

# On the Zeitgeist and the Public Interest

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*“The public good is not to be considered if it is to be purchased at the expense of the individual.”*

*Lord Acton (1834-1902)<sup>1</sup>*

The idea of some sort of *common good* or *public interest* as the goal of and guide for practical politics is as old as statehood itself. In various guises it is used by politicians and administrators as a source of legitimacy. But there is no clear definition of public interest, and its meaning keeps shifting with the intellectual winds, with the *Zeitgeist*. Therefore, a term that once had a restrictive function now has taken on a permissive function. A conceptual shield against what Aristotle and Locke saw as tyrannical government, is now wielded as a weapon, to authorise any kind of government intervention.

## *What is in the public interest?*

“The public interest”, wrote David Hume, “becomes the source of great dissensions, by reason of the different opinions of particular persons concerning it”.<sup>2</sup> F A Hayek concluded that “common welfare or the public good has to the present time remained a concept most recalcitrant to any precise definition and therefore capable of being given almost any content suggested by the interest of the ruling group.”<sup>3</sup>

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<sup>1</sup> John Emerich Edward Dalberg-Acton, *Selected Writings of Lord Acton*. Liberty Fund, 1986, vol 3, p. 544

<sup>2</sup> David Hume, *The Philosophical Works of David Hume*. Scientia Verlag, 1964, p. 318.

<sup>3</sup> F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. Routledge 1993, vol 2, p. 1.

And not just classical liberal thinkers worry about its vagueness. As a modern guide to the concept for public administrators puts it:

“while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice”<sup>4</sup>

A quick search online throws up these (and many, many other) examples of what is supposedly in the public interest:

Affordable public transit

Subsidies for solar panels

That companies in trouble do not dismiss workers

Current sports structures and the social function of sport

That a public authority defines the public good

State support for journalism

Holiday rental regulation

The contents of Hunter Biden’s laptop

Wolf hunting

Cemeteries close to residences

“Juicy hot gossip”

Public morality

High taxes

Low taxes

Tariffs

Free trade

Cancel dangerous ideas

Free speech

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<sup>4</sup> Chris Wheeler, “The Public Interest Revisited” AIAL Forum No. 72, April 2006.

It seems like using the term public interest is just a fancy way of saying “I like this, I think we should do it”.

Public interest (or *common interest*, *public good*, or *general welfare* and other variants), have become the archetypal weasel words – concepts that give the impression of saying something specific, even though it is so vague as to be almost meaningless. It establishes no particular guidelines or limitations to government intervention, so often it just serves to justify any action that you happen to favour. And yet, it has been a very important concept in classical liberal history.

### *Locke: Public interest vs tyranny*

None other than John Locke (1632-1704), the great natural-rights liberal wrote that “The public good is the rule and measure of all law-making.”<sup>5</sup> In an ironic twist in *Two Treatises of Government*, Locke approvingly quotes his ideological opponent, the defender of absolutist monarchy, James I, who justified his rule on the basis of “the Weal of the Publick”<sup>6</sup>.

Locke’s point was that a king is legitimate only as long as he uses his power for the good of the people, and not for his own personal interest. If he uses his power for his own, private gain, by selling offices or imposing monopolies, he becomes a tyrant, and thereby “unkings” himself. This is the way in which other classical liberals, like Thomas Jefferson and James Madison often used the concept of public interest.

It is a negative definition, and relies on a certain implied positive concept of the public interest. But even the empty, negative definition could serve as a powerful rallying cry against the corruption of rulers and public officials. As such, the concept has a very long history. In *Politics*, Aristotle talks about the most typical form of tyranny and the counterpart of the perfect monarchy, the individual who governs “with a view to his own advantage, not to that of his subjects, and therefore against their will”.<sup>7</sup> Thomas Aquinas built upon this definition, and explained that governments are unjust when the private good of the ruler is sought at the expense of the good of the community.

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<sup>5</sup> John Locke, *A Letter Concerning Toleration*, in *Political Writings*. Penguin Classics, 1993, p. 411.

<sup>6</sup> John Locke, *Two Treatises of Government*, Cambridge University Press, 1965, p. 399.

<sup>7</sup> Aristotle, *Politics*, 1295: 16-23

The problem in the long run was the positive definition of the public interest. For Locke and liberals in his tradition, the answer was obvious. To him, the public interest was the defence of each individual's life, liberty and property:

“Government being for the Preservation of every Mans Right and Property, by preserving him from the Violence or Injury of others, is for the good of the Governed ... for the public good, i.e. the good of every particular Member of that Society.”<sup>8</sup>

Locke explicitly banned public officials from intervening in people's lives based on their own conception of what is in the public interest:

“But what if the magistrate believe such a law as this to be for the public good? I answer...the private judgement of the magistrate does not give him any new right of imposing laws on his subjects, which was neither in the constitution of the government granted him, nor ever was in the power of the people to grant”.<sup>9</sup>

From there it is a straight line to James Madison, who suggested an amendment to the American Constitution in 1789, adding a definition to the public interest:

“the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.”<sup>10</sup>

As George H Smith explains in his history of liberalism, public good in the classical liberal tradition had a *restrictive* function – it defined what the government could not do. However, changing intellectual tides would soon give public good a *permissive* function – guiding and authorizing government intervention.

The problem is that a weasel word doesn't supply us with any clear principles and firm guidelines. When an Australian court was asked to ban clinical trials of an abortion pill because it was in “the public interest” in 1995, it responded:

“The public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.”<sup>11</sup>

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<sup>8</sup> Locke 1965, p. 210.

<sup>9</sup> Locke 1993, p. 424.

<sup>10</sup> Smith 2013, p. 29.

<sup>11</sup> Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health, 128 ALR 238 per Lockhart J, 1995.

The idea of what's in the public interest changes with the mood and beliefs of each era, with the *Zeitgeist*. As the strong natural rights perspective was undermined, the public good and public interest took on a new meaning. People soon came to think that the magistrate was absolutely justified in imposing laws if he thought it was in the public interest.

### *Utilitarians: Public interest vs individual rights*

Utilitarians like Jeremy Bentham (1748-1832) were not the first liberals who concerned themselves with positive outcomes and social utility. The whole concept of rights in John Locke and most classical liberals was based on human nature, our existence as separate individuals who need to live according to our own beliefs and reasoning to produce, trade and so create a good and decent life. They would never have doubted that a system that respected those rights would see better outcomes than those that didn't.

Therefore, there is no deep gulf separating natural rights thinkers from more utility-oriented liberals like David Hume and Adam Smith. While they legitimised their principles on the wellbeing of mankind, they always saw this as the indirect, long-term effects of a system of general rules that rarely admitted exceptions, it was not based on a belief that every single act and rule could be evaluated according to its utility.

David Hume admitted that isolated acts in accordance with a just system may seem contrary to the public interest:

“But however single acts of justice may be contrary, either to public or private interest, it is certain that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society, and to the well-being of every individual.”<sup>12</sup>

They were in favour of what Hayek would call an evolutionary form of utilitarianism, whereby certain institutions survive because they help their societies to thrive and grow, but opposed a constructivist utilitarianism that focused on the effects of every single act. Indeed, they thought that a constant focus on consequences would produce bad consequences. Adam Smith went so far as to say

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<sup>12</sup> Hume 1964, p. 269.

that “I have never known much good done by those who affected to trade for the publick good.”<sup>13</sup>

This kind of insight into both unintended consequences and the corruption of power, even when it is established to do good, made Henry David Thoreau exclaim: “If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life.”<sup>14</sup>

The major break came with Bentham’s utilitarian school, which undermined the belief in general rules and just systems by attacking natural rights ideals and replacing principles with calculations. Previous liberals had seen utility as the purpose of government, but its standard was to respect rights and liberties. Now utilitarians turned utility from purpose to standard. How would a legislator know if he had done the right thing? Not by looking at whether it adhered to a set of principles and rules, but by assessing the impact of the action on the happiness of the greatest number.

Bentham thought that individuals were usually the best guide to what is in their own best interest, so his hedonic calculus was at first used to establish a presumption of laissez-faire. But who was to make that call? In the end, since governments was no longer constrained by individual rights, they would have to decide when something was in people’s best interest. This was alarmingly naïve, warned other liberals. Differences of opinion about whether legislation serves the public interest would now have to be determined by legislators. And since the public good was originally meant to constrain rulers, how can we leave the decision about when that constraint will apply in the hands of the rulers?<sup>15</sup>

One of the greatest critics was Thomas Hodgskin, a free-market anarchist and one of the first writers at *The Economist*, who warned in 1832 that this was a vague standard that would be a great gift to rulers and interventionists. It would “lift legislation beyond our reach, and secure it from censure”. By pretending to do everything in the public interest, the legislator could now attack life, liberty and property as he pleases.

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<sup>13</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Liberty Fund, 1981, vol I, p. 456.

<sup>14</sup> Henry David Thoreau, *Walden: A Fully Annotated Edition*. Yale University Press, 2004, p. 71.

<sup>15</sup> Smith 2013, chap 8.

The thought that this would lead to enlightened rule was “contradicted by every page of history”.<sup>16</sup> Bentham was in effect having the fox guard the henhouse.

The great legal scholar Albert Venn Dicey would eventually declare that Hodgskin was right all along. By scorning the ideas of individual rights, utilitarians removed the constraints on government and turned public good from a restrictive role to a permissive one. The *Zeitgeist* changed and so did the meaning of public good:

“The principle of utility became an argument in favour, not of individual freedom, but of the absolutism of the State ... [Benthamites] had forged the arms most needed by socialists.”<sup>17</sup>

This is what Lord Acton warned about, when he noticed that Locke had been turned on his head. The term public good which had once been used to protect individuals from their rulers, was now used by rulers to ignore individuals.

### *The example of the general welfare clause*

The debate over and fate of the “general welfare” clause in the US Constitution (Article 1, Section 8) is a fascinating example of the change in the meaning of the public interest. Antifederalists rejected this clause since they thought it would give Congress a *carte blanche* to impose any kind of legislation it thought promoted the public good. Madison rejected this fear and explained that “general welfare” was not a separate and distinct power, but just a statement of the purpose of the powers that were defined by the list of enumerated power that follows.

The pseudonym Brutus warned that it is a “matter of opinion, what tends to the general welfare; and the Congress will be the only judges in the matter”, but Madison and other defenders of the Constitution considered this a silly interpretation that would make a mockery of the specific list of powers granted to Congress.<sup>18</sup>

However, it did not take long for the Antifederalists to be proven right in their fears. In 1791, the Secretary of the Treasury, Alexander Hamilton, published his interventionist *Report on Manufactures*, where he suggested industrial subsidies

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<sup>16</sup> Thomas Hodgskin, “The First Letter” in *The Natural and Artificial Right of Property Contrasted*. Dodo Press, 2008.

<sup>17</sup> A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*. Liberty Fund, 2008, p. 219f.

<sup>18</sup> Smith 2013, p. 44.

funded by tariffs. Hamilton's problem was that the Constitution did not authorise subsidies, and even seemed to rule them out, since it is a way of raising funds not for general purposes, but to benefit a particular group. For support, Hamilton now turned to the general welfare clause. He claimed that general welfare:

“necessarily embraces a wide variety of particulars, which are susceptible neither of specification nor of definition. It is therefore of necessity left to the discretion of the National Legislature...”<sup>19</sup>

In 1936, as an expression of the New Deal Zeitgeist, the Supreme Court embraced Hamilton's interpretation and the federal government's mission creep without reservations:

“the clause confers a power separate and distinct from those later enumerated...Congress consequently has a substantive power to tax and appropriate limited only by the requirement that it shall be exercised for the general welfare.”<sup>20</sup>

And of course, that means no limits at all.

### *Liberalism vs public interest*

However, the most fundamental problem with the idea of public interest as it is used today is not that the concept is vague, but that it has a particular vagueness that invites us to fill it with meaning in a certain, collectivist way. The concept relies on the premise that society is an organic unit with a single set of values and needs that can be defined, ranked and summarized into a guide for policy. In its application, this presupposes that we can know and define our needs and the means by which they must be satisfied.

Locke would object that society is made up of individuals with different goals and needs. His modern disciple Robert Nozick emphasised this point in 1974. Sometimes we undergo pain or sacrifice for a greater benefit. We go to the dentist to avoid worse suffering later and we save money to support ourselves when we are older. Nozick rejects the idea that we can just as well sacrifice individual liberties for the common good:

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<sup>19</sup> Smith 2013, p. 48.

<sup>20</sup> Ibid.

“But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.”<sup>21</sup>

Interestingly, Bentham admitted as much, at least to himself. In an unpublished manuscript he wrote that the idea that different individual utilities would arrive at a social sum “appear fictitious”:

“Tis in vain to talk of adding quantities which after the addition will continue distinct as they were before, one man’s happiness will never be another man’s happiness: a gain to one man is no gain to another”<sup>22</sup>

And yet, Bentham thought “the fiction is successful”, because it could guide policy practically. Without it, “all political reasoning is at a stand”.

But as Bentham’s presumption that the individual usually knows best was replaced by the new constructivist era’s belief in centralised authority, political reasoning did not just proceed at an orderly pace, but accelerated uncontrollably without any respect for the knowledge problem involved. That is why we are in the present situation where public good / interest is used by everyone to authorise anything.

Nowadays, both big government leftists who concern themselves with our material needs and national conservatives who think more about our spiritual needs portray the classical liberal system as “empty” and meaningless because it doesn’t have the answers and doesn’t guarantee a particular result. Because of its “great horror of the state, of traditional authority and the use of the public power to advance the common good”, as the US conservative Sohrab Ahmari complains.<sup>23</sup>

But that is the whole point.

If we want to leave room for better answers to our problems, we can’t design solutions from afar. If we assume that we don’t already know everything and can survey all the consequences of our actions, we should not try to guarantee a

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<sup>21</sup> Robert Nozick, *Anarchy, State and Utopia*. Basic Books 1974, p. 32f.

<sup>22</sup> Élie Halévy, *The Growth of Philosophic Radicalism*. Macmillan, 1928, p. 495.

<sup>23</sup> Sohrab Ahmari, “Against David French-ism”, *First Things*, 29 May 2019.

particular result in each case, just as David Hume told us, but work hard to preserve a general order which enables individuals to experiment with different ways of meeting their own needs in ways that could not have been predicted by authorities.

By its nature it is difficult to understand and defend this, because it is based on what we do not know and on taking into account the long-term effects of our actions that are not seen. But that's the thing with reality. It is bigger and messier than fiction.

As Hayek wrote in *Law, Legislation and Liberty*:

“The preservation of a free system is so difficult precisely because it requires a constant rejection of measures which appear to be required to secure particular results, on no stronger grounds than that they conflict with a general rule, and frequently without our knowing what will be the costs of not observing the rule in the particular instance. A successful defence of freedom must therefore be dogmatic and make no concessions to expediency, even where it is not possible to show that, besides the known beneficial effects, some particular harmful result would also follow from its infringement. Freedom will prevail only if it is accepted as a general principle whose application to particular instances requires no justification. It is thus a misunderstanding to blame classical liberalism for having been too doctrinaire. Its defect was not that it adhered too stubbornly to principles, but rather that it lacked principles sufficiently definite to provide clear guidance, and that it often appeared simply to accept the traditional functions of government and to oppose all new ones. Consistency is possible only if definite principles are accepted.”<sup>24</sup>

To conclude, vague concepts about “public interest” to guide policy-making do not appear to be in the public interest.

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<sup>24</sup> Hayek 1993, vol I, p 61.