I. Chapter Overview

A. Learning Objectives

- 3.1 Trace the roots of the federal system and the Constitution’s allocation of governmental powers
- 3.2 Determine the impact of the Marshall Court on federalism
- 3.3 Describe the emergence and decline of dual federalism
- 3.4 Explain how cooperative federalism led to the growth of the national government
- 3.5 Identify new trends in federalism
- 3.6 Assess the challenges in balancing national and state powers and the consequences for policy making

B. Chapter Summary

**Roots of the Federal System and the Constitution’s allocation of governmental powers**

The Framers worked to create a political system that was halfway between the failed confederation of the Articles of Confederation and the tyrannical unitary system of Great Britain. They established a system known as federalism, though that word does not appear anywhere in the Constitution. Federalism is based on the sovereignty of the people who delegate power to both the central and state governments. Such a system of shared powers had never before been tried. The national government and the state governments were to have certain powers in common and their own sets of officials and each government was to be supreme in some spheres. Since both levels of government would ultimately be responsible to the people, the electorate could shift its allegiance between levels of government, thus ensuring that no one level of government would become too powerful. It was a vertical separation of powers to establish a limitation on the power of government.

*Federalism*: a political system in which power is divided and shared between the national/central government and the states (subnational units) in order to limit the power of government (NOTE: local governments are creatures of the state and not part of the federal bargain).

**National Powers Under the Constitution**

The distribution of powers in the federal system consists of several parts: exclusive powers, shared powers, denied powers, enumerated powers, and implied powers. Since the Framers were acting in reaction to their bad previous experiences, they offered an extensive list of powers for the newly created federal government to prevent the problems that had been inherent in the Articles.

The enumerated powers of the central government are listed in *Article I, section 8*: 
Exclusive powers to central government:
- lay and collect taxes, duties, and imposts
- provide for the common defense and general welfare of the United States
- borrow money on the credit of the United States
- regulate commerce with foreign nations, among the states, and with Indian tribes
- establish a uniform rule of naturalization and uniform laws on bankruptcy
- coin money and regulate the value thereof
- punish counterfeiters
- establish post offices and post roads
- award copyrights and patents
- establish courts inferior to the Supreme Court
- punish piracy, felonies on the high seas, and offences against the laws of nations
- declare war
- raise and support armies but with no appropriation of money to that use for longer than two years
- provide and maintain a Navy
- make rules to regulate land and naval forces
- call the militia to suppress insurrections and rebellions
- rule what became the District of Columbia

Implied Powers of the central government:
- make all laws which shall be necessary and proper for carrying into execution the foregoing powers

The necessary and proper clause has often been used to expand the powers of the national government as we shall see later.

**State Powers Under the Constitution**

State powers, given the climate of the time, were taken for granted. They were not thought to need such an enumeration. This may have turned out to be a mistake, because in our society many people assume that the Framers intended the federal government to be more powerful than the states because its list of powers is longer. That is definitely not true!

The states are granted some powers in this section of the Constitution. They are:
- to determine the times, places, and manners for holding elections for senators and representatives (section 4)
- State's rights exist elsewhere in the Constitution. In Article II, states have the right to appoint electors to vote for president. Article IV contains the “privileges and immunities” clause as a guarantee that citizens in all states have the same rights. But most of their powers come from the 10th Amendment that says: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” These are often referred to as reserve or police powers.

The states also receive the following guarantees in the Constitution:
• Article I guarantees each state two members in the U.S. Senate and at least one representative in the House
• Article I guarantees that slavery will not be prohibited prior to 1808
• Article IV guarantees a republican form of government
• Article IV guarantees that the central government will protect them against foreign attacks and domestic rebellion

Concurrent Powers Under the Constitution
States also have some powers that they share with the central government, called concurrent powers such as the right to tax, borrow money, establish courts, and make and enforce laws.

Powers Denied Under the Constitution
Article I, section 9, lays out powers denied to the central government. The central government may not:
• prohibit slavery before 1808
• suspend *Habeas Corpus* except in cases of rebellion or invasion
• pass bills of attainder and ex post facto laws
• pass direct taxes unless in proportion to census enumeration
• lay tax or duty on items exported from any state
• give preference to ports of one state over another
• spend money without appropriation, and the receipts and expenditures must be published from time to time
• grant titles of nobility
• no person holding an office of trust shall accept presents, titles, etc from a king, prince, or foreign state

Article I, section 10, lays out the powers denied to the states. States may not:
• enter into treaties, alliances, or confederations
• grant letters of Marque and Reprisal (these have to do with privateering or legalized piracy)
• coin money
• emit bills of credit
• make anything but gold and silver coin a tender in payment of debt (they are not allowed to make alternate money)
• pass bills of attainder (legislatively condemning someone of a crime)
• pass ex post facto laws
• impair the obligation of contract
• grant titles of nobility
• lay imposts or duties unless explicitly allowed by Congress
• keep troops or ships of war
• enter into compacts or agreements with other states or foreign powers
• engage in war

Interstate Relations Under the Constitution
The Constitution was designed to make America more united—in other words to improve relations among the states and encourage unity. The Framers wanted a single country, not 13 squabbling semi-countries. One way the Constitution provides for better relations among the states is by designating the Supreme Court arbiter of state disputes. Under the Court's original jurisdiction, disputes between the states are argued in and decided by the Court.

Article IV requires states to give “full faith and credit” to each others' laws. This ensures that judicial decrees and contracts made in one state are legal and binding in other states. States are also required to extradite criminals if asked by another state. It also requires states to extradite criminals to other states for trial. (This is an interesting place to start a discussion about civil unions/gay marriage/same sex marriage.)

In addition, Article I, section 10 states that Congress must consent to any interstate compact. Today, there are more than 200 such compacts including the Driver’s License Compact that ensures all states recognize licenses issued in other states.

Local Governments Under the Constitution

Local government, though NOT a part of federalism, is important. Counties, municipalities, townships, and school districts have no constitutional standing but are creatures of the states.

Federalism and the Marshall Court

Federalism had never been tried before the Framers invented it. Like most experiments, it does not always fulfill your dreams, meet your expectations, or look as you envision it. Plus, since the Constitution is basically a series of compromises, it is a vague document. The positive aspect of that vagueness is it is flexible and stands the test of time. It evolves and changes. Many people also say that is the negative aspect as well.

Anyway, the allocation of powers in our federal system has changed dramatically over the years. A major player in the redefinition of federalism is the Supreme Court in its role as interpreter of constitutional meaning.

McCulloch v. Maryland (1819)

This is also known as the national bank case. McCulloch was the first major decision by the Supreme Court under Chief Justice John Marshall about the relationship between the states and the national government.

In 1816, Congress chartered the Second Bank of the United States. In 1818, the Maryland state legislature (controlled by the Democratic-Republicans, heirs of Anti-Federalists) levied a tax on the Bank of the U.S. and other banks not chartered by the state of Maryland. James McCulloch, the head cashier of the Baltimore branch of the Bank of the U.S. refused to pay the tax and the state of Maryland brought suit. McCulloch lost in a Maryland court and appealed to the U.S. Supreme Court.

In a unanimous opinion, the Supreme Court said that the U.S. Congress had legitimate authority to establish the Bank of the United States. Though the power to charter banks is not enumerated in the Constitution, the Congress does have the powers to coin money, borrow funds, and collect taxes, and from these enumerated powers it is reasonable to imply that Congress had the power to charter a bank since a bank could be “necessary and proper” to execute the listed powers. Marshall and the Court also ruled that the state could not tax a federal entity since the
“power to tax is the power to destroy,” and therefore would violate the Supremacy Clause. This ruling greatly enlarged the powers of the national government.

Gibbons v. Ogden (1824)

Shortly after McCulloch, the Marshall Court got another opportunity to rule in favor of a broad interpretation of the scope of national power. Gibbons has to do with steamship navigation on the Hudson River and whether New York could grant a monopoly concession on such navigation. Not only does the Hudson River form part of the border between New York and New Jersey—with citizens of both states wanting the right to control shipping on it—but at the same time as New York awarded a monopoly to Robert Fulton, the U.S. Congress licensed a ship to sail on the Hudson. A lawsuit resulted. The main constitutional question in Gibbons was about the scope of Congress' authority under the Commerce Clause. In Gibbons, the Court ruled that interstate commerce includes more than simply direct dealings in products. It also includes other commercial activities. New York was found to be interfering in interstate commerce by granting a monopoly on the Hudson and lost the suit.

Barron v. Baltimore

This case involving a Baltimore businessman sought to apply the Bill of Rights to the State. The Court, however, ruled that that Fifth Amendment did not apply to the states and allowed them to ignore or add to the rights.

Dual Federalism: The Taney Court, Slavery, and the Civil War

The Marshall Court was quite nationalist. However, the debate over the proper distribution of power under federalism continued to rage. Roger B. Taney became Chief Justice after Marshall, and he had a different notion about federalism. The Court began to articulate the idea of concurrent powers and the idea of dual federalism in which separate but equally powerful levels of government were preferable and that the national government should not exceed its enumerated powers.

Dred Scott Decision

The Taney Court is best remembered for the Dred Scott decision. Scott had lived with his master in Illinois and Wisconsin, both free states. After the death of his owner, he sued based on a Missouri law that stated “once free, always free.” The first trial ended in mistrial due to hearsay, but the court ordered him freed at the second trial. It took several years for the case to be heard the second time, during which Scott's wages were held in escrow awaiting a verdict. John Sanford, the brother and agent of Scott's owner, filed an appeal with the Missouri Supreme Court. Slavery had become an intensely partisan issue and passions had flared—the Missouri Supreme Court ruled that Scott remained a slave. The case was taken to federal court and on to the U.S. Supreme Court. In a 7–2 decision, the Court argued that Scott was not a U.S. citizen and therefore not entitled to sue in federal court. The case was dismissed and Scott remained a slave. Taney further wrote that Congress had no power to abolish slavery in the territories and slaves were private property protected by the Constitution. The Missouri Compromise of 1820 was therefore invalid.

The decision in the Dred Scott case strengthened states' rights and invalidated a federal law thus greatly altering the balance of state/national relations. This ruling was vastly different
from the rulings of the nationalist Marshall Court. The decision also heightened tensions and helped to bring about the Civil War.

**Nullification**

Very early in the new nation’s history a fight began over state rights. With the passage of the unpopular Alien and Sedition Acts, Jefferson and Madison attempted to circumnavigate these laws at the state level by passing resolutions that would allow states to nullify federal laws. John C. Calhoun, a leading southern politician, sought to extend state powers over the federal government by proposing that states could nullify national laws with which they disagreed; he hoped this would provide a means for southern states to maintain slavery.

**The Transformation of Dual Federalism**

Crises and wars always seem to increase the powers of the national government vis-à-vis the states. The Civil War (1861–1865) definitely followed that logic. The size of the federal government increased dramatically. For the first time the national government paid out pensions and disability payments. However, dual federalism remained the Supreme Court's framework for federalism even after the adoption of the 13th, 14th, and 15th Amendments.

The Constitution, as originally written, made no provision for a national income tax. However, when the United States entered World War I, the government recognized that it desperately needed a new method of funding for the war effort. The result was the 16th Amendment that gave Congress the power to levy and collect taxes. This was a substantial increase in federal powers.

The 17th Amendment also increased federal powers. It removed the right to appoint senators from state legislators and put it in the hands of the electorate. States rights were no longer as vociferously protected as they once were in the Senate.

**Cooperative Federalism: The New Deal and the Growth of National Government**

Dual federalism finally ended in the 1930s. The Great Depression virtually thrust power into the hands of the national government, and with the New Deal the national government accepted and exercised that power. FDR treated the Depression almost like a war. He mobilized new bureaucracies and ushered in new ideas about the roles of government.

**The New Deal**

The Supreme Court, through the mid-1930s, rejected many of Roosevelt's plans to combat the Depression. The Court argued that national solutions overstepped the national government's constitutional powers and that solutions were best left to the states (a true expression of dual federalism). FDR was angry and proposed changing the composition of the Court—called by his opponents a “court-packing plan”—by raising the number of justices to 13 from nine. He would thus get to appoint four new judges, giving the New Deal a Supreme Court majority. The Court seemed to respond to the threat, and in 1937 began to reverse itself by using a greatly expanded view of federal powers through the Commerce Clause.

States and the national government cooperated together in implementing the New Deal. In addition, a third federal partner was drafted: cities. Cities became big players in the New Deal, particularly the big cities controlled by Democratic machines that supported FDR.
The Changing Nature of Federalism: From Layer Cake to Marble Cake

Prior to the 1930s, many scholars used the analogy of a layer cake to describe federalism. Each layer had clearly defined powers and responsibilities. After the New Deal, the analogy of a marble cake seemed more appropriate because the lines of authority were much more mixed. This marble cake federalism is often called cooperative federalism and has a much more powerful national government. States have a cooperative role, as did many cities.

Federal Grants and National Efforts to Influence the States

The first real federal grant was the Morrill Land Grant Act of 1862 that gave each state 30,000 acres of public lands for each representative of Congress. The income from the sale of these lands was to be earmarked for the creation and support of agricultural and mechanical arts colleges (land-grant colleges like Texas A&M, Michigan State University, Iowa State University, Florida A&M, and many others).

The New Deal unleashed floods of federal grant monies for public works projects such as building and road construction. Grants made it easy for the national government to impose its agenda on the states. If the states wanted the money, they had to do what the feds wanted them to! Grants flourished during WWII and after as well. The national government became and remains a major player in domestic policy.

The civil rights era had a profound impact on the distribution of powers between the national and state governments. Most of the blatant discrimination based on race was occurring at the state level. Federal programs began to withhold funds from discriminatory programs and states, and of course later on the federal government intervened with National Guard troops and the Federal Election Commission to guarantee equal treatment.

In 1964, Lyndon Johnson introduced his “War on Poverty,” which was part of his “Great Society” program. In an effort to eradicate poverty, huge amounts of federal money went to the states, local governments, and citizen action groups. This undermined the traditional powers of the state governments and increased the role of localities and citizen groups. The states became more and more dependent on federal funds and on the “strings” that came with those funds.

New Trends in Federalism

The Reagan Revolution

Ronald Reagan was elected on a pledge to return power to the states. Federal aid to state and local governments declined for the first time in decades. The Reagan administration preferred to give block grants to states for specified activities. Block grants designated a broad area of responsibility such as education and left most decisions and implementation up to the states, thus reversing the trend, during the era of creative federalism, of federal mandates. Declining funds and changing rules—coupled with intense competition for federal money—led state and local governments, as well as school systems, cities, police departments, and so on, to hire lobbyists to advance their interests. This became known as the intergovernmental lobby.

The Devolution Revolution

Despite changes under Reagan, the national government still had far more power than the states. Republicans and many state governors began to campaign heavily against national power and for more states’ rights.
One method by which the national government has taken powers from the states is the power of preemption. This is based on the Supremacy Clause and basically allows the national government to override, or preempt, state and local actions in some areas. This began in 1965 under LBJ and since then Congress has routinely passed preemption laws.

One such law is special education. Congress passed a law requiring states to provide special education—however, they passed no appropriation to go with the law. This is an “unfunded mandate”—an order to the states to provide a service by the national government without federal money to pay for that service. Such highhandedness by Congress has led to numerous calls for the devolution of power back to the states.

Mandates are laws that direct states or local governments to comply with federal rules and regulations such as clean air laws and disabled access to mass transit. Prior to 1995, unfunded mandates made up as much as 30 percent of a local budget. In 1995, Congress passed a law forbidding additional unfunded mandates.

Many states were quite disgruntled with the system of federal grants-in-aid and unfunded mandates, and by 1996, Republicans controlled a large number of governorships. These factors have reinvigorated the debate about the proper distribution of powers in our federal system. Public opinion also had shifted. During the 1930s and 1940s, Americans were in favor of additional powers for the national government. The 1960s seemed to prove that the federal government was more fair and just than the governments of many states. However, by the 1980s and 1990s, public opinion shifted and people began to think that the national government was too big, too strong, and too distant to understand their concerns.

As always, the Supreme Court played a role in this new evolution of the federal bargain. Traditionally, education has been the purview of the states. That tradition was shattered with the Supreme Court ruling in *Brown v. Board of Education of Topeka Kansas* (1954). The Brown ruling ended state-mandated segregation in public schools—it ordered the end of such segregation with all due speed, though the actual result has been less than spectacular. Since then courts have played an important role in monitoring state and local efforts to tear down segregation.

Elections also have been a state function, but in 1964, the Supreme Court began to limit the states' ability to determine the nature of congressional redistricting. In 1966, the Court invalidated the poll tax; and in 1995, the Court struck down state-imposed term limits on members of Congress.

The Commerce Clause has been widely used as a justification for additional national powers. Until 1995, the Court generally ruled in favor of the national government's wide interpretation of the Commerce Clause. That seems to be changing. In *U.S. v. Lopez* (1995), the Court ruled that Congress cannot legislate gun-free zones on school property. That is a state concern.

**Federalism Under the Bush Administration**

Not long into George W. Bush’s first term, the United States was attacked on 11 September 2001. The economy struggled, education costs were rising, welfare costs were going up, and we entered wars in both Afghanistan and Iraq. These events combined led to increasing state and federal budget deficits. By 2003, state budget deficits were over $30 billion. States are required by their constitutions to balance their budgets, so this was a huge struggle to cover such shortfalls. The states managed to cover the deficits through budget cuts and increased taxes but the federal government did not. The federal budget deficit in 2005 was $427 billion. The sources
of this deficit ranged from the 2001 Bush tax cuts to the war in Iraq and Hurricanes Katrina and Rita. Bush also found that he needed to increase the size of the national government to deal with the war on terrorism and this also increased the size of the deficit. He created the new cabinet Department of Homeland Security and the Transportation Security Administration. In addition his education reform, called “No Child Left Behind,” created a host of federal requirements and state costs. NCLB is also an example of preemption, the idea that the national government can override/preempt state action.

Judicial Federalism

The Supreme Court is a very powerful influence on the balance of shared powers in the American federal system. From the New Deal until the 1980s, the SC generally expanded national power and restricted state power in its rulings. However, since that time the basic trend has reversed. The current Court does not seem to rule in favor of additional federal powers at the expense of state powers. However, the Court and its justices are not always consistent. In the 2000 presidential elections, a lawsuit was brought to the Florida courts about whether and how to recount ballots. It was appealed to the U.S. Supreme Court, and normally states’ rights justices voted in favor of federal power and normally federalizing justices voted in favor of the state court due in large part to partisan preferences over the electoral outcome. So preference for federal law, in this case, led to the election of George W. Bush, a man who will appoint more justices in favor of states’ rights.

How did this change come about? Well, it began with the presidency of Ronald Reagan who used states’ rights as one of his litmus tests for the federal bench and appointments to the Supreme Court. Among the cases that have illuminated the Court’s swing from federal toward states’ rights are Webster v. Reproductive Health Services (1989) and Planned Parenthood of Southeastern Pennsylvania v. Casey (1992). Both cases were about abortion and both restrict federal powers while enhancing the role of the states.

The fact that Bill Clinton appointed two of the sitting justices has not changed the trend. Most of the decisions since 1989 have been 5–4 majorities in favor of states’ rights. For example, U.S. v. Lopez (1995) said Congress lacked authority under the Commerce Clause to regulate guns within 1,000 feet of a school. Local gun control was ruled a state matter, not a federal one. U.S. Term Limits v. Thornton (1995), however, rein in state powers by ruling that a state law restricting the terms of federal members of Congress was unconstitutional but term limits for state offices were constitutional. The following year, the Court ruled that states, not Congress, had the right to negotiate over gaming with Indian tribes on the basis of the sovereign immunity of states. This was a major change since the Constitution specifically gives Congress and the federal government the right to deal with the Indian tribes.

During the 2002–2003 term, the Court seemed to change course. A six-person majority, with the Chief Justice himself writing the opinion, rejected the claim that the state of Nevada was immune from suit under the Family and Medical Leave Act (FMLA). Rehnquist argued that the FMLA was an appropriate exercise of Congressional power and against the state claim to the contrary.

The addition of two new justices, Chief Justice John G. Roberts, Jr. and Samuel A. Alito, Jr. in 2005, both nominated by George W. Bush and confirmed by the Senate, has continued the migration toward more states’ rights. The Roberts’ Courts first federalism ruling limited the national government’s ability to block Oregon’s assisted suicide law. However, in 2006, U.S. v. Georgia, the Court rejected a state’s right claim about the impact of the Americans with
Disabilities Act in state prisons. So it remains unclear whether the Roberts’ Court will support national or state powers in such cases.

**Toward Reform: Attempts to Balance National and State Power**

**Price of Federalism**
Paul Peterson argued in his book that governmental policies should be divided into redistributive and developmental policies. He also felt the federal government would be best at administering redistributive policies while the states and local governments are best for implementing developmental policies. However, this is not the pattern that has developed over time as members believe that developmental policies help them connect to their constituencies. In recent years the federal government has taken up the yoke of creating national standards and levels through redistributive policies.

**Progressive Federalism**
Recently states have taken some lead in developing new policies and procedures with greater leeway allowed from the federal government. Thus the states have begun to serve as laboratories of democracy.

[Return to Chapter 3: Table of Contents]