Articles

Self-Interest and the Common Good in Elections and Referenda

By Bernd J. Hartmann[*]

A. Introduction

This article examines the standard of decision-making that applies to voters. Are they free to follow their personal interests or are they bound to make decisions most beneficial to the common good? This question is answered not only for elections, *i.e.*, for people choosing their representatives and for parliament itself appointing officials. Furthermore, the treatise extends to other votes as well, as it covers not only referenda as the paradigmatic means of lawmaking by the people, but also parliamentarian legislation.

The article searches for answers in legal doctrine, without disregarding selected findings of the General Theory of the State, of political theory, and of economics. I argue that citizens are allowed to take their self-interest as the decision-making standard in elections. By contrast, the common good is the relevant standard in all other cases; this applies to lawmaking by the people in the same way as it does to lawmaking and electing in parliament. Even though I derive this result from the German constitution, the Basic Law, the answer to the question and the arguments advanced are, I hope, of relevance to other liberal democracies as well.

In order to reach the answer, I will first establish self-interest and the common good as the two possible standards. Then I will try to determine their scope and their content. Next, I will address possible objections before I summarize the paper.

B. Self-Interest and the Common Good as Applicable Standards

In an attempt to reduce to a formula what the state is for, an aphorism comes to mind which was once meant to serve as the opening clause of a preminary draft of Germany's

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constitution, the Herrenchiemsee-Entwurf.[1] This sentence, which graced the north side of the Federal Chancellor's Office not long ago,[2] and which prevails as a part of constitutional state law,[3] provides: "Der Staat ist um des Menschen willen da, nicht der Mensch um des Staates willen (The state is made for man, not man for the state)."[4] More concisely, this statement describes man's primacy over the state. In current law, the principle of primacy constitutes the basis of various structure-related ideas, such as the distinction between the state and the society and, following therefrom, the separation of private and public law. Within public law, the distinction between subjective public rights on the one hand, and state powers governed by public law on the other hand, is also rooted in the primacy of man. The statement is, therefore, also explainable from both perspectives: from an individual's perspective, man's primacy over the state follows from the guarantee of the dignity of man and from civil liberties, and from the state's perspective, it is based on the rule of law as well as the principles of democracy and republic. According to the guarantee of the dignity of man and of civil liberties, the human being is an end in itself,[5] whereas the state comes up against its purpose of serving man.[6] This is why, in the German constitution, the law relating to state organization and structure only comes after the section on the basic rights, in reverse of the previous order.[7] The rule of law recognizes that the state—unlike society—does not enjoy any freedom; rather, it is only permitted to

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[1] *See* Frank Schorkopf, *The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon,* 10 GERMAN L. J. 1219, 1222 (2009); Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 450 (2004); *cf.* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 7 sq. (2d ed. 1997).

[2] An Einstein quote for the 100th anniversary of the theory of relativity, *cf.* Anthony Philip French, *Einstein and World Affairs*, in EINSTEIN 185, 188 (Anthony Philip French ed., Harvard Univ. Press 1979); *see also* THE FEDERALIST NO. 45 (James Madison) ("[T]he impious doctrine in the old world that the people were made for kings, not kings for the people.").

[3] *See* Article 5 (2) (1) Const. Mecklenburg-West Pomerania ("The land of Mecklenburg-West Pomerania is made for man.").

[4] *See* Klaus-Berto v. Doemming, Rudolf Werner Füsslein & Werner Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes*, 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS NEUE FOLGE 48 (1951).

[5] *See* Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 1 BvR 357/05, 15 Feb. 2006, 115 BVERFGE 118, 153 (Ger.); *cf.* Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 1 BvL 14/76, 21 June 1977, 45 BVERFGE 187, 228 (Ger.); Bundesverwaltungsgericht (BVerwG - Federal Administrative Court, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 77, 80 (2006) (Ger.) (both likewise Kantian on the dignity of man).

[6] *Cf.* Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 2 BvR 350/75, 21 Sept. 1976, 42 BVERFGE 312, 331 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 2 BvL 8/77, 8 Aug. 1978, 49 BVERFGE 89, 132 (Ger.); Dirk Ehlers, *Die Staatsgewalt in Ketten*, *in* FESTSCHRIFT (FS) EKKEHART STEIN 125, 141 (Heiko Faber & Götz Frank eds., 2002); WERNER FROTSCHER & BODO PIEROTH, VERFASSUNGSGESCHICHTE recital 749 (9th ed. 2010).

[7] *Cf.* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 10 (1994); DIETMAR WILLOWEIT, DEUTSCHE VERFASSUNGSGESCHICHTE 343 (6th ed. 2009).

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act upon conferred powers for public purposes.[8] The principle of republic binds the authority of the state to the *res publica* ("the public issue") and thus to the common being,[9] or the "gemeinen nutz"[10] ("common wealth,"[11] the "public good"[12]).[13] Finally, the principle of democracy organizes the reign of people from among the midst of the people to ensure that common issues are handled in the people's interest;[14] it calls for a government not only "by," but also "for," the people.[15]

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[8] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 1/76,2 Mar. 1977, 44 BVERFGE 125, 141 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 165/75, 27 Nov. 1978, 50 BVERFGE 50, 50 (Ger.); Dirk Ehlers, *Staatliche Verwaltung*, in ALLGEMEINES VERWALTUNGSRECHT § 1 recital 33 (Hans-Uwe Erichsen & Dirk Ehlers eds., 14th ed. 2010); HANS J. WOLFF ET AL., VERWALTUNGSRECHT I § 18 recital 12 (12th ed. 2007).

[9] *Cf.* Uwe Volkmann, BERLINER KOMMENTAR ZUM GRUNDGESETZ art. 20 (part 2) recital 3 (Karl Heinrich Friauf & Wolfram Höfling eds., Otto Schmidt, 27th supp., 2009).

[10] *See* JACOB GRIMM & WILHELM GRIMM, 5 DEUTSCHES WÖRTERBUCH art. gemein 3) a) ε), cols. 3169, 3175 (1897). The term has negative connotations since the century-old formula "Gemeinnutz geht vor Eigennutz" ("common good will override self-interest") was used in the party program of the NSDAP dated 24 Feb. 1920.

[11] *Cf.* FERDINAND SEIBT, DIE BEGRÜNDUNG EUROPAS 39 (5th ed. 2003) (republic as Latin version of "commonwealth").

[12] *Cf.* Horst Dreier, *Demokratische Repräsentation und vernünftiger Allgemeinwille*, 113 ARCHIV DES ÖFFENTLICHEN RECHTS 450, 462 (1988); THE FEDERALIST NO. 45 (James Madison) ("[T]hat the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object."). Public good here is not meant in the economic sense as a good neither rival nor excludable.

[13] *See* MICHAEL ANDERHEIDEN, GEMEINWOHL IN REPUBLIK UND UNION 218, 676 (2006) (qualifying this view as the *herrschende Lehre* ("prevailing opinion"); Günter Frankenberg, *in* ALTERNATIVKOMMENTAR-GRUNDGESETZ VOL. 2 art. 20 paras. 1-3 I recitals 23, 36 (original edition 2001) (Erhard Denninger, Wolfgang Hoffmann-Riem, Hans-Peter Schneider & Ekkehart Stein eds., Luchterhand 3d ed., loose-leaf 2d supplement, revision as of August 2002); Rolf Gröschner, *Die Republik*, *in* 2 HANDBUCH DES STAATSRECHTS § 23 recitals 55, 72 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004); Hans-Detlef Horn, *Kantischer Republikanismus und empirische Verfassung*, 57 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 203, 220 (2002); GERHARD ROBBERS, EINFÜHRUNG IN DAS DEUTSCHE RECHT 61 (4th ed. 2006). *But see*, Volkmann, *supra* note 9, at art. 20, part 2, recital 1 (designating as "*vorherrschende*" ("prevailing") opinion as well); Horst Dreier, *Deutschland*, in 1 HANDBUCH IUS PUBLICUM EUROPAEUM § 1, recital 96 (Armin v. Bogdandy, Pedro Cruz Villalón & Peter M. Huber eds., 2007) (same); Roman Herzog, *in* GRUNDGESETZ art. 20 III, recital 5 (1980) (Theodor Maunz & Günter Dürig eds., 2010); HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ art. 20 recital 3 (10th ed. 2009); Michael Sachs, GRUNDGESETZ art. 20 recital 9 sq. (Michael Sachs ed., 5th ed. 2009).

[14] *See* Bundesverfassungsgericht [BVerfG - Federal Consitutional Court], Case No. 1 BvR 561/60, 17 May 1961, 12 BVERFGE 354, 364 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Consitutional Court], Case No. 2 BvR 350/75, 21 Sept. 1976, 42 BVERFGE 312, 331 (Ger.); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 1/76, 2 Mar. 1977, 44 BVERFGE 125, 141 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 2 BvL 8/77, 8 Aug. 1978, 49 BVERFGE 89, 132 (Ger.); PHILIP KUNIG, DAS RECHTSSTAATSPRINZIP 333 (1986).

[15] *See* Abraham Lincoln, Gettysburg Address (19 Nov. 1863).

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Consequently, the subjective right is an end in itself, granted to the individual for its own sake,[16] whereas powers are conferred upon a public authority solely as a means to the end of promoting the common good.[17] Therefore, subjective rights in particular grant the right to pursue self-interests based on personal preference.[18] The constitution grants a citizen the freedom of speech to make remarks that are contrary to the common good;[19] belong to a religion or party that objects to the state;[20] support a trade union which pursues an industrial action in the citizen's favor at the public's cost;[21] and, unlike the state, choose contracting partners according to the citizen's confessions or political party allegiances.[22]

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[16] *See* Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvF 1/69, 30 BVERFGE 1, 26 (Ger.); Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 1 BvR 2378/98, 3 Mar. 2004, 109 BVERFGE 279, 313 (Ger.); Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], Case No. 1 BvR 357/05, 15 Feb. 2006, 115 BVERFGE 118, 153 (Ger.); Horst Dreier*, Der freiheitliche Verfassungsstaat als riskante Ordnung*, 1 RECHTSWISSENSCHAFT 11, 28 (2010); DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG 69 (2d ed. 1994).

[17] *See* Peter M. Huber, *Das Menschenbild im Grundgesetz*, 20 JURISTISCHE AUSBILDUNG 505, 508 (1998); Hans H. Rupp, *Die Unterscheidung von Staat und Gesellschaft*, *in* HANDBUCH, *supra* note 13, at § 31 recital 30.

[18] *See* Josef Isensee, *Gemeinwohl im Verfassungsstaat*, *in* HANDBUCH, *supra* note 13, VOL. IV, at § 71 recital 116 (3d ed. 2006); EBERHARD SCHMIDT-AßMANN, DAS ALLGEMEINE VERWALTUNGSRECHT ALS ORDNUNGSIDEE 82 (2d ed. 2004); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law,* 1 INT'L J. CONST. L. 79, 89 (2003). C*ontra* Herbert Krüger, *Verfassungsvoraussetzungen und Verfassungserwartungen*, *in* FS ULRICH SCHEUNER 285, 289 (1973).

[19] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], 54 NJW 2069, 2071 (2001); *accord* Horst Dreier, *Staatliche Legitimität, Grundgesetz und neue soziale Bewegungen*, *in* DEMOKRATIE UND WIRTSCHAFT 139, 173 (Joseph Marko & Armin Stolz eds., 1987); CHRISTOPH MÖLLERS, STAAT ALS ARGUMENT 320 (2000); JOHANN BRAUN, RECHTSPHILOSOPHIE IM 20. JAHRHUNDERT 218 (2001).

[20] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 1500/97, 19 Dec. 2000, 102 BVERFGE 370, 395 (Ger.); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 122 DVBL 119, 121 (2007) (discussing freedom of religion). According to court practice, an "*aktiv kämpferische, aggressive*" ("actively fierce, aggressive") attitude is needed for a ban pursuant to art. 21(2) GG. *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvB 2/51, 17 Aug. 1956, 5 BVERFGE 85, 141 (Ger.). As long as it stays within these limits, a party is permitted by the constitution to object to the state and the society and to counter the liberal-democratic basic order with other principles.

[21] *See* Wolfgang Löwer, *Zuständigkeiten und Verfahren des Bundesverfassungsgerichts*, *in* HANDBUCH, *supra* note 13, VOL. III, at § 70 recital 184 (3d ed. 2005) (stating expressly that the parties to a collective agreement are "certainly not" bound by the common good); *accord, e.g.*, Johannes Dietlein, *in* 14 KLAUS STERN, STAATSRECHT 2003 (2007); Wolfram Höfling & Andreas Engels, *Grundrechtsausübung unter richterlichem Gemeinwohlvorbehalt?*, 23 ZEITSCHRIFT FÜR GESETZGEBUNG 250, 258 (2008); *see also* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 2203/931, 27 Apr. 1999, 100 BVERFGE 271, 283 (Ger.). *But see* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 430/65, 18 Dec. 1974, 38 BVERFGE 281, 307 (Ger.); Bundesarbeitsgericht [BAG – Federal Labor Court], Case No. GS 1/68, 21 Apr. 1971, 23 BAGE 292, 306 (Ger.); Rupert Scholz, *Koalitionsfreiheit*, *in* HANDBUCH, *supra* note 13, vol. VI, at § 151 recitals 31 sqq. (2d ed. 2001).

[22] *See* Horst Dreier, 1 GRUNDGESETZ art. 1 III recital 66 (Horst Dreier ed., 2004). Whether or not ordinary law is able to prescribe general equality of treatment for private legal relations is not a subject analyzed in this treatise, see Michael Sachs*, Diskriminierungsverbote im Spannungsfeld zu Freiheitsrechten*, *in* UNIVERSALITÄT – SCHUTZMECHANISMEN – DISKRIMINIERUNGSVERBOTE 325, 342, 348 (Eckart Klein & Christoph Menke eds., 2008).

A private philantrophist pledging money—as Bill Gates, Warren Buffet, and others have recently and generously done—does not follow a legal obligation, but donates a true gift. In contrast, the state acts exclusively through the excercise of powers *(Kompetenzen)* and never through constitutional freedoms.[23] The state is, therefore, always subject to the standard of the common good.[24] The understanding that the common good serves as a reason for, and a limit to, any action of the state[25] is the "timeless," "general idea", the *raison d'être* of the constitutional state,[26] part of the public domain of state philosophy and theory, of the General Theory of the State[27] and political science.[28]

The state's obligation towards the common good is also reflected in the official oath in Articles 56(1) and 64(2) of the Basic Law [hereinafter "GG"]: "[To] dedicate [one's own] efforts to the well-being of the German people, enhance their benefits" and "do justice to

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[23] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 1187/80, 8 July 1982, 61 BVERFGE 82, 101 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 35, 356, 794/82, 31 Oct. 1984, 68 BVERFGE 193, 206 (Ger.); Bundesvergassungsgericht [BverfG – Federal Constitutional Case], Case No. 2 BvG 1/88, 22 May 1990, 81 BVERFGE 310, 338 (Ger.); HERBERT BETHGE, DIE GRUNDRECHTSBERECHTIGUNG JURISTISCHER PERSONEN NACH ART. 19 ABS. 3 GG 67 sq. (1985); Dirk Ehlers, *Verwaltungsrecht*, *in* ALLGEMEINES VERWALTUNGSRECHT § 3 recital 11 (Hans-Uwe Erichsen & Dirk Ehlers eds., 14th ed. 2010).

[24] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 561, 17 May 1961, 12 BVERFGE 354, 364 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 518/62, 9 May 1972, 33 BVERFGE 125, 159 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 350/75, 21 Sept. 1976, 42 BVERFGE 312, 331 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvL 8/77, 8 Aug. 1978, 49 BVERFGE 89, 132 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 35, 356, 794/82, 31 Oct. 1984, 68 BVERFGE 193, 206 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvG 1/88, 22 May 1990, 81 BVERFGE 310, 338 (Ger.); Martin Burgi, *in* BERLINER KOMMENTAR, *supra* note 9, at art. 6 recital 2 (2002); THOMAS MANN, DIE ÖFFENTLICH-RECHTLICHE GESELLSCHAFT 80 (& Co. 2002); RUPERT STETTNER, GRUNDFRAGEN EINER KOMPETENZLEHRE 77, 202 sqq. (1983); STEFAN STORR, DER STAAT ALS UNTERNEHMER 105, 596 (2001).

[25] *See* Heinz-Christoph Link, *Staatszwecke im Verfassungsstaat – nach 40 Jahren Grundgesetz*, 48 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 19 (1990); Michael Sachs, *in* 3 STAATSRECHT, *supra* note 21, at 342 (1994).

[26] *See* GUNNAR FOLKE SCHUPPERT, STAATSWISSENSCHAFT 115, 116, 215 (2003); *accord* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 518/62, 9 May 1972, 33 BVERFGE 125, 159 (Ger.); Thüringer Verfassungsgerichtshof (ThürVerfGH - Constitutional Court of Thuringia), 12 LKV 83, 84 (Ger.); Ralf Dreier, *Amt, öffentlich-rechtlich*, *in* 1 STAATSLEXIKON cols. 128, 130 (Görres-Gesellschaft ed., 7th ed. 1995); Wolfgang Kahl, *Die rechtliche Bedeutung der Unterscheidung von Staat und Gesellschaft*, 24 JURA 721, 723 (2002); Michael Sachs, *Bürgerverantwortung im demokratischen Staat*, 110 DEUTSCHES VERWALTUNGSBLATT 873, 888 (1995); KARL-PETER SOMMERMANN, STAATSZIELE UND STAATSZIELBESTIMMUNGEN 199 (1997). *Contra* KATHARINA SOBOTA, DAS PRINZIP RECHTSSTAAT 481 (1997).

[27] *See* THOMAS FLEINER & LIDIJA R. BASTA FLEINER, ALLGEMEINE STAATSLEHRE 129 (3d ed. 2004).

[28] *See* Dieter Fuchs*, Gemeinwohl und Demokratieprinzip*, *in* GEMEINWOHL – AUF DER SUCHE NACH SUBSTANZ 87, 89 (Gunnar Folke Schuppert & Friedhelm Neidhardt eds., 2002).

all."[29] The lifetime and alimentation principles' guarantee of independence for the civil servants does not constitute a "personal privilege . . . but is meant to serve the common good."[30] Article 87e (4) (1) GG establishes the "public good" as the relevant standard, and, while Article 87f GG deals with private sector activities, it releases privatized companies from the obligation towards the common good—an obligation to which only the state is subject.[31] Numerous constitutions of the German states (Länder) bind the members of the governments of the Länder[32] and the parliament,[33] or even the entire authority of the state,[34] to the common good. While the Basic Law does not stipulate a general obligation of the citizen towards the common good (cf. Article 14 (2) (2) GG),[35] there are some constitutions of the *Länder* that are at least worded so as to bind the citizen to the standard of the common good.[36] In European law, Article 213(2) of the EC Treaty used to require members of the Commission explicitly to prioritize the general interest of the Communities before personal interests.[37] Today, Article 245 of the Treaty on the Functioning of the European Union is less explicit in this respect.

C. Scope of the Standards

Given that it is allowed to follow personal interests when exercising subjective public rights, while powers governed by public law must be exercised in light of what is best for

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[29] *See* Josef Isensee*, Staat und Verfassung*, *in* HANDBUCH, *supra* note 13, at § 15 recital 131; Claus Offe, *Wessen Wohl ist das Gemeinwohl?*, *in* 2 GEMEINWOHL UND GEMEINSINN 55, 62 (Herfried Münkler & Karsten Fischer eds., Akademie-Verlag 2002). *But see* ANDERHEIDEN, *supra* note 13, at 503. English quotes from the Basic Law follow the official translation of Germany's Press and Information Office, reprinted by CURRIE, *supra* note 7, at 343.

[30] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court] 28 May 2008, 27 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVwZ) 873, 875 (Ger.).

[31] *See* Kay Ruge, *in* KOMMENTAR ZUM GRUNDGESETZ, art. 87 f recital 4 (p. 1796) (Bruno Schmidt-Bleibtreu, Hans Hofmann & Axel Hopfauf eds., 11th ed. 2008); Robert Uerpmann, *in* GRUNDGESETZ-KOMMENTAR VOL. 3 art. 87 f recital 11 (Ingo V. Münch & Philip Kunig eds., 5th ed. 2003).

[32] *See* Verfassung des Württemberg Art. 48; Verfassung des Brandenburg art. 88; Verfassung des Hamburg art. 38(1); Verfassung des Northrhine-Westphalia art. 53; Verfassung des Rhineland-Palatinate art. 100(1); Verfassung des Saarland art. 89; Verfassung des Saxony art. 61; Verfassung des Saxony-Anhalt art. 66(1); Verfassung des Schleswig-Holstein art. 28; Verfassung des Thuringia art. 71(1). *But see* Verfassung des Hesse art. 111.

[33] *See* Verfassung des Bremen art. 20(1); Verfassung des Thuringia art. 53(2).

[34] *See* Verfassung des Württemberg art. 1(2); Verfassung des Bavaria art. 3(1), (2); Verfassung des Rhineland-Palatinate art. 1(2); Verfassung des Saxony art. 82 (1), (2).

[35] *See* GÜNTER FRANKENBERG, DIE VERFASSUNG DER REPUBLIK 117 sqq. (Nomos 1996); SCHUPPERT, *supra* note 26, at 135.

[36] *See* Verfassung des Bavaria art. 117(2); Verfassung des Bremen art. 9(2); Verfassung des Rhineland-Palatinate art. 20; *cf.* Verfassung des Württemberg art. 1(1); Verfassung des Hamburg pmbl..

[37] *See* Case C-432/04, *Commission v. Cresson* 2006 E.C.R. I-6426, 6445.

the common good, the standard for making decisions in elections and referenda depends on whether the underlying right qualifies as a state power or as a subjective public right.[38]

I. Lawmaking in Parliament

In this case, the qualification is clear: the parliamentary legislator exercises state authority and is thus subject to the standard of the common good.[39] There was a cross-party consensus on this point already among the fathers of the Basic Law,[40] and it is possible to trace the roots of this understanding past the Middle Ages, all the way back to the Greek polis and into Rome.[41] It is not convincing to challenge the existence of this obligation towards the common good by reference to the independent mandate, according to which a member of parliament is answerable only to her conscience. After all, Article 38(1)(2) GG also stipulates that parliamentarians are "representatives of the whole people." A representative therefore may not decide according to the interests of certain groups,[42] but, rather, has to take the interests of the entire people as the relevant standard.[43] Given that the members of parliament hold an office according to Article 48(2)(1) GG, this standard also takes into account the principle of neutral office administration under Article 33(5) GG.[44]

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[38] *Cf.* Otto Depenheuer, *Bürgerverantwortung im demokratischen Verfassungsstaat*, 55 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 90, 96, 121 (1996).

[39] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 518/62m 9 May 1972, 33 BVERFGE 125, 159 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvE 1/76, 2 Mar. 1977, 44 BVERFGE 125, 142 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvL 51/86, 7 July 1992, 87 BVERFGE 1, 35 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 2029/01, 5 Feb. 2004, 109 BVERFGE 133, 181 (Ger.); Constitutional Court of Bremen, 14 NVWZ-RECHTSPRECHUNGSREPORT (NVWZ-RR) 1, 2 (2001); Hans-Peter Schneider, *in* ALTERNATIVKOMMENTAR, *supra* note 13, at art. 38 recital 19 (2002).

[40] *See* Thomas Dehler, Rudolf Heiland & Josef Schwalber, 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 354 (1951).

[41] *See* Stefan Fisch, *Der Wandel des Gemeinwohlverständnisses in der Geschichte*, *in* GEMEINWOHLGEFÄHRDUNG UND GEMEINWOHLSICHERUNG 43–45 (Hans Herbert V. Arnim & Karl-Peter Sommermann eds., 2004); FUCHS, *supra* note 28, at 91.

[42] *Cf.* ANDERHEIDEN, *supra* note 13, at 54, 503, 513; Josef Isensee, *Grundrechte und Demokratie*, 20 DER STAAT 161, 163 (1981). *But see* THILO STREIT, ENTSCHEIDUNG IN EIGENER SACHE 110 (2006).

[43] *See* KARL DOEHRING, ALLGEMEINE STAATSLEHRE recital 373 (3d ed. 2004); Martin Morlok, *in* 2 GRUNDGESETZ, *supra* note 22, at art. 38 recital 130 (2d ed. 2006); Ekkehart Stein, *in* Frankenberg, *supra* note 13, at art. 20, paras. 1–3 recital 39 (2001). *But see* Walter Seuffert, *Freiheit der Politik und Grenzen des Rechts*, 108 ARCHIV DES ÖFFENTLICHEN RECHTS 403, 404 (1983).

[44] *Cf. See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvE 1/76, 2. Mar. 1997, 44 BVERFGE 125, 141 (Ger.); Otto Depenheuer, *Das öffentliche Amt*, *in* HANDBUCH, *supra* note 21, at § 36 recitals 44, 66, 71. *But see* STREIT, *supra* note 42, at 114.

II. Elections in Parliament

The problem of determining the relevant standard according to which a member of parliament has to make electoral decisions is hardly ever dealt with. Since elections in parliament, too, constitute an exercise of state authority, they are no different from other votes in parliament in this respect. This is why elections are subject to the standard of the common good as well. The rule that members of parliament consistently have to pursue the overall interest of the state has been accepted since the 18th century observations of commentators such as Blackstone[45] and Burke.[46] Accordingly, the General Theory of the State also recognizes the parliamentarians' obligation towards the common good.[47] Partiality provisions that are in place for parliaments on the regional level formalize the principle that the people's representatives are not allowed to adopt self-interests as the relevant standard,[48] and prohibitions on involvement help implement the local council's obligation towards the common good.[49]

III. Lawmaking by the People

By passing laws, the people exercise state authority as well,[50] as expressly stipulated by Article 20 (2) (2) GG.[51] Numerous constitutions of the Länder,[52] deemed decisive in court rulings,[53] are worded accordingly. Often, they explicitly provide that the legislative power

[45] *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *159 (Edward Christian ed., 14th ed. 1803).

[46] *See* Edmund Burke, *Speech to the Electors of Bristol on Nov. 3, 1774*, *in* 3 THE WORKS AND CORRESPONDENCE OF THE RIGHT HONOURABLE EDMUND BURKE 232, 236 (1852).

[47] *See* REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLEHRE 169 (15th ed. 2007).

[48] I owe this reference to my colleague Simone Goltz.

[49] *See* Thomas Mann, *in* PETER J. TETTINGER, WILFRIED ERBGUTH & THOMAS MANN, BESONDERES VERWALTUNGSRECHT recital 137 (10th ed. 2009); Hans Christian Röhl, *Das kommunale Mitwirkungsverbot*, 28 JURA 725 (2006).

[50] *See* Bernd J. Hartmann, *Amtshaftung für Volksgesetzgebung*, 98 VERWALTUNGSARCHIV 500, 507 (2007).

[51] *See* Oberverwaltungsgericht Northrhine-Westphalia [Oberverwaltungsgericht], 17 NVwZ-RR 283, 285 (2004); BERND J. HARTMANN, VOLKSGESETZGEBUNG UND GRUNDRECHTE 90 (2005).

[52] *See* Verfassung des Württemberg art. 25(1); Verfassung des Mecklenburg-West Pomerania art. 3(1); Verfassung des Lower Saxony art. 2(1); Verfassung des Saarland art. 61(1); Verfassung des Saxony art. 3(1); Verfassung des Hamburg art. 3(2); Verfassung des Saxony-Anhalt art. 2(2); Verfassung des Schleswig-Holstein art. 2(1), (2).

[53] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 389/94, 9 July 1997, 96 BVERFGE 231, 240 (Ger.); *cf.* Christoph Degenhart*, Direkte Demokratie in den Ländern—Impulse für das Grundgesetz?*, 31 DER STAAT 77 (1992). *But see* HARTMANN*, supra* note 51, at 81.

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is exercised by the people or in plebiscitarian initiatives and referenda.[54] This is matched by the fact that constitutions on the regional level sitpulate in unison that a regional referendum has the effect of a council decision:[55] it is beyond debate that the latter constitutes an act of state authority. Only those who consider the people's legislator to hold sovereign power are able to explain without discrepancies why a law passed by the people must uphold the basic rights pursuant to Article 1(3) GG.[56] Accordingly, the Federal Constitutional Court held that the people exercise state authority when they pass laws themselves.[57] Other votes—in this case, referenda on the regional[58] and national[59] level—are qualified in the same manner by courts of the Länder and in legal doctrine.[60] Whoever participates in these votes therefore exercises state authority and decides among legal alternatives, subject to the standard of the common good.[61]

It is not convincing to challenge this conclusion based on the principle of electoral freedom. According to this principle, the voter is entitled to base her decision on

[54] *See* Verfassung des Bavaria art. 5; Verfassung des Berlin art. 3(1); Verfassung des Bremen art. 67; Verfassung des Northrhine-Westphalia art. 3(1); Verfassung des Rhineland-Palatinate art. 107; Verfassung des Thuringia art. 45.

[55] *Cf.* Hartmann, *supra* 51, at 10 n.54 (referencing the sources of law).

[56] *See* Rolf Grawert, *Volksbegehren vor dem Verfassungsgerichtshof*, 1 NWVBL. 2, 4 (1987); HARTMANN, *supra* note 51, at 98, 102, 110.

[57] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 389/94, 9 July 1997, 96 BVERFGE 231, 240, 244 (Ger.); *cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvF 3, 6/58, 30 July 1958, 8 BVERFGE 104, 114 (1958).

[58] *See* Administrative Appellate Court of Bavaria [BayVGH], 129 BAYVBL. 23 (1998); Administrative Appellate Court of Bavaria [BayVGH], 11 NVWZ-RR 256, 257 (1998); Oberverwaltungsgericht Northrhine-Westphalia, 17 NVWZ-RR 283, 285 (2004).

[59] *See* Constitutional Court of Bavaria (Bayerischer Verfassungsgerichtshof, BayVerfGH), 2 BAYVERFGHE 181, 218 (1949); 53 BAYVERFGHE 42, 70 sq. (2000); 53 BAYVERFGHE 81, 105 (2000); BayVerfGH, 115 DVBL 1123, 1124 (2000); Constitutional Court of Berlin (Berliner Verfassungsgerichtshof, VerfGH Berlin), 114 DVBL 979, 980 (1999); Constitutional Court of Saxony (Sächsischer Verfassungsgerichtshof, SächsVerfGH), 22 NVWZ 472 (2003); ThürVerfGH, 12 LKV 83, 89 (2002).

[60] *See* KARSTEN BUGIEL, VOLKSWILLE UND REPRÄSENTATIVE ENTSCHEIDUNG 440 (Nomos 1991); Katharina Sobota, *Staatsaufgaben*, in ÖFFENTLICHES RECHT ALS EIN GEGENSTAND ÖKONOMISCHER FORSCHUNG 287, 304 (Christoph Engel & Martin Morlok eds., 1998).

[61] *Accord* Ernst-Wolfgang Böckenförde, *Demokratie als Verfassungsprinzip*, *in* HANDBUCH, *supra* note 13, at § 24 recital 80; *Peter Krause*, Verfassungsrechtliche Möglichkeiten unmittelbarer Demokratie, *in* HANDBUCH, *supra* note 21, at § 35 recital 24. *Contra* Walter Berka, *Bürgerverantwortung im demokratischen Verfassungsstaat*, 55 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 48, 65 (1996); WERNER HEUN, DAS MEHRHEITSPRINZIP IN DER DEMOKRATIE 85, 88, 92 n.65 (1983).

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standards that she has set herself.[62] The Federal Constitutional Court applies this principle to referenda analogously.[63] However, an analogy can only be drawn if an unintentional regulatory loophole exists and the underlying interests are equivalent. There is no regulatory loophole in the case at hand, since votes in referenda are already subject to the decision-making standard of the common good, given that they have the characteristics of an exercise of state power. The underlying interests differ because elections serve to select those persons who will decide on the factual issues only after having been selected, while votes in referenda constitute decisions on factual issues themselves.[64] Anyone who releases decisions on factual issues from the standard of the common good tolerates statutory law that is contrary to the comon good. Therefore, it is not the electoral freedom that seems comparable; rather, it is the independence of the parliamentary mandate, which, as shown above, does not conflict with the understanding that the common good constitutes the binding standard. The General Theory of the State dates the origins of the common good as the relevant standard for referenda back to *Marsilius of Padua* according to whom only the citizens' approval of a law ensured that the law served the general public rather than individual interests.[65]

IV. Elections by the People

Given that Article 20(2)(2) GG stipulates that elections also constitute an exercise of state authority,[66] it seems natural to apply the common good as the relevant standard in this respect as well.[67] It is true, however, that the better arguments suggest otherwise.[68] Article 38(1)(1) and Article 28(1)(2) GG mention the electoral freedom, and the term *freedom* implies subjective rights. With the complaint of unconstitutionality, Article 93(1) no. 4a GG establishes a remedy against infringements of Article 38 GG in order to permit

[62] *See* Peter M. Huber, *Der Prüfungsmaßstab von Wahlorganen bei der Zulassung von politischen Parteien und Wählervereinigungen*, 44 DIE ÖFFENTLICHE VERWALTUNG 229, 230 (1991); JAN ROSCHECK, ENTHALTUNG UND NICHTBETEILIGUNG BEI STAATLICHEN WAHLEN UND ABSTIMMUNGEN 33, 51 (2003).

[63] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvG 2/58, 11 July 1961, 13 BVerfGE 54, 91 (Ger.); PIEROTH, *supra* note 13, at art. 38 recital 2; SACHS, *supra* note 13, at art. 20 recital 34 (discussing the analogous application of electoral principles to other votes).

[64] *See* HARTMANN, *supra* note 51, at 146; *cf.* Administrative Appellate Court of Bavaria [BayVGH], 137 BAYVBL. 542 (2006).

[65] *See* MARSILIUS DE PADUA, DER VERTEIDIGER DES FRIEDENS (DEFENSOR PACIS) 122, 126, 128 (1971).

[66] *Cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvF 3, 6/58, 30 July 1958, 8 BVERFGE 104, 114 (Ger.); Volkmann, *supra* note 9, at art. 20 (part 3) recital 22 (2001).

[67] *See* HERBERT KRÜGER, ALLGEMEINE STAATSLEHRE 250 (2d ed. 1966); PAUL LABAND, 1 DAS STAATSRECHT DES DEUTSCHEN REICHES 331 (5th ed. 1911); CARL SCHMITT, VERFASSUNGSLEHRE 206, 245, 280 (1928).

[68] *See* HEINRICH LANG, SUBJEKTIVER RECHTSSCHUTZ IM WAHLPRÜFUNGSVERFAHREN 27, 130, 224 (1997); Sebastian Müller-Franken, *Demokratie als Wettbewerbsordnung*, 124 DEUTSCHES VERWALTUNGSBLATT 1072, 1078 (2009).

the defense of basic and equivalent rights. This suggests that the right to vote in elections should be considered an "expression of individual freedom"[69] in the sense of a subjective right. Further, it is true that, historically, the right to vote was a hard-won basic right[70] and, genetically (*i.e.*, according to legislative intent), the parliamentarian council specifically did not want to stipulate a legal obligation to exercise such right.[71] An obligation to exercise is characteristic for powers, but not for basic rights (*argumentum e contrario* Article 6(2)(1) GG).[72] Consequently, it is accurate that the right to vote in elections constitutes a subjective right,[73] and thus, is not subject to the standard of the common good.[74]

In conclusion, citizens are allowed to use their self-interest as the decision-making standard in elections. By contrast, the common good is the relevant standard in all other cases, *i.e.,* lawmaking by the people and both lawmaking and electing in parliament.

D. Content of the Standards

I. Self-Interest

It is widely recognized that some decisions are in one's own interest but not in the general interest: what is good for me, is not necessarily good for everybody.[75] Kant's "Categorical Imperative," according to which an individual should only act in accordance with such a maxim that he could want to become general law,[76] implies that self-interests and general interests can diverge. John Rawls threw a "veil of ignorance" on mankind in order to ensure that self-interest did not distort the general interest;[77] and the "prisoners' dilemma," thoroughly analyzed in game theory, shows that an individual's gain-maximizing

[69] *See* Morlok, *supra* note 43,at art. 38 recital 81.

[70] *See* Heun*, supra* note 61, at 90.

[71] *See* HARTMANN*, supra* note 51, at 138.

[72] *See* HARTMANN*, supra* note 51, at 63, 138.

[73] *See* Case No. 1 PBvU 1/54, 20 July 1954, 4 BVERFGE 27, 30 (Ger.); Heinrich Lang, *in* BERLINER KOMMENTAR, *supra* note 9, at art. 39 recital 35, art. 41 recital 36; Morlok, *supra* note 43, at art. 38 recital 119.

[74] *See* Bundesverwaltungsgericht [BVerwG - Federal Administrative Court] 23 May 1975, 48 BVERWGE 251, 254 (Ger.); Rolf Gröschner*, supra* note 13, at § 23 recital 67; Hans-Heinrich Trute, *in* 2 GRUNDGESETZ-KOMMENTAR, *supra* note 31, at art. 38 recital 35 (5th ed. 2001).

[75] *Cf.* BRUCE ACKERMAN, WE THE PEOPLE VOL. 1 297 (1991); HANS-GEORG DEDERER, KORPORATIVE STAATSGEWALT 29, 39 (2004).

[76] *See* IMMANUEL KANT, GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN 42 (Karl Vorländer ed., Meiner 7th ed. 1994).

[77] *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 136 (1972).

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conduct can produce results that are contrary to the interests of all.[78] In German law, the doctrine of protective standards (*Schutznormlehre*) is, for instance, based on the distinction between self-interests and general interests.[79]

That having been said, the meaning of self-interest, which can serve as a standard for the citizen's electoral decision, is clear: according to the concept of freedom, the holder of basic rights may set any goals she wishes. She is permitted to claim any interests and to weight those interests in the way she desires.[80] University students are, for instance, free to elect the political party that promises to abolish tuition fees, and assistant professors are allowed to choose the candidate who holds out the prospect of establishing the greatest number of professorships. The voter is even permitted to decide against her own interests and to give her vote for the mere sake of loyalty to a political party with policies that are detrimental to her own interests.

II. Common Good

Defining the content and boundaries of the common good are deemed "precarious." The term is said to elude a "conclusive definition."[81] Numerous papers deal with this issue. In law, the doctoral thesis of Dürig,[82] and the professoral dissertations of Martens,[83] Häberle,[84] Uerpmann,[85] and Anderheiden,[86] shall serve as selected examples. Even a treatise dealing exclusively with the definition of the common good would most likely face difficulties doing justice to these monuments, but because this treatise addresses one further question, it must present a less detailed consideration of this particular issue.

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[78] *Cf.* JAN C. JOERDEN, LOGIK IM RECHT, 403 (2d ed. 2010).

[79] *See* OTTMAR BÜHLER, DIE SUBJEKTIVEN ÖFFENTLICHEN RECHTE UND IHR SCHUTZ IN DER DEUTSCHEN VERWALTUNGSRECHTSPRECHUNG 21, 58 (1914); Johannes Masing, *Der Rechtsstatus des Einzelnen im Verwaltungsrecht*, *in* 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 7 recitals 106 (Wolfgang Hoffmann-Riem, Eberhard Schmidt-Aßmann & Andreas Voßkuhle eds., 2006); Jost Pietzcker, *Die Schutznormlehre*, *in* FS JOSEF ISENSEE 577 (Otto Depenheuer et al. eds., 2007).

[80] *Cf.* Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES J. 176, 215 (1990).

[81] *See* Depenheuer, *supra* note 44, at § 36 recital 44; *see also* Roman Herzog, *Pluralistische Gesellschaft und staatliche Gemeinwohlsorge*, *in* GEMEINWOHLGEFÄHRDUNG, *supra* note 41, at 20.

[82] *See* GÜNTER DÜRIG, DIE KONSTANTEN VORAUSSETZUNGEN DES BEGRIFFS "ÖFFENTLICHES INTERESSE", doctor's thesis (Munich 1949).

[83] *See* WOLFGANG MARTENS, ÖFFENTLICH ALS RECHTSBEGRIFF (Gehlen 1969).

[84] *See* PETER HÄBERLE, ÖFFENTLICHES INTERESSE ALS JURISTISCHES PROBLEM (Athenäum-Verlag 1970, 2d ed. 2006).

[85] *See id.;* ROBERT UERPMANN, DAS ÖFFENTLICHE INTERESSE (1999); Robert Uerpmann, *Verfassungsrechtliche Gemeinwohlkriterien*, *in* GEMEINWOHL, *supra* note 28, at 179.

[86] *See* ANDERHEIDEN, *supra* note 13; *cf.* Rolf Grawert, *Gemeinwohl*, *in* 46 DER STAAT 434, 448 (2004).

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Simply put, procedural concepts compete with substantive concepts of the common good. Defined in procedural terms, the common good is whatever is resolved in the procedure that has been set out.[87] Consequently, if the procedure is in order, it can never lead to a resolution that is contrary to the common good.[88] This view leaves parliament members alone in that they can resolve anything they like, and thus, parliament will always arrive at the common good in the end.[89] The procedural concept of the common good cannot tell parliament members whether they should vote for or against a proposed law; after all, the concept itself will not know until after the vote which decision was most beneficial to the common good (*i.e.*, in each case the decision having been made according to the proper process). In this way, the procedural concept is evocative of American legal realism: the latter comforts the judge reaching a verdict with the statement that the law is whatever the courts decide.[90] The fact that proceduralists consider all decisions made in a lawful procedure to be in accordance with the common good makes their concept random in terms of its content.[91] To emphasize, one could say that the procedural concept of the common good declares the concept of the common good to be superfluous.[92] This criticism remains valid if one reduces the common good to a moral obligation, a regulative idea, or an *idée directrice*.[93] The requirement to do all or nothing does not give any insight as to which one is the morally correct decision either; it does not regulate, and it does not direct. If the concept of the common good is to remain significant, substantive criteria for the common good need to be applied.

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[87] *See* JAMES M. BUCHANAN, THE LIMITS OF LIBERTY (1975); *accord* Fuchs*, supra* note 28, at 100, 104.

[88] *Cf.* DEDERER*, supra* note 75, at 360; Peter Graf Kielmansegg, *Gemeinwohl durch politischen Wettbewerb*, *in* GEMEINWOHLGEFÄHRDUNG, *supra* note 41, at 125, 127.

[89] *See* WINFRIED BRUGGER, DAS ANTHROPOLOGISCHE KREUZ DER ENTSCHEIDUNG IN POLITIK UND RECHT 13 (2d ed. 2008); Reinhart Koselleck, *Allgemeine und Sonderinteressen der Bürger in der umweltpolitischen Auseinandersetzung*, *in* REINHART KOSELLECK, BEGRIFFSGESCHICHTEN 516, 518 (2006).

[90] *See* Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 461 (1897); *accord* DAVID J. DANELSKI & JOSEPH S. TULCHIN, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (1973) (quoting Chief Justice Charles Evans Hughes); Martin Morlok, *Reflexionsdefizite in der deutschen Staatsrechtslehre*, *in* STAATSRECHTSLEHRE ALS WISSENSCHAFT, 7 DIE VERWALTUNG 49, 57 (Helmuth Schulze-Fielitz ed., 2007); *contra,* BRUN-OTTO BRYDE, VERFASSUNGSENTWICKLUNG 25 (1982);.

[91] *Cf.* Michael Anderheiden, in GEMEINWOHLGEFÄHRDUNG, *supra* note 41, at 120; Josef Isensee, *Konkretisierung des Gemeinwohls in der freiheitlichen Demokratie*, *in* GEMEINWOHLGEFÄHRDUNG, *supra* note 41, at 95, 99.

[92] *See* Grawert*, supra* note 86, at 448.

[93] *Cf.* Horst Dreier, *Verantwortung im demokratischen Verfassungsstaat*, *in* VERANTWORTUNG IN RECHT UND MORAL 9, 28 (Ulfrid Neumann & Lorenz Schulz eds., 2000) (reducing the concept to a regulative idea); Isensee, *supra* note 91, at 105 (same).

Not all substantive concepts of the common good are appropriate for the context reviewed herein. According to Brugger's understanding, for instance, the common good consists of three parts: legal certainty, legitimacy, and appropriateness.[94] Anderheiden defines the common good as the interactive exercise of basic rights and the provision of collective goods.[95] In this context, these two definitions are only helpful in certain cases (*i.e.*, only if the decision voted upon relates to the criteria of the respective common good concept. Regarding legislation, Brugger's partial criterium of legal certainty might, therefore, be more significant as a limitation (at the same time following from other legal sources) and less significant as a guideline for constructive decisions on content.[96] Anderheiden's criterium for the common good only contributes to the decision-making process when the vote is held on interactive basic rights, or on the provision of collective, rather than individual, goods.

A common good concept that is to serve as an appropriate standard for all covered decisions in parliament and by the people must be defined differently. The view taken herein equates the common good—or *bonum commune*, the public weal—with the public interest[97]—the latter flowing from private interests.[98] Subject to a more precise definition of this context, one can conclude that the common good is whatever serves the interest of mankind.[99] A common good concept that is thus characterized may well describe an excerpt from Brugger's legitimacy requirement to adopt good and fair measures.[100] It implies that the state is made for man.

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[94] *See* Winfried Brugger, *Gemeinwohl als Integrationskonzept von Rechtssicherheit, Legitimität und Zweckmäßigkeit*, *in* GEMEINWOHL IN DEUTSCHLAND, EUROPA UND DER WELT 17, 22 (Winfried Brugger, Stephan Kirste & Michael Anderheiden eds., 2002); Winfried Brugger, *Gemeinwohl als Ziel von Staat und Recht an der Jahrtausendwende*, *in* RECHT UND RECHTSWISSENSCHAFT 15, 17 (Peter-Christian Müller-Graff & Herbert Roth eds., 2000).

[95] *See* ANDERHEIDEN, *supra* note 13, at 61.

[96] *Cf.* Brugger, *Gemeinwohl als Integrationskonzept, supra* note 94, at 22 n.11.

[97] *See* Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 1/76, 2 Mar. 1977, 44 BVERFGE 125, 141 (Ger.); HÄBERLE, *supra* note 84, at 22; MARTENS, *supra* note 83, at 169.

[98] *See* Walter Schmitt Glaeser, *Die Position der Bürger als Beteiligte im Entscheidungsverfahren gestaltender Verwaltung, in* PETER LERCHE, WALTER SCHMITT GLAESER & EBERHARD SCHMIDT-ASSMANN, VERFAHREN ALS STAATS- UND VERWALTUNGSRECHTLICHE KATEGORIE 35, 59, 88, 93 1984); Rainer-O. Schultze, *Gemeinwohl*, *in* KLEINES LEXIKON DER POLITIK 173 (Dieter Nohlen & Florian Grotz eds., 4th ed. 2007).

[99] *Cf.* Charles B. Blankart, *Gemeinwohl durch direkte und repräsentative Demokratie,* in GEMEINWOHLGEFÄHRDUNG, *supra* note 41, at 247, 263.

[100] *Cf.* Brugger, *Gemeinwohl als Integrationskonzept, supra* note 94, at 26, 32, 34.

Whose interests? This question for the "social reference"[101] of the concept of the common good is unresolved, despite the copius literature dealing with the common good.[102] In any case, the members of the community are within the group one has to look at.[103] Political decisions have to be made based on the interests of all members of the relevant community.[104] To begin with, all eligible voters at elections and eligible participants in referenda are, therefore, included.[105] Additionally, affected members who do not yet or no longer have the right to vote, *e.g.*, those under the voting age and persons who have been deprived of this right by a court, are also covered.[106] Further, it seems reasonable to take into account the interests of foreigners who lack the right to vote, yet live in the community and are thus affected by the decision at issue.[107] Finally, future generations are also considered in accordance with the view taken by Georg Jellinek: the common good is said to extend "into the most distant future."[108]

Thus, the specified reference group extends beyond one's own family and municipality, but does not reach as far as the global community or the human race.[109] The reasons for this composition of the reference group can be deduced from current law. The rights under

[101] *See* Offe*, supra* note 29, 65.

[102] *See* Grawert, *supra* note 86, at 445.

[103] *Cf.* Fuchs*, supra* note 28, at 90; Christoph Link*, Staatszwecke im Verfassungsstaat*, 48 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 22 (1990). *But see* Offe*, supra* note 28, at 65.

[104] *Cf.* Volkmann, *supra* note 9, art. 20 (part 2) recital 15 (2008); Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity,* 8 INT'L J. CONST. L. 30 (2010).

[105] *Cf.* Fuchs*, supra* note 28, at 95 (limiting the reference group thereto). The fact that the possibility to recognize and assess the interests of the other members of the community increases as the size of the group decreases also results in the principle of subsidiarity, *i.e.,* superordinate authorities should only be entrusted with those decisions that cannot be made on a lower level. *Cf.* EMANUEL RICHTER, DIE WURZELN DER DEMOKRATIE 243 (2008).

[106] *Cf.* Siri Gloppen & Rachel Sieder, *Courts and the Marginalized: Comparative Perspectives,* 5 INT'L J. CONST. L. 183 (2007); Fritz Ossenbühl, *Richterrecht im demokratischen Rechtsstaat*, *in* FRITZ OSSENBÜHL, FREIHEIT VERANTWORTUNG KOMPETENZ: AUSGEWÄHLTE ABHANDLUNGEN 331, 342 (Meinhard Schröder et al. eds., 1994); Frank J. Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616, 626, 639 (1957) (discussing consideration or non-consideration of outsider interests and other "weak" interests).

[107] *See* Isensee*, supra* note 91, at 106; *accord* ROSCHECK*, supra* note 62, at 44; *cf.* Rodríguez, *supra* note 104 (discussing alien suffrage).

[108] *See* GEORG JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE 68 (2d ed. 1905); *accord* HANS HERBERT V. ARNIM, STAATSLEHRE DER BUNDESREPUBLIK DEUTSCHLAND 131 (1984); *cf.* HANS JONAS, DAS PRINZIP VERANTWORTUNG 35, 37, 55 (8th ed. 1988); RAWLS, *supra* note 77, at 251, 255, 319, 323.

[109] *See* ROBERT A DAHL, DEMOCRACY AND ITS CRITICS 306 (1989) (taking account of the interests "of all persons significantly affected by the decision"; further down just "adult persons," still further down again "the maximum number who can feasibly be included"); Offe*, supra* note 29, at 65, 65 n.16 (regarding these reference groups; inter alia the entire cosmos, the creation and the enlivened nature are additionally mentioned).

the guarantee of the dignity of man and most civil liberties, which constitute the reasons for the validity of common good as the relevant decision-making standard in the first place, extend to foreigners, minors, and other persons who are not eligible to vote. These groups can, in particular, invoke the rule of law (in connection with Article 2(1) GG). Officeholders have the obligation under the official oath to do justice to all (*i.e.*, to take into account the interests of the named "outsiders.")

Regarding future generations, Article 20a GG expresses, similarly to many of the Länder constitutions,[110] the "eschatological form of the Categorical Imperative,"[111] where it refers to the "responsibility for future generations." Article 79 GG establishes the constitution's long-term claim to validity,[112] and the preamble of the Basic Law appeals to the "responsibility before . . . mankind."[113] In this way, it is also possible to attribute the interests of future generations to the rule of law and the principles of democracy and republic.

The interests of foreigners, minors, and other persons who are not eligible to vote are typically represented with little assertion in the current discourse. By taking into account these interests, Adolf Muschg's understanding that the strength of a people is matched by the well-being of the weak[114] is thus given due consideration, and the democratic requirements under Article 20(2), Article 28 and Article 38 GG—according to which only Germans (and, where applicable, EU nationals) but not the remaining parts of the population are eligible to vote in elections and participate in referenda—are observed.[115] This is because it does make a difference whether a person decides for herself or whether decisions are made on her behalf. Children do not turn into eligible voters through the back door and unborn children do not gain legal capacity from behind; rather, they remain objects of another person's decisions. Given that the group of persons whose interests are relevant in decisions relating to the common good is larger than the group of voters whose self-interests constitute the basis for electoral decisions, collective decisions made in

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[110] *See* Verfassung des Württemberg art. 3; Verfassung des Bavaria art. 141(1); Verfassung des Rhineland-Palatinate art. 69(2); Verfassung des Saxony art. 10(1); Verfassung des Thuringia pmbl..

[111] *See* UDO DI FABIO, DER VERFASSUNGSSTAAT IN DER WELTGESELLSCHAFT 102 (2001).

[112] *Cf.* Gerhard Robbers, *Die Änderungen des Grundgesetzes*, 42 NJW 1325 (1989); Stefan Mückl, *Auch in Verantwortung für künftige Generationen*, *in* FS ISENSEE, *supra* note 79, at 203; Thomas Jefferson, *Letter to James Madison* (6 Sept. 1789), in Thomas Jefferson, WRITINGS 959, 963 (Merrill D. Peterson ed., Library of America 4th ed. 1984); Thomas Jefferson, *Letter to Samuel Kercheval* (12 July 1816), *in* THE POLITICAL WRITINGS OF THOMAS JEFFERSON 123, 124 (Edward Dumbauld ed., Liberal Arts Press 1955).

[113] *See* Dreier, *supra* note 93, at 37; HASSO HOFMANN, RECHTSFRAGEN DER ATOMAREN ENTSORGUNG 270 (1981).

[114] BUNDESVERFASSUNG [BV] [CONSTITUTION] 18 Apr. 1999, SR 101, pmbl. (Switz.).

[115] *See* Peter M. Huber, *Das "Volk" des Grundgesetzes*, 42 DIE ÖFFENTLICHE VERWALTUNG 531, 532 (1989).

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accordance with the common good and those made in accordance with self-interest diverge already in theory.

Which interests? The fact that the person making the decision must determine what lies in the interest of all, in her own interest, and in that of others, helps objectify the interests under consideration. Weird, peculiar interests—pursuable as one's own interests in elections—are not likely to be viewed as possible interests of others in the first place, precisely because of their peculiarity.[116] Extreme interests are likely to be considered irrelevant because one person does not picture others as extremists, but expects them to be similar to herself: *Homo homini homo*, so to speak a "maelstrom towards the middle"[117] with a subjective ability to generalize.[118] In practice as well, decisions made in accordance with the common good therefore do turn out differently than decisions made in accordance with the self-interest.

How shall these interests be weighed? Do the interests of an unborn child have the same weight as those of a born child? The further one looks ahead, the larger the number of those coming, and the more manifested is the dominance of future interests. This leads to an initial, still very broadly drawn limit of an epistemic nature: forecasts are uncertain and glances into the future are deceptive. This is why today's certain interests are given more consideration than tomorrow's uncertain—and hardly detectable or assessable—ones. Paying due regard to this complex reality, broader limits need to be drawn;[119] defining these limits would require a separate investigation. In line with Anderheiden's findings, an end point is most likely reached when it is no longer possible to attribute future interests to particular individuals but only to groups.[120]

The definition proposed herein can be referred to as a substantive-procedural concept of the common good. It is substantive in that it defines the common good based on its content, which it infers from the interests of the specified individuals. At the same time, it is procedural, given the broadly and vaguely mentioned criterion, which contains only very weak requirements as to content, thus leaving a central role to the procedure in which the decision is made.[121] In this way, the notion that the degree of being legally bound decreases as democratic legitimations increase proves accurate.[122] The "incompleteness"

[116] *Cf.* Offe, *supra* note 29, at 57; RICHTER, *supra* note 105, at 75.

[117] *Cf.* BRAUN, *supra* note 19, at 174.

[118] *Cf.* Dreier, *supra* note 12, at 468; RICHTER, *supra* note 105, at 225, 234.

[119] *Cf.* DI FABIO, *supra* note 111, at 102.

[120] *See* ANDERHEIDEN, *supra* note 13, at 137.

[121] *Cf.* Ehlers, *supra* note 8, at § 1 recital 34; RICHTER, *supra* note 105, at 244.

[122] *See* MATTHIAS JESTAEDT, DEMOKRATIEPRINZIP UND KONDOMINIALVERWALTUNG 285 (1993).

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of the concept is not a disadvantage; rather, it keeps the constitution in line with its citizens.[123]

E. Objections

I. Impossibility

The argument that decisions need to take into account the interests of others might be challenged based on the Impossibility Theorem, articulated by the economist Kenneth Arrow in 1951.[124] According to this theorem, political voting procedures do not reflect the preferences of the protagonists in all instances;[125] it is not always possible to determine the general interest by cumulating the individual interests based on democratic procedures.[126]

The Impossibility Theorem does not formulate a convincing argument against the expectation of making one's own voting decision with the interests of others in mind. Arrow nevertheless only covers decisions offering three or more options to choose from.[127] Often, this condition is not fulfilled. In the instance of lawmaking by the people, the referendum is sometimes accompanied by a parliamentary draft; to have a choice among three drafts would seem to be a rare and exceptional case. In parliaments with two opposing "factions," competing approaches are typically (pre-)discussed until two drafts can be put to the vote: the draft of the government and that of the opposition. In the German Bundestag, there are rarely any rival candidacies among three or more candidates for an office. Therefore, parliamentary elections remain as the only instance where, in Germany, typically more than two parties compete for voters. However, in parliamentary elections the voter is anyhow permitted to decide according to his or her self-interest.

Even in cases where there are three or more options to choose from, it is not possible to successfully challenge a common good concept that refers to the interests of others on grounds of the Impossibility Theorem. This treatise is only concerned about the manner in which the deciding person determines how *she* will vote. Arrow, to the contrary, deals with the subsequent question of how the procedure has to be designed so that personal

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[123] *See* GERHARD ROBBERS, GERECHTIGKEIT ALS RECHTSPRINZIP 164 (1980) (discussing the concept of justice).

[124] *See* ANDERHEIDEN, *supra* note 13, at 5 (discussing the utilization of the latter in jurisprudential contexts); BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 160 (1976) (same).

[125] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

[126] *See* ANDERHEIDEN, *supra* note 13, at 8.

[127] *See* ARROW, *supra* note 125, at 24; *cf.* Dean Lacy & Emerson M. S. Niou, *A Problem with Referendums*, 12 J. THEORETICAL POL. 5, 8 (2000).

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preferences, however formed, are reflected in the collective decision.[128] Arrow then goes on to show that the system of democratic majority decisions steadily fails to convert personal goals into a consistent preference order. Consequently, the Impossibility Theorem is only relevant to our question if one transfers it from the aggregation of votes cast onto the question for the voting decision which must be made by an individual eligible voter for herself. Where admissible, this transfer from "exterior" to "interior" solves the problem of cardinal preferences that Arrow has set out as one of the conditions for his theory: that the aggregation of a general interest from individual interests could possibly fail by reason of the interpersonal comparison of utility.[129] If, however, interests are not compared *inter*-personally, but—as in the case of the individual eligible voter—they are compared *intra*-personally, there is no such difficulty.[130] This is at least true in instances in which the deciding person is permitted to weigh the existing interests of the other persons to suit her own ideas.

Arrow's objection that it is not always possible to rationally aggregate the interests of others into one collective interest could only be avoided by completely isolating decisions from the interests of others. Interpreted pointedly in the sense of such a demand, the Impossibility Theorem would definitely prove too much[131] since it would not only call voting in elections and referenda into question, but also democracy and state control, as well as planning and decision-making as a whole. The Basic Law prescribes all this, recognizing the common good as a justiciable standard,[132] and thus, apparently tolerates impossibility theorems: political decisions have to be made even to the extent that there is no consistent system for weighing preferences yet.[133] Value judgments that take the place of deductions and substantiations are exactly in the right spot, here, in the political arena.[134]

[128] *See* ARROW, *supra* note 125, at 2, 7.

[129] *See* ARROW, *supra* note 125, at 5, nn. 11–13, 9.

[130] *Contra* ARROW, *supra* note 125, at 9 (negating generally the measurability of benefit).

[131] *See* Otmar Jung, *Grundsatzfragen direkter Demokratie*, *in* DIREKTE DEMOKRATIE IN DEN DEUTSCHEN LÄNDERN 343 (Andreas Kost ed., 2005).

[132] *Cf.* 24 BVERFGE 367, 403 sq. (1968); 71 BVERWGE 108, 124 (1998); Alexander v. Brünneck, *Das Wohl der Allgemeinheit als Voraussetzung der Enteignung*, 5 NVWZ 425 sqq. (1986) (all accepting the possibility to qualify the common good as a precondition for expropriations pursuant to art. 14 (3) (1) GG).

[133] *Cf.* Christoph Engel, *Offene Gemeinwohldefinitionen*, 32 RECHTSTHEORIE 23, 49 (2001).

[134] *Cf.* Bernhard Schlink, *Hercules in Germany?,* 1 INT'L J. CONST. L. 610, 617 (2003).

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II. Excessive Demand

The requirement to separate individual interests from the common good does not ask too much of lawmakers.[135] To begin with, this holds true for all professional parliamentarians.[136] When a member of parliament consents to a turnover tax increase, even though he disapproved of such increase in his capacity as a functionary of an association, this cannot merely be criticized as opportunistic; rather, it can also be seen as an expression of the obligation to put aside the particular interests of the lobby in parliament.[137] The citizen does not appear to be overburdened either. In political science, the "after hours legislator"[138] is generally considered to be able to cope with decisions on factual issues.[139] To the General Theory of the State, the assumption that the citizen is able to recognize and weigh the interests of others even constitutes an axiom based on Kant: "In order to be legitimate, democracy has to be based on the maturity, even in the sense of a deemed maturity, of the citizen; it would lose this legitimacy if it were to recognize that a stupid or corrupt majority dominates a minority committed to the common good."[140] The argument that there are "wählende Dummköpfe" ["voting imbeciles"][141] is, therefore, "categorically" forbidden "for normative reasons."[142]

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[135] *Cf.,* STEFAN HUSTER, DIE ETHISCHE NEUTRALITÄT DES STAATES 96 (2002); Jung*, supra* note 131, at 343; PAUL KIRCHHOF, DAS GESETZ DER HYDRA 64 (2006) (tending in the same direction as this treatise). *But see* Dreier*, supra* note 19, at 173; Jürgen Habermas*, Drei normative Modelle der Demokratie*, *in* JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 277, 283 (1999); JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 338 (1998) (tending in the other direction).

[136] *See* Hans Hugo Klein, *Mandat und Beruf, in* FRANKFURTER ALLGEMEINE ZEITUNG 7 (2006); *cf.* UDO DI FABIO, DIE KULTUR DER FREIHEIT 151 (2005). *But see* DOEHRING*, supra* note 43, at recital 373; ZIPPELIUS*, supra* note 47, at 148.

[137] *Cf.* Klein*, supra* note 136.

[138] *See* Hartmann*, supra* note 50, at 519 ("Feierabendgesetzgeber").

[139] *See* Charles B. Blankart, *Zehn Vorurteile gegen Volksabstimmungen auf Bundesebene*, *in* WISSENSCHAFTSDIENST 521, 522 (2002) (arguing against the argument of incompetency); IAN BUDGE, THE NEW CHALLENGE OF DIRECT DEMOCRACY 113 (1996) (same); Gebhard Kirchgässner & Bruno S. Frey, *Volksabstimmung und direkte Demokratie*, *in* WAHLEN UND WÄHLER 42, 63 (Max Kaase & Hans-Dieter Klingemann eds., 1994) (same); Hanspeter Kriesi, *Individual Opinion Formation in a Direct Democratic Campaign*, 32 BRITISH J. POL. SCI. 171, 185 (2002) (same); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 72 (1994) (same). *But see* Markus Gloe, *Direkte Demokratie – das Beispiel Schweiz*, 38 POLITISCHE BILDUNG 50, 55 (2005); GIOVANNI SARTORI, DEMOKRATIETHEORIE 133, 136 (3d ed. 2006); JOSEPH A. SCHUMPETER, KAPITALISMUS, SOZIALISMUS UND DEMOKRATIE 416 (8th ed. 2005).

[140] *See* DOEHRING*, supra* note 43, at recital 348; *accord* ROMAN HERZOG, ALLGEMEINE STAATSLEHRE 203 (1971).

[141] *See* Kai Arzheimer & Annette Schmitt, *Der ökonomische Ansatz*, *in* HANDBUCH WAHLFORSCHUNG 243, 288 (Jürgen W. Falter & Harald Schoen eds., 2005); *accord* Heinrich Triepel, *Wahlrecht und Wahlpflicht*, 6 JAHRBUCH DER GEHE-STIFTUNG ZU DRESDEN 69, 104 (1901) ("*Schwachkopf*" ("imbecile")).

[142] *See* Offe*, supra* note 29, at 73; *accord* Michael Kloepfer, *Öffentliche Meinung, Massenmedien*, *in* HANDBUCH, *supra* note 21, at § 42 recital 14; Helmuth Schulze-Fielitz*, Grundsatzkontroversen in der deutschen Staatsrechtslehre nach 50 Jahren Grundgesetz,* 32 DIE VERWALTUNG 241 n.169 (1999).

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Accordingly, the Federal Constitutional Court recently repudiated the "insinuation" that the citizen is not capable of correctly interpreting information on secondary activities disclosed by members of parliament. The assumption that it is not possible to clear "any misinterpretations in public debate" has found to be both "unrealistic" and "untenable in a democracy."[143]

The requirement to apply the common good as a standard is not contrary to the findings of constitutional political economics either.[144] This area of expertise in the field of economics caused a stir when it consistently transferred the economic behavioral model onto citizens and public officials. Its most important supporter, Buchanan, indeed recognized the difference between decisions made in accordance with "private, personal preferences," on the one hand, and those made in accordance with one's "own assumptions" as to what serves the common good best, on the other hand.[145] As an economist, he does, however, proceed on the assumption that parliamentarians, too, behave like *homines oeconomici*, (*i.e.*, that their decisions are, therefore, first and foremost guided by their own interests and not primarily by issues pertaining to the common good.)[146] Does the standard of the common good thus ask too much?

It is not necessary to voice a fundamental criticism of the economic analysis of the law for purposes of defending the thesis supported herein. Even though it can be tremendously useful from an analytical point of view to imagine civil servants as gain maximizers, the economic approach is indeed probably too limited in the political context.[147] This is illustrated by cases where the parliamentarian behavior is at variance with the personal interests of the members of parliament (whether money, power, or reputation). The abolition of the pension scheme of North Rhine-Westphalian members of parliament is an example of this,[148] just as the waiver of increased remuneration payments on the federal

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[143] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 26 NVwZ 916, 929 (2007); *accord* JOHANNES RUX, DIREKTE DEMOKRATIE IN DEUTSCHLAND 95 (2008).

[144] *See* Martin Morlok*, Vom Reiz und vom Nutzen, von den Schwierigkeiten und den Gefahren der Ökonomischen Theorie für das Öffentliche Recht*, *in* ÖFFENTLICHES RECHT*, supra* note 60, at 1, 3; MARTIN LESCHKE, ÖKONOMISCHE VERFASSUNGSTHEORIE UND DEMOKRATIE 18 (1993) (discussing internal differentiations). I would like to thank my colleague Dr. Jahrbuch des öffentlichen Rechts der Gegenwartn Lüdemann for important hints particularly in relation to this section.

[145] *See* BUCHANAN, *supra* note 87, at 142.

[146] *See* James M. Buchanan, *Politik ohne Romantik: Grundzüge einer positiven Theorie der öffentlichen Wahlhandlung und ihrer normativen Bedeutung*, *in* JAMES M. BUCHANAN, POLITISCHE ÖKONOMIE ALS VERFASSUNGSTHEORIE 23, 26 (1990); BUCHANAN, *supra* note 87, at 223.

[147] *Cf.* Kirchgässner, *supra* note 146, at 53; Morlok, *supra* note 144, at 1, 9.

[148] *See* Ernst Benda & Christine Landfried, *Politik als Beruf*, 130 Frankfurter Allgemeine Zeitung 8 (2008); *cf.* Abgeordnetengesetz [Delegates' Act] of Northrhine-Westphalia § 10(7) (abolishing old age pensions and provision

parliamentary level was for a long time[149]. The desire to be re-elected does not explain these decisions because the large parties jointly decide on the pay for parliament members, and the majority of the people's representatives are anyhow elected from secure lists and individual constituencies. Even the capital city resolution of 1991, based on which the Bundestag moved its own seat to Berlin for purposes of "completing the German unification,"[150] may perhaps serve as an example, given that the relocation most likely caused at least some inconvenience to most of the members of parliament. Finally, policy makers relinquish their own influence in all instances in which they concede powers[151], grant[152] or safeguard independence,[153] or limit parliament's financial possibilities.[154] It would be possible to name even more case groups and examples.

So-called *sociotropic voting* illustrates that voters are also capable of taking into account the interests of others. Empirical studies prove that when casting a vote, one is guided less by one's personal situation than by that of the general economy.[155] In particular, social preferences, such as fairness and mutuality, influence many decisions.[156] Citizens did in

for surviving dependents; in return, the monthly allowance was increased. In the long term this leads to a cost benefit for the taxpayer which is matched by an income loss on the part of the parliamentarians).

[149] *See* Frankfurter Allgemeine Zeitung (FAZ) no. 258 of 6 Nov. 2007 and no. 107 of 8 May 2008, in both cases p. 4 (discussing plans to increase the members' allowance and decrease old-age provision in the near future just as it was done in Northrhine Westphalia); *cf.* HEINRICH LANG, GESETZGEBUNG IN EIGENER SACHE (2007) (containing a general critique of the members' allowance legislation). *But see* Streit*, supra* note 42, at 140, 154.

[150] *See* DEUTSCHER BUNDESTAG DRUCKSACHE [BT] 12/815, at 1 (Ger.).

[151] *E.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], 23 May 1949, BGBl. I art. 23 (1)(2) (Ger.).

[152] As to the Federal Bank pursuant to Bundesbankgesetz [BBankG - Federal Banking Act] § 12(1) and to the Federal Audit Service pursuant to Bundesrechnungshof-Gesetz [BRHG - Federal Audit Service Act] § 1(1).

[153] *E.g.*, by prohibiting the reelection of constitutional court judges according to Bundesverfassungsgerichts-Gesetz [BVerfGG - Federal Constitutional Court Act] § 4 (2). *See* CHRISTIAN PESTALOZZA, VERFASSUNGSPROZESSRECHT § 2 recital 23 (3d ed. 1991); KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT recital 42 (8th ed. 2010).

[154] As in the creation of a special fund for civil servant pensions which is exclusively reserved for this purpose pursuant to Bundesbesoldungsgesetz [BBesG - Federal Civil Service Remuneration Act] § 14a(2), (3). *See* Bundesverfassungsgericht (BVerfG - Federal Constitutional Court], 27 NVWZ 195, 198 (2008), *see also* Gesetz über eine Versorgungsrücklage des Bundes [VersRücklG - Pension Reserve Act] §§ 3(2), 7.

[155] *See* GEBHARD KIRCHGÄSSNER, LARS P. FELD & MARCEL R. SAVIOZ, DIE DIREKTE DEMOKRATIE 195 (1999); Morris P. Fiorina, *Voting Behavior*, *in* PERSPECTIVES ON PUBLIC CHOICE 391, 406 (Dennis C. Mueller ed., 1997); Ivar Krumpal & Adrian Vatter, *Ökonomisches Wählen: Zum Einfluss von Wahrnehmungen der allgemeinen Wirtschaftslage auf das Abschneiden der Bundesregierungsparteien bei Landtagswahlen*, 39 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 93, 108 (2008).

[156] *E.g.*, Gary E. Bolton & Axel Ockenfels, *ERC: A Theory of Equity, Reciprocity, and Competition*, 90 AM. ECON. REV. 166 (2000) (same); Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q.J. ECON. 769, 855 (1999) (same); Alexander Kritikos & Friedel Bolle, *Approaching Fair Behavior: Distributional and*

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fact endorse redistributions of wealth to their own detriment.[157] Even though raising debt to finance public investments benefits the presently eligible voters at the expense of future generations, Switzerland prohibited investment-oriented indebtedness by referendum in 2001 based on an affirmative vote of 84.7 percent.[158] Swiss referenda also increased the Value Added Tax (even though only moderately on an already-low level) in 2009 and, in the week before this article's publication, declined to raise the legal minimum vacation (from four to six weeks per year).[159]

Even if one were to assume that politicians base their conduct exclusively on their own interests, this would not be the end of the standard provided by the common good. Constitutional political economics is, at least in respect of its positive orientation, a behavioral theory; it studies how humans act, and not how they should act.[160] Buchanan expressly claims to be conceptually independent of (and thus leaves open) the question whether or not the protagonists actually pursue their own interests, or whether they pursue the common good after all.[161] Where constitutional political economics imagines civil servants as net maximizers and sees plebiscitarian lawmaking as a means to express individual values,[162] it does not conclude whether these standards should be applied; rather, at best, it describes that they are applied.[163] The commandments of the law, a

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Reciprocal Preferences, *in* INEQUALITY, WELFARE AND INCOME DISTRIBUTION: EXPERIMENTAL APPROACHES 149 (Frank Cowell ed., 2004) (same).

[157] *See* Bruno S. Frey & Gebhard Kirchgässner, *Diskursethik, Politische Ökonomie und Volksabstimmungen*, 15 ANALYSE & KRITIK 129, 141 (1993); Werner W. Pommerehne & Friedrich Schneider, *Politisch-ökonomische Überprüfung des Kaufkraftinzidenzkonzepts: Eine Analyse der AHV-Abstimmungen von 1972 und 1978*, *in* SEKTORALPOLITIK VERSUS REGIONALPOLITIK 75, 89 (Ernst A. Brugger & René L. Frey eds., 1985); Michael Baurmann & Hartmut Kliemt, *Volksabstimmungen, Verhandlungen und der Schleier der Insignifikanz*, 15 ANALYSE & KRITIK 150, 163 (1993) (discussing the fact's consequences, but not negating it).

[158] *See* Hermann Pünder, *Staatsverschuldung*, *in* 5 HANDBUCH, *supra* note 13, at § 123 recitals 7, 11, 93 (3d ed. 2007).

[159] *See* FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] 28 Sept. 2009, at 13; FAZ, 12 Mar. 2012, at 6.

[160] *See* James M. Buchanan, *Konstitutionelle Demokratie, persönliche Freiheit und politische Gleichheit*, *in* BUCHANAN, POLITISCHE ÖKONOMIE ALS VERFASSUNGSTHEORIE, *supra* note 146, at 59, 71.

[161] *Id.* at 23, 26.

[162] *See id.* at 59, 62.

[163] *See* James M. Buchanan, *Die Gerechtigkeit natürlicher Freiheit*, in BUCHANAN, *supra* note 146, at 77 (discussing constitutional political economics as a subcategory of the social sciences); Morlok, *supra* note 144, at 23 (discussing institution economics). *But see* ANNE VAN AAKEN, "RATIONAL CHOICE" IN DER RECHTSWISSENSCHAFT 181, 288, 310 (2003) (discussing the normative economic theory of the law).

normative order, can, however, apply counterfactually.[164] Buchanan himself shares this opinion in that he requests politicians to remain within their limits.[165]

III. Reviewability

The obligation towards the common good as advocated herein does not just constitute a moral obligation or a regulative idea,[166] but a true legal obligation. This follows straight from the reasons for its validity:[167] The guarantee of the dignity of man, the rule of law, and the principles of democracy and republic are legally binding. Nevertheless, courts have no authority to review decisions passed by parliament and by the people as to whether they promote the common good.[168] The obligation towards the common good figures among those obligations under objective law that as such do not correlate with any subjective right and that are, furthermore, in court not even subject to the so called "objective" reviews. Yet, this does not make them any less binding. It may indeed be that *leges imperfectae* intuitively cause discomfort due to the fact that the rule *ubi ius, ibi remedium* does not apply to them. Yet, the primary purpose of rules is to control the addressee's behavior. Serving as a standard for review is but their secondary purpose,[169] because there are constellations where judicial review constitutes the less desirable alternative. This is why the law contains zones where a review does not take place.

Where the constitution provides that legality had best be reviewed by the courts, it does so only as a rule, *i.e.,* allowing exceptions; the constitutional state is not consistently a legal recourse state.[170] Article 19(4)(1) GG guarantees the right to have recourse to the courts only on grounds of the infringement of subjective rights (action by infringed party),[171] and constitutional disputes are only justiciable pursuant to Article 93 GG under the condition that statutory law provides for corresponding legal proceedings (principle of enumeration).

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[164] *See* Morlok*, supra* note 144, at 15.

[165] *See* BUCHANAN*, supra* note 87, at 234.

[166] *See* Dreier, *supra* note 93 (noting the references).

[167] *See* DEDERER*, supra* note 75, at 348, 361, 634 theses 62, 67.

[168] *See* Meinhard Schröder*, Bildung, Bestand und parlamentarische Verantwortung der Bundesregierung*, *in* HANDBUCH, *supra* note 21, at § 65 recital 52; Uerpmann, *supra* note 85, at 186.

[169] *Cf.* FRIEDRICH MÜLLER, 1 JURISTISCHE METHODIK recitals 230 (9th ed. 2004); BERND RÜTHERS & CHRISTIAN FISCHER, RECHTSTHEORIE recitals 78 recitals 88 (5th ed. 2010).

[170] *See* Erich Becker, *Verwaltung und Verwaltungsrechtsprechung*, 14 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 96, 117 (1956). *But see* FRITZ OSSENBÜHL, STAATSHAFTUNGSRECHT 262 (5th ed. 1998).

[171] *See* Bernhard W. Wegener, *Rechtsschutz für gesetzlich geschützte Gemeinwohlbelange als Forderung des Demokratieprinzips?*, *in* DEMOKRATIE UND FREIHEIT 19, 22 (Martin Bertschi et al. eds., 1999) (discussing the action by infringed parties and its counterpart, the action by interested parties in particular in French law).

Accordingly, the Federal Constitutional Court decided early on that not every obligation under objective law must be matched by a judicially pursuable claim.[172] Even where it does, the court still does not review without limitations, but, rather, observes the "*Gestaltungsraum*" ["scope of influence"][173] of the legislator,[174] his scope for interpretation,[175] assessment,[176] and projection.[177] This is why, in legal doctrine, a distinction is drawn between statutes of action and statutes of control:[178] a statute of action binds the legislator in his considerations of appropriateness without permitting the reviewing court to issue considerations of appropriateness in replacement thereof.[179] In this way, the constitution's binding effect on the legislator exceeds the court's power of review.[180]

Exceptions to the principle of full review seem to be particularly appropriate in instances in which there is no practicable standard for review,[181] or in which superordinate aspects,

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[172] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvG 2/58, 11 July 1961, 13 BVerfGE 54, 96 (Ger.).

[173] *See* Bernhard Stüer, *Zum autonomen (kontrollfreien) Gestaltungsraum von Gesetzgeber und Verwaltung*, 89 DEUTSCHES VERWALTUNGSBLATT 314 (1974).

[174] *Cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 782/94, 27 Oct. 2004, 114 BVERFGE 1, 70 73, 103; 196, 235, 245, 248; 258, 286, 289, 296, 357, 364, 371, 387 (Ger.).

[175] *Cf.* Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 1 BvR 2378/98, 3 Mar. 2004, 109 BVERFGE 279, 340 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 1778/01, 16 Mar. 2004, 110 BVERFGE 141, 158 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 1387/02, 9 Sept. 2005, 114 BVERFGE 258, 291 (Ger.).

[176] *Cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 1778/01, 16 Mar. 2004, 110 BVERFGE 141, 157 (Ger.); Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 383/03, 17 June 2004, 111 BVERFGE 54, 84 (2004); 114 BVERFGE 121, 157, 159 (2005).

[177] *Cf.* Fritz Ossenbühl, *Die Kontrolle von Tatsachenfeststellungen und Prognoseentscheidungen durch das Bundesverfassungsgericht*, *in* OSSENBÜHL, *supra* note 106, at 53, 93.

[178] *See* Ernst Forsthoff, *Über Maßnahme-Gesetze*, in GEDÄCHTNISSCHRIFT WALTER JELLINEK 221, 232 (Otto Bachof eds., 2d ed. 1974); *accord* SCHLAICH & KORIOTH, *supra* note 153, at recital 516. *Contra* WERNER HEUN, FUNKTIONELL-RECHTLICHE SCHRANKEN DER VERFASSUNGSGERICHTSBARKEIT 46 (1992); PETER LERCHE, ÜBERMASS UND VERFASSUNGSRECHT 338 (2d ed. 1999).

[179] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 281/53, 1 Aug. 1953, 3 BVERFGE 19, 25 (1953); Alfred Rinken, *in* 3 ALTERNATIVKOMMENTAR, *supra* note 13, recital 110 before art. 93 (2001).

[180] *See* WALTER KREBS, KONTROLLE IN STAATLICHEN ENTSCHEIDUNGSPROZESSEN 99, 104 (1984); Hans-Peter Schneider, *Verfassungsgerichtsbarkeit und Gewaltenteilung*, 33 NJW 2103, 2111 (1980).

[181] *See* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 167/87, 16 Dec. 1992, 88 BVERFGE 40, 61 (1992); Konrad Hesse, *Die verfassungsgerichtliche Kontrolle der Wahrnehmung grundrechtlicher Schutzpflichten des Gesetzgebers*, *in* FS ERNST GOTTFRIED MAHRENHOLZ 541, 542 (Herta Däubler-Gmelin, Klaus Kinkel & Hans Meyer eds., 1994); Dietrich Murswiek, *Der Umfang der verfassungsgerichtlichen Kontrolle staatlicher Öffentlichkeitsarbeit*, 35 Die öffentliche Verwaltung 529, 535 (1982).

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such as, for example, an exceptional democratic legitimacy,[182] make it imperative to uphold the decision of the initial interpreter.[183] In the case of resolutions passed in parliament or by the people, both criteria are fulfilled. Considering the broad and vague definition of the common good, judges would be particularly prone to substitute their own political values for those of the parliament and the people, although the latter should have the final say due to their higher democractric legitimacy.[184] Nevertheless, it seems conceivable that the courts will one day deal with the question for the relevant decision-making standard in cases of lawmaking by the people. This situation can arise if the competent authority—in the context of providing "factual and concise" information on the subject-matter of the vote to the electorate—also discloses the decision-making standard. The courts could then, on application, review the applicability of this standard.[185]

The Basic Law occasionally relies on the assumption that state authority will fulfill its obligation towards objective law even in instances where a judicial review does not take place.[186] This does not only apply in relation to officials in the traditional sense, but also and especially in relation to members of parliament and citizens: political shaping is only susceptible to juridification to a limited extent.[187] The obligation takes on internal significance as a standard that has to be fulfilled,[188] and is thus able to highlight the fundamental problem of the liberal constitutional state: that of being dependent on certain ethical resources the content and origin of which are becoming increasingly uncertain on the premise of all-over freedom.[189] In this respect, the liberal state once again lives on requirements, the fulfillment of which it itself is not capable of guaranteeing.[190] In a republican democracy, both politicians and citizens are not just called

[182] *Cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvG 2/58, 11 July 1961, 13 BVerfGE 54, 81 (Ger.); ROBERT ALEXY, THEORIE DER GRUNDRECHTE 120 (3d ed. 1996); BRYDE, *supra* note 90, at 325, 332, 343. *Contra* Forsthoff, *supra* note 178, at 236.

[183] *Cf.* Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 1 BvR 167/87, 16 Dec. 1992, 88 BVERFGE 40, 61 (Ger.).

[184] *Cf.* DEDERER, *supra* note 75, at 362; ROBBERS, *supra* note 123, at 56.

[185] I owe this argument to my colleague PD Dr. Christoph Görisch.

[186] *Cf.* Brun-Otto Bryde, *in* GRUNDGESETZ-KOMMENTAR, *supra* note 31, art. 14 recital 69 (discussing art. 14 (2), (3) GG); BERND GRZESZICK, RECHTE UND ANSPRÜCHE 276 (2002) (discussing unenforceable legal obligations). *But see* ANDERHEIDEN, *supra* note 13, at 78 n.43; *see also* Andreas Funke, *Wahlrecht, Republik, Politische Freiheit*, 46 DER STAAT 395, 396, 414 (2007) (discussing, specifically, the right to vote in elections).

[187] *See* Dreier, *supra* note 93, at 24.

[188] *See* H.L.A. HART, THE CONCEPT OF LAW 88, 98, 116 (Clarendon Press 2d ed. 1994); H.L.A. HART, DER BEGRIFF DES RECHTS 128, 140, 163 (Suhrkamp 1973) (discussing the distinction between internal and external aspects of rules).

[189] *Cf.* Volkmann, *supra* note 9, art. 20 (part 2) recital 16 (2008).

[190] *See* Uwe Volkmann, *Die Entstehung des Staates als Vorgang deer Säkularisation*, *in* SÄKULARISATION UND UTOPIE 75, 93 (1967).

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upon, but also—to the extent specified—even obliged to assume responsibility for the state and the society.

F. Summary

When voters among the people and in parliament are called upon to make decisions via elections and other votes, they are not allowed to set the decision-making standard themselves. In a liberal democracy, the state is made for man and not vice versa. Pursuant to the Basic Law, this follows from the guarantee of the dignity of man and civil liberties, as well as from the rule of law and the principles of democracy and republican government. Consequently, all state authority must be exercised in conformity with the standard of the common good; and voters may only follow their personal preferences—their self-interest—when exercising subjective rights. Which decision-making standard—common good or self-interest—applies in elections and referenda depends on whether the right to vote qualifies as a power of state authority or as a subjective right of the citizen. The fact that the members of parliament exercise state authority in the assembly is not controversial. Both lawmaking in parliament and parliamentary elections of persons into office are, therefore, subject to the standard of the common good. Article 20(2)(2) GG expressly stipulates that the people exercise state authority in elections and referenda. In the case of referenda, this statement remains accurate because the Basic Law does not contain any stipulations to a different effect. In the case of elections, however, there are systematic, genetic, and historic counterarguments which suggest that it would be more appropriate to qualify the right to participate in elections as a subjective right. It is not subject to the standard of the common good; rather, it can be exercised in accordance with self-interests.

What is meant by self-interest follows from the concept of freedom: every citizen is free to define and weigh her interests. Comparatively, defining the standard of the common good seems to be far more difficult. This treatise adopts a substantive-procedural concept. Accordingly, the common good flows from individual interests. Not only the interests of the electorate matter, but also those of citizens not yet or no longer entitled to vote, but still affected by the decision (*e.g.*, outsiders such as children and foreigners). Future generations are also considered, but with decreasing weight and only to the extent that their needs are already recognizable as individual interests today.

The argument that decisions for the common good should take into account the interests of others could be challenged on grounds that it is impossible to do so, that it asks too much of voters, or that it presents the courts with insurmountable problems in reviewing decisions. However, these objections cannot stand. It is difficult, if not impossible, to transfer Arrow's economic Impossibility Theorem to the subjects under investigation. If one were to apply Arrow's Theorem to the question of how an eligible voter ought to come up with her decision, the problem of cardinal preferences, (*i.e.*, the difficulties of the *inter*-personal comparison of utility, which Arrow established as one of the conditions under the

Impossibility Theorem, would be eliminated). This is at least true in instances in which the person making the decision is permitted to weigh the existing interests to suit her own ideas. In any event, it would be too far-reaching to derive from the Impossibility Theorem that decisions must be made completely irrespective of the interests of others: not only voting in elections and referenda, but also democracy and state control, as well as planning and decision-making, would be called into question. The Basic Law prescribes all of this. It recognizes the common good as a justiciable standard, and thus, apparently tolerates impossibility theorems.

The requirement to distinguish between individual interests and the common good does not ask too much from parliament members or citizens. This is illustrated by empirical studies carried out in the field of political science, particularly those relating to *sociotropic voting*. On normative grounds, the General Theory of the State categorically forbids using immaturity as an argument, and the Federal Consitutional Court considers the assumption of citizens' immaturity to be both unrealistic and untenable in a democracy. There is nothing in particular in the findings of constitutional political economics to suggest any overburdening. The economic approach specifically applied by Buchanan to imagine civil servants as gain maximizers, as well, is probably too limited in political contexts. Constitutional political economics is—at least, in respect of its positive orientation as a behavioral theory—only focused on addressing how the eligible voters do act, and not how they are supposed to act.

Finally, it is not possible to challenge the concept of the common good on the ground that it provides a standard, which, according to the view taken herein, cannot be reviewed by a court of law. The reason why courts cannot annul elections and referenda on the grounds that the decision did not serve the common good is due to the greater democratic legitimacy that the people and parliament enjoy over courts, as well as to the fact that the standard provided by the common good is as vague as it is broad.