
THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

ARTICLE

THE NEUTRALIZATION OF HARMONY: THE PROBLEM OF TECHNOLOGICAL NEUTRALITY, EAST AND WEST

MARCELO THOMPSON*

ABSTRACT

Technological neutrality in law is, roughly, the idea that law should not pick technological winners and losers, that law should neither help nor hinder particular types of technological artifacts. This paper examines the idea of technological neutrality for both its internal coherence and its relationship with the dominant politico-philosophical traditions of our time—the liberal and the Confucian. In doing so, the paper points at how liberalism itself has been transformed in contemporary societies, the role that information and communication technologies play in this transformation and shows how technological neutrality threatens at the same time the developments of contemporary liberalism and liberalism’s reconciliation with the Confucian system of values upon which technological neutrality, through the system of international trade, presently seeks to impinge. The paper invites us to question technological neutrality through its relations with political neutrality, a doctrine that has lost significant grounds in contemporary liberal philosophy post-communitarian critique and which is fundamentally opposed to the ethico-political traditions of Chinese societies. On an applied level, the paper invites us to abandon ideas of neutrality in technology law and politics in general and, in particular, provides a hopefully compelling argument for China to resist attempts to neutralize its value-system and nation-building project through the system of international trade.

* Research Assistant Professor and Deputy Director of the LLM in Information Technology and Intellectual Property Law at the Faculty of Law, The University of Hong Kong.

THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

B.U. J. SCI. & TECH. L.

[Vol. 18:

ABSTRACT.....
I. REWIRING NEUTRALITY
II. VAGUENESS, TECHNOLOGY, AND POLITICS
III. A MORE PERFECT UNION—OR THE VALUE OF SHÙ
IV. THE NEUTRALIZATION OF HARMONY: CONCLUSION

“But there was a stillness about Ralph as he sat that marked him out: there was his size, and attractive appearance; and most obscurely, yet most powerfully, there was the conch. The being that had blown that, had sat waiting for them on the platform with the delicate thing balanced on his knees, was set apart.

‘Him with the shell.’

‘Ralph! Ralph!’

‘Let him be chief with the trumpet-thing.’”¹

“Scientists, artists, look with the eye of genius at the present state of the human mind; you will see that the sceptre of public opinion has fallen into your hand; grasp it with vigour!”²

“‘[N]o more honours for the Alexanders; long live the Archimedes’ . . .”³

I. REWIRING NEUTRALITY

There is much that the information environment can teach us about liberalism and its core tenets in the 21st century. In the lines that follow, we will focus on one of the central elements of 20th century liberal political theory—the doctrine of political neutrality—that has now been recast in dimensions perhaps unprecedented in the history of political ideas. The way it has been so recast stems from a market-oriented ideology that is founded as much on a shrunk-pragmatic⁴ understanding of the political as on an approach to the technological that mirrors such understanding. While the first foundation

¹ WILLIAM GOLDING, *LORD OF THE FLIES* 22 (1962).

² CLAUDE HENRI DE ROUVROY, *COMTE DE SAINT-SIMON, LETTERS FROM AN INHABITANT OF GENEVA TO HIS CONTEMPORARIES* (1803), *reprinted in THE POLITICAL THOUGHT OF SAINT-SIMON* 72 (Ghita Ionescu ed., Valence Ionescu trans., 1976).

³ Saint-Simon, *quoted in* GEOFFREY HAWTHORN, *ENLIGHTENMENT AND DESPAIR: A HISTORY OF SOCIAL THEORY* 69 (2d ed. 1987).

⁴ ROBERTO MANGABEIRA UNGER, *THE SELF AWAKENED: PRAGMATISM UNBOUND* 1 (2007) (“Pragmatism has become the philosophy of the age by shrinking. . . . [W]e have lost confidence in large projects, whether of theory or of politics, we have been taught how to live without them rather than how to recover and remake them in other, more promising forms.”).

THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

2012]

THE NEUTRALIZATION OF HARMONY

is certainly not distinctive of 21st century neutrality, the second is its cornerstone. This technological semblance has enabled the doctrine of political neutrality to reach entirely new dimensions in contemporary Western societies—dimensions which now attempt to impinge upon the value systems of the East.

The technological, in a new configuration,⁵ has become the central domain of thought of the 21st century. In the West, it is the domain in which the political finds refuge—in which decisions on good and evil, friend and enemy, are conveniently evaded, seeming to reflect the ultimate realization of a way of thinking already noted by Carl Schmitt in 1929:

“The evidence of the widespread contemporary belief in technology is based only on the proposition that the absolute and ultimate neutral ground has been found in technology, since apparently there is nothing more neutral. Technology serves everyone, just as radio is utilized for news of all kinds or as the postal service delivers packages regardless of their contents, since its technology can provide no criterion for evaluating them. Unlike theological, metaphysical, moral, and even economic questions, which are forever debatable, purely technical problems have something refreshingly factual about them. They are easy to solve, and it is easily understandable why there is a tendency to take refuge in technicity from the inextricable problems of all other domains.”⁶

Political skepticism now walks *pari passu* with, if it does not ensue from, the fascination of society with the technological.⁷ As the technological

⁵ That the technological has become the central domain of thought of our age could be seen as the outcome of a long historical process rather than a matter of sheer revolution. Carl Schmitt eloquently depicts such a process, in which what may at first appear as a mere quantitative unfolding turns into a qualitative shift. See CARL SCHMITT, *The Age of Neutralizations and Depoliticizations* (Matthias Konzen & John P. McCormick trans.), in *THE CONCEPT OF THE POLITICAL* 80 (George Schwab trans., Chicago University Press Expanded ed. 2007). Human evolution, however, has always involved our attempt to master the world through the use of technological artifacts. In this view, which is the one I adopt in this article, what characterizes our time is not only the centrality of the technological but a paradigmatically new *configuration* of it.

⁶ *Id.* at 90-91.

⁷ A series of surveys conducted by the Oxford Internet Institute, University of Oxford has shown that levels of trust of society in Internet-related technological actors are

pervades all dimensions of life in society so does the expectation of state restraint with regard to the technological. A principle that commands so, the *principle of technological neutrality*, has become the touchstone of Western law and policy making in the information age, elevating neutrality to heights it had never reached before. Now, through the “Silk Roads” of international trade⁸ and the planetary avenues of international human rights, neutrality attempts to force itself into political traditions where restraint, even if exercised in the ethical life, has never led to the insulation of the political from the ethical—nor of the technological from either.

Having been invoked before in a number of contexts, in 2004 the principle of technological neutrality transcended its prior contextual references and was exported to the world stage as a cross-cutting ideal of technology law and politics. It was so as the General Assembly of the United Nations endorsed the Geneva Declaration of Principles,⁹ approved in the Geneva Round of the World Summit of the Information society. In the Geneva Declaration, participants from 175 countries around the world¹⁰ firmed their understanding that “[t]he rule of law, accompanied by a supportive, transparent, pro-competitive, *technologically neutral* and predictable policy and regulatory framework reflecting national realities, is *essential for building a people-*

significantly higher (39%) than those of trust in newspapers (28%) and other major corporations (30%), and almost twice as high as those of trust in the Government (20%). An ascendant trend with regard to trust in Internet-related actors has been consistent throughout the last 7 years. Grant Blank, *Trust on the Internet Now Exceeds Trust in Other Major Institutions*, OXIS: OXFORD INTERNET SURVEYS BLOG (Oct. 25, 2010), <http://goo.gl/6VhWW>. See also William H. Dutton, Ellen J. Helsper & Monica M. Gerber, *The Internet in Britain: 2009*, OXFORD INTERNET INSTITUTE, UNIVERSITY OF OXFORD 32 (2009) (U.K.), <http://goo.gl/FvoeR>.

⁸ See Anupam Chander, *Trade 2.0*, 34 YALE J. INT’L L. 281 (2009) (welcoming the idea of technological neutrality in trade in what he calls the “electronic Silk Road”). See *infra* note 150 and accompanying text.

⁹ G.A. Res. 59/220, ¶ 4, U.N. Doc. A/RES/59/220 (Dec. 22, 2004) (“*The General Assembly . . . endorses the Declaration of Principles and the Plan of Action adopted by the Summit on 12 December 2003.*”).

¹⁰ *First Phase, Geneva: The Summit*, WORLD SUMMIT ON THE INFORMATION SOCIETY (Mar. 31, 2009), <http://www.itu.int/wsis/geneva/index.html> (“At the Geneva Phase of WSIS nearly 50 Heads of state/government and Vice-Presidents, 82 Ministers, and 26 Vice-Ministers and Heads of delegation as well as high-level representatives from international organizations, private sector, and civil society provided political support to the WSIS Declaration of Principles and Plan of Action that were adopted on 12 December 2003. More than 11,000 participants from 175 countries attended the Summit and related events.”).

centred Information Society."¹¹

The meaning of technological neutrality is far from clear. Ultimately, there is no sense in which such a principle holds good—and thus it is only nominally that I refer to it throughout this article as a principle. None the less, amongst possible formulations,¹² that which would cast technological neutrality under the best light would go like this:

P: Law should neither help nor hinder a particular type of technology;

P1: as a necessary condition of P, law should be framed in terms of functions and values, not of technology itself.

P, which I will call *the non-discrimination principle*, is the general proposition of technological neutrality. It is in this or other very similar enunciations that the principle of technological neutrality appears in the vast majority of law and policy instruments that affirm it. However, because it is unclear how law can achieve the non-discrimination ideal, a second proposition P1 is needed. This second proposition, which I will call *the vagueness principle*, directs the law to higher degrees of abstraction with regard to technological artifacts involved in social relations the law regulates. In short, the vagueness principle commands law not to describe the specificities of technological artifacts.

There is no academic nit-picking in focusing on explaining and confronting these propositions, nor are these extraneous, localized problems of technology-related stuff. Rather, I believe, they are the central regulatory concerns of our time. Not that they deserve this standing, for they have won it furtively while we were all asleep at the ever-receding banks of our political consciousness. Yet, there they are, sailing in their steep contradictions, challenging the overall projects of any form of virtue-oriented politics one can conceive of—West and East. As the technological becomes the central domain of thought of our time, as law and politics threaten to defer to the technological on the guise of not discriminating it, the normative order loses the opportunity of translating the technological with humanizing lenses. And by excluding such an increasingly

¹¹ World Summit on the Information Society, Geneva Declaration of Principles, ¶ 39, Doc. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003) (emphasis added), available at <http://www.itu.int/wsis/docs/geneva/official/dop.html>.

¹² I enlarge on these formulations in Part II *infra*.

important dimension of our personal realities, law ceases being, as it has been said to be, something “used by people to understand themselves.”¹³

It is thus essential that jurisprudence and political theory take the reins of this process that has so far happened largely in their spite—and which is widely incompatible with much of their contemporary orientations. In the pages that follow, I will offer a modest, initial contribution on the problem of technological neutrality that points in such a direction. I start in Part II with a rough discussion of the descriptive contours of the vagueness principle and an evaluation of its specific normative shortcomings. Here my focus will be on the internal incoherence of technological neutrality. I will question whether technological neutrality, in its more specific proposition, the vagueness principle, can pull itself together as an idea that makes any modicum of sense. In Part III, I will broaden the discussions on technological neutrality towards an external, more interesting perspective. I will focus on the overall problem of trying to reconcile technological neutrality with both contemporary liberal politics and the philosophical foundations of Confucian-oriented societies on which the principle of technological neutrality presently seeks to impinge. I will explain why such an attempt fails. While technological neutrality reflects a 21st century version of neutralist liberal theory, such is a version fundamentally incompatible with any form of society we now live in—if it has ever been compatible with any other. Part IV concludes.

II. VAGUENESS, TECHNOLOGY, AND POLITICS

A number of reasons support the vagueness principle. One is the intent to future-proof the law against the normative perturbations brought about by technological change. The mobility of technological artifacts across ever-unfolding sets of categories raises a permanent threat of disconnection¹⁴ between the institutions of law and the normative reality that law seeks to stabilize.¹⁵ Vagueness thus responds with the pretence that by moving towards

¹³ JOSEPH RAZ, *ETHICS AND THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 237 (1994) (“[T]he law’ is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves.”).

¹⁴ See ROGER BROWNSWORD, *RIGHTS, REGULATION AND THE TECHNOLOGICAL REVOLUTION* 160-184 (2008), for a thoughtful discussion on what he calls the “challenge of regulatory connection.”

¹⁵ See NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 142-172 (Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., Klaus A. Ziegert transl., 2004) (explaining

always higher degrees of abstraction, law will be less susceptible to technological variation. Such sort of reasoning is problematic, if only because it works against law's function of mediating between different reasons for action—that which Joseph Raz calls the service conception of authority,¹⁶ with regard to matters of technological nature. As the mediating function of law rests eroded, and though vagueness may be of contextual value,¹⁷ one is prompted to ask whether it makes sense to affirm vagueness as a general principle of law in lieu of more granular and situated forms of legal craftsmanship.¹⁸

that what functionally differentiates the law from other social systems is its being a time-binding mechanism that promotes the *stabilization of normative expectations*). Time-binding reduces the prospects of systemic risk. It does so since, as noted by Nobles and Schiff, rules provide general solutions which “support expectations about what, in the future, will be coded legal/illegal.” This thus dispenses law from the need of “provid[ing] a ‘point to point’ defence to every potential conflict.” Richard Nobles & David Schiff, *Introduction* to NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM*, at 48 (Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., Klaus A. Ziegert transl., F004). Adopting Luhmann's perspective, we can see that where there is no stabilization of expectations involving extremely important components of our normative order, such as those related to technologies now unquestionably are, risk will have thrived and law will have failed to live up to its function. It is indeed difficult to visualize how stable expectations can become where vagueness is pursued as a principle with regard to such a pervasive dimension of the facts on which expectations are grounded.

¹⁶ 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.” RAZ, *supra* note 13.

¹⁷ Vagueness serves many functions. For instance, as Spence and Endicott note, vagueness avoids the occasional arbitrariness or impossibility of precision. It also enables different modalities of private ordering or delegation of power. See Timothy Endicott & Michael Spence, *Vagueness in the Scope of Copyright*, 121 L. Q. REV. 657, 661-65 (2005). One can thus agree with Endicott that “[f]ar from being repugnant to the idea of making a norm, vagueness is of central importance to lawmakers (and other persons who craft normative texts). *It is a central technique of normative texts*: it is needed in order to pursue the purposes of formulating such texts”. Timothy Endicott, *The Value of Vagueness*, in VAGUENESS IN NORMATIVE TEXTS 27-28 (Vijay K. Bathia, Jan Engberg, Maurizio Gotti & Dorothee Heller eds., 2005) (emphasis added).

¹⁸ Commenting on an important case in English copyright law (*Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2000] UKHL 58, [2001] 1 All ER 700), Endicott and Spence criticize the excessive vagueness of standards set by the House of Lords for defining, inter alia, which ideas, once expressed, are worthy of protection by copyright. According to the authors, the decision of the Law Lords did “nothing to control the

This challenge also applies to the second assumed reason for supporting a general principle of vagueness: the notion that states will only be able to stick to the non-discrimination principle by drafting laws and policies in ways that do not describe the specific properties of technological artifacts. The vagueness principle seeks to ensure that the words of the law are not only reflexive of the properties of one or more technological artifacts—and thus that law does not help or hinder artifacts, or sets thereof. A major problem with this understanding is precisely that of what it means to not frame the law in terms of technology itself. As put forward in P1, law should be framed in terms of the *functions*¹⁹ of technological artifacts (of the virtualization²⁰ of actual future effects these may bring about) and of the *values*²¹ that law seeks to uphold in

vagueness of [the ideas-expression] dichotomy by giving any clue as to what should count as unprotected ideas and what should count as protectable expression.” (Endicott & Spence, *supra* note 17, . at 672). In the authors’ views, the decision did not pay “due regard to the purposes for which copyright protection is afforded at all” and thus to the notion that “[t]he scope of copyright ought to reflect its justification.” *Id.* (emphasis added). This statement illustrates well that, however one may recognize the contingent value of vagueness, the extent of it—vis-à-vis the granularity of law—must hinge on how law should be conceived of to uphold the values it needs to uphold.

¹⁹ See, e.g., UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT, at 14, U.N. Sales No. E.02.V.8 (2001), available at <http://goo.gl/idXtd> (noting that, during the development of its Model Law on Electronic Signatures, “it was widely felt that *focusing on the functions typical of PKI* [a particular kind of infrastructure on which electronic signatures can be based] and not on any specific model might make it easier to develop a fully media-neutral rule at a later stage.” para. 20 (emphasis added)). UNCITRAL uses media neutrality throughout the document in a way complementary to technological neutrality, meaning the non-discrimination amongst different technological media (here, paper or electronic form). *Id.* However, one should also notice that, in UNCITRAL’s view, a fully media-neutral rule would not describe even the functions of technologies – which begs the question of what would a media-neutral framework describe. *Id.*

²⁰ As Pierre Lévy explains, “[v]irtualization can be defined as the movement of actualization in reverse. It consists in the transition from the actual to the virtual, an *exponentiation* of the entity under consideration”. PIERRE LÉVY, BECOMING VIRTUAL: REALITY IN THE DIGITAL AGE 26 (Robert Bononno trans., 1998).

²¹ See Bert-Jaap Koops, *Should ICT Regulation be Technology-Neutral?*, in STARTING POINTS FOR ICT REGULATION: DECONSTRUCTING PREVALENT POLICY ONE-LINERS 77 (Bert-Jaap Koops, Miriam Lips, Corien Prins & Maurice Schellekens eds., T.M.C. Asser Press IT & Law Series, Vol. 9, 2006) (NL) (“[R]ather than put all effort into creating specific regulations for specific problems, a legal framework may also be established that outlines the main substantive principles that are at stake. Such a framework would, for instance, indicate the fundamental rights and values that are at stake and the rationale that underlies

regulating those artifacts.

Some would claim that technological neutrality is about ensuring that law has neutral *effects* upon technologies or technological markets, rather than being a matter of wording.²² However, technological neutrality *is* a matter of wording;²³ it is in the explicitly articulated rules of the normative order that the effects of technological neutrality are felt. Technological neutrality excludes reasons of technological nature from an important dimension of practical reasoning, which is that of the reasons provided by law. Here, when an individual considers what to choose and do, the law will only provide

areas of regulation”).

²² See, e.g., Ulrich Kamecke & Torsten Korber, *Technological Neutrality in the EC Regulatory Framework for Electronic Communications: a Good Principle Widely Misunderstood*, 29:5 EUR. COMPETITION L. REV. 330, 332 (2008) (U.K.) (claiming that “[a]s a substantive prohibition of discriminatory practices, [technological neutrality] is understood as pertaining to effects. The principle is therefore directed against substantive distortions of competition calling for a more economic approach to regulation policy”). See also Chris Reed, *Taking Sides in Technological Neutrality*, 4:3 SCRIPT-ed 264, 267 (2007), available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.pdf> (noting that in order to “achieve a functionally equivalent treatment for each technology,” we must “[R]ecognise that technologically neutral rules addressing the same issue may well differ in their wording and content, in order to achieve the same (or at least broadly equivalent) *effects* when applied to these technologies.”).

²³ See e.g. *Dow Jones & Co. v Gutnick*, (2002) 210 CLR 575, 630-631 (Austl.) (claiming that “[g]enerally speaking, it is *undesirable to express* a rule of the common law *in terms of* a particular technology” and that “[r]ules should be *technology-neutral*: Whilst the Internet does indeed present many novel technological features, it also shares many characteristics with earlier technologies that have rapidly expanded the speed and quantity of information distribution throughout the world.”) (emphasis added). See also *Robertson v. Thomson Corp.*, [2006] S.C.R. 363, 395 (Can.) (“[L]ike its American counterpart, Canada’s Copyright Act is media neutral: the right is to reproduce the work in ‘any material form whatever’ . . . [t]he concept of media neutrality is how Parliament chose to come to grips with potential technological developments. On its face, the media neutrality protection found in s. 3(1) is a simple concept. As Gonthier J. pointed out in *Théberge*, s. 3(1) offers ‘*an appropriate and carefully worded recognition* that a work may be reproduced *even if* the new medium is different.’”) (emphasis added). See also Ysolde Gendreau, *A Technologically Neutral Solution for the Internet: Is it Wishful Thinking?*, in SCIENCE, TRUTH AND JUSTICE 198, 199 (Joost Blom & Hélène Dumont eds., 2001) (noting, in the copyright context, that “[i]t has become *commonplace* to say that any change in a copyright legislation that would be required in order to come to terms with the Internet should be drafted in a technologically neutral manner.”) (emphasis added).

directives concerned *with the functions*²⁴ of technological artifacts (or values of higher nature) because the vagueness principle excludes all other reasons. The ideal of treating technological artifacts with like functions alike, at times called “the principle of functional equivalence,” may seem rather intuitive.²⁵ The principle of functional equivalence points to the very likeable proposition that the state should not take action for arbitrary or capricious reasons. Hence, if more than one technological artifact performs the same task, why should the law discriminate amongst these?

There are two answers for the functional equivalence argument. The first is irresistibly contemptuous: in a moment of complex, evolved societal life that we boldly refer to as a “new enlightenment” or “the information age”, amongst other similar self-congratulatory sobriquets, why would we need a new principle to convey a general idea of *reasonableness* that should by now be the ultimate tautology of any minimally established legal system—a general idea

²⁴ The vagueness principle also appears at times as demanding that law be expressed (passive voice) but in terms of the functions *or effects* of technological artifacts. Bert Jaap-Koops, for instance, speaks somewhat loosely at times of functions and effects, at others only of effects (“[T]he purpose of a regulation must be to regulate functions and effects, not means”; “From the perspective of the goal of regulation, the statement stresses that, in principle, the effects of ICT should be regulated, but not technology itself”). Koops, *supra* note 21, at 106. However, we do better in understanding that, due to its time-binding properties and, to its orientation towards the future, law typically reflects, in its utterances, the functions of technological artifacts, not yet the effects of these. When law comes into being, such effects do not yet exist. Technological artifacts, in this sense, are a virtualization of functions. See, e.g., Pierre Lévy, *supra* note 20, at 94 (“Where do tools come from? Initially, we identify some physical or mental function of a living being (striking, trapping, walking, flying, calculating). We then detach these functions from a specified assemblage of flesh, bones, and neurons. In doing so we also separate them from internal and subjective experience. *The abstract function is materialized in a new form*, which differs from the animal’s customary gesture.”) (emphasis added). Regulating effects is thus in part redundant and in part an impossible enterprise. To the extent that effects are a linear actualization of functions, effects will be reached by the utterances of law as functions unfold into them. Seeking to regulate the not yet actual adds nothing to this extent. And then there is the authorial, the innovative, surprising, the unexpected, that portion of effects that we would have failed spectacularly in failing to predict. These are the unintended consequences of the unfolding of functions of technological artifacts – that which was not originally written, would never have been and cannot thus be part of the law.

²⁵ See United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment* 20 (1998), available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (discussing ‘functional equivalence’).

that every legal action must be action *for a reason*? Second, functional equivalence may not be the proper way of expressing the contours of reasonableness with respect to technology because technological artifacts matter for reasons beyond their functions. Technological artifacts are multidimensional—they are enacted in different topologies²⁶ and may be approached from different directions. Thus, the law may need to focus on properties extending much beyond the artifacts' functions.

Think of computer programs, for instance. They make computers work in certain ways. Functions performed by computers, before they are rendered actual, exist virtualized in the instructions of computer programs. So we can say computer programs have a functional dimension. Beyond their functional dimension, however, computer programs also have a semiological one. They have a *language* and are written in ways that may be considered a form of literary expression meriting copyright protection.²⁷ This double functional-semiological configuration was at the very root of the debates on how to protect computer programs when they were first unbundled from servers and desktops and started to experience a life of their own as central goods of the world we now live in. Copyright now recognizes the literary worth of computer programs and does so not because of their functions but because of the different, creative ways in which computer programs may be written.

Besides their functions and their languages, computer programs may also differ in their *architecture* and in their *forms of development*. They may have an open architecture—where their structure and the wording of their code are open to society at large—or a closed one. They may be developed in a hierarchical, top-down, cathedral-like fashion, or they may be developed in a decentralized, bottom-up, bazaar-like fashion.²⁸ Far from being irrelevant for law, politics and society in general, architecture and forms of development of computer programs matter profoundly. I have argued elsewhere²⁹ that for governments, for instance, only the adoption of programs that are open to public scrutiny and participation is compatible with the democratic principle. As computer programs determine how important public functions are carried

²⁶ See John Law, *Objects and Spaces*, 19 THEORY, CULTURE & SOC'Y 91, 102 (2002) (arguing that “objects are topologically multiple, existing as intersections or interferences between different spaces including regions, networks, and fluids.”).

²⁷ See, e.g., *Apple v. Franklin*, 714 F.2d 1240 (3d Cir. 1983).

²⁸ See ERIC RAYMOND, *THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (2d ed., 2001).

²⁹ See Marcelo Thompson, *The Democracy of FLOSS: Software Procurement Under the Democratic Principle*, 5 U. OF OTTAWA L. & TECH. J. 79.

out and also structure the relations of power between governments and private companies, including foreign monopolies, it is of paramount importance that governments may be able to know what the code of their computers say. Civil society organizations may act as custodians of this key dimension of freedom of information principles, except where national security imperatives demand otherwise.

That is to say, law may need to regulate and enjoin governments to embrace certain types of technological artifacts *for reasons other than their functions*. The same happens, for instance, with regard to the ongoing process of transformation of the architecture of both the personal computer and the Internet. In a work of profound relevance,³⁰ Jonathan Zittrain noted that computers and the Internet are moving towards a model of increasing control and restriction, which is very different from the model under which they were originally conceived.

The original PC and the original Internet were, in Zittrain's view, characterized by an "overall capacity to produce unprompted change driven by large, varied, and uncoordinated audiences."³¹ The *conditio sine qua non* of a PC operating system was that of permitting consumers to run third-party code. Similarly, the original architecture of the Internet was such that computing processes would take place at the endpoints—the desktop PCs—while the core of the Internet would be one of extreme simplicity, enabling information to flow end-to-end.³² The original designs of both the operating systems of PCs and the Internet in its core layers made them accessible, uncomplicated, flexible, and, as a result, leveraging technological artifacts.³³ This model, according to Zittrain, is now changing—and the ways in which it is, I would add, have less to do with the *functions* of the Internet and the PCs than they have to do with the *architecture* of the world-scale computational grid in which the Internet and the PC are intertwined.

On the one hand, things which used to be done at the PC are now being done somewhere else on the Internet, and this phenomenon will increasingly happen as the capacity of broadband networks unfolds. "The Internet is the computer," the modish expression says, reflecting the fact that an increasing number of processes are getting concentrated under a handful of gatekeepers that operate

³⁰ See generally Jonathan L. Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006).

³¹ *Id.* at 1980.

³² *Id.* at 1989.

³³ *Id.* at 1982-96.

invisibly in the digital cloud.³⁴ On the other hand, people are increasingly adopting devices which, though in theory can perform as wide a range of functions as desktop computers do, are locked down and closed in ways that make a wide range of processes that could otherwise be performed in them contingent upon authorization. For instance, there are much more stringent requirements for running software on tablet devices such as the iPad and video game consoles such as the Xbox than there would originally be for the same processes to happen on desktop PCs. Those devices are much more constrained—tethered—and thus less generative than the original PC was designed to be.

When one puts all these fragments together, the picture that emerges is that of an increasingly closed, concentrated, gatekeeper-ridden Internet. Activities need permission before they are performed and every process that leads to their performance is now more secret, less transparent and thus possibilities of mastery and innovation by society at large is much narrower. If law is to address these problems, it *will* need to choose between different possible technological models and do so by regulating technological artifacts themselves through properties *other than their functions*.

The vagueness principle, however, restrains such choices by directing the law to focus only on the functions of technological artifacts³⁵ or on whatever other incomplete dimension an even more abstruse enunciation of technological neutrality would command. How internally incoherent doing so is should already be clear enough by now. What we do need to clarify before taking our analysis further in the next section is the nature of those restraints. It may seem that the pertinence of such restraints to technological matters obliges us to address their eventual problems anew, on sheer technological grounds, as if there were no long-standing questions of political philosophy into which they fit. There have been so far no attempts to reconcile technological neutrality with its possible political orientations. True, there have been some

³⁴ Zittrain speaks of a “generative *grid* of Internet and PCs.”. *Id.* at 1979 (emphasis added).

³⁵ As noted before, the vagueness principle also, or perhaps mainly commands the law to focus only on the values it seeks to uphold. This, however, takes the principle to such an extreme proportion as to transform the law in a statement of values. *See, e.g.*, Lyria Bennett Moses, *Recurring Dilemmas: The Law’s Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL’Y 239, 273 (2007) (“The only way to guarantee technology neutrality into the future so that new technologies will be treated fairly is to enact a law whose level of generality corresponds with the highest level goal that the lawmakers wish to achieve. However, a rule such as: *All must act so as to preserve human life* is ridiculous for other reasons”) (emphasis added).

not very persuasive attempts to approach it with law and economics lenses.³⁶ These, however, are just unsuspected manifestations of the same disenchanted, politically sceptic mood on which technological neutrality feeds—and which we are going to discuss below.

The new form of restraint that technological neutrality reflects is then just partially new, for, as noted in the introduction, it is also a restatement of much older forms of political skepticism. While the vagueness principle excludes reasons of a technological sort—those that do not relate to the functions of technological artifacts – it also does so with reasons of political nature. It would be indeed a mistake to assume that technological artifacts, though bestrewn with technological reasons, do not also assume a more or less intense political form. Reasons of both technological and, wittingly or not, political nature are intertwined in the design of technological artifacts. And both are excluded from the realm of state action by technological neutrality, which, with regard to the political, reflects the same scope and the same disenchanting effects as the traditional doctrines of political neutrality.

To explain that the technological and the political are intertwined *in technological artifacts* moves us beyond age-old debates between the autonomy (or substantive)³⁷ and the social construction (or instrumental) views of technology.³⁸ On the one hand, one does not need to deny that in technology, as reflected in its own, *technological reasons* may indeed be self-created, operatively closed and functionally differentiated from social processes in general—that is, one does not need to deny the autonomy of technological reasons. In this sense, the *reasons of technology* are indeed

³⁶ See, e.g., Kamecke & Korber, *supra* note 22.

³⁷ Martin Heidegger and Jacques Ellul are the foremost exponents of the autonomy view which, in Andrew Feenberg's words, "attributes an autonomous cultural force to technology that overrides all traditional or competing values". ANDREW FEENBERG, *CRITICAL THEORY OF TECHNOLOGY* 5 (1991). For Heidegger's view, see Martin Heidegger, *The Question Concerning Technology*, in HEIDEGGER'S THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 3 (William Lovitt trans., 1977). For Ellul's view, see JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (John Wilkinson trans., Random House, Inc. 1967).

³⁸ For an accessible overview of both theories, see James Garvey, *The Moral Use of Technology*, in *PHILOSOPHY OF SCIENCE* 241 (Anthony O'Hear ed., Supp. 61 2007) (*inter alia* agreeing with Andrew Feenberg on the social prevalence of the instrumental view and attributing it most prominently to Francis Bacon: "Bacon shows us that if our eyes fall comprehensively on the ends we hope to achieve, our default conception of technology is merely a means for getting something else."). For a more comprehensive survey from a legal perspective, see Arthur J. Cockfield, *Towards a Law and Technology Theory*, 30 *MAN. L.J.* 383 (2004) (Can.).

different from the *reasons of politics*. Here one may agree with Carl Schmitt when he says that “no conclusions which usually can be drawn from the central domains of spiritual life can be derived from pure technology as nothing but technology—neither a concept of cultural progress, nor a type of *clerc* or spiritual leader, nor a specific political system.”³⁹ Technology in this sense can be understood according to Ralph Schroeder’s definition, in which he draws on Ian Hacking,⁴⁰ as the “adventure of the inter-locking of refining and manipulating” technological artifacts—and thus as a process distinguished from these.⁴¹

On the other hand, when our focus moves from *technological reasons* towards *technological artifacts*, any illusion of autonomy disappears. This is so as, when reflected in the architecture of technological artifacts, technological reasons *are* modified by political ones. That is to say, law and politics provide reasons that impinge upon whatever otherwise purely technological reasons the designers of technological artifacts may hold. When technological artifacts are enacted, it is on the balance of reasons of different natures, including political reasons, that their configuration will ultimately hinge. Artifacts, thus, as Langdon Winner notes, have politics.⁴² In some cases, they settle particular states of affair⁴³ while in others, they carry properties which are only compatible with certain political configurations.⁴⁴ In all its dimensions⁴⁵, the design of technological artifacts is constrained by reasons of political nature that we can say are ultimately embedded in technological artifacts.

It follows that to command law not to describe the properties of technological artifacts implies deference to whatever techno-political

³⁹ SCHMITT, *supra* note 5, at 92.

⁴⁰ IAN HACKING, REPRESENTING AND INTERVENING (1983).

⁴¹ RALPH SCHROEDER, RETHINKING SCIENCE, TECHNOLOGY, AND SOCIAL CHANGE 8-9 (2007) (“[M]odern technology has been the adventure of the interlocking of refining and manipulating since technological advance consists of the process whereby artifacts are continually being modified in order to enhance or extend our mastery of the world.”).

⁴² LANGDON WINNER, THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY 19-39 (1986).

⁴³ A famous example discussed by Winner is that of the overpasses of Long Island, controversially projected by Robert Moses, New York’s architectural mastermind, to stand at very low height so as to prevent low income people, who would normally travel by bus, from accessing the island. *Id.* at 22-23. More related to our points in this paper, we may think of the closed versus open source software example discussed earlier in this section.

⁴⁴ For instance, Winner mentions the inherently authoritarian properties reflected in the functionalities of the atomic bomb. *Id.* at 34.

⁴⁵ Law, *supra* note 26.

configuration these may assume.⁴⁶ Doctrines that command the exclusion of reasons of technological nature from law and politics prevent these from interweaving in their fabric any idealized image to be pursued by the designers of technological artifacts—any image that depicts an integral and reflective equilibrium⁴⁷ between technological reasons and other, political ones. In doing so, technological neutrality threatens to exclude the reasons ensuing from such a balance from the design of technological artifacts—if only because it reduces the likelihood that the designers of technological artifacts will embrace those reasons as theirs in cases of evaluative shortcoming. The outcome is one in which values and conceptions of the good relative to the technological will be reflected neither in the normative structure nor in the factual infrastructure of an increasingly dehumanized technological society.⁴⁸

⁴⁶ It could not actually be otherwise, due to the inherent political properties of law itself. When law incorporates technological reasons it also necessarily reflects the political repercussions of these. When law excludes any set of political considerations other political considerations take the place of these.

⁴⁷ I use the expression in the Dworkinian sense, not the Rawlsian one. While John Rawls restricts his method of reflective equilibrium to the limited range of goods that he admits of as part of the political constitution, Ronald Dworkin is ready to take up the enterprise in its full breadth. In what relates to our argument, there is indeed no reason to rule out any individual or collective, political or otherwise cultural dimension of technological artifacts from the realm of political concern. We enlarge on this point in the upcoming sections. On the difference between his approach and Rawls's, see RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 263-264 (2011) ("Our challenge is in some ways like that posed by John Rawls's method of reflective equilibrium, but it is more ambitious and more hazardous. Rawls aimed at a kind of integrity among abstract and concrete convictions about justice, but one that allowed subordination, compromise, and balancing among different values. He insisted on a "lexical priority" of liberty to equality, for example. He did not aim to interpret each value in the light of others so that each supported rather than challenged the others. That difference reflects a deeper one. Our strategy is driven by a theory of moral and interpretive truth . . ."). See also Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 *OXFORD J. LEGAL STUD.* 1, 18 (2004) (U.K.) ("My recommendation is similar to Rawls' method of reflective equilibrium, which aims to bring our intuitions and theories about justice into line with one another. The difference with Rawls' methodology is more striking than the similarities, however, because the equilibrium I believe philosophy must seek is not limited, as his is, to the constitutional essentials of politics, but embraces what he calls a 'comprehensive' theory that includes personal morality and ethics as well.").

⁴⁸ Such a world of surrender of the political to the technological, a world in which law, by not describing the technological, fully defers to it, is the ultimate realization of Justice Holmes's prophecy: "[T]he man of the future is the man of statistics and the master of economics." Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469

This brings us to two important points. The first is that, by excluding state action based on conceptions of the good—here those that are reflected in technological artifacts – *technological neutrality* is tantamount to *political neutrality*. Doctrines of political neutrality indeed enjoin governments not to make choices between different conceptions of the good life. They exclude these from the realm of state action altogether, even where value lies in pursuing them.⁴⁹ Technological neutrality does precisely the same, but it also does more. This is our second point. The widespread adoption of a principle of technological neutrality raises the doctrine of neutrality to a position of prominence in the realms of law and politics that it had never had before.

As I had noted above, embedded in them, technological artifacts carry a balance of the different reasons that their developers hold.⁵⁰ Beyond (autonomous or not) typically technological reasons, technological designers may embed in technological artifacts their personal conceptions of values such as friendship, religion⁵¹ and, overall, culture. These are values that political

(1897). For an even more troubling account than that of the bad-man style prophecies of Holmes and legal realism, see, e.g., Lee Loevinger, *Jurimetrics: The Next Step Forward*, 33 MINN. L. REV. 455 (1949) (proposing a science of jurimetrics); see also Lee Loevinger, *Jurimetrics: The Methodology of Legal Inquiry*, 28 LAW & CONTEMP. PROBS. 5 (1963). Jurimetrics, as Loevinger explains, is not concerned with the “meaningless questions” of jurisprudence (1949, at 470), “with a debate as to whether the metaphorical life of the law has been logic or experience.” (1963, at 35). Rather, jurimetrics “is concerned only with investigating the structure and dimensions of all experience that is relevant to the law.” *Id.* “It is . . . the doctrine that the methods of scientific inquiry should be *extended to every phase of human activity* which is of concern to society.” (1949, at 493) (emphasis added). Technological neutrality’s political deference to technology is thus old wine in new bottles. The problem, however, is that now we have been drinking of it.

⁴⁹ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 110-111 (1986). The doctrine of political neutrality is a doctrine of restraint for it advocates neutrality between valid and invalid ideals of the good. It does not demand that the government shall avoid promoting unacceptable ideals. Rather, it commands the government to make sure that its actions do not help acceptable ideals more than unacceptable ones, to see to it that its actions will not hinder the cause of false ideals more than they do that of true ones.

⁵⁰ See *supra* note 39 and accompanying text.

⁵¹ One needs not subscribe to any particular theological creed to see the Ghost in the machine. One just needs to recognize the religious foundations of much of the moral reasons embedded in our arguably disenchanted discourses. See STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* (2010); see also PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* (2006); NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY: A STUDY ON THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME* (William Small trans., The Johns Hopkins University Press 1980) (1864).

neutrality has traditionally excluded from the realm of state action and, in this sense, technological neutrality adds nothing new in closing the eyes of politics to these dimensions of technological artifacts. But technological neutrality also excludes reasons that are of central importance to the political theories of many philosophers who otherwise subscribe to political neutrality. To the extent that technological artifacts reflect their designers' understandings about concepts such as human personhood, personal identity, freedom, and privacy; and these are excluded from politics by the idea of technological neutrality. Doctrines of political neutrality reach entirely unprecedented dimensions with regard to their scope.

But it is not merely the *scope* of political neutrality that has been formidably extended in the 21st century—its *reach* also has. Up to the past century, the doctrine of neutrality had indeed found limited concrete expression in the fundamental political decisions of countries around the world. It lived but in the political mood and sceptical attitude of some champions of absolute or quasi-absolute freedom—a never-fully-realized product of intellectual export. It barked punctiliously, but did not bite. Beyond topical spellings in issues such as the non-establishment of religion by the state, there had been no successful attempts to embed an overarching principle of neutrality in the constitutional foundations of liberal societies. In international human rights law, the International Covenant on Economic, Social and Cultural Rights⁵² would naturally deflect its signatories from the exclusion of pursuits that neutrality could have otherwise excluded from the scope of state action. There is no denying that, theoretically, some of the most prominent liberal doctrines of the past century did rely, to a huge extent, on the supposed soundness of a principled pursuit of political neutrality. But such a theoretical conviction, has now, with new cloak, been brought to the realm of praxis in monumental terms.

What is most surprising, however, is that technological neutrality has come to revive political neutrality with such an intensity at a time in which the theoretical foundations of the latter seemed to have already called it a day, when old conceptions of liberal neutrality seemed to have given place to new orientations in liberal theory and practice that are more genuinely faithful to value pluralism and reconcilable with the philosophical traditions of Eastern societies. Such a strange revival cannot thus be explained but by the vapidness of the new neutrality, by its lack of pursued connections with any theoretical universes—for its skepticism despises these universes altogether. One cannot

⁵² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3.

THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

2012]

THE NEUTRALIZATION OF HARMONY

justify the adoption of technological neutrality, however, if not by assessing it against the backdrop of the more established debates in which, wittingly or not, technological neutrality is rooted—those of political neutrality.

Having hinted in the lines above at the connections between technological neutrality and political neutrality, in the next section we turn to our mission described at the outset of this paper—to question the prospects of political neutrality itself in the 21st century as well as of the flavors of liberalism based on it. There are lessons to be learned here that concern the very foundations of doctrines of neutral political concern and of liberalism itself in the information age. They reflect the paradigmatic change that technologies have brought to contemporary societies and, related to these, the overarching trend of convergence between the political orientations of East and West in at least one respect: the development of a common conception of the human person that is typical of the times we live in—a conception based on an explicitly articulated normative reality of connectedness.

In the big pictures of political theory and praxis this more expansive conception of the person seems to have been in effect factored in. But in those undeservingly trite matters of everyday policy the new neutrality trifles with any more reflective notion of the self. Symptomatically, as two authors note *as a reason for commending it*: “technological neutrality is a quite particular anti-discriminatory rule as it protects technologies and thus property rights *instead of legal subjects*.”⁵³ However, as our venture in this work concerns the latter, we must pursue the integrity of the large view deep in which they are—we are—embedded.

III. A MORE PERFECT UNION—OR THE VALUE OF SHÙ

In November 4, 2008, the president of a distinctively liberal bastion was elected with the promise of bringing people together on the path to a more perfect union.

[I]n the end, then, what is called for is nothing more, and nothing less, than what all the world’s great religions demand—that *we do unto others as we would have them do unto us*. . . . Let us find that common stake we all have in one another, and let our politics reflect that spirit as well.⁵⁴

⁵³ Kamecke & Korber, *supra* note 22, at 331 (emphasis added).

⁵⁴ Barack Obama, Presidential Candidate, United States, A More Perfect Union, Speech Before the National Constitution Center, Philadelphia, Pennsylvania (Mar. 18, 2008); *see Text of Obama’s Speech: A More Perfect Union*, WALL ST J. (Mar. 18, 2008, 10:27 AM),

– said then the ruler-to-be.⁵⁵ In China, this has been framed in similar terms since at least the Spring and Autumn Period. It is called *shù* (恕),⁵⁶ the method of *rén* (仁).⁵⁷ And the collective spirit which one expects politics to reflect may be no other but that in whose knowledge exemplary persons become sages—and which, even before Confucian times, here has been known as *tianming* (天命), or Heaven’s Mandate.⁵⁸

Such an attractive—and hopefully not too spurious—similarity between important elements of the Confucian philosophical project and more collective-oriented turns in contemporary liberal politics may reflect a broader perception of the self in contemporary knowledge-based societies. One can *now* say that the political structures of contemporary liberal societies reflect the irresistible

<http://blogs.wsj.com/washwire/2008/03/18/text-of-obamas-speech-a-more-perfect-union>.

⁵⁵ With that speech, the then candidate Barak Obama redefined the directions of the United States presidential elections, capturing and yet challenging the collective mindset after eight years of liberal policies of a very different nature.

⁵⁶ “Tzu-kun asked, ‘Is there a single word which can be a guide to conduct throughout one’s life?’ The Master said, ‘It is perhaps the word “shu”. Do not impose on others what you yourself do not desire.’” CONFUCIUS, ANALECTS 135 (D. C. Lau trans., Penguin Books 1979) [hereinafter ANALECTS (D.C. Lau Translation)].

⁵⁷ “Authoritative persons establish others in seeking to establish themselves and promote others in seeking to get there themselves. Correlating one’s conduct with those near at hand can be said to be the method of becoming an authoritative person.” THE ANALECTS OF CONFUCIUS: A PHILOSOPHICAL TRANSLATION 110 (Roger T. Ames & Henry Rosemont Jr. trans., 1998) [hereinafter *Analects* (Ames and Rosemont Translation)]. What Ames and Rosemont translate by “authoritative personhood” is a specific form of the word *rén* (here represented by Confucius as 仁). *Id.* In D.C. Lau’s translation it appears as “benevolence”. See *supra* note 56, at 85. The Ames and Rosemont translation, however, highlights both the notes of self-cultivation and connectedness that the idea of personhood assumes in the Confucian project. See, e.g., Roger T. Ames, *Confucianism and Deweyan Pragmatism: A Dialogue*, 30:3&4 J. OF CHINESE PHIL. 403, 412 (2003) (“‘Authoritative’ entails the ‘authority’ that a person comes to represent in community by becoming *ren*, embodying in oneself the values and customs of one’s tradition through the performance of ritual propriety (*li*).”). The *èr* (二) element of *rén*, which in English translates as two, would underscore “the Confucian assumption that one cannot become a person by oneself—we are, from our inchoate beginnings, irreducibly social.” *Id.* at 411.

⁵⁸ “Knowing *tianming*, exemplary persons hold it in awe, because its realization is of great import – it is the realization of authoritativeness, of ethico-political order, of sagehood (*Analects* 16.8).” SOR-HOON TAN, CONFUCIAN DEMOCRACY: A DEWEYAN RECONSTRUCTION 144 (Roger T. Ames, ed., 2003).

importance of collective values, of which knowledge is the paramount,⁵⁹ for the pursuit of freedom and the construction of the self. The self of the most persuasive versions of contemporary liberalism is indeed one that does not exist but in the pursuit of an *integral perception of the world around it*.⁶⁰ As noted by an important contemporary liberal,

[I]ndividuals inevitably derive their goals by which they constitute their lives from the stock of social forms available to them, and the feasible variations of it. . . . By being

⁵⁹ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed., 2011) (1980) (assigning central importance to knowledge as a basic, self-evident form of good). Though Finnis, on the one hand, denies the idea that knowledge amounts to a supreme form of good, on the other hand the importance of knowledge for practical reasonableness is evident. *Id.* at 62. And while practical reasonableness structures our pursuit of all other goods, knowledge “makes intelligible . . . any particular instance of the human activity and commitment involved in such pursuit.” *Id.* at 62, 100. For Finnis, the orientation towards the common good is a requirement of practical reasonableness itself, and thus does not seem to be a distinctive trait of the good of knowledge. Yet, this should not prevent us from recognizing that knowledge *is* the collective good par excellence, for its pursuit requires the concurrence of many minds at different times and with different dispositions. The writing of the annals of truth – including truth about the self – is, in effect, a process of collective authorship. Not too distant from this collective perspective, we can think of the Platonic idea of “true wisdom as the highest form of love” – and, indeed, of the philosopher as a *lover* of wisdom. Christopher Gill, *Introduction* to PLATO, *THE SYMPOSIUM*, at xxix (Christopher Gill ed., trans., Penguin Press, 1999) (c. 384-379 B.C.E.).

⁶⁰ Like the Hegelian self, the self of contemporary liberalism is one whose consciousness “can only be attained when men come to see themselves as emanation of universal Geist. For it is only then that they will not see the surrounding universe as limit”. Charles Taylor, *Hegel* 148 (1975). It is not thus in any sense strange, for instance, to pursue justifications for Human Rights discourse in Hegelian ideas of recognition, as Costas Douzinas did in his *Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?*, 29 *J.L. & SOC’Y* 379 (2002) (U.K.). In line with my ideas above, Douzinas notes, drawing on Charles Taylor, that [h]uman history moves towards a ‘total integrity’, in which the opposition between self and other will have been overcome and the external reality which determines us contains nothing alien or hostile. Integrity will be achieved only when our dependence on the external world is dialectically negated, in other words, when humanity is at home in its environment.

Id. at 384. Interestingly, this project of integrity is not divorced from Confucian ideas of harmony, and one can also pursue justifications for Human Rights discourse within Confucian philosophy, as Stephen Angle has recently done. See Angle, *infra* note 103 and accompanying text).

teachers, production workers, drivers, public servants, loyal friends and family people, loyal to their communities, nature loving, and so on, they will be pursuing their own goals, enhancing their own well-being, *and also* serving their communities, and generally living in a morally worthy way”.

The liberal project of the 21st century is thus one in which the Rawlsian, veiled, anti-social conception of the self has been largely superseded. In today’s knowledge-based societies, theories grounded on artifices that prevent the self from knowing or acting upon what’s known are a paradigmatic contradiction. The Rawlsian framework excludes knowledge in a twofold way. On the one hand, it does so procedurally, by positioning the self in an original position that lies behind a veil of ignorance⁶¹—not aware of its social location, natural endowments and conceptions of the good. On the other hand, it excludes knowledge substantively. That is so as the antecedently individuated selves⁶² of the original position, by being deprived of their full belongingness to the collective, moral space of questions,⁶³ can only reach principles of justice compatible with their asocial individualism. Conceptions of the good of more communal nature are thus filtered by the veil ignorance. The political structure one arrives at assigns priority to conceptions of the good of an individualist character, which are the only thought to deserve the sobriquet of rights. Knowledge-related, public goods are just not here.⁶⁴

The political structures of old-fashioned forms of liberalism thus are—or rather claim to be—*neutral* between ideals and conceptions of the good (i.e. between value categories of arguably lesser priority than rights). In this sense, they are based on *anti-perfectionist* doctrines, which exclude the implementation *even of worthy* ideals of the good life.⁶⁵ They command governmental restraint, restricting the pursuit of *valuable* goals and precluding the possibility of governmental action *even* where there would be *sound*

⁶¹ JOHN RAWLS, A THEORY OF JUSTICE 118 (2nd 1999).

⁶² MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 62 (2d ed. 1998).

⁶³ CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY 29 (1989).

⁶⁴ See RAWLS, *supra* note 61, at 332 (“[T]he principles of justice do not permit subsidizing universities and institutes, or opera and the theatre, on the grounds that these institutions are intrinsically valuable, and that those who engage in them are to be supported even at some significant expense to others who do not receive compensating benefits.”).

⁶⁵ See RAZ, *supra* note 49.

reasons for action.⁶⁶ But why? One of the most significant explanations, already hinted at above a number of times, is that doctrines of neutrality are founded in a widespread, if *self-defeating skepticism* about the abilities of the political structures of society to grasp and pursue conceptions of the good life. They were the cornerstone of some of the most prominent liberal political theories of the second half of the last century—both of egalitarian and libertarian persuasions. So strongly their sceptical roots have marked twentieth century liberal theory that William Galston, writing at that time, noted: “[c]ontemporary liberal theory *consists of* the attempt to combine this skepticism about theories of the good life with the belief in philosophically defensible principles that regulate relations among individuals.”⁶⁷

Galston also explains why such an attempt failed—in short, those liberal theories of the past century would themselves “covertly employ theories of the good.”⁶⁸ In effect, they mistakenly assumed that liberal freedoms of an individualistic nature (rights) are more objectively definable than more collective-oriented ones (which would come under the category of goods). As Claudio Michelon notes in his excellent *Being Apart from Reasons*, liberals of which Thomas Nagel is the best example, assumed *rights* to be based on “*common grounds of justification*”⁶⁹ while reserving the *lesser* category of

⁶⁶ *Id.* at 110 (“Principles of restraint restrict the pursuit of good or valuable goals, they exclude action for valid, sound reasons for action, or they enjoin government to preserve a state of affairs which there are good reasons to change.”).

⁶⁷ WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 79 (1991).

⁶⁸ *Id.*

⁶⁹ CLÁUDIO MICHELON, JR., BEING APART FROM REASONS: THE ROLE OF REASONS IN PUBLIC AND PRIVATE MORAL DECISION-MAKING 96 (Francisco Laporta et al. eds., 2006). A note is due here to explain that the idea of “common grounds of justification” does not relate to any communal nature of liberal goods – or, for liberals, rights. Rather, it refers to the assumption that the only goods people would acquiesce to seeing reflected by the political order would be those with a higher degree of objectivity; those which can ground a shared belief on their validity. For last century liberals, however, such goods are limited to those individualistic ones available to the disembedded person of the Rawlsian original position. As Mulhall and Swift note, the communitarian objection in this regard is that

[t]he liberal sees society as nothing more than a cooperative venture for the pursuit of individual advantage, as an essentially private association formed by individuals whose essential interests are defined independently of, and in a sense prior to, the community of which they are members. Conceptions of the good that are more strongly communal in content, that have as part of their very nature an insistence that social bonds are valuable in themselves, over and above their value as means to the attainment of other, merely

“*personal beliefs*” to *goods in general*.⁷⁰ This, if it were the case, could even explain why *rights* could have priority over the *good*. However, as Michelon submits, common grounds of justification are “as likely to ground massacres as personal moral beliefs.”⁷¹ Liberals would have to provide more satisfactory justifications for their absolute priority of the right over the good if such a systematic priority were not to exist as a moral argument in itself. As those justifications do not exist, liberals’ claims to objectivity fail. Their “insulation between reasons for the right and reasons for the good” cannot be sustained. Neither can the agenda for asocial individualism on which their perception of the priority of rights is based.

Neutrality claims of industrial age’s liberal theory could not resist either the communitarian challenge or the challenge of contemporary liberals who understand that the very value of personal autonomy is socially embedded. As we move further into the information age, the challenges to neutrality claims are magnified as the facts are thrown in the face of liberal theories of the past. First, the locus of power is shifting, to a great extent, from the state to non-state actors. Multinational corporations, we know well, now challenge even the most powerful states and try to sow dissent amongst brothers as the seasons of their convenience shift.⁷² The sources thesis in analytical jurisprudence needs to face the challenge of legal pluralism, which is typical of a time of what Julia Black calls decentred regulation⁷³ or, as Neil McCormick would wish it, post-positivism.⁷⁴ Similarly, political theory needs to deal with the exercise of power by actors that try to control the most important, if alternative sources of normativity of our time. Processes of standardization of technologies such as the Internet have a pervasive impact on our lives and attempts by non-state actors to capture the unfolding of such processes are much more serious than

individual, goods, are thereby downgraded.

STEPHAN MULHALL & ADAM SWIFT, *LIBERALS & COMMUNITARIANS* 15 (2nd ed. 1996).

⁷⁰ MICHELON, *supra* note 69, at 97-98.

⁷¹ *Id.* at 99.

⁷² See *infra* note 129 and accompanying text for a discussion of Google’s move of its search engine from Mainland China to Hong Kong after years cooperating with the PRC Government.

⁷³ See Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World*, 54 *CURRENT LEGAL PROOB.* 103 (2002) (U.K.).

⁷⁴ See NEIL MACCORMICK, *INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY* 278-279 (2007).

many such carried out in the houses of parliament.⁷⁵ What is the role of nation-states that intend to preserve their relevance in light of all that?

This is linked to a second, and most important, challenge to liberal neutrality, which is that the nature of the power exerted by non-state actors is shifting as well. Non-state actors of the 21st century are not simply providers of Coca Cola, largely invariable telecommunications services or even of massive electricity grids. They are the typical, fundamental stakeholders of a society that has experienced a paradigmatic shift, towards what Manuel Castells has termed “informationalism.”⁷⁶ They provide us with informational goods that are deeply intertwined with zones of societal happening that, in the past, would cause furore if a state ever attempted to regulate. Think of Facebook, for instance—or, in China, think of RénRén.com or KǎixīnWǎng. These sites provide us with ways of expressing and visualizing our friendships and otherwise affective relationships. Friendship, a fundamental private-yet-public form of good in both the communitarian and the Confucian traditions, is here expressed according to the technological artifacts provided by certain corporations. And so are the spaces between what is public and what is private in these relationships.

Social networking sites reflect, explicitly articulated or embedded in their technological infrastructure, powerful norms based on which people not only express but also constitute or revise their personal relationships. Does it matter if heteronomy reigns over the construction of technologies that increasingly define how people’s relationships are carried out? Should the public worry about how such technologies are designed—in their many visual, architectural, functional dimensions?

For liberalism of the industrial age the answer seems clear. Different forms of friendship reflect but conceptions of the good life that should not be mingled in the basic structure of society.⁷⁷ Politics should be neutral, so to say, with

⁷⁵ See LAURA deNARDIS, *PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE* (2009), for a comprehensive discussion of the political processes surrounding the protocols upon which the Internet functions.

⁷⁶ 1 MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* 1, at (2nd ed. 2009) (16

⁷⁷ For Rawls, the basic structure of society encompasses “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.” RAWLS, *supra* note 61, at 6. The conditions under which this obtains are given by the principles of justice agreed upon in the original position. Given the very limitedly social nature of such principles, more comprehensive moral doctrines within which the value of friendship could be subject to inquiry are ruled out of the basic structure. It is in this sense that friendship appears not as a foundation of the basic structure but as a consequence of our following the rules that ensue from it. *Id.* at 412

regard to friendship.

Contemporary political theory, however, cannot dare to ignore a reality which is so visibly articulated right before its eyes. Power *is* exercised over the ways our constitutive attachments are formed or revised within the boundaries given by technology; people *do* fine-tune the course of their behavior, the thickness of their modes of common expression to account for how different technological configurations affect their possibilities of expanding their personalities in the information environment.⁷⁸ Digital natives⁷⁹ expose their merriness on social networking sites as a token for affection—and yet they hope for possibilities of doing so in a selective manner. They wish that the tools will not spoil their bonds and their lives—and where they cannot wish so they will live if not less rich, at least different social experiences from those they would have lived otherwise. As network effects obtain,⁸⁰ digital natives depend on those tools to express themselves; as the architecture (not just the functions) of those tools prevents migration towards different platforms, digital natives are chained to whatever technological configuration is enabled in the universe inhabited by their friends.

The question, thus, rather than *if* power and friendship should be mingled in the basic structure of society, is one of *who* is going to exercise such power in an unavoidably political information environment—and one of to which extent

(“Thus if those engaged in a system of social cooperation regularly act with evident intention to uphold its just (or fair) rules, bonds of friendship and mutual trust tend to develop among them, thereby holding them ever more securely to the scheme.”). To a more limited expression, not encompassing the range of attachments one understands by friendship, Rawls discusses the value of *fraternity* as providing a justification for the difference principle (and thus for distribution). He remarks: “The ideal of fraternity is sometimes thought to involve ties of sentiment and feeling *which it is unrealistic to expect between members of the wider society.*” *Id.* at 90-91 (emphasis added).

⁷⁸ See Janis L. Goldie, *Virtual Communities and the Social Dimension of Privacy*, 3:1 U. OTTAWA L. & TECH. J. 133, 141-42, 164 (2006) (discussing how virtual community participants use technological possibilities offered by technology to “negotiate the boundary between public and private, and hence, the society and the self. . . . Because virtual communities offer participants more control over their expression and interaction than previously possible, participants are further able to work on the reflexive project of the self in new and important ways.”).

⁷⁹ I borrow the expression from JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* (2008).

⁸⁰ CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 45 (1999) (“[N]etwork effects arise when the value one user places on a good depends on how many other people are using it.”).

we should defer to non-state sources the power of channelling of our affective possibilities.

Now, it is easy to try to make a scapegoat here of a more established liberal value—privacy—and say that if regulation ever ensues in this area, if we are to define how the technological infrastructure should be designed, it would be exclusively because of the dangers of harm to the individual person with regard to her informational privacy. Traditionally, this has been in effect a matter to which the principle of technological neutrality is willing to make a concession. If one reads, for instance, the European Directive on Privacy and Electronic Communications, one will see in its Article 14(1) the prescription that “no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market.”⁸¹ Whatever that means (and we disputed in many ways the idea in Part II above), the exception is, in Article 14(3), that “measures may be adopted to ensure that terminal equipment is constructed in a way that is compatible with the right of users to protect and control the use of their personal data”—though the Commission still needs to be informed of the adoption of such measures (Article 14(2)).⁸² In other words, technological neutrality here makes a concession for the protection of privacy and against harm. Nothing more liberal, perhaps.

The problems appear, however, when we extend such a sort of reasoning to the more relational realm of the information environment—and of social networking websites in particular. It has been increasingly recognized how the traditional contours of informational privacy deal inadequately with the problem of privacy, or the expectation thereof, in public spaces—as many loci in the information environment happen to be.⁸³ The scholarly literature has suggested new ideas such as contextual integrity⁸⁴ and expressive privacy,⁸⁵

⁸¹ Directive 2002/58, of the European Parliament and of the Council of 12 July 2002 on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector (Directive on Privacy and Electronic Communications), 2002 O.J. (L 201) 37, 46.

⁸² *Id.*

⁸³ See, e.g., Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 L. & PHIL. 559 (1998); see also Anne S. Cheung, *Rethinking Public Privacy in the Internet Era: A Study of Virtual Persecution by the Internet Crowd*, 1 J. MEDIA L. 191 (2009).

⁸⁴ See Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); see also HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2009).

⁸⁵ JUDITH DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS AND THE RISE OF TECHNOLOGY*

which reflect the need of providing people with a shelter that enables their communication processes to take place free from social overreaching in those spaces. This encompasses respect for the particular contexts of those processes, the avoidance of profiling and stigmatization, and concerns much more relational ideas of identity and reputation than old conceptions of a right to be let alone. In other words, the protection that should ensue here considers an integral picture of the self that encompasses its constitutive attachments—its relations of affection and friendship.

It is certainly not easy to grasp such a picture. This is actually the greatest challenge of our time. Many, most famously Isaiah Berlin, have derided the enterprise of embracing “positive liberty”⁸⁶—but what alternative is left for us before the change of paradigms in contemporary networked societies?⁸⁷ Recently, the European Union Working Party on the Protection of Individuals with Regard to their Personal Data went to the trouble of trying to define the duties of users of social networking sites.⁸⁸ It did so by relying on those users’ relations of ‘friendship’. On one hand, it understood that users who have many acquaintances with whom they do not hold previous friendships are data controllers and should be thus obliged to abide by data protection principles. On the other hand, it noted that those users who have in their friends list mostly people with whom they do hold previous relations of friendship are covered by the exception for processing of personal data for purely personal or household purposes, and are thus not data controllers within the context of the Directive on Personal Data Protection. It is clear from this that the Working

77 (1997).

⁸⁶ Isaiah Berlin, Two Concepts of Liberty, An Inaugural Lecture Delivered Before the University of Oxford (Oct. 31, 1958), in ISIAH BERLIN & HENRY HARDY, LIBERTY - INCORPORATING ‘FOUR ESSAYS ON LIBERTY’ 166 (2002).

⁸⁷ Joseph Raz, for instance, is ready to defend the idea of positive freedom as a synonym of what he prefers to call the capacity sense of autonomy. This involves “the possession of certain mental and physical abilities and the availability of an adequate range of options” as a requirement for one’s living a life which is “to a considerable extent his own creation.” RAZ, *supra* note 49, at 408. Raz believes all of us owe duties to each other with regard to autonomy that go beyond the traditional idea of the harm principle. Some of these duties, which are deeply related to our point in this chapter, concern the development of “cognitive capacities [required for the conduct of an autonomous life], such as the *power to* absorb, remember and *use information*, reasoning abilities, and the like.” *Id.* (emphasis added). Others relate to the availability of an adequate range of options. All are encompassed by Raz’s capacity sense of autonomy and the conception of the state that ensues from it.

⁸⁸ See Article 29 Data Protection Working Party, *Opinion 5/2009 on Online Social Networking*, WP 163 01189/09/EN (Jun. 12, 2009).

Party found no alternative to regulate ‘privacy’ but to (loosely) interpret the idea of friendship—and consider its different degrees of thickness and obligations corresponding to these. Does this involve any judgement on conceptions of the good life? Of course it does.

All this is not to say that the notion of harm should no longer be a concern. “Freedom from psychological oppression,” a basic Rawlsian liberty required for what he calls “integrity of the person,”⁸⁹ is certainly part of the reason why it is important to care for how technological platforms are designed. What is not possible, though, is to completely disentangle, as Rawls clearly does, “integrity of the person” from “the virtues of integrity.”⁹⁰ The latter, as Rawls sees them, are secondary in relation to his basic liberties and principles of justice. They encompass “truthfulness and sincerity, lucidity and commitment, or, as some say, authenticity”⁹¹—and are not the state’s business. But to which extent should one tolerate technological platforms that bring about exactly the opposite and think of authenticity (or authoritativeness?) as a matter completely foreign to the polis?⁹²

Friendship and knowledge are values that do and should come together in contemporary liberal politics—East and West. They are values towards which states cannot remain neutral. Sad as this may sound, the self that has never been befriended does not matter for contemporary politics—if it has ever mattered for politics at all. Rather, politics can only understand the self by drawing, to different degrees of depth, on the fabric of its constitutive attachments. Friendship is essential for self-knowledge—and it moves from the personal level through to our notions of morality, civility and every conception of the good reflected in the political structure under which we choose to live. Without any inquiry about our constitutive attachments—and actually without *having* such constitutive attachments, our moral and political choices become arbitrary. It is in this sense that Michael Sandel notes that “[f]riendship

⁸⁹ Rawls, *supra* note 61, at 53.

⁹⁰ *Id.* at 455.

⁹¹ *Id.*

⁹² John Finnis’s critique in this regard to the Rawlsian view is very lucid: 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. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 106 (1980). For Finnis, however, it is “unreasonable for anyone to deny that knowledge is (and is to be treated as) a form of excellence, and that error, illusion, muddle, superstition, and ignorance are evils that no one should wish for, or plan for, or encourage in himself or in others” *Id.*

becomes a way of knowing as well as liking.”⁹³

Such is not different in the Confucian project, in which friendship and knowledge are so intrinsically intertwined in the achievement of what Ames and Rosemont translated as “authoritative personhood.”⁹⁴ This appears very prominently in a number of books in the *Analects*. In one of them, which concerns the very idea of “authoritative personhood” (or benevolence), Tseng-Tu closes the conversation by noting: “A gentleman makes friends through being cultivated, but look for friends in support of benevolence.”⁹⁵ Book I itself is famously opened by Confucius in these terms: “Is it not a pleasure, having learned something, to try it out at due intervals? Is it not a joy to have friends come from afar?”⁹⁶ Both excerpts convey how friendship at the same time supports and is enticed by the move towards authoritativeness—or sagehood.

Ideas such as these are not, as noted at the outset of this chapter, foreign to contemporary liberalism and its perception of autonomy as a socially embedded concept. Judith deCew make such point about autonomy in the context of expressive privacy. “Autonomy,” she says, “is required for people to be self-expressive. . . . But the point of such autonomy, understood as successful control over one’s life and values, is not to disengage one from relations but to enhance one’s ability to form new and deeper relationships.”⁹⁷ Expressive privacy is founded upon such enlarged but largely persuasive contemporary understanding of autonomy without which the authorship of our lives in contemporary societies is not possible. In Ferdinand Schoeman’s words, quoted by deCew, privacy is here “an important value, then, ‘largely because of how it facilitates associations and relational ties with others, not independence from people.’”⁹⁸ As deCew explains: “[W]e are free from the

⁹³ SANDEL, *supra* note 62, at 181. In Sandel’s view, the lack of constitutive attachments prevents one from learning about herself; the lack of alterity, of otherness, impedes reflexivity – and so does one’s inability to situate her practical choices across a spectrum of conceptions of the good that she continuously define and revise according to the thickness of her relationships with others. *Id.* at , 178-183. For Sandel, choices of ends which are not grounded on “a relative fixity of character” within the bounds of a commonality of constitutive attachments turn out to be arbitrary. *Id.* at 180. And so does the self whose every attempt at reflexivity is defeated by the lack of alterity.

⁹⁴ See *Analects* (Ames and Rosemont Translation), *supra* note 57.

⁹⁵ ANALECTS (D.C. Lau Translation), *supra* note 56 at 117.

⁹⁶ *Id.* at 59.

⁹⁷ DECEW, *supra* note 86, at 69.

⁹⁸ FERDINAND SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* (1992) *cited in* DECEW, *supra* note 86, at 69.

power of the state or society not when we act without reference to the attitudes of others, as Mill advocated, but when we have diverse social groups available to which we can adhere and contribute, and from which we can gain support.”⁹⁹

This is a powerful point. The purpose of such a ‘positive’ idea of liberty reflected in expressive privacy is not an idea of overreaching by the state or society. Rather, it is the idea of ensuring that individuals will have a variety of reasons for action to choose amongst—and will be able to master the channels that constrain the making of such choices. This is the essence of the idea of autonomy as supported by contemporary liberal theory, represented at its best by the thoughts of Joseph Raz.¹⁰⁰ And the ability to form, revise and draw upon our constitutive bonds is, perhaps paradoxically, very strong a part of what makes us autonomous. It should not be strange to the idea of liberalism that the state has a concern with laying out the conditions, including the technological ones in their necessary degree of depth, that enable us to author our lives and interweave it in a larger, and livelier, societal tapestry.¹⁰¹

Stephen Angle pursued similar avenues recently in explaining how human rights are reconcilable with the Confucian idea of harmony (*hé*和).¹⁰² There are three aspects I would like to briefly highlight in this regard that I believe important to our discussion. These are that harmony presupposes diversity and proportionality, that harmony implies an idea of relatedness and constitutive attachment,—and, finally, that harmony demands a certain propriety of rites which requires regulation. These three aspects are perhaps uncannily similar to the point we have just made above about autonomy. First, as autonomy, harmony presupposes diversity and proportionality amongst albeit incommensurable values. Angle explains that harmony, not uniformity, is a guideline of Confucian thought.¹⁰³ Harmony allows for and demands a variety of opinions and criticisms to be expressed and presupposes an idea of balance and proportionality in the blending of these.¹⁰⁴ Unlike neutrality, which tends

⁹⁹ *Id.* at 71.

¹⁰⁰ See generally RAZ, *supra* note 49.

¹⁰¹ I have enlarged on this point in Marcelo Thompson, *In Search of Alterity: On Google, Neutrality, and Otherness*, 14 TUL. J. TECH. & INTELL. PROP. 137 (2011).

¹⁰² See Stephen C. Angle, *Human Rights and Harmony*, 30 HUM. RTS. Q. 76 (2008).

¹⁰³ *Id.* at 79.

¹⁰⁴ “The proportionate blending of the five flavo[u]rs and the harmonizing of the five tones by the former kings was done for the purpose of setting their minds in balance and bringing perfection to their governance.” ZUO ZHUAN, Zhao 20 (522 BC), *translated in* Scott Bradley Cook, *Unity and Diversity in Musical Thought of Warring States China* 71 (1985)

to a uniform negative constancy, harmony is dynamic in the pursuit of diversity—which reminds us of the foundational concept for contemporary liberalism that there is a possibility of not only adopting, but also revising, one’s life plans.¹⁰⁵

Second, harmony and contemporary conceptions of autonomy are based on a requirement of *care*. As Angle explains,

[c]aring is basic to Confucianism and is linked with harmony almost from the beginning. Harmony, in a Chinese context at least, is not about an abstract balance of inanimate objects but about the interactions of life-valuing, generative, caring creatures—including the interactions of such creatures with their broader, inanimate, or at least nonsapient, environment.¹⁰⁶

For Angle, this type of care upon which the idea of harmony relies is not incompatible with the moral foundations—and indeed the requirements—of international human rights.¹⁰⁷ Drawing on Michael Slote’s moral philosophy,¹⁰⁸ Angle advances an idea of a non-aggregative¹⁰⁹ balance

(unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library), *cited in* Angle, *supra* note 103, at 86.

¹⁰⁵ See, e.g., RAZ, *supra* note 49, at 370-71: [T]he ideal of personal autonomy is not to be identified with the idea of giving one’s life a unity. An autonomous person’s well-being consists in the successful pursuits of self-chosen goals and relationships. . . . It does not require an attempt to impose any special unity to one’s life. The autonomous life may consist of diverse and heterogeneous pursuits. And a person who frequently changes his tastes can be as autonomous as one who never shakes of his adolescent preferences. See also WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 164 (1991):

The idea of seeing the value of our activities is very important. It’s crucial to what Rawls calls self-respect, the ‘sense that one’s plan of life is worth carrying out’. Self-respect, as Rawls says, isn’t so much a part of any rational plan of life, but rather a precondition of it. If we thought that our goals in life weren’t worth pursuing, then there would be not point to our activities. To ensure that we have this self-respect, we need freedom to examine our beliefs, to confirm their worth.

(citation omitted).

¹⁰⁶ Angle, *supra* note 103, at 85.

¹⁰⁷ Id.

¹⁰⁸ See MICHAEL SLOTE, MORALS FROM MOTIVES 66-67 (2001).

¹⁰⁹ A non-aggregative balance is one that goes beyond merely utilitarian calculus – that is, one which is not satisfied with the idea of society being generally better-off (i.e. better

between different kinds of concern that an individual may have with regard to others. These kinds of concern reflect the different degrees of depth of our constitutive attachments—with intimates, complete strangers or any grade in between—and even good individuals will strike a balance between these concerns in different ways.¹¹⁰ As Angle puts, “[e]xactly how we balance will depend on our sense of integrity—that is . . . what gives our life a feeling of integrity or wholeness.”¹¹¹ If harmony is truly in place, however, and if an individual is authoring his own life with integrity in the pursuit of a balance between the different degrees of care that his personal attachments require, it is unlikely that violations to human rights will ensue. And as much as harmony and human rights are reconcilable around this understanding of care, so are harmony and autonomy in a contemporary liberal perspective.

I have just referred above to Joseph Raz’s understanding on the positive duties we owe each other with regard to the development of the capacities necessary for authoring our lives.¹¹² More recently, Yochai Benkler highlighted the need for a concern with the “effects that law can have through the way it structures the relationships among people with regard to the information environment they occupy.”¹¹³ Autonomy, knowledge and our constitutive attachments stand shoulder to shoulder in Benkler’s political project. This is because, for Benkler, the possibility of self-authorship in contemporary societies hinge significantly upon the new modalities of *collaboration* and *social production* that characterize the information economy—and that are defined by the structure of the information environment.¹¹⁴ To the extent that these new modalities are hindered, so are we.

The third aspect is related to the second. Autonomy requires regulation, some form of normative orientation towards its valuable dimensions. As Joseph Raz says, autonomy is only valuable if it is used towards the good.¹¹⁵

off in the aggregate) at significant expense to the lives of a limited number of individuals or groups.

¹¹⁰ Angle, *supra* note 103, at 84.

¹¹¹ *Id.*

¹¹² See *supra* note 88 and accompanying text.

¹¹³ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 151 (2006).

¹¹⁴ *Id.* at 146 (“The structure of our information environment is *constitutive* of our autonomy, not only functionally significant to it.”).

¹¹⁵ RAZ, *supra* note 494 at 417 (“[T]he autonomy principle is a perfectionist principle. Autonomous life is valuable only if it is spent in the pursuit of acceptable and valuable

THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

B.U. J. SCI. & TECH. L.

[Vol. 18:

There is here a dimension of cultivation, of propriety that is not foreign at all to the Chinese conception of harmony—rather, is tantamount to it, as Confucius tells us:

Of the things brought about by the rites, harmony is the most valuable. Of the ways of the Former Kings, this is the most beautiful, and is followed alike in matters great and small, yet this will not always work: to aim always at harmony without regulating it by the rites simply because one knows only about harmony will not, in fact, work.¹¹⁶

Contemporary states, thus, whether in Western or Eastern thought, cannot thus embrace neutrality if they are to widen our avenues along the way. As D.C. Lau writes in his Appendixes to the Mencius, “The Way . . . is not morally neutral. It is basic moral principle.”¹¹⁷ Such is the way of the information environment and the liberal principles of the times we live in—where knowledge, information and our relational bonds, our constitutive attachments come together so visibly articulated as very central elements of any life worth being lived. Learning (*xué* 學) and thinking (*sī* 思) are thus important here not only as a way of cultivation of an individualist self in areas that are not the state’s business. Ensuring the proper design of the semiotic avenues of the information environment is part of the very first thing that rulers should do when they take the reins of government—“the proper establishment [or rectification] of names” (*zhèngmíng* 正名),¹¹⁸ for when names are not correct “speech . . . will not flow properly . . . affairs will not culminate in success . . . rites and music will not flourish . . . punishments will not fit the

projects and relationships. The autonomy principle permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones.”).

¹¹⁶ ANALECTS (D.C. Lau Translation), at page 7.

¹¹⁷ MENCIOUS 210 (D.C. Lau trans., Penguin Books rev. ed. 2004) (1970) [hereinafter MENCIOUS (D.C. Lau Translation)] (translating the work of the 4th century B.C.E. Chinese philosopher).

¹¹⁸ I thank Mary Rundle for using the expression in a OECD Working Paper we co-authored – and which provided further inspiration for this paper. See Mary Rundle et al., *At a Crossroads: “Personhood” and Digital Identity in the Information Society 3* (OECD - Directorate for Science, Technology and Industry, Working Paper DSTI/DOC(2007)7), available *at* [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/DOC\(2007\)7&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/DOC(2007)7&docLanguage=En).

crime . . . the common people will not know where to put hands and feet.”¹¹⁹

The forms through which the proper design of the information environment can be ensured are manifold, as much as the features of such design may be. Neutrality, though, ignores political concern with propriety at any degree and thus, paradoxically, the possibility of protecting personal autonomy in such a space of social connectedness. It ignores, thus, the very values without which the existence of the information environment is not even possible.

Technological artifacts determine how increasingly important parts of our lives unfold; they embed important societal and political value-choices. The challenges to liberal theory of the past century are many and various and spring from the different technological configurations of the information environment, in all its dimensions. Beyond examples of social networking sites seen above, one can think of the ways in which Search Engines determine the relevance and morality of what we can and cannot access¹²⁰—and thus have a fundamental, pervasive impact on individual and collective practical reason; of how socially managed Encyclopedias have their own political processes, rules with fractal levels of detail and real edit wars in the writing of entries of much greater societal reach and consequences than Encyclopaedias of the past have ever had.

One may still insist that all this, if it does invite State action, will do for the potential of harms to personal autonomy that may ensue from the design of such technologies. Such an answer, however, will only reveal how far liberalism has evolved in its understandings about the range of actions that are capable of restricting the number and variety of reasons available for one to author her own life—of restricting autonomy, thus. Conversely, it also reveals how more tolerant contemporary liberalism has grown about the scope of reasons that may be reflected upon by the political structure of Western societies, beyond any previous orientations of neutrality and insulation of the right from the good.

¹¹⁹ Tan, *supra* note 58, at 71 (translating *Analects* 13.3).

¹²⁰ There is a growing literature on the political and otherwise normative implications of search engines. See, e.g., Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169 (2000). See also Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 401 (Berin Szoka & Adam Marcus eds., 2010), available at http://nextdigitaldecade.com/ndd_book.pdf; Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149 (2008); James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1 (2007). But see Thompson, *supra* note 102 (suggesting a broader perspective for these approaches).

The image of the person that springs from such a wider understanding of personal autonomy is certainly not that of an atomistic person who authors its life unfettered by any intervention of the state unless destined to preserve individualistic conceptions of liberty and justice. Rather, it is the image of a person enveloped by the information environment, who expands himself and his spheres of relationship through the network of networks, who may have its possibilities of authoring his life-plan, individually or in common with others, affected by technological interventions of many kinds, in very different areas and springing from the most diversified sources of power and normativity.

In theory, then, liberalism has evolved in the information age and redeemed the West from a past of exclusion of ideals and conceptions of the good. In thought at least, neutrality has been superseded as a core doctrine of contemporary political theory. In practice, however, neutrality has gained unexplainable force amongst the central regulatory principles of the information age—a realm whose properties, curiously, render neutrality most unpersuasive. The principle of technological neutrality has unfolded, in effect, completely disconnected from any normative theorization, and, as is briefly explained in the next, concluding section, it now attempts to impinge upon the value systems of Eastern societies. Throughout this section, we have noted that the way to a more perfect union, to authoritative forms of personhood, to benevolence, to humanity, or however we wish to call the bonds of self-cultivation that link us together, certainly does not encompass neutrality towards the most defining aspects of our age. And yet, at the practical level, once again¹²¹ we witness the attempted exportation of practically and theoretically failed institutions to societies that not only would be inevitably better off without these,¹²² but also, and mostly, have the core foundations of their value systems violated by such an attempt.

The irony here is that contemporary liberalism has also been so violated.

¹²¹ See, e.g., William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 136 (1997) (arguing that the U.S. intellectual property approach towards China “has failed to take adequate account of the legacy of China’s past, the impact of her current economic, political, and social circumstances, or the ways in which a greater respect for this and other important forms of legality might be engendered.”).

¹²² See generally HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2003) (providing an in-depth historical discussion whose content the title renders most evident).

IV. THE NEUTRALIZATION OF HARMONY: CONCLUSION

In April 21, 2006, in his first travel to the United States as the President of the People's Republic of China, Hu Jintao explained to a group of American students assembled at Yale University the high place held by harmony in the Chinese value-system while also highlighting the prospects of any act that goes against China's project of building a harmonious society. In Hu's words:

"The Chinese civilization has always given prominence to social harmony, unity and mutual assistance. Back in the early days of the Chinese nation, the Chinese already advocated that "harmony is most valuable." They strove for harmony between man and nature, among people and between man's body and soul, and yearned for an ideal society where "everyone loves everyone else, everyone is equal, and the whole world is one community." Today, China is endeavoring to build a harmonious society. . . . Any act that promotes ethnic harmony and national unity will receive the warm welcome and support of the Chinese people. On the other hand, any act that undermines China's ethnic harmony and national unity will meet their strong opposition and resistance."¹²³

China's project of development is, of course, not dissociated from its own historical and evaluative moment. As President Hu also stressed, "China has adopted a new concept of development in line with its national conditions and the requirement of the times. That is, to pursue a scientific outlook on development that makes economic and social development people-oriented, comprehensive, balanced and sustainable."¹²⁴ Such orientation towards people with which both the ideas of balance and harmony are imbued is very different indeed from the ideal of a technology-neutral people-centric society affirmed in Geneva.¹²⁵ The paths seem irreconcilable. Harmony does not fit together with any flavor of neutrality—and one wonders whether people centricity itself does. The path pursued by China is thus one that has as a principle the political

¹²³ Hu Jintao, President of the People's Republic of China, Speech by Chinese President Hu Jintao at Yale University (Apr. 20, 2006), *available at* <http://www.fmprc.gov.cn/eng/zxxx/t259224.htm>.

¹²⁴ *Id.*

¹²⁵ *See* World Summit on the Information Society, Geneva Declaration of Principles, *supra* note 11, at 1, 5, and accompanying text.

enframing of scientific endeavour rather than an affirmation of technological indulgence by the political.¹²⁶

Of course, to say this is not to proclaim the infallibility of China's model or to endorse the permanence of its current contours. The Chinese government itself, I would suspect, would not do so. As Daniel A. Bell notes, "[i]n China . . . the political future is wide open. According to the formulation of the Chinese Communist Party (CCP), the current system is the 'primary stage of socialism,'" meaning that it's a transitional phase to a higher and superior form of socialism."¹²⁷ And yet, whatever defects China's current policies for the Internet may have, one cannot do away with China's possibilities of harmonizing the architecture of the Internet with the Chinese value-system and political institutions without doing away with the latter altogether. The imposition of a principle of neutrality to China, thus, throws out the baby with the bath water. It is a recipe for normative annihilation that contradicts the tolerance and pluralism that truly liberal values require.

However, both the U.S. government and its foremost, state-like Internet company, —Google, have been pulling the international human rights and trade levers to pursue the neutralization of China's technological policies.¹²⁸

¹²⁶ See, e.g., YONGNIAN ZHENG, TECHNOLOGICAL EMPOWERMENT: THE INTERNET, STATE, AND SOCIETY IN CHINA (2008) (explaining how technological development in China is part of a longstanding project of nation-state building – which, against common wisdom, is also highly determined by the participation of social movements).

¹²⁷ DANIEL A. BELL, CHINA'S NEW CONFUCIANISM: POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY 3 (2008).

¹²⁸ This not to mention Google's recent altercation with Beijing and sudden move of its search engine from the Mainland China to Hong Kong, which mounted a challenge not only to the PRC legal system but also to the very idea of "One Country, Two Systems" that preside over the relations between Hong Kong and the Mainland. Such a challenge did not take off thanks in part to the fact that mainlanders, rather than seeking alternative routes to access Google's search services, continued to further their adoption of Baidu, the leading search engine in China. See *China's Baidu quarterly profit up 95 percent*, ASSOCIATED PRESS (JULY 25, 2011, 11:47 PM), reprinted in YAHOO! FINANCE25http://finance.yahoo.com/news/Chinas-Baidu-quarterly-profit-apf-3369068852.html?cmtnav=/mwphucmtgetnojspage/headcontent/main/3369068852/reply_count/1/0 ("Baidu's market share has risen to 75.9 percent from 64 percent in the first quarter of last year before Google's closure, according to Analysys International, a research firm in Beijing. Google is still China's second-most popular search engine but its market share has declined from 30.9 percent to 18.9 percent."). For an analysis of Google's political stances, see Mark Landler, *Google Searches for a Foreign Policy*, N.Y. TIMES, Mar. 28, 2010, at WK4, available at <http://www.nytimes.com/2010/03/28/weekinreview/28landler.html>.

THIS VERSION DOES NOT CONTAIN PARAGRAPH/PAGE REFERENCES.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE VERSIONS FOR
PROPER CITATION INFORMATION.

2012]

THE NEUTRALIZATION OF HARMONY

The beliefs underpinning this movement are well described by Wu and Goldsmith. They concern an intent to export freedom expression absolutes in ways that are indeed adverse to ideals of tolerance and pluralism. Noting the potential harms of First Amendment law to countries that do not embrace the same values, the authors say:

“This point is invariably missed by the critics of government control over the Net, who believe that the U.S. First Amendment reflects universal values and is somehow written into the architecture of the Internet. But the First Amendment does not reflect universal values; to the contrary, no other nation embraces these values, and they are certainly not written into the Internet’s architecture.”¹²⁹

Ironically, years after the publication of Wu’s and Goldsmith’s influential work, the beliefs the authors referred to seem to persist unabated. As suggested by Google in two recent public policy documents:

“Governments that *build censorship into networks* change the architecture and nature of the Internet in ways that damage trade and innovation. . . . Trade officials and policymakers should be deeply concerned about the impact of Internet information restrictions on economic growth and trade interests. And, they should be ready to use current trade rules and negotiating forums to reduce this threat.”¹³⁰

What should we understand by censorship? “Anything that differs from the

¹²⁹ JACK GOLDSMITH & TIM YU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 156-57 (2006).

¹³⁰ Google, *Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information*, 10-11, <http://www.ntia.doc.gov/files/ntia/comments/100921457-0457-01/attachments/TradeFreeFlowofInformationWhitePaper.pdf> (last visited Jan. 26, 2012) (comments submitted in response to Global Free Flow of Information on the Internet, 75 Fed. Reg. 60068 (Sept. 29, 2010)); Google, *Comments to the Department of Commerce: Notice of Inquiry on the Global Free Flow of Information on the Internet Docket No. 100921457-0457-01*, 9, <http://www.ntia.doc.gov/files/ntia/comments/100921457-0457-01/attachments/CommerceFreeExpressionNOI.pdf> (last visited Jan. 26, 2012) (comments submitted in response to Global Free Flow of Information on the Internet, 75 Fed. Reg. 60068 (Sept. 29, 2010)) (emphasis added).

First Amendment and its entrenchment in the network architecture” would be as inoperable an answer as to define censorship as “the opposite of neutrality.” Both render it impossible that we even try to earnestly engage with the question. For how can countries come together to define the acceptable boundaries of speech if the starting point is that no such boundaries should exist? In effect, the idea that the Internet should embed no defining characteristic but a morality of absolute freedom is, borrowing Charles Taylor’s words, a “dream . . . doomed to self-destruction.”¹³¹

Technological neutrality, however, reflects a morality of precisely such a sort, by preventing the state from specifically engaging with the defining properties of technological artifacts—and thus by deferring to however socially defective reasons technological designers may embrace. It would prevent China from making particular choices with regard to its territorial Internet, thus hindering China’s aspiration of promoting the pursuit of a people-oriented scientific outlook—and overall undermining China’s nation-building project.

In the realm of trade, technological neutrality would mean that China cannot restrict the trade of online goods and services in ways that it does not restrict the trade of offline ones. The principle in this sense resembles what in Part I I had called *the non-discrimination principle*. But here as well the idea of non-discrimination invites further definition of its meaning. That is, how should China go about in avoiding discrimination? How far can it go in describing the properties of technological artifacts?¹³² It is indeed only in a more abstract form, as a general non-discrimination ideal that technological neutrality appears in the international trade system—or, better, as the *attempt* to impose such an ideal, for technological neutrality is yet to be recognized in a definite

¹³¹ “Now this dream of absolute freedom is impossible; and we have seen that the root reason is this, that it does not recognize an independent significant reality outside of its own will, and hence is doomed to self-destruction.” CHARLES TAYLOR, *HEGEL* 185 (1977).

¹³² A specific agreement of the world trade system – the Agreement on Technical Barriers to Trade – could provide us with some clues. In a wording in all similar to what in Part I we had called *the vagueness principle*, Article 2.8 of the Agreement commands: “Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance *rather than design or descriptive characteristics*.” Agreement on Technical Barriers to Trade art. 2.8, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT] (emphasis added). Notice that what the TBT requires here is that technical regulations be framed only in terms of what technological artifacts perform – i.e. their functions – instead of describing the characteristics of technological artifacts themselves. However, while we can understand the vagueness principle as the more precise formulation of technological neutrality, in the context of the world trade system technological neutrality has appeared so far in a more abstract form, simply as a general non-discrimination rule.

way by the Dispute Settlement Body (DSB) of the World Trade Organization.

In *China—Audiovisual*, the United States pushed forward the proposition that the General Agreement on Trade in Services¹³³ “does not contain any provisions that distinguish between the different technological means through which a service may be supplied.”¹³⁴ At stake would be China’s possibilities of establishing restrictions for the distribution of sound recordings through electronic means. In its Schedule of Commitments under the GATS, China had committed to liberalize “[V]ideos[,] distribution services” and “[s]ound recording distribution services.”¹³⁵ The question would thus be whether those commitments should be read as also encompassing the performance of distribution services through electronic means. China sought to make the point that the word “distribution” should be restricted to physical means—which would thus enable it to establish differentiated rules for electronic services.

The Panel¹³⁶ concluded that “electronic distribution of sound recordings was technically feasible and a commercial reality as early as 1998 and, in any case, before China’s accession to the WTO in December 2001.”¹³⁷ This, together with a number of other reasons related to the context of China’s commitments and object and purpose¹³⁸ of the GATS,¹³⁹ led the Panel to conclude that

¹³³ See General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

¹³⁴ Appellate Body Report, *China-Measures Affecting Trading Rights and Distributional Services for Certain Publications and Audiovisual Products*, ¶ 83, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China-Audiovisual Appellate Body Report*], (referring to the United States’ argument before the Panel).

¹³⁵ The People’s Republic of China, Schedule of Specific Commitments, Sector 2.D, Feb. 14, 2002, GATS/SC/135.

¹³⁶ References to the Panel Report hereinafter imply that this has not been modified by the Appellate Body Report in the specific aspects referred to.

¹³⁷ Panel Report, *China-Measures Affecting Trading Rights and Distributional Services for Certain Publications and Audiovisual Products*, WT/DS363/R (Aug. 12, 2009) [hereinafter *China-Audiovisual Panel Report*].

¹³⁸ These interpretive criteria are laid out in Article 31 of the Vienna Convention. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

¹³⁹ From a genuinely contextual perspective there was nothing absurd in China’s claims. Besides a number of other issues that were raised by China in its defence, one can see that, in 1996, shortly after the GATS was adopted (in 1994), the Diplomatic Conference that adopted the World Intellectual Property Organization Copyright Treaty also agreed on a number of interpretive Statements on that treaty, amongst which was one concerning the so-called right of distribution: “Agreed statements concerning Articles 6 and 7: As used in these Articles, the expressions “copies” and “original and copies,” being subject to the *right*

electronic distribution services could be read as part of China's commitment.¹⁴⁰ In understanding that China's GATS schedule specifically encompasses the electronic distribution of audiovisual products, however, the Panel did not need to address the issue of whether, if China's original commitments did not happen to cover the electronic equivalent of a service committed for performance through tangible means, a principle of technological neutrality would demand extension of the same commitments by analogy.

China's resistance to technological neutrality in the case was grounded, on the one hand, on the lack of final recognition of the principle by the DSB and, on the other hand, on the very pertinent argument that there are important differences between what it called "network music services" and the "sound recording distribution" services it had originally committed in its Schedule.¹⁴¹ China suggested a number of factors for interpreting these differences, which the Panel understood as of limited value since no source of authority was provided for them by China and also because they would not necessarily lead to unambiguous results. But neither did the Panel agree on the matter of technological neutrality. Rather, it observed:

"We note . . . that in interpreting China's commitment on "sound recording distribution services", we have no need to

of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects" (emphasis added). This argument was not examined by the Panel that heard the case in the WTO nor the Appellate Body. See WIPO Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf [hereinafter WCT]; see also Agreed Statements Concerning the WIPO Copyright Treaty, statement concerning art. 6, Dec. 20, 1996, WIPO Doc. CRNR/DC/96 (published Dec. 23, 1996), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

¹⁴⁰ Such was a rather dynamic understanding of a term – distribution – that, with regard to the same type of intellectual works, the parties to the WIPO Copyright Treaty, a somewhat established international framework. See Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 CHI. J. INT'L L. 263, 271-73 (2007) (noting WTO's DSB overall tendency to give a dynamic interpretation to members' schedules of commitments under GATS). The WCT currently counts 89 contracting parties, including the United States and China. See *Contracting Parties: WIPO Copyright Treaty (Total Contracting Parties : 89)*, WIPO, http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=16 (last visited Feb. 11, 2012).

¹⁴¹ *China-Audiovisual Panel Report*, *supra* note 135, at 376.

2012] *THE NEUTRALIZATION OF HARMONY*

invoke a principle of technological neutrality. We have already found that the core meaning of China’s commitment on these services includes the distribution of audio content on non-physical media.”¹⁴²

The development of an always-on, mobile Internet, however, in which services are rendered over the cloud and do not encompass the distribution of copies, will give China’s arguments on “network music services” renewed importance. Together with other issues concerning the regulation of Internet services in rubrics that cannot be precisely encompassed under China’s GATS commitments, the transformation of files and copies into overall “experiences” will at some point prompt the WTO to specifically consider the problem of technological neutrality as raised in *China–Audiovisual*—in particular given the U.S. and the E.U. keenness on moving this agenda forward.

China must pitch its defence higher. It must establish that the recognition of technological neutrality by the WTO would be tantamount to recognizing that virtually the entirety of China’s regulatory framework for the Internet infringes China’s commitments under the GATS, that China’s nation-building project itself does so. Internet-related technologies pose challenges to the Chinese regime that are paradigmatically different from those posed by earlier technological kinds. China needs to address these challenges in accordance with its system of values. It needs to harmonize the design of technological artifacts with those reasons that are inherent to its political system, with the basic structure of its society. Requiring China to ground all of its Internet-specific regulations on public morals or public order defences¹⁴³ would transform China’s political system as a whole in an exception. China could not

¹⁴² *Id.*

¹⁴³ Article XIV(a) of the GATS defines that measures necessary for the protection of public morals or maintenance of public order are exceptions to the obligations contained in the Agreement. Though an earlier case saw the United States having its exceptions to some extent legitimized by the DSB, the same did not happen in *China–Audiovisual*, since the Panel did not find that China’s measures were even necessary and thus did not engage in the evaluation of the substantive merits of China’s public morals and public order defences. At stake here was the interpretation of Article XX(a) of the General Agreement on Tariffs and Trade (GATT), which however has an identical wording to Article XIV(a) of the GATS. *See* General Agreement on Tariffs and Trade 1994, art. XX(a), Apr. 15, 1994, 1867 U.N.T.S. 187; *See also* Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 296-299, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *United States - Gambling*] for the earlier United States case concerning public morals and public order exceptions.

have committed to such an enterprise. To read it as having done so would be an act of political violence.

But, as the earlier sections of this paper have argued, that would be an act of political violence not only against the Chinese regime. In a world of technological erring, liberal states themselves would be precluded from ensuring that the technological infrastructure enables the pursuit of valuable options. They would not be able to rectify misspoken words in the informational foundations upon which people build their lives. Some may welcome such a sight. Some may wish to uproot liberalism from the more fecund soils on which it has finally settled. Amongst these, the most superficial may think that any project of political correctness is inherently adverse to the very foundations of Western philosophy. But if we go back to the sources, we see that “[t]o Socrates, as to Confucius, correct language, the rectification of names, was the prerequisite for correct living and even efficient government.”¹⁴⁴ As Socrates remarked in *Phaedo*, “You may be sure, dear Crito, that inaccurate language is not only in itself a mistake: it implants evil in men’s souls.”¹⁴⁵

In a recent article, Anupam Chander defended forbearance and the pursuit of agreed international standards as forms of *harmonization* necessary for the flourishing of international trade though what he called the “electronic silk road.”¹⁴⁶ For Chander, harmonization is necessary as a form of freeing trade in the information environment from a threat of Balkanization—“the creation of borders in cyberspace, thereby risking the advantages of global information and services sharing.”¹⁴⁷ In his words: [C]ourts have largely avoided provincialism, favoring instead due consideration of foreign and international interests. This willingness to forbear in the interests of comity and the international order will prove essential with respect to services as well. The risks of Balkanization, the incursions upon foreign sovereignty, and the costs of compliance with multifarious and potentially conflicting municipal laws all counsel restraint.¹⁴⁸

While restraint is certainly also an important virtue within the Confucian

¹⁴⁴ W. K. C. GUTHRIE, *THE SOPHISTS* 276 (1971) *quoted in* Warren E. Steinkraus, *Socrates, Confucius, and the Rectification of Names*, 30 *PHIL. E. & W.* 261, 262 (1980).

¹⁴⁵ PLATO, *PHAEDO* 115e (R.S. Bluck trans.) *quoted in* W. K. C. GUTHRIE, *SOCRATES* 168 n.1 (1971).

¹⁴⁶ Chander, *supra* note 8, at 281.

¹⁴⁷ *Id.* at 317.

¹⁴⁸ *Id.* at 321.

philosophical project,¹⁴⁹ it is so in the sense of self-cultivation, of regulation by the rites.¹⁵⁰ It is restraint in pursuit of authoritativeness, benevolence—shù (恕) as the method of rén (仁). The modality of restraint that Chander advocates seems more conducive to *neutrality* than to *harmony*. It is no surprise, thus, that the author also advocates technological neutrality as a value that should guide the development of international trade.¹⁵¹

More than a principle of restraint, however, technological neutrality is a principle of deference. It asks not only that states seek to regulate their own conduct in accordance with rules of propriety and in respect to rights and principles that the international community strives to agree upon. It rather assumes the absolute fallibility of international institutions, their incapacity to come together and solve important normative perplexities concerning some of the greatest problems of our time. In doing so, technological neutrality subjects the international community to the will of those states and corporations who hold the technological stakes of an age. Applied to the reality of the information environment, it takes it to be a principle that we should ignore a change of paradigms that has completely redefined the world we now live in.¹⁵² But how can we? How can we assume that those who blow the conches through which the notes of our future resound, who write the formulae that determine the constitution of our societies should do so without any normative boundaries specific to their endeavours? Above all, how can we reconcile liberty and harmony through an ideal of political annihilation? We must do better in finding our Way.

¹⁴⁹ “One should keep glib talkers (*ningren* 佞人) at a distance, for ‘clever words undermine excellence,’ and ‘glib-tongued talkers bring down states and families’ (*Analects* 15.11, 15.27, 17.18).” TAN, *supra* note 58, at 179.

¹⁵⁰ “The Master said, ‘Do not look unless it is in accordance with the rites; do not listen unless it is in accordance with the rites; do not speak unless it is in accordance with the rites; do not move unless it is in accordance with the rites.’” ANALECTS (D.C. Lau Translation), at 112.

¹⁵¹ Chander, *supra* note 8, at 301-04.

¹⁵² Even if the idea of non-discrimination meant that we must assimilate the effects of Internet-related technologies to those of technologies conceived within an older social paradigm, that would still leave unanswered the question of why we should ignore the specific challenges and opportunities that the information environment presents us with; of why we should not pursue an ideal of harmony between these and the broader social values that we care about – of course not anew, but with a fresh heart.