The new property

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The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.

One of the most important developments in the United States during the past decade has been the emergence of government as a revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of tion. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth – forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more American's depends upon a relationship to government. Increasingly, Americans live on government largess – allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individual independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society.

I. The Largess of Government

A. THE FORMS OF GOVERNMENT-CREATED WEALTH

The valuables which derive from relationships to government are of many kinds. Some primarily concern individuals; others flow to businesses and organizations. Some are obvious forms of wealth, such as direct payments of money, while others, like licenses and franchises, are indirectly valuable.

Income and benefits. For a large number of people who hold no public jobs government is nevertheless a direct source of income. This is a result of the legal status of these people. Examples are Social Security benefits, unemployment compensation, aid to dependent children, veterans' benefits, and the whole scheme of state and local welfare. These represent a principal source of income to a substantial segment of the community. Total federal, state, and local social welfare expenditures now exceed seventy billion dollars annually.

Jobs. Approximately ten million persons receive income from public funds because they are directly employed by federal, state, or local government. The size of the publicly employed working force has increased steadily since the founding of the United States, and seems likely to keep on increasing. If the three to four million persons employed in defense industries, which exist mainly on government funds, are added to the ten million directly employed, it may be estimated that fifteen to twenty percent of the labor force receives its primary income from government.

Occupational licenses. Licenses are required before one may engage in many kinds of work, from practicing medicine to guiding hunters through the woods. Even occupations which require little education or training, like that of longshoremen, often are subject to strict licensing. Such licenses, which are dispensed by government, make it possible for their holders to receive what is ordinarily their chief source of income.

Franchises. A franchise, which may be held by an individual or by a company, is a partial monopoly created and handed out by government. Its value depends largely upon governmental power; by limiting the number of franchises, government can make them extremely remunerative. A New York City taxi medallion, which cost

very little when originally obtained from the city before 1937, can now be sold for many thousands of dollars. The reason for this high price is that the city has not issued new transferable medallions despite the rise in population and traffic. A television channel, once given away, can now be sold for many millions. Government distributes wealth when it dispenses route permits to truckers, charters to bus lines, routes to air carriers, certificates to oil and gas pipelines, licenses to liquor stores, allotments to growers of cotton or wheat, and concessions in national parks.

Contracts. Many individuals and many more businesses enjoy public generosity in the form of government contracts. Fifty billion dollars annually flows from the federal government in the form of defense spending. These contracts often resemble subsidies; it may be virtually impossible to lose money on them. Businesses sometimes make the government their principal source of income, and many "free enterprises" are set up primarily to do business with the government.

Subsidies. Analogous to welfare payments for individuals who cannot manage independently in the economy are subsidies to business. Agriculture is subsidized to help it survive against better organized (and less competitive) sectors of the economy, and the shipping industry is given a dole because of its inability to compete with foreign lines. Local airlines are also on the dole. So are other major industries, notably housing. Still others, such as the railroads, are eagerly seeking help. Government also supports many non-business activities, in such areas as scientific research, health, and education. Total federal subsidies for 1966 were expected to be over seven billion dollars.

Use of public resources. A very large part of the American economy is publicly owned. Government owns or controls hundreds of millions of acres of public lands valuable for mining, grazing, lumbering, and recreation; sources of energy such as the hydroelectric power of all major rivers, the tidelands reservoirs of oil, and the infant giant of nuclear power; routes of travel and commerce such as the airways, highways, and rivers; the radio-television spectrum which is the avenue for all broadcasting; hoards of surplus crops and materials; public buildings and facilities; and much more. These resources are available for utilization by private businesses and individuals; such use is often equivalent to a subsidy.

Services. Like resources, government services are a source of wealth. Some of these are plainly of commercial value: postal service for periodicals, newspapers, advertisers, and mail-order houses; insurance for home builders and savings banks; technical information for agriculture. Other services dispensed by government include sew-

age, sanitation, police and fire protection, and public transportation. The Communications Satellite represents an unusual type of subsidy through service: the turning over of government research and know-how to a quasi-private organization. The most important public service of all, education, is one of the greatest sources of value to the individual.

B. THE IMPORTANCE OF GOVERNMENT LARGESS

How important is governmentally dispensed wealth in relation to the total economic life of the nation? With personal income approximating five hundred billion dollars today, governmental expenditures on all levels amount to about two hundred billion. And these figures do not take account of the vast intangible wealth represented by licenses, franchises, services, and resources. Moreover, the *proportion* of governmental wealth is increasing. Hardly any citizen leads his life without at least partial dependence on wealth flowing through the giant government syphon.

In many cases, this dependence is not voluntary. Valuables that flow from government are often substitutes for, rather than supplements to, other forms of wealth. Social Security and other forms of public insurance and compensation are supported by taxes. This tax money is no longer available for individual savings or insurance. The taxpayer is a participant in public insurance by compulsion, and his ability to care for his own needs independently is correspondingly reduced. Similarly, there is no choice about using public transportation, public lands for recreation, public airport terminals, or public insurance on savings deposits. In these and countless other areas, government is the sole supplier. Moreover, the increasing dominance of scientific technology, so largely a product of government research and development, generates an even greater dependance on government.

Dependence creates a vicious circle of increased dependence. It is as hard for a business to give up government help as it is for an individual to live on a reduced income. And when one sector of the economy is subsidized, others are forced to seek comparable participation. This is true of geographical areas; government contracts can fundamentally influence the economy of a region. It is also true of different components of the economy. If one form of transportation is subsidized, other types of transportation may be compelled to seek subsidies. When some occupations are subsidized, others, which help to pay the bill, find themselves disadvantaged as a class. Thus, it is not strange to find musicians seeking a subsidy – perhaps to pay food bills that are made artificially high because of another subsidy. Nor is it strange to find that an unemployed worker replaced by a machine seeks government funds to retrain, when in many cases the machine was created through government subsidized research and develop-

ment. And it is not surprising that subsidies may be needed to enable workers to live in our large cities; they must buy necessities at prices inflated to meet others' subsidized ability to pay.

The prospect is that government largess will necessarily assume ever greater importance as we move closer to a welfare state. Such a state, whatever its particular form, undertakes reponsibility for the well-being of those citizens who, because of circumstances beyond their control, cannot provide minimum care, education, housing, or subsistence for themselves. This responsibility can only be carried out by means of what we have defined as government largess.

C. LARGESS AND THE CHANGING FORMS OF WEALTH

The significance of government largess is increased by certain underlying changes in the forms of private wealth in the United States. Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, job seniority with a particular employer is the principal form of wealth. For the jobless, their status as governmentally assisted or insured persons may be the main source of subsistence. The automobile dealer's chief wealth is his franchise from the manufacturer which gives him exclusive sales rights within a certain territory, for it is his guarantee of income. To the large manufacturer, contracts, business arrangements, and organization may be the most valuable assets.

The kind of wealth dispensed by government consist almost entirely of those forms which are in the ascendancy today. To the individual, these new forms, such as a profession, job, or right to receive income, are the basis of his various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses.

II. The Emerging System of Law

Wealth or value is created by culture and by society; it is culture that makes a diamond valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its "owner." Government largess is plainly "wealth," but it is not necessarily "property."

Government largess has given rise to a distinctive system of law. This system can be viewed from at least three perspectives; the rights of holders or largess, the powers of government over largess, and the procedure by whoch holders' rights and governmental power are adjusted. At this point, analysis will not be aided by attempting to apply or to reject the label "property." What is important is to survey – without the use of labels – the unique legal system that is emerging.

A. INDIVIDUAL RIGHTS IN LARGESS

As government largess has grown in importance, quite naturally there has been pressure for the protection of individual interests in it. The holder of a broadcast license or a motor carrier permit or a grazing permit for the public lands tends to consider this wealth his "own," and to seek legal protection against interference with his enjoyment of it. The development of individual interests has been substantial, but it has not come easily.

From the beginning, individual rights in largess have been greatly affected by several traditional legal concepts, each of which has had lasting significance:

Rights vs. privilege. The early law is marked by court attempts to determine which forms of largess were "rights" and which were "privileges." Legal protection of the former was by far the greater. If the holder of a license had a "right," he might be entitled to a hearing before the license could not be revoked; a mere "privilege" might be revoked without notice or hearing.

The gratuity principle. Government largess has often been considered a "gratuity" furnished by the state. Hence it is said that the state can withhold, grant, or revoke the largess at its pleasure. Under this theory, government is considered to be in somewhat the same position as a private giver.

The whole and the parts. Related to the gratuity theory is the idea that, since government may completely withhold a benefit, it may also grant it, subject to any terms or conditions whatever. This theory is essentially an exercise in logic: the whole power must include all its parts.

Internal management. Particularly in relation to its own contracts, government has been permitted extensive power on the theory that it should have control over its own housekeeping or internal management functions. Under this theory, government is treated like a private business. In its dealings with outsiders it is permitted much of the freedom to grant contracts and licenses that a private business would have.

The most common forms of protection of individual interests in government largess are procedural, coupled with an insistence that government action be based on standards that are not "arbitrary" or unauthorized. Development has varied mainly according to the particular type of wealth involved. The courts have most readily granted protection to those types which are intimately bound up with the individual's freedom to earn a living. They have been reluctant to grant individual rights in those types of largess which seem to be exercises of the managerial functions of government, such as subsidies and government contracts.

Occupational licenses. After some intial hesitation, courts have generally held that an occupational or professional license may not be denied or revoked without affording the applicant notice and a hearing. Doctors, lawyers, real estate brokers, and taxi drivers may not be denied their livelihood without some minimum procedure. In addition to requiring notice and hearing, some courts may also review the evidence for sufficiency, to see if a basis for the official action exists in fact. The need for procedural protection for occupational licenses is sufficiently well accepted that hearings have been required on denial of security clearances when these are tantamount to occupational licenses.

Drivers' licenses. Licenses not specifically tied to a particular occupation, such as drivers' licenses, have to some extent been assimilated under the umbrella of occupational licenses. New York's highest court declared that a driver's license is "of tremendous value to the individual and may not be taken away except by due process."

Franchises. A franchise is less of a "natural right" than an occupational license, because it confers an exclusive or monopoly position established by government. But the courts early took the position that certain types of franchises were "property" protected by the Constitution. And even air route certificates which are clearly not like the old-time franchise, are given judicial protection.

Benefits. With somewhat greater reluctance, the courts have moved toward a measure of legal protection for benefits. The District of Columbia Court of Appeals rejected an argument that a Veterans' Administration decision (imposing a forfeiture of benefits because the veteran had rendered assistance to an enemy) is not reviewable by the courts. The same court also questioned whether Congress could authorize an administrator to revoke a veteran's disability pension without some standards to guide him. And the U. S. Supreme Court held that a state cannot deny unemployment benefits on grounds which interfere with freedom of religion. In California, the courts held that unemployment compensation may not be denied one who refuses a job because he feels unable to take a required loyalty oath.

Subsidies. A subsidy to a business is like a benefit to an individual, but the concept of "rights" in a subsidy is somewhat more attentuated. However, when the Postmaster General found the contents of Esquire Magazine to be objectionable, the Supreme Court made a strong stand for protection of the second class mail subsidy against arbitrary withdrawal.

Use of public resources. Although it is frequently stated that there are no property rights in public resources, the courts have af-

forded a measure of protection. They have given the holder of a grazing permit the right to prevent interference by others. And the California Supreme Court has held that the use of a public school auditorium cannot be denied to a group because it refuses to sign a loyalty oath.

Contracts. Government contracts might seem the best possible example of a type of valuable which no one has any right to receive, and which represents only the government's managerial function. But even here, at least one court has said that "while they do not have a right to contract with the United States on their own terms, appellants do have a right not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects." The District of Columbia Court of Appeals held that sellers of petroleum stated a valid cause of action when they charged that the government was insisting without authority that it would purchase oil only from companies agreeing to abide by its "Voluntary Oil Import Program."

In all of the cases concerning individual rights in largess the exact nature of the government action which precipitates the controversy makes a great difference. A controversy over government largess may arise from such diverse situations as denial of the right to apply, denial of an application, attaching of conditions to a grant, modification of a grant already made, suspension or revocation of a grant, or some other sanction. In general, courts tend to afford the greatest measure of protection in revocation or suspension cases. The theory seems to be that here some sort of rights have "vested" which may not be taken away without proper procedure. On the other hand, an applicant for largess is thought to have less at stake, and is therefore entitled to less protection. The mere fact that a particular form of largess is protected in one context does not mean that it will be protected in all others.

While individual interests in largess have developed along the lines of procedural protection and restraint upon arbitrary official action, substantive rights to possess and use largess have remained very limited. In the first place, largess does not "vest" in a recipient; it almost always remains revocable. For example, veterans' disability benefits are by statute made subject to forfeiture by "any person shown by evidence satisfactory to the Administrator to be guilty of mutiny, treason, sabotage, or rendering assistance to any enemy of the United States or of its allies." Forfeiture may take place because the public interest demands it, despite the absence of any fault in the holder. In a recent case the Civil Aeronautics Board took the position that "the public interest" would be furthered by cancelling the certificate of the most successful of four competing air carriers in order to help the others, which needed government subsidies.

When the public interest demands that the government take

over "property," the Constitution requires that just compensation be paid to the owner. But when largess is revoked in the public interest, the holder ordinarily receives no compensation. For example, if a television station's license were revoked, not for bad behavior on the part of the operator, but in order to provide a channel in another locality, or to provide an outlet for educational television, the holder would not be compensated for its loss. This principle applies to largess of all types.

In addition to being revocable without compensation, most forms of largess are subject to considerable limitations on their use. Social Security cannot be sold or transferred. A television license can be transferred only with FCC permission. The possessor of a grazing permit has no right to change, improve, or destroy the landscape. And use of most largess is limited to specified purposes. Some welfare grants, for example, must be applied to support dependent children. On the other hand, holders of government wealth usually do have a power to exclude others, and to realize income.

The most significant limitation on use is more subtle. The holder of government largess is expected to some extent, to act as the agent of "the public interest" rather than solely as that of his own self-interest. The theory of broadcast licensing is that the channels belong to the public and should be used for the public's benefit, but that a variety of private operators are likely to perform this function more successfully than government; the holder of a radio or television license is therefore expected to broadcast in "the public interest." The opportunity for private profit is intended to serve as a lure to make private operators serve the public.

The "mix" of public and private, and the degree to which the possessor acts as the government's agent, varies from situation to situation. The government contractor is explicitly the agent of the government in what he does: in theory he could equally well be the manager of a government-owned factory. Only his right to profits and his control over how the job is done distinguish his private status. The taxi driver performs the public service of transportation (which the government might otherwise perform) subject to regulation but with more freedom than the contractor. The doctor serves the public with still greater freedom. The mother of a child entitled to public aid acts as the state's agent in supporting the child with the funds thus provided, but her freedom is even greater and the responsibility of her agency still less defined.

The result of all of this is a breaking down of distinctions between public and private and a resultant blurring or fusing of public and private. Many of the functions of government are performed by private persons; much private activity is carried on in a way that is no longer private.

B. LARGESS AND THE POWER OF GOVERNMENT

Affirmative powers. When government – national, state, or local – hands out something of value, whether a relief check or a television license, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish. This increase in power is furthered by an easy and wide-ranging concept of relevance. A government contractor finds that he must comply with wage-hour and child labor requirements. Television and radio licensees learn that their possible violation of the antitrust laws, or allegedly misleading statements to the FCC, are relevant to their right to a license. Doctors find they can lose their licenses for inflating bills that are used as a basis for claims against insurance companies in accident cases, and theaters are threatened with loss of licenses for engaging in illegal ticket practices. The New York State Board of Regents includes in its definition of "unprofessional conduct" by doctors, dentists, and other licensed professions any discrimination against patients or clients on the basis of race, color or creed. California has used its power over the privilege of selling alcoholic beverages in order to compel licensed establishments to cease discriminating.

One of the most significant regulatory by-products of government largess is power over the recipients' "moral character." Some random illustrations will suggest the meaning and application of this phrase. The District of Columbia denied a married man in his forties a permit to operate a taxi partly because, when he was a young man in his twenties, he and a woman had been discovered about to have sexual intercourse in his car. Men with criminal records have been denied licenses to work as longshoremen and chenangoes and prevented from holding union office for the same reason. A license to operate a rooming house may be refused on the basis of lack of good character. Sonny Liston was barred from receiving a license to box in New York because of his "bad character." Louisiana attempted to deny aid to dependent children if their mothers were of bad character.

Political activities are also regulated by use of largess power. The Hatch Act forbids federal employees to engage in political activities on pain of loss of their jobs; the act was also made applicable to state employees engaged in activities aided by the federal government. But political activities thought to be subversive or communistic have been the chief area of concern. One of the earliest illustrations is the Emergency Relief Appropriations Act, which sought to prevent any member of the Communist Party or Nazi Bund from getting work under the act. Another example is the effort – ultimately frustrated by the courts – to bar communists or subversives from occupying public housing. Membership in the Communist Party or subversive organizations has been considered relevant to the right to pursue

a number of important occupations and professions, including that of the lawyer, the radio-telegraph operator, and the port worker. Nor does the list stop at occupations. Ohio required a loyalty oath to receive unemployment compensation. For a time a loyalty oath was required under the National Defense Education Act. New York has provided for the mandatory revocation of the driver's license of any motorist convicted under the Smith Act of advocating the overthrow of the government.

The restrictions which derive from these expanded notions of relevance are enforceable not merely by withholding largess, but also by imposing sanctions. Along with largess goes the power to punish new crimes. Misuse of the gift becomes criminal, and hence new standards of lawful behavior are set: government can make it a crime to fail to spend welfare funds in such a manner as accords with the best interests of the children.

Government largess not only increases the legal basis for governmental power; it increases the political basis as well. When an individual or a business uses public money or enjoys a government privilege or occupies part of the public domain, it is easier to argue for a degree of regulation which might not be accepted if applied to businesses or individuals generally. Objections to regulation fade, whether in the minds of the general public or legal scholars, before the argument that government should make sure that its bounty is used in the public interest. Benefits, subsidies, and privileges are seen as "gifts" to be given on conditions, and thus the political and legal sources of government power merge into one.

The magnification of governmental power by administrative discretion. Broad as is the power derived from largess, it is magnified by many administrative factors when it is brought to bear on a recipient. First, the agency granting government largess generally is allowed a wide measure of discretion to interpret its own power. Second, the nature of administrative agencies, the functions they combine, and the sanctions they possess, give them additional power. Third, the circumstances in which the recipients find themselves sometimes makes them abettors, rather than resisters of the further growth of power.

The legislature generally delegates to an administrative agency its authority with respect to a given form of largess. In this very process of delegation there can be an enlargement of power. The courts allow the agencies a wide measure of discretion to make policy and to interpret legislative policy. Sometimes a legislature gives the agency several different, possibly conflicting policies, allowing it (perhaps unintentionally) to enforce now one and now another. There is little if any requirement of consistency or adherence to precedent, and the agency may, instead of promulgating rules of general application,

make and change its policies in the process of case-to-case adjudication. For example, New Jersey's Waterfront Commission has power "in its discretion" to deny the right to work to any longshoreman if he is a person "whose presence at the piers or other waterfront terminals in the Port of New York is found by the commission on the basis of the facts and evidence before it, to constitute a danger to the public peace or safety." The discretion of an agency is even broader, and even less reviewable, when the subject matter is highly technical.

Different agency powers can augment each other, as the story of New York's television Channel Thirteen illustrates. When Channel Thirteen was put up for sale, the Federal Communications Commission wanted the transferee to be an educational television station. But although the FCC has plenary power to dispense channels initially, Congress expressly denied it the authority to pass on the comparative merits of would-be transferees. In this case a non-educational organization was the highest bidder, and would have been the purchaser if the seller followed its natural self-interest. But the FCC can cause costly, indefinite delay by commencing a general investigation. Here it used this power as a threat. The seller was given reason to fear that a time-consuming, expensive investigation would be commenced unless it sold to the lowest bidder, and educational group. Pressed by circumstances, the seller bowed. The FCC thus exercised a power denied it by Congress.

Most dispensing agencies possess the power of delay. They also possess the power of investigation and harassment; they can initiate inquiries which will prove expensive and embarrassing to an applicant. Surveillance alone can make a recipient of largess uncomfortable. And agencies have so many criteria to use, so many available grounds of decision, and so much discretion, that they, like the FCC, can usually find other grounds to accomplish what they cannot do directly. This is a temptation to the honest but zealous administrator, and an invitation to the official who is less than scrupulous. In addition, the broader the regulation, the greater the chance that everyone violates the law in some way, and the greater the opportunitis for punishment or forgiveness. But even if a dispensing agency is self-restrained and scrupulous beyond the requirements of statutes, the function of dispensing will make its power grow. For the dispensing of largess is a continuing process. The threat of an unfavorable attitude in the future should be sufficient persuasion for today.

The recipients of largess themselves add to the powers of government by their uncertainty over their rights, and their efforts to please. Unsure of their ground, they are often unwilling to contest a decision. The penalties for being wrong, in terms of possible future loss of largess, are very severe. Instead of contesting, recipients are likely to be overzealous in their acceptance of government authority

so that a government contractor may be so anxious to root out "disloyal" employees that he dismisses men who could probably be retained consistently with government policy. Likewise a "think institute" existing primarily on government contracts, may be more eager to "think" along accepted lines because it has its next month's bills to "think" about.

This penumbral government power is, indeed, likely to be greater than the sum of the granted powers. Seeking to stay on the safe side of an uncertain, often unknowable line, people dependent on largess are likely to eschew any activities that might incur official displeasure. Beneficiaries of government bounty fear to offend, lest ways and means be found, in the obscure corners of discretion, to deny these favors in the future.

C. LARGESS AND PROCEDURAL SAFEGUARDS

The procedural law of government largess is as distinctive as the substantive. In addition to the general law governing the grant and revocation of largess, there are special aspects of unusual interest: the power to conduct trials of persons for alleged violations of law, and the authority to apply sanctions and punishments.

Procedures: in general. The granting, regulation, and revocation of government largess is carried on by procedures which, in varying degrees, represent short-cuts that tend to augment the power of the grantor at the expense of the recipient. In the first place, the tribunal is likely to be an arm of the granting agency rather than an independent and impartial body. For example, when disputes arise over government contracts, the tribunal may turn out to be the government contracting officer, himself a party to the dispute, followed by a series of contract appeals boards likewise composed of government contracting officials. More commonly the initial tribunal is a hearing officer, but the final decision is by the dispensing agency itself.

These tribunals lack not only independence; they may also be unable to provide necessary safeguards as well. Sometimes decisions are based upon evidence not in the record, or upon evidence which the recipient has no opportunity to test by cross-examination, or upon "expert" opinions which are virtually immune to adversary procedures familiar to the courtroom. The agency's own "expertise" may also be a factor of importance in the decision. Sometimes there is no hearing at all; for example, the SEC has been upheld in suspending, without a hearing, a broker-dealer license for alleged violations. Drivers licenses are also sometimes suspended without a hearing.

Decisions concerning government largess are not always subject to effective review in the courts. An application for a savings and loan charter can be granted or denied without judicial review. The matter rests in the "vast discretion" of a federal board. A local agri-

cultural committee, exercising authority under the federal soil bank subsidy program, has virtually unreviewable authority to find a farmer in violation of the rules of the program, making him subject to statutory forfeitures. At present there is a trend toward more judicial review; but the important question is, What kind of review? Review limited to constitutional or jurisdictional questions may prove inadequate to curb possible agency abuses.

Trials. Among the matters which may be relevant to the granting or revocation of government largess are various types of law violations, civil and criminal in nature. Violations of law are normally determined by courts. But in dispensing largess, government has not always been willing to rely on courts to determine whether laws have been violated. In an increasing number of cases it has undertaken to make such determinations independently. And thereby it has exercised an extraordinary procedural power – the power to try law violations in the executive branch, without benefit of judge or jury. It is true that there "trials" cannot result in imposition of criminal sanctions. But the ability to conduct trials and adjudications is of great significance in itself, and the denial of benefits which may follow approximates a sanction.

One of the most important federal trial-conducting agencies is the Securities and Exchange Commission, which dispenses broker-dealer licenses and other privileges of great value. The SEC revokes licenses for violations of the Securities Act – violations which it determines for itself. Like power is exercised by other federal agencies. Such cases have at least the virtue of relating to matters within the special expertise of the agency. But the power to "try" also extends to matters that are more within the special competence of courts than of the agency conducting the "trial." This is clearly the case with the FCC, which disclaims any expertise in the area of the antitrust laws, but insists that it can make findings on monopolistic practices without the aid of a court, and deny licenses on the basis of such findings.

Administrative "trials" are not even limited to conduct that might violate some law. Agencies can deny government largess for "bad" conduct which is lawful. This often happens when a license is denied because of "bad character." Many largess-dispensing agencies are concerned with character – from the SEC to state boxing commissions. The entire federal loyalty-security program for public employees involves trials of character. Here the "gift" of a public job has been the justification for a process by which the agencies try not an offense but the whole of a man, his strengths and weaknesses, his moments of honor and of temptation.

Perhaps the greatest extreme reached by agency trial power is illustrated by motor vehicle bureaus, which sometimes find motorists

"guilty" after courts have found them innocent. In New Jersey the Director of the Division of Motor Vehicles may suspend a driver's license (a) where the individual has been acquitted of the charge by a court or (b) where the individual has been convicted and punished, but the additional punishment of license suspension was expressly withheld by the sentencing court.

New and unusual punishments. Administering largess carries with it not only the power to conduct trials, but also the power to inflict many sorts of sanctions not classified as criminal punishments. The most obvious penalty is simply denial or deprivation of some form of wealth or privilege that the agency dispenses. How badly this punishment hurts depends on how essential the benefit is to the individual or business affected. The loss of some privileges or subsidies may be quite trivial. But for the government contractor placed on a blacklist the consequences may be financial ruin if the government is one of its major customers. The television station which loses its license is out of business. So is the doctor who loses his medical license.

Although the denial of benefits is consistently held not to be penal in nature, it is perfectly clear that on occasion the government uses this power as a sanction. The FCC has denied a radio or television license as a sanction for the applicant's misrepresentations to the Commission. Government contractors who are guilty of undesirable conduct may be officially "debarred" from contracting for a specified term of years.

Denial of benefits by no means exhausts the list of sanctions available to government. Severe harm can be inflicted by adverse publicity resulting from investigations, findings of violation, blacklisting, or forfeitures for cause. A striking instance is the SEC practice, upheld by the courts, of placing alleged violators of certain of its regulations on a public blacklist. Forfeitures are imposed under agricultural stabilization programs. The mere pendency of proceedings may be harmful, especially if accompanied by costly and harassing investigation and interminable delay.

III. The Public Interest State

What are the consequences of the rise of government largess and its attendant legal system? What is the impact on the recipient, on constitutional guaranties of liberty, on the structure of power in the nation? It is important to try to picture the society that is emerging, and to seek its underlying philosophy. The dominant theme, as we have seen, is "the public interest," and out of it there grows the "public interest state."

A. THE EROSION OF INDEPENDENCE

The recipient of largess, whether an organization or an individual, feels the government's power. The company that is heavily subsi-

dized or dependent on government contracts is subjected to an added amount of regulation and inspection, sometimes to the point of having resident government officials in its plant. Perhaps the most elaborate and onerous regulation of businesses with government contracts is the industrial security system, which places all employees in defense industries under government scrutiny, and subjects all of them, even high executives, to dismissal if they fail to win government approval.

Universities also feel the power of government largess. Research and development grants to universities tend to influence the direction of university activities, and in addition inhibit the university from pursuing activities it might otherwise undertake.

Individuals are also subject to great pressures. Dr. Edward K. Barsky, a New York physician and surgeon since 1919, was for a time chairman of the joint Anti-Fascist Refugee Committee. In 1946 he was summoned before the House Committee on Un-American Activities. In the course of his examination he refused, on constitutional grounds, to produce records of the organization's contributions and expenditures. For this refusal he served six months in jail for contempt of Congress. Thereafter the New York State Education Department filed a complaint against him, under a provision of law making any doctor convicted of a crime subject to discipline. Although there was no evidence in any way touching Dr. Barsky's activities as a physician, the Department's Medical Grievance Committee suspended his medical license for six months. The New York Courts upheld the suspension. On appeal, the suspension was upheld by the United States Supreme Court.

If the businessman, the teacher, and the professional man find themselves subject to the power of government largess, the man on public assistance is even more dependent. Welfare officials, often with the best of motivations, impose conditions intended to better a client, which sometimes are a deep invasion of his freedom of action. In a memorable case in New York, an old man was denied welfare because he insisted on living under unsanitary conditions, sleeping in a barn in a pile of rags. The court's opinion expresses a characteristic philosophy: "Appellant also argues that he has a right to live as he pleases while being supported by public charity. One would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense."

To envision how sweeping the powers derived from government largess can become, one may turn to New York City, where the Commissioner of Licenses holds sway over a long list of gainful employments. With broad discretion, he dispenses and revokes licenses for exhibitions and performances, billiard and pool tables, bowling alleys, miniature golf, sidewalk cafes and stands, sightseeing guides, street

musicians, public carts, expressmen, porters, junk dealers, second-hand dealers, pawnbrokers, auctioneers, laundries, wardrobe concessionaires, locksmiths, masseurs, bargain sales, bathhouse keepers, rooming houses, barbers, garages, refuse removal, cabarets, coffee houses, and cannon firing. The license commissioner has used his broad powers to deny licenses to many persons on the basis of "bad character." For example, an application for a junk-cart license was denied because the applicant had been charged with several crimes, even though the most recent charge had occurred over sixteen years before, and all of the charges had been dismissed. A parking lot license was denied to an applicant for failure to disclose arrests for bookmaking which had occurred some twelve years previously. Whatever the merits of individual denials, the commissioner seems to have no standards to guide him. Nor has the commissioner limited himself to denials for bad character. He has used his power of revocation to regulate his licensees in many ways. One incumbent warned motion picture houses that their licenses would be revoked if they did not clean up sidewalk displays of "lurid and flamboyant" advertising, saying that such advertising was "a blight over the important area of our city," and declaring, "If I have to close half the theaters in the Times Square area to abate this nuisance, I am ready to do so." Many other incidents might be cited. Again, the point is the absence of standards; broad discretion to deny or revoke licenses "for cause" allows a commissioner to do his own legislating and inflict his own punishments.

Vast discretion tends to corrupt. The New York State Liquor Authority, having the power to grant valuable liquor licenses to a favored few, having inadequately objective standards by which to make the choice, and operating in secret, fell into a pattern of corruption in which it would dispense its favors only in return for bribes and pay-offs, refusing to grant privileges to those who were too honest, too ignorant, or too poor to play its game. Thus a dispensing agency of government became little better than a shakedown racket.

The pressures on the individual are greatly increased by the interrelatedness of society and the pervasiveness of regulation. The individual with a black mark against him, merited or unmerited, finds that it dogs him everywhere, from locality to locality, and from one kind of work to another. Even a mountain guide in the West must now be a "person of good moral character" in order to be licensed. And licensing control can reach the point achieved by New York, where all entertainers and cabaret employees must be fingerprinted. Caught in the vast network, the individual has no hiding place.

B. PRESSURES AGAINST THE BILL OF RIGHTS

The chief legal bulwark of the individual against oppressive government power is the Bill of Rights. But government largess may impair the individual's enjoyment of those rights.

The Appellate Division of the Supreme Court of New York instituted an inquiry into improper solicitation and handling of contingent retainers in personal injury cases in Brooklyn. (Solicitation of legal business is a crime in New York.) In the course of the inquiry Albert Martin Cohen, an attorney for thirty-nine years, was called to testify. In reply to approximately sixty questions, he pleaded his privilege against self-incrimination, guaranteed by the state constitution. The unanswered questions related to such matters as his records in contingent retainer cases, the activities of his associates, and whether he had paid others for referring cases to him. After warnings, disciplinary proceedings were instituted against Cohen for refusing to cooperate with the inquest, and he was disbarred by the Appellate Division. On review, the United States Court upheld the disbarment. Thus it appears that a lawyer may lose his profession if he exercises his constitutional privilege, or may have to relinquish his privilege in order to keep his profession.

Pressures are also applied against the protection of the fourth amendment. In the case of many public assistance programs, a power to make unannounced searches of recipients' premises is asserted by administrators. Since persons receiving public assistance fear the loss of their subsistence, they are unlikely to be able to assert their fourth amendment rights.

Largess also brings pressure against first amendment rights. The Pacifica Foundation was for a long period in danger of losing its three radio licenses because of "controversial" broadcasts, including "extreme" political views. For an extended period the FCC delayed action on the Foundation's application for renewals. Then the FCC demanded that the Foundation's directors, officers, and managers give answers disclosing whether they were or had been members of the Communist Party or of any groups advocating or teaching the overthrow of government by force. The Foundation refused to answer. Eventually the FCC renewed the licenses.

It takes a brave man to stand firm against the power that can be exerted through government largess. This is nowhere better shown than by the case of George Anastaplo. In the fall of 1950, Anastaplo passed the Illinois bar examination, and applied for approval to the Committee on Character and Fitness, which in Illinois has the duty "to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship." Anastaplo came from a small town in Illinois, served honorably in the Air Force during World War II, and graduated from the University of Chicago. In his written application, Anastaplo was asked to state his understanding of American constitutional principles. After mentioning such fundamentals as the separation of powers, and protection of life, liberty, and the pursuit of happiness, Anastaplo added this sentence: "And,

of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or abolish it and thereupon to establish a new government." When Anastaplo appeared before a subcommittee of the Character Committee, the members showed great concern about the quoted sentence – despite the fact that it is taken almost word for word from the Declaration of Independence. Anastaplo was questioned in detail about his "views on revolution." In the course of that questioning one member asked him whether he was a member of any organization on the Attorney General's list, or of the Communist Party. Anastaplo refused to answer these questions on the ground that they were political questions which he was privileged not to answer under the first amendment. After further hearings during which Anastaplo stuck to his position, he was notified by the Committee that, solely because of his failure to reply, he had failed to prove such qualifications as to character and general fitness as would justify his admission to the bar of Illinois. The U. S. Supreme Court upheld the denial of admission, resting its decision on the refusal to answer the question concerning Party membership.

The foregoing cases suggest that the growth of largess has made it possible for government to "purchase" the abandonment of constitutional rights. And government, for a variety of reasons, has used this power in many circumstances.

C. FROM GOVERNMENTAL POWER TO PRIVATE POWER

The preceding description has pictured two fundamentally opposite forces: government versus the private sector of society. Emphasis on a sharp dichotomy highlights some of the relationships created by government largess. But to a considerable extent this picture distorts reality. First, the impact of governmental power falls unequally on different components of the private sector, so that some gain while others lose. Second, government largess often creates a partnership with some sectors of the private economy, which aids rather than limits the objectives of those private sectors. Third, the apparatus of governmental power may be utilized by private interests in their conflicts with other interests, and thus the tools of government become private rather than public instrumentalities.

Inequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favors some applicants and recipients over others. The administrative process is characterized by uncertainty, delay, and inordinate expense; to operate within it requires considerable know-how. All of these factors strongly favor larger, richer, more experienced companies or individuals over smaller ones. Only the most secure can weather delay or seemingly endless uncertainty. A company accused of misusing a license can engage counsel to fight the action without being

ruined by the expenses of the defense; an individual may find revocation proceedings are enough to send him to the poorhouse regardless of the outcome. And the large and the small are not always treated alike. For example, small firms which deal with the government are sometimes placed on a blacklist because of delinquencies in performance, thus losing out on all government contracts. But giant contractors who are guilty of similar delinquencies are apparently not subject to this drastic punishment. Similarly, regulation of taxicabs tends to be harder on the individual owner or driver, who may lose his driver's license, while little harm comes to the company controlling a fleet, which may lose drivers but not its precious franchises.

These inequalities modify somewhat the simple picture of a government-private dichotomy. But a second modification is required: government and the private sector (or a favored part of that sector) are often partners rather than opposing interests. The concept of partnership covers many quite different situations. Sometimes government largess serves to aid the private objectives of an industry, as when government supplies grazing land to stockmen, timber to the lumber industry, and scientific know-how to the private investors in Telstar. A second type of partnership exists where governmental actions protects the recipient of largess from adverse forces with which he would otherwise have to contend; the Atomic Energy Commission provides insurance against public liability due to negligence. Just as frequently, government largess offers protection against the disadvantages of competition. ICC motor carrier regulation provides partial monopolies for each trucker. CAB routes give partial monopolies to airlines. Professional or occupational licensing limits competion and adds a tone of respectability and reliability as well. Often the leaders in seeking regulation have been the persons affected, and not government or the general community; the professional and occupational groups want government protection just as the property owner wants zoning. Sometimes licensing is a particularly obvious cover for monopoly. An ordinance in Seattle limited to a handful the number of persons or firms who could be licensed to operate juke boxes in different establishments; this effectively restricted the business to a small but highly privileged group. The partnership of government and private parties may give further protection – not merely from the consequences of competition, but also from the legal consequences of eliminating competition. Some privilege-dispensing agencies can exempt their clients from the antitrust laws, and, like the Maritime Board, use this power in connection with the grant of franchises to make lawful all sorts of anticompetitive practices that otherwise would violate the Sherman Act.

Public-private partnerships attain their greatest significance when they are translated into power. Sometimes private elements are

able to take over the vast governmental powers deriving from largess, and use them for their own purposes. Thus, an exercise of governmental power may reflect the standards of the dominant group in an industry or occupation, and represent an effort to enforce these standards on others. The Isbrandtsen Company's troubles with government agencies reflect the difficulties of the rate-cutter. The organized bar's greater concern with "ambulance chasing" than with other ethical failings reflects the dominant group's suspicion of the negligence lawyer. The revocation of the license of a radio station in Kingstree, Georgia, for broadcasting "vulgar" jokes, contrasts sharply with the failure of the FCC to criticize vulgarity on the large television networks. Licensing creates a guild system, in which an industry or occupational group can police itself. By these means an oligarchy dominates, competition is suppressed, and minority behavior restrained.

In any society with powerful or dominant private groups, it is not unexpected that governmental systems of power will be utilized by private groups. Hence the frequency with which regulatory agencies are taken over by those they are supposed to regulate. Significantly, most of these agencies are also the chief federal dispensers of largess. They quarrel with the industries they regulate, but seen in a larger perspective these quarrels are all in the family. In sum, the great system of power created by governmental largess is a ready means to further some private groups, and not merely an advance in the position of government over that which is "private" in society as a whole.

D. THE NEW FEUDALISM

The characteristics of the public interest state are varied, but there is an underlying philosophy that unites them. This is the doctrine that the wealth that flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state. This philosophy is epitomized in the most important of all judicial decisions concerning government largess, the case of *Flemming v. Nestor.*

Ephram Nestor, an alien, came to this country in 1913, and after a long working life became eligible in 1955 for old-age benefits under the Social Security Act. From 1936 to 1955 Nestor and his employers had contributed payments to the government which went into a special old-age and survivors' insurance trust fund. From 1933 to 1939 Nestor was a member of the Communist Party. Long after his membership ceased, Congress passed a law retroactively making such membership cause for deportation, and a second law, also retroactive, making such deportation for having been a member of the Party grounds for loss of retirement benefits. In 1956 Nestor was deported, leaving his wife here. Soon after his deportation, payment of benefits to Nestor's wife was terminated.

In a five to four decision, the Supreme Court held that cutting off Nestor's retirement insurance, although based on conduct completely lawful at the time, was not unconstitutional. Specifically, it was not a taking of property without due process of law; Nestor's benefits were not an "accrued property right." The Court recognized that each worker's benefits flow "from the contributions he made to the national economy while actively employed," but it held that his interest is "noncontractual" and "cannot be soundly analogized to that of the holder of an annuity." The Court further stated that, in any case where Congress "modified" social security rights, the Court should interfere only if the action is "utterly lacking in rational justification." This, the Court said, "is not the case here." As the Court saw it, it might be deemed reasonable for Congress to limit payments to those living in this country; moreover, the Court thought it would not have been "irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute."

The implications of *Flemming v. Nestor* are profound. No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual. Yet under the philosophy of Congress and the Court, a man or woman, after a lifetime of work, has no rights which may not be taken away to serve some public policy.

The philosophy of *Flemming v. Nestor* and similar cases, resembles the philosophy of feudal tenure. Wealth is not "owned," or "vested" in the holders. Instead, it is held conditionally, the conditions being ones which seek to ensure the fulfillment of obligations imposed by the state. Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state. And, it may be added, fealty to the state is often one of the essential conditions of modern tenure. In the many decisions taking away government largess for refusal to sign loyalty oaths, belonging to "subversive" organizations, or other similar grounds, there is more than a suggestion of the condition of fealty demanded in medieval times.

The comparison to the general outlines of the feudal system may best be seen by recapitulating some of the chief features of government largess. (1) Increasingly we turn over wealth and rights to government, which reallocates and redistributes them in the many

forms of largess; (2) there is a merging of public and private, in which lines or private ownership are blurred; (3) the administration of the system has given rise to special laws and special tribunals, outside the ordinary structure of government; (4) the right to possess and use government largess is bound up with the recipient's legal status; status is both the basis for receiving largess and a consequence of receiving it; hence the new wealth is not readily transferable; (5) individuals hold the wealth conditionally rather than absolutely; the conditions are usually obligation of loyalty to the government; the obligations may be changed or increased at the will of the state; (6) for breach of condition the wealth may be forfeited or escheated back to the government; (7) the sovereign power is shared with large private interests; (8) the object of the whole system is to enforce "the public interest" – the interest of the state or society or the lord paramount – by means of the distribution and use of wealth in such a way as to create and maintain dependence.

This feudal philosophy of largess and tenure may well be a characteristic of collective societies, regardless of their political systems. According to one scholar, national socialism regarded property as contingent upon duties owed the state. In Soviet Sussia, the trend reportedly has been somewhat similar, although starting from a different theoretical point.

The public interest state is not with us yet. But we are left with large questions. If the day comes when most private ownership is supplanted by government largess, how then will governmental power over individuals be contained? What will dependence do to the American character? What will happen to the Constitution, and particularly the Bill of Rights, if their limits may be bypassed by purchase, and if people lack an independent base from which to assert their individuality and claim their rights? Without the security of the person which individual wealth provides and which largess fails to provide, what, indeed, will we become?

IV. Property and the Public Interest: An Old Debate Revisited

The public interest state, as visualized above, represents in one sense the triumph of society over private property. This triumph is the end point of a great and necessary movement for reform. But somehow the result is different from what the reformers wanted. Somehow the idealistic concept of the public interest has summoned up a doctrine monstrous and oppressive. It is time to take another lok at private property, and at the "public interest" philosophy that dominates its modern substitute, the largess of government.

A. PROPERTY AND LIBERTY

Property is a legal institution, the essence of which is the creation and protection of certain private rights in wealth of any kind. The

institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle the owner has a greater degree of freedom than from without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference – it is as if property shifted the burden of proof.

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and "antisocial" activities are given the protection of law; the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.

Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to cerate it, in order to have the kind of society we wish. The majority cannot be expected, on specific issues, to yield its power to a minority. Only if the minority's will is established as a general principle can it keep majority at bay in a given instance. Like the Bill of Rights, property represents a general, long-range protection of individual and private interests, created by the majority for the ultimate good of all.

Today, however, it is widely thought that property and liberty are separable things; that there may, in fact, be conflicts between "property rights" and "personal rights." Why has this view been accepted? The explanation is found at least partly in the transformations which have taken place in property.

During the industrial revolution, when property was liberated from feudal restraints, philosophers hailed property as the basis of liberty, and argued that it must be free from the demands of government or society. But as private property grew, so did abuses resulting from its use. In a crowded world, a man's use of his property increasingly affected his neighbor, and one man's exercise of a right might seriously impair the rights of others. Property became power over others; the farm landowner, the city landlord, and the workingman's boss were able to oppress their tenants or employees. Great aggregations of property resulted in private control of entire indus-

tries and basic services capable of affecting a whole area or even a nation. At the same time, much private property lost its individuality and in effect became socialized. Multiple ownership of corporations helped to separate personality from property, and property from power. When the corporations began to stop competing, and to merge, agree, and make mutual plans, they became private governments. Finally, they sought the aid and partnership of the state, and thus by their own volition became part of public government.

These changes led to a movement for reform, which sought to limit arbitrary private power and protect the common man. Property rights were considered more the enemy than the friend of liberty. The reformers argued that property must be separated from personality. During the first half of the twentieth century, the reformers enacted into law their conviction that private power was a chief enemy of society and of individual liberty. Property was subjected to "reasonable" limitations in the interests of society. The regulatory agencies, federal and state, were born of the reform. In sustaining these major inroads on private property, the Supreme Court rejected the older idea that property and liberty were one, and wrote a series of classic opinions upholding the power of the people to regulate and limit private rights.

The struggle between abuse and reform made it easy to forget the basic importance of individual private property. The defense of private property was almost entirely a defense of its abuses – an attempt to defend not individual property but arbitrary private power over other human beings. Since this defense was cloaked in a defense of private property, it was natural for the reformers to attack too broadly. Walter Lippmann saw this in 1934: "But the issue between the giant corporation and the public should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the economic security of private property."

The reform took away some of the power of the corporations and transferred it to government. In this transfer there was much good, for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on to government. And government carried further the powers formerly exercised by the corporation. Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out grattuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

From the individual's point of view, it is not any particular kind

of power, but all kinds of power that are to be feared. This is the lesson of the public interest state. The mere fact that power is derived from the majority does not necessarily make it less oppressive. Liberty is more than the right to do what the majority wants, or to do what is "reasonable". Liberty is the right to defy the majority, and to do what is unreasonable. The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.

B. LARGESS AND THE PUBLIC INTEREST

The fact that the reforms of the past decades tended to make much private wealth subject to "the public interest" has great significance, but it does not adequately explain the dependent position of the individual and the weakening of civil liberties in the public interest state. The reformers intended to enhance the values of democracy and liberty; their basic concern was the preservation of a free society. But after they established the primacy of "the public interest", what meaning was given to that phrase? In particular, what value does it embody as it has been employed to regulate government largess?

Reduced to simplest terms, "the public interest" has usually meant this: government largess may be denied or taken away if this will serve some legitimate public policy. Most of the objectives aimed at are laudable, and all are within the power of government. The great difficulty is that they are simplistic. Concentration on a single policy or value obscures other values that may be at stake. Some of these competing values are other public policies; for example, the policy of the best possible television service to the public may compete with observance of the antitrust laws. The legislature is the natural arbiter of such conflicts. But the conflicts may also be more fundamental. In the regulation of government largess, achievement of specific policy goals may undermine the independence of the individual. Where such conflicts exist, a simplistic notion of the public interest may unwittingly destroy some values.

Judges tend to limit their sights to a single issue. *Barsky v. Board of Regents* shows how one-sided the public interest concept may become. The Supreme Court, upholding the suspension of Dr. Barsky's license (for contempt of Congress), identified the public interest as the state's "broad power to establish and enforce standards of conduct relative to the health of everyone there," and the "state's legitimate concern for maintaining high standards of professional conduct." But what about the importance of giving doctors security in their professions? What about the benefits to the state from having physicians who are independent of administrative control? Not only were these ignored by the state and the court; no effort was even made to show how the suspension promoted the one public policy that was named

(high professional standards for those concerned with public health). As Justice Frankfurter said, "It is one thing to recognize the freedom which the constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession."

In this case, as in others affecting various kinds of licenses, the courts did not attempt to assign any weight to the value of unfettered exercise of constitutional rights. Nor did the courts consider what effect their decisions might have on the constitutional rights of motorists, radio operators, businessmen or lawyers generally. Each case was treated as if it existed in isolation – as if each individual's case concerned him alone. This fundamental fallacy – treating the "individual interest" as affecting only the party to the case – runs through many of the public interest decisions concerning largess.

It is not the reformers who must bear the blame for the harmful consequences of the public interest state, but those who are responsible for giving "the public interest" its present meaning. If "the public interest" distorts the reformers' high purposes, this is so because the concept has been so gravely misstated. Government largess, like all wealth, must necessarily be regulated in the public interest. But regulation must take account of the dangers of dependence, and the need for a property base for civil liberties. Rightly conceived, the public interest is no justification for the erosion of freedom that has resulted from the present system of government largess.

V. Toward Individual Stakes in the Commonwealth.

Ahead there stretches – to the farthest horizon – the joyless landscape of the public interest state. The life it promises will be comfortable and comforting. It will be well planned – with suitable areas for work and play. But there will be no precincts sacred to the spirit of individual man.

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would rule, not in the public interest, but in their own interest. If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do.

In these efforts government largess must play a major role. As we move toward a welfare state, largess will be an ever more impor-

tant form of wealth. And largess is a vital link in the relationship between the government and private sides of society. It is necessary, then, that largess begin to do the work of property.

The chief obstacle to the creation of private rights in largess has been the fact that it is originally public property, comes from the state, and may be withheld completely. But this need not be an obstacle. Traditional property also comes from the state, and in much the same way. Land, for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group. Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts. Many other natural resources – water, minerals and timber – passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws "give" the property to one who performs certain actions. Even the man who catches a wild animal "owns" the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.

Like largess, real and personal property were also originally dispensed on conditions, and were subject to forfeiture if the conditions failed. The conditions in the sovereign grants, such as colonization, were generally made explicit, and so was the forfeiture resulting from failure to fulfill them. In the case of the Preemption and Homestead Acts, there were also specific conditions. Even now land is subject to forfeiture for neglect; if it is unused it may be deemed abandoned to the state or forfeited to an adverse possessor. In a very similar way, personal property may be forfeited by abandonment or loss.

If all property is government largess, why is it not regulated to the same degree as present-day largess? Regulation of property has been limited, not because society has no interest in property, but because it was in the interest of society that property be free. Once property is seen not as a natural right but as a construction designed to serve certain functions, then its origin ceases to be decisive in determining how much regulation should be imposed. The conditions that can be attached to receipt, ownership, and use depend not on where property came from, but on what job it should be expected to perform. Thus in the case of government largess, nothing turns on the fact that it originated in government. The real issue is how it functions and how it should function.

To create an institution, or to make an existing institution function in a new way, is an undertaking far too ambitious for the present

article. But it is possible to begin a search for guiding principles. Such principles must grow out of what we know about how government largess has functioned up to the present time. And while principles must remain at the level of generality, it should be kept in mind that not every principle is equally applicable to all forms of largess. Our primary focus must be those forms of largess which chiefly control the rights and status of the individual.

A. CONSTITUTIONAL LIMITS

The most clearly defined problem posed by government largess is the way it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must have no power to "buy up" rights guaranteed by the Constitution. It should not be able to impose any condition on largess that would be invalid if imposed on something other than a "gratuity." Thus, for example, government should not be able to deny largess because of invocation of the privilege against self-incrimination.

This principle is in a sense a revival of the old but neglected rule against unconstitutional conditions, as enunciated by the Supreme Court twenty-five years ago: "Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal constitution." The courts in recent times have gone part of the distance toward this principle. In 1958 the Supreme Court held that California could not use the gratuity theory to deny a tax exemption to persons engaged in certain political activities: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is that same as if the state were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or a 'bounty,' its denial may not infringe speech." In 1963 the Court followed this reasoning in the important case of *Sherbert v. Verner.* South Carolina provided unemployment compensation, but required recipients to accept suitable employment when it became available, or lose their benefits. An unemployed woman was offered a job requiring her to work Saturdays, but she refused it because she was a Seventh Day Adventist, for whom Saturdays is the Sabbath – a day when work is forbidden. The state thereafter refused to pay her any unemployment benefits. The Supreme Court reversed this action.

The problem becomes more complicated when a court attempts, as current doctrine seems to require, to "balance" the deterrence of a constitutional right against some opposing interest. In any balancing process, no weight should be given to the contention that what is at stake is a mere gratuity. It should be recognized that pressure against constitutional rights from denial of a "gratuity" may be as great or

greater than pressure from criminal punishment. And the concept of the public interest should be given a meaning broad enough to include general injury to independence and constitutional rights. It is not possible to consider detailed problems here. It is enough to say that government should gain no power, as against constitutional limitations, by reason of its role as a dispenser of wealth.

B. SUBSTANTIVE LIMITS

Beyond the limits deriving from the Constitution, what limits should be imposed on governmental power over largess? Such limits, whatever they may be, must be largely self-imposed and self-policed by legislatures; the Constitution sets only a bare minimum of limitations on legislative policy. The first type of limit should be on relevance. It has proven possible to argue that practically anything in the way of regulation is relevant to some legitimate legislative purpose. But this does not mean that it is desirable for legislatures to make such use of their powers. And courts sometimes manage, by statutory construction, to place limits on relevance. One example was the negative judicial reaction to attempts to ban "disloyal tenants" from government aided housing projects.

Besides relevance, a second importnt limit on substantive power might be concerned with discretion. To whatever extent possible, delegated power to make rules ought to be confined within ascertainable limits, and regulating agencies should not be assigned the task of enforcing conflicting policies. Also, agencies should be enjoined to use their powers only for those purposes for which they were designed. In a perhaps naive attempt to accomplish this, Senator Lausche introduced a bill to prohibit United States government contracting officers from using their contracting authority for purposes of duress. This bill in its own words, would prohibit officials from denying contracts, or the right to bid on contracts, with the intent of forcing the would-be contractor to perform or refrain from performing any act which such person had no legal obligation to perform or not perform. Although this bill might not be a very effective piece of legislation, it does suggest a desirable objective.

A final limit on substantive power, one that should be of growing importance, might be a principle that policymaking authority ought not to be delegated to essentially private organizations. The increasing practice of giving professional associations and occupational organizations authority in areas of government largess tends to make an individual subject to a guild of his fellows. A guild system, when attached to government largess, adds to the feudal characteristics of the system.

C. PROCEDURAL SAFEGUARDS

Because it is so hard to confine relevance and discretion, procedure offers a valuable means for restraining arbitrary action. This was

recognized in the strong procedural emphasis of the Bill of Rights, and it is being recognized in the increasingly procedural emphasis of administration law. The law of government largess has developed with little regard for procedure. Reversal of this trend is long overdue.

The grant, denial, revocation and administration of all types of government largess should be subject to scrupulous observance of fair procedures. Action should be open to hearing and contest, and based upon a record subject to judicial review. The denial of any form of privilege or benefit on the basis of undisclosed reasons should no longer be tolerated. Nor should the same person sit as legislator, prosecutor, judge and jury, combining all the functions of government in such a way as to make fairness virtually impossible. There is no justification for the survival of arbitrary methods where valuable rights are at stake. Even higher standards of procedural fairness should apply when Government action has all the effects of a penal sanction.

Even if no sanction is involved, the proceedings associated with government largess must not be used to undertake adjudications of facts that normally should be made by a court after a trial. Assuming it is relevant to the grant of a license or benefit to know whether an individual has been guilty of a crime or other violation of law, should violations be determined by the agency? The consequence is an adjudication of guilt without benefit of constitutional criminal proceedings with judge, jury, and the safeguards of the Bill of Rights. In our society it is impossible to "try" a violation of law for any purpose without "trying" the whole person of the alleged violator. The very adjudication is punishment, even if no consequences are attached. It may be added that an agency should not find "guilt" after a court has found innocence. The spirit, if not the letter, of the constituional ban against double jeopardy should prevent an agency from subjecting anyone to a second trial for the same offense.

D. FROM LARGESS TO RIGHT

The proposals discussed above, however salutary, are by themselves far from adequate to assure the status of individual man with respect to largess. The problems go deeper. First, the growth of government power based on the dispensing of wealth must be kept within bounds. Second, there must be a zone of privacy for each individual beyond which neither government nor private power can push – a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status – status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well denote destruction of the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality alone.

Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. Like property, such largess could be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation. As things now stand, violations lead to forfeitures -- outright confiscation of wealth and status. But there is surely no need for these drastic results. Confiscation, if used at all, should be the ultimate, not the most common and convenient penalty. The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.

The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in demands for goods, depressions, or wars. The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and of a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.

Conclusion

The highly organized, scientifically planned society of the future, governed for the good of its inhabitants, promises the best life that men have ever known. In place of the misery and injustice of the past there can be prosperity, leisure, knowledge, and rich opportunity open to all. In the rush of accomplishment, however, not all values receive equal attention; some are temporarily forgotten while others are pushed ahead. We have made provision for nearly everything, but we have made no adequate provision for individual man.

This article is an attempt to offer perspective on the transformation of society as it bears on the economic basis of individualism. The effort has been to show relationships; to bring together drivers' licenses, unemployment insurance, membership in the bar, permits for using school auditoriums, and second class mailing privileges, in order to see what we are becoming.

Government largess is only one small corner of a far vaster prob-

lem. There are many other new forms of wealth: franchises in private businesses, equities in corporations, the right to receive privately furnished utilities and services, status in private organizations. These too may need added safeguards in the future. Similarly, there are many sources of expanded governmental power aside from largess. By themselves, proposals concerning government largess would be far from accomplishing any fundamental reforms. But, somehow, we must begin.

At the very least, it is time to reconsider the theories under which new forms of wealth are regulated, and by which governmental power over them is measured. It is time to recognize that "the public interest" is all too often a reassuring platitude that covers up sharp clashes of conflicting values, and hides fundamental choices. It is time to see that the "privilege" or "gratuity" concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public.

Above all, the time has come for us to remember what the framers of the Constitution knew so well – that "a power over a man's subsistence amounts to a power over his will." If the individual is to survive in a collective society, he must have protection against its ruthless pressures. The challenge of the future will be to construct, for the society that is coming, the appropirate institutions and laws. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today – a Homestead Act for rootless twentieth-century man. We must create a new property.