

# A Utilitarian Balance, the Regulation of Internet Pornography: A Comparison of the U.S. and China

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**Abstract.** Representing two mostly opposite political systems and ideologies, the U.S. and China stand on the opposite spectrum regarding modes of regulation. This paper focuses on the regulation of Internet Pornography (IP). Both countries are actively adjusting to new changes appearing on the Internet. Comparing the American and Chinese modes of IP regulation and censorship using the literature review, this paper contrasts the current effectiveness and efficiency of the two regulatory modes. Drawing on Jeremy Bentham, the paper assumes that legislation involves a utilitarian balance between various consequential costs and benefits--all the influencers of certain provisions, both enablers and inhibitors. After the comparison, the paper concludes that the U.S. IP regulation faces more resistance and difficulties than the Chinese regulation due to strong inhibitors. However, the U.S. can hardly learn from the Chinese mode of strict censorship, as it will generate more problems than solve, as demonstrated by the historical national ban on alcohol. Eventually, this paper concludes that the future development of the U.S. IP regulation is almost hardly strict censorship. Nevertheless, considering IP's harmful effects, its regulation is pressing. Thus, the legislators have to sacrifice, which takes effect in the long-term. The current U.S. regulation is likely to struggle.

**Keywords:** Internet Pornography (IP); Comparative Study; Cost and Benefit Analysis.

## 1. Introduction

The U.S. regulation of Internet Pornography (IP) has long been a result of the entanglement of a set of enablers and inhibitors, which is finely demonstrated by the *Reno v. American Civil Liberties Union (ACLU)* case, in which the Supreme Court held two provisions in the Communications Decency Act (CDA) unconstitutional. In 1996, the U.S. Congress attempted to protect minors, restricting their access to Internet pornography (IP) by issuing the Communications Decency Act (CDA) that requires websites to restrict banned communications only to adults or deploy age verification methods--such as credit card verification [1]. Immediately, the joint plaintiff (the ACLU) sued Congress, challenging the CDA's constitutionality. The federal government appealed to the Supreme Court. The legal question of this case is to what extent freedom of speech can be limited to protect minors [2]. The Court concluded that the terms used in the Act--such as indecent and patently offensive--were vague and overbroad, which fell beyond the range judged by standards established by previous cases such as *Miller v. California* [1].

The *Reno v. American Civil Liberties Union (ACLU)* case suggests that diverse interests of various parties surround the issue of the U.S. IP regulation, including the federal government, different groups of citizens, and the pornography industry. U.S. censorship is countered by cleavages in society. As learned from U.S. history, censorship is usually problematic. Despite the established legal framework, the Supreme Court is adjusting to new technological changes. This paper compares the nearly opposite U.S. and Chinese modes of IP regulation, examines the current difficulties and hardships of U.S. regulation, and provides potential future development.

## 2. Current Legal Framework in The U.S. and China

### 2.1. The U.S.

In the U.S., the regulation of obscenity is partially superseded by the freedom of speech--a constitutional right--specified by the First Amendment [3]. The First Amendment declares that "Congress shall make no law...abridging the freedom of speech, or of the press...", and the speech includes sexually explicit entertainment. The Supreme Court distinguished between pornography--the general sexually explicit content--and obscenity--specific sexually explicit material. While pornography is generally bound to constitutional protection, some subcategories of obscenity and child pornography are regulated without scrutiny [4]. This paper further examines cases to clarify the current U.S. legal framework and principles.

The *Roth v. United States* in 1957 case marked the beginning of constitutional adjudication on obscenity. The Supreme Court established the Roth tests, deciding obscene material based on (i) a prominent theme regarded as a whole that appeals to prurient curiosity, (ii) goes above contemporary community standards, and (iii) being completely lacking in redeeming social value [4].

Later, in the *Miller v. California* case, the Supreme Court further declared that pornography regulations must be confined to materials that depict or describe offensive 'hard core' sexual conduct defined by the relevant state law [4].

After the Third Industrial Revolution (ca. 1950), the Internet became widespread [5]. New forms of pornography emerged--namely Internet pornography--inducing many concerns about its damage [4]. In 1996, the U.S. Congress responded, issuing the Communications Decency Act (CDA) to protect minors from accessing Internet pornography, which made transmitting "obscene" or "indecent" messages--determined by local community standards--to recipients under 18 years old criminal. Additionally, it prohibited intentionally sending or displaying "patently offensive" messages that depict or describe sexual excretory activity or organs to minors [6].

The Act aroused controversies. After the President signed the statute, twenty plaintiffs (the ACLU) filed a lawsuit against the Attorney General of the United States and the Department of Justice to challenge the constitutionality of the CDA on the First Amendment ground of free speech, focusing on the criminalization of "'knowing' transmission of 'obscene or indecent' messages to any recipient under eighteen years old." Later, 27 additional plaintiffs filed the second lawsuit, challenging the provision of "knowing [g] sending or displaying to a person under 18 of any messages that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs". In both cases, the District Court issued a preliminary injunction prohibiting the enforcement of the two provisions [2].

The Federal government appealed to the Supreme Court, claiming that the district judge erred in ruling the provisions unconstitutional [7]. The question in this case is to what extent the freedom of speech can be limited to protect minors. The Supreme Court accepted the reasoning of the District Court, reasoning that the Communications Decency Act (CDA)'s enforcement is both unfeasible and burdening people with the constitutional right to receive and discuss certain pornographic material. Firstly, there is no effective way to determine the identity or age of a user accessing material through e-mail, mail exploders, newsgroups, or chat rooms, and the Government offered no evidence on reliable ways to monitor recipients and participants. The current two age verification methods--credit card and adult password verifications--cannot ensure the users' age over 18. Besides, many ambiguities in the CDA's language potentially suppress speeches that citizens with the freedom of speech can receive and address. For example, the two provisions being challenged use different linguistic forms--one uses "indecent" and the other uses "depicts or describes sexual or excretory activities or organs". Given the absence of definitions, this discrepancy will provoke uncertainty in speakers and thus raise First Amendment concerns. The Supreme Court concluded that the CDA lacks the precision required by the First Amendment for a statute to regulate the speech contents [7].

In 2024, the Supreme Court intervened in the *Free Speech Coalition v. Paxton*, which challenged a Texas law that requires commercial websites displaying “sexual material harmful to minors” to verify the age of users. The question in the case is how much constitutional scrutiny a court must apply to determine whether the Texas law’s age verification provisions violate the Freedom Speech Clause. A Texas district court applied strict scrutiny. However, the U.S. Court of Appeal for the Fifth Circuit overturned the decision, holding that according to the Supreme Court’s decisions in *Ginsberg*, the proper standard of review is judicial scrutiny, or rational basis review, which declared that a law is constitutional if it rationally connects to a legitimate government interest. Thus, the Fifth Circuit upheld the age verification provision. The Free Speech Coalition appealed to the Supreme Court, whose decision will likely come in the summer of 2025 [8].

## **2.2. China**

In China, the regulation of Internet Pornography (IP) is characterized by strict censorship. Since 1949, the People’s Republic of China (PRC) has enforced a national ban on sexually explicit media, with harsh penalties for people who purchase, produce, or distribute materials considered a violation of public morality. The PRC government monitors and censors the Internet by discovering prohibited content, organizing encounters between police officials and site administrators, blocking host servers, and modifying sites that are linked to foreign servers. The creation of the Great Fire Wall--a database-driven remote surveillance system--enables the government to access national and local individual records [9].

To be specific, the regulation involves three legal domains: (i) regulations and directives issued by the Council of State and relevant governmental departments, (ii) laws on Administrative Punishments for Public Order and Security (LAPPOS), and (iii) the Criminal Law (CL) [10]. In 1997, the Ministry of Public Security first issued strict regulations on online content, listing nine categories of prohibited content, which contain obscene and pornographic materials. The 1997 Regulation prohibits the production, duplication, dissemination, reading, and storing of any online obscenity. In 2005, the Standing Committee of the National People’s Congress (NPC) issued the Administrative Punishments for Public Order and Security (LAPPOS), allowing the Chinese police to punish unlawful acts that are insufficient to warrant criminal charges (e.g. actions which threaten public security, disrupt public order, or impair citizen rights) without court trials. Specifically, Article 68 declares that people who produce, transport, replicate, sell, or rent obscene materials--such as books and pictures--or disseminate pornography via telecommunication devices--such as computer networks--may face a ten to fifteen-day detention and a fine of a maximum of 3000 yuan [11]. The Chinese Criminal Law (CL) also specifies the regulation of obscenity and pornography. It defines obscene materials as appealing to the prurient interest and depicting sexual conduct or publicizing pornography and related articles. Articles 367 (2) and (3) exemplify works that are not deemed obscene: (i) scientific works on human anatomy and medical knowledge, and (ii) works of art and literature with artistic value. However, the CL does not clearly define “pornography” and “pornographic”. According to Article 364 (1), disseminating obscene books, motion pictures, periodicals, or other obscene articles can result in a two-year prison sentence, criminal detention, or control and supervision. According to Article 364 (2), people who organize the display of obscene materials are punishable with a fine and imprisonment of no more than three years, detention, or control and supervision. For serious matters, the imprisonment term can be three to ten years. The CL provisions are similar to those of LAPPOS. Later declared in the 2000 NPCSC Decision on Protecting Internet Safety, the 2004 Supreme People’s Court and Supreme People’s Procuratorate Interpretation, and the 2010 Interpretation, Internet (Online) Pornography is regulated under CL provisions [11]. The Chinese authorities are actively devising laws to address the problems brought by Internet Pornography, which extends the surveillance culture.

### **3. Analysis of Cost and Benefit of Legislation**

This paper assumes that the legislation involves a utilitarian balance between the costs and benefits of the result. According to Jeremy Bentham's theory, when determining an action, a person should calculate the possible pain and pleasure affected by the action. Legislators should articulate similar calculations while making laws [12]. Applying this paper's context, the regulation of Internet Pornography (IP) should consider the consequential problems and benefits brought by the provisions, in other words, the inhibitors and enablers.

#### **3.1. Cost of Regulating Internet Pornography**

The costs of regulating IP--in other words, the potential resistance--mainly rest on the public's demand and the psychological benefit of IP on sexual minorities.

Firstly, both adults in the U.S. and China demand Internet Pornography. Research in 2022 which focuses on the use and perception of IP by American young adults (ranging from 18 to 25) shows that (i) around 82% of them consume IP, and (ii) they largely accept IP. Additionally, the research demonstrates a wide public detachment. In the report, most males deem the content of pornography unproblematic while recognizing the subjugation of women in pornography [13]. In China, responding to the surveillance culture, netizens exercise subversive discourses. For example, they create D.I.Y. pornography, disseminating vulgarities and sexually explicit materials through social networks. For instance, some young adults film sex videos in everyday locations--such as bathhouses, classrooms, and computer labs—and label them with the names of the exact locations. Besides, people navigate to avoid the Great Fire Wall and search illegal peer-to-peer sites. For example, Yang deploys strategies to research sexually explicit materials on sites like Emule and BitTorrent--black market industries from other countries [9]. In sum, although people acknowledge the moral problem and harm of IP, they still demand and consume it. Although prevented, people will still search for means to watch pornography online. Therefore, the regulation may gain wide verbal and ideological support from the public. However, at the backdrop, the public can act oppositely. Legislators need to consider the attitudes and actions of the regulated.

Additionally, IP can help sexual minorities (e.g. gay or bisexual) to feel accepted, as it can depict people with the same sexual orientations engaging in pleasurable sex, resulting in normalization. Given the stigma of being a sexual minority, potential persecution, and shame, diverse pornographic depictions of positive sexual conduct can be an essential source of self-validation, self-esteem, and dignity for LGBTQ groups [14]. Therefore, if Internet Pornography is strictly censored and constrained, it will become less accessible to sexual minorities, which potentially lowers the chance for them to discover "in-group" individuals and form self-recognition and acceptance. To promote general equality, legislators need to consider both the explicit and implicit treatments and their effects on minorities.

Furthermore, especially in the U.S., the legislation faces the challenge from the pornography industry, as IP generate significant economic profit. Early in 2005, the estimated revenue for the general global pornography industry was 57 billion dollars and 2.5 billion for Internet Pornography [15]. Facing huge profits, legislators seldom have chances to obtain consent from firms in the IP industry. To ensure the ultimate effect of IP provisions, legislators need to consider the above inhibitors.

#### **3.2. Benefit of Censoring Internet Pornography**

The benefit of censoring IP is greatly the prevention of its harm--child pornography. Both porn producers and possessors impair children. The producers directly cause physical or psychological injury--such as sexually transmitted diseases, depression, and trauma--which usually render child actors' constant engagement in self-destructive activities such as suicide and substance abuse. Additionally, downstream users can inflict harm through mere possession, as it is traumatic for child actors to know that their image is being circulated, 'causing the child victims to be continuously harmed through haunted experiences' from the Supreme Court's account. Furthermore, although

child victims may be unaware of the circulation of their images, the behaviors of child pornography creation, trade, and viewing undermine children's human dignity. As child victims are a vulnerable group who are unable to legally consent, it is urgent to legally regulate and surveil child pornography, which is made more accessible by the Internet [16]. The regulations of IP, especially those that attack child pornography, are a milestone in the legal protection of minors.

In conclusion, the legislation involves a process of consequential balance between the costs and benefits. To achieve the ultimate success of regulation, the impact of the public's resistance, protest of sexual minorities, markets and industry, and the protection of children should be weighed properly. Considering the cleavage of interests and attitudes of diverse social groups, legislators need to choose and rank its importance.

#### **4. Comparison of Current Regulations between The U.S. and China**

Regarding the regulation of harmful online content, the U.S. and China occupy opposite sides of a spectrum. China's censorship of the Internet is the strictest in the world, while the U.S.' is *laissez-faire*.

In the U.S., the regulation of IP is hugely countered by the traditional constitutional right--freedom of speech. The U.S. Congress is actively protecting the rights of minors--such as enacting Community Decency Act. However, currently, the enablers and resistances intertwine. As this paper already stated, the main enabler of IP regulation is the recognition and assistance from other levels of legislation, for example, the Texas state government and the Court of Appeal for the Fifth Circuit in the *Free Speech Coalition v. Paxton*. Additionally, specifically regarding child pornography, the Supreme Court and Congress agree on its severity, both supporting hard censorship [7]. However, the enforcement of IP provisions faces significant resistance from diverse parties. Firstly, the two U.S. parties--the Republican and Democratic--disagree on certain regulatory issues. For example, after 2020, a wide consensus suggests the U.S. Congress amend the CDA 230 (a specific section of the Community Decency Act) regime. Members of the two parties agree to reduce its scope to "*child sexual exploitation, content moderation operations...[and] content that courts determine to be illegal.*" However, they disagree on how to approach this change. Secondly, the public would likely implicitly reject strict regulations. According to Maslow's hierarchy of needs, sexual well-being is a basic human physiology need and motivation [17]. Thus, strict censorship on IP is likely to fail, because (i) basic human needs can hardly be suppressed, and (ii) citizens can apparently support the regulation but implicitly search for resources on implicit websites, which can flourish the dark web, rendering censorship even more difficult. Thirdly, sexual minorities are likely to express objection [18]. In the U.S., sexual minorities are a loud voice in society who are passionate about engaging in activism [19]. As IP can provide psychological well-being--self-recognition and acceptance--to them, they are likely to express feelings and needs through social movement, serving as a significant resistance if the legislators strive for social equality and consider minors' opinions. Furthermore, specifically in the U.S., the IP industry is likely to strongly resist hard regulation, which hinders firms' revenue [15]. This is what happened in several Supreme Court cases. In sum, different forces in U.S. society--political parties, individuals, sexual minorities, and the pornography industry--have diverse attitudes toward IP regulation, which are capable of countering the provisional enforcement, rendering the legislation difficult and laborious.

In contrast, in China, the censorship of IP is harsh and prolonged. The Chinese government highly emphasizes conformity on every online platform. For example, when tennis player Peng Shuai was accused of prominent sexual harassment, her accounts were removed from the Internet within minutes with entirely no search results. The Great Fire Wall further prevents Chinese netizens from accessing the most harmful online content, including sexually explicit material and hate speech. More importantly, the Chinese government faces less resistance compared to the United States. The main resistance is the implicit objection of Chinese netizens. To meet basic physiological needs, netizens deploy strategies--for instance, the D.I.Y. IP--to circumvent censorship and escape from the Great

Fire Wall to search for resources on other countries' websites [9]. However, netizens are vulnerable under the government, as it has dominant power. An account that is considered harmful to society can readily be blocked and deleted. In other words, the resistance of the public is not severe enough to hinder Chinese IP regulation. Besides, other resistances--objections of the sexual minorities and the IP industry--cannot be entirely applied. Firstly, China has no tradition of protest and activism from sexual minorities, and many people do not recognize them [20]. In other words, sexual minority is a niche group in society, whose objection is unlikely to be widely heard. Additionally, the Chinese government has a tradition of supervising and regulating the market with advancements in Digital platform regulation since the twenty-first century [21]. As the government has power above markets and industries, the resistance from firms caused by economic interests tends to be weak. In sum, the Chinese IP regulation is effective and efficient under the dominance of the government, as the enabler is more powerful than possible inhibitors.

In conclusion, the U.S. IP regulation faces significantly more costs and resistance than China's, rendering itself less effective in protecting minors. The two countries' legal systems, ideology, and emphasis are almost opposite, but could the U.S. learn lessons from the Chinese legal mode? This paper further examines the main difficulties of the U.S. IP regulation and discusses potential development.

## **5. Difficulties of the U.S. Regulation and Future Development**

### **5.1. Current Difficulties**

The difficulty of the U.S. IP regulation mainly consists of three reasons: (i) difficulty to satisfactorily define "obscene" pornography under the First Amendment principles, (ii) problems brought by censorship and prohibition, and (iii) the concern of Liberal Democracy.

Firstly, the state and federal prohibitions on "indecent" and "obscene" materials are vague and broad, rendering the Supreme Court struggle to define obscenity that could be banned. As this paper has stated, the Court mainly defines obscenity based on prurient interests, community standards, and redeeming social value. However, neither of them is clear. The Court defines prurient interest as "a shameful or morbid interest in sex", which is opposed to "a good, old fashioned, healthy interest in sex". The boundary is almost impossible to draw. Second, the definition of community is obscure, as local and national communities tend to have diverse standards. If the Supreme Court were to make the final decision in each case, it would have to define a nationwide standard and evaluate each case to ensure that local judges, prosecutors, and juries apply it properly. Third, judges' opinions can vary regarding sources that completely lack redeeming social value and "hard-core" pornography. Several reasons explain the current definitory hardship. For instance, a broad definition of obscenity and pornography poses a danger to the First Amendment value of free speech. Additionally, the meaning of "obscenity" and "pornography" can vary across different people.

Secondly, as learned from U.S. history, prohibitions usually cause more problems. For example, the national ban on alcohol failed in many aspects. Millions of citizens refused to obey the strict prohibitory law, supporting the partial ban only on liquors. However, the strict regulation was still enacted. As a result, black markets surged with certain cooperation with gangs. These markets further expanded to supply gambling, drugs, and prostitution, potentially leading to an increase in the crime rate. The federal and state governments followed and enforced the prohibition, leading to new developments in criminal law, for instance, plea bargaining and entrapment. The ultimate consequence of the ban is disappointing, as the consumption of illegal alcohol remained unabated. The history of pornography regulation is comparable to the ban on alcohol. For example, in the Sylvia Beach case, federal and state law prevented citizens from several readings, even literary masterpieces, which is similar to the prohibition of alcoholic beverages. Unsurprisingly, readers continued to read forbidden works. The Internet censorship is trickier. If certain prominent websites are regulated and censored, other sites--which might not even be located in different countries--will replace the

previous ones to supply the demand and desire of netizens. Blocking all of them would result in significant underground crimes.

Thirdly, citizens require liberal democratic freedom. The U.S. has a long history of protecting basic freedom--freedom of religion, speech, the press, and assembly to ensure morality and equality [22]. Among all, free expression is fundamental that a democratic government cannot lack. Besides, civil society assimilates free speech into its culture. Citizens desire the broad inclusion and diversity brought by. Thus, strict IP regulation opposes the basic value of freedom of speech and is likely to be resisted. In sum, the U.S. IP regulation faces both legal and ideological challenges.

## **5.2. Future Development**

Based on the above difficulties, this paper further examines possible future development of the U.S. IP regulation. As stated in 5.1, hard censorship and strict prohibition tend to fail in the U.S. context, based on historical and ideological reasons. Thus, the U.S. federal government can hardly learn from the Chinese mode of governmental regulation. The U.S.' founding--principles of the republic, Declaration of Independence, state and federal Constitutions--are liberal. Clauses of the First Amendment further strengthen the importance of liberty. Additionally, many founding figures--such as George Washington and Abraham Lincoln--emphasized the national commitment to citizens' freedom. Therefore, the federal and state governments in the twenty-first century would follow the nation's tradition, seriously considering freedom of speech in legal enactment.

The call for effective censorship and regulation of Internet Pornography (IP) needs to evaluate the background of the Internet and the history of previous prohibitions and censorship. Although IP causes and tends to continuously cause negative impacts on minors and society, the proper solution in the U.S. liberal democracy is unlikely strict censorship. Legislators have to control the extent of regulation, not rendering repression yet protecting vulnerable minorities. The current U.S. IP regulation tends to struggle.

The law is a social institution, reflecting the diversified emphasis on ideologies, worldviews, cultures, and traditions [23]. All these considerations can lead to the potential difficulty of legal enforcement. Depending on the ultimate desirable goal, legal approaches can vary significantly.

## **6. Conclusion**

In conclusion, this paper compares the regulation of Internet Pornography (IP) in the U.S. and China, examining the current legal framework in each country, stating the potential costs and benefits of regulation, comparing the regulatory modes of the two countries, demonstrating the current difficulties in the U.S. IP regulation, and discussing potential development of the U.S.A. This paper concludes that the Chinese mode of regulation is more effective and efficient, as it faces less resistance compared to the U.S. and further examines lessons that the U.S. legislation can learn from China. The history and ideology demonstrate that censorship and prohibition are unlikely to succeed on the American ground. Thus, the current U.S. IP regulation is likely to struggle, as legislators need to weigh between legal repression and the protection of minors.

The regulation of obscenity--Internet Pornography (IP) in particular--is pressing, as minors and industry actors can be seriously harmed. However, the law is rooted in social, historical, and cultural contexts, varying significantly across countries. Although may currently be stagnated, legislation and the following enforcement need to consider precedents and fundamental social values to achieve the ultimate goal without causing severe damage to citizens and society. The study of IP regulation in different countries is essential, as it provides a framework for analyzing the difficulties and potential achievements in legislation regarding new technology and individuals' daily lives. In the future, more studies and research are needed to uncover the real effects of IP on citizens in different social contexts.

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