform.

## **Way Forward**

In the absence of intervention transparency and third-party observers and regulators, these problems will only fester under social media/big data's current ability to adjudicate their own innocence. Platforms can obfuscate behind the notion of "independent" fact checkers—even when blatantly wrong—and Google can bury investigations into its own corruption (see figure 1). Facebook can portray

the optics of objectivity by upholding its own decision to deplatform Trump via an appeals board it also controls (i.e., a literal manifestation of the trope, “We’ve investigated ourselves and found no evidence of wrongdoing”).<sup>24</sup> Simply put, the current policy shortcomings challenge the ability of elections to facilitate informed consent of the governed while remaining free from the disproportionate influence of wealthy technocrats and corporations.

Implementing the abovementioned policy proposal (i.e., defining the participants and enacting multifaceted accountability/sanctions) will take time to evaluate after navigating the parallel legislative and executive branch rule-making processes. Requiring account verification is the logical first step and should create decisively measurable effects considering more than a billion fake social media accounts were deleted in 2021<sup>25</sup> and research indicates a third of American social media users create fake accounts.<sup>26</sup> Once fake accounts are largely eradicated (which also upends foreign-sponsored influence campaigns), public and private human capital will be freed up to focus on establishing indicators and measures for a more equitably accessible digital marketplace of ideas. For in the same way physicians are at a reduced risk for lawsuits when continually verifying informed consent,<sup>27</sup> reducing partisan mis/disinformation interventions will counteract the ever-decreasing faith in electoral institutions and norms<sup>28</sup> by brokering an open exchange of ideas free from mega-corporations clandestinely commanding subliminal influence over American voters.<sup>29</sup>

In the interim, the marketplace of ideas must be defended where possible under existing laws and rules so as to shield society from the “peculiar evil of silencing the expression of opinion.”<sup>30</sup> Although the free speech provisions of the First Amendment are commonly invoked, there are admittedly challenges in applying them to privately operated platforms. Nevertheless, being erroneously accused of propagating mis/disinformation could be addressed through existing protocols for slander, libel, and defamation. Similarly, deplatforming and demonetization for illegitimate reasons could be considered a form of damages punishable under torts law or a type of wrongful termination if directly causing a loss of income. These stopgaps notwithstanding, the time to regulate social media/big data as utilities and common carriers is now!

**Facebook Post (Left):**

T.P. Harmon · Follow  
Apr 28 · 🌐

Just in case anyone needs a reminder!

1.68<sup>9</sup> 1.82<sup>9</sup>

Nov. 7, 2020

T.P. Harmon  
Apr 28 · 🌐

**Missing context**  
The same information was checked in another post by independent fact-checkers.  
See Why

**PolitiFact Fact-check**  
PolitiFact - No, gas did not cost \$1.86 a gallon when Donald Trump left the White...  
Former President Donald Trump took multi...

**Google Search Results (Right):**

google manipulate clinton

About 6,130,000 results (0.32 seconds)

https://www.nytimes.com › U.S. › Politics ›  
**Fact-Checking Trump's Claim That Google 'Manipulated ...**  
Claim: "Google manipulated from 2.6 million to 16 million votes for Hillary Clinton in 2016 Election."  
Claimed by: Donald J. Trump  
Fact check by The New York Times: This lacks evidence.  
Feedback

https://www.aei.org › carpe-diem › is-google-manipulat... ›  
**Is Google manipulating search results to promote a social ...**  
Jun 24, 2019 — The search interest for "Hillary Clinton email" (in blue) was obviously significantly greater than for "Donald Trump email," especially in June ...

https://www.politifact.com › factchecks › aug › donald-... ›  
**Donald Trump wrong on Google manipulating election results**  
Claim: "Wow, Report Just Out! Google manipulated from 2.6 million to 16 million votes for Hillary Clinton in 2016 Election!"  
Claimed by: Donald Trump  
Fact check by PolitiFact: False  
Feedback

https://www.cnn.com › 2019/08/20 › politics › hillary-cl... ›  
**Clinton slams Trump for falsely claiming Google 'manipulated ...**  
Aug 20, 2019 — Hillary Clinton on Monday slammed President Donald Trump's false claim that Google manipulated millions of votes for Clinton in the 2016 ...

https://www.rainyag.com › Insta ›  
**Watch: Google Manipulated Search Results To Swing Up To ...**  
Sep 3, 2019 — A prominent US psychologist and former Editor-in-Chief at Psychology Today, Robert Epstein in a recent Senate hearing claimed that tech ...

https://www.newsweek.com › ... › Google ›  
**Hillary Clinton Slams Trump for Claiming Google Manipulated ...**  
Aug 19, 2019 — "The debunked study you're referring to was based on 21 undecided voters," Clinton said. "For context that's about half the number of people ...

https://www.businessinsider.com › News ›  
**Experts: Trump Google Voter Manipulation Claims Based on ...**  
Aug 19, 2019 — One of the studies — which claims Google shifted 2.6 million votes in favor of Clinton — surveyed only 95 participants.

https://www.politico.com › story › 2019/08/19 › clinto... ›  
**Hillary Clinton zings Trump over new voter conspiracy theory**  
Aug 19, 2019 — Clinton shot back on a claim that Google manipulated votes in her favor in 2016.

https://people.com › politics › hillary-clinton-tweet-don... ›  
**Hillary Clinton Responds to Trump's Google Conspiracy**  
Aug 20, 2019 — Hillary Clinton clapped back this week at President Donald Trump's baseless

https://www.usatoday.com › news › politics › 2019/08/20 ›  
**Hillary Clinton slams Trump's claim of voter manipulation**  
Aug 20, 2019 — She had been referring to Trump's post earlier Monday about alleged voter fraud in the 2016 election. Trump had said on Twitter that because of ...

1 2 3 4 5 6 7 8 9 10 Next

**Figure 1: Manipulating Their Corporate Image to Appear Objective**

(Left) Facebook declares 11/7/20 gas prices as "False" via irrelevant national average price from 01/20/21 (Right) Google obfuscates its culpability in 2020 election tampering by burying the congressional report, prioritizing instead "fact checks" that incorrectly attribute the claim to Trump rather than Robert Epstein.

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## Endnotes

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<sup>2</sup> Shah, et al., "Informed Consent."

<sup>3</sup> Federal Election Commission, "Contribution Limits."

<sup>4</sup> Corporate valuations accessed via Google Finance (<https://www.google.com/finance>) on August 30, 2022.

<sup>5</sup> Federal Communications Commission, "Political Programming."

<sup>6</sup> Fischer, "Fact-Checking Goes Mainstream."

<sup>7</sup> Mikkelson, "Did CNN Purchase?"

<sup>8</sup> BBC, "Trump-Russia Steele Dossier."

<sup>9</sup> Horwitz, Schechner, and Seetharaman, "Facebook Imposes Limits."

<sup>10</sup> Mangan, "Postal Service Data."

<sup>11</sup> Copland and Davis, "Reddit Removes Millions."

<sup>12</sup> *Wall Street Journal*, "Zuckerberg."

<sup>13</sup> Judiciary Subcommittee on the Constitution, Robert Epstein testimony.

<sup>14</sup> This claim was made repeatedly by researchers at the North Atlantic Treaty Organization-sponsored Eurasia Disinformation Summit, Clemson, South Carolina, December 2021. See also studies with methodological and experimental assumptions that imply social media interventions are 100 percent accurate (e.g., Lees, McCarter, and Sarno, "Twitter's Disputed Tags").

<sup>15</sup> CNN, "Intelligence Community." See also US Department of Justice, "US Attorney." Note: Clemson University Media Forensics Hub researchers also observed Iranian pro-Biden activities during the 2020 presidential debates; this was reported to the Commission on Presidential Debates (research sponsor) but an academic publication was not pursued (i.e., no externally accessible citation is available).

<sup>16</sup> For a variation of this argument, see Shkabatur, "Global Commons."

<sup>17</sup> Ostrom, *Governing the Commons*, 185–86.

<sup>18</sup> Skowronski, "Trolls and Bots."

<sup>19</sup> One such example can be seen at Coleman, "Introducing Birdwatch."

<sup>20</sup> Hopp, Ferrucci, and Vargo, “Why Do People.” See also Marshall, “Who Shares.”

<sup>21</sup> Baca, “Facebook Makes Small Tweaks.”

<sup>22</sup> Thompson, “Beyond Gatekeeping.”

<sup>23</sup> Joe Concha, “Strikingly Sophisticated”; Russian MOD Facebook active months after Ukraine invasion: <https://www.facebook.com/mod.mil.rus>.

<sup>24</sup> Clegg, “In Response.” Note: The terms of this suspension extend through the 2022 midterm elections.

<sup>25</sup> Sbraccia, “Be Aware.”

<sup>26</sup> Mello, “A Third.”

<sup>27</sup> Hall, Prochazka, and Fink, “Informed Consent.”

<sup>28</sup> National Democratic Institute, “Disinformation.”

<sup>29</sup> In addition to the Google manipulation and other case studies cited throughout the paper, research from Princeton University contends Twitter’s liberal content bias reduced the overall Republican vote share and possibly persuaded moderate voters to vote against Trump in the 2016 and 2020 elections. For more, see Fujiwara, Müller, and Schwarz, “The Effect of Social Media.”

<sup>30</sup> Mill, *On Liberty*.



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