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DEMOCRACY'S SECRET

Carl Schmitt and the German Critique of Secret Voting

Introduction

Individual citizens who have an equal right of political participation are the basic component of modern democracy. Max Weber describes in his article *Wahlrecht und Demokratie in Deutschland* (Voting Rights and Democracy in Germany) the role of the citizen as distinct from all other social roles: “From a pure political point of view, it is no accident that an equal ‘numeral-electoral-law’ [*Ziffernwahlrecht*] is gaining ground in every nation today. The equality of the vote in its ‘mechanical’ character corresponds with the nature of the modern nation state. ... The equality of the vote indicates nothing else but: at this particular point in his social life, the individual is *not seen*, – as usually anywhere else – in his capacity with respect to his professional and family status or in his distinct financial or social position, but as a citizen only. It symbolizes the political unity of the state-citizens in contrast their antagonisms in the private sphere”¹ (Weber 1917:254). From Weber’s point of view², the history of voting procedures in the 19th and 20th century can be read as a gradual institutionalization – of the individual citizen. Political sociologists have followed Weber’s approach in their narratives of the history of voting rights³.

In order to safeguard the role of the individual citizen, modern democracy has its secrets. One of them is secrecy itself⁴, in particular with respect to cast the vote. The secret ballot is by now compulsory in all Western democracies⁵. Its compulsory status shall prevent citizens from ‘voluntarily’ – or, to put it more bluntly: due to social pressure – voting publicly. By employing voting booths, ballot boxes or specially secured voting machines in public places, state authorities ensure the anonymity of voting. Modern democratic theorists strongly insist on it. To quote Robert A. Dahl, “secrecy has become the general standard; a country in which it is widely violated would be judged as lacking free and fair elections” (Dahl 1998:96)⁶. A few authors like Benjamin Barber, Claus Offe, and Albert O. Hirschmann have taken a less affirmative stand towards secret voting. According to them, the secret ballot is an ambivalent achievement. It fosters the privatization of politics to a degree of total dismantling of any aspirations of the common good. But only a few of them go as far as actually questioning the secret ballot; the dominant reform option lies in an expansion of deliberative institutions in modern democracies⁷.

At the same time, mandatory secret voting has come under a different form of attack due to very recent developments in the technology of voting procedures. In most Western democracies experiments are under way which aim to an introduction of online-voting. According to the enthusiastic supporters of this new technology, citizens will cast their vote in the near future by using their home PC or cell phone. The challenge this means to mandatory secret voting is obvious: online-voting from home will shift the responsibility to secure the absolute secrecy of the voting process – similar to absentee voting by letter – from the state to the individual citizen. In effect, secret voting loses its mandatory status and becomes voluntarily⁸.

So both theoretical considerations and current plans to introduce online voting from home places the question of the relevance and status of secret voting back on the agenda of democratic theory. This discussion is much more difficult to put up in Germany than in other western democracies. The argument of this paper is that the deeper reason for this taboo can be identified as a misunderstood opposition to Carl Schmitt. For the later German debate on issues of the secret ballot, Schmitt’s writings of the Weimar Republic had the effect of an intellectual narcotic.

The first section of the paper is a brief reminder of some historical aspects with regard to the introduction of secret voting in Germany (I). A closer examination of Schmitt's position reveals that he should rather not be counted as an opponent of the secret ballot, because, strictly speaking, he opposed the open ballot, too (II). Contemporary scholars have already pointed out that Schmitt's theoretical writings did not have much effect on the actual political system of the Third Reich. So the third section will deal with the Nazi electoral law without necessarily making references to Schmitt. The Nazi regime had formally adhered to the principle of secret ballot, even though there have been serious violations in practice. The most effective electoral frauds were not committed by violating the secrecy of the vote, but by ensuring that there are no meaningful alternative choices on the ballot (III). By uncoupling Schmitt's critique of the secret ballot from Third Reich politics I want to encourage a less rigid denial of any critique of mandatory secret voting. Instead we should pay more attention to the ambivalence of secret voting (IV).

I. From Public to Secret Voting

Before getting deeper into this topic, one has to remind oneself of the fact that secret voting is a relatively new achievement. Whenever in the late 18th or in the early 19th century the authors of the Federalists Papers and their opponents in North America, Jeremy Bentham, James and John Stuart Mill in England, or Immanuel Kant and Georg F. W. Hegel in Germany had discussed electoral law and voting rights, the electoral procedures they proposed (or criticized) were public. Citizens voted by calling the name of the candidates ('*viva voce*'), by signing in public voting lists, or by reading and submitting the ballot in front of their fellow citizens. Although the secret ballot had historic precedents reaching back to the ancient Greek and Roman eras, the open ballot was the form of voting that was commonly associated with democracy.

Not before 120 years today's mandatory secret ballot had begun to replace a public show of hands⁹. Secret ballot voting was first practiced in the Australian colony of Victoria in 1856, using ballots that have

been printed in advance and ballot boxes. During the following 65 years, the ‘Australian ballot,’ – as it was named after the continent of its origin – was introduced in almost all then existing democracies. It was established in 1870 in New Zealand, 1872 in the UK, between 1873-75 in Canada, 1877 in Belgium, 1884 in Norway, 1887 in the Netherlands, after 1888 in several States of the U.S., 1907 in Austria, and 1913 in France, to mention only some countries.

In comparison to other Western democracies, Germany stands out due to its particular duality from 1871-1918¹⁰. On the national level of elections for the German Reichstag, secret voting was introduced already in 1871. In the largest German state, Prussia, elections to the Prussian Parliament (but not to the *Reichstag*) were held viva voce until the collapse of the Kaiserreich in 1918. It was incorporated into Article 22 and 125 of the Constitution of the Weimar Republic which later became the model for the equivalent articles in the Basic Law of the Federal Republic of Germany. In the Weimar Republic it was due to an extensive interpretation of Article 125 of the constitution¹¹ that mandatory secrecy did not only apply to federal and statewide elections, presidential elections and referenda, but also to elections of employees’ representations, health insurance boards as well as professional associations.

Constitutional lawyers of all political colors named their good reasons for the secret ballot¹². Only one leading constitutional law scholar was at odds with this broad consensus among the commentators of the Weimar Constitution: Carl Schmitt. This fact has shaped the German debate on public and secret voting until today.

Such a line of argument blends Schmitt’s theory of voting with the later electoral practices of the Third Reich in a way that misrepresents both Schmitt’s theory and the national-socialist electoral procedures. It can be found exemplary in a statement of Wilhelm Grewe shortly after the foundation of the Federal Republic in 1949. Obviously reflecting on his own earlier criticism of the secret ballot during the Third Reich, Grewe¹³, wrote: “it is to be expected that, due to the political experiences of the recent past, these [i.e. Schmitt’s] arguments cannot be upheld even by those who had articulated them bona fide” (Grewe 1949:470).

Advantages and disadvantages of secret voting have never been discussed extensively in Germany after 1945. This silence is not the

result of a sweeping majority for secret voting at the point of constitution-making. Rather, the image of the most outspoken German critic of the secret ballot, Carl Schmitt, caused public and secret voting to be a non-issue. A certain intellectual reflex was commonplace in German post-war debates: if Schmitt, who had been a supporter of the Third Reich in its early years, argues against the secret ballot, this very principle has to reasonable.

II. Carl Schmitt's Critique of the Secret Ballot

In the German Empire, the controversies about the appropriate voting procedures were embedded in the debates about the characteristics of the State and the status of the citizens' interests vis-à-vis the State.¹⁴ In a short article on parliamentary electoral law written in 1912, Rudolf Smend portrays a sharp division in the German controversies on the electoral laws. Smend's basic analytical distinction can already be found in the reflections for electoral reform by the French journalist and centre-right politician Charles Benoist in 1896¹⁵. According to Smend, two different notions of the state have evolved since the early 19th century, one being 'historical-organic' and the other 'rationalistic-mechanistic.' Both concepts imply different theories of elections, each envisioning an optimal way of facilitating the people's participation in government. In the rationalistic concept of the state, the franchise is the individual right of reasonable citizens, while the organic concept of the state implies that the right to vote is essentially a political right that is granted to holders of certain positions in the state, or according to traditional titles. The latter notion favors the secret ballot, since interests are seen as subjective attributes. Therefore, interests do not need to be legitimized, they only need to be articulated by persons authorized to vote. The defense of the open ballot, in contrast, is part of the rationalistic notion of the state. According to Smend, public voting is part of the rationalistic attempt to search for objectively right aims in politics. The open ballot is part of the rationalistic notion of the state, because it implies that citizens, being part of the larger project of searching for objectively right policies, have to justify their interests and

views in front of their political community.¹⁶ Later, during the Weimar Republic, Smend became one of the leading conservative and anti-liberal constitutional theorist. His *Integrationslehre* was strongly anti-rationalistic and goes without any critique of the secret ballot. The voting act for him was a symbolic means of political integration.

Carl Schmitt also took an instrumental position. Even after 1949, he rejected any general concept of elections. “By elections,” he writes in 1956 in a book on Shakespeare and Germany, “we usually only mean free elections” (1956:59). Such a concept, he continues, is a liberal narrowing of the original scope. Looking at a wider time frame, “a concept like elections should only be used in connection with and against the background of the concrete political order of the respective people” (59). What, then was Schmitts position during the Weimar Republic?

The secondary literature on Schmitt and his ideas is still today both extraordinary and controversial. It is remarkable that within the large body of secondary literature on him, a comprehensive study on his criticism of secret individual voting does not exist yet. This is even more astonishing if one takes into account that this criticism of electoral procedures was Schmitt’s trigger for distinguishing between democracy and liberalism and then turning this distinction against the concept of liberal democracy.

Which were the main points of Schmitt’s criticism?

Different writings from the 1920s reveal how Schmitt imagines his critique to be translated into the political system of the Weimar Republic. In his *Verfassungslehre* (1928), he develops a concept of democracy that is deeply rooted in Rousseau’s thought. The individual secret election is, according to Schmitt, not a democratic, but a liberal institution that “is in contradiction to the political principle of democracy” (Schmitt 1928:245). In *Verfassungslehre*, Schmitt continues a line of reasoning that he had begun in *The Crisis of Parliamentary Democracy*, originally published five years earlier. In the 1926 preface to the second edition of the book he states that efforts aimed to introduce the individual and secret ballot are part of a “undemocratic conception, resulting from a blend of liberal principles in the nineteenth century” (Schmitt 1926:16).

Schmitt spots two major faults in the liberal mode of decision-making. Of the two objections he raises, only the first one (a) is

directed against the secrecy of the vote as opposed to the open ballot. The second one, in contrast, reveals that Schmitt's criticism is much broader than his objection against the secret ballot. Rather, he is opposed to the idea of individual voting in general (b).

(a) Schmitt's arguments against the secret ballot are rooted in a certain notion of the democratic sovereign, the people. "The people," asserts Schmitt, is "is a concept in public law. The people exists only in the sphere of publicity" (Schmitt 1926:16). The people and publicity either exist together or not at all: "no people without publicity, and no publicity without a people" (Schmitt 1928:243). The public realm is, in turn, not defined by requirements such as the exchange of opinions, mutual advice, or the common quest for truth. Instead, the public realm exists whenever the people is convened. "Through its presence, the people creates the public realm" (Schmitt 1928:143). This requirement of actual presence implies a certain modus of decision-making. "Only the actually convened people is a people," states Schmitt in his 1927 writing *Volksentscheid und Volksbegehren*, "and only the people that is actually convened is capable of exercising the specific right of a people: acclamation" (Schmitt 1927:35).

According to this criterion, the secret ballot endangers the "authenticity" (Schmitt 1927:35) of the people's expression. Even worse, this electoral procedure destroys the people's specific modes of expression. "The unmediated presence of the people," Schmitt contends, is eradicated by "the isolation of the individual voters and the secrecy of the vote" (Schmitt 1927:35). For liberal electoral procedures, the ideal voter is not part of the masses, but acting as a selfish private individual. In contrast, "according to the democratic ideal, the voting citizen is not a private individual, but acts in a public position. But contemporary electoral procedures, most prominently the individual and secret ballot, transform the citizen into a private person at the crucial moment of voting. The secrecy of the vote is the point at which this transformation takes place and democracy is distorted in order to accommodate the liberal protection of the private sphere" (Schmitt 1928:246).

The contemporary procedures of individual elections with the secret ballot endanger the political by completely privatizing the proc-

ess of voting. In *Wesen und werden des faschistischen Staates* (The Essence and Development of the Fascist State), a sympathetic comment on current Italian politics, Schmitt criticises liberal democracy by “displacing the people as a political body from the public sphere ... (the sovereign disappears into the voting booth)” (Schmitt 1929:110f.). The consenting opinions of millions of such private individuals cannot form a public opinion. The result can therefore only be the sum of private opinions. This procedure cannot produce a *volonté générale*, but only a *volonté de tous* (Schmitt 1928:280).

Schmitt was not the only right-wing author in the Weimar Republic to criticize the liberal notion of voting. Most representatives of the political right of the Weimar times had similar views. In *Die Herrschaft der Minderwertigen* (The Rule of the Inferior), a widely read book written in 1927, the young conservative Edgar Jung remarks that “voting is nowadays the expression for mechanical aggregation” (Jung 1927:246). Gerhard Günther, in his 1932 book *Das werdende Reich* (The Dawning Empire) objects to the “ever more sophisticated extension of a statistical voting machinery” and claims that “the essence of democracy is that the people acts in its entirety” (Günther 1932:177).

(b) However, Schmitt’s criticism of the secret ballot should not lead to the misguided conclusion that he was an advocate of democratic open ballot elections. Schmitt’s second objection to secret voting, most comprehensively formulated in his 1927 booklet *Volksscheid und Volksbegehren* (Referendum and Petition for a Referendum), reveals that he generally opposes individual acts of voting — regardless whether the ballot is cast openly or secretly.

According to Schmitt, the procedure of individual voting is based upon the “widespread, typically liberal misconception that the individual voter is asked to express his founded opinion on a substantial question, and that the voter should be encouraged to articulate his opinion on all kinds of subject matters. This would not be democracy, and it is not even acceptable as a mere ideal,” (Schmitt 1927:35). Schmitt does not count on the citizens’ democratic participation, but relies on statist modes of political decision-making. The consequence from these thoughts he draws in the 1929 article on the essence and development of the fascist state is a general rejection of

open elections as means of political decision-making: “The fact that the [italian] fascism refrains from holding elections, and hates and despises the whole business of ‘elezionismo’ is not undemocratic, but anti-liberal,” (Schmitt 1929:110).

(c). To sum up my point here. Schmitt does not only view secret voting, but individual voting in general as undemocratic. Publicity and individual ballots are antagonisms, and their incompatibility cannot be wiped out by deliberately combining both. Public as well as secret ballot elections violate, according to Schmitt, the basis of democracy, which he thinks is the reacting and acclaiming public. With this view, Schmitt stands in stark contrast to the individualistic interpretation of democracy by Max Weber and Robert A. Dahl quoted above.

Schmitt’s critical comments during the Weimar republic on secret voting did not go undisputed by his fellow constitutional scholars. The social-democrat Hermann Heller and the liberal Hans Nawiasky both countered Schmitt’s arguments by pointing out that only the liberal component of protecting the voters through the secrecy of the ballot can ensure genuine democratic decision-making.¹⁷ But their replies remained relatively unnoticed. Not because their arguments were so weak, but because this debate was only a minor aspezc in the whole debate on Schmitt in the early thirties. Schmitt’s general critique of the Weimar parliamentary system and the role of the president had stirred up a hornet’s nest and provoked many scholars to either agree with him or to oppose his line of reasoning fiercely. In comparison to this debate, Schmitt’s arguments against secret voting were not discussed as a practical reform option.

III. Third Reich Electoral Politics

One would expect that the interest in Schmitt’s critique of secret voting would have increased after Hitler’s government coalition came into power on January 31, 1933. But the electoral law ensuring the secrecy of the ballot, as well as the respective constitutional provisions and executive order on electoral procedure all remained on the books during the entire rule of the Nazi-party.

For the immediately following elections of November 1933, the election commissioner, Minister of the Interior, and parliamentary leader of the NSDAP, Wilhelm Frick, even firmly insisted on ensuring the secrecy of the ballot. The reasons for this move were strategic: Frick was sure that the new government led by Hitler would get a high percentage of the vote even without obvious electoral fraud. Violations of the secrecy of the vote would accordingly be unnecessary actions of overzealous party followers that could only harm the international legitimacy of the election results.¹⁸

Frick's old fellow party members were irritated by these orders. They thought the secret ballot to be a sellout of national socialist ideals and principles. Four days prior to the election, The Regional Leader of the Farmers in Upper Silesia announced in the *Frankfurter Zeitung* to the Farmer's Leader that "Upper Silesia's free German farmers will profess their loyalty to Adolf Hitler and to the government freely and openly, and will not make use of the secret ballot invented by Marxists and Liberalists."¹⁹ Still, Frick finally prevailed. Regardless of all measures of political terror, contemporary foreign observers confirmed that the secrecy of the vote was usually ensured. Adolf Hitler did not articulate his view on this issue, but allowed Frick to continue. From a passage in Joseph Goebbels's diaries of the Olympic year 1936 we know, however, Hitler's own opinion on the secret ballot. Goebbels writes "The Leader wants another election — if the opportunity is good. But this time open. Because the secret ballot is not proper. The person that is elected has stand to his principles with all of his responsibility, but the voter does not even mention his name. This does not work."²⁰

Neither Schmitt's criticism of secret voting nor Hitler's disdain for this electoral procedure had any consequences for the electoral law in the Third Reich. Even after the regime was firmly established, both the Reichstag elections of 1936 and 1938²¹ and the referenda — in November 1933 as a general appreciation to the politics of the *Führer*, in August 1934 on the transfer of competences from the President to the Chancellor Adolf Hitler, and in April 1938 on the accession of Austria — were conducted with the electoral procedures as known from the Weimar Republic. The Third Reich never officially renounced the secret ballot, and in the relevant constitutional commentaries it was mentioned positively — even in the last editions

that were published during the war.²² Some violations of the secrecy of the ballot are known, but these are rare cases. For example, during the 1938 elections the special security division (SD) of the SS controlled potential opponents of the regime in some districts by invisibly marking the ballots with numbers, creasing the edges of some ballots, or secretly observing the voters behind the sight screens.

Such violations were sometimes discovered and gave rise to rumors. In *Der Waldgang*, Ernst Jünger – a close right-wing fellow of Schmitt – recalls in 1951 his feelings concerning the election and these rumors in those years: “the voters ... would have preferred to abstain (from the election), but this act would have unmistakably documented his views. But participating also seemed dangerous, since the science of interpreting fingerprints, and sophisticated statistical methods, have to be taken into account,” (Jünger 1951:7). A few pages later he notes the last thoughts before entering the voting booth: “only yesterday he had heard that the ballots were to be numbered by a typewriter without a typewriter ribbon” (Jünger 1951:12). Some of these violations of the secrecy of the ballot may have been severe. Still, the overall analysis reveals that the electoral manipulations by the national socialists were not as much centered on robbing the voters’ anonymity as on terrorizing political foes and keeping potential alternative choices from the ballot.

As the Third Reich had ended, all German states once again adopted the secret ballot in their constitutions, picking up the thread from the Weimar Republic and its Constitution. The same provision was later on incorporated in the Basic Law of West Germany and Constitution of East Germany. In West Germany, the Federal Electoral Act guaranteed the mandatory secrecy of the vote. In East Germany in contrast, the citizens were practically asked to profess their approval of previously determined candidates — regardless of the constitutional provisions and the laws protecting the secrecy of the ballot.²³ Although there were voting booths in the room, the voters were effectively forced to cast their votes publicly, since the representatives of the “National Front” and the Unified Socialist Party (SED) had called upon voters to vote publicly. Tenants’ associations and workers’ collectives ‘voluntarily’ committed themselves to casting their votes visibly to anyone. The procedure worked as follows: After showing their identity cards to the election commissioner, the voters were

handed the ballots, but no envelopes. The voters were expected to simply fold the ballot and then put it into the ballot box, thus signaling the acceptance of the listed candidates. Only voters who explicitly decided to do so chose another way: They went to the voting booths and modified the list of candidates by crossing out one or more names. Until the breakdown of the GDR, only a minority of the citizens practiced the latter procedure, and absentee ballots were not allowed. The GDR constitutional scholars defended the voluntary status of the secret ballot.²⁴ Only since the elections of March 1990, the secrecy of the ballot is mandatory again on the territory of the former GDR.

Even though the differences between the voting procedures of the FRG and the GDR are immense, the decisive factor for sustaining the GDR regime was not the forced publicity of the vote but the previous abolition of alternative choices on the ballot.

IV. Conclusion: The Dilemma of a Critique of Political Individualization

The line of argument in this article so far can be summed up in two points: First, Carl Schmitt's criticism of the secret ballot was not primarily aimed against the secret ballot, but rather against individual voting procedures in general. Schmitt believed every individually cast ballot to be an undemocratic act, regardless of the issue of secrecy. Even public voting procedures, as long as the participants act individually, would violate Schmitt's notion of democracy. Consequently, Schmitt does not genuinely belong to the group of famous opponents of the secret ballot. This fact is especially remarkable since all attempts to cautiously point out problems of secret voting in Germany were disqualified simply because Schmitt was thought to be on the same camp. Schmitt's criticism of the secret ballot had therefore the paradox effect of rendering any new attempt of criticizing this electoral procedure, or pointing out its disadvantages, futile.

The second observation is concerned with the development of secret and public voting after the breakdown of the Weimar Republic. There is no evidence that electoral procedures containing the

open ballot were instrumental in sustaining dictatorial regimes. The Third Reich held on to the secret ballot — with only few exceptions. The regime secured its power basis by not permitting political alternatives. The development in the GDR was different. There, voting basically became a publicly visible act, with only few brave exceptions. But even the GDR regime did not rely on public voting as a strategy for securing apparent support. Rather, political foes were terrorized and the available choices on the ballot were pre-selected by the regime. Both regimes were based on outlawing political opposition, and not on a certain electoral procedure.

My discussion of the German case may be generalized and then leads to a more ambivalent view of secret voting. It is a view that is less doctrinaire in its defense and less patronizing towards its critique. With respect to the current challenges to secret voting which were mentioned in the introduction, such a less rigid position may be connected to two different models of democracy: the republican model and the preference-aggregation model.

In the context of the republican model one can find critical objections against the secret ballot already in the work of John Stuart Mill²⁵. Republican critics of the secret ballot like Mill are concerned that the secrecy of the ballot fosters the voters' tendencies to refrain from discussing and justifying their political views and decisions. For them, the voting booth has an eminently symbolic political function, namely conveying the message that politics is an area in which the citizens act isolated from each other. In their view the secret ballot reinforces the trend of forming political preferences according to the estimated individual benefits. Thus, regardless of its advantages, it contributes to the erosion of political convictions oriented at the common good. Recalling such criticism need not lead to the reintroduction of the open ballot. Rather, the knowledge of such criticism alerts to those institutional settings which lead to a privatization of politics in which the aspirations of the common good will get destroyed. The republican reform option lies not in the reintroduction of public voting but in the supplementary provision of institutions which counters the individualizing effects of modern voting procedures through political participation²⁶

In light of current initiatives to introduce online-voting from home PCs or cell phones a less rigid position on mandatory secret voting

would be attractive too. This is because online-voting from home cannot guarantee the absolute secrecy of the vote. It is up to the individual citizen whether he or she is able or even wants to vote secretly. There are good reasons to assume that this kind of voting will make political individualization to an even more dominant feature. Online-voting from home takes politics farther away from its public habitation. Preferences on public issues are expressed literally from the center of the private existence. Democracy gets divorced from the symbolic spaces of concern for the common good. Online-voting will probably encourage privatistic judgements on public issues and thus erode public oriented citizenship²⁷.

Thus any critique which weakens the normative status of the secret ballot faces a dilemma: on the one hand such a critique is necessary in order to put pressure on political reforms which will foster concern for the common good; on the other hand any weakening of the status of the secret ballot may give way to an even further privatization of politics through online-voting. In some respect it was easier in the days of Max Weber to reflect on problems of voting procedures.

Notes

- ¹ The italics are in the original. – If not otherwise indicated, all translations from the German originals are mine (H.B.).
- ² For a deeper discussion of this aspect in Max Weber's work see: Palonen 1998: 187-192.
- ³ Most prominently Rokkan 1970. See more recently the detailed study of the French case: Rosanvallon 1993.
- ⁴ For subtle discussions of the general relationship between democracy and secrecy see: Gutmann/Thompson 1996: 95-127, Jestaedt 2001, and Dean 2001.
- ⁵ See Reeve/Wade 1992:98ff. and Nohlen 2000:38f.
- ⁶ On the mandatory status of secrecy see the argument by Tom Schelling: "The mandatory secret ballot is a scheme to deny the voter any means of proving which way he voted. Being stripped of his power to prove how he voted, he is stripped of his power to be intimidated" (Schelling 1980:19).

- ⁷ See: Hirschman 1984:112ff, Barber 1984:187f., Offe 1989:767f., and Garrigou 1993:24f. Jean Paul Sartre made a similar point in one of his late writings (Sartre 1976:80). Only Geoffrey Brennan and Phillip Pettit go as far as advocating the reintroduction of the open ballot (Brennan and Pettit 1991).
- ⁸ On online-voting in general and its implications for secret voting in particular see: Buchstein 2001b, Neymanns/ Buchstein 2002.
- ⁹ A detailed account of the history of public and secret voting is given in my book: Buchstein 2000.
- ¹⁰ For this constellation see: Buchstein 2001a.
- ¹¹ The leading liberal commentator Gerhard Anschütz (1932) has been a proponent of the extensive interpretation. Friedrich Stier-Somlo and Georg Kaisenberg, in contrast, have argued for a restrictive interpretation of this clause, limiting its applicability to elections in which the voters are called upon as citizens as opposed to members of associations, see Kaisenberg 1930:165.
- ¹² On the interpretation of the relevant provisions of the Weimar constitution see Seifert 1934:29-74, Heyl 1975:87-91, and Gusy:1997:56, 116f.
- ¹³ Wilhelm Grewe (1911-2000) became a member of the Nazi-party early in 1933 and taught international law and political science at Berlin University until 1943. He was then expelled from the party because he resisted to divorce his Jewish wife. In the Federal Republic Grewe became one of the main political advisers of Konrad Adenauer.
- ¹⁴ On this debate see Schönberger 1997.
- ¹⁵ On Benoist's criticism of the 'inorganic' universal suffrage and his proposal for a collective democracy see: Jones 2000:30-32.
- ¹⁶ "The open ballot is the electoral law of rationalism. In this concept, casting a ballot, or voting, is an act determining the objectively correct, true, and best. Such an act is subject to public scrutiny. Public voting facilitates this analysis, posing the question whether the chosen candidate is fit for this position. The secret ballot, in contrast, leaves the decisions to the subjective discretion of the voters. The political views of the modern voters are beyond debate, they are matters of private taste. The function of the secret ballot is to give unhindered and uninfluenced voice to all components forming contemporary society." (Smend 1912:11f.)
- ¹⁷ In his 1929 article *Rechtsstaat oder Diktatur* (Rule of Law or Dictatorship) Heller fundamentally opposes Schmitt's arguments: "If the liberal rights of freedom of expression, of assembly, of association, and of the press, as well as the secret individual vote are graded down, the guarantees of a genuinely democratic determination of the people's will are removed simultaneously" (Heller 1929:457). Nawiasky comments on Schmitt's

theses even more in depth. “The secret ballot,” he writes, “is really not, as Schmitt thinks, an expression of liberal conceptions of the state, but, to the contrary, it is thoroughly democratic. The secret ballot can, unlike the individual and subjective right of the local dignitaries, achieve the social ideal of uninfluenced and unintimidated expression of everyone’s will, including the will of those who are economically dependent. This concept is *unrealistic* because it neglects the fact individuals do not even act isolated in private life, and much less in social actions, in which they always act as a part of a group. The secrecy of the ballot only protects from having to reveal the position of the group one truly feels a member of. The secret ballot is therefore not only no negation of democracy, but moreover it is one of the most necessary preconditions of democracy,” (Nawiasky 1931:184, italics in original).

¹⁸ Twelve days prior to the elections in November 1933, Frick sent a memorandum to the state governments, demanding that the secrecy of the vote has to be observed. “For the election and referendum of November 12, I ask you to protect the polling places and the voters in the usual manner. ... The result of the referendum should not be diminished by news about cases of ‘election terror,’ which will only give rise to more anti-German propaganda,” Memorandum of the Minister of the Interior to the State Governments, November 1, 1933. Quoted in Hubert 1992:252.

¹⁹ Quoted in Hubert 1992:254.

²⁰ Diary entry of December 30, 1936. Quoted in Goebbels 1987:763.

²¹ Gesetz ueber das Reichstagswahlrecht vom 7. Maerz 1936: Reichsgesetzblatt 1936, I:133 and Zweites Gesetz ueber das Reichstagswahlrecht vom 18. Maerz 1938, Reichsgesetzblatt 1938, I:258.

²² See: Stuckart/ Rosen-v. Hoewel/ Schiedermaier 1943:71.

²³ “The ballot boxes shall be made in such a way that the secrecy of the ballot is ensured,” Gesetz ueber die Wahlen zu den Volksvertretungen der DDR (1976), Art. 31, para 1. Quoted in Lapp 1982:117-30. For the electoral practice in the GDR see Kloth 2000:69f., 105f.

²⁴ The constitutional interpretation went that the voters’ ‘renunciation’ of using the voting booths does not violate the secrecy of the ballot because the principle of casting a secret ballot does not imply the obligation to use the voting booth, but only the right to do so. The voters finally decide whether they want to make use of this right. Worries about similar practices induced the FRG constitutional scholars to interpret the secrecy of the ballot provisions more strictly. According to this interpretation, the secrecy of the vote is no right that citizens can claim or relinquish, but a legal duty (see footnote 6 above).

- ²⁵ In chapter 10 of his *Considerations on Representative Government*, written in 1861: J. St. Mill gives a set of arguments for public voting (Mill 1862:205ff.). For a discussion of Mill and the 'republican tradition' in the critique of the secret voting see: Buchstein 2000:633-673.
- ²⁶ The classic programmatic statement of democratic republicanism is Barber 1984.
- ²⁷ See. Buchstein 1997 and 2001b.

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