1

Mutual Dependence and Bargaining

The central characteristic of the American political system is federalism. "A centralized national government modified with provisions to preserve the states,"[1] the American federal system has been much admired and copied since its creation by the delegates to the Constitutional Convention of 1787. James Madison described it as a "compound republic . . . [in which] the power surrendered by the people is first divided between two distinct governments, and the portion allotted to each subdivided among distinct and separate departments."[2] And he welcomed the capability of different levels of government to "control each other, at the same time that each will be controlled by itself."[3]

Mutual control by different levels of government with opposed interests within the "compound republic" is the central theme of this book. Why do we focus on intergovernmental disputes? William Riker provides a succinct, straightforward answer: "Intergovernmental disputes," he writes, "are inherently necessary in federalism. If there are disputes, then federalism is alive and well. Clearly, if there are no disputes, then either the federal system has been fully unified or it has collapsed."[4]

Basically, intergovernmental disputes involve adjustments to the authority of state, local, or national governments. How are they resolved? Most of the time they are resolved through bargaining among the parties involved. Arrangements among governments, whether incorporated in the constitution, in judicial interpretations, in laws, or in regulations, represent bargains struck by political bargainers to achieve mutual satisfaction.

In this chapter we present a bargaining perspective on American federalism. Mutual dependence, or symbiosis, as a precondition for bargaining in the federal system is discussed in the first section. The essential elements of

Copyrighted Material

a bargaining framework are presented in the next section. The institutional environment, including constitutional provisions and Supreme Court interpretations, is set forth in the third and fourth sections. The chapter concludes with an assessment of the current state of American federalism.

Symbiosis

Bargaining is the currency of the American federal system because of a simple, but very important, reality: mutual dependence. National, state, and local governments exist in a symbiotic state, a condition where "dissimilar organisms liv[e] together in more or less intimate association or close union."[5]

Morton Grodzins observed the symbiosis in 1949, well in advance of the great expansion of federal aid to states and localities associated with the "Great Society" administration of President Lyndon Johnson. "It is difficult," Grodzins wrote, to find any government activity, "which does not involve all three of the so-called 'levels' of the federal system."[6]

Such interplay can involve all or some of the three dimensions of implementing public programs—financing, policy making, and administration. For example, services to stabilize families and prevent the placement of children in foster care are directly administered by states, and in some states, local governments. Such services are financed by federal and state, and, in some states by local governments. Finally, policies concerning eligible uses of the funds and intended beneficiaries of the services are set at the federal, state, and in some states, local levels. It is adjustments to the roles of the involved governments, as, for example, those initiated by the Reagan administration, that are often the issues in intergovernmental bargaining.

Is the symbiosis benign? Is it nonthreatening to the interests of federal and state governments and mutually beneficial? Or is the relationship adversarial because adjustments to it are not neutral in effect?

Both benign and adversarial perspectives can be invoked when actions initiated by one government affect governments at other levels. From a benign perspective, the actions by one government have innocuous effects on other levels. Expenditures by the national government, for example, that are frequently revenues for state and local governments, are not perceived to threaten their autonomy. This is because those governments play a necessary role in enabling or constraining the federal actions, and in the process they protect their own interests. As Thomas Anton writes, "localized representation in Congress and the locally specialized interests of national administrative agencies... give much of national policy its traditionally regional configuration."[7]

An adversarial perspective, in contrast, views the extensive ripple effects from changes in federal taxing or spending policies, such as "increases

Copyrighted Material

in local taxes, or... substantial reductions in older state-funded programs,"[8] as evidence that priorities of those recipient governments are distorted and diminished. Thus the effects are not benign; federal actions challenge the integrity of state and local governments. The federal government is regarded as an adversary.

Whether benign or adversarial, both perspectives assume that the symbiosis is dynamic.

The Elements of Bargaining

Several generic concepts introduce us to bargaining. *First*, the term refers to "a process by which a joint decision is made by two or more parties. The parties first verbalize contradictory demands and then move toward agreement by a process of concession making or search for new alternatives."[9] *Second*, the outcome of the process is an agreement, or bargain, between the parties "settling what each one gives or receives in a transaction between them or what course of action or policy each pursues in respect to the other."[10] Between these basic concepts of joint process and joint agreement lies dynamic and complicated terrain that is relevant to real-world bargaining under federalism. That terrain includes the following elements:

(1) the *involved parties* (their number, nature, and interests);
(2) the *issues* (their number, nature, and clarity of definition);
(3) the *initial and subsequent conditions* for bargaining (bargaining partners, issues, and strategies); and
(4) the *strategic alternatives* available to the parties involved.

These are the "interesting phenomena,"[11] often highly simplified in abstract models of bargaining, that compose the framework within which we shall examine the dynamic symbiosis between New York and the federal government.

Who are the Involved Parties?

"All of the deductive models of bargaining treat the players, for all practical purposes, as single individuals, in contrast to collective or corporate entities."[12] Clearly, this is misleading in the federalism bargaining context. To characterize bargaining over a proposed federal statute, for example, as involving the national government and the states, is to oversimplify and misrepresent differences in values and preferences among the states. In addition, separate institutional actors with different strategic interests within a single state or within the federal government would be overlooked.

Copyrighted Material

For our purposes, the involved parties, depending, of course, on the issue, are collective governmental entities (e.g., states or local governments), or subunits of governments (e.g., the Congress or federal agencies), or non-governmental (e.g., nonprofit organizations), or private groups (e.g., trade associations or citizen groups).

The tax reform case (Chapter 6), for example, encompassed many actors —the State of New York, the Congress, the Treasury Department, and educational and trade lobbies. The superconducting supercollider issue involved state and local governmental officials and an ad hoc group of citizens.

What are the Issues?

Issues involve benefits produced by governments at all three levels. Anton classifies them as economic, juridical, and symbolic. Economic benefits from governments encompass direct subsidies to corporations and to eligible people, tax deductions, and public sector employment. Juridical benefits "assign rights and obligations to individuals based on some defined status", as, for example, "voter or lawyer."[13] Symbolic benefits range from patriotic celebrations to expressions of values shared by the public. The ongoing interplay among national, state and local governments in the production of these benefits often generates intergovernmental disputes.

The intergovernmental disputes described in this book principally involve controversy over economic benefits. Tax reform, welfare matters, and the domestic policies of the Reagan administration all included bargaining between New York State and the national government over the allocation and distribution of economic benefits.

Issues can also be characterized as *cyclical, recurrent, or new.* Cyclical and recurrent issues are those that are "older and more familiar."[14] Cyclical issues involve, for example, "a new budget [that] must be passed each year and a change in the debt ceiling [that] must be adopted almost as frequently. Recurrent issues indicat[e] primarily the failure of previous policy choices to produce the intended or desired impact on society."[15] Civil rights matters, such as integration of public schools and legalization of abortion, are examples of recurrent issues. In contrast to cyclical and recurrent matters, new issues have no perceived links to prior political decisions. President Reagan's 1986 tax reform proposal to eliminate deductions of state and local taxes and the 1981 budget cuts are examples of new issues.

What are the Conditions for Bargaining?

It is frequently difficult to establish the initial conditions for bargaining. As Oran Young notes, "It is sometimes hard for the players to identify their

Copyrighted Material

bargaining partners with precision. This is especially true in large groups in which there are numerous relationships involving strategic interaction. The alternative strategies available to one or more of the players may be vague or undifferentiated so that it is difficult even to begin the process of constructing a utility function."[16]

And as the bargaining progresses, the "range of alternatives available to any player may be subject to change . . . rather than being fixed at the outset. That is, some of the alternatives may become irrelevant while new alternatives may be introduced during the course of bargaining. . . . [Such internal interactions among potential and actual coalition members may also cause fluctuations in the] external behavior of the collective entity."[17]

These complicating realities of multiple actors and coalition formation are incorporated in several cases in this book. For example, the case of the disputed rent-check regulations (Chapter 7) illustrates how the involvement of multiple actors representing New York State created a complicated bargaining reality. And the tax reform and New York City fiscal crisis cases (Chapters 5 and 6) depict how the dynamics of coalition formation were very much a part of the New York strategy.

What Kinds of Strategic Alternatives are Available?

Strategic alternatives in bargaining can take many forms. Three basic ones, however, predominate when the parties are committed to reaching agreement. Dean Pruitt describes them as follows: "One strategy is to *concede unilaterally.* This has the goal of reducing the distance between the two parties' demands. The second strategy is to stand firm and employ pressure tactics (e.g., persuasive arguments, threats, positional commitments) in an effort to persuade the other party to concede and thus also to reduce the distance between demands. The elements of this strategy can be called *competitive behavior* since they seek to gain an advantage for the self at the other's expense. The third strategy is to collaborate with the other party in search of a mutually acceptable solution. . . . Examples of coordinative [*collaborative*] behavior are a proposal for a possible compromise, participation in a problem-solving discussion, a unilateral tension-reducing initiative, or cooperation with a third party who is trying to resolve the controversy."[18]

These strategic alternatives can be readily applied to bargaining in the federal system. In particular, the analysis of New York's responses to the Reagan domestic program (Chapter 9) illustrates how and why the State variously conceded, competed, and collaborated with the federal government. The supercollider case (Chapter 10) features a competitive strategy at work.

Now that we have laid out the elements of the bargaining framework we shall use in analyzing disputes between New York and the national government, we turn to the institutional environment for bargaining in the federal system.

Copyrighted Material

The Constitutional Perspective

Defining federalism is a daunting challenge. Some scholars contend "that federalism is so broad and inchoate as a governmental arrangement that it defies close specification."[19] William Stewart, for example, has classified federalism under fifty-five categories containing nearly 500 "literal as well as figurative representations."[20]

Here, however, we take the position that federalism has two essential elements: (1) powers are divided between national and regional governments; and (2) the powers of the regional governments are consequential.

The division of powers element has been well articulated by Arend Liiphart and by Daniel Elazar. In a comprehensive comparison of forms of democratic government, Liiphart identifies "a guaranteed division of power between central and regional governments"[21] as the primary characteristic of federalism. Elazar extends that statement by defining federalism as "a mode of political organization that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both. . . ."[22]

Richard Nathan and Margarita Balmaceda have enunciated the second element. They write that "the acid test of federalism is not whether the general and local government are co-equal. The test of whether a political system is federal is whether it has regional governments with consequential powers."[23] Such consequential powers can pertain to legal and revenue prerogatives, functional authority and responsibilities, and power over local units.

How and in what ways are consequential powers distributed among the "general and constituent governments"? Rufus Davis, in a thoughtful and provocative essay, considers several central dimensions of distributing functions, including distinctions between "national," "common," "local," and "particular," and concludes that the terms themselves are subjective and ambiguous. A federal constitution, he writes, is an inherently political document, "a political bargain, struck by political bargainers—the "Founding Fathers"—who assemble from a variety of motives to create some degree of permanent union between communities where previously there was none, or to create some degree of diversity where previously there was complete union."[24] Davis further observes:

> The distribution of power is a unique form of division, containing its own procedure, its own technique, and its own functions. What is divided in this process is the world of known or conceivable political activities and the principle of division is mutual satisfaction. What functions are vested in the general government, and what is left to the regions, what activities are expressed, and what implied, what activities are protected, and what activities denied only emerge from an elab-

Copyrighted Material

> orate system of political horse trading in which the variety of interests seeking expression must be compromised. There is neither science nor theory in this process . . . [rather] the skill of translating precedent to local circumstances, and the draftsmanship to express the compromised purposes of the key bargainers in a language to satisfy them.[25]

The United States Constitution embodies bargains struck by its framers in 1787 about the division of powers between the national government and the states. A careful division was proposed; it was intended to reassure opponents like Patrick Henry of Virginia, who contended that the "principles of this system are pernicious, impolitic, and dangerous."[26]

Proponents of the new constitution argued that the changes were not a radical departure from the Articles of Confederation. James Madison asserted:

> If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union than in the invigoration of the ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.[27]

The Constitution contains a threefold division of powers—those delegated to the national government, those reserved to the states, and those denied to both the national government and the states. Madison addressed himself to the first two categories. Powers exclusive to the national government, he wrote, are "few and defined," and intended to be exercised "principally on external objects, such as war, peace, negotiation, and foreign commerce."[28] Powers reserved to the states, described as "numerous and indefinite," were intended to "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state."[29]

To counteract criticisms that the national government would "squint toward monarchy"[30] and ride roughshod over the rights of individuals and states, Madison argued that the powers delegated to the national government would be much less frequently called into play than those reserved to the states. He wrote:

> The operations of the federal government will be most extensive and important in times of war and danger; those of the state governments in

Copyrighted Material

> times of peace and security. As the former periods will probably bear a small proportion to the latter, the state governments will . . . enjoy another advantage over the federal government.[31]

In addition to powers delegated to the national government,[32] reserved for the states,[33] and denied to both national and state governments,[34] the Constitution contains two other categories of relationships between the national government and the states. One involves obligations on the national government vis-à-vis the states—guarantees of territorial integrity, a republican form of government, and protection against foreign and domestic violence.[35] The other involves an important role for the states in the composition of the national government—representation of population within states in the House of Representatives, and of states in the Senate; determination of the times, places, and manner of holding election for the Congress; selecting the president by electors allotted to each state on the basis of congressional representatives; and ratifying amendments to the Constitution.

The constitutional structure is an important starting place for understanding American federalism. But the Constitution is not a static document whose original bargains have remained struck. Rather, as Anton has observed, it is a framework within which "endless debates over divisions of authority, constant adjustments to changing circumstances, and ambiguous political rhetoric"[36] have occurred. Decisions by the Supreme Court have been an important dimension of these debates.

Supreme Court Interpretations

"The Constitution, in all of its provisions, looks to an indestructible union, composed of indestructible states." These words, expressed by Chief Justice Salmon P. Chase in 1869 in *Texas* v. *White*, are often evoked as the very essence of the symbiosis between the national and state governments. Chief Justice Chase argued that the "preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the union and the maintenance of the national government."[37]

From *Texas* v. *White* to the present, the Supreme Court has grappled with the "indestructible union/indestructible states" standard. Advocates for the federal government have frequently invoked the Commerce Clause (Article I, Section 8) as the basis for federal action. Advocates for the states, alleging infringement of state sovereignty by the federal government, have invoked the Tenth Amendment. The Court's rulings on federal-state relations are numerous, involving many dimensions of the relationship.

Copyrighted Material

Three decisions in the twentieth century—*Massachusetts* v. *Mellon* (1923), *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), and *South Carolina* v. *Baker* (1988)—reveal especially well the Court's attempt to achieve balance in federalism. In the *Massachusetts* case, which involved federal grants to states for maternity and infancy health programs, the court asserted "If Congress enacted [the statute] with the ultimate purpose of tempting [states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding,"[38] that is, not accepting the funds. In the *Garcia*[39] and *South Carolina*[40] cases, involving wage and hour regulations for state and local government employees and intergovernmental tax immunity respectively, the court majority held that "the political process rather than the judicial process is the appropriate avenue for protecting state and local interests in the federal system."[41] Thus, in all three cases the court majority found the contested federal statutes to be constitutional and the sovereignty of the states to be intact.

Has the sovereignty of the states, indeed, remained intact? Are their powers still consequential? Dissenters in the *Garcia* and *South Carolina* decisions argued vigorously to the contrary. Never before, noted Justice Lewis Powell in *Garcia,* had the court "abdicated responsibility for assessing the constitutionality of unchallenged action on the grounds that affected parties theoretically are able to look out for their own interests through the electoral process."[42] And in *South Carolina,* Justice Sandra Day O'Connor charged,

> If Congress may tax the interest paid on state and local bonds, it may strike at the very heart of state and local government activities. . . . The Court has failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as the principles of federalism implicit in the Constitution.[43]

Martha Derthick, in an essay on the state of Madison's "compound republic," suggests that the courts have been as influential as Congress in promoting centralization in the system. This is, she writes, "not so much because [federal] courts have preferred the national side in overt contests between the national government and the states as because . . . [they] have aggressively pursued the extension of individual rights with little regard for the effect on states' prerogatives as governments in their own right."[44]

The Current State of the "Compound Republic"

Contemporary federalism has been variously characterized as a system of "fifty semi-sovereign states and thousands of local governments with

Copyrighted Material

varying [degrees of] home rule and autonomy"[45] and as a system in which the influence of the central government is powerful and pervasive. Within the dynamic symbiosis, both observations have merit.

Derthick reasons that over the past two hundred years, "the national government has proved supreme."[46]

> It got the better of the states in the original contest as well as in the major tests of subsequent centuries. The nineteenth century, embracing the great debates over nullification and secession and culminating in the Civil War, virtually disposed of the doctrine that the states have the right to decide disputes over the distribution of governmental power. The twentieth century then proceeded to dispose of the original precept that the powers of the national government are confined to those enumerated in a written constitution. . . .[47]

The proliferation of federal grants-in-aid to states and localities between 1965 and 1980—categorical as well as broader based in nature—together with the increasing use of cross-cutting requirements and partial preemptions, led David Walker to declare in 1981 that the American federal system was "overloaded" and "co-optive."[48] Other students of federalism concurred: "Federal financial aid has created a nationally dominated system of shared power and shared functions."[49] "The federal government is developing an American equivalent of prefectorial administration."[50] Even the Reagan administration, whose philosophical commitment to decentralization was more clearly articulated than that of previous administrations, sacrificed that goal when it was pitted against "competing administration goals of reducing regulatory burdens on the private sector or advancing its conservative social policy agenda."[51]

"On the other hand," as Derthick points out, "even the national government does not operate alone."[52]

> State governments survive, not as hollow shells . . . but as functioning entities, with their own constitutions, laws, elected officials, and independently raised revenues. Though Congress has pervasively invaded domains once thought exclusively those of the states and though it very much constrains their conduct with Commerce Clause regulations applying directly to them and with grant-in-aid conditions, on the whole it has refrained from displacing them. . . . As a general rule, when Congress essays new domestic responsibilities, it relies on cooperation of the states, with the result that the two levels of government in our federal system are today massively and pervasively intertwined.[53]

Such "massive and pervasive intertwining," with retention by state and local governments of a great deal of discretion in policy making and admin-

Copyrighted Material

istration, has been amply documented. There are numerous empirical studies of the implementation since 1965 of a wide range of federal grants-in-aid, encompassing income transfer, capital, and operating subsidies. One review of these studies and an investigation of federal and local influences on community development block grant choices, concluded that "macroassertions of pervasive central government domination"[54] need tempering. A field network investigation of the effects of the Reagan domestic program on fourteen states revealed additional evidence of the potency of states; substantial evidence was found of "delaying, blunting, and, in some cases, preventing the impact of the 1981 cuts in federal grants."[55]

Why does the "compound republic," the federalism of the founders, still exist? Why, in view of its ample prerogatives, exercised by Congress and upheld by the courts, has the national government not actually superseded the states in every dimension of public policy? Why does Congress resort to intergovernmental mechanisms for the implementation of national policy—mechanisms, as we have just noted, that can actually thwart the intent of its own actions? Why do federal agencies not regularly resort to their principal weapons—"to withhold funds in grant-in-aid programs [and] to take charge of enforcement in regulatory programs?"[56]

There are two interrelated explanations. One involves political institutions; the other, pragmatism. The nature of political parties in America is at the heart of the institutional explanation. Because the parties are highly decentralized, they "lack unity on a national level with respect to both platforms and leaders. . . . City and county (and, rarely, state) organizations are the bodies that control most nominations for Congress and for state and local offices. Even the nominations to the presidency are often controlled by confederations of local party and state leaders, rather than by clearly national leaders."[57]

The highly decentralized nature of political parties, their "historic localism, is reflected in and reinforced by [provisions in the Constitution requiring members of Congress to] be residents of the state from which they are elected, and [permitting] state legislatures to prescribe the manner of elections."[58] In consequence, the president cannot count on substantially complete support from members of his own party in the Congress because their orientation for renomination and reelection is local. The net effect is "not that states control national decisions . . . but that the nation cannot control state decisions. The result is a standoff. . . ."[59] According to this explanation, the "compound republic" persists because of the localism of America's political parties.

The second explanation is pragmatic; it reflects not only the inability, but, more fundamentally, the unwillingness of the national government to usurp state and local prerogatives. Withholding federal funds from the states is self-defeating; it carries the risks of "congressional intervention and reprimand."[60] And, as Derthick notes, "the threat to take charge of administration

Copyrighted Material

. . . lacks credibility . . . because Congress is unwilling to spend the funds or otherwise to bear the onus of creating a large federal bureaucracy."[61]

These inhibiting realities, which flow directly from the local allegiances of senators and representatives we have just discussed, set the stage for resolution of disputes between the levels of government through "bargaining and negotiation, [rather than] . . . command and obedience."[62]

Thus we conclude the discussion of the bargaining framework in American federalism. We have shown that the decentralizing features of the American federal system are sufficient to prevent the national government from overwhelming the integrity of the states. Mutual adjustments between the national government and the states occur through bargaining. We now turn to the bargaining context for New York State in the federal system.

Copyrighted Material