In Search of Alterity: On Google, Neutrality, and Otherness

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Discourses on network neutrality have often, if not always, been introduced without any more in-depth evaluation of their normative bearings. This Article pursues such an evaluative approach against a specific empirical backdrop. It inquires into that which has been the archetypal voice in network neutrality discourses: Google's. In doing so, this Article reveals as much about Google's views on network neutrality as it does about the normative context and regulatory implications of Google's own activities. Drawing on Google's policy propositions, this Article demonstrates that Google's support for network neutrality relates to a broader normative culture Google seeks to advance. Such is a culture in which Google's possibilities of reasoning and acting upon its reasons assume a degree of priority in relation to those of other actors in the information environment. This Article demonstrates that the method of such a culture is the nullification and neutralization of equal possibilities of reasoning and action by actors other than Google. It explains the incoherence of Google's overall approach and refutes the idea that other actors, here ISPs, should be treated more detrimentally than Google due to their being Internet bottlenecks in a way that Google arguably is not. By discussing the normative contours of Google's influence, this Article points toward the limitations of existing theories about the regulation of "search" and suggests an alternative theoretical model that focuses on search from a broader perspective within the regulation of the information environment. In the model proposed, neutrality does not play any role—reason and alterity do.

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I. PREFACE

This Article is part of what began as a research project on the normative boundaries of network neutrality—the widely held idea that Internet service providers must not discriminate packets of bits on the Internet according to their source, content, or destination. Early results were presented in a congress organized by the Hans Bredow Institute for Media Research, at the University of Hamburg, under the title "A Network of Values." As the research further unfolded, however, it became evident that network neutrality's normative context and politico-regulatory implications ensuing from it were deeply intertwined with those of network neutrality's most prominent patron, Google, to the point that the former could not be understood without the latter being understand as well. While there is much already said on network neutrality, Google's own normative universe in this regard has been left somewhat untouched. As this Article will show, inquiring into Google's formal stances on network neutrality raises important questions on the regulation of Google's own activities, on the idea of neutrality itself, what it means for politics, the state and agency in general, and on the type of political system we may wish to live in during the information age. The Article answers these questions, by laying out some assertive conclusions about Google's stances already at the outset. These conclusions are deepened as the Article unfolds.

Timeo hominem unius libri
—St. Thomas Aquinas

II. SEARCH AND RESPONSIBILITY

"The King can do no wrong" is the proverbial saying whose contemporary equivalent can be found in the idea that "Google does no evil."[1] Both expressions convey, in different ways, and with regard to their different times, a description of a state of affairs and a normative directive ensuing from such a state. Descriptively, they reflect historical or contemporary beliefs in the righteousness of a sovereign. Normatively, they entail that the acts of such a sovereign ought to be

1. "Don't Be Evil" was a motto officially adopted by Google during an internal corporate meeting in 2001. According to accounts by Google's own personnel, it was chosen, together with other general principles, to reflect "what Google was all about"; it was adopted within an efficiency-oriented ethos, by engineers resistant to the excessive specificity of rules. *See* JOHN BATTELLE, THE SEARCH: HOW GOOGLE AND ITS RIVALS REWROTE THE RULES OF BUSINESS AND TRANSFORMED OUR CULTURE 138 (2006).

judged by standards different from those under which the acts of ordinary people ought to be. If there is one forced element in such an analogy, that may be only that the first, ancient expression, even in legal systems where crown privileges have held strong throughout the centuries, has been widely attenuated by the historical developments of public law.[2] The authority of the second, contemporary motto, however, has been asserting itself ever more strongly.

When we speak of Google's position of sovereignty, one can read such a claim as framed in figurative, metaphorical terms. Other works have advanced similar claims with more market-oriented slants. In his book, *The Googlization of Everything*, Siva Vaidhyanathan notes, with fitting irony, that "we are not Google's customers: we are its product"[3]—our time, our attention, our preferences, our personal attributes thus, these are the offerings on which Google builds its revenue. In this sense, we are not the persons who buy, we are the things that are sold. Vaidhyanathan's position can only be fully understood in a metaphorical context. Lessened though our dignity may be through these commodifying links that link us to Google, our status as persons (and thus not products) still remains.

Yet, we do contract out portions of our liberty; we transfer these to an overarching organization that purposes (or purports) to reflect the wider public interest—the "database of intentions,"[4] in John Battelle's words—and to do so in a benevolent or at least nonmalicious way. We become increasingly dependent on such an organization, at a very fundamental level, to navigate what Charles Taylor has suitably called the "space of questions"[5]—the ontologically basic framework-definition

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2. Think of the United Kingdom. From the Magna Carta, in 1215, to the present, as witnessed in cases like *M v. Home Office*, [1994] 1 A.C. 377, the history of British constitutional law, despite its mishaps and setbacks, has been one of control and subjection by the Crown. *See, e.g.*, JAMES C. HOLT, MAGNA CARTA 29 (1992), *quoted in* ADAM TOMKINS, PUBLIC LAW 40 (2003) (arguing that the Magna Carta was "based on a political theory of 'monarchical responsibility'"). This, of course, is far from claiming that there is anything resembling a regime of perfect tripartite separation of powers in Britain, with the Crown entirely at check by the judicial power. *See*, TOMKINS, *supra*, at 54-60.

3. SIVA VAIDHYANATHAN, THE GOOGLIZATION OF EVERYTHING: (AND WHY WE SHOULD WORRY) 3 (2011).

4. BATTELLE, *supra* note 1, at 1.

5. CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 29 (1989). ("[T]o speak of orientation is to presuppose a space-analogue within which one finds one's way. To understand our predicament in terms of finding or losing orientation in moral space is to take the space which our frameworks seek to define as ontologically basic. The issue is, through what framework-definition can I find my bearings in it? In other words, we take as basic that the human agent exists in a space of questions. And these are the questions to which our framework-definitions are answers, providing the horizon within which we know where we stand, and what meanings things have for us.").

within which we find our ways and moral bearings in the world. The illusion that just to wish such a framework away and switch to a different provider is costless will be further addressed below. Google *is* the sovereign, not only in metaphorical terms, but also in very real and unprecedentedly fundamental terms. Google gives and takes away the *reasons* whose number, variety, and relevance are increasingly determinant of the ways we author our lives—of our personal autonomy. This will be ever more so in a society whose normative orientations come to be increasingly and explicitly articulated in the institutional orders of the information environment. Our liberty hinges upon the configurations of that framework and on an information environment which is remarkably influenced by it.[6] We are not Google's product; we are its subjects.

Whether or not one accepts this bold attribution of sovereignty to an Internet company, one may still accept the more modest remainder of the propositions introduced at the outset—that Google's motto reflects: (1) a belief in its (moral or cognitive) evaluative superiority, which gains strength when one notices that Google's self-assigned mission is that of "organizing all the world's information" and that this entails some degree of self-confidence in so doing; and (2) an expectation that, due to its claimed superiority, Google should be judged by standards different from those by which ordinary people or companies should be.

Both these self-aggrandizing ascriptions come together in the main argument put forward in this Article. In the pages that follow I will demonstrate, in the light of a concrete example, that Google seeks to establish an evaluative culture in which its possibilities of reasoning and acting upon its reasons assume a degree of priority with regard to those of other agents in the information environment. The pursuit of such a priority by Google presents itself as a call for the nullification, *neutralization* of equal possibilities of reasoning and action by other agents other than Google.[7] After that, this Article will discuss different conceptions of the political system that are most suitable for dealing with

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6. Recent studies show that 6.4% of all global Internet traffic comes from Google - a number that may, depending on the variables, go up as much as 8%-12%. *See* Craig Labovitz, *Google Sets New Internet Traffic Record*, ARBOR NETWORKS (Oct. 25, 2010, 11:03 AM), http://goo.gl/hBTg9. This makes Google the largest source of traffic on the Internet. And yet, it is a measurement of traffic itself and not of Google's influence. Compared to Skype's traffic, for instance, much of Google's traffic may be relatively light. Thus, 6% is a very impressive number. But the real, unanswered question, is how much of the remaining traffic, though not carried by Google, arises either directly or indirectly from information obtained through it.

7. It is in this technical sense, which will become clear later, that the word *neutralization* will be used in this Article.

such problems. Inquiring into all this has immense relevance in a moment in which competition authorities, in Europe[8] and in the United States alike,[9] seek to evaluate the regulatory implications of Google's practices in the realm of search. The conclusions reached in this Article, however, also point to the limitations of a competition-based approach that focuses on search engines as particular ontological entities[10] and on search as a relevant market.

Part III of this Article discusses a very prominent instance in which the pursuit of neutralization of otherness, of alterity by Google presented itself to the fullest—the case of a call for the neutrality of Internet service providers (ISPs), also known as "network neutrality" or, in other words, the idea that ISPs must not discriminate packets of data on the Internet based on their source, content, or destination.[11]

Until it "changed" its position in August 2010,[12] Google had been one of the most vocal proponents of network neutrality. Its shift had less

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8. Press Release, The European Commission, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010), *available at* http://goo.gl/FrzcS.

9. *Investigating Google*, N.Y. TIMES, July 4, 2011, at A20, *available at* http://goo.gl/CAV8K.

10. A number of earlier works seem to adopt this ontological approach with regard to search. *See, e.g.*, Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC'Y 169 (2000). In a pioneer normative account on search engines, Introna and Nissenbaum discuss how the ways these function are "at odds with the . . . ideology of the Internet as a public good." *Id.* at 178; *see also* Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007). Pasquale has recently expanded this perspective in a cogent piece. *See* Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 401-02 (Berin Szoka & Adam Marcus eds., 2010) (inviting "scholars and activists to move beyond the crabbed vocabulary of competition law to develop a richer normative critique of search engine dominance").

11. I will not pursue any comprehensive account of what network neutrality means in all of its different flavors—if only because these so are varied and manifold that they make network neutrality, to use Christopher Yoo's words, "a naked normative commitment." Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 26 (2005). I will, however, describe and evaluate that which I trust to be the archetypal stance on network neutrality; the stance most faithful to net neutrality's teleological foundations: Google's. Network neutrality here is mostly interesting for the world view it at the same time draws on and brings about.

12. Google is widely believed to have shifted its stance on network neutrality in a joint proposal with *Verizon Communications Inc.*, sent to the U.S. Federal Communications Commission in August 2010. *See* Alan Davidson & Tom Tauke, *A Joint Policy Proposal for an Open Internet*, GOOGLE PUB. POL'Y BLOG (Aug. 9, 2010, 01:38 PM), http://goo.gl/voeVZ [hereinafter *Joint Proposal*]. The proposal, in a nutshell, suggests a differentiated approach for providers of wireless and wireline Internet access—with a significant set of constraints applying to the latter but not to the former. On the one hand, traditional broadband ISPs will be subject to neutralizing constraints that enable Google to ride freely upon them. On the other hand, the approach to wireless communications will be one that enables Google to be a first mover and, in partnership with Verizon, build upon its established dominance in the information environment.

to do with normative repentance than with a pragmatic recognition of the regulatory difficulties in the implementation of its propositions—coupled, of course, with some degree of self-interestedness in the pursuit of alternative paths. In essence, however, Google continued to push a similar agenda of restraint for ISPs under a different terminology. We will discuss the almost incredible, indeed absolute, form of restraint reflected in Google's formal calls for network neutrality and compare it with the position finally adopted by the Federal Communications Commission (FCC) on the matter. I will highlight the incoherences of both these approaches—Google's more so than the FCC's—and of the conceptions of law and action that they espouse. Both the FCC's and Google's approaches rely in part on the idea that search engines in particular, and application and service providers in general, should be judged by standards different from those applicable to ISPs.

Part IV addresses this misconception by explaining how it amounts to an exclusion of ISPs from the normative whole that we call "the Internet" and relies on the false assumption that application and service providers cannot control the infrastructure of the information environment as ISPs are claimed to do. This Article focuses, in particular, on the case of search and on the argument that customers are always free to switch away from Google's services.

Part V revisits the overall claims of this Article under the lights of contemporary liberal theory. It submits that, rather than providing support for the neutralization of any actor in the information environment, or overall requiring that stakeholders—ISPs, states, among others—keep away from people's evaluative pursuits on the Internet, liberalism actually requires that a range of substantive choices are made by stakeholders precisely to enable people to live autonomous lives. Here, the Article engages with the most ambitious attempt so far to devise a political theory for the information environment—Yochai Benkler's. Benkler's thoughts lend remarkable, if contestable, authority to Google's world views and aspirations. But they also silently, and unfortunately, depart from the sounder political theory of Joseph Raz, which Benkler claims to embrace while only selectively doing so. The Article draws on Raz's liberal perfectionist framework to propose a model for state action that moves us beyond neutrality and beyond overly optimistic accounts of self-regulatory possibilities of the information environment. Part VI concludes.

By doing so, Google can neutralize other ISPs in ways it knows it would not be able to do via policy intervention by the FCC. Network neutrality, however, was overall abandoned by Google as a term of art. *Id.*

III. NEUTRALIZING ALTERITY

There have been many instances—and one may argue this has happened systematically—in which Google sought to establish a framework of absolute social priority for its own reasons. At times this happened in defiance, in an attempted exclusion of the dominant, exclusionary reasons of the law. That was the case, in the Google Books Project, when Google undertook to digitize all books in existence on earth (whether in the public domain or not) without seeking permission from their respective rights' holders.[13] That was also the case when Google decided to challenge a legal regime with which it had been cooperating: that of China—in a process that continues to unfold. Indeed, having moved its search engine away from Mainland China,[14] Google now champions the use of the international trade system to nullify China's possibilities of choosing reasons which it trusts to be of worthy pursuit in the information environment.[15]

If effective, all those processes of prioritization of Google's own reasons—for reasons which I will elaborate on below—would threaten the prospects of contemporary liberalism. In short, those processes would impair the possibility that actors other than Google act upon reasons chosen by them. Thus, the liberal logic would be inverted except for a company that expects to be judged as doing no evil and, paradoxically, as being a champion of values of liberal nature.

Nowhere does this problem appear more clearly and explicitly articulated than in the debates concerning the idea of network neutrality. The attempts to neutralize China's possibilities of "regulating the Internet" and to establish exceptions for copyright in the Google Books case also challenge liberalism.[16] But they do so mainly by challenging

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13. Having been challenged through a Class Action, Google pursued a settlement that, for the time being, has been struck by the Judge hearing the case. *See*, Pamela Samuelson & David Nimmer, *The Amended Google Book Settlement: Judge Chin's Decision*, WIPO MAG. (June 2011), http://goo.gl/1mvu9.

14. David Drummond, *A New Approach to China*, OFFICIAL GOOGLE BLOG (Jan. 12, 2010, 03:00 PM), http://goo.gl/SqpSk.

15. One of the main arguments used in recent World Trade Organization proceedings against China is precisely the idea of "technological neutrality," which enjoins political authorities not to reflect specific choices in society's technological infrastructure. I have dealt with the merits of China's choices in this context in another work. *See* Marcelo Thompson, *The Neutralization of Harmony: Whither the Good Information Environment* 18 B.U. J. SCI. & TECH. L. (2012) [forthcoming]. For Google's approach, see Bob Boorstin, *Promoting Free Trade for the Internet Economy*, GOOGLE PUB. POL'Y BLOG (Nov. 15, 2010, 10:07 AM), http://goo.gl/zFz8U.

16. One may rush to claim that challenging China's policies with regard to the information environment is to do liberalism a favor. One should also note, however, that to nullify China's possibilities of making *any* choices on conceptions of the good in this regard—

the authority of the state and the law, and thus the possibility that these intervene to preserve, in the information environment, certain values that contemporary liberalism came to understand as worthy of protection. The challenge to individuals and the collective does not happen directly, but rather indirectly by stripping them of possibilities for authoring their lives, pursuing goals they believe to be valuable.

Surely in the Google Books case, though, the biggest challenge had been to copyright law, because authors and publishers had their rights, to some extent, usurped by Google.[17] A normative inversion was attempted which would presume the righteousness of Google's behavior, resulting in the subjection of rights' holders to Google's will. Yet, serious though it is to have parts of one's books searchable against their will, rights' holders were not shackled or divested of their central reasons and pursuits.[18] This, however, is precisely what network neutrality does to ISPs.

The idea of network neutrality hurts liberalism at its very core by establishing, for ISPs, a form of restraint that paradigmatically inverts the logic of the liberal principle. It does not merely impinge upon, it *disfigures* the idea of liberty by preventing important social agents from choosing their reasons for action—in this case, their criteria for managing their networks. As the calls for neutrality extend beyond ISPs to other actors in the information environment, this othering of liberty threatens to become the normative touchstone of a remarkably individualistic age.

Everywhere we see the Internet mob calling for the neutralization of states and economic actors. The underlying principle seems to be that no authority but that of the individual self should be recognized. In a late reverberation of outworn liberal theory of the past centuries, which is embraced and bolstered by the scholarship and practical contrivances[19] developed by colleagues at the Berkman Center, the call of the time is for

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which is entailed in neutrality claims—is a self-defeating way of promoting liberalism. I expand on this point in Part V.

17. This in spite of Google's expedient observations, elsewhere that Copyright law in the United States, including the DMCA, reflects "a delicate balance, carefully crafted by Congress and adjudicated through the courts." Reply Comments of Google Inc. at 72, *In re* Preserving the Open Internet Broadband Indus. Practices, GN Docket No. 09-191, WC Docket No. 07-52 (Apr. 26, 2010), *available at* http://goo.gl/xY8YF.

18. Were this to happen, it would be the product of a building up of different challenges to the law, and not as an absolutist, all-encompassing challenge to any individual actor in the information environment.

19. *See, e.g.*, STOPBADWARE, http://goo.gl/JuKI4 (last visited Nov. 8, 2011); HERDICT, http://goo.gl/frGL8 (last visited Nov. 8, 2011); CHILLING EFFECTS, http://goo.gl/MpQXj (last visited Nov. 8, 2011).

having "individuals as the bearers of the claims of political morality."[20] This is most visible in the network neutrality movement.

Despite the ardency with which clamors for network neutrality have been echoed by the multitude, the principle is yet to see actual implementation. It is important, however, that we enlarge on its proposed contours so that we can understand the normative implications that would have accrued from the principle had it been implemented—and may still do if it ever is. Understanding these implications, as we will see further on, is of central importance when we seek to define the political destiny of our information environment.

A. Google's Manifesto

Google's original network neutrality defense can only be found today in the historical archives of the Internet.[21] Network neutrality is there defined as "the principle that users should be in control of what content they view and what applications they use on the Internet."[22] Interestingly, though the seeming kindheartedness towards users, the only mentioned means to achieve the said effects is reflected in the following precept: "broadband carriers should not be permitted to 'use their market power' to discriminate against competing applications or content."[23] This shifts the focus, from protecting users, towards restraining ISPs. And though the chosen wording, it seems to aim at restraining ISPs even beyond competition aspects.

It is indeed difficult to disentangle the expression "use of market power"[24] in the context above from the sheer performance of ISPs' core activities. ISPs hold the power of routing information through the Internet, which also entails the power of not doing so. The making of decisions on if and how to route information seems to be enough to characterize the exercise of power in a market context. Similarly,

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20. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 280-81 (2006).

21. Google's original evangelization page—"A Guide to Net Neutrality for Google Users"—can only be found in the Internet Archive, its latest version being from September 27, 2009. *See A Guide to Net Neutrality for Google Users*, GOOGLE.COM (Sept. 25, 2009), http://goo.gl/PWLrY [hereinafter *Google Guide*]. The paradox that Google would seek to remove information from public access is notable. When one queries the old URL one is simply redirected to Google's justifications for its changed position. For the original Guide, see http://goo.gl/PWLrY (last visited Nov. 20, 2011). For Google's justifications, query *Google Guide*'s original address at http://www.google.com/help/netneutrality.html (last visited Nov. 20, 2011).

22. *Google Guide*, *supra* note 21.

23. *Id.*

24. *Id.*

"competing content" seems able to accommodate any content discriminated by an ISP—that is, any content which competes with content that has not been discriminated.[25] Of course, the latter expression assumes more strength if the discriminated content is one which competes with that of the ISP itself or companies vertically integrated with the ISP's activities. In all the range of its meaning, however, Google's proposition seems to indicate, broadly and simply, that ISPs should not be permitted to discriminate applications or content on the Internet; that control of the flow of information on the Internet should not be entrusted to ISPs. As Google elaborates somewhere else in the now extinct document "broadband carriers should not be allowed to use their market power *to control activity online*."[26]

Two questions follow from this. First, if the objective is truly that of putting users in control, why only ISPs should be obliged by a rule that neutralizes their possibility of acting upon reasons chosen by them? Why are application and service providers, in particular Google, not equally constrained by a principle of neutrality? Second, is the idea of neutralizing any actor in the information environment compatible with the orientations of contemporary liberal politics? I will offer some tentative responses to these questions in Parts IV and V, respectively.

I will introduce, however, the first question in more detail in the paragraphs below, as we seek to ascertain the normative boundaries of Google's more formal position on the regulation of ISPs. This position expands Google's original orientations in its Guide to Net Neutrality under a new terminological orientation. In it, Google lays out its calls for ISPs' restraint in an awkward, and extremely telling, systematic perspective.

B. The "Murkiness" of Justice

It is at the core of Google's activities, as it is of ISPs', to make judgments about attributes of data it deals with. Should a principle of restraint neutralize Google's possibilities of doing so? The answer to this question must go beyond Google itself and also include other application and service providers. After all, all of these are part of an Internet whose layers are in continuous interaction and whose actors have reciprocal impacts on the services of each other. However, given Google's prominent political role, and its leadership in the network neutrality movement, it seems natural that scrutiny would at some point turn

25. *Id.*
26. *Id.* (emphasis added).

against Google itself. Here scrutiny arises against Google itself—not only to test whether Google walks its own talk but also, and perhaps mainly, as a consequence of Google's immense possibilities of interfering with the individualistic desires of the Internet crowd. By the time Google surprisingly "modified" its stance on the topic, in August 2010,[27] public calls for neutrality had more assertively started to include Google's activities as well.

In July 2010, the *New York Times* ran an editorial called "The Google Algorithm,"[28] in which it noted the need to adopt regulation to ensure that Google's tweaks in its algorithms do not prevent Google from leading us where we want to go. While the editorial did not explicitly contain a call for Google's neutrality, it was widely read that way. In acknowledgement of such a reading, a response to the Editorial was promptly published in the *Financial Times* by Marissa Mayer, Google's Vice-President of Search and Product Experience. In her response, Mayer attempted to explain why regulators should not step in to enforce "search neutrality." In this piece, titled "Do not neutralise the web's endless Search,"[29] Mayer claimed that neutrality rules "remove[] the potential for innovation and turn[] search into a commodity."[30]

Mayer's choice of words was not coincidental. Rather, the title and content of her short piece were pondered and reflective of an ongoing movement that started to become more material when Google first joined efforts with Verizon in October 2009. In a statement of common grounds issued at the time by both companies,[31] neither committed to neutrality, but rather to promoting an open Internet. Shortly after, in January 2010, Google released its most official and important comments so far on the matter[32] in the context of a Notice of Proposed Rulemaking (NPRM)

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27. *Joint Proposal*, *supra* note 12, at 1-5.

28. Editorial, *The Google Algorithm*, N.Y. TIMES, July 14, 2010, at A30, *available at* http://goo.gl/n9TcV.

29. Marissa Mayer, *Do Not Neutralize the Web's Endless Search*, FIN. TIMES (July 14, 2010, 11:19 PM), http://goo.gl/PA6sg.

30. It is ironic, and we will come back to this point, that Google sees its own services as *innovating* while others'—those that should be neutralized—are seen as mere commodities.

31. Eric Schmidt & Lowell McAdam, *Finding Common Ground in an Open Internet*, GOOGLE PUB. POL'Y BLOG (Oct. 21 2009, 06:15 PM ET), http://goo.gl/cdBoi.

32. *See* Reply Comments of Google Inc., *In re* Preserving the Open Internet Broadband Indus. Practices, GN Docket No. 09-191, WC Docket No. 07-52 (Jan. 14, 2010), *available at* http://goo.gl/9pmPr [hereinafter *Comments*]. FCC's authority in this context was later challenged and ruled against in *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). This was a case concerning the interruption of BitTorrent traffic by Comcast, whose behavior was reprimanded in a 2008 Order issued by the FCC. *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 F.C.C.R. 13028 (2008) [hereinafter *Comcast Order*]; *see also* Marcelo

issued by the Federal Communications Commission (FCC) in October 2009.[33] Again, Google's notes on network neutrality were merely tangential as the Comments moved from a neutrality-based approach towards a formal call for *awesomeness*.[34]

It might be tempting to think that the terminological shift represented a paradigmatic normative conversion—from a doctrine of neutral concern to a virtues-based approach; from the neutral towards the good, or the awesome. But rather the episode reveals the always too close proximity between doctrines of neutrality and substantive world views about what the good, in political terms, is. Google's commitments have always been, in effect, to conceptions of the good reflected in a political framework that enables it to avail its users with (only apparently) boundless informational choices. It is based on these views that Google seeks to neutralize alternative procedural and substantive possibilities for the information environment. Google can still implement its worldview while abandoning a neutrality terminology, which was threatening to engulf its own services.

Perhaps it was to close the Pandora's box it had opened, or to prepare the public for its partnership with Verizon, that Google decided to abandon neutrality as a term of art, conveying its policy propositions with a different wording. The spirit, however, was still the same. As noted in its Comments:

> [Google's] interest in this proceeding is straightforward: to *keep the Internet awesome for everybody*.
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> The Internet was designed to empower users. They are in control of the applications and services they use and create. And they—*not network providers or anyone else—decide* what ultimately succeeds in the online market."[35]

On the one hand, Google reserves for itself the role of preserving awesomeness—which necessarily encompasses deciding on whatever awesomeness is. On the other hand, Google sees the original design of the Internet as one for which no one but users—and, as in the first sentence, Google—make choices of ultimate value. Such is the "awesome" model which Google believes should be preserved.

Thompson, *The Sheriff of 'Not-the-Internet': Reflections on Comcast Corp. v. FCC*, 1 COMM. L. REV. 201 (2010) (Br.) (providing an analysis of the D.C. Circuit's decision finding against the FCC).

33. *In re* Preserving the Open Internet: Broadband Industry Practices, Notice of Proposed Rulemaking, 24 F.C.C.R. 13064 (2009) [hereinafter *NPRM*].

34. *See infra* note 35 and accompanying text.

35. *Comments*, *supra* note 32, at I (emphasis added).

Now, it may seem that when the Comments mentioned that network providers—ISPs—should not be entitled to make decisions, this was meant as an exaggeration, something to be taken with a grain of salt. However, that was not the case, for the Comments proposed what was called a "simple nondiscrimination" rule,[36] similar to the propositions of Google's earlier and more informal Guide. According to the "simple nondiscrimination rule," ISPs should be prevented from using their control over the network to favor or disadvantage particular sources of content or applications. In other words, ISPs should be prevented from using their position in the network to manage the network.[37] As explained in the Comments, the "simple nondiscrimination" rule prevents broadband providers from blocking, degrading, or prioritizing Internet traffic.[38]

Justifications given for the rule were the critical nature of broadband access as a basic component of communications infrastructure, the scarce nature of broadband resources due to demand of enormous upfront investments, and the power held by ISPs to control the upper layers of the Internet[39]—where, to use FCC's terminology, Edge Providers[40] lie. Let us leave alone for now the fact that all of these same reasons could be applied to Google itself. Let us also forget for a bit that, when highlighting recent bad behavior by ISPs, Google gave as an example of its good behavior its commitment to openness through its investment in the Android operating system—which, ironically, Google has recently decided to close.[41]

What is important at this point is the absolute nature of the restraints sought to be imposed on ISPs. This can be seen very eloquently in the Comments' endorsement of a statement in the NPRM which expresses, as a principle of "User Control of Content," that users should be "*unconstrained* by broadband Internet access providers in their ability to participate in the marketplace of ideas."[42] It is important to note that the idea of unconstrained users implies completely constrained ISPs.

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36. *Id.* at ii, 3, 60-63.

37. *Id.*

38. *Id.* at 3.

39. *Id.* at 13-26.

40. In its recently issued Open Internet Rules, the FCC uses the expression "edge providers" when referring "to content, application, service, and device providers, because they generally operate at the edge rather than the core of the network." *See In re* Preserving the Open Internet: Broadband Industry Practices, Report and Order, 25 F.C.C.R. 17905, n.2 (2010) [hereinafter *Open Internet Rules*].

41. *See* Ryan Paul, *Android Openness Withering as Google Withholds Honeycomb Code*, ARS TECHNICA (Mar. 25, 2011), http://goo.gl/tu0dP.

42. *Comments*, *supra* note 32, at 56; NPRM, *supra* note 33, para. 95 (emphasis added).

The principle is based on the premise that ISPs cannot choose reasons of their own in deciding upon how to manage their networks. The reasons available to ISPs would be fully heteronomous reasons, ex-ante defined by the FCC as valid and picked from a very narrow spectrum outlined in the Comments. It is in this sense that the Comments speak of delineated permissible network management practices,[43] preferring the simplicity of absolute impossibility to the "murkiness" of justice as a standard: "Adopting an 'unjust and unreasonable discrimination' standard and reasonable network management exception would establish a more murky [sic], complex, and likely ineffectual legal standard."[44] To put it differently, it is not that ISPs should be allowed to operate within certain principles of justice and expected to make choices which are practically reasonable.[45] It is, rather, that such principles and choices are not available to ISPs at all, except as narrowly dictated by the FCC. Autonomy is thus fully replaced by heteronomy.

The most patently absurd reason given in the Comments for such an absolute form of restraint is that a "simple nondiscrimination" rule as the one proposed is "easier to understand and requires less enforcement expense and resources."[46] A reasoning at all similar to this would be one that is as unsubtle as Google's proposition: because bondage eliminates the normative uncertainty that could arise from entrusting bondsmen with the possibility of choosing their reasons for action, one can say that wider social benefits accrue from bondage than from liberty. We see at what cost this type of certainty would come.

Though the Comments do contemplate the possibility of the FCC defining a number of reasons according to which ISPs can manage their networks, these are restricted to a "narrow set of reasonable network management practices, limited solely to engineering practices legitimately related to network congestion."[47] But even here ISPs' possibilities are minimized as: (1) the "optimal solution" suggested by the Comments are, rather than reasoning, the sheer "addition of capacity

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43. *Comments*, *supra* note 32, at 60.

44. *Id.* at 62 (emphasis added).

45. Practical reason is here referred to in a technical sense, as "the general human capacity for resolving, through reflection, the question of what one is to do" and as involving all the normative elements, the comprehensive world-views that we discuss in the upcoming sections. R. Jay Wallace, *Practical Reason*, STAN. ENCYCL. PHIL., Oct. 13, 2003, *available at* http://goo.gl/lPNWV; *see* John Finnis, *Foundations of Practical Reason Revisited*, 50 AM. J. JURIS. 109 (2005) (offering a persuasive and insightful account on the requirements of practical reason). *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

46. *Comments*, *supra* note 32, at 63.

47. *Id.* at 68.

on the network level;"[48] and, most importantly, (2) ISPs are not even entitled to interpret the law, since compliance of content with the law is understood not to be an issue "related to network management at all."[49]

The latter restriction being true, one wonders what to make of the few possibilities in which the Comments do provide for the adoption of network management practices, such as to prevent "malware," block "spam," and "protect children from offensive materials (e.g., pornography)."[50] It is curious indeed that ISPs are in this sense allowed to address the intersection between the technological (engineering practices) and the ethical (the mal-, in malware), but need to interpret the ethical completely bereft of legal reasons. In other words, Google's strange liberalism leads it to agree with several, albeit narrow and predetermined, modalities of decision by ISPs on conceptions of the good (for instance, determining which software in being harmful is bad),[51] while denying to ISPs any possibility of decision on conceptions of the right (for instance, determining which software is illegal).

Not only is this a very unique kind of liberal philosophy, it is one that does not make sense at all, for to exclude any interpretation of lawfulness from the realm of the ethical is to exclude from this same realm any possibility of reasoning upon those most severe forms of ethically deviant behavior that law is concerned with. While ISPs can manage their networks to prevent the trite, they may not do so spontaneously to avoid the atrocious when this is settled by the law.

It is very important to note that decisions on what constitutes "malware," for instance, are not merely engineering decisions. Google itself collaborates with a Harvard University-originated project called "Stop BadWare," which is a clearing house for preventing the spread of malware on the Internet.[52] One does not need to go very far to understand how normative the definition of badware is. According to Stop BadWare, "[b]adware is software that fundamentally disregards a user's choice about how his or her computer or network connection will

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48. *Id.* at 69.

49. *Id.* at 72 ("A separate network management exception for 'unlawful content' and the 'unlawful transfer of content' is unnecessary. . . . [T]hese issues are not related to network management at all, but rather are properly matters of law enforcement and compliance with the law.").

50. *Id.*

51. As the following lines will show, however differently one may understand the harm principle in other realms of practical reason, determining what is harmful *in relation to informational goods* inevitably engages our conceptions of the good in moral, political and otherwise cultural ways.

52. *See* STOP BADWARE, http://goo.gl/JuKI4 (last visited Nov. 8, 2011).

be used."[53] In other words, badware is software that imposes to users that same ideal that Google seeks to impose to ISPs and the world—heteronomy.

It is further evidence of badware's, beyond technological, normative nature that Stop BadWare alludes to it as "a threat to the open Internet, one of our greatest political, economic, and cultural shared resources."[54] Hence, it is not surprising that Stop BadWare classified the Green Dam filtering software, whose installation in every PC in China was mandated by the Chinese government, as badware. The reason given for such a classification was that the software would "filter political speech without notice."[55] In light of the extensive regulatory framework of the Internet in China, can one really say that enough notice was not given that filtering would occur? More directly related to our inquiry, however, is to note that the classification of the Green Dam software as badware because of its filtering of political speech is tantamount to classifying the whole techno-regulatory framework of the Internet in China as badware. Given the extent to which such a framework is intertwined with China's political system and nation-building project,[56] one can see how deeply political the definition of badware is.

It is a mistake to pretend that decisions on the engineering of the Internet take place in separation from normative criteria—that is, that ISPs may tackle network management as *simply* a matter of engineering. Elsewhere I have explained how the explicit articulation of normative expectations through technological artifacts renders it impossible for nation-states to ignore the processes by which these artifacts come into being—and thus the norms that they reflect and that are often determined by large scale, state-like enterprises.[57] States cannot commit to neutrality without risking the demise of their already fading authority and the nullification of conceptions of the good whose pursuit is worthy of protection. As much as states need to interpret such normative realities

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53. *StopBadware Frequently Asked Questions*, STOPBADWARE, http://goo.gl/8EA0I (last visited Nov. 8, 2011).

54. *About StopBadware*, STOPBADWARE, http://goo.gl/ySHwH (last visited Nov. 8, 2011).

55. Maxima Weinstein, *China's Green Dam Is BadWare and So Much More*, STOPBADWARE BLOG (June 13, 2009), http://goo.gl/xuxJw.

56. *See, e.g.*, YONGNIAN ZHENG, TECHNOLOGICAL EMPOWERMENT: THE INTERNET, STATE, AND SOCIETY IN CHINA 17 (2008) (arguing that while "the development of science and technology has long been embedded in the mind-set of the Chinese elite regarding nation-state building" the policies and practices of nation-state building in China at the same time "provide opportunities for the rise of social movements"). Both perspectives, for Zheng, interact in the constitution of what the political in contemporary China is, all of this being "especially true in the case of . . . the Internet." *Id.*

57. *See* Thompson, *supra* note 15.

in most different realms of societal happening, against the odds of much of earlier centuries liberal theories that would advocate for state neutrality, so do corporations, whose weaving of the technological infrastructure is constitutive of those realities.

It is tempting to move here towards more in-depth discussions on Science and Technology Studies to explain the relations between the technological and the social. However, we need not do so. We can settle the matter that the engineering of the Internet has politics—and is otherwise normative—just by looking at the standards that preside over the Internet's development. For instance, the Internet Engineering Task Force, clearly adopts politico-normative orientations in defining the process by which Internet standards are approved and the value that these must embrace. It is in this sense that its RFC 2026—the meta-standard that sets the procedure for the making of standards—defines *fairness* as one of the goals of the Internet Standards Process.[58] Similarly, the Internet Society, IETF's organizational home, speaks of an "overarching principle of *openness*" and of *choice*, *access* and *transparency* as "underlying policy principles" for the Internet.[59] At the same time, it criticizes the idea of network neutrality as a "broad and ill-defined term."

The first organization in charge of Internet governance to formally adopt network neutrality as a principle was the Brazilian Internet Steering Committee (CGI.Br), in a Resolution of 2009[60]—albeit CGI.Br's lack of any legally-backed enforcement attributions.[61] Interestingly, the way the principle was adopted in Brazil adds concrete weight to our discussions in this Part. In its Resolution, CGI.Br defined the principle as meaning that "filtering or traffic privileges must meet *ethical and technical criteria only*, excluding any political, commercial, religious, and cultural factors or any other form of discrimination or preferential treatment."[62] Like Google's peculiar philosophy, CGI.Br's implies a separation between two different normative realms—here, the ethical and

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58. Scott O. Bradner, *The Internet Standards Practice—Revision 3*, IETF RFC 2026, para. 1.2 (Oct. 1996), http://goo.gl/kmN3u. *See* KATHY BOWREY, LAW AND INTERNET CULTURES 1 (2007). The reference is not merely to fairness as a procedural criteria for approving standards, which appears in another part of the RFC, but, substantively, to fairness as a goal of the standards process.

59. *Open Inter-Networking*, INTERNET SOCIETY 2 (Feb. 21, 2010), http://goo.gl/zZ7Yx (emphasis added).

60. Brazilian Internet Steering Committee (CGI.Br), *Principles for the Governance and Use of the Internet*, (Apr. 24, 2009), http://goo.gl/MBPwz [hereinafter *CGI.Br's Resolution*].

61. *See* Joaquim Falcão, *Globalização e Judiciário: a Internalização das Normas de Nomes de Domínio*, *in* CONFLITOS SOBRE NOMES DE DOMÍNIO: E OUTRAS QUESTÕES JURÍDICAS DA INTERNET 15 (Ronaldo Lemos & Ivo Waisberg eds., 2003).

62. CGI.Br's Resolution, *supra* note 60, § 6 (emphasis added).

the political admitting to filtering to attend to the former while ruling it out entirely for the latter. Thus, while filtering for invasive ethical criteria would be allowed by CGI.Br's Resolution—for example the filtering of homosexual content—the assignment of privileges to content related to the political constitution of a society would be completely ruled out—for example quality of service assurances for traffic intensive political material in times of presidential campaigning.

An interesting answer to the ethical challenge posed above to CGI.Br's Resolution could be that the filtering of homosexual content is not ethical, but rather anti-ethical and that ISPs cannot thus adopt homosexuality as a criterion for filtering content. However, this leaves ISPs with the power of deciding on the *validity* of ethical criteria adopted by them in the routing of Internet content. Granting ISPs the power of deciding this seems to be entirely at odds with the propositions put forth by network neutrality advocates—and Google's proposition for an "awesome" Internet. And yet, it seems natural, that ISPs will examine the validity, the truth of the reasons they adopt. In effect, ISPs should be expected to do so, not only on ethical, but also on political, legal, and any other normative grounds.

This is not to attribute to ISPs the role of gatekeepers of public morality. Especially this is not to avail ISPs with the power of effacing the boundaries between the public and the private in the information environment. Privacy standards, for instance, will be amongst the reasons that should inform action by ISPs. Prohibitions against specific discriminatory practices, if enacted, will be valid reasons as well. If ISPs overstep, checks and balances should be in place to address their excesses. This is one thing. To exclude any specific normative realm—or normative realms altogether—from the scope of the valid reasons that an ISP can adopt an entirely different thing.

In sum, what should be taken from the lines above is, on the one hand, that the pretense that one can consider engineering criteria in isolation from other, normative criteria does not obtain. Network engineering, even in its own typical standards, is informed by notions such as harm, fairness and openness, which render it much more subjective than one may think in the first place. On the other hand, the same thoughts can be applied to the pretense that network management can be limited to only one or more normative—such as ethical—criteria. Neither can the political be ruled out, as suggested by CGI.Br's Proposal,

nor can the legal, inter alia, be, as proposed by Google.[63] Rather, reasoning in practical terms implies pursuing the truth among values that arise in the most diversified areas of societal happening. The possibility that some heteronomous criteria can be applied—for instance by the FCC—to ISPs does not mean that in any area ISPs should be precluded from reasoning or have their reasons presumed against.

At the core of such reasoning lies the idea of justice, weaving an orderly fabric with the different reasons that ISPs, as other actors of the information environment, may validly pursue. Google sought to exclude justice due to its arguable murky nature. And yet, one cannot interpret ideas of *reasonable* network management without resorting to principles of justice. There are two points we should understand in this regard: one point is more practical, and the other, more philosophical.

The practical point is that, from an FCC's earlier Internet Policy Statement of September 2005[64] to date, and especially in FCC's Open Internet Rules of December 2010,[65] justice and reasonableness have neither been excluded nor treated by the FCC as exceptional elements in ISPs' reasoning. However differently Google may have wished for in its Comments,[66] the requirement of reasonable network management was rightly placed by the FCC at the very core of every action to be lawfully undertaken by ISPs. In other words, reason was demanded, and thus *entrusted* to, rather than seized from ISPs.

It was in this sense that the Policy Statement mentioned that "[t]he principles [the FCC] adopt[s] are subject to reasonable network management."[67] The FCC's Rules, similarly, coupled a prohibition of

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63. One note is due here. Amongst other murky criteria that go beyond engineering (e.g., fairness and lawfulness) Google seeks to rule out the political. In practice, however, the political is only ruled out at Google's own convenience, for it continues to play a strong role through Google's own affiliated projects, such as StopBadware.

64. *Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities: Policy Statement*, 20 F.C.C.R. 14986 (2005) [hereinafter *Policy Statement*].

65. Open Internet Rules, *supra* note 40.

66. For Google, instead of a reasonable network management requirement at the core of every principle, there should be a general prohibition against network management practices not explicitly delineated. Such a prohibition would then be coupled with *a defense* for those cases where it can be established that a network management practice *is* reasonable. In its Rules, however, the FCC understood that "principles guiding case-by-case evaluations of network management practices are much the same as those that guide assessments of 'no unreasonable discrimination.'" Rules, *supra* note 40, para. 87. In other words, these principles do not work merely as a *defense* of reasonable network management for presumably unjustified network management practices. They work as a general *rule* of "no unreasonable discrimination" for network management practices that are generally taken as reasonable, until otherwise established.

67. Policy Statement, *supra* note 64, at 3 n.15.

blocking *lawful* content[68] or *nonharmful* devices with a general requirement that every discriminating act be reasonable. There was of course, no prohibition to interpret what the unlawful or the harmful are, for how could there be reasonableness without reason?[69] Use-agnosticism, the nondiscrimination between specific uses of the network, was defined as an indication of reasonableness but by no means a requirement of it. In other words, ISPs can still, and sometimes they must,[70] discriminate between different uses, as long as they do so reasonably. Reasonableness was understood broadly, encompassing the prevention of harm, enablement of parental control, and guarantee of network integrity—whatever that turns out to be.[71]

And yet, somewhat disappointingly, albeit only topically, the FCC disentangled *reasonableness* from *lawfulness* in its definition of reasonable network management, noting: "[W]e conclude that the definition of reasonable network management omit elements that do not relate directly to network management functions and are therefore better handled elsewhere in the rules—for example, measures to *prevent the transfer of unlawful content*."[72] This does not mean that ISPs are prevented from evaluating the lawfulness or unlawfulness of content. It only means that this evaluation by ISPs will not be taken by the FCC as a criterion for deciding whether a network management practice is reasonable or not. Such is a strange and indeed disappointing outcome. Even if the factual effects of this policy will be limited, the normative significance of saying that understanding reasonableness prescinds from understanding lawfulness is worthy of notice.

This brings us to the second, more philosophical point which needs to be made about network management. This point speaks more widely to the nihilistic, arguably pragmatic posture of network neutralists in general, and may prompt them to question their antinormative instance.

In much of contemporary legal theory, the understanding of law as command (the so-called command theory of law) has been replaced by another understanding according to which law provides people with

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68. "The rule protects only transmissions of lawful content, and does not prevent or restrict a broadband provider from refusing to transmit unlawful material such as child pornography." Rules, *supra* note 40, para. 64.

69. The FCC noted its "disagree[ment] with commenters who argue that a standard based on "reasonableness" or "unreasonableness" is too vague to give broadband providers fair notice of what is expected of them." In its words: "This is not so. 'Reasonableness' is a well-established standard for regulatee conduct." *See id.*, para. 77.

70. Albeit the Rules establish no independent requirement that they do so.

71. Does the *integrity* of networks encompass, for instance, IETF RFC 2026's goal of a *fair* Internet? *See* Bowrey, *supra* note 58.

72. Rules, *supra* note 40, para. 82 (emphasis added).

reasons for action. Law, in this sense, mediates amongst different reasons we hold[73] in the process of thinking about what to choose and do—that is, in the process of *practical reason*.[74] In mediating, law modifies the scope of other considerations,[75] it impinges upon the reasons that people would otherwise hold. Legal reasoning cannot thus be dissociated from the overall process of practical reason. For it modifies the normative order, for it is reflected in the common institutions of everyday life, law presents itself to us not merely episodically but every time we reason in practical terms. How can thus *lawfulness* be thought of as something to be disentangled from *reasonableness*—by ISPs or by any other agent?

Of course, there are diverging views on the relations between legal reasons and other reasons upon which law impinges. Rather than a process of exclusion, some see a process of confluence, of identity between the reasons of law and other reasons of practical nature. Under this view, the reasons provided by law are inherently connected with the reasons of morality and those of politics. In effect, these reasons are one and the same in the central case of what we must understand by law. It is based on such "central case viewpoint" that John Finnis presents his idealized, but nonetheless very persuasive thoughts:

> [T]he central case viewpoint itself is the viewpoint of those who not only appeal to practical reasonableness, but also are practically reasonable, that is to say: consistent; attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction. What reason could the descriptive theorist have for rejecting the conceptual choices and discriminations of these persons, when he is selecting the concepts with which he will construct his description of [law's] central case and then of all the other instances of law as a specific social institution?[76]

In sum, in being practically reasonable—in managing their networks reasonably, how can ISPs ignore all these aspects entailed by practical reason and, in its central case, by law?

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73. In Joseph Raz's "service conception of authority," the authority of law stems from the service it provides in "*mediating* between people and the right reasons which apply to them." JOSEPH RAZ, ETHICS AND THE PUBLIC DOMAIN 214 (1994).

74. *See* Wallace, *supra* note 45.

75. Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 9 (2004) ("What happens . . . is that the law modifies the way morality applies to people. . . . [L]aw modifies . . . the way moral considerations apply.").

76. FINNIS, *supra* note 45, at 15.

One may frown, however, on ISPs adopting this more comprehensive view of the relations between law and other normative realms, especially the relations between law and morality. Yet, this does not do away with the fact that ISPs will still need to identify what the law is when choosing their reasons for action. Whether there is an identity between the legal and the moral realms or not, law does translate the moral with its own, legal lenses. Law does the same with politics, economics and all other social systems which it, at the same time, functionally differentiates itself from, and holds a functional relationship with—something Niklas Luhmann terms "structural coupling."[77] For Luhmann, the specific function performed by law is the stabilization of normative expectations,[78] which law translates from other social systems and reflects in a coding of its own.

It may be that Finnis or Luhmann, different as these authors' views may be, do not meet the pragmatic intents of those who want to advocate either the FCC's form of normative restraint—to say reasonableness does not encompass lawfulness—or Google's more wild version of it—to say that ISPs, besides not engaging with the law, must not adopt any murky, nonstrictly engineering criteria either, such as those of justice, politics, amongst others.

It may be that network neutrality pragmatists still do not agree that it is not possible to exclude legal criteria from practical reason in general, and vice-versa. They may not agree: (1) that ISPs can only exclude law from reasonableness if they ignore social institutions altogether—for legal reasons are always embedded in these; (2) that whereas Google is concerned with complexity, it may be more paralyzing for ISPs to try to disentangle legal reasons from, among others, those based on harm than just to look for what is reasonable in these realms altogether; and (3) that, if only legal criteria were admitted, ISPs still would have difficulties in excluding political or moral criteria from legal ones; that this would be paralyzing.

Perhaps pragmatists of the sort above may be in pursuit of a more objective theory of law; one that rejects incorporation of other normative criteria—for instance, of moral criteria—by law. In other words, even if Google admit of the adoption of legal criteria by ISPs, which it currently

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77. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 140 (Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., Klaus A. Ziegert trans., 2009) ("This does not mean, as one might suspect at first glance, that the legal system and the political system form one system together. But they do resort to special forms of structural coupling and are linked to each other through that coupling.").

78. *Id.* at 142-72.

does not, that should be as far as ISPs should be able to go. The most likely theoretical model for pragmatists of this sort to pursue is a form of legal positivism - exclusive legal positivism of a Razian kind, which both rejects the thesis of the incorporation of morality by law and as a corollary, defends that the identification of law does not depend on the evaluation of its moral merits.[79]

Even here, Google would still face two important challenges. The first is that not even exclusive legal positivists would deny that law reflects political criteria. As Joseph Raz notes, "legal positivists endorse the model of rules because of a political theory about the functions of law."[80] In effect, law's claims of authority to mediate amongst different reasons for action cannot but be political through and through. If ISPs are entitled to apply legal criteria as a matter of reasonableness, it is unavoidable that political criteria will be applied as well.

A concrete example may help us to understand. Consider the GreenDam software, mentioned above. The classification of the GreenDam as badware necessarily relies on a disregard for the legitimacy of the regulations of the Chinese Communist Party; on a refutation of their validity as law. Challenging the validity of the laws of China is obviously a challenge of political nature. Even if one is unwilling to see the political in law, one cannot deny that if ISPs are allowed to filter the distribution of the GreenDam as badware—or, say, to facilitate the traffic of data in circumvention to the wider system of techno-political filtering in place in China—the challenge to the authority of the laws of China will not be but a political challenge as well.

The second challenge is that, whatever critiques one may level against legal positivism's separation between law and morality, it is wrong to assume that legal positivism invites any actor in society, from dutiful officials to anarchical programmers, to abandon the pursuits of moral criteria altogether in doing law or living life. Legal positivism does not deny the incorporation of political criteria by law, nor does it invite us to, in living a successful life by the law, abandon the pursuit of moral values at all. These are rare theoretical privileges that only Google

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79. According to this view, just as one can identify a service in the church, even being an agnostic, merely by looking at its *important* features, so can the morally impious still understand what the law is just by looking at its sources, without sharing moral convictions of any sort. JULIE DICKSON, EVALUATION AND LEGAL THEORY 68-69 (2001). To Raz, moral criteria, concerns law's legitimacy, the *acceptance* of its *legal* propositions, but are foreign to and modified by the legal propositions one accepts. In sum, law, in being accepted as law, impinges upon morality, but does not incorporate morality and can thus be identified without resort to it. RAZ, *supra* note 73, at 70.

80. Raz, *supra* note 73, at 235. In this excerpt, as not very often happens, Raz is citing Ronald Dworkin approvingly, which shows just how much of a platitude the point is.

can claim for its own theory of law and action—or rather, for its lack thereof.

IV. SUBJUGATING LAYERS

In the Parts above we examined the internal incoherence of attempts to neutralize a category of actors of the information environment—ISPs. We have demonstrated how these attempts are carried out and, hopefully, how nonsensical the undertaking is altogether. We can now advance towards our last claims in this Article. These are, on the one hand, that there is no justification for treating ISPs differently from actors in other layers of the Information Environment and, on the other hand, that the attempt to neutralize any actor of the Information Environment is incompatible with the orientations of contemporary liberal politics. We engage with the latter claim in Part IV. In this Part, we focus on the problem of differentiation.

A. Separate but Equal

In its Open Internet Rules, the Federal Communications Commission noted that "there is one Internet, which should remain open for consumers and innovators alike."[81] The precise achievement of the neutralization of ISPs, however, would be a split of the Internet as we know it into two unknown ones. At the top, where edge providers like Google are, a layer of unconstrained possibilities; at the bottom, where ISPs labor, a sheet of serfdom. As a whole, an inversion of Newton's "standing in the shoulders of giants" allegory, for here ISPs have giants standing on theirs.

The division of the Internet into layers is but a thought exercise of engineers and policymakers.[82] The layers do not exist if not as a logical artifact for aiding our intuitions about the Internet and helping us set the standards for its development. The Internet is a *normative whole*. The loose and symbiotic *association* of different actors in a large-scale, world-encompassing informational grid gives the Internet a normative unity that enables us to recognize it as *the* Internet.[83] And such is a

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81. Rules, *supra* note 40, para. 93.

82. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 23 (2001) (explaining how the idea of layers helps us to organize our thoughts).

83. As Searls and Weinberger argue, "The Internet isn't a thing. It's an agreement." Doc Searls & David Weinberger, *World of Ends: What the Internet Is and How To Stop Mistaking It for Something Else* (Oct. 3, 2003), http://goo.gl/fUVyk. Of course, we need to understand this as an exaggeration, for the Internet is enacted in different dimensions, including, beyond that of

normative unity that at the same time allows us to navigate and reflects the structure of our relations in contemporary society—with all the same treats of fragmentation that are everywhere inherent to these relations.

Now, if the law intervenes to nullify the reasons of any of the agents in the ecosystem, it will be in effect ruling such an agent out of the central normative representation of our society and of ourselves that the Internet is. Of course, the law does need to intervene to remedy normative perturbations that threaten to fragment the wider project of social cohesion. Law will need to regulate the activities of ISPs as it also needs to regulate the activities of every other actor of the information environment. This is one thing. But to nullify the prospects that ISPs will act with autonomy in choosing the reasons with which to contribute to this wider project of normative unity is another thing altogether.

The neutralization of ISPs thus excludes their membership to the information environment. It dissociates them from what we call the Internet—or at least it renders the division of the Internet in layers, more than a thought exercise, a tangible reality of domination. In other words, if ISPs are neutralized, either we term the space occupied by them as something that is "not the Internet,"[84] or we indeed understand that there are two completely different layers in the Internet—one of dark, restricted boundaries within which ISPs wander, and other of luminous, endless possibilities that ISPs shoulder.

This certainly would be a heavy burden. It is thus surprising to find in the scholarly literature the information that only the lower layers of the Internet are capable of constraining the upper layers, and not the other

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conventions, also the tangible dimension that John Law calls the Euclidean topology. It *is*, thus, a thing, an object in all these dimensions. *See* John Law, *Objects and Spaces*, 19 THEORY, CULTURE & SOC'Y 91 (2002). The unity of what we call the Internet, however, is indeed conventional. It is given by the syntactical network through which we *normatively* enact the Internet, as an agreement, a meeting of minds and thus of reasons.

84. Very symptomatically, in a submission to the FCC last year during a consultation following the Comcast decision, a group of influential academics and supporters of network neutrality invited the Commission to acknowledge that the transmission component of ISPs' services is not part of the Internet, opening the way for the Commission to regulate these services. In the authors' words, "carriers' assertions that the Commission would be regulating 'the Internet' [by regulating the transmission component of their services] are deliberately misleading." Marvin Ammori, Susan Crawford & Tim Wu, Submission to the Federal Communications Commission at 7-8, *In re* Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52 (Apr. 30, 2010). The FCC had considered this idea (abandoning it later) in the consultation, noting that, in regulating ISPs' transmissions, it would not be regulating the Internet: "[G]eneral agreement has developed about the agency's light-touch role with respect to broadband communications. . . . *The Commission does not regulate the Internet*." Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, BROADBAND.GOV (May 6, 2010), http://goo.gl/0jnat. For a critique, see Thompson, *supra* note 32 (critiquing the view set forth by Schlick).

way around.[85] Why would the need to manage networks even arise for ISPs if the upper layers had no effects upon their own?

An example may help illustrate this point. One of the requirements recently imposed by FCC's Rules on ISPs was that of transparency.[86] In the realm of search, however, such is a requirement to which Google objects with regard to its own engine. Google does so due to the possibility that linking farms, Google bombs and, in general, black hat "Search Engine Optimizers" will use this wealth of information to game Google's algorithms and appear high in Google's Page Rank.[87] But is it not possible that the same be said of ISPs' networks?

Imagine if, besides a requirement of transparency, a full-blooded nondiscrimination requirement had been established by the FCC, with no exceptions, for ISPs. Obviously, absent any constraints, application providers would be able to use the wealth of information available about ISPs' networks to game and exploit them to the fullest. One can think of Skype, Spotify, World of Warcraft, and other bandwidth-harvesting applications deploying powerful algorithms to make complete use of available bandwidth. That would leave no choice to ISPs other than monitoring new entrants in the applications market and constantly increasing the capacity of their networks to meet the interests of these. That had in fact been precisely—if incredibly—Google's proposal for the regulation of ISPs, by electing "addition of capacity on the network level" as the "optimal solution" for solving network congestion.

The FCC hinted at this point in its 2008 *Order to Comcast*, and yet, has never addressed the contradiction since. In the *Comcast Order*, the FCC noted that Comcast could "work with the application vendors themselves" and quoted comments, stating:

> If Comcast made "available information on what it considers the peak periods of network traffic . . . it would not be difficult for the authors of

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85. *See, e.g.*, ANDREW MURRAY, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT 45 (2007) (noting, based on Benkler, that "vertical regulation is only effective from the bottom-up, that is regulation in a supporting layer is effective in the layers above, but does not affect the layers below").

86. *See* Open Internet Rules *supra* note 40, paras. 53-56.

87. On Google's Transparency Report Web site, data related to transparency actually refers not to Google itself but to Governments who may create hurdles to the provision of Google's services—by means of user information requests, information filtering or infrastructure outage. *See Transparency Report*, GOOGLE.COM, http://goo.gl/uplzX (last visited Nov. 8, 2011); JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET: AND HOW TO STOP IT 220 (2008) ("Search engines are notoriously resistant to discussing how their rankings work, in part to avoid gaming—a form of security through obscurity. . . . The most popular engines reserve the right to intervene in their automatic rankings processes—to administer the Google death penalty, for example—but otherwise suggest that they do not centrally adjust results.").

> BitTorrent [the application which was being blocked by Comcast] to modify their programs to query a Comcast server to determine what is the best time to upload/download data."[88]

It did not consider, however, perhaps due to its foreseeable lack of authority, the alternative of also regulating edge providers.

Republican Commissioner McDowell's statement on that occasion, however, was much more in line with our notes above (however Democrat the ideals that run through this Article may be). He observed, on one hand, that "applications providers could do a better job of designing software that works more efficiently on networks that were designed and built sometimes decades ago."[89] On the other hand, McDowell remarked that "we are witnessing a deepening division between some in the application industry and some network operators."[90]

This was also possibly the view of the United States Court of Appeals for the District of Columbia Circuit in its decision that quashed FCC's *Order in Comcast*.[91] In that case, the court understood that, if the Commission was to regulate ISPs, it could not do so with regard to cable Internet services per se.[92] One of the avenues not ruled out by the D.C. Circuit, however, is the regulation of cable Internet services *for the impact these have on regulated, common carrier and broadcasting services*.[93] Currently, only dial-up access providers, such as providers of lower bandwidth Internet access through telephone lines, are regulated as common carriers. But, these are fading activities of no greater interest to our analysis. It is with regard to broadcasting services that the D.C. Circuit decision is relevant to our argument. The Commission's understanding of this issue had been that, since the provision of online video service providers, such as Hulu, "has the potential to affect the

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88. Comcast Order, *supra* note 32, at 13057 n.229.

89. *Id.* at 13088 (statement of Comm'r Robert M. McDowell) ("The providers of certain peer-to-peer (P2P) applications, for example, could do a better job of making consumers aware that their applications require consumers' computers to work 24 by 7 in ways that can tie up their computing power and reduce broadband speeds for themselves and their neighbors.").

90. *Id.*

91. *Id.*

92. Those services had been earlier classified by the FCC itself as information services, due to the fact that their "*telecommunications* 'component' . . . is 'functionally integrated' [with their '*computing* functionality'] into a single 'offering.'" Comcast Corp. v. F.C.C., 600 F.3d 642, 649 (applying *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). In other words, those services were held to be a whole and thus not to be regulable as if telecommunication services. Simply, they were. For instance, the Commission would not be able to impose a common carrier obligation to providers of information services—as such an obligation can only be imposed to services which the Commission has direct authority upon, which is not the case of information services.

93. *Id.* at 645-46 (emphasis added).

broadcasting industry,"[94] the ways ISPs such as Comcast manage their networks with regard to these services have direct regulatory implications. This argument, although brought before the court, had not been invoked originally in the Commission's Order against Comcast, and thus the D.C. Circuit declined to consider it in the Comcast case. The appreciation of the matter, however, is left open for a future opportunity. It is telling that one of the only possible grounds still available for the Commission to invoke its authority upon ISPs involves the power of edge providers themselves (e.g., Hulu) to disturb regulated activities at a lower layer.

It is not surprising that the reciprocal influences between the network layer and the applications and content layers were one of the foundations on which the Commission based its authority upon ISPs in its recently issued *Rules*.[95] Yet, the Commission decided to regulate the contours of network management by addressing only one level of the equation—that of ISPs—and disregarding the other level—that of edge providers—tout court. In the Commission's words, the Rules "apply only to the provision of broadband Internet access service and not to edge provider activities, such as the provision of content or applications over the Internet."[96] Perhaps the most stringent reason for the Commission to decide this way was that, in its view, ISPs are "distinguishable from other participants in the Internet market-place"[97] in that they "control access to the Internet for their subscribers and for anyone wishing to reach those subscribers" and thus are "capable of blocking, degrading, or favoring any Internet traffic that flows to or from a particular subscriber."[98] But can this only be said of ISPs? Is it not possible to say the same of Google?

B. The Click-Away Delusion

The problems described above concern the digital arm wrestling between ISPs and edge providers. Edge providers, however, command the flow of communications on the Internet far beyond their influence over ISPs. It is important to understand how these actors gatekeep the information environment in ways that disprove the common assumption that at the content and application layers competition is just one click away. That being so, these actors consisting in such an essential part of

94. *Id.* at 660.
95. *See* Open Internet Rules, *supra* note 40, para. 124.
96. *Id.* para. 50.
97. *Id.* at 31 n.160.
98. *Id.* para. 50.

the Internet infrastructure, there would be no reason to defend that ISPs are "distinguishable from other participants in the Internet marketplace."[99] Given the scope of this Article, we focus our argument on Google, drawing on research that demonstrates that network externalities surrounding Google's search platform restrict users' switching possibilities far beyond what is frequently assumed.

In his book *Information Rules*, Hal R. Varian, now Google's Chief Economist, proposed: "We'll show you how to use lock-in to your advantage, or at least to neutralize others who try to use it against you."[100] It makes sense that his own company would grow to become a master of such strategies. Even if lock-in has not been used by Google as a deliberate strategy, it is clear that a situation of lock-in has arisen in relation to Google's dominant position in the information environment.

It may be difficult to define precisely what Google's relevant market is and in which respect Google is a dominant actor. Search is as ubiquitous a need in the information environment as it is in life in general. The search for valuable options is intrinsically connected with personal autonomy, for only those options which are somehow found enable one to author one's life. Google's dominance happens with regard to reasons, informational options of so many different sorts, that it transcends any single economic realm. One may argue that what characterizes Google's dominant position is the tendency towards a monopoly of meaning in the information age—a semiotic monopoly. Of course, Google does not in fact monopolize all sources of meaning of our time. But it may be the agent that comes the closest to doing so.

As Google's dominance unfolds even further, there will be the need for regulators to intervene. Competition law, however, would face difficulties in finding the right reason for doing so. The strongest difficulty, perhaps, would be to ascertain the defining characteristics of informational goods and services. In a society in which the basic economic good—information—has blurred the boundaries between all realms of life, competition law struggles to disentangle markets and, most importantly, to do so amidst the different degrees of depth of informational processes. It is important to understand this question of depth for it is at the root of the regulatory problem we are trying to solve.

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99. *See supra* note 97 and accompanying text.

100. HAL R. VARIAN & CARL SHAPIRO, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 104 (1999).

Let us think here of information in terms of a *deep structure* and of a *surface structure*.[101]

Deeper in the structure of information we find meaning. By ourselves, or through our technological extensions, we interpret information in ways that convey meaning. Some of these meanings will relate to the functions that information itself performs. It is here that information is an adventure game, that it is Windows or Linux, a novel, or a viral YouTube video. We may look at information and find, reflected in it, some goods that competition law has traditionally dealt with. Information in this sense can be labeled, divided into categories, some of which will matter for competition law. But on the face, on its epithelial surface—information is just information, and yet, it is an economic good in itself. It circulates economically. We trade it. We access it. But as we interpret it, as we decode it, we travel towards deeper realms in which information conveys ever broader forms of meaning. Information is thus always in both these dimensions; it is both shallow and deep and the challenge of competition law is to ascertain at what level, at which of those dimensions to pursue the traditional categories of economic markets—or, perhaps, to recognize that the regulatory enterprise actually moves us towards broader problems that transcend those traditional categories altogether.

The perhaps hopeless struggle to find the boundaries between, on the one hand, information on its face and, on the other hand, the deeper meanings information conveys can be imperfectly summarized in Marshall McLuhan's famous expression that "the medium is the message." Imperfectly, however, because information itself is now the medium and the message. Gatekeepers no longer control merely something we can identify as Television or the Cinema. They control informational equivalents of these. They control access to information on its face and to the inner dimensions of information by controlling *processes which are themselves informational*.

Very significantly, as these actors hold and impart information they add new information—in surface and meaning—to existing information. Even ISPs do so, however Google may wish them to inhabit only the surface structure of informational processes, dealing with meaning to no extent.

One may say that no single agent in the information environment would meet Jean-Baptiste Say's classical definition of the merchant as

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101. I use the expressions differently from the way Chomsky famously used them. For this, see NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 64 (1965).

one who "give[s] value to things to which [he] actually *communicate[s] no new quality, but that of approximation to the consumer*."[102] Agents in the information environment do communicate new qualities to informational goods, even if for enabling the process of approximation Say refers to. ISPs, for instance, will verify if packets of data meet some core standards of network security. And, whether one wants it or not, ISPs will also, as noted above, make some judgments of politics and morality that are inherent not only to security checks (like in the case of badware), but also to decisions on the legality of actions ISPs undertake in routing content through the net. "What are the boundaries of an injunction?" "Which authorities can prevent me from routing content?" "Is this information related to paedophilia?" "To terrorism?" "Is it fair to slow down pornographic material during peak hours?" "Would I need to have included a clause in this regard in my Terms of Service?" These are all legitimate questions that may present themselves to an ISP. Hard cases, zones of penumbra, inevitably call for interpretation and, in doing so, in clearing packets before routing them, ISPs signal that these packets meet the criteria for being routed. Further value, and further meaning, is thus given to these packets.

The information environment, in effect, has no single agent working only at the surface structure of informational processes—not even ISPs. Actors situated at one informational level are situated at other levels as well.

As much as the deep structure of information will relate to ISPs activities so will the surface structure be very important for the regulation of search. So important that it should actually be the starting point of regulatory activities. This may seem counterfactual. Searching seems to be virtually all about meaning. Page ranks rely on outstandingly complex processes to classify and define the priority of information. Google's products only exist in what they mean to us. Viewed on their very surface, Google Maps and Google Books are nothing but packets of data somewhere in the cloud. It is only because, through our computers and by ourselves, we interpret what information *means* that we can think of them in terms we are familiar with, such as maps and books. The natural, it seems, would be for competition law to regulate Google's activities by looking only into the deep structure where these processes *are*.

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102. JEAN-BAPTISTE SAY, A TREATISE ON POLITICAL ECONOMY bk. I, ch. II, para. 19 (Charles Robert Prinsep trans., 1855) (emphasis added).

However, when one looks at these processes in separation, through their different meanings, there seems to be no need to regulate Google's activities. Google Maps and Google Books are just isolated drops in the virtual seas of the information environment. They may seem to correspond, and in a way they do, to entirely different economic realms that regulators cannot systematically connect. Problems of horizontal concentration, in this sense, would be out of the question given the apparent distance between markets in which Google's products are situated.[103] Yet, the growing extent of Google's dominance in the information environment signals that there is something above and beyond such products whose economic contours we cannot systematically define.

One way of responding to that is by noting that Google's products seem to combine into something fundamentally different that we call "search." But what is search if not something that has been offered by everyone, from the Church to libraries, and throughout the centuries—the brokering of access to relevant information? Do all Internet gatekeepers not act as search engines, even when they also offer something else? While some provide purely logical forms of search, for example Wikipedia, Google Video, Hulu, Spotify, others connect

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103. As the U.S. Department of Justice and the Federal Trade Commission note in their Horizontal Merger Guidelines, even if competition agencies' analyses need not start with the definition of markets, "evaluation of competitive alternatives available to customers [—that is, of markets-] is always necessary at some point in the analysis." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 7 (2010) [hereinafter GUIDELINES], http://goo.gl/quUHO. The scholarly literature has also noted the insufficiency of market definition exercises with regard to informational goods. Gilbert and Rubinfeld, for instance, argue that technologies are often complementary to each other and thus that it is inadequate to define technology markets as those involving "technologies or goods that are close enough substitutes to constrain the exercise of market power with respect to the intellectual property that is licensed." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.2.2. (1995), http://goo.gl/1L4Ss; *see also* Richard Gilbert & Daniel Rubinfeld, *Revising the Horizontal Merger Guidelines: Lessons from the U.S. And the E.U.*, *in* COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE U.S. AND EUROPE 262, 269 (Michael Faure & Xinzhu Zhang eds., 2011). The problem here would be to assume that there is even some degree of complementarity between Google's different services. That would lead to an overly elastic definition of markets that could very well encompass the whole Internet. On the other hand, adopting other starting points but the definitions of markets may not be of much help to competition authorities either. Here, rather than looking into pricing dynamics within a defined market, what agencies will pursue are evidences of detrimental *competitive effects* of a merger. GUIDELINES, *supra*. These effects typically arise wherever reduced product quality, reduced product variety, reduced service, or diminished innovation are not followed by significant pressures of demand substitutability. Guidelines, *Supra*, at 1. None of these effects take place in Google's increasing dominance scenario—rather the opposite. Google passes all these tests with flying colors. The problems it prompts are of a completely different nature. They are externalities to the Pareto efficiencies and Nash equilibriums of economic analysis.

information with the physical avenues where information materializes (which is what ISPs do)[104]. All of these—ISPs, search engines "sensu stricto," application providers, "content" providers—offer us gateways to information that exists both in its surface and at the depths of its meanings. All of them make judgments of relevance and, in Say's words, "communicate new qualities"[105] to the information—things they approximate consumers to.

It is not search, as a particular service, that characterizes the form of dominance that Google, through its different activities, exerts in the information age. Difficult though it may be to define that dominance, however, one cannot deny the extent of Google's power over the flow of information in the information environment. It is perhaps to the quantitative extent of Google's dominance at the surface structure that we should look in the first place as an indication of the power of its qualitative decisions to influence the construction of meaning in our societies.

The clear tendency of such a process of dominance to continue to unfold invites the placement of checks and balances by regulatory authorities. Of course, these checks and balances must come at the level of meaning. They must address the lock-in effects that make switching from Google services so costly to consumers, and this is not merely related to the topology of information flows.

Interestingly, from a regulatory standpoint, there may be no typical anticompetitive practice that Google is engaging in. Yet, the continuous densification of the surface structure of informational processes around Google's nodes on the Internet tells us that Google became a (not always bright) sun around which everything irresistibly swirls.

Some of Google's products visibly grant it powers very similar to those held by ISPs. They create a general purpose infrastructure to which applications connect—or from which applications can be banned. This challenges the FCC's understanding, as seen above, that what distinguishes ISPs from other economic agents on the Internet is that these "control access to the Internet for their subscribers and for anyone wishing to reach those subscribers," and thus they are "capable of

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104. One can find another example of this logical-cum-geographical type of services in the Domain Names System of the Internet, which maps mnemonically accessible names to logical locations associated to physically situated resources. IETF's RFC 1034 speaks of a *name space* in a logical sense but, ultimately, these logical entities that we call names identify resources. Thus, "[t]he primary goal [of the Domain Name System] is a consistent name space which will be used for referring to resources." Paul Mockapetris, *Domain Names—Concepts and Facilities*, IETF, RFC 1034, para. 2.2 (Nov. 1997), http://goo.gl/BFppN.

105. *See* SAY, *supra* note 102.

blocking, degrading, or favoring any Internet traffic that flows to or from a particular subscriber."[106] Android, Google's operating system for mobile devices, is an example of a product that holds such a power, in a market that does not count on wide competition, and in which competitors like Apple iPad's iOS do not have a very impressive track record of openness. Not only can Android block certain applications if it wishes, it can have Google favor them through its other product offerings, furthering the ongoing process of lock-in. Microsoft has argued just this in a complaint recently filed before the European Commission in which it submits, inter alia, that Android, which is the dominant OS for mobiles, is being favored by YouTube, a Google-owned company.[107]

Less visible, but far more significant, is the process of lock-in that Google has been able to carry forward with its search engine. Against the common assumption that users can easily shift to competitors such as Bing or Yahoo should Google abuse its dominant position, research has shown that Google's market displays low contestability.[108] In Argenton's and Prüfer's words, "the production of search quality is characterized by a peculiar (inter-temporal) kind of indirect network externalities."[109] The quality of search is said to be a network externality because it results from the use of search engines by a network of consumers. The larger the network, the greater the quality and thus the value that the search engine, as a product, will acquire. As no search engine has accumulated the wealth of knowledge that Google has about users' clicking behavior, no other search engine can offer the same experience in terms of accuracy that Google can.

Argenton and Prüfer also believe the market of search has reached a tipping point, promising to become ever more concentrated, monopolistic, unless regulators intervene.[110] This increasing concentration, they demonstrate, has been taking place since 2003, evidencing that the

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106. *See supra* note 98 and accompanying text.

107. Brad Smith, Microsoft Corporation, *Adding Our Voice to Concerns About Search in Europe*, MICROSOFT ON THE ISSUES: NEWS AND PERSPECTIVES ON LEGAL, PUBLIC POLICY AND CITIZENSHIP TOPICS (Mar. 30, 2011), http://goo.gl/NGB0a ("Unfortunately, Google has refused to allow Microsoft's new Windows Phones to access this YouTube metadata in the same way that Android phones and iPhones do.").

108. *See* Rufus Pollock, *Is Google the Next Microsoft: Competition, Welfare and Regulation in Online Search*, 9 REV. OF NETWORK ECON. Article 4, 28 (2010) (noting that a "strong contestability result . . . is unlikely to be robust [in the search market]"). *See* Cédric Argenton & Jens Prüfer, *Search Engine Competition with Network Externalities*, TILEC DISCUSSION PAPER, 1-2 (2011), http://goo.gl/MSlWv (arguing that "the search engine market displays a strong structural tendency towards monopolization.").

109. Argenton & Prüfer, *supra* note 108, at 2.

110. *Id.* at 9.

market's tipping point had already been reached by then and pointing to a strong tendency towards monopolization. The solution, in the authors' view, would be an obligation for Google to share with its competitors the data related to users' clicking behavior. In their words, "intense competition between search engines based alone on the merits of the search algorithm provides better incentives to the firms to produce high quality products than the rent enjoyed by a dominant firm that exploits a competitive advantage created by network externalities."[111]

Rufus Pollock also reaches the conclusion that, in theory, in a fixed zero-price scenario customers "will only use the search engine[s] with the maximum quality"[112]—a scenario of winner-takes-all competition. In practice, with regard to search, Pollock believes that it is likely that there will be some heterogeneity in the perception of quality—for example, through brand preference, or specialization in a certain type of content, as is the case of Baidu for MP3-related search. Thus, the situation is unlikely to be so stark as to lead to a monopoly, but still tends to lead to a firm being highly dominant in the search market. Heterogeneity in brand perception will also explain why certain search engines have a higher market share in certain markets than in others despite differences in quality.[113]

On the other hand, however, and more importantly, brand perception also contributes to reinforce the adoption of the dominant search engine in the market and reduces the contestability of its market share in what it is joined by the adoption of search engine specific query strategies by users, personalization of search results[114] and, I would add, users' familiarity with a given search engine interface.[115] These are all factors that contribute to the non-negligible lock-in of users in the search market. Together with the very high up front fixed costs for challengers to invest in research, development, and infrastructure,[116] costs which can always be topped up by Google, those factors lead to the continuous strengthening of Google's dominance in the search market. For reasons that Pollock explains well, the establishment of a monopoly tends towards—even purposeful—reduction in quality.[117]

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111. *Id.* at 15.

112. Pollock, *supra* note 108, at 12.

113. *Id.* at 16-18. Yahoo's substantially low market share in the United Kingdom and Google's vis-à-vis Baidu's in China. *Id.*

114. *Id.*

115. *See* Argenton & Prüfer, *supra* note 108, at 7 (citing a survey showing that interface design plays a role in product differentiation of search engines).

116. Pollock, *supra* note 108, at 11.

117. *Id.* at 21-23.

The modality of regulatory intervention suggested by Pollock would be the decoupling of "software" (such as the ranking algorithms) and "service" (the facilities such as data centers, support systems, etc. which run the "software"). For him, decoupling the two would allow for greater competition, by fostering greater transparency on the software side. Regulation would happen on the service side, which would be provided through governmental intervention, in a monopoly or near-monopoly scheme, in turn allowing companies to concentrate their investments on the software side.[118]

While Pollock's suggestion is interesting, it does not directly answer Argenton and Prüfer's concerns with regard to monopoly on the information resulting from users' clicking behavior. From a competition standpoint, a lack of transparency seems to be a larger concern in that regard than with regard to ranking algorithms themselves. The transparency of ranking algorithms should be fostered not because of competitive reasons. There is nothing harmful with secrecy in this regard.

Rather, criteria embedded in algorithms should be made available, at least to regulatory authorities, for more general public accountability reasons. After all, in determining which reasons to make available for their users, search engines will inevitably be guided by evaluative considerations of moral and political nature whose impact can be as far reaching in the public sphere as moral and political choices made by ISPs. If transparency is demanded from ISPs, there is no reason why the same standards should not be extended to search engines.

This demand for transparency does not seem to sit comfortably with Pollock's model. His proposals of regulatory intervention mostly concern the "service" component of search.[119] In Pollock's view, transparency of the algorithms would arise as a natural outcome of regulatory decoupling rather than by regulatory fiat. At some point in his text, he does incidentally remark that regulators could handle distortions by requesting confidential access to the algorithms and functioning as a review panel for ranking "appeals."[120] Pollock does not, however, advance a proposal similar to that by Argenton and Prüfer, which seems a much more likely candidate to address his competition concerns. Ironically, though, Pollock's incidental suggestions with regard to search algorithms seem to transcend pure competition matters and provide us

118. *Id.* at 26-27.

119. *Id.* at 26 ("[R]egulatory attention could be focused on the 'service' side which in many ways is simpler.").

120. *Id.* at 27.

with a viable solution to the problem of public accountability of dominant search engines.

But are these proposals enough to regulate Google's increasing dominance in the information environment? They concern only the problem of search engines "sensu stricto"—not Google's wider influence over the flow of information in what above we have called the surface structure of the information environment. In its recent complaint before the European Commission, Microsoft noted that Google's dominance in the search market is strengthened by Google's exclusive deals with most website owners to display its search box with exclusivity for search by the users of these websites. It is true that Google's widespread search boxes further the process of lock-in.[121] They are, however, only a limited and visible part of a much larger problem. The problem of Google's dominance extends far beyond what we understand by its "search engine." Through the provision of services in the most diversified, even disconnected areas, ranging from maps to books, from news to translation, from videos to shopping tools, blogs and operating systems, Google is increasingly everywhere information is.

One can see in Google's strategies plenty of the insights Hal Varian outlines in his work with regard to the recognition of lock-in effects. We know that, with regard to mass-market products, especially those characterized by zero-price models, "small consumer switching costs can constitute large barriers to entry."[122] We know that "[c]ustomer perceptions are paramount" and then that "a brand premium based on superior reputation or advertising is just as valuable as an equal premium based on truly superior quality."[123] We also know that "one of the distinctive features of information-based lock-in is that it tends to be so durable: equipment wears out, reducing switching costs, but specialized databases live on and grow, enhancing lock-in over time."[124] Or that, "with brand-specific training, switching costs tend to rise with time, as personnel become more and more familiar with the existing system;"[125] that "[search] costs borne by consumers when switching brands include the psychological costs of changing ingrained habits."[126] Or, finally, that "[t]he easiest place to hop onto the lock-in cycle is at the brand selection point—that is, when the customer chooses a new brand,"[127] a brand with

121. *See* Smith, *supra* note 107.
122. Varian & Shapiro, *supra* note 100, at 109.
123. *Id.* at 113-14.
124. *Id.* at 115.
125. *Id.* at 121.
126. *Id.* at 126.
127. *Id.* at 131.

which she will be locked-in after an entrenchment phase, "when consumer really gets used to the new brand [and] develops a preference for that brand over others."[128] Paradoxical as it may seem, in zero-price markets all of these effects are maximized.

It may be unfair, however, to characterize Google's profiting from these postulates as a deliberate plan to dominate the information environment. Of course, Google's practices should be put in context. Altogether they must be seen as intrinsic components of Google's overall political agenda. But taken for their own, individualized properties, those strategies are not simply ill-intentioned attempts of domination. They are also characteristic traits of informational markets. That Google masters their knowledge so well is not just the result of some degree of malignity, but also a demonstration of competence in understanding the social dynamics of our time. Hence, it would be odd to claim that simply because Google engages in those practices it is resorting to specific forms of anticompetitive behavior.

This is not to say that those practices should not be regulated. All that is meant here is that the justifications for regulatory intervention should move beyond the culpability of Google's individualized modes of conduct from a competition standpoint. Regulators must understand that Google's gigantic and ever-increasing influence over the surface structure of the information environment in effect sublimes the traditional categories of competition law, and provides a distinctive justification for state action. Thus, it is fundamental to objectively measure the reach of this influence. Webometrics-like tools may be an important regulatory aid in this instance.[129] They may help us to visualize the extent to which Google enframes the information environment and, by doing so, controls the construction of meaning in the most different realms of life in society.

And yet, because we are dealing with informational goods, our task as regulators cannot be purely objective. While the starting point of measuring the dynamics of information flow needs indeed to rely on objective parameters, the inherent subjectivity—the deep structure—of informational goods cannot be overlooked. It is actually this subjectivity that, by dissolving the boundaries between Google's activities, makes the reach of these so problematic.

The proposals by Argenton and Prüfer, and by Pollock, move in some ways towards an objective direction. They take lock-in as a fact of life, rather than as a form of anticompetitive behavior tout court, and they

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128. *Id.* at 132.

129. *See, e.g.*, MICHAEL THELWALL, INTRODUCTION TO WEBOMETRICS: QUANTITATIVE WEB RESEARCH FOR THE SOCIAL SCIENCES (2009).

consider which policies can mitigate lock-in effects. But those authors seem still to rely on the idea of search as a relevant market and on the need to address lock-in effects related to search engines as a product. The objectivity of their proposals is thus limited by the ignored subjectivity of the object they focus on.

To think of search merely as a product to be regulated by disentangling *its* different components is a partial, still competition-based effort that does not factor in the polysemic nature of information—the capacity of information to convey the different meanings which and through which we are always searching for, be it by 'googling,' clicking, dialing, tweeting, opening, tapping, flipping and overall seeking to *access*. To search for information can mean as many things as the information we seek to access, the means we use to do so, and the ways we interpret such information ourselves or through our technological extensions.

What we now call search is but a topical or contingent form of *procuring access*.

Of course, regulators must also be attentive to the different, contextual meanings of search, to the different forms through which search is carried out. Regulating these may mean enacting more granular, technology-specific rules—rules attentive to particular dimensions of social conventions surrounding technological artifacts. Above and beyond these fragmented dimensions, however, we must understand search as a foundational component of agency in the information environment, this space-time continuum that, today and for the foreseeable future, curves around Google's gravity.

We as regulators must understand that the dangerous monopoly that Google's activities *tend* towards is the monopoly of meaning itself—even if such is a tendency that will never be fully realized. In the end, there is no simple problem of competition here, but a race to control the flow of information in a plethora of different possibilities. That is why we find Google interested in competing with ISPs, Cable TVs, Operating System developers, Encyclopedias, and Bookstores, among many others. And that is why we find Google attempting to neutralize actors that in any way can threaten its overarching project of "organizing all the world's information."[130] Such is indeed a project that, by its very nature, admits of no alterity.

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130. *Google's Mission Is To Organize the World's Information and Make It Universally Accessible and Useful*, GOOGLE.COM, http:GOO.GL/7vkja (last visited Nov. 20, 2011).

V. NEUTRALITY, AUTONOMY, AND THE INFORMATION ENVIRONMENT

In March 2010, when Google decided to pull its search engine away from Mainland China, the *New York Times* ran an article noting Google's state-like foreign policy attitude. The article quoted New York University Professor Clay Shirky stating that "[w]hat forces Google to have a foreign policy is that what they're exporting isn't a product or a service, it's a freedom."[131] Shirky's statement in a way concurs with what has been said in our preceding Part. As we have seen, the justifications for intervening on Google's activities are not purely economic. Regulation should ensue not merely because of competition aspects related to a product or a service. Rather, the problem is cognitive and evaluative in a broader sense. Regulation should ensue because of the tendency that Google, by controlling the structure of the information environment, will also control the construction of meaning and value in contemporary societies. Given this fact, our concurrence with Shirky can only be partial. It is not freedom that is exported by Google, but rather the lack thereof—a diminishing of our possibilities of living autonomous lives. As Yochai Benkler explains in his chef-d'oeuvre, *The Wealth of Networks*, "a concern with autonomy provides a distinct justification for the policy concern with media concentration" that move us beyond considering the limits of competitive markets.[132]

From all we have seen in the lines above, it should be clear that this Article's concern with autonomy develops in two fronts. On the one hand, it relates to Google's attempt to, by influencing the development of law and policy, neutralize other agents who threaten its overall project of "organizing" the information environment. This was our focus in Part III, in which we looked in particular into the case of Internet Service Providers. On the other hand, our concern relates to Google's possibilities of increasingly controlling the global flow of information through the lock-in effects of its own services. This was our focus in Part IV. From the perspective of the economic agents that Google seeks to neutralize, it is beyond doubt that to have one's possibilities of choosing amongst available options neutralized—which the idea of network neutrality, in any of its flavors, imposes to ISPs—goes against freedom of enterprise and the foundations of any liberal model one can conceive of. With regard to the relationships between users and Google, however, the question is more nuanced.

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131. Mark Landler, *Google Searches for a Foreign Policy*, N.Y. TIMES, Mar. 28, 2010, at WK4, *available at* http://goo.gl/y6u68.

132. BENKLER, *supra* note 20, at 157.

Here one could argue that, by providing services that further number and diversity of options available to us, Google actually enhances our autonomy. This is the view held by Yochai Benkler, which merits our careful examination as we close our venture in this Article.

Benkler's body of work is undoubtedly the most sophisticated and profound thought-exercise on the political theory of the information environment. There is much we can learn from it, but I will focus our discussions in this Part on a single, overarching point, which is Benkler's understanding of what an ideal conception of the political system would look like if we are to further personal autonomy in the information environment. Understanding how the idea of neutrality can fit into such a conception, or why it cannot, is fundamental if we are to situate Google's prescriptions against the backdrop of a more refined account of the relations between state and society in the information age. Benkler's ideas shed an important light on this issue. However, though there is much to compliment Benkler for on his understanding of personal autonomy, I trust that there are also some acute shortcomings in his views of what a political system consists of, as well as some important lessons to be learned from these.

We should start by noting the prominence that filtering mechanisms assume in Benkler's framework. According to Benkler, the decentralization and socialization[133] of earlier creative industries has caused an overload of information that threatens our prospects of self-authorship in the information environment.[134] We need Google and (if there were) its like to redeem us from a life of ignorance in plenitude. The so-called Babel objection to the idea that social production furthers autonomy poses that the cacophony of new forms of production undermines our capacity of identifying those options that are available to us. Benkler's response is, in part, that filtering mechanisms like Google rescue us from wandering around through the busy avenues of the information environment.[135]

The problem here, however, is the illusion that entrusting to a company the design of our possibilities of action in the information environment *furthers* our personal autonomy. In reality, the choices

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133. In *The Wealth of Networks* and in earlier works, Benkler speaks of a new model of commons-based peer production or, more broadly, of social production, as a social-economic phenomenon that provides a third-way alternative to the traditional models of markets and firms—an alternative of systematic advantages for dealing with information and culture as objects of production. *See, e.g.*, Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002).

134. BENKLER, *supra* note 20, at 169.

135. *Id.*

made by Google are *constitutive* of our personal autonomy. They are to a large extent what our autonomy amounts to or, precisely because of this, what our autonomy does not amount to at all. In other words, our normative sources here do not come from within, but rather from outside of us. The process is not one of autonomy, but of heteronomy, and to the extent that a dominant entity seeks to "organize" all sources of normativity in the information environment, it is also a process of neutralization of other sources of normativity—of neutralization of alterity—in this same environment.

To be fair, there is a sense in which Benkler sees a role for the state in laying down the *structural* foundations that will enable personal autonomy to flourish in the information environment. But Benkler is also largely optimistic about the possibilities that these foundations will arise organically, from within the information environment itself. The role that he sees for the state is thus a correspondingly reduced role. It is with regard to this somewhat reductionist perspective, which I will note as a shortcoming of his theory, that Benkler's work invites our attention.

Benkler indeed seems to assume that a liberal model for our age demands a dissociation between the state and the substance of life plans chosen by individuals in the information environment. In assuming so, as I will discuss below, Benkler departs from the particular liberal model that, in his book and elsewhere, he claims to embrace—the model put forward by Joseph Raz in his work *The Morality of Freedom*.[136] It is unclear why Benkler departs from Raz so silently. Perhaps, though unlikely, he does so unconsciously. Perhaps he does so to render his theory more palatable to an audience traditionally resistant to the idea that the state may nose into the information environment beyond just supporting its development.[137] Whatever the reason, Benkler's departure from Raz's model is difficult to defend. Understanding how this

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136. JOSEPH RAZ, THE MORALITY OF FREEDOM (1986). In one of his earlier articles, Benkler draws more heavily and explicitly on Raz's work. *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23 (2001).

137. That being so, Langdon Winner's words could not happen to be more opportune. Speaking of those who seek to advocate a broader normative agenda in a world dominated by anti-normative, efficiency-oriented stances, Winner notes:

> Because the idea of efficiency attracts a wide consensus, it is sometimes used as a conceptual Trojan horse by those who have more challenging political agendas they hope to smuggle in. But victories won in this way are in other respects great losses. For they affirm in our words and in our methodologies that there are certain human ends that no longer dare to be spoken in public. Lingering in that stuffy Trojan horse too long, even soldiers of virtue eventually suffocate.

LANGDON WINNER, THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY 54 (1986).

departure unfolds will allow us to reach important conclusions about the regulation of the information environment and of search as a foundational component of it.

On the one hand, and as we have just noted, Benkler does believe that state intervention is necessary to ensure the *structural* possibilities that enable personal autonomy to be furthered in the information environment. He believes we need to care for the effects that "law can have through the way it structures the relationships among people with regard to the information environment they occupy."[138] This is so as the structure of the information environment will itself enable or disable different configurations in social relationships. How autonomous one will be within these relationships is tantamount to how the structure of the information environment is designed. In Benkler's words, "[t]he structure of our information environment is constitutive of our autonomy, not only functionally significant to it."[139] The state thus has a role in ensuring these structural foundations of personal autonomy.

On the other hand, precisely because in the information environment determining structure goes beyond form and transmutes into substance,[140] there is a delicate balance to be struck here. Benkler trusts that the empowerment of individuals, rather than the political system, to devise jointly and directly the structural contours of their environment is to be welcomed as the default option.

"[F]iltration and accreditation" tools are an important example, as they are a fundamental part of that structure because they are "themselves information goods,"[141] and thus as much substance as they are form, such tools can be devised through the same peer-production and social processes that Benkler sees as characterizing the production of knowledge in contemporary societies. Of course, to some extent the design of such tools will be reflective of boundaries outlined by the state. For Benkler, the setting of structural boundaries is necessary not as part of any program of positive liberty, but as a condition of self-authorship in itself.[142] To a larger extent, however, the development of filtering and accreditation tools will mostly unfold as both an enabler and a produce of people's autonomous pursuit of their own walks of life. In fact, Benkler trusts this is the way things are happening right now. In his words:

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138. BENKLER, *supra* note 20, at 151.
139. *Id.* at 146.
140. We have discussed this point *supra* Part IV.
141. BENKLER, *supra* note 20, at 169.
142. *Id.* at 141.

> From the discussions of Wikipedia to the moderation and metamoderation scheme of Slashdot, and from the sixty thousand volunteers that make up the Open Directory Project to the PageRank system used by Google, the *means of filtering data are being produced within the networked information economy using peer production* and the coordinate patterns of nonproprietary production more generally."[143]

It seems far-fetched, however, and it was so already in 2005, when his book was written, to include Google and the Wikipedia in the same group of socially-produced filtering tools. Benkler seems to be widely influenced by Google's rhetoric about the democratic properties of its search engine. This affinity with Google also appears very clearly in the author's antipathy reserved towards the ways in which, according to him, the adoption of "policy routers" by Internet Service Providers[144] threatens to reduce individual autonomy. Why does Benkler not direct equivalent suspicions to that which is by far the hegemonic power in the information environment—Google? Most interestingly, while for the generality of gatekeepers the accumulation of power seems to be a concern in itself,[145] with regard to search engines, for Benkler, only monopoly and the masking of paid rankings seem to be.[146]

As previously noted, Benkler's liberal theory for the information environment draws widely on Joseph Raz's work. But it is from Benkler's peculiar departure from Raz that we can extract the most interesting lessons for our debates in this Article. These lessons concern the interplay between the ideas of *autonomy* and *neutrality*.

It appears that, by criticizing ISPs' policy-based routing of data, Benkler is defending theories of network neutrality. Neutrality, however,

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143. *Id.* at 171-72 (emphasis added).

144. "It is fairly clear that the new router increases the capacity of cable operators to treat their subscribers as objects, and to manipulate their actions in order to make them act as the provider wills, rather than as they would have had they had perfect information." *Id.* at 148. This is not completely surprising, though, since much of Benkler's earlier scholarship had been directed to advocating commons-based forms of administration of communications resources. *See, e.g.*, Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998) (explaining a view, which of course, he continues to sustain in the book); *see also* BENKLER, *supra* note 20, at 161 ("The autonomy deficit of private communications and information systems is a result of the formal structure of property as an institutional device and the role of communications and information systems as basic requirements in the ability of individuals to formulate purposes and plan actions to fit their lives.").

145. "The extent to which information overload inhibits autonomy relative to the autonomy of an individual exposed to a well-edited information flow depends on how much the editor who whittles down the information flow thereby gains power over the life of the user of the editorial function, and how he or she uses that power." BENKLER, *supra* note 20, at 169.

146. "The problem would be with search engines that mix the two strategies and hide the mix, or with a monopolistic search engine." *Id.* at 157.

is not something we can reconcile with liberal theory of a Razian orientation, if we can reconcile it with contemporary liberalism at all. Raz is a *liberal perfectionist*. To a great extent, his work in political theory has focused on debunking earlier theories of political neutrality, such as John Rawls's and Robert Nozick's, under the premise that a truly liberal model founded on autonomy and value pluralism actually needs the political institutions of society to engage with conceptions of the good life. Without political engagement of this kind, the state cannot ensure that people will have available to them the means necessary for authoring valuable lives. As Raz puts it:

> Political action should be concerned with providing individuals with the means by which they can develop, which enable them to choose and attempt to realize their own conception of the good. But there is nothing here which speaks for neutrality. For it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to *discourage evil or empty ones*.[147]

Benkler, on the other hand, though welcoming a limited structural role for the state, notes that the structuring of social relationships "calls for no therapeutic agenda to educate adults in a wide range of options . . . it calls for no one to sit in front of educational programs."[148] Benkler seems to be reminding us that, precisely because the information environment conflates form and substance, the state should be mindful of its power of interfering in the content of people's conceptions of the good; that the state should embrace a posture of restraint with regard to these—a doctrine of *political neutrality*—deferring substantive choices to the new collaborative forces that characterize the information environment.

In his view, attempts to intervene on cultural discourse seem to be neither justifiable nor feasible. While Benkler does criticize the "black-box" approach of certain liberal theories such as Rawls's—which ignore culture as a legitimate concern for the political constitution of a society,[149] he also cautions about the futility of attempting to regulate culture itself, beyond laying out the structural foundations upon which the cultural modes of the information age can thrive. We must take up a "systematic commitment to avoid direct intervention on cultural exchange."[150] In his words:

> Understanding that culture is a matter of political concern even within a liberal framework does not . . . translate into an agenda of intervention in

147. Raz, *supra* note 136, at 133 (emphasis added).
148. BENKLER, *supra* note 20, at 151.
149. *Id.* at 279-80.
150. *Id.* at 298.

> the culture sphere as an extension of legitimate decision making. Cultural discourse is systematically not amenable to formal regulation, management, or direction from the political system.[151]

The theory here is that the transparency and participatory possibilities of twenty-first-century liberal societies will increase reflexivity in cultural processes and enable people to make better and more autonomous decisions on how to author their life stories against an ever more refined cultural background. There surely are reasons to believe that *to a great extent* that will be so. But to move from here to the conclusion that people will just wind up at such a liberating intellectual oasis, even if left to their own devices by a state that has a merely structural role, seems to be an unwarranted jump. Several challenges can be raised against this conclusion.

First, research shows that cultural discourse tends towards polarization, with groups of individuals getting ever more extreme in their world views.[152] Will a framework to sort out disagreement between groups emerge even if no choices are made by the political system on aspects of such a framework that are themselves cultural and substantive?

Second, and related to this, are there frameworks that can evade cultural choices at all? The choice for a liberal framework for cultural decision making of the sort that Benkler envisions is already, in itself, a cultural choice of the kind he sets out to avoid. Different cultural traditions exist where possibilities of cultural dissent in the information environment are more tightly and substantively regulated, as in China. Conceptions of the state present themselves differently in these traditions and are reflected in different forms in the substance of their cultural discourses. The only way to live up to Benkler's aspirations is thus to eliminate any more ambitious images of the political system from the

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151. *Id.*

152. *See, e.g.*, CASS SUNSTEIN, REPUBLIC.COM 2.0 (2007). Benkler rejects Sunstein's theory but does not go to great lengths to disprove it. *See* BENKLER, *supra* note 20, at 238-39. The irony here is that the very visible polarization around net neutrality debates, and the twitter brouhahas that seem to feed these, lend remarkable persuasiveness to Sunstein's arguments. Further research on political polarization on Twitter notes that, while people do use that platform to engage with alternative world views, they find themselves unable to do so in a meaningful way—and, of course, tend to interact more with like-minded users. Boyd and Yardi seem to blame it on the constraints of the platform. That may be so, but then it is worth noticing that the major constraint presented by Twitter is not its brevity. More space will not per se add to consent. The major constraint is another which, especially after their recent victories in the spring revolutions, actors in the West may not be willing to sacrifice: *immediacy*. *See* Danah Boyd & Sarita Yardi, *Dynamic Debates: An Analysis of Group Polarization over Time on Twitter*, 30 BULL. SCI., TECH. & SOC'Y 316, 316-32 (2010); *see also* Michael Conover, et al., *Political Polarization on Twitter*, AAI.ORG (2011), http://goo.gl/741x8 (noting, besides polarization, the frequently uncivil tone of the debates).

substance of cultural discourses in the information environment. But this, in itself, would amount to the elimination of dissenting voices, of alternative cultural conceptions within which a political system is formed. Culture pervades everything in society. To refrain from making substantive choices with regard to culture is to refrain from making substantive choices altogether. How can that be possible?

Third, Benkler's theory says much about the framework that will enable us to jointly model the outer boundaries of a cultural clay man, but it says nothing about what to do, politically, when the clay man happen to embody a wicked soul. There is an underlying assumption in Benkler's work, in which he is certainly not alone, that the generative possibilities of the information environment, the forms of participation and collaboration that characterize it, must be cherished as intrinsically good.[153] This reflects an all too common creed in the auspicious properties of technological development—always to be preferred to the intractable substantive problems of normativity. But what do we do when the mores and sentiments of a time happen to be different from what reason would advise?

It is well known that crowds can behave badly. The Internet gives us uncountable examples of that. Internet vigilantism is one such example.[154] Aided by technological tools, crowds come together to hold individuals accountable beyond any proportionality or due process guarantees, if not to bully completely innocent people for the sheer fun of it. The Internet promises to forever "remember" wrongdoers for their misdeeds and mocked individuals for their magnified traits.[155] The outputs of collaborative efforts are themselves inherently wrong in these cases. One cannot endow ordeals with virtue just by correcting their procedural improprieties. The political system needs to address the substantive cultural assumptions upon which such processes hinge.

Fourth, and linked to the third, there is the challenge of adjudication. Who is going to settle disputes arising out of substantive cultural matters of the information environment? Benkler's only possible solution to this challenge is to say: information environment's very "inhabitants." He cannot say this, however, without resorting to the same Rawlsian rights-based discourse that he himself vilifies. That is, the only way Benkler

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153. Generativity is, indeed, the happiness of contemporary utilitarianism, or at least its idiosyncrasy. *See* Zittrain, *supra* note 87, at 90.

154. *See* Anne Cheung, *Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd*, 1 J. MEDIA L. 191 (2009).

155. *See* VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009).

can hold to this claim is to concede that adjudication by the state should be limited to legally-recognized rights *that are themselves of a different nature from that of substantive cultural affairs*, whose disputes should be settled by society. One could respond to this by arguing that state adjudication, while not concerning cultural affairs, can nonetheless concern the *structure* that brings cultural affairs about. Yet, this does not solve the problem. One still needs to clarify the nature of structural concerns themselves—the only possibility being to assign these the status of *rights*, in distinction from cultural *goods*.

However, if disputes concerning cultural goods are to be settled by society itself, who is going to mobilize the coercive apparatus? If these disputes—all that take place within the information environment—cannot mobilize the coercive apparatus, are we to restrict the use of coercion to the increasingly less frequent disputes that do not concern cultural matters? Furthermore, if society itself ends up devising alternative forms of coercion more compatible with cultural goods, can we still sustain the distinction between society and the state or, rather, Benkler's theory ends up engulfing itself?

The only way to answer these questions satisfactorily is to admit that there is not, after all, any difference of nature between *rights* and other cultural *conceptions of the good*. Rights-based disputes, in effect, arise in profoundly cultural settings. The difference that exists is one of degree. Rights are forms of good whose violation the law recognizes as having particular significance, assigning them, as a result, the power to invoke the coercive apparatus of the state—or at least to claim from the state different modalities of promotion and incentive that are inherent to their recognition and fulfillment. Normative and cultural as they are, rights exist within a wider practical universe. Together with other conceptions of the good, they form a system on whose contours our possibilities of living an autonomous life will hinge. Thus, nothing is more natural than the state engaging with the system as a whole.

The idea of merely structural interventions by the state to further personal autonomy, though claiming to see what Rawls prevents us from seeing, namely culture, in effect resembles Robert Nozick's libertarian framework where the state provides people with nothing but a filter—a framework for reaching agreements that, politically, are conducive to no other political arrangement but that of a minimal state. Indeed, if the role of the state is to provide society with a framework for its own, autonomous cultural agreements in a world where culture is everything—staying away otherwise but to enforce the operation of the

framework—the proposal is virtually identical to that of Robert Nozick's "framework for utopia."[156]

Nothing could be more incompatible with Joseph Raz's liberal perfectionist model, which Benkler claims to embrace in his work, but which, in reality, he does not. Most importantly, if Raz is correct, Benkler's ruling out of more "positive" modalities of political action seems to be incompatible with Benkler's own agenda of furthering personal autonomy. For Raz, the substantive elimination of bad, autonomy-demeaning options is not incompatible with liberal pursuits. Liberalism requires this.[157] While coercion should be reserved only for the morally repugnant options,[158] regulatory modalities that, for instance, subsidize the performance of valuable activities or discourage the pursuit of evil ones are nonetheless to be welcomed.[159] Education seems to be just a perfect example of these less direct forms of regulatory intervention.

The goal of liberalism, in sum, is to ensure the availability of valuable options for individuals and groups to author their lives. Modalities of state intervention that, by making substantive choices for the information environment, enhance the overall prospects that a wide range of options will be available for people to author their lives are to be preferred to the minimal and anti-idealistic conceptions of a state that practices a form of informational, cultural negligence under the flag of neutrality.

Doctrines of neutrality rely on a fictitious and arbitrary distinction between goals that can be pursued by the state and those that cannot. They were characteristic of liberal theories of the industrial age, such as

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156. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 297-333 (1974).

157. It requires so even at the price of coercion to prevent the pursuit of morally repugnant options. For Raz, "[the] pursuit of the morally repugnant cannot be defended from coercive interference on the ground that being an autonomous choice endows it with any value." Raz, *supra* note 73, at 418.

158. Raz states:

> Perfectionist goals need not be pursued by the use of coercion. A government which subsidizes certain activities, rewards their pursuit, and advertises their availability encourages those activities without using coercion. . . . The government has an obligation to create an environment providing individuals with an adequate range of options and the opportunities to choose them. . . . Autonomy-based duties . . . require the use of public power to promote the conditions of autonomy, to secure an adequate range of options for their population

Id. at 417-18.

159. "[T]the autonomy principle is a perfectionist principle. Autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones." *Id.* at 417.

Rawls's, with which Benkler, in the end, has a somewhat uneasy relationship.[160] Such theories sustained the vision that the state must assign a lexical priority to individualistic forms of good (which they would call rights) while blinding itself as much as possible to more collective-oriented ones. To a large extent, doctrines of political neutrality have been put to rest by the communitarian critique, and even by liberals, such as William Galston,[161] Thomas Hurka[162] and, above all, Joseph Raz. One of the most stringent reasons for this was precisely that evaluative arbitrariness about which John Finnis's words could not, once again, be more opportune:

> For the sake of a 'democratic' impartiality between differing conceptions of human good, Rawls insists that, in selecting principles of justice, one must treat as primary goods only liberty, opportunity, wealth, and self-respect, and that one must not attribute intrinsic value to such basic forms of good as truth, or play, or art, or friendship. Rawls gives no satisfactory reason for this radical emaciation of human good, and no satisfactory reason is available: [his] 'thin theory' is arbitrary.[163]

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160. Benkler does seem to have an uneasy relationship with Rawls. On the one hand, he criticizes Rawls's black-box approach with regard to culture. On the other hand, he does not fully reject the political neutrality fundamentals upon which such an approach relies. But, beyond that, Benkler also trusts that his views of the networked information environment are compatible with the "difference principle" of Rawls's theory of justice, that is, with Rawls's views on distribution. Actually, Benkler trusts that his own views on the networked environment are compatible with *any* of the theories of justice he lists in his book: Rawls's, Dworkin's, Akerman's and Nozick's. BENKLER, *supra* note 20, at 303-08. Is it a mere coincidence that all of these authors have also espoused theories of liberal *neutrality*? (while the late Dworkin seems to have abandoned these, Benkler's reference still seems to be the 1981 Dworkin)? Or does Benkler's reliance upon neutralists actually tell us that it is not possible to disentangle those author's political views on autonomy and neutrality from their take on distribution—and that that is why perhaps Benkler is ready to refer to the latter? This being so, however, it is important to point to a difficulty in Benkler's line of reasoning. Though Benkler seems ready to assume that Rawls's difference principle encompasses cultural goods, he can only do so by stretching Rawls's rather individualistic understanding of what primary goods amount to and the consequent (if arguable) neutrality of Rawls's political system towards culture. Other authors have explicitly tried this approach, but have also ignored the neutrality component of Rawls's theory, which renders the enterprise, in my view, equally problematic. *See* Jeroen van den Hoven & Emma Rooksby, *Distributive Justice and the Value of Information: A (Broadly) Rawlsian Approach*, *in* INFORMATION TECHNOLOGY AND MORAL PHILOSOPHY 376 (Jeroen van den Hoven & John Weckert eds., 2008).

161. *See, e.g.*, WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991).

162. *See, e.g.*, THOMAS HURKA, PERFECTIONISM (1996); THOMAS HURKA, VICE, VIRTUE, AND VALUE (2003).

163. Finnis, *supra* note 45, at 106.

VI. CONCLUSION

The main problem we have been exposed to throughout this Article is one which Finnis rightly attributes to Rawls: the arbitrary exclusion of important classes of reasons from the scope of political deliberation.

Network neutrality accomplishes this by enjoining the state to make sure that no questions involving such reasons arise at the network layer of the Internet. But neutrality here moves beyond the state, and beyond the typical boundaries of the political constitution. It precludes, for certain actors, those political, normative contributions of their everyday life. Beyond—indeed against—what liberals of Rawlsian orientation would admit, network neutrality annihilates the autonomy of actors whose core activities lie at the network layer—ISPs. In Google's advocacy, only those options which are merely related to engineering decisions should be left available to ISPs, which otherwise cannot act at all. No significant reasons exist for this, nor could they. Here, the arbitrariness that Finnis speaks about is radical and the violation of liberal principles, conspicuous.

Less ostensibly, the lenience with the extension of Google's dominance in the information environment is also founded upon an arbitrary decision of this sort. It reflects the understanding that only competition reasons—and not, for instance, moral reasons—justify state action against "search engines." But traditional competition reasons, as we have seen, are clearly not engaged by the new kind of monopolistic tendency displayed by the overall combination of Google's activities. Together, these activities tend to engender a regime of absolute organization that transcends the habitual considerations of market-based rationale. The call not to regulate Google's activities is thus a call to exclude other concerns—concerns with how truth is presented to people, with how knowledge is imparted and overall with the deeper, substantive aspects of the information environment. We have just seen Benkler's cautionary notes on going beyond the structure. But is it true that liberalism requires us to keep away from *substantive* forms of informational violence that may happen deep within the information environment?

Of course, structure matters. I was ready to note, in Part IV, how important it is to measure the extent of Google's dominance in the information environment and that this requires a careful examination of the very structure of information flows. Elsewhere, I have noted that the regulation of social networking sites must not (and does not) ignore the ways in which the structure of these sites constrain how our relations of

friendship are carried out.[164] But in the cases of both Google and Facebook, we cannot blindly ignore the fact that regulating structure matters precisely because of the values that the structure constrains. There is no reason to assume that states and the law should not directly engage with and uphold such values in enabling us to follow more auspicious, autonomous avenues in the information environment.

Equally importantly, there are no grounds to submit that law should forbid any agent in the information environment from engaging in evaluative pursuits. Nor *can* law do so. Rather, within and in interaction with its boundaries, agents—ISPs inclusively—create the values that render law and life overall meaningful. Doing law is not an exclusive privilege of governments and legislators, but rather an essential part of the ways of all who reason in practical terms. And doing law entails the adoption of certain criteria of validation that "presuppose positions about what would be good for [a given community];"[165] of certain general principles that articulate "what seem to one, in one's legal thinking—as they have seemed to many others—to be requirements of civilized, decent, humanly appropriate behavior."[166] All of us engage with these principles and criteria as we live by the law in our everyday life. How can one not do so?

Truth, *friendship*, and *culture*, for instance, are important evaluative criteria that are engaged when one thinks of *freedom*, *justice*, and the *rule of law*.[167] These are not two completely different cognitive realms, one acceptable (the latter) and the other (the former) to be avoided at all costs by certain agents of the information environment. Rather, both realms compose a seamless web outside of which living a lawful life—or any life at all—is plainly impossible. Of course, to outline the limits of our possible engagements with these criteria is an important function performed by law. But the idea that one must be enjoined to act in partial or total disengagement from some or any of those criteria makes as much sense as the pretense that one can be forced to act in separation from law itself.

In his book *Rights, Regulation and the Technological Revolution*, Roger Brownsword speaks of a community of rights as the vantage point of a society which accepts that the "development and application of

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164. *See* Thompson, *supra* note 15.

165. Finnis, *supra* note 45, at 110.

166. *Id.*

167. Some may disagree and defend that the identification of legal considerations can happen independently of moral criteria. Not even these, however, as noted above, would submit that successfully living a lawful life can happen in separation from a theory of morality that renders our legal pursuits meaningful and worth living by.

modern technologies should be compatible with respect for individual rights."[168] Amongst more specific characteristics of such a community would be its embeddedness of a formal moral standpoint, and its reflective and interpretive nature—that is, its being a community that "constantly keeps under review the question of whether the current interpretation of its commitments is the best interpretation."[169] In a way, Brownsword's individual rights-based community is as restrictive as those of other, Rawlsian-style forms of liberalism we discussed above. It is a *community*, thus, in a limited sense, for its reflective and interpretive commitments do not seem to encompass collective-oriented conceptions of the good that take us beyond the language of individual rights. It does not provide an explicit justification for concern by the political system with substantive cultural matters afflicting life in the information environment. It *is* a community, nonetheless, for it recognizes our possibilities of jointly devising the normative commitments (at least rights-based ones) under which to live by in our technological society.

We do well to expand Brownsword's views. We must see to it that our substantive requirements for self-authorship in the information environment be furthered by the political system with regard to options that matter precisely because of their common nature—for instance, our possibilities of forming and revising our constitutive attachments, our relations of friendship, through social networking sites; or the priorities and degrees of relevance that we jointly attribute to different sources of knowledge and culture in the information environment. These, among others, are not projects that concern individuals as the exclusive bearers of claims of political morality. Rather, they transcend individualisms and more authentically relate to our lives as members of a community.

Most importantly, as Brownsword aptly recognizes, we must treat all these as options that we make and revise as *members* of a community. We must appreciate our common membership to the overall process by which our individual and collective life stories unfold. There is nothing that speaks for neutrality or for absolute forms of organization here. Rather, our membership to the wider community of the information environment demands that different voices—from individuals, but also from groups and organizations, inclusively of economic nature—be equally heard. It demands that all of us are able to reenact daily the substantive normative commitments by which we live.

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168. ROGER BROWNSWORD, RIGHTS, REGULATION AND THE TECHNOLOGICAL REVOLUTION 24 (2008).

169 *Id.* at 25.

"I fear the man of a single book," Thomas Aquinas is said to have noted, in a possible reference to the dangers of fundamentalism. The normative evolution of the information environment demands indeed the teachings of many books. It objects to the overarching uniformity of standards predefined by any single company, as much as it objects to the exclusion of normative contributions by any other. Google's increasing and unified influence over the construction of meaning in the information environment, its belief in its own evaluative superiority, its mission of organizing all the world's information and its corresponding intent of neutralizing alternative sources of normative contribution speak to the heart of Aquinas's concerns. The boundaries between Google's different services increasingly blur against the backdrop of its overall project. That Google's latest product is a social network called Google *Plus*, is far from a coincidence. Rather, it denotes how a complete redefinition of Google's core services towards a social networking platform can in the end be seen as no more than an incremental addition, an upgrade, a plus in its overall plan. As the pages of Google's single book unfold, more may very well amount to less.