KEEPING GOOGLE GOOD: REMARKS ON PRIVACY REGULATION AND FREE SPEECH

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Some argue that a cost-benefit analysis is useful when evaluating privacy concerns.[1] But in recent arguments, Google has maintained that a cost-benefit analysis along these lines may be unconstitutional.[2] In a recently published white paper commissioned by Google, Eugene Volokh and Donald Falk suggest that everything the company does—from search to geolocational tracking—is a form of speech, fully protected by the First Amendment and therefore immune from regulation.

I would like to suggest that this dramatic First Amendment claim is unfortunate and should be challenged. Regulating Google is important in some circumstances because it creates benefits. Google's informal corporate motto is "Don't be evil."[3] Regulating Google—not only in the realm of privacy, but also with regard to antitrust regulation—prevents Google from becoming evil and losing that core sense of corporate responsibility. Eric Schmidt controls Google today, but imagine if Google were controlled instead by Kim Jong-un. An "evil" Google, armed with the vast data it controls, could pose grave threats to constitutional values like privacy and free speech and could generally threaten innovation around the world. Therefore, I would like to argue that Google's strong First Amendment claim should be resisted; without regulation and oversight, good Google might become bad Google, which would impose considerable costs to people around the globe.

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[1] Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 817 (2012).

[2] *See* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *4 (W.D. Okla. May 27, 2003); *see also* EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS 27 (2012), *available at* http://volokh.com/wp-content/uploads/2012/05/.pdf (stating that Google and other search engines "are shielded by the First Amendment, which blocks the government from dictating what is presented by the speakers or the manner in which it is presented").

[3] Steve Lohr, *Don't Be Evil*, N.Y. TIMES (Dec. 26, 2004), http://www.nytimes.com/2004/12/26//26evil.html.

Let's begin by imagining what might happen if Google became bad. Andrew McLaughlin, then Google's head of public policy in 2007, raised the example of Open Planet.[4] McLaughlin said he expected within a few years Google would be asked to link all the surveillance cameras in the world and put the live feed online.[5] If archived and stored, these images could reveal the movements of everyone around the world; you could click on an image of me and see where I came from this morning, how I got here, and where I'm going after I leave.

Good Google, McLaughlin explained, would refuse to link the images because of the great dangers ubiquitous surveillance could create.[6] But bad Google might indeed link the cameras. Bad Google might make the linked images available to the FBI, or the CIA, to track citizens without a warrant. Bad Google might even sell the data to marketers. The availability of these linked images could lead to forms of surveillance in the public and private sector which would fundamentally transform the way we live.

A bad Google could do other kinds of harm as well. The Federal Trade Commission ("FTC") recently found no evidence that Google was favoring its own search results and disfavoring those of its competitors.[7] European regulators continue to look into the question, but imagine if a bad Google actively did favor its own search results, to the disadvantage of its competitors. Alternatively, imagine if a bad Google skewed its search results to favor one political candidate over another, as AT&T did, Professor Tim Wu has noted, when it favored Rutherford B. Hayes over Samuel Tilden in the 1876 presidential election.[8]

What would be an effective regulatory response to a bad Google? To enjoin Google from illegal activities, we need privacy and antitrust regulations. That is why the FTC investigated the situation. But scholars funded by Google took the position that regardless of the outcome of the investigation, the FTC could not enjoin Google from favoring its own search results because Google's search algorithm is a form of corporate speech, fully protected by the First Amendment.[9] As Professor Wu has noted, this claim has been raised in several forms.[10] In court, Google has repeatedly claimed its

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4 Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1525 (2012).

5 *Id.*

6 Andrew McLaughlin, Remarks at the Legal Futures Conference at Stanford Law School (2007).

7 Cadie Thompson, *FTC Finds Google Does Not Unfairly Favor Its Own Services*, CNBC (Jan. 3, 2013, 12:25 PM), http://www.cnbc.com/id/100352160.

8 Tim Wu, *Is Filtering Censorship? The Second Free Speech Tradition*, GOVERNANCE STUDIES AT BROOKINGS, 1, 14 (Dec. 27, 2010), *available at* http://www.brookings.edu/~/media/research/files//2010/12/27%20censorship%20wu/1227_censorship_wu.pdf.

9 VOLOKH & FALK, *supra* note 2.

10 Wu, *supra* note 8, at 1-3.

search results are protected speech.[11] In *Search King v. Google*,[12] for example, a search engine optimization firm that promised elevated client search results sued Google for tortious interference with contract.[13] In response, Google raised a First Amendment defense. The district court held that Google's ranking of webpages was a form of protected speech and refused to grant a preliminary injunction.[14]

Furthermore, Google funded a white paper written by Professor Eugene Volokh and Donald Falk that pressed the First Amendment argument even more aggressively.[15] These authors compared Google to a newspaper publisher who chooses the most important stories of the day and puts them on the front page.[16] Professor Volokh and Falk concluded that, like the newspaper, Google deserves First Amendment protection when its search engine ranks webpages by relevance according to various criteria.[17]

Professor Wu identifies a problem with Professor Volokh and Falk's analogy.[18] A search engine's purpose, he suggests, is fundamentally different from that of a newspaper.[19] The newspaper is trying to communicate ideas to its audience. A search engine, by contrast, is trying to locate information and provide answers. The search engine acts more like an AT&T switching device than a form of protected opinion. Therefore, Professor Wu concludes, when the purpose behind a category of communication is primarily functional, it should not be considered speech under the First Amendment.[20]

Regardless of which argument you find more persuasive, it is clear that Google's First Amendment claim could thwart virtually all regulation of Google. Google's claim has the capacity not only to interfere with antitrust investigations, but also basic consumer protection laws, product liability laws, laws designed to prevent consumer deception, and arguably all privacy laws. In the Open Planet example, for instance, geolocational tracking could be considered protected speech under this analysis and therefore immune from regulation. Although the court avoided analysis of Google's free speech defense in *Rosenberg v. Harwood*[21]—in which the plaintiff

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11 *See, e.g.*, Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193, at *4 (W.D. Okla. May 27, 2003).

12 No. CIV-02-1457-M, 2003 U.S. Dist. LEXIS 27193 (W.D. Okla. May 27, 2003).

13 *Id.* at *4.

14 *Id.* at *11-12.

15 VOLOKH & FALK, *supra* note 2, at 6-7.

16 *Id.* at 8-9.

17 *Id.* at 10-11.

18 Wu, *supra* note 8, at 13-14.

19 *Id.*

20 *Id.*

21 Complaint and Jury Demand, Rosenberg v. Harwood, No. 2:10-CV-496 (D. Utah May 27, 2010), 2010 WL 3414706.

claimed Google was liable when a car struck her as she navigated relying on Google map directions—these claims could become more common.

Imagine, for example, that Google was indeed favoring its search results, or favoring political candidates. Now imagine that the FTC ordered Google to stop. That FTC order would be invalid under Google's First Amendment claim. Even structural remedies requiring that Google rank results neutrally would be in jeopardy. If, hypothetically, the FTC or European regulators were to more aggressively order a full breakup of Google, this order would also be in trouble. To divest Google and Gmail from one another, for example, would be a burden on Google's speech. And privacy regulations might falter under heightened, or even intermediate, First Amendment scrutiny. Even the mandatory placement of a do-not-track option on Google's browser might be struck down as unconstitutional under a robust First Amendment analysis.

A completely unregulated Google would have license, without any possibility of oversight, to drift in directions that its founders never anticipated. A basic principle of American constitutionalism is that unchecked power corrupts.[22] Google's First Amendment argument paves the way to that unchecked power.

To respond to this danger, there are a number of arguments that can thwart the potential of Google's First Amendment analysis. First, and most radically, the government could nationalize Google, as it did AT&T.[23] If Google were nationalized, then it would become a government speaker; because all of its speech would be government speech, it could no longer invoke the First Amendment as a shield against regulation. To nationalize Google, the government could theoretically seize Google under its eminent domain power as long as it paid just compensation, in the same way it threatened to nationalize the steel companies during the Korean War.[24] But nationalization is not ultimately a persuasive solution. My hero, Justice Louis Brandeis, warned of the "curse of bigness" as a danger in the private sector, and he was similarly concerned about bigness in the public sector as well.[25] If Google were a government monopoly, like the utility companies, there would be a serious fear of stagnancy. The government might favor its

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22 *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part) ("[N]o government official is 'tempted' to place restraints upon his own freedom of action, which is why Lord Acton did not say 'Power tends to purify.'").

23 *See generally* Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983 (2013) (describing how the federal government took over the telephone system during World War I).

24 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 680 (1952) (Vinson, C.J., dissenting) ("The steel mills were seized for a public use. The power of eminent domain, invoked in this case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government.").

25 *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 318 (1949) (Douglas, J.) ("The lessons Brandeis taught on the curse of bigness have largely been forgotten in high places.").

own search results, and the government has no place deciding which information the public can access. That scenario itself raises serious First Amendment concerns.

Perhaps a better response to Google's First Amendment claim is to subject it to something like intermediate scrutiny under the *Central Hudson* test.[26] In *Sorrell v. IMS Health Inc.*,[27] a surprising 6 to 3 decision, the Supreme Court held that the First Amendment protects marketing speech and that privacy restrictions on that speech are subject to heightened scrutiny.[28] That holding was a departure from the traditional test in *Central Hudson*, which emphasized the "informational function" of commercial speech.[29] *Central Hudson*'s balancing test would protect commercial speech (while prohibiting misleading speech or speech involved in illegal activity) provided that the government interest advanced by regulation is substantial, the regulation indeed advances the interest, and the regulation is narrowly tailored to serve that interest. In fact, the *Central Hudson* test sounds similar to the cost-benefit analysis that began this discussion.[30]

Perhaps the ultimate answer to keeping Google good is simply to continue subjecting Google to careful federal oversight, encouraging the company to improve its products instead of excluding its rivals. We need multiple search engine competitors, and thoughtful industrial policy can help to maximize the number of players. Consumers should have the option of moving easily from one Internet platform to another, and intelligent government discretion can further that goal.

When confronting a question involving privacy and speech, I always ask a simple question: W.W.B.D., or what would Brandeis do? On this question, his insights are characteristically apt. We learned long ago, he wrote, that "liberty could be preserved only by limiting in some way" the individual's freedom.[31] Otherwise, liberty would "necessarily yield to absolutism; and in the same way we have learned that unless there be regulation of competition, its excesses will lead to the destruction of competition, and monopoly will take its place."[32]

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26 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

27 131 S. Ct. 2653 (2011).

28 *Id.* at 2659.

29 *Cent. Hudson*, 447 U.S. at 563.

30 *See supra* note 1 and accompanying text.

31 Louis D. Brandeis, Address to the Economic Club of New York: The Regulation of Competition Versus the Regulation of Monopoly (Nov. 1, 1912), *available at* http://www.law.louisville.edu/library/collections/brandeis/node/260.

32 *Id.*