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Nobody's Business: A Novel Theory of the Anonymous First Amendment

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Abstract

Namelessness is a double-edged sword. It can be a way of avoiding prejudice and focusing attention on one's ideas, but it can also be a license to defame and misinform. These points have been widely discussed. Still, the breadth of these discussions has left some of the depths unplumbed, because rarely is the question explicitly faced: what is the normative significance of namelessness itself, as opposed to its effects under different conditions? My answer is that anonymity is an evasion of responsibility for one's conduct. Persons should ordinarily be held responsible for what they do, but in some cases, where there is sufficient justification, they may enjoy a privilege not to be. One such privilege—the privilege to participate in community thinking—is based in the First Amendment interest that persons have in developing their thinking with others without having to be held responsible for it. I argue that this privilege was not applicable eleven years ago to the challengers in *Doe v. Reed* and is, for somewhat similar reasons, not applicable to the challengers in the Supreme Court's most recent anonymity case: *Americans for Prosperity Foundation v. Bonta*. I argue it was wrongly decided.

Keywords: Anonymity, Free Speech, First Amendment, Freedom of Association, Supreme Court, Responsibility, Grand Juries, Petit Juries, Ballot Initiatives, Doe v. Reed, Americans for Prosperity Foundation v. Bonta, Secret Ballot, Representative Democracy, Names, Privileges, Constitutional Law

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I. Introduction

Stories of all kinds suppose that names have power. According to some religions, God is too great to be named. In the world of Harry Potter, Voldemort is able to grow in power by making ordinary people too afraid to say his name. Rumpelstiltskin will only allow the princess to keep her child if she can guess his name. Superman can only defeat Mister Mxyzptlk by getting him to say his name backwards.

The power of names is not just a product of the imagination. A name can grab someone's attention, formalize a contract, assert one's individuality, express affection, and signal allegiances and lineages. A name's absence is just as consequential. The January 2021 vote by House Republicans to keep Liz Cheney in her leadership position had a distinct significance due to its being anonymous.[1] Additional examples are easy to find. Authoring a book in one's own name is different from authoring it anonymously;[2]

1. This vote suggested that private views of Trump's conduct were at least somewhat in competition with the political incentives to support him. It also suggested the weakness of her support, which is now being highlighted in a second challenge to her position in the Republican caucus. *See* Catie Edmondson & Nicholas Fandos, *House Republicans Choose to Keep Liz Cheney in Leadership*, in some David Morgan, *House Republicans Ready Vote on Trump Critic Cheney's Leadership Post*, REUTERS (May 4, 2021, 2:44 PM), https://www.reuters.com/world/us/house-republicans-ready-vote-trump-critics-leadership-post-sources-2021-05-04/.

2. Many authors publish under a pseudonym. Pseudonyms introduce complications that I will deliberately leave aside in this paper, but some uses of them are illustrative since someone who uses a pseudonym does not speak in their own name. *See* Joseph Fulda, *The Ethics of*

reporting a crime in one's own name is different from giving an anonymous tip;[3] and writing one's own opinion is different from joining a *per curiam* opinion.[4]

But what exactly *is* the difference between acting in one's name and not? In one sense, this question is easy to answer. The difference is one of connectivity or attributability.[5] When one writes a note and signs it, the content and its author can be linked up. The words can be attributed to them. By contrast, an anonymous note separates its content from its author. The words are disowned; they are not anyone's in particular.[6]

However, the preceding question has a more difficult side to it: what is the difference in *normative significance* between acting in one's name and not? That is, what is the importance of anonymity such that it is sometimes worth protecting and sometimes not?

The vast majority of legal scholarship and judicial opinions about anonymity assumes that the answer to this hard question is straightforward: the importance of a person being dissociated from what they say lies exclusively in the effects.[7] For example, anonymity may preclude unfair retaliation and incentivize unpopular speech, but it may also enable harassment and misinformation.[8]

From this assumption, it follows that the legal rules regarding anonymity should be evaluated through a case-by-case cost-benefit analysis.[9] They should encourage or discourage anonymity to produce the best overall consequences. Many commentators make this point by saying that anonymity

Pseudonymous Publication, 16 J. OF INFO. ETHICS 75 (2007). *See also*, Alexandra Schwartz, *The "Unmasking" of Elena Ferrante*, THE NEW YORKER (Oct. 3, 2016), https://www.newyorker.com/culture/cultural-comment/the-unmasking-of-elena-ferrante (discussing the identification of a popular novelist who had written under a pseudonym).

3. Navarette v. California, 572 U.S. 393 (2014) (holding that an anonymous tip may satisfy the requirement of reasonable suspicion when sufficient indicia of reliability are present, such as the identity of the car that was reported to have driven dangerously).

4. *See* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1199 (2012) (arguing that courts have reason not to speak as institutions and should generally speak through the opinions of particular judges).

5. *See* Julie Ponesse, *The Ties that Blind: Conceptualizing Anonymity*, 45 J. OF SOC. PHIL. 304 (2014); Jeffrey Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 720-22 (2015); Kathleen A. Wallace, *Anonymity*, 1 ETHICS AND INFO. TECH. 21 (1999).

6. There are other kinds of important anonymous activities, like anonymous reading, but I focus on speech at this point for ease of exposition.

7. *See infra* Section I (offering examples).

8. These points are ubiquitous in scholarship about anonymity. *See, e.g.*, Lyrissa Lidsky & Thomas Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537 (2007). Courts focus heavily on the chance of reprisals against speakers. *See* Am. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995); Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978) (discussing anonymity as the concealment of one's face rather than one's name); NAACP v. Alabama, 357 U.S. 449 (1958) (a foundational precedent for anonymous speech that focuses on the risks of reprisals).

9. *See infra* Section I.A (giving examples of this assumption).

or anonymity rules are tools and that their use should be evaluated according to an instrumental logic. They should be used if they are the right tool for the job (i.e., when they will produce the best outcome relative to other doctrines or rules).[10]

These claims about anonymity—the instrumental or tool view—may seem unremarkable, but I think that is flawed. In this paper I will argue that a different tool—*the privileged participation view*—is superior and that it can be used to provide improved analyses of anonymity practices in the law.

Some motivation for resisting the instrumental view is that, intuitively, names have a special significance to a person as it pertains to their identity; hence, the absence of a name is likely similarly significant. Support for this intuition is that some uses of anonymity seem to be prohibited for reasons that have less to do with the effects it would have and more to do with the role that anonymity plays in protecting thought. For example, legislative representatives cannot vote on legislation anonymously, even if this would lead to better decision-making or other good consequences. I think this is because the valuable role that representatives play in a democracy is *per se* incompatible with anonymity.[11] On the other hand, I think that the right to read anonymously is not justified by the good consequences it may have, but rather by the unique role that anonymous reading plays in a society animated by the values of the First Amendment.

The view I favor vindicates these two intuitions. The importance of a person being dissociated from what they say does not lie exclusively in the effects that such a dissociation will have on other normatively important goals and values, such as preventing reprisals or incentivizing valuable speech. Rather, my claim is that this dissociation has a distinct and determinate normative significance in itself.

Names are how we think about a person and link that person's conduct to the person. This kind of linking is significant because it is the basic initial way in which we hold others responsible for what they do. That is, we hold persons responsible for what they do—whether good or bad, right or wrong—by thinking that *they* have done it. We may, of course, have cause to go further and praise or criticize them, or even reward or punish them for what they have done. However, all of these steps depend on first attributing

10. *E.g.,* A. Michael Froomkin, *Lessons Learned Too Well: Anonymity in a Time of Surveillance*, 59 ARIZ. L. REV. 95, 145 (2017) ("[c]ommunicative anonymity is a core part of freedom in a democratic state and a critical tool for those who seek freedom from nondemocratic states."); Bryan H. Choi, *The Anonymous Internet*, 72 MD. L. REV. 501, 538 (2013) ("[t]here is good reason why anonymity and generativity are key pressure points. Both are tools…"); Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996).

11. Perhaps the response will be that open voting by legislators will always produce the best consequences. That may be true, but my point is that it does not seem we have to tally up the consequences of secret voting by legislators to know that it is not permitted. I discuss this more at the beginning of Section II.

the action to them and so altering, whether slightly or greatly, our view of who they are. Names are essential to this attribution as they are how we perceive the person.[12] This perception is a name's source of power.

Generally, we hold persons responsible by mentally "filing" their actions under their name. When anonymity precludes such a filing by suppressing the relevant name, it precludes being held responsible for what one does. Accordingly, anonymity does not just keep one's identity from being known, anonymity defeats responsibility. This is its distinctive normative significance.

Moreover, since holding persons responsible for what they do is an important moral activity—after all, why should persons not be held responsible for what they are responsible for?—anonymity will be presumptively wrongful. However, this presumption can be defeated in some circumstances, in which case there will be a privilege to be anonymous. One such privilege is based on the importance of thinking and not, as the leading view would have it, on the need to produce the overall best consequences. Thinking is both heavily experimental and social. Persons need to be able to try out their ideas with others, but if doing so is conditioned on being held responsible for what one says, one may be deterred from coming forward. Hence, persons should enjoy a privilege, based in the First Amendment, to anonymously participate in community thinking.[13] This is the essence of the privileged participation view.

After establishing this theoretical claim, I apply it to various anonymity practices to show how it reshapes the kind of arguments that can and should be given for them. Considering these anonymity practices also provides an opportunity for me to illustrate the kind of factors that determine whether someone can claim the privilege to participate in community thinking anonymously.

First, I consider anonymous speaking and reading. Free speech doctrine currently protects a right to do both, and the privileged participation view supports that result. After all, persons may need to make contact with ideas and arguments that are found among a community of thinkers without thereby taking a position within that community. Second, I turn to various kinds of formal democratic participation. I argue that the privileged participation view provides some support for the secret ballot, but it does not permit representatives to vote anonymously nor does it permit citizens to suppress

12. There is no doubt that one can see someone do something and chastise that person for it without knowing their name, but without their name one cannot integrate the interaction into the person's biography. By contrast, if one knows a person's name then one can, in principle, transmit it by speech "Oh Emily? I once saw her do such and such…"

13. *See, e.g.*, JANNA MALAMUD SMITH, PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE loc. 556 (1997) (ebook) ("[a]nonymity, you might say, is privacy for people who don't want to be really alone.").

access to their signatures in favor of a ballot initiative.[14] Next, I illustrate how the arguments in *John Doe v. Reed* are applicable to *Americans for Prosperity Foundation v. Bonta*.[15] I argue that the California disclosure requirements at issue in that case should be upheld.

The organization of this Article is as follows: Section I illustrates the view that anonymity is a tool and then offers an alternative view: the privileged participation view. I illustrate and defend the privileged participation view by showing how it justifies anonymous speaking and reading. In Section II, I offer a sketched theory of representative democracy in the course of discussing the three democratic practices listed above: voting in elections by citizens, legislative voting by representatives, and voting on ballot initiatives. I argue that it is proper for the first to be anonymous, but that the latter two must be done openly. I then argue that similar arguments can be made to support upholding the disclosure laws in *Bonta*.

II. Theoretical Foundations

A. The Going View: Anonymity is Significant Only Because of its Consequences for Other Goals and Goods

In this section, I will offer some examples of the assumption that anonymity is only contingently normatively significant (i.e., that it does not have a definite, built-in significance). I do so not only to illustrate the nature of this assumption and its prevalence, but also to point out some of the insights that it has generated as well as to highlight some questions it has produced.

The assumption I identify finds clear, albeit implicit, expression in an article by Lyrissa Lidsky and Thomas Cotter.[16] Their focus is on anonymous speech and the general right to engage in it. They do not suppose that anonymity has a built-in moral significance that can be consulted to evaluate the appropriateness of such a right. Instead, they assume that such a right will be justified or not, depending on the effects that anonymity would have across speakers and speech situations in the aggregate, as well as the relative importance of those effects.[17] Thus, determining whether there is justification for anonymous speech requires a grand accounting. Costs and benefits are to be totaled up, and if the benefits sufficiently outweigh the costs to a greater degree than other options, anonymity is justified for speech.

14. John Doe v. Reed, 561 U.S. 186 (2010) (holding that there is no general First Amendment requirement for the signatories of a ballot initiative to be kept from the public).

15. Am. for Prosperity Found. v. Bonta, 594 U.S. —- (2021).

16. *See* Lidsky & Cotter, *supra* note 8 (this article is cited by other scholars focusing on privacy and anonymity); *See, e.g.*, Margot E. Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 815, 823 n.27 (2013) (citing and elaborating on Lidsky and Cotter).

17. Lidsky & Cotter, *supra* note 8*,* at 1159.

As Lidsky and Cotter acknowledge, such a grand accounting is difficult to carry out, because it depends on empirical facts that are hard to pin down.[18] Lidsky and Cotter state that:

In theory, audiences could be either better or worse off under a regime that grants strong protection to anonymous speech, as opposed to one that grants only weak protection, depending upon which effect—the production of more socially valuable speech, or the production of more harmful, though discounted, speech—predominates.[19]

In the interest of reaching a more definitive judgment, they assume that persons are savvy and will approach anonymous speech with the correct amount of caution.[20] They also assume that anonymity is a superior way of incentivizing speech, compared to other methods, such as greater institutional protections and consequences for retaliation against speakers.[21]

The empirical dependencies of their arguments are evidence of the assumption that anonymity has no inherent normative significance and that it is to be evaluated situationally. Put another way, anonymity is, in their view, the preferred way of calling forth a certain balance of good speech. But like any tool, anonymity is only good given how things are now. Perhaps in the future, for all their argument claims, greater tolerance and protections against retaliation will make a right to anonymous speech unnecessary. By contrast, I will argue that anonymity protects speech in a distinct way, and that this kind of protection is not made obsolete by greater tolerance or stricter laws against retaliation.[22]

A bigger problem though, and one that Lidsky and Cotter also acknowledge, is the need for an evaluative framework. That is, even if we had rock solid empirical evidence of how anonymity alters the content and quantity of certain kinds of speech, we still need to know how much bad anonymous speech can be tolerated to secure some amount of valuable speech that would not be spoken without the protection of anonymity. But the very notion of a tradeoff is out of place, given that the constitutionally established value of the latter kind of speech is not usually balanced against

18. *Id.* at 1577.

19. *Id.* at 1539-40.

20. *Id.* at 1588.

21. *Id.* at 1578 ("[i]ndeed, for this class of speakers, a system that simultaneously compelled disclosure of authorial identity and effectively prevented retaliation would be preferable to one that merely protected anonymity, because (1) speech consumers would stand to benefit from knowing the speaker's identity, and (2) the speaker would stand a better chance of being taken seriously, all other things being equal. Reality suggests, however, that retaliation (let alone mere social ostracism) can never be prevented with 100% effectiveness, and thus that a rule forbidding anonymity almost certainly would discourage some apprehensive speakers from coming forward.").

22. Though it is possible that circumstances will change such that very few persons feel the need to avail themselves of this kind of protection. My point in the text is that anonymity protects speech in a distinct way.

the possibilities of the bad speech that might result.[23] For instance, the right to free speech itself is not dependent on there being a favorable balance of good speech and bad speech, but rather enjoys a justification that transcends this balance. This justification is the value of speech in advancing one's thinking, which happens through both good and bad speech.

Such are the problems of evaluating anonymity based on a grand accounting of various values, with no definite way to compare them. By contrast, my own view holds that persons must be free to read and speak anonymously not because these rights produce the best results—though they may—but because they vindicate the central goal of the First Amendment, which is to ensure a vigorous public sphere.[24]

Note that my goal is not to mount a full critique of Lidsky and Cotter's approach, but only to emphasize that it presumes a particular picture of what anonymity is and hence how it is justified. Based on their approach, we are drawn into the project of creating a tradeoff schedule for the various effects of anonymity because it is assumed that anonymity does not provide its own normative logic, apart from totaling up its costs and benefits.

Other scholars follow the approach of Lidsky and Cotter.[25] For example, Jeffrey Skopek's comprehensive and innovative article mentions that anonymity "often hides the identity of someone about whom facts are known for the purpose of putting such goods into public circulation."[26] This is, in my opinion, a correct characterization of anonymity that has profound implications. Citizens need anonymity to start communally experimenting with what they think, but without having to make their experiments known. However, Skopek does not develop this remark as a statement of anonymity's normative significance or the key to its justification in particular cases. Instead, he intends it to be a summary of how anonymity—and attribution—are:

> [B]oth used by our law to shape the costs and benefits of creating goods in order to align private production incentives with public goals and values, control information flows in order to address evaluation

23. Lidsky & Cotter, *supra* note 8, at 1581 n.190 ("[w]hether the costs and benefits of anonymous speech are even commensurable with respect to one another is debatable. As we suggested above, for example, if the autonomy interests in support of a right to speak anonymously are worthy of respect, how exactly does one determine the optimal tradeoff in return for a reduction in harmful speech? More importantly, and as others before us have noted, the social welfare approach appears inconsistent with a good deal of existing First Amendment jurisprudence…").

24. *See infra* text accompanying notes 36–52.

25. Citations can be multiplied in law and philosophy. *E.g.,* Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J.L. & POL. 39 (2010); Victoria Smith Ekstrand, *The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law*, 18 J. TECH. L. & POL'Y 1 (2013) (cataloguing costs and benefits of anonymous speech); Ponesse, *supra* note 5, at 304 (noting the two-faced nature of anonymity).

26. Jeffrey Skopek, *Anonymity, the Production of Goods, and Institutional Design*, 82 FORDHAM L. REV. 1751, 1755 (2014).

> costs associated with using goods, and reallocate rights of control over goods in order achieve their efficient or fair allocation.[27]

For Skopek, anonymity is a peculiar or interesting kind of tool or "design lever"[28] that institutions can manipulate to get the results they want, and will be justified when it is the right tool to bring about the desired outcome.[29]

Crucially though, Skopek explicitly disclaims any attempt to try and identify what the right outcome would be, such that the use of anonymity would be the most suitable lever to pull to make it so. From Skopek's comments about balancing interests it seems plausible that he supposes the right outcome is a complicated grand accounting of anonymity's impact on a multitude of goods, rather than the single distinct good of anonymity. Instead, the grand accounting considers the impact of goods such as efficiency, freedom, and fairness.

The overall point is this that many legal theorists of anonymity treat its justification as a matter of seeing to what degree it can call forth various mixtures of good and bad in a given factual context. When it calls forth a sufficiently attractive mixture in a particular case, it is justified. This view of how anonymity is justified embodies a contestable assumption; namely, that we use it to realize goods, whatever they happen to be and as the opportunity arises.

B. Anonymity Has a Distinct Normative Significance All Its Own: It is an Evasion of Responsibility

In this section, I offer a theory of anonymity that will address two issues: the nature of anonymity and its consequent normative and legal significance. I contend that the nature of anonymity is that of preventing persons from being held responsible for the things they do with ideas (e.g., speaking them and reading them). This aspect of anonymity's nature—that it is *responsibility defeating*—is troubling and calls for justification. After all, it is a matter of general moral importance that persons be *held* responsible (fairly and proportionally of course) for those things that they *are* responsible for. For example, persons are responsible for how they conduct themselves and they may be held responsible for how they do so through various means, such as civil suits for battery and negligence. There are exceptions such that

27. *Id.* at 1756.

28. *Id.*

29. *Id.* at 1755 (Skopek at one point says that anonymity is not a "mere tool or aspect of privacy." Note that in saying this, he does not intend to deny that anonymity is a tool; rather, he tries to claim that anonymity is not a tool *of privacy*, but one of a wider sort. I will argue later that this is based on a misunderstanding of privacy, as many if not all the examples he cites of anonymity are cases of privacy when privacy is understood properly as a certain kind of barrier to being held responsible.).

conduct that would ordinarily earn liability does not, but these exceptions are, we say, privileges and require strong justification.[30]

Since persons *are* responsible for what they say to others, they should be potentially *held* responsible for the same. But anonymity precludes the latter, and thus constitutes an exception to the ordinary moral order of things. For this reason, it is a privilege, and requires a strong justification. This justification is supplied by the proper use of anonymity, which is to allow persons to participate in thinking with others through externalizing and receiving ideas, without having first to work out which ideas they wish to be responsible for.

It should be noted that this justification is similar in some ways to what I believe to be the justification for the privacy of thoughts. Persons *are responsible* for their thoughts but may not be *held responsible* for them since their thinking would suffer under such intense scrutiny. Anonymity plays a similar role, but for communal rather than personal thinking. That is, anonymity allows a person to interact with the thinking of others, without having to "own" a particular position to do so. Still, I should stress, anonymity is not the ideal form of community thinking. The ideal is to think with others in one's own name. However, getting to that point requires space in which to prepare and consolidate. Anonymity (and privacy) provide that space.

1. The Nature of Anonymity

Having laid out my two main contentions, I will now defend them. First is the claim that anonymity defeats the ability for others to hold one responsible. If one thinks that holding persons responsible involves imposing consequences on them or doing something to them, then anonymity will often preclude it, by denying the other party knowledge of the "target" for these interventions.

However, the activity of holding someone responsible does not necessarily involve imposing consequences on them, although it can progress to that point. Instead, the essence of holding someone responsible is the making of a mental record that links a particular person with something for which they are responsible (e.g., an action or a thought). By doing this, one updates one's view of the person to reflect how they have changed. Put another way, holding someone responsible for something adds to one's mental biography of that person and so alters, to some extent, one's view of that person.

A full defense of this view would overwhelm the goals of this article, but I will provide three examples to show its plausibility. The first is an institutional example. Congress holds various government entities and officers responsible by exercising "oversight," which may consist of building a record of who did what and who is responsible for what, which often takes

30. 86 C.J.S. Torts § 28-34 (surveying some privileges against tort liability, such as the self-defense and litigation privileges).

the form of an official report.[31] Of course, a report may, depending on its content, warrant more.[32] Perhaps new laws are needed, or charges need to be brought against wrongdoers. My view does not deny that holding someone responsible may continue well past the stage of record-making; it only insists that its anchoring, initiating, and indispensable core is one of record-making. Although its starting point is the epistemic task of generating an accurate understanding of what happened, that understanding may legitimate and even require additional steps. One step might asking "What do you have to say for yourself?" followed by punishment or liability if the response to the previous question is not satisfactory.

The second example is interpersonal. In many cases, persons hold each other responsible without blaming or punishing. Two colleagues may hold each other responsible for writing a certain amount each week by nothing more than "checking in." In a week when both meet their quota, holding each other responsible need not consist of anything other than an email with the writing from that week. Even when one party fails to write, nothing more is warranted.[33] Perhaps the other party simply acknowledges their lack of writing for the week. Similarly, when an ordinarily punctual friend is running late, one may hold them responsible by simply noting that they are late, without thinking anything of it. If the friend is late again, one is prepared to say "this is the second time you've been late," which may, in turn, warrant some digging or a demand for an explanation: "is everything ok?"

While the first two examples are about non-speech action, the lesson I'm taking from them is further confirmed by the third example: speech. Persons hold each other responsible for what they say by acknowledging that they have said it. For instance, an audience holds a speaker responsible for what they heard the speaker say, scholars hold each other responsible for what they argue by citing their work, and journalists hold politicians responsible by "putting them on the record." The point is, again, that holding someone responsible is fundamentally a matter of adjusting one's view of the person by taking account of what that person is responsible for.

Since holding someone responsible is a matter of mentally linking a particular person with a particular thing for which they are responsible, providing these two pieces of information asks or invites another party to perform this bit of recordkeeping. This kind of asking or inviting constitutes *taking responsibility*. So, when a speaker states content as *theirs*—"in their

31. Another example: a school may hold a student responsible by making a note on the student's permanent record.

32. For instance, a grand jury is a means by which the government tries to figure out what happened in a way that is sufficiently accurate to warrant further steps (i.e., making the accusation against the target).

33. A person may tell friends of their New Year's resolution so that they will be held responsible for meeting them, again, solely by the friends' registering whether they have met them or not. Nothing more is needed.

own name"—the speaker provides, in a single package, everything that a listener needs to make the corresponding record in the listener's mind: that the speaker is responsible for the content. Such provision of all the requisites for being held responsible invites the listener to go through the required bit of record-keeping, and hold the speaker responsible. In an ordinary conversation between two people, this kind of exchange is ubiquitous. One person says that it is a nice day and the listener holds them responsible for saying so, by hearing and so recording them as saying it.

Through presenting some content *as one's own,* one *takes responsibility* because it facilitates another person to hold one responsible for one's content. The flip side of this is that one *avoids taking responsibility* for some content by attempting to preclude another's holding one responsible for it, by *not presenting it as one's own*.

Crucially, there are two ways to not present content as one's own. One way is *not to present* the content at all. If one does not speak one's thoughts to another, then one attempts to keep others ignorant of one's content. Through this approach, one signals an unwillingness to be held responsible for the content, and such unwillingness should generally be honored.

This default is, as I mentioned before, a consequence of persons being entitled to mental privacy.[34] Without this entitlement, others could begin to hold a thinker responsible for their thoughts at an arbitrary point in their development – before they are really finished being worked out. This will misrepresent the thinker's true position. Moreover, persons who are not ready to share their thoughts are vulnerable to being excessively influenced by those who expose their thinking, perhaps conforming to what they perceive to be the exposer's viewpoint.

However, a second way to not present content as one's own, and to signal an unwillingness to be held responsible for it, is to present the content *but not as one's own.* Anonymity permits this second option. As previously discussed, holding someone responsible is a matter of attributing something to someone as theirs: mentally linking a specific person to some specific content. But without access to that person by way of their name, this is impossible. If holding someone responsible is a matter of recording something in one's mental "file" on a person, then without a name, the right file cannot be updated. For example, if one receives an anonymous note, one can, at most, make a mental note of the content, and file it under the heading "?" as a placeholder for whoever sent it.

This theoretical result is bolstered by common intuitions about names. When something bad happens and we want to hold someone responsible, we

34. I argue for the claims in this paragraph at length in previous writing. *See* Jordan Wallace-Wolf, Mental Privacy (2020) (unpublished Ph.D. dissertation, University of California, Los Angeles) (on file with University of California eScholarship, available at https://escholarship.org/uc/item/0g21n38c).

may shout "I want names!" Informants are threatening because they might "name names," and when we want to praise or criticize someone specifically, we may "call them out" by name. In all these cases, a name provides the key for holding someone responsible, because it provides a label, shared among a community, under which their actions can be recorded, and, if necessary, judged in various ways.[35] A name is the means of mental record-making about a particular thing, *par excellence*.[36]

An example of these claims is art. An artist signing a painting is like a speaker stating a thought in their own name. The artist's signature is not just a piece of evidence that they painted it, on a par with a chemical or brushstroke analysis that says the same. An artist signing a painting is an endorsement. It indicates that the artist thinks the painting counts as a full member of their corpus. Arguably, a signed painting is one they wish to be known or evaluated by, whereas an unsigned painting is one they disclaim, as not fully representative of their artistic style. Again, the point is not that disclaiming a piece of art can make it so—they painted the painting. Nothing can change *that*. Rather the point is that any interpretation of their art should take into account how they view it. It would be a misleading simplification to treat everything the artist ever painted, even what the artist threw away or never showed, as equal members of the artist's corpus.

The discussion so far has addressed the first goal of this section to elaborate on the nature of anonymity: that it is responsibility defeating. Since holding someone responsible is fundamentally an act of mental recordation—of linking, in thought, a particular act or thought with a particular person—and since a name is the way one thinks directly about a particular person, ignorance of person's name precludes holding them responsible. If one does not know who wrote a note, its content cannot be attributed to anyone as that for which they are responsible. It is disclaimed content.

It must be emphasized that though namelessness precludes being held responsible, it is not true that anonymity guarantees namelessness. Not signing a note or a painting may often keep it nameless, but not always and perhaps not forever. The author may be easy to identify despite there being no signature, or it may come to light later when new information is revealed. Still, the anonymous speech is a *bid* or an *attempt* to avoid being held responsible for content, and this aspect of anonymous speech is inseparable from the speech itself and survives the identification of its speaker. What I mean is that if the anonymous author of a note is later identified, it is not as

35. The community is the holder of a person's "complete" record, in the sense that whatever others attribute to that person under the person's name can, in principle, be combined (e.g., "Oh you know Jim? I was on a trip with him once and he…"). Things are complicated for others with "secret identities" (e.g., Batman).

36. *Cf.* Skopek, *supra* note 5, at 720-22 (arguing that a name is just like any other piece of information in being a potential way to single the person out such that "namelessness is neither a sufficient nor a necessary condition for anonymity").

if the content of the note can now be considered written in the author's name in the same way as their other correspondences.[37] A cloud of uncertainty or ambiguity hangs over the note, even after being linked to its source, because the linkage has been created post hoc by others and not the author. The note was never put forward *as* the author's, and this fact is not altered by finding out that they did in fact write it. Instead, its disclaimed status lives on.

Taking into account these last points, my claims about the nature of anonymity can be put compactly like this: a nameless person cannot be held fully responsible for the content they put forward, and anonymity always seeks namelessness, even if it fails to achieve it.

2. The Value of Anonymity

Having dealt with the nature of anonymity, I turn now to its value. What is the good in it? Why should persons be allowed to defeat the responsibility for which ideas they traffic with? Why should they have this privilege? My answer is built around thinking.

Persons have an interest in thinking critically, thoroughly, and autonomously, which requires having control over when their solitary thinking becomes a part of thinking with others. This is the basis of privacy in one's thoughts. Without this control, persons may be misrepresented or have their thinking stunted or diverted. With this control, persons can wait until they are satisfied with their thinking before integrating it with the thinking of others, as the latter requires carrying out a demanding joint activity and fulfilling its attendant obligations.

Morality recognizes this interest in control by prohibiting others from accessing the content of thoughts that one has not signaled a readiness to reveal. This protects one's ability to withhold content from joint-thinking and to introduce it to others only selectively, at one's own pace, and on one's own terms. It allows persons to start thinking by themselves and then pull in mentors, friends, and spiritual advisors before broadening further to, say, a small workshop and then to a conference, and perhaps eventually, to the republic of letters in the form of published work.

Protection for growing the breadth of one's own thinking at one's own pace is valuable, but it is also limited in that one sometimes needs access to others *to* further develop their thinking. That is, one sometimes prepares to think with a community in one's own name by first thinking with the community anonymously. But if one were only protected from being held responsible by others so long as one kept quiet, then one would always have to take responsibility for the relevant thought in front of an audience to grow from the community's input. This is a Catch-22 because in order to think

37. The same is true when an anonymous painting is later identified as the work of a particular artist. Though the artist painted it, the import of the painting to interpretations and judgments of the artist's artistic legacy is ambiguous due to her decision not to treat it as a full member of her corpus.

with others about something, so as to better assess *whether* to take responsibility for it, one would first have to take responsibility for it to that very audience.

These points illustrate the need for protection for one's thinking that allows for one's participation in various community discourses, rather than withholding one's thoughts from them. Take thinking with the public at large. Public thinking is not just private thinking with a lot of people. It is of a different order. For example, publishing something does not just make it available to a certain set of persons, but to persons, generally and indiscriminately.[38] Consequently, participation in public thinking is distinctly valuable, both in and of itself and as a means of improving what one thinks.[39] However, such participation is also particularly intimidating because it defines who one is, not just in some circles, but to an entire community of persons. Thus persons need a participatory kind of privacy that will let them think with others, but without being held responsible for their thoughts by them.

Anonymity protects one's thinking in various community discourses because it prevents persons from being held responsible for their thoughts. By suppressing their identity and not their ideas, it allows persons who are unready to be held responsible for their ideas to participate in public discourse, albeit as "nobody." For this reason, anonymity can be understood as the public-facing or participatory side of mental privacy. This is its justified use: to permit persons to engage in community thinking (with the maximal community being the public) without the burden of having to take responsibility for their thoughts.

3. The Justification for Anonymous Speaking and Reading

Consider anonymous reading, which, for example, includes anonymously preparing to read, say, by querying a search engine.[40] It is a paradigmatic illustration of a privileged use of anonymity. The thinking-based, participatory interests persons have in reading are enormous; the risks posed by reading in one's own name are serious, and the possibilities for abusing anonymous reading are scarce.[41]

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38. *Cf.* Michael Warner, *Publics and Counterpublics*, 14 PUB. CULTURE 49 (2002) (discussing the formation of a public).

39. In thinking with others, one must articulate ideas in ways that can speak to many kinds of listeners, and likewise to respond and address arguments from many kinds of challengers or critics.

40. The First Amendment right to read anonymously has not received an explicit endorsement from the Supreme Court. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (In *Stanley*, there is strong support for such a right, since it permitted persons to view obscene material in the privacy of their home. Justice Marshall conceived of the case in terms of the privacy of the mind and characterized the right at issue as "the right to be free from state inquiry into the contents of his library.").

41. Others have also argued forcefully that anonymous reading is important. *See, e.g.*, Marc Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and*

First, the interest in receiving the content of others is crucial to thinking and without it, the ability to have thoughts without revealing them to others would be of limited value since one would be restricted to whatever thoughts one could put together by oneself. One needs material to gain from solitary thinking. One needs to access the rich legacy of past thinking in the form of "great" books but also to get in touch with the zeitgeist, which may live in pulp novels or popular TV. Seeing what others are thinking is a way of participating in community thinking at a basic level.

These benefits are threatened if one must read in one's own name, because what one reads is an infirm but tempting basis for others to reach conclusions about who one is. Consider two examples, one old and one new. In the late 80s, a reporter gathered Supreme Court nominee Robert Bork's video rental records from his local store.[42] Nothing too shocking was revealed, but still, this prematurely exposed the workings of Bork's mind. More recently, the *New York Times* ran an article that analyzed celebrity bookshelves (made visible due to zoom calls prompted by the coronavirus pandemic) in an effort to see what they "revealed" about them.[43] Here too, the content a person engages with excites speculation about who they are and what they think. Reading on the subway also demonstrates the dynamics of judgment at play in such knowledge.[44] One may be circumspect about reading notorious works. No doubt, what one reads reflects what one thinks, but only inchoately because reading is how one explores an area, or satisfies curiosity, in preparation for settling on what one truly believes. Search queries are an even earlier stage of one's curiosity, in which one decides *what* to read.

Moreover, it is often the most "radical" material that is crucial to developing one's own views, because they help one chart the boundary of what is ambitious and extreme and what is nonsense or patently mistaken.[45] It is a

a First Amendment Theory for an Unaccompanied Right to Receive Information, 74 UMKC L. REV. 799 (2004); Marc Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141 (2008); Julie Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Neil Richards, *The Perils of Social Reading*, 101 GEORGETOWN L. REV. 689 (2013).

42. Andrea Peterson, *How Washington's Last Remaining Video Rental Store Changed the Course of Privacy Law*, WASH. POST (Apr. 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/how-washingtons-last-remaining-video-rental-store-changed-the-course-of-privacy-law/.

43. Gal Beckerman, *What Do Famous People's Bookshelves Reveal?*, N. Y. TIMES (July 27, 2020), https://www.nytimes.com/2020/04/30/books/celebrity-bookshelves-tv-coronavirus.html.

44. Susan Dominus, *Snoopers on Subway, Beware Digital Books*, N.Y. TIMES (Mar. 31 2008), https://www.nytimes.com/2008/03/31/nyregion/31bigcity.html (discussing privacy in what persons read in public); Scott Rogowsky, *Taking Fake Book Covers on the Subway*, YOUTUBE (Apr. 6, 2016), https://www.youtube.com/watch?v=jFxu9dOO4zk&feature=youtu.be (humorously dramatizing the privacy aspect of reading on public transportation by conspicuously reading fake books with outlandish titles).

45. It is a separate issue, but one worth mentioning, that anonymity is, in this regard, also crucial for those propounding minority viewpoints, because if the latter cannot even be considered without incurring social judgment, then they will be robbed of their persuasive merit before any

sensitive affair because in reading, even when one is reading mainstream ideas, one plays host to another mind and gives oneself over to its narrative of the relevant issues and ideas, or, in a novel, to its plot and characters.[46] In reading an author's work, one becomes their associate or fellow traveler for a time, and the risk of "guilt by association" is great. This is similar to the way that actual association with an organization or a person may be tainting, even though one's associates hardly define one's own viewpoint.[47] A prominent example is reading communist literature during the fifties and sixties.[48] Going much further back, we can take account of the decisive change in society that resulted from the slow introduction of silent reading starting in the 16th century.[49] Reading something without others knowing what it was "radically transformed intellectual work."[50]

Anonymous reading can be abused. It can be abused to infringe copyright,[51] learn information for malevolent purposes,[52] or serve as the audience for wrongful revelations about others, such as by reading a tabloid article that one would ordinarily be ashamed to be seen reading. These consequences may be managed in other ways though.[53] There are ways to protect copyright besides trying to reveal the identity of those who read anonymously or by blocking anonymous access. Gaining information about how to break the law does not entail a desire or ability to do so much more than any non-mental step in doing so. There is ample time to intercept criminal activity without trying to monitor what people are wondering about. The same is arguably true about anonymous access to privacy-invading content, as those who post such information may be better targets for identification.

Anonymous speech is also justified, though its abuse may directly constitute a violation of a non-property law, such as in the case of anonymous defamation or the interference with the thinking of others through the spread

discussion takes place. *See* Margot Kaminski and Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 508 (2015) (making this point).

46. CECILE JAGODZINSKI, PRIVACY AND PRINT (1999) (discussing religious authorities' worries about the effect of reading on devotees); Georges Poulet, *Phenomenology of Reading*, 1 NEW LITERARY HISTORY 53 (1969).

47. NAACP v. Alabama Ex Rel. Patterson, 357 U.S. 449 (1958).

48. *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (The First Amendment bars the requirement to certify that one is not a communist).

49. 3 Roger Chartier, *The Practical Impact of Writing, in* A HISTORY OF PRIVATE LIFE 124 (Roger Chartier ed., Arthur Goldhammer trans., 1989).

50. *Id.* at 125.

51. *See* Cohen, *supra* note 41.

52. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005) (many of the possible benefits of such speech redound to readers of it, some of whom, perhaps most, will be anonymous).

53. *Cf.* Blitz, *supra* note 41, at 1171 ("a silent listener threatens less disruption to the lives of others than does a public speaker").

of false information.[54] Nonetheless, speaking anonymously is an important channel for participating in public reasoning. It allows one to make an idea a part of public discourse. It also allows persons to test out ideas by soliciting responses indiscriminately from others and, in turn, to identify those who are interested and knowledgeable. These justifications for anonymous speech do not depend on the need to resist or obviate the wrongful conduct of others.

In other cases, though, one may need anonymous speech to (partially) counter the wrongs of others. For instance, someone with an unpopular viewpoint may be perfectly satisfied with it but wish to speak it anonymously for fear that they will unfairly suffer for it, whether due to reprisals, or else due to being stereotyped by others. A whistleblower may be confident that wrongdoing has occurred, but still resist speaking without anonymity, due to the risk of reprisals. A member of a radical political party, on the other hand, may be worried about being misrepresented or demonized. The Supreme Court has paid special attention to the interests of political speakers in remaining anonymous, arguing, in an important precedent, that "identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue."[55]

In other cases, one does not wish to take responsibility for an idea not because one is uncertain of it nor because one will suffer for it, but rather because one wants the idea to be fairly received and appreciated for the true value it has. An example is art. A novelist may be satisfied with their novel and satisfied that they can publish it without suffering any reprisals. Nonetheless, the artist may suspect that because she is a woman, their novel will be poorly received. This mis-reception is an indirect misrepresentation of them since the neglect of their novel will reflect badly on them as a novelist. It may also be injurious to them directly, as the neglect of their art itself, which they are invested in.

To avoid these responses, they may publish under a pseudonym or anonymously. In this example, the author is subject to wrongful prejudice, but in other cases, the prejudice may not be wrongful, at least not in the same way. For instance, J.K. Rowling published under a pseudonym to receive more honest feedback from editors, and many presidents have done the same.[56] Here, the goal is not to avoid prejudice but to avoid superficial

54. Jason A. Martin & Anthony L. Fargo, *Anonymity as a Legal Right: Where and Why It Matters*, 16 N.C. J. L. & TECH. 311, 340-343 (2015) (citing a number of examples).

55. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995) ("identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue."); *See also*, Talley v. California, 362 U.S. 60 (1960) (anonymous political pamphleting); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (petition circulators could not be made to wear name tags); Watchtower Bible & Tract Soc. of NY, Inc. v. Village of Stratton, 536 U.S. 150, 166-67 (2002) (door to door religious solicitation).

56. Sylvia Hui, *J.K. Rowling Revealed as Writer of Crime Novel*, WASH. POST (July 14, 2013), https://wapo.st/2UEpxBm.

praise, earned only by their reputation rather than their ideas. Publius is another famous example from American history. Though it is a pseudonym, it wears its pseudonymity on its sleeve, rather than purporting to be the true name of someone.

Speaking anonymously can be abused. This is because anonymity is a departure from the norm, and the reason for the departure cannot often be easily discerned without the aid of background conventions or institutions. Consequently, some anonymous statements, if they are false, abusive, or originate in tentativeness on the speaker's part, may not be communicated. This is because others may take the anonymity as a sign that what is being said *is* true, but told anonymously because it is threatening to someone in power. An example is an anonymous tell-all book from an "insider" in a presidential administration.[57] In such case, readers will infer that anonymity is being used to avoid wrongful reprisals, which provides cover for someone to spread disinformation more easily. Denials of the falsehoods may fan the flames too since they may appear to be evidence of a cover up and proof of the damaging nature of the revealed secrets. In other cases, such as the anonymous posting of non-consensual pornography, anonymity is nothing but an attempt to avoid being held responsible.

It is important to see the significance of these abuses. A legal right to speak anonymously may incidentally shield, to a degree, abuses of that right given that the proper use of the right is responsibility defeating. Due process may require additional steps to hold a person responsible for anonymous defamation simply because, without such steps, the legitimate value of anonymity would be undermined. However, I think there is little doubt that using anonymity simply to escape being held responsible for wrongdoing is an abuse of it. If so, this is further evidence that anonymity's justifiability turns on its nature and not on its consequences. Anonymous speech that is otherwise illegal should not be evaluated on a cost-benefit basis, with some credit being given to it simply because it is a way of organizing one's message. The anonymity in such a case is no different than waiting until dark to commit a crime with the goal of escaping detection for a wrongful act.

For the above reasons, persons have a strong interest in being able to interact anonymously with communal thinking, which is comprised of anonymous speaking and reading. These two kinds of interactions with the republic of letters—the public understood as the community of readers and

57. *E.g.*, ANONYMOUS, A WARNING (2019) (insider look at the Trump White House). The author of *A Warning* was later revealed to be Miles Taylor, who defended his anonymity in terms of the impact he intended his book to have on public discourse. *See* Katherine Faulders, *'Anonymous,' Author of White House Tell-All Book, Revealed to be Miles Taylor*, ABC NEWS (Oct. 28, 2020), https://abcnews.go.com/Politics/anonymous-author-white-house-book-revealed-miles-taylor/story?id=73884296 ("Issuing my critiques without attribution forced the President to answer them directly on their merits or not at all, rather than creating distractions through petty insults and name-calling. I wanted the attention to be on the arguments themselves").

writers—are legally protected by the U.S. constitutional system in the form of the First Amendment. In the next section, I explore whether and to what degree persons have any interests in interacting anonymously with the republic itself—the public understood as a constitutional order.

III. Applications of the Theory – Voting and Charitable Giving

Should democracy always be practiced in the open? To investigate this question, consider: voting by citizens,[58] voting by legislative representatives,[59] and signing a ballot initiative.[60] The issue at the heart of these practices is: the degree of political power that must be exercised openly, and the determining factors that bear on the answer to that question in a particular case. A more focused version of this question is: what is the nature of a citizen's interest in voting anonymously? Is the secret ballot for citizens a pragmatic attempt to prevent corruption and intimidation or is it a more fundamental interest, akin to the right to speak anonymously or the right to participate in politics?

The Supreme Court has never directly addressed this question, but it came close in *Doe v. Reed*, in which it considered a ballot initiative to repeal a recently passed Oregon law altering the rights of domestic partners, including same-sex partners.[61] According to state law, the signatories to the ballot initiative and their addresses were public record and could be requested by private parties under a state transparency statute.[62] The law was facially challenged as a violation of First Amendment in virtue of requiring the disclosure of a persons' political affiliations. The decision was 8-1 in favor of the holding that a state's choice to make ballot initiative signatories publicly available was permissible under the First Amendment. However, the Court

58. *See* Levmore, *supra* note 10, at 2219-2220 (pointing out the prevalence of secret balloting in national elections). An exception is West Virginia. *See* W. VA. CODE ANN. § 3-1-4 (West) ("In all elections the mode of voting shall be by ballot, but the voter shall be left free to vote by either open, sealed, or secret ballot, as he may elect").

59. Some theorists have wondered why elected representatives must vote publicly. *See* Levmore, *supra* note 10, at 2219-2220 ("[a]nonymity is thus required rather than simply accepted in (the legal rules governing) general elections. In contrast, when voting takes place in representative or deliberative bodies, it is open."); Annabelle Lever, *Privacy and Democracy: What the Secret Ballot Reveals*, 11 LAW, CULTURE, AND THE HUMAN. 164, 175 (2015) ("[w]hile democratic legislators may be more vulnerable to intimidation than citizens – as they are relatively few in number and hold special power and authority *qua* legislators – it is the former, not the latter, who must vote openly, not secretly").

60. *See* Reed, 561 U.S. 186 (2010) (Oregon ballot initiative); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (analyzing Colorado ballot initiative rules).

61. *See id.*

62. *Id.* at 190 (The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents, and the State construes the PRA to cover submitted referendum petitions.).

emphasized that the challengers to the law could prevent disclosure if they could show a specific risk of reprisals or harassment from publication.[63] Although the constitutional status of the secret balloting was not discussed, three broad views about that practice can be extracted from the opinions.

One view, embodied in Justice Thomas' dissent, views "privacy in political association"[64] as is sufficiently important to warrant anonymity. In his view, state law may not require that ballot initiative signatories be made public because it chills the exercise of First Amendment electoral rights.[65] Given the privacy justification Justice Thomas offers for this claim, it seems clear that he would support the secret ballot as earning significant constitutional support.

Justice Scalia takes the opposite view in his concurrence, concluding that the secret ballot enjoys no fundamental constitutional or democratic justification.[66] He argues first by invoking the history of electoral practices in the U.S.[67] But he also contends that acts that have a legislative effect must be public. He writes that the "public nature of federal lawmaking is constitutionally required," and he clearly intends this constitutional judgment to encompass state lawmaking too.[68]

This principle disposes of the case given his opinion that, by signing a ballot initiative, a signatory is "acting as a legislator."[69] This principle is broad though, and also arguably entails that there is no First Amendment right, or fundamental democratic interest, in voting anonymously—something that Chief Justice Roberts correctly points out in a footnote.[70] Justice Scalia's view can be characterized as favoring consistent publicity; when legislators vote, when citizens vote as something akin to legislators, and when citizens vote. This view puts him in the company of many political scientists and theorists, who argue that, *prima facie*, voting by citizens should

63. As a matter of law, the Court is correct to keep open the possibility that in particular instances in which a policy such as the PRA burdens expression "by the public enmity attending publicity," speakers may have a winning constitutional claim. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 98 (1982); *Id.* at 218 (Sotomayor, J., concurring); *Id.* at 204-06 (Alito, J., concurring).

64. *Id.* at 231 (Thomas, J., dissenting).

65. *Id.* at 229 (Thomas, J., dissenting).

66. *See, e.g.*, Burdick v. Takushi*,* 504 U.S. 428 (1992) (We have acknowledged the existence of a First Amendment interest in voting, but we have never said that it includes the right to vote anonymously. The history of voting in the United States completely undermines that claim.); *Id.* at 224 (Scalia J., dissenting).

67. *Id.* at 221 (Scalia, J., concurring) ("Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect.").

68. *Id.* at 222 (Scalia, J., concurring).

69. *Id.* at 221 (Scalia J., concurring).

70. *Id.* at 196 n.1.

be public, but that sometimes the dangers of voter corruption or voter intimidation warrant secret balloting as a prophylactic counter.[71]

All the other justices gravitate toward either Justice Scalia's or Justice Thomas' position about the fundamentals of the case—about whether the right starting point is privacy of political belief or the publicity of electoral activity—but find reason to moderate it for pragmatic reasons, from either direction. For instance, Justice Roberts essentially endorses Justice Thomas' view that anonymous political participation is a fundamental First Amendment right but, unlike Thomas, he sees the government interests in protecting against fraud and mistakes as enough to justify publicity despite that right. For Justice Roberts, ballot initiatives implicate a fundamental privacy interest, but that interest may be qualified when the pragmatics of the situation demand it.[72]

Justices Sotomayor, Ginsburg, and Stevens, on the other hand, approach the case more from Scalia's view, favorably quoting about the publicity of lawmaking and broadly lauding the importance of "openness" and "transparency" as well as the "inherently public" nature of ballot initiatives. However, it is unclear how Justices Sotomayor, Ginsburg, and Stevens' position exactly relates to Justice Scalia. On the one hand, they do not only rest their opinion on the public nature of legislating, but also that pragmatic interests permit the regulation of elections by states. They further argue that any free speech interest in anonymous political association is only minimally implicated by disclosure of the ballot initiative signatories. On the other hand, they argue this last point by analogy to campaign finance disclosure rules. They say these rules "do not prevent anyone from speaking," but public voting would not prevent anyone from speaking (or voting) either.[73] If this latter argument about the negligible effects of disclosure is given emphasis, then their position is closer to Scalia's in favor of thoroughgoing publicity. If the pragmatic rationales are more important, then it seems that they are closer to Justice Roberts in believing that there is a privacy interest in political association that can be curtailed for pragmatic reasons.

The key lesson from *Doe* is its dialectic. The two principles that divide the justices are blunt and eliminate the intermediate moral terrain, with only

71. Most famously, John Stuart Mill. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT Ch. X (1873) (available at https://www.google.com/books/edition/Considerations_on_Representative_Governm/16FFAQAAMAAJ?hl=en&gbpv=0). Contemporary examples are Daniel Sturgis, *Is Voting a Private Matter?*, 36 J. OF SOC. PHIL. 18 (2005); Philip Pettit & Geoffrey Brennan, *Unveiling the Vote*, 20 BRIT. J. OF POL. SCIENCE 311 (1990); Pierre-Etienne Vandamme, *Voting Secrecy and the Right to Justification*, 25 CONSTELLATIONS 388 (2017) (arguing that balloting itself should be secretive, but persons should have to give their justifications for voting as they did). *See generally* Tom Theuns, *Jeremy Bentham, John Stuart Mill and the Secret Ballot: Insights from Nineteenth Century Democratic Theory*, 63 AUSTRALIAN J. OF POL. & HIST. 493 (2017) (offering a synoptic, historically informed view of the issue).

72. Reed, 561 U.S. at 197-99.

73. *Id.* at 196.

pragmatic concerns tempering their reach. Political beliefs are either private or else voting must be public. I suspect the bluntness owes to the fact that both principles are likely to be the partial consequences of deeper, more tangled moral principles. This is evidenced by the fact that it seems coherent to ask why lawmaking should be public, and why a person's political beliefs may be subject to privacy protections. If we knew the answers to these questions, we might be able to see how there is room for distinctions between democratic practices that do not amount to pragmatic limitations on a single, broad principle. There may be a fundamental interest in some anonymous electoral action *and* a fundamental need for public lawmaking.

The basis for this claim is a view of democracy as a means of securing an increasingly robust and public deliberation about community issues. For instance, deliberation about an issue may start in the minds of a few citizens, but then grow to include dinner-table discussion, water-cooler talk, sermons, party caucusing, and finally, legislative debate in Congress. In this progression, the earlier stages are more private, while the latter stages are more public. The precise nature of each stage of deliberation turns on the issue itself and the institutions charged with addressing it.

For example, the grand jury is an institutionalized way for a group of citizens to consider a particular question: whether the person under investigation committed illegal wrongdoing. If the grand jury finds that the prosecution has not presented sufficient probable cause of the defendant's wrongdoing, a new grand jury can be convened at a later date to investigate the same conduct.[74] However, if the grand jury does find that there is sufficient probable cause, the grand jury will issue a true bill and the prosecution of the defendant continues in the form of an indictment, and a public trial.

Fundamentally, the grand jury is a preparatory, preliminary step in an overall stretch of deliberation about whether the prosecution has presented sufficient probable cause of the defendant's criminal wrongdoing, and is entitled to secrecy to protect jurors from outside pressures.[75] The grand jury is necessary because it is a chance for the government, in partnership with individual citizens, to explore the evidence and get a handle on what happened.[76] These activities are exploratory rehearsals of the deliberation that may take place publicly at trial. Grand juries provide a preview of how a

74. CHARLES DOYLE, THE FEDERAL GRAND JURY, 46 (2008) (discussing the possibility of convening subsequent grand juries).

75. *See* 2 Fed. Grand Jury § 16:2 (2d ed.) (principle of secrecy including anonymity); United States v. Mansoori, 304 F.3d 635, 649 (7th Cir. 2002) (discussing when an anonymous jury can be empaneled).

76. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 748 (2008) ("[s]ecrecy also shields the grand jury's exercise of discretion from public glare, thereby minimizing the possibility that grand jury members will feel compelled to base their decisions on concerns about immediate public backlash in a given case. Thus, secrecy can lead to greater reflection and richer, more sincere deliberation").

trial might go, and whether the government's case would be sufficiently convincing in that eventuality. Grand juries are a crucial step in *building* a case. Without a grand jury's approval, any charges would be maverick. It is only by consulting with and convincing the grand jury as a representative of "the people" that a prosecutor can bring federal charges in the name of the latter (e.g., "the people" v. X).

The point of this example is to show that the identifiability or anonymity of citizens in the performance of democratic obligations depends on the justifications for those obligations and the institutional setting in which they must be performed. In a federal criminal trial, the public is present in different roles. The prosecutor represents the people by acting on their indictment, the judge represents the people by being selected by them (usually through their representatives) and the petit jury represents the people by being a fair cross-section of them.[77] These different roles come together to produce a display of public reason. This amounts to the accumulated effect of different persons thinking about a subject matter from different angles, organized in a productive way, embodied in the detailed procedural rules governing an open, adversarial trial.

While legislative action differs from determinations of individual criminal guilt, both warrant the same private (or secret) exploratory deliberations to bolster and prepare for progressively more public deliberations. Whereas a grand jury is the first step in a stretch of deliberation to proceed with a public trial, punctuated with a verdict, individual thinking and private conversations between friends are the first step in a stretch of deliberation that will terminate in congressional debate, punctuated by official state action.

Next, I will identify specific democratic practices and the way in which they are initiated with private thinking, and how this private thinking is properly "grown" or "built" into a display of public reason.

A. Representatives Must Vote Publicly

I will start with a view of representative democracy according to which it is primarily concerned with, and partially justified by, the creation of public persons. Celebrities are public persons, but they are so *de facto*. By contrast, a representative democracy creates public person *de jure*, for the purpose of executing and implementing public business.[78] The crucial role that representatives play is not that they make decisions with binding legal effect, though of course this is important. Rather, the valuable role that public

77. A petit jury is, in some ways, a grand jury that must pronounce publicly, where this obligation of publicity is justified owing to the more determinate question it is asked to answer, and by the more rigorous controls, in the form of the rules of evidence, of how it is to answer it.

78. The idea is that law creates public persons in the sense that they are public servants with duties and obligations commensurate with that role. Celebrities are public persons not by the choice of the community, rather because they happen to be popular or influential.

persons play is one that is indispensably played by persons, which is to take responsibility for thinking. Representatives take responsibility for public thinking in the specific sense that they heighten and develop it, by combining the disparate viewpoints of their constituents into what is ideally, a coherent, reasoned, and accessible vision of the political landscape.[79]

Though I will not defend a full theory, I challenge the view that representatives are just the agents of the people who may not do more than carry out instructions. The relationship between the people and their representatives is more reciprocal and open-ended, with representatives taking account of what their constituents think but also reflecting their views back to them. A simple example might be John McCain telling a town hall participant that Obama was not an "Arab." I do not mean to suggest that McCain's response was flawless, but only that it illustrates the way in which information flows in two directions between constituents and those they elect.[80]

To elaborate on the question answering function of democratic actions, I will discuss how elected officials are representatives of the public in the orchestrated bit of public thinking that consists, at least, in legislating: making speeches and voting in Congress. In other capacities, the role of the legislator is different, but still derived from this public function. For instance, legislators may have meetings with constituents or lobbyists. Such meetings are not themselves legislating but are also not private in the way that a legislator may have a friend over for dinner. The lobbying may be rightly subject to duties of, for example, disclosure given that it is thinking that is pursuant to legislating.[81]

In voting for a representative, which I consider next, citizens answer a question about who would advance the public good, and then the elected representative continues the citizens' thinking about that question, by organizing them within their own thinking for use in a public deliberation. This use makes the citizens derivatively present as participants in that deliberation too.[82] Crucially, a representative can only make the thinking of citizens present to the national deliberation, and vice versa, by carrying out the deliberation publicly. Without publicity, the thinking of constituents reach dead-

79. THE FEDERALIST NO. 10, at 44 (James Madison) (Terence Ball ed., 2003) ("[t]he effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose").

80. ASSOCIATED PRESS, *McCain Counters Obama 'Arab' Question*, YOUTUBE (Oct. 11, 2008), https://www.youtube.com/watch?v=jrnRU3ocIH4.

81. Thanks to Seana Shiffrin and Richard Re for asking about the dividing line between a representative as a public figure and as a private citizen.

82. HANNA PITKIN, THE CONCEPT OF REPRESENTATION 63, 92 (1967) (discussing the idea of presence as an influence on views about representation).

ends, as they have no way of keeping up with the actions of their representatives and the interactive loop between representative and constituents closes.[83]

In short, without publicity, citizens cannot hold representatives responsible for public thinking. For this reason, representatives may not vote anonymously, and the reason is not that permitting it would do more harm than good (though that's true), but because doing so would be an abuse of anonymity. The purpose of representatives is to take responsibility for public thinking and on behalf of the public. Consequently, voting anonymously would directly contravene their public purpose. In other words, the duties of a legislator preclude the privilege of anonymity.

B. Citizens Have a Non-Pragmatic Interest in Voting Anonymously

In this section, I argue that the secret ballot is favored for two distinct reasons, neither of which is pragmatic, in the sense of trying to forestall anticipated wrongdoing. Then, I consider the importance of these reasons and argue, tentatively, that persons should be permitted to vote anonymously despite admittedly serious counter-considerations. The first reason I offer is one based in the interest of individual citizens. They will often be, with good reason, unready to take responsibility for their view of the public good, and yet, they have an interest in providing it to the public. The second reason is a collective interest that citizens have in not holding each other responsible for how they vote, to keep citizens from developing an excessively partisan identity.

The first reason for anonymous voting draws directly from the previously discussed justifications for anonymity; namely, participation in public thinking. In the case of anonymous speech, one is participating in the public sphere, but in the case of anonymous voting, one is participating in the government itself. With the former, one chooses the content one will speak or read. However, when citizens vote, the content is fixed. A citizen is asked a specific question, for example, should this law be implemented or not, or which of the following persons should hold office?

Second, the effect is different. Participation in the public sphere does not exercise power over others in the same way as voting. The latter has legal effects, whereas the former, while by no means innocuous, has effects on what others consider or think about. Moreover, some ways of abusing anonymous speech are illegal because the spoken content is independently wrongful. For instance, defamatory speech is illegal and so anonymous defamatory speech is too and may be unmasked on that basis. Whereas the use

83. Similar arguments can be made against judicial decisions in which the votes of particular justices are shielded from public view, such as with the so-called "shadow docket." *See* Jimmy Hoover, *Wary Lawmakers Put Justices' 'Shadow Docket' In Spotlight*, LAW360 (Feb. 16, 2021), https://bit.ly/3k2wwjQ.

of anonymity to vote for damaging or self-serving policies is not, because persons are free to vote as they choose.

Third, I assume the subject matter of voting is different and specialized as it pertains to the public good.[84] That is, when one is answering a specific question in voting – the relevant metric in evaluating it is the public good. This assumption is controversial, but the controversy is innocuous here because it only makes my argumentative task harder. To the extent persons should vote to maintain a private view of the good then secret balloting will be even more justified.[85]

Given these points, we can see that open voting would require something fairly onerous of citizens: it would ask them to publicly answer a difficult question that they may not have settled to their satisfaction and that they wish to think more about. The difficulty of the question is due to it being about the public good, which is notoriously difficult to discern. It is also intimidating because the lives of others are at stake. Moreover, voting requires applying one's theory of political morality and communal good to the specific empirical circumstances one finds oneself in. One must know a fair bit about one's society and its conditions to understand what would move it closer to an ideal, flourishing, or fair society. These conditions are always changing.

Furthermore, there may be strategic questions to consider that arise from the way in which institutions aggregate votes, or how representatives will form coalitions or otherwise amass the needed political power. These present additional complications and are always changing as well. Thus, the question of who or what to vote for is one that persons may not easily answer, warranting continued thought.

By itself, the difficulty of who and what to vote for does not warrant anonymity for voting as one can simply decide not to answer. However, the option of answering may not be viable, either because there is pressure to respond or because exercising it will itself reveal one's thinking (refusing to answer some questions tends to reveal a certain answer to them) . Sometimes, there is reasonable pressure to provide an answer. In law school, one may be asked a difficult legal question and one may wish to think more about it, but the question comes with some pressure to answer. There are the social dynamics of being asked something in front of a group of one's peers, the need to evaluate students, and the need to elicit material for discussion and further contemplation as a group.

84. *Cf.* Annabelle Lever, *Mill and the Secret Ballot: Beyond Coercion and Corruption*, 19 UTILITAS 354, 369-70 (2007) (arguing for some caveats to the view that voting should be in the public interest).

85. Then again, a counterargument might be that if persons are supposed to vote based on their private view of the good, they may arrive at the answer more readily and be expected to make it public, without invading their entitlement to keep thinking–as further thinking is unnecessary.

Public voting, it might seem, asks difficult questions to the electorate, but not with any real pressure since persons can choose not to vote or to return an empty ballot. This result is arguably beneficial. According to some, the whole point of public voting is to make persons pay more attention to how they are voting and so, to defer voting until they are confident enough to take responsibility for their judgment.

However, I contend there is pressure to answer. Why? Because the vote of each person cannot wait. In a democracy, everyone's equal participation is a great public good. If some feel comfortable voting their view of the public good while others wait to think more, then the former have, for the arbitrary reason that their thinking "finishes" first, an outsized presence and role in the formation of public life. Thus, the public loses out when persons don't vote because the opportunity to educate and engage that person about civic affairs is deferred, and the opportunity to be educated by them is sacrificed as well.

These problems are bad enough as they are, but they are exacerbated by the fact that there are path dependencies in the life of a polity. Making some decisions at one point may apply pressure, both rational and non-rational, to adopt other decisions later, so that not voting early may shut one out of fully participating in national life, given the later influence that the early votes have. For example, a decision at one time to pave park paths with gravel may provide some hindrance to later attempts to encourage bicycle use, since repaving the paths with smooth concrete may be prohibitively expensive.[86] Alternatively, decisions at one point may create new uncertainties, such that some voters may feel that they must resolve their uncertainties before they vote. The more cautious voters may be continuously playing catch-up as the world moves around them. A third related example is that the state of the polity (its institutions and patterns of interactions) may tend to normalize or make salient certain kinds of conduct that dampen criticism or dissent. If persons wait to think more about how society ought to be, they may have to resist these kinds of pressures.

It is true that those who are cautious about voting may realize that they must vote their best guess or be left out of national affairs, but this is not a good kind of pressure to apply. It frames the decision of whether to vote as one that is partly forced by the thinking of others and may breed resentment.

A better solution is secret balloting, as this permits persons to vote their best guess, allowing persons to participate in politics right away. Accordingly, persons would not be forced to choose between participating in politics and continuing to think without taking responsibility for it. If this solution is warranted for significant groups of citizens, then there is a reason to make secret balloting the default for all citizens. If persons had to request to

86. *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1687 (2002) (giving this example).

vote anonymously, then they would be trading one undesirable public stance for another. Requesting anonymity for oneself specifically would allow one to vote one's uncertain view of the public good, but one would then have to accept the suspicion of others that one has something to hide.

At this point, I will review the argument and distinguish it from the prevalent view that secret balloting guards against voters being bribed or intimidated into changing their vote. In review, the argument is that elections, which have to be reasonably frequent, pose a hard question to voters. If voting is public, they must choose between participation or taking responsibility for a political view. If it is anonymous, they need not choose.

This view is a further application of my claim that a key use of anonymity (as namelessness, not non-identifiability) is to permit participation in communal thinking. The right to speak anonymously, which is, doctrinally, given special protection in the context of political speech, is a way in which one can participate in the republic of letters even when one's thinking is uncertain. Similarly, voting anonymously is how one participates in the republic itself, when one's thinking about the public good is uncertain. Anonymous reading does double duty. It is not just how one receives information from the republic of letters, but also from the republic. The former allows one to enrich one's thinking about a number of topics, whereas the latter allows the same, but where the topic is distinct from civic understanding or engagement.

This view differs from many justifications for the secret ballot.[87] Many theorists think the reason for the secret ballot is to guard against wrongful attempts to influence voters. According to this view, persons should not have to vote publicly, because one effect of doing this will be to give an opening to those bad actors who wish to corrupt or intimidate voters. Bad actors will be able to see how persons vote, and thus can credibly promise to pay for votes that they want cast or else issue threats against votes they don't want cast. So, the reasoning goes, to preclude these wrongful activities, secret balloting should be the norm.

By contrast, the rationale I am offering does not put the possibility of bad actors at the center of the case for the secret ballot. Rather, my view is that persons cannot be made to think with each other about politics because that subject matter is hard. Thus, persons will very often not be finished thinking about it in time for the next election, and yet, their provisional political conclusions are needed. For this reason, the secret ballot is not a capitulation to a flawed and ugly world, but rather responds to a fundamental

87. An exception is Annabelle Lever. She argues that anonymity is not an attempt to head off bad behavior, but, like me, a way of ensuring participation in government by citizens. Lever's argument is very different from mine though. She does not discuss anonymity's relationship to being responsible for thoughts and instead focuses on the risks of persons being shamed for how they vote if voting were open. Anonymity prevents this shaming on this view. Her argument is developed across two articles. *See* Lever, *supra* note 84; Lever, *supra* note 59.

feature of thinking about the public good as it finds expression in democratic politics. This is a better position than the alternative because it correctly explains the feeling that the importance of the secret ballot outstrips its prophylactic benefits. This is especially the case given that those benefits could likely be gained in other ways (e.g., aggressive investigation and enforcement of laws against voter intimidation and vote-buying).

I have shown how a distinct justification for the secret ballot emerges from an application of anonymity's chief rationale, that of being a privilege to participate in communal thought. As another form of that same privilege, the secret ballot has significant similarities to anonymous speaking and reading. However, it is also dissimilar to these activities in that it has a collective dimension. I now shift my focus to an interest in anonymous voting that the community-at-large has rather than individual citizens. This interest is that of making salient the creation of "the people" as a collective subject of democratic politics.

The general source of anonymity's role in creating collectivities is the import of its removal of an individual's identity, which can function differently depending on the background conditions. If an individual decides to make an anonymous statement, the statement has no owner. However, if an individual with several identities makes an anonymous statement, then the removal of the individual's identity may make room for a different one to take its place, or to enter salience. For my purposes, the kind of substitution that is most relevant is that of an institutional, collective identity rushing into the void left by a particular person's anonymity.[88] In these cases, a refusal to possess something as one's own is converted, via an institutional background, into a willingness to share responsibility with others.

A concrete example of this general phenomena is the *Economist's* editorial policy of not listing the authors of the articles it contains.[89] The purpose of this policy is to allow "many writers to speak with a collective voice."[90] A writer who produces an article does not take responsibility for their words, primarily, as I, but as a member of a community. I say "primarily" to highlight an important wrinkle, which is that one can, for some articles, find out who wrote it without much trouble because the *Economist's* website lists, at least, its major columnists.[91]

A second example is *per curiam* opinions. The practice is complicated and can have a range of forms and consequences.[92] However, its effect is at

88. *See* Ponesse, *supra* note 5, at 307.

89. *Why Are The Economist's Writers Anonymous?*, ECONOMIST (Mar. 27, 2017), https://medium.economist.com/why-are-the-economists-writers-anonymous-8f573745631d.

90. *Id.*

91. *Editorial Directory*, https://mediadirectory.economist.com/ (last visited Dec. 2, 2020).

92. *E.g.*, Stephen L. Wasby, *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29 (1992); Richard Lowell Nygaard, *The Maligned Per Curiam: A Fresh Look at an Old Colleague*, 5 SCRIBES J. LEGAL WRITING 41, 46 (1995).

least sometimes to alter the structure of the resulting opinion. In many cases in the U.S., judges write for themselves, and the result is a composite of discrete viewpoints on the relevant legal questions where the nature of the composite can be a matter of some complexity.[93] These opinions are "by the court," but only derivatively. In some situations, the court's disposition of the case is not found by combining individual opinions, but rather, is presented fully formed and, so to speak, needing no assembly, in the name of the court itself. The institution itself speaks.

If we turn back to voting, we can see, with some differences, a similar paradigm at work: of individual identity effacement as tending to reinforce the salience and reality of a collective identity. When an election is held, the people speak and the representatives become credentialed through that speech.[94] In this way, the people serve as the "mind" of the polity. It embodies the shifting, tentative, and flexible view of the nation as it becomes expressed by the people who speak in elections, and so casts their views in the form the government, with specific persons occupying its offices.

Anonymity for individual voters preserves the flexibility of the people and their openness to new arguments, whereas when persons are publicly identified with their vote, the people become fragmented into particular peoples with particular views. This causes two kinds of inertia that get in the way of the people serving as a responsive addressee for democratic argument.

One is at the level of individuals becoming associated with a decision. If voters are publicly associated with their vote, they will develop a record, and records can create inertia in thinking.[95] Persons may be pushed to vote again for the candidate that they voted for last time, or the policy they endorsed in the election before. Anonymity prevents the weight of past decisions from slowly calcifying the people into specific persons with controlling histories.[96] In this way, the people have no history, no voting record, and no affiliation. It is recreated anew in each election to deliberate about the public good, *de novo*. Just as an anonymously published argument may have more force, owing to its depersonalized presentation, maintaining the people as an abstract embodiment of the thinking of individual citizens, but not their

93. Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942 (May 10, 2019) (reviewing and analyzing the relevant doctrine).

94. This is similar to the way that a prosecutor gains the imprimatur of the people by proceeding on a grand jury indictment.

95. Mahesh Gopinath et al., *The Effect of Public Commitment on Resistance to Persuasion*, 26 INT'L J. RSCH MKTG, 60 (2009) (finding that making one's position known increases adherence to it); Jennifer Lerner and Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOLOGICAL BULLETIN 255, 257 (1999).

96. Gopinath et al., (discussing consistency effects); Robert B. Cialdini and Noah J. Goldstein, *Social Influence: Compliance and Conformity,* 55 ANN. REV. OF PSYCH. 591 (2003) (discussing pressure to act consistently with one's public positions).

particular characteristics or histories, helps preserve its flexibility and openness to argument.[97]

By making this point about depersonalization, I am not going back on my earlier claim that the ideal for public deliberation is not anonymity but taking responsibility in one's own name. My point is rather that the dialogue between representatives and citizens works best when both poles are represented. Public deliberation is fulfilled by representatives taking responsibility for their votes, but it is also well-initiated by preserving the people, as an experimental, thought-like body.

The second kind of inertia concerns the relationship between voters and their representatives. Representatives are supposed to govern for the people, which is to say, those who voted for them and those who did not. If persons were identified with their vote, interactions between constituents and representatives would be infused with a personal "with me or against me" mentality. That is, politicians could know, when helping a particular constituent with an issue whether they voted for the candidate or not, rather than reinforcing the voter's identity as a member of the people.

Notice that my argument is not that anonymity can or should preclude persons from forming political identities. They may do so in a variety of ways, such as by being a member of a party, publicly supporting particular candidates, as well as announcing their voting choices. Instead, my point is that secret balloting creates a starting point in which one is not affiliated with a position. Moreover, the secret ballot precludes there being an official record of a person's voting, even if he avows his electoral choices. This is justified on the ground that such record would constitute the erosion of anonymity of others, even though this will have, in most elections, a negligible effect.

I have provided two considerations in favor of the secret ballot, but are they decisive? An important counter-consideration lies in the principle that citizens must take responsibility for how they exercise political power. It is one thing to read and speak anonymously in the public sphere, but a political community is different. For example, though answering questions about the public good is difficult, citizens have help. A good democracy will foster an understanding of the role of civic institutions as well as thinking about collective problems faced by the community. As I argued before, representatives, agencies, and courts, not to mention think tanks and newspapers, provide examples of publicly-oriented thinking. Moreover, individual elections

97. *See* Hui, *supra* note 56 (better advice from editors if one submits as not a famous person); Victoria Smith Ekstrand, *The Many Masks of Anon: Anonymity As Cultural Practice and Reflections in Case Law*, 18 J. TECH. L. & POL'Y 1, 14 (2013) ("Writing as Publius, Madison, Hamilton, and Jay wished not only to protect themselves and their reputations but also to persuade solely on the basis of their arguments, devoid from any bias a reader might attach to their identities. Anonymity granted Publius a chance at persuasion that might not otherwise be attainable with some readers.")

are preceded by campaigns, which provide further education about the relevant issues. Lastly, one could argue that a good democracy should require open voting but cultivate a default tolerance of how others vote rather than shield individual voters from taking responsibility for how they vote. Together, these reasons militate in favor of open voting, even if we accept the view of democracy according to which citizens answer questions about the public good.

There are reasons on the other side though too. First, voting persons exercise a symmetrical and equal political power to others, so that though one is not taking responsibility for how one votes, one's influence on an election overall is just as much as anyone else's. It is not generally true that persons must only take responsibility for actions they take in positions of power, but certainly, the exercise of power heightens the need for responsibility. A good leader must take responsibility for what happens in virtue of having prerogatives to make things go well, as well as having an obligation to wield those prerogatives carefully. In an election, voting power should be equal given that two citizens who disagree balance each other's votes. There is no doubt the two citizens should talk about their differences, but there are many opportunities for them to do so, and in any case, a discussion mediated by other centers of thinking may be more productive. In the meantime, the exercise of power by these two citizens is reciprocal and frequently renegotiated through regular elections.

As previously discussed, voting for a representative exercises power, but not for a final view of what the laws will look like. Hence, those who voted for the losing candidate may still attempt to persuade the elected representative to moderate their position on the relevant issues. Representatives represent all of their constituents and so should be sensitive to such efforts.

Ultimately, whether voting by citizens should be anonymous is a close call. It is best justified when voting for representatives as opposed to laws, as the former can be responsible for conducting public deliberation while preserving the flexibility of ordinary voters.

C. Citizens as Representatives: Ballot Initiatives

The foregoing discussion helps answer the question of whether signing a ballot initiative should be something that citizens must do in their own name. It helps because it has illustrated, very broadly, one way that thinking "flows" in a democracy. Namely, a public question is posed to citizens who are thereby mobilized into a segment of "the people." When this question is sufficiently difficult, they are entitled to answer anonymously, and in so doing provide a proto-answer to that question. This is then taken up by a public official as the initial step in taking responsibility for fleshing out and enriching that answer with some corresponding public action (e.g., legislative representative voting for the piece of legislation, or prosecutor bringing charges).

Where do ballot initiatives fit in this cycle? They are hard to characterize because they involve ordinary citizens and because their legal effect is not to enact a bill, but to permit a bill to be enacted directly by citizens rather than by their representatives. They put specific law on the agenda, but they don't actually enact it.

An argument can be made that signatories to a ballot initiative should be entitled to anonymity, on the grounds that they are only suggested public actions, purposefully submitted to the public at large for approval. Arguably, signatories to a successful ballot initiative do not legislate in any determinate way, but only ask the entire polity to consider a change, in the form of the ensuing direct vote.

Notwithstanding their suggestive nature, ballot initiatives are public acts and signing them should be done in one's own name. The reason being that a ballot initiative is not a query of the people for which an institution or official stands ready to take responsibility for the answer in further thinking. Ballot signatories wish to put an idea on the collective agenda that has, except for the signatories, no spokesperson. Hence, the signatories become the spokespersons. They must accept that role.

First, ballot signatories are not responding to a question that they might otherwise have wished to keep thinking about. Rather, they see the initiative as a good idea, or, at least, they wish others to consider it *now*.[98] They thus set the timing for the deliberation of others as well as the form it takes (i.e., whether the initiative will be enacted will turn on the deliberations of the members of the polity themselves and not their representatives). This shift in timing and form is not trivial, as the passage of the initiative may have follow-on effects, such as giving legislators reason to take up different business than they otherwise would, to respond to the law that was passed to limit its bad effects, or to make it consistent with other regulatory regimes.

Second, anonymity, if granted to ballot initiative signatories, would not secure a general participatory right for persons to equally consider a question, at their own pace, but it would protect those who share a particular perspective and have organized on that basis. The supporters of the initiative conducted their own, selective and informal polling of the public, where only those who support the initiative are recorded and those who did not sign are irrelevant, even if their number is comparatively large. This makes a ballot initiative a one-sided mobilization of the public where supporters are gathered and opponents are filtered out.

This one-sidedness does not make ballot initiatives suspect or wrongful. Most of politics consist in organizing the like-minded, but the point is that an attempt to organize those who are like-minded to change the power of

98. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974) (arguing that petitioner Elmer Gertz was not a public person because he did not "engage the public's attention in an attempt to influence its outcome").

other citizens should be done in the name of those who wish to band together. They are not a manifestation of the people, but rather, are some particular people who found others who agree with them, and they should be identified as such.

Third, if the ballot initiative is successful, then the result is a new option to vote for, but the option does not come with any person who takes responsibility for it, in the sense of advocating it or being a target for questions and challenges regarding it. The electorate is thus on its own in trying to gauge its desirability. Further, those who signed the initiative already started thinking about it, have familiarity with it, and ordinarily have been exposed to the benefits of the proposal by those who favor it. This combination—the lack of a spokesperson for the law and the comparative expertise of those who endorsed its proposal, as compared to the ordinary member of the electorate—militates in favor of treating the signatories as stepping into the shoes of such a spokesperson. Persons may use the identities of those who signed the ballot initiative as a clue by which to assess the proposal. If the signatories are from a particular group or industry, this may provide information about how to go about researching the proposal itself.

In summary, signatories to a ballot initiative are a subset of the public acting, so to speak, *sua sponte*. While not responding to a question put to the public, the signatories are wanting to have their own chosen question taken up. This is not a bad thing. Democracy is well-served by active citizens, but their activity as a particular subset of citizens is what requires publicity. It is activism borne of a particular viewpoint and desire to move it forward that requires doing it in one's own name.

Let me note one limitation of the argument. I am not claiming that ballot initiative signatories are never entitled to anonymity. Rather, I agree with the concurrence in *Doe v. Reed* in thinking that ballot initiative signatories may earn anonymity when they can show a cognizable risk that they will suffer reprisals or harassment.[99] I also agree with the concurrence that absent such a showing, signatories must reveal their names. Where I differ from the concurrence is in how I reach that latter conclusion. I do not rely on the sweeping premise that all acts with legislative effect must be public, or that the exercise of political power must always be public. Instead, I assume only that acts for which one must take responsibility are public. Since a ballot initiative signatory must, I argued, take responsibility for signing, their signature must be public, but this is compatible with there being no need to take responsibility for other acts that exercise political power.

99. Reed, 561 U.S. at 215 (case specific relief is available "in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control") (Sotomayor, J., Stevens, J., Ginsburg, J., concurring).

D. Americans for Prosperity Foundation v. Bonta

The theory I defended in Section I along with my discussion of *Doe v. Reed* offers a novel way to view the Supreme Court's latest precedent on compelled disclosure: *Americans for Prosperity Foundation v. Bonta*.[100]

In this case, the Supreme Court considered a rule promulgated by California's Attorney General. This rule requires various disclosures from organizations that wish to be permitted to solicit tax-exempt donations in California. One such required disclosure is a Schedule B to I.R.S. form 990, which identifies by name and address donors who give more than a certain amount of money to the organization.[101] The petitioners in the case challenged this rule as a violation of the First Amendment right to freedom of association, alleging that it "would make their donors less likely to contribute and would subject them to reprisals."[102] The petitioners challenged it as applied to them, but also facially.[103] The Court sustained the facial challenge, with only Justices Sotomayor, Breyer, and Kagan disagreeing with that result. They expressed sympathy only with an as-applied challenge.

I think the dissenters are right, but not for the reason they give. Their main argument is that the majority ignores *Doe v. Reed*.[104] That is, they argue that *Bonta* raises the same question as *Doe*, but nonetheless comes out differently. In *Doe v. Reed*, the disclosure of the names of ballot signatories to the public was upheld against a facial challenge without much tailoring, partly on the grounds that there was no evidence that the typical ballot initiative signatory would be subject to reprisals if their name were disclosed.[105]

But then in *Bonta*, the Court held that no evidence for such reprisals need be found. Rather, a risk can be presumed and that's enough to require more tailoring than was found in *Doe v. Reed*.

1. *"[T]he protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough."*[106]

2. *"[E]xacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate and by the possible deterrent effect."107 (emphasis in original)*

3. *"[I]dentification and fear of reprisal might deter perfectly peaceful*

100. Bonta, 141 S. Ct. 2373 (2021).
101. *Id.*
102. *Id.*
103. *Id.* at 2380 ("Both organizations challenged the disclosure requirement on its face and as applied to them.").
104. *Id.* at 2395-97.
105. Reed, 561 U.S. at 200-01.
106. Reed, 561 U.S. at 200-01.
107. *Id.*

discussions of public matters of importance."[108] *(emphasis in original)*

This is a disagreement, but not yet one that is anything but a stalemate. The dissent is right about where the overwhelming bulk of precedent lies, but normatively, neither side has a decisive argument.

The *Bonta* dissent thinks that we should assume that many persons will not be chilled by disclosure of their charitable commitments, making it unimportant whether the disclosure requirement is a little loose in its tailoring. However, the *Bonta* majority thinks we should be cautious and take the risk that persons will be chilled by disclosure of their charitable commitments as a reason to require tighter tailoring. The dissent can inveigh against the substitution of judicial judgment for that of "politically accountable actors"—it lets the government operate unless citizens can come forward with evidence of chill. The majority, on the other hand, can invoke the value of individual rights against mere "administrative convenience"—it protects the individual unless the government can show that it has tiptoed around possible chilling.

This stalemate is a symptom of the view I have been at pains to challenge in this Article. Both sides want to evaluate anonymity in terms of who has a burden to show chilling in some particular circumstances, but there are costs to placing it on either party, since anonymity is double-edged. It can hide abuse and fraud, or it can protect unpopular views. Neither scenario necessarily predominates, so the burden is likely to get the wrong result at least some of the time.

The privileged participation view offers a different way of approaching disclosure cases. In line with my analysis of *Doe v. Reed*, this approach asks what persons should be responsible for, and to whom. It asks directly about the kind of thing that is being shielded by anonymity. *Doe v. Reed* involved ballot signatories who were seeking to have a significant effect on the political activity of a community, and so they cannot claim anonymity. If they are going to prompt persons to consider and make binding legal decisions about an issue, they should do so in their own name. If one is seeking to make the world over as one would have it, one's mind is made up, and so there's no place for a privilege to make it up.

In *Bonta*, I also think that anonymity is inappropriate. My reasoning can be introduced by the example of a legislative representative. Representatives carry out a public function because they act on behalf of their constituents and cannot vote anonymously. Further, the public nature of the representative's work means that others who seek to interact with representatives may also take on some obligations of transparency. For example, there are a variety of disclosure rules for lobbyists which help constituents know who their leaders are talking to and who is seeking to influence their judgment.[109]

108. *Id.*

109. *See* United States v. Harriss, 347 U.S. 612 (1954) (upholding the disclosure requirement in the Federal Regulation of Lobbying Act). *See* William Luneburg, *Anonymity and Its Dubious*

Now apply the same logic to a tax-exempt charity like the challengers in *Bonta*. I think it is clear that such charities can be required to disclose their officers.[110] Why? Because charities play a partly public role in society in virtue of the fact that contributions to them defray the overall tax burden of the donor. A charity is partly treated as an agent that sufficiently aids public goals and community interests. It is also entitled to solicit funds from others, as a charity.[111] Hence, there must be a person who can answer for its activities. But if the officers of a charity can be compelled to reveal their names, then there is ample reason to hold that large donors must do so as well because they are likely to have influence with the charity. They are defraying their public obligations through an avenue of their choice. In the worst-case scenario, donors may be abusing the tax-exempt status of the charity or working with it to avoid taxes.

Moreover, large donors are not plausibly settling their views. The Americans for Prosperity Foundation is only required to disclose the names of donors who give $250,000 or more. Such donors are plausibly committed to the cause of the charity and are, again, acting to make over the world as they wish it to be. Since their actions indicate that they have made up their mind about what they wish to promote, they can be required to do so in their own name.

According to these arguments, the key facts are not whether a donor will or will not be actually chilled by the requirement to disclose their donations to the attorney general, but whether it is fair to require them to give their name. Perhaps some donors are paranoid about the California attorney general knowing that they donate a lot to a particular cause. If so, their donations will be chilled, but that consequence cannot be a basis to suspend an otherwise sound disclosure requirement. And, as I argued, California's disclosure requirement is sound because of the impact that large donations make on public life and because of the modest public obligation that they are permitted to fulfill.

Given the inappropriateness of anonymity, I think that California's interest in manageably policing an expansive charitable trust register is likely sufficient to protect the disclosure rule from facial invalidation. I say "likely" because the privileged participation view does not permit disclosure simply because anonymity is inappropriate without any countervailing

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110. NAACP v. Alabama, 357 U.S. 449, 464 (1958) ("Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it.").

111. Cal. Bus. & Prof. Code § 17510(a) (1999) (West) (legislative findings) ("Many solicitations or sales solicitations for charitable purposes have involved situations where funds are solicited from the citizens of this state for charitable purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity. The charitable solicitation industry has a significant impact upon the well-being of the people of this state").

government interest. That would be harassment.[112] There must be some genuine enforcement value to California obtaining these records, and plausibly, there is.

Note that the arguments I gave leave room for a grant of anonymity (as in *Doe v. Reed*) when others wrongfully attempt to deter donors from exercising their associational rights with threats or violence, or when the Attorney General mishandles the information that is disclosed. The record in *Bonta* suggested serious government negligence and even the dissent claimed that "there is no question that petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed."[113] For these reasons, I think an as-applied challenge against the California disclosure rule is plausible, but that the law on its face is sound.

IV. Conclusion

My goal was to identify and challenge a pervasive assumption: that anonymity is just a state in which one's identity is unknown to others and that its importance rests on the effects of that ignorance. If one accepts this assumption, then anonymity rules will be properly analyzed on a case by case, cost-benefit basis. With regard to each case, the question will be "what do we want to happen here?" followed by an inquiry into whether anonymity will satisfactorily advance whatever the answer is (e.g., more dissident speech, safety from reprisals, etc.). The question of whether to use anonymity will be a purely technical, instrumental one that turns only on the results it produces compared to other doctrines.

This results-only assumption about the significance of anonymity is too restrictive. It misses the significance of names as the way in which persons think about others and, in turn, update their view of them by attributing new things to them. Anonymity is not just a state in which a person's identity is unknown, but also, thereby, a state in which a person cannot be held responsible for what they do. Hence, anonymous speech is speech for which its speaker cannot be held responsible.

This fact that anonymity precludes holding persons responsible, gives it inherent moral significance. Because persons should be held responsible for whatever they are responsible for, anonymity is an exception to, or a privilege from, the normal moral order of things. Such a privilege requires justification, and the justification is not wide open. It does not consist of a sufficient balance of "goodness" however denominated, but is instead one

112. Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) (invalidating a disclosure requirement that had no justification beyond harassment.); Acorn Inv., Inc. v. City of Seattle, 887 F.2d 219, 226 (9th Cir. 1989) ("[i]n short, there is no logical connection between the City's legitimate interest in compliance with the panoramic ordinance and the rule requiring disclosure of the names of shareholders").

113. Bonta, 141 S. Ct. at 2405 (Sotomayor, J., dissenting).

that ensures the realization of the good *of anonymity*, as a distinct moral practice.

The distinct good of anonymity is that it permits a form of thinking by which persons can retain the privacy of their thoughts without having to withhold them from others. With anonymity, one retains privacy in one's ideas, not by holding the ideas back, but by holding one's self back, so that others cannot identify the one who holds the idea. The justification for anonymity is to privilege participation in community intellectual life.

If we accept this account of what anonymity is, then we will have to stop evaluating various anonymity practices in terms of what goods they produce. Instead, in each instance of anonymity we will have to ask whether someone should be held responsible for what they do anonymously. This is a different question. It requires thinking about the allocation of responsibilities to persons—what should persons have to own and what may they disown? I've given one partial answer in this paper: persons may sometimes disown their thinking, since thinking is a work in progress, and so they should not have to take responsibility for their early thoughts in order to improve them. If they did, they might choose not to participate in communal thinking at all, and this is a grave loss to the individual thinker and to their community.