

“The New Property” – Charles A. Reich

Summary:

Reich’s “The New Property” is a critique of the administration of government largess. In particular, Reich is concerned about the states intrusion into the individual’s sanctuary that is property in the name of public interest.

Reich begins with a discussion about the importance of private property to fundamental liberty. Generally, individuals must respectively justify their actions to the government. It is the government that determines the rules in our society, and individuals must operate within those rules if they are to avoid sanction. However, owners are permitted to operate with greater liberty on their property. Although the owner may not operate with impunity, the burden of justification is shifted: the government must explain its interference with the owner acting within the bounds of private property.

Reich then moves to a discussion of the historical context within which private property has been degraded to the point of no longer providing an effective boundary of protection against state intrusion. During the industrial revolution, a time when feudalism was still fresh in the mind of the people, it was understood that private property must be free from government and societal control. But as corporations became more powerful in the early part of the 20th century, and they used their ownership of vast amounts of property as a means of oppression, reformers sought to reign in private property rights with government regulation. The reformers took the position that property should be separated from personality, and that private property is in fact antagonistic to individual liberty.

However, for Reich, the reformers framed the issue incorrectly: instead of impugning private property, they should have been focusing on the arbitrary use of private property to impinge individual freedoms. This misconception resulted in a transfer of some of the power held by corporations to the government. Reich argues that although power in the hands of the government is better than power in the hands of a selfish few, the individual must fear all power, including the power held in a public interest state/a state of government largess.

The paper then turns to how the laudable objectives of the reformers resulted in inferior civil liberties. Reich notes that although the reformers may have been misguided in their analysis of the problem, they indeed sought to enhance individual liberty by instituting a public interest state. Reich addresses the apparent paradox by determining that it is not the public interest state itself which has caused an erosion in personal freedoms, but the meaning which has been attributed to ‘public interest’. After citing several cases as illustrations, Reich concludes that in balancing public interest against individual interest, administrative bodies and courts have engaged in a fundamental fallacy: “treating the ‘individual interest’ as affecting only the party to the case”.

The article next moves to a discussion of how the erosion of individual liberty might be cured. Reich recognizes that it would be futile to attempt to regress society to its pre-public interest state. But Reich is undeterred by that proposition. For him, it matters not that property is distributed by the government, but how such property functions or ought to function.

As such, Reich makes several recommendations which could be integrated into our current system. First, Reich asserts that the government largess must not be administered in a way that effectively undermines constitutional protection. For instance, government should not operate according to the so-called 'gratuity theory' whereby citizens might be precluded from relying on their constitutional rights should they want to be successful in their application for government property. Similarly, Reich contends that in balancing the deterrence of a constitutional right against some other interest, courts should assign no importance to the fact that what is at stake is a gratuity.

Second, Reich turns to substantive limits – beyond those imposed by the constitution – on the government power over largess. He argues that the government must consider only relevant factors in distributing property. For instance, a surgeon is not to be denied a licence because of his communist affiliation, nor should a citizen be denied residency in a low income housing project by reason of her affiliation in a subversive organization. Moreover, only public agencies are to administer largess, and the discretion which such agencies use to distribute property must be bound by ascertainable limits.

Third, Reich states that government power over largess must be subject to procedural safeguards. He makes a number of recommendations in this respect: i) action should be open to hearing and contest, ii) action should be based upon a record subject to judicial review, iii) undisclosed reasons should not be tolerated, and iv) the same person should not sit as legislator, prosecutor, judge and jury thereby violating the separations of powers. Where the proceedings might result in quasi-criminal sanctions, such safeguards are even more important. However, where the government action is clearly criminal litigation normally undertaken in a court of law, government agencies should defer to the courts. Similarly, in accordance with the constitutional safeguard against double jeopardy, agencies should not find guilt after a court has found innocence.

Finally, recognizing that his preceding recommendations are insufficient to protect individuals' respective liberty interests in the public interest state, Reich argues that certain benefits of core importance to individuals must be held as of right, not as a gratuity. For Reich, status – derived primarily from the source of livelihood – has become so intertwined with personality that "destruction of one may well destroy the other". As such, a system of denial, suspension and revocation is inappropriate for regulating sources of livelihood (e.g. unemployment compensation, public assistance or old age pension).

Reich concludes by noting that government largess is only one new form of wealth among many. We must therefore undertake a comprehensive analysis of the regulation of wealth in our new collective society. If the status of the individual is to be protected, we must create "a new property".

Questions:

- 1) How well does our administrative law regime accord with Reich's critique of government largess?
- 2) Do you agree with Reich's contention that in today's society personality is inextricably tied to status?
- 3) Is "collective" an appropriate label for our society?
- 4) Should the protection Reich extends to "sources of livelihood" extend to sources that create extreme affluence?