Commentary: Block Grants and the Meaning of Entitlements

Colleen M. Grogan†

Both Jerry Mashaw's "Block Grants, Entitlements, and Federalism,"[1] and R. Shep Melnick's "Federalism and the New Rights"[2] examine the definition of entitlement, and consider to what extent block grants are consistent with the notion of entitlement. In this commentary, I will first highlight that their examinations arrive at fairly different conclusions; then second, consider what we can learn from these divergent examinations; and, finally, challenge us to think not only about the effect of downward devolution, but also the effect of privatization or outward devolution on representative democracy.

Mashaw suggests that federal categorical grant requirements denote an entitlement for specified populations. Therefore, we could design programs which are funded through a block grant process and, not inconsistently, also specify entitlement requirements for particular groups of people. Melnick argues that there was a subtle judicial transformation of grants-in-aid to the states into entitlement for individuals. He claims that Aid to Families with Dependent Children (AFDC), for example, was not an "entitlement" program when it was first enacted. According to Melnick, the Aid to Dependent Children statute at that time was silent on almost all eligibility issues.[3] Let me address Melnick's argument first.

While significant latitude was given to the states, the federal government specified from the very beginning that the program was set up for single mothers. There was very clear legislative intent that single mothers—who were primarily thought of (and were) widows—were deserving of cash assistance.[4] In this sense, the federal government had a lot to say about who was categorically eligible. It was quite clear in setting the parameters of eligibility: the program wasn't for poor people, but selected types of poor people.

---

† Assistant Professor, Yale University Department of Epidemiology and Public Health; Institute for Social and Policy Studies.

1. *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, *in* YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 297 (1996).

2. *See* R. Shep Melnick, *Federalism and the New Rights*, *in* YALE LAW AND POLICY REVIEW/YALE JOURNAL ON REGULATION, SYMPOSIUM: CONSTRUCTING A NEW FEDERALISM 325 (1996).

3. Melnick, *supra* note 2, at 332-37.

4. *See generally* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992).

As mentioned above, the federal government allowed significant state discretion, but it was discretion for determining who was eligible within this category of single women and their dependent children. Eligibility was typically decided by the local welfare case worker, who would decide on a case-by-case basis whether a particular family was "worthy" of assistance. Many researchers have documented that race often played a role in case worker determinations, as well as individual perceptions of moral character.[5]

The Supreme Court decisions from 1968 to 1972 that Melnick refers to were in large part addressing the arbitrary nature in which states determined who among the federally defined categorical group were eligible for benefits. While these decisions were extremely important, I don't think they served to transform AFDC into an entitlement program. Court action simply reinforced the entitlement that was specified for a select group of people when the program was enacted. Although my view is consistent with Mashaw's definition of entitlement, Melnick's examination importantly speaks to the meaning of such a broad definition of entitlement. While federal categorical specifications denote entitlement status (such specifications suggest legislative intent that a specified group of people are entitled to benefits under the program in mind and provide legal protection to defend the "rights" defined), this entitlement intent is often rendered meaningless without litigation. In this sense, I agree with Melnick that it was litigation that truly turned AFDC into an individual entitlement. However, I would not take this argument as far as Melnick when he suggests that the individual entitlement is largely a creation of the federal courts.[6] The federal government needs to specify the categorical requirements and provide the legal protection in the first place.

If the federal government needs to specify categorical requirements for programs to maintain an individual entitlement, important questions about how block grants change existing notions of entitlement arise. Mashaw argues that moving to block grants does not have to mean a discontinuation of entitlement. He provides useful illustrations of how entitlements take different forms under varying cooperative financing schemes. For example, he points out how the National Governors' Association's 1996 Medicaid reform proposals preserves existing entitlements for primary beneficiaries, but makes these entitlements enforceable only through state administrative and judicial institutions.[7] However, although we can call this an entitlement, the term may be misleading since we would then have fifty-one different court interpretations of a Medicaid entitlement. Thus, it is important to consider which particular requirements are necessary to ensure that a *meaningful* entitlement is continued. For example,

5. *See generally* GORDON, *supra* note 4; SKOCPOL, *supra* note 4.
6. Melnick, *supra* note 2, at 335.
7. Mashaw & Calsyn, *supra* note 1, at 304-06.

is a federal categorical requirement in which states are allowed to determine which type of persons within this specified group are eligible (teen mother restrictions), or which type of persons are eligible for which type of services (workfare programs), an entitlement program?

This notion of whether block grants should have particular requirements attached to them to achieve a meaningful entitlement really depends on our assessment of what states will do under block grants. Melnick argues that under a block grant, states will do what they have been doing recently: "More work requirements, more time limits, 'wedfare,' 'learnfare,' residency requirements of dubious constitutionality—all these will proliferate."[8] Underlying these recent welfare reform efforts is a consideration of the moral character of AFDC recipients—judging some recipients to be worthy and others not. Depending on the capacity of state governments to assess "objectively" who fits into their newly defined categories, the determination of eligibility could be quite arbitrary—and could be disturbingly similar to the early days of AFDC. Indeed, many of these "new" behavioral modification programs require individual assessments by case workers: Can the mother work? What are her day care needs? Can the teen mother live with her parents?

This concern about state-defined eligibility criteria is related to the "race to the bottom" debate. During the two-day symposium, we heard a number of variations on the term "race"—walk, wobble, slide—but no suggestions for revising the term "bottom." The implication is that we know what the bottom is. Martha Derthick alluded to this in her talk by saying "we won't have the data to determine whether we're at the bottom."[9] But, again, the implication is that if we had the right data, we would know what the bottom is. Of course, this is a normative question: restrictions on AFDC benefits to teen mothers, for example, is an innovative reform to some, a representation of a laggard state to others.

To objectify this notion of the bottom, we tend to think about states' financial commitment—as long as states maintain the same level of financial commitment, they are not (according to this definition) moving toward the bottom. To judge the way in which states use their money would be to question the whole point of devolution of authority. What disallows us from questioning what states do is the presumption that an increase in state political authority over jointly funded programs enhances representative democracy. But whether or not an entitlement is present under a block grant has important implications with regard to recipient representation. As Mashaw points out, the elimination of an entitlement under block grants takes power away from individuals and

8. Melnick, *supra* note 2, at 349.

9. Martha Derthick, Commentary on Welfare Panel at Symposium on "Constructing a New Federalism: Jurisdictional Competition and Competence" Yale Law School, New Haven, CT, March 1-2, 1996.

gives it to state government. Under an entitlement, beneficiaries "may choose what cases to pursue, what remedies to request, and which court system will hear their claims."[10] Moreover, under an entitlement, all categorically eligible recipients should be represented equally. Is it only the preferences of the broader state citizenry that matter under block grants? How will recipients be represented? Addressing these questions about representation is equally, if not more, important than simple financial assessments in determining whether states have (or will) digress.

The representation question is not only important when thinking about downward devolution, but outward devolution as well. As states privatize their public programs, is power going to the people or to private entities? This is particularly important in state Medicaid programs as many states move toward some form of managed care where private Health Maintenance Organizations (HMOs) are asked to assume the risk of providing medical services to individual Medicaid recipients. Here recipient representation is realized through their articulation of health plan choice. Obviously, there are serious concerns about representation when many states report that around half of their recipients do not exercise their option to choose and are assigned to plans. Moreover, the fact that many states contract with private, nationally-based companies raises significant questions as to whether downward devolution produces public policies that more closely align with local preferences. For example, to what extent do national companies customize their services to meet local needs?

Because representation is an important component of individual rights, it is crucial for us to give more thought to (1) the different emerging forms of representation in the states; (2) whether some forms of representation need to be protected for individuals; and (3) how representation is articulated under various state privatization efforts.

10. Mashaw & Calsyn, *supra* note 1, at 312.