An Old Regime for Viewpoint Diversity of the New Media: protecting anonymity for a functioning 'marketplace of ideas' in cyberspace

Ju Young Lee
Pennsylvania State University
The United States
jil5393@psu.edu

Abstract

This study examines the necessity of protecting anonymity as a way to promote „marketplace of ideas' in cyberspace. As an old regime, Fairness Doctrine that used to apply to radio broadcasting industry, provides not only the rationale for the protection of political viewpoints diversity but also the reason why the direct government intervention in content is neither appropriate nor effective in facilitating the public's access to diverse political views on the internet. With regard to the Fairness Doctrine, *Red Lion Broadcasting Co. v. FCC* (1969) indicates that the government should play a role in achieving the public interest by imposing the obligation to provide balanced coverage of controversial issues on the privileged spectrum users. However, the Doctrine was abolished in 1987 on the grounds that it was having a „chilling effect' on speech and could not serve the public interest. As a relevant case, in *Miami Herald Publishing Co. v. Tornillo* (1974), the Supreme Court held a „right of reply' statute unconstitutional because it intruded into the function of editors and would lead to a chilling effect on their political coverage. From those two cases, three important principles are drawn: (1) the political viewpoint diversity is a public interest that the government should attempt to achieve; (2) the government measure to achieve the diversity of views is unconstitutional and, thereby, unacceptable when it has chilling effect on speech; (3) speakers have the right to decide what not to speak as well as what to speak. Applying these principles to the internet regulation, protecting the anonymity of on-line speakers is the key to the viewpoint diversity in cyberspace in terms that it can prevent chilling effect that is possibly caused by the fear of reprisals and punishments.

Keywords

marketplace of ideas, diversity, fairness doctrine, chilling effect, anonymity.

One of the most significant contributions of the internet to modern democratic society might be the realization of ‚marketplace of ideas' by integrating political participation into popular culture. In theory, the public can freely participate in discussion on political issues through the internet, which is clearly different than traditional mass media used dominantly by the ‚privileged' few. Thus, the internet environment appears to have achieved a level of viewpoint diversity that other media cannot hope to achieve. However, in practice, it is doubtful that there is substantial diversity in viewpoints on the internet, because a variety of restrictions, ranging from government censorship to personal attack, may negatively influence the public's on-line communication. In this case, the internet will only have the status of a new ‚old medium.' To promote the viewpoint diversity of old media especially in terms of political viewpoints, in the past, the government chose to directly intervene in communication process, but the direct intervention would not likely work for the internet as an effective way to foster the viewpoint diversity. The direct government measure could degenerate the decentralized internet and chill free discussion. Thus, it is necessary to create an environment in which people feel free to exchange their ideas on public issues through an indirect measure. From this perspective, protecting anonymity can be considered as a measure to promote the viewpoint diversity in cyberspace.

The right of anonymity has been protected as a constitutional right and constitutes the fundamental mechanism of on-line communication. However, anonymity is often infringed by compulsory identification and government surveillance for preventing and coping with on-line problems including defamation, copyright infringement, and various cybercrimes. Therefore, this study intends to revisit the importance of protecting anonymity in promoting diverse viewpoints on the internet by examining the applicability of the direct government intervention in the speaker's autonomy to decide the content, exemplified by the Fairness Doctrine, to the internet.

Historically, the diversity regulation has taken largely two forms: structural regulation, such as media ownership rules, and content-based regulation, such as the Fairness Doctrine.

Both ways of regulation presuppose the passive public, who do have the right of access to diverse viewpoints provided by the media but do not have the right to express their viewpoints using the media. Accordingly, the main purpose of those regulations is to prevent a ‚big' media from controlling people's thoughts, ideas, and elections.

Yet, the emergence of the internet undermined the basic premise of the passive public. That is, the one-way nature of the communication between the media and audience dramatically changed. The interactive nature of on-line communication has heated debate on the necessity of the Fairness Doctrine type of regulation directly limiting the speaker's autonomy over the content, whereas the structural regulation, which in effect restricts the quantity of audience a single media entity can reach, appears to retain justification. Therefore, this study reviews the Fairness Doctrine to address the questions of whether or not the Doctrine is applicable to the internet and what is the diversity implication of anonymity protection. To investigate these questions, *Red Lion Broadcasting Co. v. FCC* (1969), *Miami Herald Publishing Co. v. Tornillo* (1974) and *McIntyre v. Ohio Elections Commission* (1995) will be analyzed.

Through the analysis of *McIntyre v. Ohio Elections Commission*, which is a landmark case of the protection of anonymous political speech, in light of three principles derived from *Red Lion* and *Miami Herald*, it will be examined how the First Amendment protection of anonymous speech can play a crucial role in creating a functioning ‚marketplace of ideas' on the internet. Additionally, this study would provide insight into how ensuring anonymity on the internet could make significant contributions to participatory democracy by reviewing prior studies applying the *McIntyre* case to on-line communication issues.

Political Speech and Marketplace of Ideas

Political speech has received the greatest protection under the First Amendment in the United States. The principal premise underlying the political speech protection is that under the federal system, the state is governed by ‚informed citizenry' (See Franklin, Anderson, & Lidsky, 2005, p. 17). Alexander Meiklejohn (1961) argued that First Amendment protection of free speech should be understood as the protection of the ‚governing' activities such as casting a ballot. He maintained that the freedom of governing activities must not be abridged in order for people to make a wise and effective decision. According to his extreme viewpoint that the First Amendment protected only political speech essential for self-government (Meiklejohn, 1948 in Franklin, Anderson, & Lidsky, 2005, p. 19), political speech, including "public discussion of public issues together with the spreading of information and opinion bearing on those issues" (p.

18), lies at the core of the First Amendment. While Meiklejohn emphasized the importance of political speech in terms of self-government and participatory democracy, Blasi (1977) implied the value of political speech by stressing the function of First Amendment protection in checking the abuse of official power. Thus, both of the viewpoints agree that free discussion on political issues is protected as a fundamental element of democratic society.

Before the internet emerged, public debate on political issues had long been dominated by the mass communication media such as newspapers, television, and radio. Therefore, U.S. government has attempted to intervene in the editorial or programming decision of those institutionalized media to promote diversity of view on controversial issues including political issues. The two landmark Supreme Court cases, *Miami Herald Publishing Co. v. Tornillo* (1974) and *Red Lion Broadcasting Co. v. FCC* (1969), show the governmental attempts. In *Red Lion*, the Supreme Court held that the Fairness Doctrine, which required broadcast stations to provide the fair and balanced coverage of controversial issues, was constitutional, whereas, in *Miami Herald*, the Court found that the editor's First Amendment rights to decide the content of the paper outweighed a right to access to diverse viewpoints, which the Florida's „right of reply' statute intended to assure. The Fairness Doctrine is an important regulation example that shows the government's stance on controversial political speech. Sunstein (1993) asserted that such intervention in the „marketplace of ideas' "could promote both political deliberation and political equality" (p. 18-19). However, it is too hasty to say that the same type of government intervention is applicable to the internet. In order to examine the applicability the old rules, it is necessary to identify the principles that can be derived from the cases related to the Fairness Doctrine.

Lessons from the Fairness Doctrine

The Fairness Doctrine was adopted as an FCC rule in 1949 on the basis of the assumption that the broadcast media were trustees of a scarce public resource (i.e., spectrum), which were required to share their frequencies with others for viewpoint diversity in exchange for the exclusive use of a frequency, that is, gaining a license or license renewal. More specifically, the Fairness Doctrine consisted of two requirements; both radio and television stations were required to devote some of their airtime to the coverage of "vitally important controversial issues of [public] interest" and to "provide a reasonable opportunity for the

presentation of contrasting viewpoints on such issues" (Hazlett & Sosa, 1997).[1] *Red Lion Broadcasting Co. v. FCC* (1969) indicates how this type of direct regulation of speakers can be justified. In *Red Lion*, the Court held that broadcast television and radio stations could be regulated to ensure a balanced and open discussion of contested issues, which promotes political participation as well as the viewpoint diversity, because they were granted the exclusive right to use a scarce radio spectrum. Despite this justification, the Fairness Doctrine had been harshly criticized from the beginning for the possibility of causing self-censorship of broadcasters and resulting in the decrease in controversial speech (Simmons, 1977; Krattenmaker & Powe, 1985). In 1985, the FCC announced on the basis of its Fairness Report (102 F.C.C.2d 145) that the doctrine did not serve the public interest and thus violated the First Amendment. Further, it found that the spectrum scarcity rationale for the doctrine became invalid due to the advent of multiple channels on cable television. For these reasons, in 1987, the commission abolished the doctrine.

A lesson from the Fairness Doctrine is that even the regulation designed to promote political discussion might have a chilling effect on controversial speech including political speech and, as a result, actually decrease the quantity of speech. Hazelett and Sosa (1997) empirically examined the chilling effect of the doctrine in evidence – decrease in the quantity of the coverage of controversial issues – by analyzing informational programming on AM radio between 1975 and 1995. Their analysis demonstrated that informational programming, which might trigger public controversy, increased relative to other formats after the Fairness Doctrine had been abolished.

As a relevant case, *Miami Herald Publishing Co. v. Tornillo* (1974) clearly demonstrates the conditions for the application of the Fairness Doctrine type of content regulation to the media. In *Miami Herald*, Florida Statute 104.38 (1973) called a „right of reply' statute required newspapers that criticized a political candidate to publish the candidate's reply on his request. The Supreme Court held the „right of reply' statute unconstitutional because it not only intruded into the function of editors but also would lead to a chilling effect on editors who want to avoid controversy and reduce the coverage of political issues. The Court clarified that telling editors what to publish was unconstitutional as was telling them what not to publish, as long as there was no ground to apply the scarcity rationale to the media such as newspapers.

[1] See also The General Fairness Doctrine Obligation of Broadcast Licensees, 102 F.C.C. 2d 145, 146 (1985).

The aforementioned two cases indicate that a legitimate government interest could be outweighed by the chilling effect of the government measure to foster that interest. The chilling effect in relation to the Doctrine was not theoretically conjectured but embodied by the mechanism in which fear of punishment causes the decrease in the quantity of controversial speech. Additionally, editors, namely, speakers, have the constitutional right to decide what not to speak as well as what to speak. In other words, people can decide whether or not to include certain information (e.g., personal identity information) in the content of their speech. These principles provide justifications for protecting anonymity on the internet. In the next section, the history of anonymity protection will be reviewed, and it will be examined how the chilling effect was embodied in relation to the compulsory disclosure of identity.

Protection of Anonymous Political Speech and Chilling Effect

UN has declared anonymous communication as a strongly protected human right (Choi, Na, & Park, 2010).[2] The right to speak and publish anonymously is a fundamental right that is based on a long historical tradition that dates to the very founding of democracy in the United States.[3] "During the break with Great Britain, the revolutionaries employed pseudonyms both to conceal their identity from Crown authorities and to impart a message'. (*McIntyre v. Ohio Elections Commission*, 1995, p. 368) Pseudonymous and anonymous speech was also frequently used during and after the ratification debates on the Constitution (*McIntyre v. Ohio Elections Commission*, 1995, p. 368).[4] Specifically, Alexander Hamilton, James Madison, and John Jay wrote the Federalist Papers advocating the adoption of the Constitution under the pseudonym Publius (Larios, 2010).[5] The Anti-Federalists' critics also published anonymously (*McIntyre v. Ohio Elections Commission*, 1995, p. 343). Thomas Paine published many of his popular pamphlets pseudonymously, including Common Sense. Not only this anonymous political speech but also non-political speech was commonly used in the United States well into the 19th

[2] Quoting 1948 UN General Assembly's *Human rights Declaration*

[3] See 'The constitutional right to anonymity: Free speech, disclosure and the devil'. (1961). *Yale Law Journal,* 70(7), 1084–1128. 1961. "At the time the first amendment was adopted, the device of anonymous political authorship was well known, and utilized by many of the founding fathers."

[4] Pseudonymity is conceptually different from anonymity and needs a different legal approach and interpretation. Thus, it will be only mentioned as a way of anonymous speech, in terms of a shield of identity, and will not be discussed further.

[5] Quoting 'Defending Federalism: Realizing Publius's Vision', (2008). *Harvard Law Review*, 122, 745-, n.2 (2008).

century by those who had fear of retaliation or insisted on separating themselves from their messages by hiding or disguising their identities (Carr, 1996).

Several U.S. court cases on the constitutionality of the statues restricting the distribution of anonymous literature show a historical path of the protection of anonymous political speech.[6] The Supreme Court made a decision that freedom of anonymous expression is comprised in the freedom of speech as a constitutional right. The first major U.S. Supreme Court case regarding the prohibition on private anonymous speech was *Lewis Publishing Co. v. Morgan* (1913), involving government-mandated disclosure of identity and ownership of a newspaper who wished to qualify for second-class postage. In this case, the Court rejected the argument that such disclosures violated the freedom of the press and held that the requirement was a reasonable regulation of the mail system. The Court characterized the disclosure as „incidental' to the privilege of the status enjoying less expensive second-class postage rates and, therefore, found that it is not unconstitutional to restrict the freedom of anonymous speakers "only if necessary to qualify for some granted privilege or entitlement'.[7]

Twenty-five years later, the Court decided its first handbill ban case, *Lovell v. Griffin* (1938). The *Lovell* Court struck down an ordinance in the city of Griffin that requires "any distribution of literature of any kind", – anonymous or not – "including newspapers, handbills, or advertisements, to first obtain a permit from the City Manager'. (*Lovell v. Griffin*,1938, p. 316) Considering the Framers' original intent in extending protection to the press, the Court unanimously held that "the ordinance in question would restore the system of license and censorship in its baldest form" and violated the First Amendment (*Lovell v. Griffin*,1938, p. 452). The Court also noted that "the liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets…. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion'. (Carr, 1996, p. 526) This indicates that the Court intended to apply the press freedom to diverse media, as well as to printed text.

[6] The precedent dealt with in this paper is the handbill-related laws, which appear to be appropriate and useful in understanding political speech on the Internet.

[7] The Court stated:

> We are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded (p. 316).

The first case declaring that the First Amendment protected anonymous speech is *Talley v. California* (1960), which is the foundation of *McIntyre v. Ohio Election Commission* (1995). In that case, the Court judged "whether the provision of a Los Angeles City ordinance restricting the distribution of [anonymous] handbills abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution'. (p. 60) This Court referred to *Lovell* and asserted that "the obnoxious press licensing law of England… was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government'.(*Talley v. California*, 1960, p. 65) It in turn noted that the identification requirement of the ordinance "could tend to restrict freedom to distribute information and thereby freedom of expression'. (*Talley v. California*, 1960, p. 64) The Court also pointed out that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance'. (*Talley v. California*, 1960, p. 65) Justice Harlan in his concurring opinion pointed to the overbreadth of the ordinance. The ordinance could suppress "the circulation of all anonymous handbills" in order to identify the distributors of the obnoxious handbills although it was "aimed at the prevention of fraud, deceit, false advertising, negligent use of words, obscenity, and libel'. (*Talley v. California*, 1960, p. 67) Thus, he concluded that the all-embracing ordinance is likely to have the deterrent effect on free speech (*Talley v. California*, 1960, p. 67). For these reasons, the Court held void on its face the broad Los Angeles ordinance.

While the *Talley v. California* (1960) case ruled on the dissemination of anonymous handbills in general, *McIntyre v. Ohio Election Commission* (1995) is cited most as a landmark case holding that the First Amendment protects anonymous political speech. The Supreme Court ruled that an Ohio law[8], which required the disclosure of personal identity on political literature, violates the First Amendment by "burdening core political speech" and was subject to "exacting scrutiny" of whether the law was narrowly tailored to promote a compelling state interest (*McIntyre v. Ohio Election Commission*, 1995, p. 334). The Court said,

> [A]n author generally is free to decide whether or not to disclose his or her true identity, and that the decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a

[8] *Ohio Rev. Code Ann.* 3599.09(A) (Anderson 1988) The *Ohio Code* provides, in relevant part, that "no person shall write, print ... or distribute ... a notice ... or any other form of general publication which is designed to ... influence the voters in any election ... unless there appears on such form ... the name and residence ... of the ... person who issues, makes or is responsible therefore."

> desire to preserve as much of one's privacy as possible. (*McIntyre v. Ohio Election Commission*, 1995, p. 342)

Accordingly, it is recognized that an author's decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment (*McIntyre v. Ohio Election Commission*, 1995, p. 342).

Concerning the question of whether "„the freedom of speech, or of the press", as originally understood, protects anonymous political" speech, the Constitution says nothing about freedom of anonymous speech. However, according to Justice Thomas's concurring opinion in *McIntyre*, the historical evidence indicates that Framers of the Constitution opposed attempts to force anonymous authors to disclose their identities and believed that the forced disclosure violated the freedom of the press (*McIntyre v. Ohio Election Commission*, 1995, p. 364). That is, "Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion'. (*McIntyre v. Ohio Election Commission*, 1995, p. 371) In practice, anonymity was defended "because it encouraged authors to discuss politics without fear of reprisal", and "the liberty of the press" was invoked "as the guardian for anonymous political writing'. (*McIntyre v. Ohio Election Commission*, 1995, p. 363-364) The Court also believed itself bound by the intent of the Framers who draft and ratified the Constitution, as well as by the text of the Constitution (*McIntyre v. Ohio Election Commission*, 1995, p. 371).

Justice Stevens additionally stated that anonymity provides a writer with an opportunity to be read by unprejudiced readers regardless of the writer's personal popularity (*McIntyre v. Ohio Election Commission*, 1995, p. 343). In conclusion:

> [a]nonymity is a shield from the tyranny of the majority and thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. (*McIntyre v. Ohio Election Commission*, 1995, p. 357)

The Court held that the ordinance prohibiting all anonymous handbills was unconstitutionally overbroad because "the prohibition encompasses documents that are not even arguably false or misleading", although it only sought to identify persons who distributed false statements during political campaigns (*McIntyre v. Ohio Election Commission*, 1995, p. 352). That extremely broad prohibition was not justified by its compelling interest in preventing

fraudulent and libelous statements and its interest in providing the electorate with relevant information (*McIntyre v. Ohio Election Commission*, 1995, p. 348). The Court concluded that although "political speech by its nature will sometimes have unpalatable consequences, … our society accords greater weight to the value of free speech than to the dangers of its misuse" (*McIntyre v. Ohio Election Commission*, 1995, p. 357).

Both *Talley* and *McIntyre* cases are representative cases dealing with the protection of anonymous speech. In particular, *McIntyre* demonstrates U.S. Supreme Court's position towards anonymous statements, which approved right to express political messages anonymously as a constitutional right. *McIntyre v. Ohio Election Commission* (1995) not only has far-reaching implications regarding the viability of similar disclosure statutes constraining political speech, but also has an obvious relevance to current debates about regulating anonymous messages on the internet (Constantine, 1996).

Many prior studies analyzed the *McIntyre* case to enunciate the scope of the protection of anonymous political speech and to find its implications for dealing with future anonymous speech questions. Constantine (1996) pinpointed the normative approach of the *McIntyre* decision for balancing between promoting unfettered political discussions and protecting the election process from corruption. She clearly demonstrated the value and impact of anonymous speech by contrasting the philosophical grounds of the majority and dissent opinions of the *McIntyre* court. Constantine also points out the difference between the majority and the dissent in their understanding of the motivation for anonymous speech and their disagreement on the value of the anonymous speech and the compulsory disclosure. For the majority, the protection of anonymous political speech is in line with the democratic tradition and is "critical in protecting controversial ideas from suppression" (Constantine, 1996, p. 4). Thus, a disclosure requirement shall not be approved because it may selectively deter unpopular ideas and stifle valuable sources of information (Constantine, 1996, p. 4-5).[9] Although the majority acknowledged that the right to anonymity may be abused and generate fraudulent speech, they found that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry'. (*McIntyre v. Ohio Election Commission*, 1995, p. 342) On the Contrary, the dissent asserted that the mandatory disclosure of the speaker's identity is necessary to prevent the dissemination of false information. Justice Scalia argued that "[anonymity] facilitates wrong by eliminating

[9] Citing Comment. (1961). 'The Constitutional Right to Anonymity: Free Speech, Disclosure, and The Devil', *Yale Law Journal*, 70, 1084, 1108.

accountability" and, therefore, would encourage individuals to produce irresponsible statements (Constantine, 1996). For the dissent, the compulsory disclosure helps protect the electoral process by preventing fraudulent and libelous expressions and enhancing the quality of political debate.

What Constantine (1996) extrapolates from the majority and dissent's normative stance on the forced disclosure of the speaker's identity is that both the opinions recognized that the compulsory disclosure will exclude some ideas from the marketplace of ideas. Therefore, the majority supported anonymity, which "facilitates the search for truth by increasing the amount of information in the marketplace" while the dissent opposed to the protection of anonymity, which hinders the search for truth by decreasing the accuracy of information (Constantine,1996, p.5). Although there was the disparity of philosophy between the majority and the dissent, the *McIntyre* Court gave priority to protecting speakers who remain anonymous because of their fear of reprisal. Despite the implication of this normative approach (i.e., the consideration of the value and impact of anonymous speech relative to the attributes of human), Constantine (1996) concluded that the *McIntyre* court remained legislative uncertainty, that is, failed to delineate "the requirements of a constitutionally sound statute regulating anonymous political speech" (p. 8).

Although Norton (1996)[10] also points to the weakness of the *McIntyre* case as "a predictive model for anticipating how the Court will decide future anonymous political speech questions", he derives a principle underlying the *McIntyre* decision by considering normative concerns about human tendency (p. 555). As aforementioned, in *McIntyre*, the majority held that anonymous pamphleteering (i.e., political speech) is "a shield from the tyranny of the majority [and]… protect[s] unpopular individuals from retaliation and their ideas from suppression" (*McIntyre v. Ohio Election Commission*, 1995, p. 357). Also, the Court noted by quoting *Talley v. California* (1960, p. 64) that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all" (*McIntyre v. Ohio Election Commission*, 1995, p. 380). To sum up, the Court asserts that a right of anonymity needs to be ensured to control the power of majoritarian

[10] He addresses the following three questions of human tendency: 1) "how vigorously we should protect the use of anonymity as a shield from coercion and reprisal," 2) "how much we should concern ourselves with the human tendency to hide behind the shield of anonymity in order to sling mud," 3) "how much faith can be put in the 'ordinary voter' to discern truth from mud and discount the sullying effects of dirty tricks and character assassination." (Norton, 1996, p. 574)

tyranny that causes public fear of "threats, harassment, or reprisals" (*McIntyre v. Ohio Election Commission*, 1995, p. 380).

From *McIntyre*, Norton (1996) reasoned that the Court would strike down "any state or federal proscription on one's ability to engage in anonymous political speech, whenever anonymity is necessary as a check against coercion and reprisal" (p. 554-555). This provides a useful standard for determining the constitutionality of the restriction on anonymous political speech, as well as an insight into the role that anonymity plays in our society.

Although the majority in M*cIntyre* left open the possibility that more narrowly tailored proscription on anonymous speech could be allowed, it shed light on the benefits (or interests) that might be achieved by protecting anonymous political speech. The *McIntyre* model ensures a right of anonymity to encourage the public to freely discuss political issues without fear of reprisal or majoritarian tyranny. This can be a useful framework in addressing questions of the protection of on-line anonymous speech even though it is unclear how *McIntyre* applies to other media than leaflets.

Protecting On-line Anonymity and Chilling Effect

There have been numerous studies on the internet ramifications of *McIntyre*, showing how the Court's decision will affect various phenomena on the internet (e.g., Branscomb, 1995; Carr, 1996; Cohen, 1996; Froomkin, 1999; Long, 1994; Stieglitz, 2007; Tien, 1996). Larios (2010) examines the lower federal court cases such as *ACLU v. Johnson* (D.N.M. 1998), which held the unconstitutionality of a Georgia statute criminalizing the use of false names on the internet, *ACLU v. Miller* (N.D. Ga. 1997), which found the unconstitutionality of a New Mexico statute requiring websites with sexual content to verify the ages of their visitors, and *Doe v. 2themart.com* (W.D. Wash. 2001), which quashed a subpoena seeking to force an internet service provider to disclose the identity of anonymous online speakers. The court in *2themart.com* upheld the right to speak anonymously on the internet, acknowledging "the constitutional rights of internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded" (*Doe v. 2themart.com*, 2001, p. 1097). The court said, "The free exchange of ideas on the internet is driven in large part by the ability of internet users to communicate anonymously" (*Doe v. 2themart.com*, 2001, p. 1093). Larios's review (2010) of those cases indicates that the courts have held that the First Amendment protection of anonymous speech extends to the internet (p. 41-43). Carr (1996) investigated how the traditional anonymous speech protection principles apply to the relationship between internet

users and internet access service providers who enable people to access the communication medium. He acknowledges that users, who gain access through a government-sponsored access provider, have the right to technologically „anonymize' their speech as an extension of their right to determine the content of their speech (Carr, 1996, p. 521). Therefore, if a governmental access provider requires identity verification as a precondition for access to the internet using government facilities, it, under *McIntyre*, would be "content-based speech discrimination" and thus violating the First Amendment (Carr, 1996, p. 541). Carr's study implies that the identity verification required by government entities could deter the general public's on-line communication.

While the aforementioned cases and studies examined the protection of the right of anonymity on the internet in terms of freedom of „speech', many other studies view the right of anonymity as an essential element of social interaction, which presupposes freedom of assembly or association. Tien (1996) illustrates that anonymity on the internet is consistent with *McIntyre*'s protected anonymous speech in terms of "speaker autonomy" and, at the same time, emphasizes the characteristics of on-line anonymous speech as a type of social interaction.[11] Considering potential retaliation against the speaker and actual speech deterrence as costs of regulating anonymity, he asserts that on-line anonymous speech deserves First Amendment protection based on the premise that on-line speech is a "cheap speech"[12] protected in *McIntyre*. Additionally, Tien (1996) argues that on-line speech should be viewed as social interaction (or association), and that information about identity plays a crucial role in that interaction.

The principle of speaker autonomy in relation to freedom of assembly was established in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* (1995). In *Hurley*, the Court ruled that a group of people organizing a public demonstration were permitted to exclude groups who presented a message contrary to the one that the organizing group wanted to convey. That is, if inclusion of certain groups into a demonstration affects what message is actually conveyed to the public, the organizers may not be compelled by the state to include or exclude the groups who intend to impart different messages. In this vein, the Court stated that

[11] He generalize the notion of speaker autonomy to consider "speakers as participants in discursive interaction." "Speech is framed as discourse with others taking place in time and space, and if it's clear that what's going on is expressive, both what is said and who says it may be irrelevant." (Tien, 1996, p. 155)

[12] In *McIntyre*, Justice Stevens said that Mrs. McIntyre composed and printed her leaflets on her home computer and then paid a printer to make extra copies. "Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently." (*McIntyre v. Ohio Election Commission*, 1995, p. 337)

McIntyre's protection of anonymity should be regarded as "an instance of the general First Amendment principle of speaker autonomy" (Tien, 1996, p. 132).[13] Thus, a speaker has the right to decide to remain anonymous, as an author has the right to omit or add certain messages to the content of a publication (*McIntyre v. Ohio Election Commission*, 1995, p. 342).[14] Additionally, since control over the circumstances of speech, such as the boundaries of communicational association,[15] is part of freedom of speech, anonymity can be protected as a context of speech (Tien, 1996, p. 158; *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 1995; *NAACP v. Alabama ex rel. Patterson*, 1958). Tien (1996) concluded that anonymity should be seen as "safeguarding the ability independently to define one's identity [in interaction] that is central to any concept of liberty" (p. 123).[16]

The speaker's autonomy as the anonymity jurisprudence also includes „associational privacy' (Tien, 1996, p. 176; Carr, 1996, p. 543-545). *NAACP v. Alabama ex rel. Patterson* (1958) holding the protection of the right of anonymity coheres with the speaker autonomy grounds in *McIntyre*. In this case, the National Association for the Advancement of Colored was afraid that the compelled disclosure of membership "may induce members to withdraw [from the Association]… and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and [fear] of the consequences of this exposure" (*NAACP v. Alabama ex rel. Patterson*, 1958, p. 463). In response to this petitioners' contention, the Court held that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs" (*NAACP v. Alabama ex rel. Patterson*, 1958, p. 462). Applying this case law to on-line anonymous speech, Tien (1996) theorizes that "any broad regulation of anonymity on the Internet" would be found to be unconstitutional because that regulation is a restriction on an associational expressive activity (i.e., on-line communications) (p. 123).

[13] "Although Justice Stevens's opinion for the Court in *McIntyre* did not expressly employ speaker autonomy, the Court has since characterized *McIntyre* as an example of this principle." (Tien, 1996, p. 189, n.83)

[14] Anonymity was part of a speaker's autonomy "to decide whether or not to disclose her true identity." (Tien, 1996, p. 124); "Given the McIntyre Court's assumption that there are legitimate reasons for anonymity, it necessarily follows that banning anonymity will alter the content or distribution of speech." (Tien, 1996, p. 117)

[15] Anonymous speech can be related to First Amendment rights of association because typical on-line activities, such as bulletin boards, mailing lists, and newsgroups, are ways that people assemble in cyberspace (Tien, 1996, p. 176).

[16] Quoting *Roberts v. Jaycees*, 468 U.S. 609, 619 (1984).

If the protection of anonymity includes the associational privacy, questions about the relationship between anonymity and privacy as constitutional rights can be raised. Brenner (2002) provides a demarcation between the two intertwined rights. Although a right to privacy is not expressly granted as a general right by the Constitution, the Supreme Court has recognized that the right to privacy is derived from the First Amendment protecting anonymous speech and the confidentiality of associations, the Fourth Amendment prohibiting unreasonable searches and seizures, and the Fifth Amendment protecting the right to avoid self-incrimination – the right to not divulge one's guilty secrets (Brenner, 2002, p. 124). On the other hand, anonymity is part of the right to privacy and is guaranteed only by the First Amendment protecting the right to speak anonymously and the right to associational privacy (Brenner, 2002, p. 125, 139).[17] Additionally, the purpose of protecting privacy is to "shield [one's] activity from observation by members of the general public" (Brenner, 2002, p. 171) whereas the focus of the protection of anonymous speech is on encouraging people to freely discuss controversial political issues without fear of reprisal, discrimination, and social ostracism. Therefore, anonymity can be interpreted as a way to preserve one's privacy and thus can be protected by invoking the privacy protection. However, with regard to the protection of anonymous political speech, the First Amendment right of anonymity is the most relevant legal ground.

As reviewed above, nonymous political speech has been protected as "valuable and necessary elements of society" (du Pont, 2001). In *McIntyre v. Ohio Election Commission* (1995), the Court asserted that a major purpose of the First Amendment was to protect the free discussion of governmental affairs including discussions of candidates,[18] and that protecting anonymity facilitated the unfettered interchange of ideas for political and social changes desired by the people.[19] Nevertheless, government measures to cope with internet problems often involve identity disclosure. Stieglitz (2007) expresses concern about such governmental intervention. He maintained that because those who commit serious cybercrimes may elude the law enforcement through hiding their communications using security and anonymity software, the chilling effect of the government regulation would be "on ‚gray' speech rather than communication that is truly dangerous" (p. 1394). As found in *McIntyre*, the government restriction on anonymous speech, which only seeks to prevent fraud, false and libel statements, could suppress and deter political speech in general. In this vein, government regulation to

[17] The right to associational privacy means the right to preserve the confidentiality of one's associations.

[18] Quoting *Mills v. Alabama*, 384 U. S. 214, 218 (1966).

[19] Quoting *Roth v. United States*, 354 U. S. 476, 484 (1957).

prevent illegal behaviors in cyberspace, from *ex post facto* identity verification to internet surveillance, may result in the reduction in the quantity of on-line political communication, which can easily be deterred by government regulation.

Conclusion: On-line Anonymity and Viewpoint Diversity

From *Red Lion Broadcasting Co. v. FCC* (1969) and *Miami Herald Publishing Co. v. Tornillo* (1974), three important principles are drawn: (1) the political viewpoint diversity is a public interest that the government should attempt to achieve; (2) the government measure to achieve the diversity of views is unconstitutional and, thereby, unacceptable when it has chilling effect on speech; (3) speakers have the right to decide what not to speak as well as what to speak. Applying these principles to the internet regulation, protecting the anonymity of on-line speakers is the key to the viewpoint diversity in cyberspace in terms that it can prevent chilling effect that is possibly caused by the fear of reprisals and punishments.

Unlike the traditional media, the internet technically enables every person to freely and easily publish his or her opinion. Additionally, people no more rely only on a limited number of mass media for political information, but they depend on each other as each of them can be an information source. Therefore, in order to promote the diversity of viewpoints on the internet, it is utmost important to provide an environment in which individuals feel free to express what they think and believe. If on-line speakers do not want to disclose their identity in expressing their opinion on a controversial issue, the government should not require them to provide their identity information. This is evident in the prior court cases reviewed including *McIntyre v. Ohio Elections Commission*. The jurisprudence of the protection of speakers' anonymity has been developed with special emphasis on controlling a chilling effect of identification on the circulation of political messages and protecting speakers' autonomy.

Despite the necessity of the anonymity protection for the viewpoint diversity in cyberspace, it could be inevitable to identify an internet user's identity and infringe upon his or her right of anonymity for finding a criminal who commits a cyber crime. Because the identification requirement or any type of identity tracking can make people think that they are watched and become unwilling and hesitant to speak of controversial issues, it should be narrowly tailored and very carefully applied.

References

Blasi, V. (1977). The Checking Value in First Amendment Theory. *Law & Social Inquiry*, *2*(3), 521–649.

Branscomb, A. W. (1995). Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces. *Yale Law Journal*, *104,* 1639-1679.

Brenner, S. W. (2002). The Privacy Privilege: Law Enforcement, Technology, and the Constitution. *Journal of Technology Law & Policy*, *7*, 123-193.

Cantijoch, M., & San Martin, J. (2008). Exposure to Political Information in New and Old Media: Which Impact on Political Participation? *APSA 2008 Annual Meeting, Hynes Convention Center*, Boston, Massachusetts, Aug 28, 2008. Retrieved from http://www.allacademic.com/meta/p280108_index.html.

Carr, G. H. (1996). Application of U.S. Supreme Court Doctrine to Anonymity in the Networld. *Cleveland State Law Review*, *44*, 521-546.

Choi, J. M., Na, H. S., & Park, Y. K. (2006). An Empirical Analysis of the Effect of Real-name System on Internet Bulletin Boards: Focusing on How the Real-name System and Users' Characteristics Influence the Use of Slanderous Comments and Abusive language. *2010 International Communication Association Conference* June 22-26, Singapore, Singapore.

Cohen, J. E. (1996). A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace. *Connecticut Law Review*, *28*, 981-1039.

Constantine, A. (1996). What's in a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech. *Connecticut Law Review*, *29*, 459-. (Retrieved from LexisNexis. The page number is omitted.)

D'Andrade. R. G. (1982). Reason versus Logic. *Symposium on the Ecology of Cognition*, Greensboro, NC.

Du Pont, G. F. (2000). The Criminalization of True Anonymity in Cyberspace. *Michigan Telecommunications and Technology Law Review*, *7*, 191-216.

Franklin, M. A., Anderson, D. A., & Lidsky L. B. (2005). *Mass Media Law: Cases and Materials* (7th ed.). New York, NY: Foundation Press.

Froomkin, A. M. (1999). Legal issues in anonymity and pseudonymity. *The Information Society*, *15*, 113-127.

Furlong, A., & Cartmel, F. (2007). *Young People and Social Change: New Perspectives*. Maidenhead: Open University Press.

Gaw, S., Felton, E. W., & Fernanadez-Kelly, P. (2006). Secrecy, Flagging, and Paranoia: Adoption Criteria in Encrypted E-Mail. *ACM CHI 2006*, 591-600.

Hazlett, T. W., & Sosa, D. W. (1997). Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market. *The Journal of Legal Studies*, *26*, 279-301.

Kelly-Woessner, A., Woessner, M. & Rothman, S. (2009). Perception of political disagreement and self-censorship in downward communication. *ISPP 32nd Annual Scientific Meeting*, Trinity College, Dublin, Ireland, Jul 14, 2009. Retrieved from http://www.allacademic.com/meta/p305670_index.html.

Kim, E. & Kim, S. (2007). Talking about Mundane Topics on the Internet: A Comparison of Political and Nonpolitical Online Discussions in Korea. *Annual Meeting of the International Communication Association*, San Francisco, CA, Retrieved from http://www.allacademic.com/meta/p171174_index.html.

Krattenmaker, T. G., & Powe, Jr., L. A. (1985). The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream. *Duke Law Journal*, 151–176.

Larios, M. E. (2010). ePublius: Anonymous Speech Rights Online. *Rutgers Law Record*, *37*, 36-43.

Long, III, G. P. (1994). Who Are You?: Identity and Anonymity in Cyberspace. *University of Pittsburgh Law Review*, *55*, 1177-1213.

Meiklejohn, A. (1948). *Free Speech and Its Relation to Self-Government*. New York, NY: Harper Brothers Publishers.

Meiklejohn, A. (1961). The First Amendment is an Absolute. *The Supreme Court Review*, 245-266.

Nam, K. G. (2004). *Freedom of Speech on the Internet (Korean).* Unpublished master's thesis, Yonsei University, Seoul, Korea.

Nicholas, A. V., Antoine, J. B., Vincent, L. H., & Anne, K. D. (2009). Selective Exposure in the Internet Age: The Interaction between Anxiety and Information Utility. *Political Psychology*, *30*(4), 591-613.

Norton, R. K. (1996). McIntyre v. Ohio Elections Commission: Defining the Right to Engage in Anonymous Political Speech. *North Carolina Law Review*, *74*, 553-584.

Peer, L. (2007). The former audience and the future public: Conceptualizing and measuring new media use and its potential for democracy. *Annual Meeting of the American Political Science Association*, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers, Chicago, IL, Aug 30, 2007. Retrieved from http://www.allacademic.com/meta/p211461_index.html.

Simmons, S. J. (1977). The Problem of "Issue" in the Administration of the Fairness Doctrine. *California Law Review*, *65*, 546-595.

Stieglitz, E. J. (2007). Anonymity of the internet: How does it work, who needs it, and what are its policy implications?. *Cardozo Arts & Entertainment Law Journal*, *24*, 1395-1417.

Sunstein, C. R. (1995). *Democracy and the Problem of Free Speech*. New York, NY: The Free Press.

Tien, L. (1996). Symposium: Innovation and the Information Environment: Who's Afraid of Anonymous Speech? McIntyre and the Internet. *Oregon Law Review*, *75*, 117-189.

Venturelli, S. (2002). Inventing E-Regulation in the US, EU and East Asia: Conflicting Social Vision of the Internet & the Information Society. *Telematics and Informatics*, *19*(2), 69-90.

Lewis Publishing Co. v. Morgan, 299 U.S. 288 (1913).

Lovell v. Griffin, 303 U. S. 444 (1938).

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

Talley v. California, 362 U.S. 60 (1960).

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Buckley v. Valeo, 424 U.S. 1 (1976).

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338 (1995).

ACLU v. Miller, 977 F. Supp. 1228, 1230 (N.D. Ga. 1997).

ACLU v. Johnson, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998).