Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain

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The popular press is currently filled with articles in which words like "block grant," "entitlement," "federalism," and "devolution" figure prominently.[1] The general plot line of these stories goes something like this: For many years the federal government has created more and more entitlements programs. Some of these programs are "cooperative" arrangements with the states, e.g., AFDC and Medicaid, but they are not very cooperative. Indeed, the general image[2] of an entitlement program seems to be of a federal statute that imposes detailed and rigid standards of beneficiary eligibility in return for

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1. For a small sample of current popular press articles on the subject, see *Blockheads*, NEW REPUBLIC, Mar. 20, 1995, at 7; Michael Kinsley, *The Ultimate Block Grant*, NEW YORKER, May 29, 1995, at 36; Paul Niquette, *Let's See If I've Got the Idea Behind These Block Grants Straight . . .*, IDAHO STATESMAN, Feb. 21, 1996, at 6A; Sam Howe Verhovek, *Welfare in Transition: The National Picture*, N.Y. TIMES, Sept. 21, 1995, at A1; David Whitman & Penny Loeb, *Let 50 Flowers Boom: Turning Welfare Over to the States May Not Fix the Welfare Mess*, U.S. NEWS & WORLD REP., Mar. 27, 1995, at 22.

2. Image and reality are two different things. Many entitlement programs are not cooperative programs between the state and federal government at all. *See infra* text accompanying note 11. Other entitlements set only "minimum standards" of eligibility, leaving the state with substantial discretion over eligibility above the minimum. *See, e.g.*, Medicaid, 42 U.S.C. § 1396a(10)(A) (1994). Still others allow the states largely to determine eligibility but mandate that those deemed eligible maintain certain legal rights and claims to benefits prescribed by the state. *See, e.g.*, Aid to Families with Dependent Children, 42 U.S.C. §§ 602, 603 (1994).

a federal contribution to state financing of transfers of cash, goods, or services. In the popular image, such programs empower beneficiaries and the central government at the expense of the states. Indeed, in more elaborate forms of this narrative the states are seen as powerless to change policies in programs that they substantially fund, not because the federal government is particularly good at enforcing programmatic requirements, but because the entitled beneficiaries can enforce full compliance in federal courts.[3]

To the extent that this story embraces a political history it usually connects the entitlements form to the New Deal or the Great Society. Categorical grants or entitlements are thus associated with Democratic Presidents and Democratic Congresses. Block grants often are associated with presidential initiatives in the Nixon or Reagan Administrations, and today with the Republican majority in the Congress.[4]

Partisan product differentiation aside, proponents suggest at least three major reasons for moving from categorical entitlements to block grant funding. The first is a normative political claim about devolution of power. The block grant technique moves governmental power "closer to the people" and is presumptively, therefore, more accountable and democratic than is "cooperative federalism" in the entitlement mode. Second, block granting promotes flexibility and rationality in program design. Multiple, narrowly-targeted, categorical programs in a general policy domain inevitably produce gaps and overlaps. Both beneficiaries and state and local administrators complain that existing arrangements disable ground-level administrators from meeting the real needs of beneficiary populations. By providing greater flexibility block grants presumably would permit more "rational" allocations of funds.

Finally, some emphasize the way in which block grants can increase fiscal prudence.[5] To the extent that block grants cap the level of federal expendi-

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3. On the subject of the importance of the federal courts in the entitlement regime, see R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS (1994).

4. Major categorical entitlement programs begun under Democratic regimes include Medicaid, 42 U.S.C. § 1396 (1994), Medicare, 42 U.S.C. § 1395 (1994), Aid to Families with Dependent Children, 42 U.S.C. § 601 (1994), Old Age and Survivors and Disability Insurance, 42 U.S.C. § 401 (1994), and Unemployment Insurance, 42 U.S.C. § 501 (1994). Major block grant programs initiated under Republican administrations include Community Development Block Grants, 42 U.S.C. § 5301 (1993), Community Services Block Grants 42 U.S.C. § 9901, Social Services Block Grants, 42 U.S.C. § 1397 (1994), Maternal and Child Health Block Grants, 42 U.S.C. § 701 (1994), Alcohol and Drug Abuse and Mental Health Block Grants, 42 U.S.C. § 290cc-21 to cc-35 (1994), Low Income Energy Assistance Block Grants, 42 U.S.C. § 8621 (1994), and Job Training and Partnership Act Block Grants, 29 U.S.C. § 1501 (1994).

However, the partisan preferences are not absolute. Supplemental Security Income, 42 U.S.C. § 901 (1994) (a categorical entitlement), was begun during the Nixon administration, and Crime Prevention Block Grants, 42 U.S.C.A. § 13757 (1995), were enacted during the Clinton administration.

5. Historically, the objectives of "block grants" have proven quite malleable. Writing in 1977, Stenberg and Walker listed them as "economy and efficiency, *program enlargement*, and policy and administrative decentralization." Carl W. Stenberg & David B. Walker, *The Block Grant: Lessons from Two Early Experiments*, PUBLIUS, Spring 1977, at 31, 34-36.

tures, they give Congress greater control over the level of central government financial commitments.[6] Entitlements are thought to entail open-ended commitments by the federal government, not subject to the usual forms of budgetary restraint. Moreover, categorical funding may promote state irresponsibility. If the federal government matches fifty percent of all state expenditures, for example, then states can decide to spend dollars while taxing themselves only fifty cents. States can thus "irresponsibly" choose expenditure levels and policies that they would not choose were they paying the full marginal cost.[7] Narrowly focused grant programs may also promote tight coalitions of providers, beneficiaries and funders that inhibit change and preserve or enhance funding levels by "capturing" the relevant administrative agencies and legislative committees.[8] Taken together these arguments make a prima facie case that the time has come to switch from categorical entitlements to block grants as the primary mechanism for inter-governmental cooperation.[9]

The purpose of this brief essay is to attempt to develop a clearer vision of the real stakes in the block grants versus entitlements controversy. Our argument is that there is both more and less here than meets the eye: more in the sense that block grant and entitlements programs each have more varied structures and more heterogeneous purposes than the current debate suggests; less in the sense that block grants and entitlements are not mutually exclusive categories. Not only can they be combined in the same program, but each can be designed in ways that pursue most of the purposes generally assigned to the other.

Discontinuing entitlements, thus, is not a necessary condition for achieving

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6. While such a funding system allows Congress to set the amount that it is to spend on a program each year (both overall and in each state), it does not guarantee that the amount spent will be less than would have been appropriated under an open-ended reimbursement system. In fact, in the welfare reform bill vetoed by President Clinton in 1995, H.R. 4, 104th Cong., 1st Sess. (1995), § 403, lump-sum appropriations to the states were to be based on the average amount paid to the states in fiscal years 1992, 1993, and 1994, years with unusually high federal payments due to the increased numbers of persons eligible for AFDC as a result of the recession.

However, because the payments are not adjusted for inflation, most observers predict that such a system would bring substantial savings to the federal government, in the five to seven year time frame as compared to the current law. Mark Greenberg, *AFDC Caseload Declines: Implications for Policy*, CENTER FOR LAW & SOCIAL POLICY, Oct. 2, 1995, *available in* HandsNet, http://hninfo@handsnet.org.

7. However, a matching grant is a "sensible way to correct for the presence of a positive externality." HARVEY ROSEN, PUBLIC FINANCE 539 (1995). In this manner, a state's unwillingness to pay the full marginal cost of a good may stem from the fact that the state is unable to capture the full benefit of the good. Thus, if state spending on a good produces benefits to entities outside the state (e.g., firms, citizens, governments), a matching grant may help bring state spending to the socially optimal level.

8. For the classic discussion of the "iron triangle" phenomena in politics, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

9. For a discussion of the politics surrounding block grants, see generally RICHARD NATHAN, THE PLOT THAT FAILED (1975); Timothy Conlan, *Back in Vogue: The Politics of Block Grant Legislation*, INTERGOVERNMENTAL PERSP., Spring 1981, at 8 [hereinafter Conlan, *Back in Vogue*]; Timothy Conlan, *The Politics of Federal Block Grants: From Nixon to Reagan*, 99 POL. SCI. Q. 247 (1984) [hereinafter Conlan, *The Politics of Federal Block Grants*].

any of the major goals attributed to block grants: devolution of authority, rationalization of programs, or fiscal prudence. Nor do block grants necessarily achieve those goals. In designing effective programs, we would do better to leave aside large and loose ideas like block grants versus entitlements and ask ourselves directly how best to structure the activities in question. Features conventionally assigned both to the block grant technique and to the entitlement technique often will be useful in improving the performance of our highly complex forms of cooperative federalism.

The discussion that follows makes this case in three ways. First, we try to clear up some definitional confusions relating to block grants and entitlements. Second, we discuss the problematic relationship between block grants and the goals of devolution, program rationality, and fiscal prudence. Finally, we illustrate ways in which block grant, categorical grant, and entitlement ideas can be mixed and matched in various policy structures.

I. DEFINITIONAL DIFFICULTIES

The Advisory Commission on Intergovernmental Relations (ACIR) has prescribed five distinctive traits for block grants:[10]

1. Federal aid is authorized for a wide range of activities within a broadly defined functional area;

2. Recipients have substantial discretion in identifying problems, designing programs to deal with them, and allocating resources;

3. Administrative, fiscal reporting, planning, and other federally imposed requirements are kept to the minimum amount necessary to ensure that national goals are being accomplished;

4. Federal aid is distributed on the basis of a statutory formula, which has the effect of narrowing federal administrators' discretion and providing a sense of fiscal certainty to recipients; and

5. Eligibility provisions are statutorily specified and favor general purpose government units as recipients and elected officials as decision-makers.

We should note at the outset that this definition is "aspirational." Most current proposals and historical examples of block grants violate one or more of these criteria.[11] This political reality will figure prominently in our later discussion

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10. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BLOCK GRANTS: A COMPARATIVE ANALYSIS 6 (1977).

11. For example, Stenberg notes that the ACIR's review of four major block grant programs during the 1970s, "indicated that block grants are not as well defined structurally or as stable politically as other instruments. They are neither widely understood nor widely accepted. . . . And they often rest upon unstated premises, unclear intentions, and untested assumptions." Carl W. Stenberg, *Block Grants: The Middlemen of the Federal Aid System*, INTERGOVERNMENTAL PERSP., Spring 1977, at 8. Stenberg goes on to note that even where there is a reasonable amount of consensus that a particular grant is a "block grant," deviations from the defining characteristics are common. For example, in writing about

of the pursuit of devolution, rationalization, and fiscal prudence via block granting. For now we need notice only that there is nothing in these five criteria that is directly inconsistent with entitlements. But to see this we must provide another definition.

By "statutory entitlement" we mean simply a legal right to some benefit that is available to all who meet the statutory eligibility criteria. Entitlements have no logical connection to federal-state cooperative programs. Indeed, from a fiscal perspective, most entitlements in American law have nothing to do with federal grants. Social Security pensions, Medicare, veterans' benefits, disability benefits, Old Age Assistance, housing vouchers, farm subsidies, the Earned Income Tax Credit, home mortgage interest deductions, and dozens of other federal entitlements involve no state financial participation. Similarly, state law creates entitlements to general assistance, Supplemental Security Income supplements, medical care, tax abatements, public education, and a host of other goods and services that are structured only marginally, if at all, by federal grant conditions. How then did "entitlements" come to be contrasted with "block grants" as defining the crucial choice about the generic form of federal-state cooperative programs?

The answer seems to be historical accident. The categorical grant-in-aid programs that states would now most like to reform—AFDC and Medic-aid—have two features that constrain state policymaking. First, they are targeted programs with a host of federal requirements and reporting routines. Second, because federal law requires that aid be provided to all eligible individuals, the beneficiaries may pursue their legal rights in federal court. The federal entitlements structure thus reinforces the programmatic constraints that

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the Law Enforcement Assistance Administration under the Safe Streets Block Grant Program, contrary to claims about "minimum administration," Stenberg notes that "total overhead expenditures may exceed those of previous categorical programs." *Id.* at 10. With regard to the "substantial discretion" offered in program design, Shapek notes that the Partnership for Health Act (passed in 1966), which "consolidated" nine existing programs, was subjected to increasing categorization through amendments, contained "set asides" which mandated specific expenditures, and was later surrounded by categorical programs which "logically should have been included" in the Act. RAYMOND SHAPEK, MANAGING FEDERALISM: THE EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM 84 (1981).

For a nice overview chart of the ways in which early block grants varied in terms of fiscal reporting, plan review, and monitoring, see Stenberg & Walker, *supra* note 5, at 35. Their article also examines two early block grants (Partnership for Health Act of 1966 and Safe Streets Act of 1968) on the criteria established by the ACIR for block grants. Notable deviations from the "ideal type" block grant existed for both grants. Peterson and others have noted that 90% of Community Services Block Grant Funds were required to be sent to existing Community Action Agencies which had previously received categorical funding, while mental health and substance abuse funds were to be split among pre-block shares, and maternal and child health dollars were to allocate a "reasonable proportion" to each of the various programs to be funded out of this grant. GEORGE E. PETERSON ET AL., THE REAGAN BLOCK GRANTS: WHAT HAVE WE LEARNED? 10 (1986).

The 1995 welfare reform proposal, H.R. 4, 104th Cong., 1st Sess. (1995), vetoed by President Clinton, contained a number of provisions that violated the spirit of block granting. Mandated time-restrictions on benefits, restrictions on teenage mothers receiving benefits, and restrictions on legal immigrants receiving benefits are hardly in the spirit of letting the states decide. *See* Rochelle L. Stanfield, *Holding the Bag*, NAT'L J., Sept. 9, 1995, at 2206.

limit state policy discretion. Indeed, the enforcement structure's focus on legal rights, rather than intergovernmental relations, arguably enhances and expands federal conditions in ways that further restrict state power.

The image of federal constraint has thus for many states become the image of federal court enforcement of federal requirements at the behest of program beneficiaries. Whether a state wants to change its mix of Medicaid services or attempt to limit provider charges, it confronts recalcitrant beneficiary and provider constituencies.[12] Because federal law arms these constituencies with a federal cause of action, they are in a powerful position to oppose innovations that some states feel are desperately needed. The solution many states now support is the elimination of entitlements by a move toward block grants.

But the script that is being written by complaining states may be focusing on the wrong villain. The real constraints on state power seem to be in the categorical nature and detailed criteria of the programs to which entitlements adhere. The true enemy of state discretion would seem to be narrow programmatic scope and multiple requirements, not the existence of a federal statutory entitlement.[13] Indeed one might suggest that the ACIR definition of a block grant makes a block grant a state entitlement in order to guarantee state discretion. In this sense federal entitlements and block grants are mutually reinforcing, not oppositional, categories.

We will return below to what might yet be at stake in the "entitlements-versus-block-grants" controversy. How entitlements are structured clearly does matter in assessing the balance of federal and state power in programs of cooperative federalism. For now we will rest with the observation that block grants and entitlements should be understood to occupy positions in two conceptually distinct, but historically related, domains.

Block grants fall somewhere between the most general and flexible form of federal support of state activities, general revenue sharing, and the most confined and targeted form of project by project support.[14] Block grants emphasize state discretion in comparison with more targeted categorical grants. But as we shall see, the differences are more of degree than of kind.[15] Many

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12. *See* Mary J. Mullany, *Third Circuit Review*, 37 VILL. L. REV. 1081 (1992); Michael D. Daneker, Note, *Medicaid, State Cost-Containment Measures, and Section 1983 Provider Actions Under* Wilder v. Virginia Hospital Association, 45 VAND. L. REV. 487 (1992), and cases cited therein.

13. Others have noted similar ideas in a slightly different context. Mann and Kogan write, "In any event, *the issue of flexibility is not necessarily linked to a particular financing design*—states can be granted authority to design program rules without turning the program into a block grant." Cindy Mann & Richard Kogan, *Comparing the Options for Achieving Federal Medicaid Savings*, CENTER ON BUDGET & POL'Y PRIORITIES, (1995), *available in* The Electronic Policy Network, http://epn.org/cbpp/cb-savi.html.

14. *See* ROSEN, *supra* note 7, at 539-45; SHAPEK, *supra* note 11, at 171-78; *see also* DEIL S. WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS 128-31 (1978) (providing general discussion on differing grant types).

15. For example, some categorical grants behave like block grants. As Walker noted, "Title I of the Elementary and Secondary Education Act clearly was intended by Congress to operate as a

categorical grants, for example, might satisfy at least the final three ACIR criteria for block grants.[16]

Grant Spectrum

State Discretion	General Revenue Sharing	Block Grants	Categorical Grants	Project Funding	Federal Control

By contrast, entitlements versus non-entitlements programs are distinguished in terms of beneficiaries' capacity to enforce their interest in the states' fulfillment of programmatic promises. Crudely put, the issue here is the degree to which statutory standards give administrators discretion to determine a beneficiary's access to cash, goods, or services and the extent to which those decisions are constrained by legal remedies. The degree of legal protection is thus a function of both the definitiveness of statutory or regulatory criteria and the level of legal protection afforded to defend the "rights" defined.[17]

Just as cooperative federalism programs can mix and match various elements of grant types, they also may deploy differing mixes of discretionary administration and well-defined entitlements. And while, historically, there is an association between categorical grants and strong entitlements, this association does not hold, for example, for project grants. Such grants virtually never create entitlements but they often leave states very little programmatic

formula-based categorical program. Yet, during its early years, it might as well have been a block grant, thanks to a combination of factors. These included the looseness of the statutory definition of 'educationally deprived children,' the Office of Education's reluctance to provide directions regarding appropriate educational programs for this target group, and the vertical links between and among educational professionals." David Walker, *Categorical Grants: Some Clarifications and Continuing Concerns*, INTERGOVERNMENTAL PERSP., Spring 1977, at 16. Similarly, programs which begin as block grants often have ended up looking more like categoricals, with health and crime control being "the two best examples of 'creeping categorization'." Stenberg, *supra* note 11, at 10.

16. For example, both statutory funding formulas and utilizing the states as primary actors are prescribed in existing AFDC, 42 U.S.C. § 602(a)(3), 603a (1994), and Medicaid, 42 U.S.C. § 1396a(5), 1397a(1) (1994), law. Whether the amount of administrative reporting is "minimal" to insure compliance with the federal goals of the program is a rather subjective criteria. State reporting requirements for AFDC can be found at 42 U.S.C. § 602, 608, and for Medicaid at 42 U.S.C. § 1396a(6).

17. For example, contrast court enforcement of beneficiaries' rights for two classes of recipients, Aid to Families with Dependent Children and public housing certificate recipients. While public housing recipients have been afforded some protection in federal courts, see Hill v. Richardson, 740 F. Supp. 1393 (S.D. Ind. 1990); Holly v. Housing Authority of New Orleans, 684 F. Supp. 1363 (E.D. La. 1988), the program does not contain a federal entitlement, and therefore local programs may vary greatly in their use of restrictions such as waiting lists, residency requirements, and differing preference rules for benefit receipt. In contrast, as Melnick describes, Aid to Families with Dependent Children recipients have been afforded legal protections through a number of federal court decisions. *See* MELNICK, *supra* note 3, at 83-111.

discretion.[18] Strong federal control does not necessarily rely upon strong beneficiary entitlements to secure federal interests.

A complete taxonomy of programmatic possibilities may be impossible. It would certainly be tedious. The point to be observed for now is that access to federal judicial remedies currently flows from a judgment about whether state law creates an entitlement and about whether a particular feature of state law is compelled by a federal grant condition. Any property interest or entitlement created by state law can be defended in federal court at least by subjecting state administration to the procedural due process requirements of the Fourteenth Amendment.[19]

If the right conferred by state law is necessary to satisfy a federal grant condition,[20] the adequacy of the state's compliance with that condition can be tested by a suit in federal (or state) court pursuant to 42 U.S.C. § 1983. This second feature of entitlements remedies is obviously a contingent aspect of federal statutory law. Congress is free to impose multitudinous and onerous requirements while making clear that it has no intention of creating federal rights that can be pursued via a § 1983 action. The 1996 proposals on Medicaid reform put forward by the National Governors' Association nicely illustrate how models and techniques can be blended to produce unique program configurations. Those proposals guarantee that most mandatorily eligible Medicaid populations will continue to receive virtually all currently required services. It therefore preserves existing primary beneficiary entitlements save in a few instances.

However, the proposals contain two dramatic entitlement changes. First, providers of services would cease to be protected by any federal pricing or "reimbursement" criteria.[21] While presumably state contract law would apply, the proposal explicitly denies providers any federal cause of action to enforce their rights against state programs (indeed, because there would be no federal rights, it is not obvious what could be enforced in federal courts in any event).

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18. Project grants rely much more heavily on federal bureaucracies to make decisions about recipient worthiness in securing federal interests. However, this discretion may be limited through statutes that mandate the awarding of grants through some formula framework (so-called "project–formula" grants) or by empowering state bureaucracies to make funding decisions based on statutory guidelines. This structure is often utilized for specific projects for which individual applications are required. Stenberg and Walker note that project grants are best suited for "stimulative purposes," that is, when the federal government is trying to encourage new activity in a given field. Stenberg & Walker, *supra* note 5, at 55.

19. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). *See generally* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

20. *Compare* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that section at issue did not create federal grant condition), *with* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (holding that section at issue did create federal grant condition).

21. Richard Kogan & Cindy Mann, *Medicaid Coverage Could Erode Dramatically Under Governor's Proposal*, CENTER ON BUDGET & POL'Y PRIORITIES, Feb. 8, 1996, *available in* Electronic Policy Network, http://epn.org/cbpp/cbngar.html.

Second, Medicaid beneficiaries would be protected by slightly altered guarantees enforceable only through state administrative and judicial entitlements.[22] Claims of denial of federal rights by state courts would remain appealable to the U.S. Supreme Court, though the possibility of review would be remote. Suits in federal court to ensure compliance would be limited to intergovernmental litigation, that is, enforcement efforts by HHS against state governments.

The first change contemplates a straightforward devolution of power to control costs. Freed from federal reimbursement criteria, backed by provider lawsuits in federal court, states believe that they can reduce spiraling Medicaid costs. This is a plausible claim and one rich in political irony. To defeat it providers will have to reverse their historic demand that the federal government avoid all regulation of the pricing of medical goods and services and seek to maintain federal protection from state cost-cutting.[23] The second change is more subtle, but potentially more important. It seeks to reverse the symbolism of Medicaid law as federal law and interrupt a dynamic of entitlements elaboration in federal court jurisprudence that has profoundly enhanced the importance and reach of federal requirements.[24]

The political importance of this shift can hardly be overstated. Issues of state compliance are consigned to the realms either of state judicial interpretation or of standard forms of legislative and administrative intergovernmental politics. The former is less likely to have the "ratchet effect" on rights that has been a characteristic of much federal entitlements jurisprudence.[25] The latter is toothless historically when states are prepared to draw clear lines in the sand.[26] If these predictions are correct, then beneficiaries would also lose very substantial political power in the development of state Medicaid policy. "See you in federal court" will no longer be available as an entry into state legislative or administrative policymaking.

The combined effects of disentitling providers and defederalizing beneficiary enforcement thus may produce substantial gains in state governmental power. Yet as we have just described the plausible effects of the governors' proposals, questions begin to emerge about exactly how these shifts promote

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22. David Nather, *Governors Drop Block Grant Approach, Discuss Coverage Guarantee at State Level*, DAILY REP. FOR EXECUTIVES, Jan. 26, 1996, at A17.

23. For a description of why providers seek state regulation, see Richard Briffault & Sherry Glied, Double Exit, Voice, and the Mismatch of Resources and Responsibility: The Implications of Federalism for Health Care Reform 26-28 (Apr. 25, 1995) (unpublished manuscript, on file with author).

24. On the subject of the importance of the federal courts in the entitlement regime, see MELNICK, *supra* note 3.

25. But see *id.* at 107 for examples of state court activism. *See also* Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367 (1988) (reviewing expansion of welfare benefits through federal and state court action from late 1960s to present).

26. Briffault & Glied, *supra* note 23, at 246; *see also* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 228-30 (1990).

devolution, program rationality, and fiscal prudence. Is centralizing enforcement power in HHS a devolutionary move? Does the potential for heterogeneous interpretation of common federal grant conditions in state courts promote program rationalization? Does complete loss of federal control over reimbursement levels ensure fiscal prudence? To seek answers to these sorts of questions we need to re-engage broader issues of the purposes and problems of block granting.

II. ASPIRATIONS AND EFFECTS: THE DEVOLUTION THESIS

The idea that block grants devolve power toward state governments should be considered from two perspectives: First, under what conditions is a real increase in state authority or discretion likely to take place? Second, assuming devolution is not an end in itself, how does devolution enhance some more fundamental value such as accountability or democratic governance?

Block grants meeting the criteria articulated by the ACIR seem designed to increase state control over both policy-making and administration. Nevertheless, the history of block grant provisions in the United States suggests that block grant programs will often fail to meet some or all of these conditions.[27] Even if they meet all of them, block grants may have a problematic relationship to devolution of political discretion from the central government to the states.

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27. In many ways, state discretion has been limited even within a block grant funding formula. Techniques which have been used include the auditing of the grantees' expenditures, requiring grantees to file plans for the use of the money, creation of "discretionary funds" for federal administrators to target development of a hybrid block-categorical grant which targets certain populations, or mandating public hearings on the use of the funds. Additional ways of limiting discretion include "pass through" requirements which specify that the grantee distribute the funds, or a portion of the funds, in certain prescribed proportions and "set-asides" that simply prioritize within a block grant.

For example, the Community Development Block Grant, 42 U.S.C. § 5301 (1988), generally championed as a success story by block grant advocates, specifies a planning procedure to be utilized, § 5304, set-asides for particular uses, § 5307, restrictions on the use of funds, § 5305, performance evaluations on the use of funds, § 5304(e), requirements for citizen participation in the allocation of funds, § 5304(a)(2),(3), and auditing procedures, § 5304(f). Thus, it is hardly accurate to think of the states (or localities) being completely "free" within a particular policy area to spend in anyway they see fit. Furthermore, existing block grants are often recategorized over time. *See supra* note 11 and accompanying text. In addition, block grants may find themselves subject to increasing concerns of members of Congress over how federal dollars are being spent. This may lead to attempts to gather more information on program expenditures by states, thus slowing the trend toward the notion of "minimum" administrative requirements. In fact, such concerns have been so strong that they have overridden Presidential vetoes which attempted to restrict the imposition of increased federal controls of the spending of existing block grant funds. *See, e.g.*, Revenue Sharing and Health Services Act of 1975, P.L. 94-92.

Even when given discretion, states do not always utilize this authority to behave differently under a block grant regime. For example, in their review of the Reagan era block grants, Peterson et al. found that programs previously administered by the states, which were consolidated into block grants, often showed few changes in levels of funding or programmatic focus. However, when programs were not administered at the state level (such as those funded out of the Community Services Block Grant), large programmatic and funding changes were present. PETERSON ET AL., *supra* note 11, at 17, 67-85.

To take the latter point first, block grants are not necessarily a consolidation or broadening of existing categorical grant systems. A block grant may be in a new area, defining a new federal initiative, and effectively conscripting state fiscal and administrative resources for these newly defined national purposes. A recent example of such a program might be the Safe Streets Act.[28] Most states felt impelled to participate in the program, yet they complained bitterly about the federal conditions that attended the new grants, however minimal they may have appeared. Other examples go back to the very beginning of federal-state cooperative arrangements. One might mention, for example, the transfer of lands from the federal government to the states for the purpose of financing education, including the so-called "land grant" colleges. However minimal the federal requirements and certain the funding source, these grants started new public educational enterprises from which the states have never been able to extricate themselves.[29]

We say that these situations represent problematic increases in state political discretion because there are at least two different ways to think about the states' participation in such new federal initiatives. On the one hand, it may be fair to say that the states are doing what they want given the subsidy that has been made available. They might not create the same program if they were spending 100% state dollars. But they are perfectly happy creating programs that are different from the ones they would have adopted for themselves, given the discounted price produced by federal financial participation. Accepting federal money plus federal conditions is an exercise of state discretion.

Yet to put the matter this way raises crucial issues about the meaning or interpretation of the "devolution" goal. Satisfying state preferences concerning the spending of joint federal-state dollars is not necessarily the same thing as devolving political authority to the states. For if the purpose of devolution is not just implementing state preferences, but promoting democratic choice at the state level, then we should also be interested in the accountability and responsibility aspects of state decision-making. The simple agreement of a state to participate in a federal-state initiative is, from this perspective, not an authentic exercise of state political authority. The actions taken are presumptively not those that the state, or the electorate of the state, would choose with a full devolution of political authority, that is, a straightforward decision by the federal government to leave a particular policy domain to state control.

This latter point is not whole story either. There are situations in which states may require federal funding in order to engage in a responsible exercise of political authority. This is true in the multitude of situations in which the

28. 42 U.S.C.A § 13701 (West 1995).

29. For a history of grant programs, see DANIEL ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL COOPERATION IN THE NINETEENTH CENTURY UNITED STATES (1962).

states are unable to internalize all the benefits of their actions or avoid the costs of actions taken by other states. An obvious case is an upstream state's choice concerning expenditures for water quality improvement. The upstream state may prefer drinkable and swimmable water, but may be unwilling to finance that level of water purity given the substantial benefits to downstream, extraterritorial users.

If the state taxes itself sufficiently to achieve its desired level of water quality, it may perceive itself to be disadvantaged in the competition for mobile commercial or industrial activities. Unable to force the downstream users to contribute to its water quality improvements, and faced with potential competitive disadvantages in the attraction or retention of jobs and ultimately a tax base, the state will restrict its water quality ambitions below the level that it would choose if it could get a fair contribution for its efforts from many of the ultimate beneficiaries. Federal grants can provide the transfers from external beneficiaries to state actors that will permit the state to choose responsibly, that is, to set its water quality programs at the level at which the benefits to its citizens equal the cost to its taxpayers.

Consideration of externalities—sometimes described as the "race-to-the-bottom" problem—thus suggests that federal grant programs may often be necessary for states to optimize their expenditures.[30] Yet it is not obvious that this need for federal participation to free states from undesirable political competition yields a clear preference for block grants. States may be in very different positions with respect to water quality activities, air quality activities, solid waste disposal, endangered species protection, and so on. Indeed, it is insisted by participants in this symposium that not all races are to the "bottom," that many are not "races" at all, and that each "externalities" or "prisoners' dilemma" claim must be looked at specifically and in detail. Given this understanding, a broad block grant for environmental protection may less successfully target the goal of internalizing externalities than narrower programs tailored to specific needs in different pollution control categories.

The relationship between block grants and increases in state political discretion is problematic enough under ideal circumstances. The history of block grants in the United States though suggests that the circumstances are seldom ideal. Block grants have often been targeted at localities or have required that states pass through funds to localities on a formula basis.[31] This leverages local political power, but often at the expense of the state. By contrast certain conditions in standard categorical grants reinforce state power

30. Paul Peterson makes this point with regard to all "redistributive" spending. PAUL PETERSON, THE PRICE OF FEDERALISM 186-87 (1995).

31. For example, 80% of elementary and secondary education block grants enacted during the Reagan administration were mandated to be passed through to local governmental entities. PETERSON ET AL., *supra* note 11, at 11.

vis-a-vis localities. For example, a number of entitlement programs require that states designate a single state entity that is responsible for the program.[32] While this may sound like a state burden, it permits the state to retain state control by portraying itself as a "federal hostage" in negotiations with local authorities who want more discretion with respect to the administration of federal-state programs.

Block grants also often fail to provide the secure "statutory formula" for funding that the ACIR specifies as an important aspect of the block grant system. In virtually all current proposals for block granting funds, for example, there are savings to the federal government.[33] But these proposals may not include maintenance of effort requirements that would ensure that federal funding continues at the same real rate, or is adjusted appropriately for changed circumstances. Hence block grants may introduce funding uncertainties that complicate the exercise of state power while purporting to facilitate it.

Finally, a block grant strategy that consolidates programs may actually have a tendency to disempower states in their dealings with the Congress. This was indeed very much the Nixon strategy in proposing a number of block grant programs.[34] The basic idea was to sever the connections that linked particular states and interest groups to particular bureaucracies, congressional committees and subcommittees in the creation or maintenance of categorical programs. Rolling programs together was designed to make these coalitions much harder to build. Not only would the number of actors be increased, they would be competing for the same "block" of funds. Hence, while states might get some increased authority and discretion in the administration of the new block grants, such grants were intended to decrease state power in determining the funding levels and configurations of the programs over which they would have broader

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32. Entitlement programs requiring state administration include Medicaid, 42 U.S.C. § 1396a(5) (1991), and AFDC, 42 U.S.C. § 602(a)(3) (1994).

33. Federal savings under the Personal Responsibility and Work Opportunity Act of 1995, H.R. 4, 104th Cong., 1st Sess. (1995), which the President vetoed, were predicted by the Congressional Budget Office to have been about $64 billion dollars over seven years. However, while the bulk of these savings stem from programs other than AFDC (like Food Stamps and Supplemental Security Income), large reductions in the total amount of money going towards the AFDC program could result from reduced state funding or unforeseen recessions. 54 CONG. Q. WKLY. REP. 395 (1996). Savings in the Medicaid program as part of the budget reconciliation bill, H.R. 2491, 104th Cong., 1st Sess. (1995), vetoed by the President on December 6, 1995, were predicted to reduce the amount of federal spending by 163 billion dollars over seven years. 54 CONG. Q. WKLY. REP. 39 (1996).

34. While part of the rationale behind Nixon's proposed consolidation proposals was greater coordination among the myriad of categorical programs which were enacted during President Johnson's term, many observers believe the plan was based primarily upon "overtly ideological and partisan reasons." Conlan, *The Politics of Federal Block Grants*, *supra* note 9, at 252. His attempts were designed to "weaken the federal bureaucracy," NATHAN, *supra* note 9, at 31, overcome the decentralized nature of a Congress that supported "particularistic benefits," Conlan, *The Politics of Federal Block Grants*, *supra* note 9, at 253, and bypass the special interest groups that pressed for money in Washington. This outright attack on the "iron triangle" represented a shift from previous block grant reform efforts which had focused on establishing a carefully crafted consensus among policy making elites.

administrative authority. While this trade-off will sometimes increase net state authority, the effects are heterogeneous across states. If devolution of power means the ability to get the program you want, some states win and some states lose even where block granting consolidates multiple programs and makes the terms for qualification for federal funds more flexible.

Thus far we have been discussing the problematic relationship of a shift from categorical to block grants to the empowerment of state governments. Yet, even if it were clear that block granting had this effect, there is a further question of the degree to which devolution of this sort creates political gains. To put the matter slightly differently: to what extent does an increase in state political authority over jointly funded programs enhance democracy?

The difficulty in giving an answer to this question relates to our modern ambivalence concerning the role of the states in the American union. If there ever were a serious doubt about whether "we the people" have an unmediated relationship with the national government—that is, one that is not inextricably bound up with our relationship with our state of residence—post-Civil War developments make the answer all too clear. Our citizenship in our respective states is guaranteed by the federal Constitution; we elect representatives to the Congress directly; and our voting rights with respect to those representatives, as well as state and local office holders, are guaranteed by national constitutional law.[35] Juridically we are citizens of the nation first, our states of residence second.

Sociologically, of course, this need not be the case. Yet, Americans generally view themselves as Americans first and citizens of their state second. Turnouts in national elections are much higher than those in state and local contests,[36] and citizens often know more about what is happening in Congress or the White House than in the state legislature or the Governor's Office. Devolution of power to the states in order to get power "closer to the people" is not self-evidently sensible.

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35. U.S. CONST. art. I, §§ 2, 3, 4; U.S. CONST. amends. XIII, XIV, XV, XVII, XIX & XXVI; *see also* Allen v. State Board of Elections, 393 U.S. 544 (1969); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Baker v. Carr, 369 U.S. 186 (1962). For a recent discussion of term limits and the Voting Rights Act of 1965, 42 U.S.C. § 1973, see Anthony E. Gay, *Congressional Term Limits: Good Government or Minority Vote Dilution?*, 141 U. PA. L. REV. 2311 (1993).

36. Burnham estimates that 38% of American citizens are "core" or regular voters in all major state or national elections, 17% or so are marginals who come mainly during presidential campaigns, and 45% are rather consistent non-voters. Walter D. Burnham, *The Turnout Problem*, *in* ELECTIONS AMERICAN STYLE 97, 98 (A. James Reichley ed., 1987). During presidential election years since 1960 the turnout rate has dropped from about 65% to 55%, while off-year elections turnout has declined from about 48% to 37%. *Id.* at 113, 114; U.S. DEPARTMENT OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 289 (115th ed. 1995) [hereinafter STATISTICAL ABSTRACT]. State and local elections which are held at times other than on national election days fair much worse, and are subject to great diversity between states and among different elections. Engel notes that "[t]he outstanding characteristic of American politics is low participation, especially in state and local elections." MICHAEL ENGEL, STATE AND LOCAL POLITICS: FUNDAMENTALS AND PERSPECTIVES 222 (1985).

There is, of course, a chicken and egg problem at the core of this description of the phenomenology of citizenship. Were states more thoroughly empowered to make important policy choices, involvement of citizens with state government might rise as well. Nor is it correct to suggest that the American states are merely historically validated legal fictions. The guarantee of state territorial integrity in the U.S. Constitution is not all that holds states together. Many citizens still view their states as having an organic integrity, seeing "[s]tate governments," like Justice O'Connor does, as "neither regional offices nor administrative agencies of the federal government."[37] Polling data suggest slightly higher citizen confidence in state rather than federal government.[38] Moreover, some state elections and state issues have higher salience for voters than many federal issues or elections.[39] The degree of citizen information, involvement, or confidence is not uniform across policy domains within states and may vary systematically across states.

Our point thus is only that states in the American union now have complicated and ambiguous relationships to representative democracy and to ideas of citizen efficacy. One cannot draw the general conclusion that devolution of all sorts of programs and functions—where that devolution is of power to state government—promotes representative democracy in a federal polity like ours.

In addition, there are ways in which eliminating entitlements in connection with a shift to block grants moves power away from the people, not just the central government, in order to give that power to state government. Entitlements often empower citizens to act for, that is, govern, themselves. Hence, if we are a liberal democracy as well as representative one (which indeed we are) we might think that entitlements have important devolution properties themselves.

To take a contemporary example, Congress is considering folding the Supplementary Security Income (SSI) program for disabled children into a block grant for social services that would be administered by the states. Presumably state social services personnel would determine what families needed and how much those goods or services should cost. The removal of eligibility for cash payments to families with disabled children thus shifts the power to determine the service mix for those children away from their families

37. New York v. United States, 505 U.S. 144, 188 (1992).

38. For example, the percentage of those saying that their level of confidence was "a great deal" was 4.4% for state versus 3.5% for federal government; "quite a lot" was 16.4% for state versus 15.5% for federal government; and "very little" was 31.2% for state versus 34.8% for federal government. STATISTICAL ABSTRACT, *supra* note 36, at 288.

39. For example, David Sears and Jack Citrin note, in writing about the famous Proposition 13 election in California, "a dramatic shift" occurred in the public's sentiment about taxing and spending, as expressed in opinion polls that were conducted only a week prior to the election. DAVID SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 49 (1989).

and toward state government. In this sense the move is a centralization of power rather than a devolution of authority, for what is closer to the people than the people themselves?[40]

Entitlements also radically decentralize decisions about the enforcement of programmatic criteria. Entitlement enforcement is in the hands of beneficiaries who may choose what cases to pursue, what remedies to request, and which court system will hear their claims. "De-entitling" beneficiaries will move the question of whether governments make good on their promises into a realm of inter-governmental politics in which only the states and the national government are relevant players.

To the extent that increased state control over inter-governmental programs entails state control over policy choice, there is also the question of the structure of citizen participation in programmatic development. For many years federal categorical programs have demanded public participation in state processes of policy choice.[41] The attempt has been to give citizens a more meaningful voice than the simple act of pulling a lever in the voting booth. These provisions, once again, are moves toward greater involvement of the citizenry in public choices that affect them and, hence, devolve power toward the people. It remains an open question whether state processes under block grants would have these same participatory characteristics or whether block grants might contain participation conditions themselves.[42]

It may be objected, of course, that all of these examples involve a sort of double movement that complicates analysis of devolutionary effects. First there is the centralizing move of creating a requirement at the federal level. That condition or entitlement then empowers individuals within the state political process either to participate more effectively in processes of state collective decisionmaking or to avoid them entirely. Government moves away from and

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40. This is an example of "devolution down" conflicting with "devolution out," to use the categories developed in Peter Schuck's paper for this symposium. *See* Peter Schuck, *Some Reflections on the Federalism Debate*, *in* YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 1 (1996).

41. Examples of categorical programs which require public participation in the state processes of policy choice include the Federal Highway Act, 23 U.S.C. § 128 (1994), and the Elementary and Secondary School Act, 20 U.S.C. § 6319 (1994), both of which require public participation in the state spending of federal grant monies.

In addition, citizen participation requirements have also been present historically in block grants. For example, see the Community Development Block Grant requirements, SHAPEK, *supra* note 11, at 190-201, or the participation requirements mandated in the Local Crime Prevention Block Grant Program passed as part of the Safe Streets Act of 1994, 42 U.S.C.A. § 13756 (West 1995).

42. In fact, the lack of such requirements in the recent Republican efforts led those who were philosophically inclined to favor block grants to object to the existing proposals, "Block grants with no direction for local community involvement may end up promoting funding mechanisms that are as bureaucratic, categorical, and unresponsive to family, neighborhood, and community needs as the worst aspects of the current system." CENTER FOR THE STUDY OF SOCIAL POLICY, CHILD AND FAMILY POLICY CENTER, CENTER FOR YOUTH DEVELOPMENT AND POLICY RESEARCH, AND THE FAMILY RESOURCE COALITION, HOW BLOCK GRANTS CAN MAKE/BREAK FAMILY SUPPORT: A WORKING PAPER (July 14, 1995), *available in* HandsNet, http://hninfo@handsnet.org.

then back toward "the people." It protects liberty by centralizing rights creation. This is just the problematic relationship, though, between devolution to the state and citizen efficacy that we want to emphasize.

Our point here, once again, is not to argue that categorical grants or entitlement programs are uniformly representation reinforcing or citizen empowering while block grants have opposite or countervailing characteristics. The claim is a weaker one: Broad talk about devolution of authority, to the extent that it conjures up cheerful images of greater democratic participation or accountability, has a lot of explaining to do. Whether block granting will produce a political system that we experience as more closely aligned with our basic normative democratic commitments depends on the myriad details of program design and pre-existing contexts. The suggestion that block grants equal devolution equals government closer-to-the-people requires careful examination case-by-case.

III. THE PROSPECTS FOR PROGRAM RATIONALITY

The dominant vision of block grants seems to be one of consolidation of categorical programs within a broad subject matter area.[43] The claim that such an aggregation promotes rationality has several facets. One has to do with gaps and overlaps in categorical programs. Aggregation with discretion to use funds anywhere within a general subject matter area can prevent these sorts of programmatic irrationalities. Another involves the lack of "fit" between particular funding levels and local service needs. Even if federal categorical grants are "seamless" and produce no overlapping categories, their discrete funding formulas may not meet local needs. A block grant permits a state to take excess funds that would have been allocated to categorical program A and to allocate them to program or area B where the need is greater.[44]

Note that aggregation may promote programmatic rationality at the federal level as well. We previously mentioned that Nixon's block grant scheme was intended to break up the "iron triangles" that surrounded particularistic categorical programs in favor of a broader view of the public interest.[45]

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43. Conlan notes "[g]rant consolidation originally was proposed as a relatively nonpartisan means of improving the management and effectiveness of federal assistance programs . . . [o]ver time . . . the politics of grant consolidation also acquired a growing ideological dimension." Conlan, *The Politics of Federal Block Grants*, *supra* note 9, at 248.

44. Indeed one of the innovative features of the Reagan era block grants was the ability of recipients to shift funds (usually less than 10%) from one block grant to another. PETERSON ET AL., *supra* note 11, at 8-9. Under the current National Governor's Association proposal for welfare reform, states would be free to transfer up to 30% of the block grant (itself much larger than any previous block grant) to other social service programs. Mark Greenberg, *Racing to the Bottom?*, CENTER FOR LAW AND SOCIAL POLICY (Feb. 21, 1996), *available in* HandsNet, http://hninfo@handsnet.org.

45. *See generally* NATHAN, *supra* note 9; Conlan, *The Politics of Federal Block Grants*, *supra* note 9. Lawrence Brown has noted that Nixon was a decentralizer who wanted "to reduce the power of the federal government in state and local affairs. Whether more or less federal money is spent in achieving

Viewed from this perspective block grants not only permit sensible overall policy planning, they attack the political economy of public spending in a way that promotes rationality understood as "the public interest."

Finally, to the extent that block granting categorical programs involves the removal of beneficiary entitlements, block grants remove a potential irrationality at the enforcement stage. As we mentioned earlier, entitlements permit a highly decentralized enforcement process in which beneficiaries pursue remedies either in federal or in state courts. However, categorical programs are no more "self-interpreting" than any other statutory form. Beneficiary enforcement may thus promote a disaggregated interpretative process with the potential to undermine program coherence. However much one may believe that beneficiaries should have some opportunity to enforce their "rights," no one is likely to imagine that litigation in state or federal court is a good strategic planning device. It is easy to lose sight of general purposes or linkages across programs, when mired in individualistic litigation, employing idiosyncratic strategic maneuvering. Such an enforcement regime can lead to inconsistencies across the country or to the deformation of original public purposes. Either result might be considered to be a programmatic irrationality.

While there are many good reasons to think that block grant approaches could promote rational public policymaking and implementation, our prior discussion surely overstates the degree to which this will be realized in practice. Once again there are numerous reasons to believe that block granting has the potential to increase irrationality rather than rationality in joint federal state programs. The first reason proceeds from a simple skepticism about the administrative or policy-planning capacities of many states. The opportunity to coordinate can easily be lost if states do not have the policy-planning infrastructure necessary to use it effectively.[46] Moreover, there are strong

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this end [wa]s irrelevant." Lawrence Brown, *The Politics of Devolution in Nixon's New Federalism, in* CHANGING POLITICS OF FEDERAL GRANTS 66 (Lawrence Brown et al. eds., 1984).

46. State government's "policy infrastructure" can be measured in numerous ways: employment has increased in state government approximately 62% since 1969 to 4.2 million people (while federal employment has remained nearly constant), spending by state governments has also increased (both from own sources and grant- in-aid sources) between 1985-1993, and states remain the dominate players in a number of policy areas. Carl W. Stenberg, *Recent Trends in State Spending: Patterns, Problems, Prospects*, PUBLIUS, Summer 1994, at 135, 135-52. In addition, observers have commented on the professionalization of state governments. *See* ANN BOWMAN & RICHARD C. KEARNEY, THE RESURGENCE OF THE STATES (1986); LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNOR TRANSFORMED (1983).

However, many state legislatures have short sessions, low salaries, and small staffs, and their members historically have spent considerable amounts of time performing case-work constituency-related work rather than policy-making. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 129 (1993); Richard C. Elling, *The Utility of State Legislative Casework as a Means of Oversight*, 4 LEGIS. STUD. Q. 353-79 (1979). Furthermore, state bureaucracies have relied upon federal statutory guidelines in a number of major social policy areas and are constrained in their policy-making efforts by their limited ability to control the movement of people and goods within their boundaries. *See generally* PETERSON, *supra* note 30.

pressures in many states to devolve activities further to the county or city level. This further disaggregation makes individualized implementation easier, but general policy development harder. In the end, one could end up with a system in which the capacity to plan, monitor, and control programs is so diffuse as to be almost nonexistent.[47]

It might be objected that this is precisely the point of devolution: Rationality should not be judged from an overhead perspective where centrally prescribed purposes are implemented locally, rationality is measured by the capacity of implementers to adhere strictly to predetermined purposes. We shall return shortly to a consideration of what "rationality" means in this context. For now, it is sufficient to point out that block grant programs are not general revenue sharing programs. Federal purposes remain, expressed as conditions on eligibility for grants. Instrumental rationality may not be the defining element of block grant programs, but it remains a reasonable perspective for judging success with respect to specified federal goals.

Second, we must remember once again that not all block grants are consolidations. Block grants may be used, as previously noted, to start new programs.[48] In these cases they are not an answer to the gap/overlap problem. Moreover, block grants can extend or broaden preexisting categorical grant initiatives in ways that make it more difficult to engage in rational policy-planning. As with statutes that grant broad powers to federal administrative agencies, block grants may have the tendency to specify goals that are both broad and competitive. And, given a simple failure to set priorities at the federal level, it will be difficult to articulate any standard by which to determine the rationality of state implementation.

These considerations suggest that instrumental rationality is not necessarily what is meant, or should be meant, by the claim that block grants increase programmatic rationality. At the very least, instrumental rationality does not exhaust the rationality claim. But, what then is the alternative vision of rationality that becomes relevant?

In some sense it would seem to be a vision of the public interest as defined

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47. This is in fact how many block grants operate. Some have been partially or wholly tied to local government, e.g., Community Development Block Grants and Comprehensive Employment and Training Block Grants, *see* Shapek, *supra* note 11, at 190-201, or have mandated the pass-through-of-funds to local governmental agencies, e.g., Elementary and Secondary Education Block Grants passed in the Omnibus Budget Reconciliation Act of 1981, *see* PETERSON ET AL., *supra* note 11, at 11.

48. Block grants which were not consolidations of existing programs include Omnibus Crime Control and Safe Streets Act, P.L. 90-351, 82 Stat. 197 (1968), and Local Crime Prevention Block Grants, 42 U.S.C.A. § 13757 (1995). In addition, block grants vary widely in the number of categorical grants and the amount of funding consolidated. For example, the Reagan education block grants consolidated 23 programs compared to 2 consolidated by the Low Income Energy Assistance Block Grant. The Social Services Block Grant consolidated $2.4 billion (of funds often already categorized as "block") while the Preventative Health Block Grant consolidated just $81 million worth of categoricals. PETERSON ET AL., *supra* note 11, at 8-11.

by state governments. The basic idea may be that getting government "closer to the people" necessarily improves the prospects for appropriate aggregation of their preferences. State programs are more rational than federal programs in the sense that they pursue the goals and use the means that citizens prefer. Note, however, that this argument restates the process claims of the devolution thesis in "rationality" rhetoric. If it is the case that the political economy of state decisionmaking has a better chance of pursuing the public interest than does the political economy of federal action, then the case is made. The problem is that there is no obvious empirical support for this proposition. Many believe that state governments are historically more beholden to special interests than is the federal government.[49] Counter examples featuring special interest "capture" of federal policy-making are equally plausible.[50] But there seems no convincing way to measure the comparative capacities of states and the federal government to pursue the public interest. Madison's faith in the capacity of a national representative democracy to avoid the claims of local faction confronts the populist belief that citizens will better monitor and control their representatives at the state or local level.

The elimination of entitlements feeds into the political economy debate in an interesting way. Over time the dynamics of entitlement enforcement seem to have produced a special role for beneficiaries and courts in the categorical grant process. Cheerfully described, the right to enforce conditions in federal grants has given beneficiaries a place at the table in the development of subsidiary policy at the federal and state levels. Beneficiaries thus have been able to counteract—at least compete with—the interests represented by state and federal bureaucracies and providers of goods and services. In this way the micro-politics of grant programs has been made more representative of the interests affected.

Equally cheerfully described, federal and state courts have insisted that initial goals not be compromised in the face of fiscal or administrative exigencies. The entitlements regime is thus a way for state and federal governments to bind themselves effectively to carry out the programs that they have jointly developed. Entitlements support the public interest by resisting political pressure from powerful groups and avoiding program oscillation and inconsistency amidst shifting fiscal conditions. From this perspective, rather than impeding program rationality, entitlements protect program coherence across time.

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49. *See* ROSCOE C. MARTIN, GRASS ROOTS (1957); *see also* Briffault & Glied, *supra* note 23, at 26-28 (providing recent example of how federal structure contributes to influence of providers in state health care policy-making); Bruce Vladek, *The Design of Failure: Health Policy and the Structure of Federalism*, 4 J. HEALTH POL. POL'Y & L. 522, 528-30 (1978).

50. *See generally* MAYHEW, *supra* note 8.

IV. PROMOTING FISCAL PRUDENCE

We need not tarry long over the question of promoting fiscal prudence. It is all too clear that open-ended categorical programs can lead the federal government into imprudent commitments and may promote "gaming" strategies at the state level to milk the cash cow that an entitlement system creates.[51] To the extent that gaming also skews state policy in directions that would not be taken save for the availability of federal funds, it is in everyone's interest to bring some fiscal order to the federal state grant system.

The simple fact of the matter, however, is that block grants are not necessary in order to impose order. While the block grant idea seems to have instinct in it a globally budgeted or capped grant amount, caps and global budgets can be employed in categorical entitlement programs. The funding formula in any categorical program can pay a percentage of expenses up to a globally budgeted amount, after which all expenditures must come out of state funds.[52] Moreover, many block grant programs have in fact been formula grants rather than the simple commitment of a predetermined block of funds to the states for broadly defined purposes.[53] The crucial issue is the funding formula, not whether it appears in a broad or narrow grant program.

We should also recognize that the notion of what is a "prudent" expenditure is not exhausted by the notion of a "limited" expenditure. "Prudence" in government spending involves spending the right amount for approved purposes. It may be as imprudent to underspend as to overspend. Presumably prudence is promoted by consolidating responsibility for programmatic purposes and expenditure amounts and assuring accountability for both sorts of decisions. Does a block grant do this better than a categorical grant? The answer seems to be "yes and no." If the block grant caps federal expenditure it increases state responsibility by ensuring that state decision to spend above

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51. The State of Louisiana has been notorious for such efforts in maximizing federal dollars for its Medicaid program. Changes in federal oversight eliminated the benefits of such tactics and pushed the state into a budget crisis. *See* Jack Wardlaw, *$750 Million Shortfall in 1995; Medicaid Problems Persist*, TIMES-PICAYUNE, Sept. 7, 1994, at B1.

52. Those programs which are funded in such a manner are referred to as "closed ended matching" programs. Historically, when such programs have been converted to a lump sum appropriation system without matching, distinct spending patterns within states have emerged. Title XX Social Service funds in the early 1980s are an example of such a shift. There were some states who spent more than the maximum needed to draw down all possible federal dollars and thus absorbed 100% of the cost of the expenditures above the federal maximum. In contrast, other states did not spend enough to draw down all the possible federal match dollars. When the federal government went to a block grant structure, that lowered federal spending and removed matching incentives, those states which were spending above the necessary amount to maximize federal dollars raised their expenditures to make up for lost federal dollars. Those who were spending below the federal maximum cut their expenditures. PETERSON ET AL., *supra* note 11, at 16.

53. For example, Community Development Block Grants rely on a formula relating to population, poverty, and housing conditions 42 U.S.C. § 5306 (1993) and Maternal and Child Health Block grants are tied to the number of low-income children in a state 42 U.S.C. § 702c (1994).

the cap are not made with discounted dollars.[54] State decisions above the cap should therefore be more "prudent," but below the cap there is no improvement.

On the other hand, the relaxation of federal standards tends to decouple federal expenditures from federal purposes and thereby decrease the national government's accountability for the expenditure of nationally generated funds. Citizens of state A are allowed to spend federal funds for program X, while the citizens of state B spend their federal grant monies on program Y. The citizens of these two states thus trade a capacity to spend federal funds any way they want in their own state for the loss of any control over how national funds are spent in the other. The national government loses accountability for either programmatic choice, while neither state is accountable for the level of federal expenditure.

Is this an institutional design that decreases "prudence"? Prudence as we have defined it is not sacrificed if the national polity is in fact indifferent between X and Y and the federal government is effectively held accountable for the level of expenditure it provides for any combination of X and Y. But of course these conditions can be satisfied by capped categorical grants for X and Y as well. Moreover, a majority of citizens may well believe that the national government should not be indifferent between X and Y. It is this lack of indifference that historically has made general revenue sharing unattractive in the United States and that leads to "recategorization" of block grants over time. If the federal government is going to spend federal money, we seem to believe that it should make a choice about what is worth doing. Giving money to states to do what they want seems irresponsible—indeed imprudent.

IV. CONCLUSION: PURPOSES, RIGHTS, AND PROGRAM STRUCTURE

By now we hoped to have convinced you of at least two things: (1) Block grants and entitlements are neither self-defining nor mutually exclusive categories; and (2) Both have complex and potentially contradictory effects on the realization of goals, such as, democratic accountability, programmatic rationality and fiscal prudence. The desirability of particular program structures must be analyzed in some fashion that gets beyond these false dichotomies and problematic slogans.

The current debate about the structure of cooperative federalism, nevertheless, raises three important questions: (1) What are the respective state and national interests in particular policy domains, putting aside any potential constitutional impediments to organizing state and federal activities either separately or jointly? (2) What types of funding arrangements promote

54. But see text accompanying note 7 for a discussion of when "discounted dollars" might lead to "prudent" spending patterns.

responsible and accountable public spending? (3) What sort of regime of legal rights and responsibilities is likely to support the programmatic purposes established either by state or federal legislation?

These are not easy questions in any context and we do not propose here to attempt to provide a general answer applicable to all programs. Our argument is more modest: First, we believe that block grant or categorical grant regimes are difficult to justify as the optimal design for any program intended to deliver cash, goods or services to individuals or families. "Marble cake" federalism blurs lines of authority and democratic accountability in ways that "layer cake" federalism avoids. Nevertheless there are complex ideological and political reasons to believe that marble cake regimes—cooperative federalism of the block or categorical grant variety—will persist. Therefore, we believe, second, that the utilization of entitlement enforcement structures remains critical to the realization of national interests in any program of "cooperative federalism" designed to support, protect or empower identifiable beneficiaries.

The Case Against Marble Cake. Ignore for the moment the questions of whether or to what extent there are legitimate national interests in particular substantive areas—health care, income support, education or the like. Assume merely that there are two types of national interests that might be furthered by programs established nationally, at the state level, or through a cooperative scheme. One such interest we will denominate a "structural" interest. The national concern has no substantive or programmatic content. National intervention in the structuralist mode is premised exclusively on a desire to rectify fiscal imbalances among the states, internalize interstate externalities and avoid collective action problems among the states ("races to the bottom"). The second type of national interest is "substantive." Participation by the national government is premised on particular policy preferences. These preferences may or may not be inconsistent with state preferences. All that matters is that the national government has defined a national interest that it proposes to pursue, either independently or with some form of state cooperation.

We consider the second category first. To make the discussion more concrete assume that the national government concludes that there is a substantive national interest in assisting persons with disabilities to have a reasonable level of income, to have access to health care services and to be free from discrimination in employment and places of public accommodation. How should the Congress proceed? We know, of course, how the Congress has proceeded. It has adopted national programs of income support (Social Security Disability Insurance, or SSDI, and Supplemental Security Income, or SSI), a national anti-discrimination law (the Americans with Disabilities Act) and both national (Medicare) and categorical grant-in-aid (Medicaid) medical care programs for which SSDI and SSI recipients are automatically eligible. In all of these disability programs recipients have individually enforceable entitlements

that are defined exclusively (or in the case of Medicaid, substantially) by federal law. Funding is, again with the exception of state contributions to Medicaid, exclusively federal.

So long as the national political process determines that there is a national interest in providing these supports and protections for persons with disabilities it seems difficult to find persuasive political or economic arguments for altering this general structure. National goals are being pursued with national funds provided through the national political process. Beneficiaries are empowered to use federal courts to monitor compliance with programmatic requirements. Both fiscal prudence and democratic accountability seem to be enhanced by the national structure of the programs. Moreover, given the national interests that inhabit these programs, promoting individual economic security, providing access to needed health services and assuring non-discrimination, their entitlements structure seems equally appropriate. Pursuit of these national interests would be radically incomplete were their realization legally "discretionary." A reliable, legal guarantee of income support, medical care and non-discrimination is precisely the point of the national policy.

The one arguable organizational defect in the current design of disability policies is that Medicaid is administered and partially funded by states, thus confusing lines of authority and accountability for Medicaid expenditures. But the solution to this problem does not seem to run in the direction of block granting or the elimination of entitlements. The sensible approach to the Medicaid issue would seem to be for the federal government to fund and regulate all Medicaid activities directed toward persons made categorically eligible for the program by federal law. Contracting with states to administer the program may, of course, be sensible, as the national government does with initial disability cash benefits determinations. But contracting out an administrative function of a national program maintains the lines of authority and accountability for both the scope and the financing of the program. Note, moreover, that the "national" structure of these programs leaves substantial room for state disability policy. States may supplement national efforts or provide entirely different types of programs on their own. Should they do so, as all currently do, full accountability for and control of these initiatives will reside at the state level.

Now try to imagine a purely "structural" national program in aid of persons with disabilities. Here the national government is asserting no interest in any particular level of protection for persons with disabilities. The national motivation is only to protect states from pathologies of interstate competition or to correct for fiscal imbalance. How could this be done? One possibility would be simply to provide 100% federal funds for any state program in aid of persons with disabilities. This is not a very attractive option for reasons that are all too obvious. Expenditure decisions would have become completely

divorced from political accountability for fundraising.

What about sharing the costs? This might make sense, but determining an appropriate federal contribution is not easy—indeed, it may be impossible. Consider, for example, the three types of disability programs that we have been discussing, but assume that they are state programs that express differing state substantive preferences for assisting persons with disabilities. Cash and medical care provision are straightforward redistribution programs beset by the usual perceptions of potential "races to the bottom." The ADA is a mandate to public and private entities. But compliance is not costless. Taxes will be required for the public effort, and firms will be asked to bear uneven compliance burdens. "Race to the bottom" scenarios are easily constructed in this context and uneven fiscal capacities across states may also be a concern. Hence, there is some justification for federal participation in funding these state efforts.

But the case has not yet really been made. In order for State A to justify federal assistance to its disability efforts it would need to show that its *overall* tax burdens or *overall* fiscal capacities justify national assistance. For, if State A's combination of redistributive programs requires a fiscal effort no greater than any other state, then equalization is unnecessary.

Note, moreover, that once we take this position, it is not obvious why expenditures by A and B for education, pollution control and almost anything else are not relevant. In short, the appropriate approach would seem to be general revenue sharing based on states' overall fiscal capacities and preferred levels of fiscal effort. From a "structuralist" perspective grants for "disability programs" are underinclusive. We see no reason why other programmatic areas should not be analyzed in the same way.

Indeed, assuming only a formalist motivation for national efforts, what makes a programmatic area an appropriate area for federal support would need to be reconceptualized. The three "disability policy" approaches that we have used for purposes of illustration could as easily be characterized as three policies related to entirely different substantive areas—"income support," "health care," and "anti-discrimination policy," for example. Without substantive purposes of its own, the national government would require different, structuralist criteria for determining that any national expenditure is warranted in the form of a grant of revenue to the states. A grant to support "disability" programs would reveal some sort of general substantive purpose at the national level; a purpose definitionally excluded from the scope of "structural" support.

Defining purely structuralist criteria for federal financial assistance to the states is conceivable, but the application of those criteria in the real world seems problematic. Presumably a formula could be developed that would completely harmonize tax burdens by providing federal matching funds for all state expenditures based entirely on a measurement of overall state fiscal effort.

States could thus have very different levels of expenditure or different mixes of programs based on their own citizen preferences without fear that they were "overtaxing" their residents in relation to other states. Moreover, devolution would combine with political accountability. States could draw federal funds only through taxing themselves, and equivalent efforts across states would produce equivalent revenues. The level of national commitment to the structural, equalization effort would be controlled by the Congress. And, presumably, some formula or formulae could be devised to supplement state expenditures that have benefits beyond their borders and that might otherwise be underfunded.

We need not pursue the difficulties with getting these formulae "right" to perceive the political difficulty of doing them at all. Formalist impulses to equalize fiscal burdens, or internalize externalities, do not seem to have much political "resonance," to use the currently fashionable buzzword. Citizens and politicians generally are concerned about substance. They come to be concerned about fiscal imbalances or externalities because they affect the accomplishment of substantive political goals.

To recapitulate the argument thus far: "Cooperative federalism," block granted or in a more targeted, categorical form, has extremely modest appeal. Where the federal government has substantive purposes it should enact national programs. Where it means only to redistribute fiscal capacity or avoid pathologies of federal territorial division (externalities and unproductive interstate competition) it should adopt a revenue sharing strategy.

But Marble Cake It Is. What then explains the plethora of "cooperative federalism" programs that we observe? The answer, we believe, builds on the practical political explanation just given for the paucity of general revenue sharing initiatives. For Americans also have an aversion to direct national administration. Programs of cooperative federalism are compromises that seek to pursue national substantive purposes without forgetting that states were often in the same business first, that their politicians and bureaucracies do not like to be displaced, and that "borrowing" state employees is politically more palatable than hiring more federal ones. Piggybacking on existing state administrative capacity may also be more cost effective and may be helpful in targeting the reduction of particular externalities. We should recognize, however, that these benefits could be captured by national programs with contracting out arrangements for their administration, rather than by making grants for federal-state cooperative schemes.

In the compromise world of cooperative federalism, block grants may dominate narrower, more "categorical," grants for the reasons previously discussed. But, this "second best," realpolitik argument for block grants carries with it no brief for the elimination of entitlements regimes where the national (and/or state) substantive purposes include such goals as individual or family

income security or freedom from discrimination. These are programs in which the substantive national purposes include individual economic security and individual equality of treatment. If those purposes were carried out in a national program, we would think it odd were the Congress to exclude the usual remedies available to beneficiaries under the Federal Administrative Procedure Act. Indeed, in most such regimes the legislation spells out specific administrative and judicial remedies.

Return, for example, to the case of health care insurance: A Medicare program that purported to insure the elderly and disabled against medical expenses, but that provided no remedies for disputes about coverage would seem radically incomplete. Indeed, in the face of a statute that contained no remedial structures, federal courts usually would have little difficulty in finding that general principles of federal administrative law supplied both administrative hearings and judicial review. The question, then, is why the funding structure of Medicaid should lead us to prefer a different result—a non-entitlements regime—where the federal purpose is to insure certain low income populations against medical expense? We see no good answer to that question. So long as we assume that providing secure access to medical insurance is a part of the national purpose, defining beneficiary interests in an entitlements form seems crucial to effective implementation.

We should be clear, however, about what this conclusion entails. We are not urging that all programs involving federal financial assistance to the states have an entitlements structure. Entitlements are necessary only where providing individualized assistance to members of an identifiable beneficiary class is a part of the national purpose. Infrastructure grants for transportation or community development, for example, are not strong entitlements candidates. Nor are general programs for human capital development, such as, basic education, job training or vocational rehabilitation.

Nor are we arguing that entitlements should always be defined in a detailed fashion that sharply limits state policy discretion. We can imagine a Congress that wants to assist persons with below poverty level incomes, but that is uncertain how best to do so. And we can imagine such a Congress partially funding all state efforts directed at the relevant population. But even in this very loosely defined "poverty block grant," we cannot imagine how the national purposes could be consistent with indifference about whether some persons are arbitrarily excluded from whatever programs the states devise. To that extent those beneficiaries should have an entitlement, that is, a legal right secured by appropriate legal remedies.

We highlight "appropriate" because we do not mean to defend the current remedial structure of many federal entitlements schemes. There may be much more efficient and effective enforcement structures than an action under 42 U.S. Code § 1983. Indeed, we believe that Congress should be as attentive to

the design of sensible remedial structures for its "cooperative" entitlements programs as it has been when providing direct federal entitlements. Ours is not an argument for the remedial status quo.

At base our claim is just this: There is no strong a priori case for block grants—indeed for any form of programmatic, cooperative federalism. Rationality, democratic accountability, and fiscal responsibility would seem to be furthered either by independent national (and state) programs or by some form of revenue sharing. Block grants are attractive only in a second best world of inefficiently designed categorical programs. But so long as federal grants seek to benefit identifiable individuals or families by providing access to particular levels of income, or particular goods and services, there will be some irreducible, substantive federal purpose whose implementation is best secured by the recognition of a federal right. The important programmatic design issues, therefore, are how best to structure and enforce federal entitlements given particular, substantive, national purposes, and a desire to increase the rationality, democratic accountability, and fiscal responsibility of cooperative federalism.