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Laura Jensen

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Entitlements in Law and History

As a legal idea, the concept of an entitlement is utterly mundane. But the substantive content and distributive effects of the range of legal entitlements are not matters of indifference, rather they reflect and enact distinct political values. Legal entitlements do not descend from the sky, but are created by human actors who make moral or philosophical decisions, explicitly or implicitly, about who is deserving or undeserving of reward within a chosen economic structure. The politics of race, gender, and class are filtered through these choices.

Lucy A. Williams, 1998¹

In December 1817, sixty-six-year-old George McBeth of the Pendleton District of South Carolina, a veteran of the American Revolution, petitioned the United States Congress to grant him Federal income assistance. McBeth admitted that he had not received an injury in the service of the nation that would entitle him to disability benefits. Nonetheless, he hoped that he could rely upon the Government in his time of need. Aged, infirm, and incapable of supporting himself and his elderly wife, he had no relatives or connections upon whom to rely for support during “the short time that m[ight] remain of his frail existence.” McBeth ascribed “no particular merit” to himself for having fought in the Revolution, but begged Congress to shelter him from “the pitiless storms of adversity” and “shield him from the chilling grasp of utmost poverty.” As his acquaintances would attest, he was an “honest, honorable, sober upright man” who sincerely believed that he had “claims upon the bounty of his

¹ “Welfare and Legal Entitlements: The Social Roots of Poverty,” p. 575, in *The Politics of Law: A Progressive Critique*, ed. David Kairys (New York: Basic Books, 3rd. ed., 1998), pp. 569–90.

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country, whose liberties he fought for and whose independence he aided in establishing.”²

McBeth was not alone in thinking that the United States should come to his aid, as the many petitions and claims sent to Congress in the late eighteenth and early nineteenth centuries demonstrated. Rawleigh Christian of Northumberland County, Virginia, another veteran of the Revolution, wrote to Congress in December 1817 to ask for “something for his immediate support and also such an annual pension as [Congress] m[ight] think just, taking into consideration his services and situation.” He had devoted the prime of his life to the American cause, having fought in seven major engagements between 1774 and 1781 as a soldier in the army. Advancing in age, feeling the effects of his war wounds, and incapable of earning a living through his own labor, Christian “thr[ew] himself on the justice and bounty of the Congress of the United States under the most thorough assurance that they w[ould] not suffer the worn out Soldier of the Revolution to pine in want for that pittance which would be like a drop from the ocean of a great and wealthy country.”³

Congress received the petition of Nathaniel Kinnard of Portsmouth, New Hampshire, in January 1818. It detailed Kinnard’s decades of devotion to the United States, from his enlistment as a soldier in the revolutionary army in 1775 to his discharge as the commander of the cutter *New Hampshire* in 1815. He had “served the whole of two Wars, during which he ha[d] suffered more than five years imprisonment & captivity.” Like McBeth and Christian, the sixty-three-year-old Kinnard felt “compelled to throw himself on the bounty, or the justice of his Government, for that decent support to which his own means [we]re totally inadequate.” He prayed that Congress would add him to the pension list or otherwise provide for him so that “the few remaining days, or years, which m[ight] be allotted to him, [would] not be embittered with the reflection, that while he ha[d] devoted the best period of his life to his country, his services & sufferings should have resulted in the Poverty of himself and his family.”⁴

On March 18, 1818, President James Monroe signed a bill establishing a Federal pension program for aged, impoverished veterans of the

² Petition of George McBeth, HR15A-G10.1, Records of the U.S. House of Representatives, Record Group 233, National Archives, Washington, DC.

³ Petition of Rawleigh C. Christian, SEN 16A-G10, Records of the U.S. Senate, Record Group 46, National Archives, Washington, DC.

⁴ Petition of Nathaniel Kinnard, HR 15A-G10.1, Records of the U.S. House of Representatives, Record Group 233, National Archives, Washington, DC.

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American Revolution. The legislation had been passed by overwhelming majorities of both chambers of the Fifteenth Congress of the United States. According to its terms, surviving patriots who had served in the Continental Army or Navy until the Revolution ended, or for at least nine months during that war, and who were in need of their country's support because of reduced circumstances, became entitled to Federal pensions for life.⁵

The enactment of the Pension Act of 1818 was a watershed event. Most obviously, it committed the U.S. Government to playing an active and direct role in the alleviation of poverty. The Pension Act constituted a major departure from the uncertain and highly localized support provided under the poor laws, establishing a vital new source of national-level income assistance for thousands of citizens and a new partner for state and local entities charged with caring for the poor. In conferring entitlement status upon aged veterans, the act also constituted an expression of "enforceable virtue," which embodied new national standards for public morality and civic responsibility.⁶

In addition to inaugurating an important new Federal social role, the Pension Act entailed a critically important congressional turn toward a novel type of public policy: statutes entitling *groups* of citizens to Federal benefits via public benefit *programs*. Entitlement programs are such standard fare today that they seem to be an intrinsic part of public affairs. As a policy strategy, however, they were an invention of the early national period. An essentially new form of public law, entitlements proactively granted Federal largesse to citizens sharing certain designated characteristics. Such a device deviated radically from the tenets of representation and fiscal responsibility enshrined in the political and constitutional culture of early America, which obligated legislators to respond directly to the petitions and claims of citizens like McBeth, Christian, and Kinnard on an individual, case-by-case basis.

In creating pension entitlements in 1818, Congress acknowledged decades of struggle for recognition by the military veterans who had fought to establish the American nation. Yet, as many men petitioning for Federal aid soon learned, the Pension Act passed by Congress did

⁵ *Annals of Congress*, 15th Cong., 1st sess. (Washington, DC: Gales and Seaton, 1834–), pp. 2518–19.

⁶ John Resch, *Suffering Soldiers: Revolutionary War Veterans, Moral Sentiment, and Political Culture in the Early Republic* (Amherst: University of Massachusetts Press, 2000), p. 118.

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not recognize or reward the efforts of all veterans.⁷ Instead, it took an overtly selective approach in designating a category of eligibles, restricting benefits to a carefully delimited subset of the men who had served in the Revolutionary War. Many people who celebrated the Pension Act's enactment apparently were willing to overlook the selective perception involved in its establishment. Others, however, were appalled by the new law's selectivity, which seemed to violate contemporary legal norms barring legislation that operated "partially" upon particular classes of citizens, advancing egalitarian conceptions of citizenship and distributive justice.

In embracing entitlements as a device for programmatically addressing the presumptively similar characteristics and circumstances of groups of citizens, Congress relinquished some of its legal authority and duty to determine the worthiness of individuals. This created a need for an administrative branch of government and invested it with significant powers over citizens' lives. At the same time, the American state gained the power to construct abstract categories of desert and reward, signaling what kinds of people and behaviors would be deemed virtuous and meritorious by the nation. America's original entitlements bound citizens and their loyalties to the government of the United States, but not in such a way as to engender passivity. Rather, Federal entitlements urged positive actions in the service of Government goals, by members of the military and civilians alike. Mobilizing the energies and imaginations of thousands of American citizens, entitlement programs allowed multiple thorny problems of national governance to be addressed simultaneously, be they conquest, territorial expansion, or the elimination of native peoples.

The scope of the 1818 Pension Act was unprecedented when its terms were inscribed in the statute books of the United States. In form, however, it was not entirely new, for it joined a set of earlier enactments that programmatically entitled other select groups of Americans to land and monetary benefits. Because the Federal government had extended the Continental and Confederation Congresses' commitments to provide for men injured in the service of the state, the pension program of 1818 was grafted onto an existing pension plan for disabled veterans. A set of

⁷ There is no record that George McBeth or Nathaniel Kinnard ever received pensions under the Pension Act of 1818. Rawleigh Christian apparently died shortly after he petitioned Congress for aid, leaving his widow to seek a pension. Revolutionary War Pension and Bounty-Land-Warrant Application Files, Records of the Veterans Administration, Record Group 15, National Archives, Washington, DC.

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land-related entitlement programs was also already in place. Federal law granted land to certain classes of veterans who had fought in national forces during the Revolution and the War of 1812, and bestowed special purchase rights upon select categories of civilians who had settled illegally on the public domain. New pension and land entitlements would soon be added to those on the books in March 1818, further extending the beneficence of the United States to particular “types” of citizens. Together, these early American entitlements constituted the United States’ first “system of national public care.”⁸ The establishment of this early system of Federal social aid, and the coincident invention and legitimation of programmatic, legal entitlement as a Federal policy practice, had enormous consequences for the institutional development of the American state, the contours of American civic life, and the shape of future U.S. social policy.

Rethinking the American State and American Governance

The idea that an important system of national social provision came into being in the United States at the turn of the nineteenth century may confound readers steeped in the conventional wisdom that a Federal social role did not meaningfully exist in the United States until the 1930s. Even those acquainted with recent revisionist scholarship situating the origins of Federal social policy in the Civil War pension system may be perplexed to learn that major programs of public care existed well before the Civil War and Reconstruction. For many, the absence of an American “welfare state” before the late nineteenth or early twentieth century logically denies the existence of antebellum social programs of enduring significance. Theda Skocpol, most notably, ignores Federal land benefits in her account of the origins of social policy in the United States, and dismisses the establishment and expansion of Federal military pensions before the 1860s as “minimal” compared with what was to come later, even though she otherwise emphasizes that policies shape politics.⁹

Those who understand the early American state to have been a limited, underdeveloped, premodern shell may similarly be confounded by the notion of a significant early-nineteenth-century system of national

⁸ Theda Skocpol’s phrase. *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992), p. 151.

⁹ *Ibid.*, p. 105.

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social benefits. The preeminent works detailing American state formation postpone the evolution of genuine “stateness” until the middle to late nineteenth century, when the exigencies of the Civil War and Reconstruction led to the development of wholly new forms of central authority and capacity.¹⁰ By the terms of these and other accounts, the insubstantial, essentially frail entity that was the antebellum American state would not have been capable of enacting and implementing Federal social policies and programs on behalf of the nation’s citizens. Not until the victory of the Union’s forces, as Richard Bensel puts it, would the American state gain the “fundamental attributes of territorial and governmental sovereignty.”¹¹

It is unfortunate that some of the finest scholarship on American political development not only fails to account for the empirical realities of early Federal institutions and social welfare policy but, moreover, effectively dismisses them, creating large blind spots in our field of vision. These blind spots will not disappear until we begin to rethink the qualities of the early American state and its policies, elucidating the attributes that it possessed and the goals it could and did achieve, instead of focusing upon the features that it lacked and the tasks it could not and did not accomplish.

A critical first step in this reconsideration is that of identifying the scholarly tendencies that have worked to camouflage the true dimensions of the American polity in its formative years. One of these tendencies is the almost systematic inattention that has been paid to the institutional dimensions of early American governance during the past several decades, even by scholars of a “new historical institutionalist” stripe, whose research focuses on the relations between institutions, social forces, and political outcomes and their consequences. Richard John has attributed this inattention to the emergence of new traditions in historiography that discounted the role of state institutions in the early republic, effectively rendering analysis of the structural features of American governance passé.¹² Only very recently have scholars begun to redirect their

¹⁰ Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (Cambridge: Cambridge University Press, 1990); see also Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge: Cambridge University Press, 1982).

¹¹ *Yankee Leviathan*, p. 2.

¹² “Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835,” *Studies in American Political Development* 11 (2) (Fall 1997): 347–80.

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focus toward the law, public policy, and public administration of the early national period in an effort to assess how governmental institutions, in combination with ideas and social circumstances, enduringly influenced the developing nation. Much more remains to be discovered about governance in the United States' early national period.

John has also diagnosed the myopia that results when early American governance is evaluated in terms of anachronistic understandings of state and "stateness," such as when the nation's original administrative apparatus is measured according to comparisons with the post-Civil War or even the twentieth-century administrative state. Such judgments render the state building and governance that took place before the 1860s prehistoric, effectively consigning them to an interesting but irrelevant past. This is regrettable, for meaningful and far more appropriate comparisons can and should be drawn between the institutional arrangements and policy outputs of the founding generation and those that existed immediately prior to the framing of the Federal Constitution.¹³

These insights of John's provide a valuable starting point for an inquiry into the true qualities of the early American state, but they need to be extended to reveal the ways in which our vision is also distorted when American "stateness" either is appraised in terms of inapt international comparisons or assessed solely in administrative terms. Federally organized, formally dedicated to the principles of popular sovereignty, representation, and citizens' rights, and curiously invested in both liberal and illiberal pursuits,¹⁴ the early American state was in key respects a state like no other. The institution at the core of this unique state was not the executive, as is implied by studies measuring state strength according to central administrative capacity, but rather the nation's legislature. It was the U.S. Congress that was the key institutional player in establishing political stability, prosperity, and security while expanding the American nation and forging a national community – in no small part through the establishment of the entitlement programs chronicled in this book.

Just as incongruous assessments of the state and state capacity skew our vision of the realities of early American governance, so too do analyses predicated upon contemporary understandings of the welfare state.

¹³ Ibid., p. 368. See also Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse* (Cambridge, MA: Harvard University Press, 1995).

¹⁴ Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven, CT: Yale University Press, 1997).

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The welfare state is an extremely problematic standard for evaluating the national social programs of nineteenth-century America, because those programs were not necessarily enacted with the goal of constructing a deliberate, holistic system of care or even intended primarily as what we now think of as “social policy.” This does not mean that they should be viewed as insignificant providers of welfare or classified as a different “type” of policy, such as military policy or land policy. Instead, they should be recognized as forms of governance established under changing conditions of democracy, which constituted systems of public benefits appropriate to particular historical circumstances. Like their counterparts in modern welfare states, these benefits were legal entitlements.

Calling eighteenth- and nineteenth-century Federal benefits “entitlements” may be fraught with some danger, since the term has strong modern associations, means strikingly different things to different people, and usually carries a strong political charge. Many who take the sign of that charge to be positive understand entitlement programs to indicate that a given nation-state recognizes certain basic commitments to its citizens, whether they take the form of universal guarantees for all (in T. H. Marshall’s words, the “social rights of citizenship”)¹⁵ or more discretionary allocations. Those reading the sign of the charge to be negative, by contrast, typically comprehend entitlements to invoke the specter of welfare, or unearned, noncontributory assistance. To them, the word entitlement is either a term that signifies a welfare benefit per se or a label that contains the potential to invite social stigma, whatever program it might be applied to.

There is nonetheless an inherently neutral understanding of entitlements – the one relied upon in this book – that takes the term entitlement simply to identify a particular *form* of public law or policy: one that grants public benefits to groups of “like” individuals *programmatically*, on the basis of the statutory eligibility criteria of deliberately enacted legislation.¹⁶ R. Shep Melnick has called attention to the formal, programmatic aspect of entitlements in order to demonstrate that such benefits have never

¹⁵ See “Citizenship and Social Class” in *Class, Citizenship, and Social Development* (New York: Doubleday & Co., 1964), pp. 65–122.

¹⁶ A form of public policy has been usefully defined by Deborah Stone as a particular strategy for “structuring relationships and coordinating behavior” toward the achievement of particular purposes. *Policy Paradox and Political Reason* (Glenview, IL: Scott, Foresman & Co., 1988), p. 208. This definition of entitlements is refined further in subsequent sections of this chapter.

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achieved the status of constitutional guarantees in the United States.¹⁷ Equally important, however, is the fact that it is the programmatic dimension of entitlements as a form of public law that distinguishes them from the sporadic acts of legislative generosity found in private law. This distinction admittedly is not vital to an understanding of the modern world of social policy, for public law is now at the core of the legislative process. However, it is absolutely essential to an understanding of American political development in the late eighteenth and nineteenth centuries, when the congressional agenda was dominated by private claims and private legislation. Early American legislators devised the programmatic entitlement of categories of citizens as a formal alternative to the one-time, ad hoc grants of aid or preferential treatment that were then their normal mode of response to citizens' individual and unpredictable claims of need and right.

To underscore this formal dimension of entitlements is not to suggest that their substance is unimportant. Entitlement programs distribute certain resources and impose certain burdens. They confer identities, encourage preferences, establish understandings, and enable experiences. The particulars of specific programs matter. Yet, the common structure shared by all entitlements is also significant. As the case studies of America's original entitlements found in the following chapters demonstrate, different programs tend to generate similar institutional processes, serve the same ideological functions, and produce the same kinds of political dynamics. In both form and substance, entitlements play a vital role in composing states and societies, as well as the institutions and characters that inhabit them.

This book explores how, why, and with what effects national legislative bodies selectively entitled groups of Americans to social benefits from the very beginning of the nation's existence, starting with land grants and disability and service pensions for veterans of the Revolutionary War. It shows that entitlements were a primary instrument by which the fledgling U.S. Government constituted itself and the new nation during the first century of the Republic's existence. First, and perhaps most obviously, there was a vital substantive link between entitlements and the concrete geographical development of the nation. The national-level pension and

¹⁷ *Between the Lines: Interpreting Welfare Rights* (Washington, DC: Brookings Institution, 1994), pp. 16–18, 274–83; “The Courts, Congress, and Programmatic Rights,” in *Remaking American Politics*, ed. Sidney Milkis and Richard Harris (Boulder, CO: Westview Press, 1989), pp. 188–212.

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land entitlements legislated by the Continental and U.S. Congresses from 1776 on facilitated the establishment, consolidation, expansion, and reconstruction of the United States through military and civilian conquest, allowing the Revolution to be won and American sovereignty gradually to be extended over a continental republic of unprecedented size.

State building went hand in hand with these processes, and entitlement programs played a major role in the development of national institutions. To begin with, they allowed the new American state to build and sustain a capable national military – no mean feat in a country philosophically opposed to professional or standing armies. Entitlements also necessitated and justified the establishment of a national treasury and a public domain, even as they simultaneously required their use. They shaped the development of Congress, contributing to the establishment of the committee system and the emergence of modern legislative behavior rooted in programmatic responses to group demands. Early American entitlements also spurred the creation of a Federal bureaucracy, since government agents of various kinds were needed to process, verify, and police applications for programmatic benefits and organize their disbursement. The nation's first entitlement policies even affected the evolution of the federal courts by provoking conflicts over procedural justice and the distinction between legislative and judicial roles and functions.

Entitlements also figured prominently in the evolution of the U.S. Constitution's meaning and, more generally, in the development of law and legality in the United States. The creation of Federal pension and land entitlements involved the practical incarnation of foundational American legal concepts that were not self-executing, including the separation of powers, federalism, Congress's taxing and spending authority, property, the right of petition, and representation. Looking at the actual record of the first hundred years of U.S. governance through the lens of statutory entitlements, we learn that original understandings of institutional functions, derived from colonial legislative precedent, vested adjudicatory authority over certain kinds of claims in Congress rather than the courts.¹⁸ The mechanism for conveying those claims to Congress was the petition, a form of political speech so vital as an expression of the will of the people, and as an instrument that structured politics and the processes of representative government, that the ability to petition became

¹⁸ Christine A. Desan, "The Constitutional Commitment to Legislative Adjudication in the Early American Tradition," *Harvard Law Review* 111 (1998): 1381–90.