

Rights and Regulation in the Internet Age

COMMENTARY

By [Peter Berkowitz](#) - RCP Contributor
May 17, 2020

In Book I of “[Plato’s Republic](#),” Socrates observes that master doctors serve as our guardians against the most dangerous diseases while possessing the greatest skills for surreptitiously producing them. The quality of doctors’ character makes all the difference.

Something similar can be said about government and the private-sector tech companies the people increasingly entrust with safeguarding their rights: such entities, public and private, also possess the effective means to ravage our rights. Along with the laws of the land, the commitment to justice of those with power to regulate goes a long way toward determining whether our rights are vindicated or crushed.

These facts of life should be kept in mind in assessing the controversy ignited by a recent Atlantic article, “[Internet Speech Will Never Go Back to Normal](#).” According to a [response](#) to their critics published by the authors -- my friend Jack Goldsmith, a professor at Harvard Law School, and Andrew Keane Woods, a professor at the University of Arizona College of Law -- “Neither of us has ever written anything that has been as misinterpreted as this piece.”

Goldsmith and Woods provide a fair summary of the outrage: “People construed the essay to [call for](#) 'an end to freedom of speech in America'; to [endorse](#) 'China’s enlightened authoritarian approach to information' and 'lament[] the U.S.’ provincial fealty to the First Amendment'; as an [attempt to surrender](#) a 'model of social organization predicated on individual liberty'; to [argue](#) that 'the United States’ response to coronavirus would have been better had Big Tech and the U.S. government, like the Chinese communist regime, been able to control speech more effectively on the internet'; and to [overlook](#) that the 'U.S. & China are not equivalent' because 'Americans are not at risk of being sent to a goulag [sic] if they breach YouTube’s terms of service [but in China] the risk is real.'”

As the authors remark, “Those were the nice comments.”

They also deny the charges. “If you read the article, you will see that we do not remotely endorse China-style surveillance and censorship, or claim that the United States should adopt China’s practices,” Goldsmith and Woods maintain. “The piece was meant as a wake-up call about how coronavirus surveillance and speech-control efforts were part of a pattern rather than a break in one, and why, and what the stakes were.”

That is an accurate summary of their important contribution to the public debate. How then did readers confuse an effort by two leading scholars to inform about the reality of growing

regulation of online speech and digital surveillance in the United States with an endorsement of autocratic China's draconian censorship and all-enveloping digital surveillance?

The authors identify one passage in particular in their Atlantic essay as the source of the critics' ire: "In the great debate of the past two decades about freedom versus control of the network, China was largely right and the United States was largely wrong. Significant monitoring and speech control are inevitable components of a mature and flourishing internet, and governments must play a large role in these practices to ensure that the internet is compatible with a society's norms and values."

"This is not an endorsement of Chinese government-style authoritarianism, though we see how it could be read that way in isolation," the authors insisted. They rightly maintain that they do not side with Chinese autocracy against American freedom. They correctly state that their intention was badly misunderstood. The controversy, however, cannot be exclusively pinned on the critics for reading their formulation out of context.

The main problem with the authors' contrast between China's foresight and the United States' backwardness is that, contrary to their intention, the authors imply that the ruling Communist Chinese Party, on the one hand, and the American people and their elected representatives, on the other, were asking the same question. To say that China was largely right and the United States largely wrong about the need for supervision of the internet is to obscure the difference - a difference to which the authors call attention elsewhere in the piece -- between regulation undertaken by a dictatorship and that undertaken by a liberal democracy. The ruling Chinese Communist Party has not institutionalized internet regulation in general to protect society in general: [The Great Firewall of China](#) provides a lesson in regulation for the United States about as much as the Berlin Wall provides a lesson in border control.

The CCP's conduct stands for the proposition that sweeping internet censorship and comprehensive digital surveillance are tools essential to the preservation of ruthless dictatorships. The fundamentally different question -- the pressing one the authors' Atlantic piece was designed to bring to readers' attention -- is how the United States can reconcile online censorship and digital surveillance with fundamental freedoms, individual rights, and constitutional government.

It would have been more accurate statement of their intention had Goldsmith and Woods said that in the great debate of the past two decades about freedom versus control of the network, the United States was largely wrong in one crucial respect and China was largely right. The United States was largely wrong to suppose that the internet inherently served the interests of freedom and democracy and, in any case, that cyberspace was not subject to effective regulation while China was largely right that government regulation of the internet was possible and could well serve illiberal and anti-democratic ends.

Such a revision brings into focus Goldsmith's and Woods's central thesis: regulation of the internet in the United States is already extensive, bound to grow, and raises profound challenges for constitutional government in America.

The authors' point of departure is the observation that in response to COVID-19, America's leading tech platforms "are [proudly collaborating](#) with one another, and [following government guidance](#), to censor harmful information related to the coronavirus. And they are using their prodigious data-collection capacities, in coordination with federal and state governments, to improve contact tracing, quarantine enforcement, and other health measures."

The internet's early days, the authors argue, were quite different. From the 1990s through the first decade of the 21st century, the U.S. government and tech companies favored online freedom of speech and a minimum of supervision.

Two events of relatively recent vintage crystalized these fears: "Edward Snowden's revelations in 2013 about the astonishing extent of secret U.S. government monitoring of digital networks at home and abroad" and "Russia's interference in the 2016 election."

As tech platforms and social networks over the last decade "became filled with bullying, harassment, child sexual exploitation, revenge porn, disinformation campaigns, digitally manipulated videos, and other forms of harmful content, private platforms faced growing pressure from governments and users to fix the problems." Eventually, tech firms began "[cooperating with one another](#) and with international organizations, and sometimes law enforcement, on other censorship practices."

The authors appreciate the drawbacks of tech-firm censorship. Facebook, for example, "takes down hate speech, terrorist propaganda, 'cruel and insensitive' speech, and bullying speech." However, these categories of speech, the authors write, "are harder to identify objectively and more controversial to regulate or remove." Regulation is nevertheless likely to proliferate, they contend, because people demand it and because government and companies are inclined to provide it.

As online censorship in the United States has increased over the last 10 years, so too has digital surveillance: "The hundreds of computers we interact with daily -- smartphones, laptops, desktops, automobiles, cameras, audio recorders, payment mechanisms, and more -- collect, emit, and analyze data about us that are, in turn, packaged and exploited in various ways to influence and control our lives." Growing too has been government cooperation at all levels with the private sector in the conduct of digital surveillance.

Coping with the global pandemic has brought into focus benefits derived from the steady expansion of high-tech monitoring of citizens' online conduct: "The response to COVID-19 builds on all these trends, and shows how technical wizardry, data centralization, and private-public collaboration can do enormous public good," Goldsmith and Woods emphasized in their original article. "As Google and Apple [effectively turn most phones in the world into contact-tracing tools](#), they have the ability to accomplish something that no government by itself could: nearly perfect location tracking of most the world's population. That is why governments in the United States and around the world are working to take advantage of the tool the two companies are offering."

Because the authors expect that the social harms of an unfettered internet will increase while government and firms will continue to refine their ability to collect and analyze massive amounts of data, they doubt that internet speech control and digital surveillance will subside as the pandemic abates. The jury is still out on the long-term implications for our fundamental freedoms: “The surveillance and speech-control responses to COVID-19, and the private sector’s collaboration with the government in these efforts, are a historic and very public experiment about how our constitutional culture will adjust to our digital future.”

Goldsmith and Woods perform an urgent service by reconstructing the history of this “very public experiment” which is playing out in real time. To ensure an outcome in the United States that is favorable to the nation’s governing principles and constitutional tradition, the distinction between regulation under autocracy and regulation under liberal democracy must remain, as they insist, front and center. In contrast to China, where online censorship and digital surveillance are part and parcel of the ruling party’s determination to crush dissent and dictate the conduct of people’s lives, in the United States online censorship and digital surveillance must be justified by the overall contribution they make to securing freedom and individual rights.

In assessing the tradeoffs involved in online censorship and digital surveillance and in drawing lines, it is vital to take into account the spread within our constitutional culture of two dangerous and closely related intellectual pathologies. First, for more than a generation, our leading universities have encouraged the equation of hate speech with speech that diverges from campus orthodoxy. Second, influential media organizations, increasingly populated with graduates of these universities, have acquired a habit of regarding facts that undercut newsroom conventional wisdom as unworthy of publication.

These pathologies of the academy and of journalism -- which are spreading throughout all spheres of society -- raise serious concerns about the ability of government and the private sector, just when there is a premium on refined constitutional judgment, to weigh the complex tradeoffs accurately and to draw the thin lines responsibly. The tendency to define controversial content as harmful content and then proscribe it damages free societies, because suppressing opinions diminishes the ability of citizens to counter them where they are wrong and to learn from them where they are right.

As we hone our response to COVID-19, we would do well to recognize the pertinence of the Platonic wisdom about the connection between mastery of craft and justice: because government and tech firms possess great power to protect our freedom and rights, they also possess great power to eviscerate them.

Peter Berkowitz is director of the State Department’s Policy Planning Staff and a member of the department’s Commission on Unalienable Rights. He is on leave from the Hoover Institution, Stanford University, where he is the Tad and Dianne Taube Senior Fellow.

Links:

https://www.realclearpolitics.com/authors/peter_berkowitz/

<https://www.gutenberg.org/files/1497/1497-h/1497-h.htm>

<https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549/>

<https://www.lawfareblog.com/covid-19-speech-and-surveillance-response>

<https://www.youtube.com/watch?v=sPrbGU0Wyh4>

<https://twitter.com/anthonyLfisher/status/1254557981087334400?s=20>

<https://www.commentarymagazine.com/noah-rothman/lockdown-breakdown/>

<https://www.washingtonexaminer.com/opinion/byron-yorks-daily-memo-huh-on-free-speech-china-was-right-and-we-were-wrong-seriously>

<https://twitter.com/jacobhelberg/status/1254423700775923712>

<https://www.bloomberg.com/quicktake/great-firewall-of-china>

<https://twitter.com/googlepubpolicy/status/1239706347769389056?s=20>

<https://www.theverge.com/2020/4/20/21228036/facebook-ban-event-protest-misinformation-government-social-distancing>

<https://knightcolumbia.org/content/the-rise-of-content-cartels>

<https://www.apple.com/newsroom/2020/04/apple-and-google-partner-on-covid-19-contact-tracing-technology/>