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研究ノート

A PRELIMINARY APPROACH FOR JAPANESE LEARNERS OF AMERICAN LAW: A BRIEF INTRODUCTION TO FEDERALISM AND OTHER BASICS

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I. Introduction

If Mr. Tanaka kills a man in Kyushu and Ms. Watanabe kills a woman in Hokkaido, is the applicable criminal law the same? Yes. Both would be subject to the applicable law found in the Japanese Criminal Code. If Mr. Smith kills a woman in New York and Ms. Jones kills a man in California, is the applicable law the same? No. Each state (and the federal government) has different law, including separate criminal or penal codes. This is easily seen by the fact that certain states (and the federal government) have the death penalty while others do not.[1] The reason for this difference in

(1) As of November 9, 2016, 31 states (including California) as well as the federal government and U. S. military had the death penalty on their books and 19 states as well as Washington, D. C. (District of Columbia) had abolished or overturned it. In recent years, there has been a trend against the death penalty in terms of the number of executions, the number of imposed sentences and the number of cases in which it has been sought by prosecutors. Many states that have the death penalty in law are not using it in practice. For↗

law applicability is because the United States has a system of federalism whereas Japan has a unitary or centralized government system.

This note seeks to provide a brief[(2)] introduction to and overview of federalism and some other comparative basics of American law and legal systems that are quite different from those found in Japan and essential or useful for Japanese learners[(3)] to know and understand prior to studying specific aspects of the law and legal systems in the United States. The points included were developed and found very practical and of interest over many years of teaching American law and legal systems to Japanese students as well as in providing consultations to Japanese lawyers, professors, businesspeople and others.

↘ example, California's last execution was in 2006, although some people are predicting that executions will recommence following the passage of ballot initiative Proposition 66 in November, 2016 with a directive to speed up the process for death penalty appeals. *See, e. g., California could finally resume executions next year*, Los Angeles Times (AP), (April 23, 2017), http : //www.latimes.com/local/lanow/la-me-california-executions-20170423-story.html. As of November 9, 2016, 4 states (Pennsylvania, Washington, Colorado and Oregon) had moratoria on the death penalty imposed by their governors. On the other hand, some states like Texas love the death penalty. A useful source of information including statistics on the death penalty (from which the foregoing statistics in this footnote came) is the website of the Death Penalty Information Center at https : //deathpenaltyinfo.org/. Note that all of the references cited and links referred to in this note's footnotes were last accessed during the first two weeks of October, 2017.

(2) When writing commenced, it was anticipated that the length of the note might be about 10 to 15 pages, but as drafting progressed it turned out to be much longer as new ideas and cases and examples to add came to mind. It is still very brief, however, in that the subject matter of federalism is extremely complex and a library could be filled with books on the subject. The note is also merely an introduction to the topic with only some of the key points and a few cases and other examples cited out of the many possibilities due to its objective and space limitations.

(3) It is hoped that the information including footnote references will be useful to people in other countries studying American law as well. Some different focuses, however, would likely be more beneficial based on their own particular legal systems and law, such as an emphasis on differences in federalism in law and practice between the United States and their own country in countries which also have a federal system.

Ⅱ. FEDERALISM IN THE UNITED STATES — THE BASICS[4]

A. What is federalism?

Unlike in Japan where there is a unitary, or centralized, government system, the United States has a federal system. Federalism is the division of powers between the national government, called the federal government (in slang usage, "the feds"), and the state governments. The system is established in the U. S. Constitution.

B. Why does the United States have a federal system of government?

The federal system of government finds its roots in the country's history. The United States was formed following the colonies' successful fight for independence from Britain in the Revolutionary War. The 13 original colonies joined together as states to become one country, as reflected in its name, the *United States* of America. When joining together, the separate states wanted to maintain as many of their powers as possible. Therefore, they wanted to give the federal government only limited powers, that is, those powers that were necessary so that the country could function as a whole.[5] To make it very clear to the federal government that the states

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(4) Students in the United States begin to study federalism as well as separation of powers and checks and balances in elementary school and continue to study these concepts throughout their school years. For a useful and entertaining guide to these and other basic U. S. government concepts for different age levels, *see* Government Publishing Office (GPO), *Ben's Guide to the U. S. Government*, https : //bensguide.gpo.gov/. Some student study aids used for learning the history of federalism and its various types as well as other federalism topics can be found at Note 65. They are just a few of the many sources of information available on the Internet.

(5) In fact, the states originally wanted to give the national government even fewer powers. The U. S. Constitution is actually the second constitution of the United States. It replaced the Articles of Confederation which organized the country as a confederation of independent states with a very weak national government with only a unicameral legislature in which each state had one vote regardless of its size, and with no executive branch to enforce the laws effectively and no national court system to interpret them. The↗

planned to keep the majority of their powers, the 10th Amendment to the U. S. Constitution, known as the Reserved Clause, was proposed and ratified as part of the Bill of Rights.(6) The 10th Amendment states: "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"(7).

C. The Division of Powers Under Federalism

When discussing federalism and the division of powers between the federal and state governments under the U. S. Constitution(8), the following categories are generally mentioned: the "delegated powers" and "implied powers" of the federal government, the "concurrent powers" that both levels of governments share and the "reserved powers" of the states. The U. S. Constitution also denies certain powers to the federal and/or state governments.

To enable the country to act as a united whole with respect to particular matters, the states delegated certain powers to Congress, the federal legislature, in Article I, Section 8 of the U. S. Constitution(9). Because the

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↘ states realized that to overcome the weaknesses under the Articles of Confederation, they would have to delegate more powers to the national government. They therefore created the federal system in the U. S. Constitution under which the sovereign national government shares powers with sovereign states, with the federal law supreme. For a chart comparison of the major differences between the Articles of Confederation and the U. S. Constitution, *see* http : //home.earthlink.net/~gfeldmeth/chart.art.html.

(6) The Bill of Rights is the first ten amendments to the U. S. Constitution.

(7) All quotes from the U. S. Constitution, including its amendments, in this note come from the website of the Legal Information Institute of Cornell University, with the overview and link references at https : //www.law.cornell.edu/constitution/overview. The text at that website uses modern-style capitalization instead of the style used in the original documents, and is therefore more natural for a reader.

(8) For a basic chart of the division of powers and other information on federalism, including a quiz, *see, e. g.*, Lumen Learning, *American Government, The Division of Powers*, https : //courses.lumenlearning.com/amgovernment/chapter/the-division-of-powers/.

(9) Article I, Section 8, provides for the following delegated powers: ↗

powers are set forth as a list, such powers are also referred to as the "enumerated powers" or "expressed powers". Among the powers delegated to the federal government are those to regulate foreign commerce and set tariffs, to regulate interstate commerce, to deal with

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↘ "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
To borrow money on the credit of the United States;
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
To provide for the punishment of counterfeiting the securities and current coin of the United States;
To establish post offices and post roads;
To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
To constitute tribunals inferior to the Supreme Court;
To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
To provide and maintain a navy;
To make rules for the government and regulation of the land and naval forces;
To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings".

naturalization so people could become citizens, to coin money (that is why all states use the U. S. dollar as currency), to establish post offices, to declare war and raise and support armies and maintain a navy, to make patent and copyright laws and to make bankruptcy laws.

At the end of Article I, Section 8 following the list of delegated powers is found the Necessary and Proper Clause[10], which allows Congress to make laws to carry out its enumerated powers and other powers given to the federal government in the U. S. Constitution. Such powers are referred to as the "implied powers" because they are not explicitly stated in contrast to the expressed powers. The Necessary and Proper Clause is also known as the "Elastic Clause" because it has enabled Congress to expand its powers as discussed in the following section.

"Concurrent powers" that both the federal and state governments share include powers to make and enforce laws, to establish courts, to provide for the public welfare, to levy and collect taxes, to borrow money, to regulate banks, and to expropriate private property for public use (the power of "eminent domain"). Due to the expansion in practice of federal government powers and the intertwining of federal and state roles and responsibilities in numerous areas over the course of American history, more and more powers are being exercised concurrently.

Still, the majority of law is state law due to the states' "reserved powers" as provided for in the 10th Amendment Reserved Clause[11]. Among such powers are the powers to regulate intrastate commerce, to establish local governments (which results in local law), to regulate marriage and

(10) This clause provides that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof".

(11) *See* Section II. B.

divorce, to establish and regulate corporations, to establish schools and to conduct elections.

D. The Expansion in Practice of the Federal Government's Powers and Roles

Although the initial intention was for the U. S. federal government to have limited powers, over the years the federal government has managed to extend its powers and roles in practice and increasingly more and more areas are governed by or potentially impacted by federal laws and policies.

Three of the ways the federal government has managed to expand its powers in practice over what some people contend are state activities is through the use of the Commerce Clause,[12] the Necessary and Proper Clause, or "Elastic Clause", and federal funding. Nevertheless, as seen below,[13] there has been a pushback by the states which have been exerting "states' rights" and a number of these expansion attempts have failed.

In a successful instance, Congress was able to end discriminatory segregation between blacks and whites in the southern part of the United States by enacting the Civil Rights Act of 1964 using its authority under the Commerce Clause and the Necessary and Proper Clause. The U. S. Supreme Court held Title II of the Act constitutional and "found it a valid exercise of the power to regulate interstate commerce insofar as it requires hotels and motels to serve transients without regard to their race or color" in *Heart of Atlanta Motel, Inc. v. United States*[14] and insofar as it applies "to restaurants which serve food a substantial portion of which has moved in

(12) This clause, found in Article I, Section 8 of the U. S. Constitution, provides that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes".

(13) *See* Section IV. E. 2.

(14) 379 U. S. 241 (1964).

commerce" in *Katzenbach v. McClung*.[15] In *Heart of Atlanta Motel*, the Court stated, "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may — as it has — prohibit racial discrimination by motels serving travelers, however "local" their operations may appear[16]".

The Necessary and Proper Clause was found by the U. S. Supreme Court in the landmark case *McCulloch v. Maryland*[17] to be authority for Congress to create a national bank (which Maryland could not tax as it violated the Supremacy Clause[18]) to help it carry out its enumerated borrowing and taxing powers in Article I, Section 8 of the U. S. Constitution. Much more recently, the Necessary and Proper Clause was invoked and read very broadly by the Court in *United States v. Comstock*[19] to uphold the constitutionality of Congress's enactment of a provision[20], as part of the Adam Walsh Protection and Safety Act of 2006, for indefinite civil commitment of convicted sex offenders who are potentially sexually dangerous even after they have completed serving their sentences.

A very pervasive way that the federal government has been able to expand its powers and roles and influence state and local law and policy is through federal funding, including grants-in-aid, which are given to state and local governments for specific projects, and block grants, which are

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(15) 379 U. S. 294 (1964). The quoted language in this sentence is from *Katzenbach*. 379 U. S. at 298.

(16) 379 U. S. at 258.

(17) 17 U. S. 316 (1819).

(18) *See* Section II. E. and Note 23.

(19) 560 U. S. 126 (2010).

(20) 18 U. S. C. §4248.

given for broadly defined purposes.[21] The federal government requires the states and local governments to follow its policies to receive the federal funds. Simply put, the federal government says that we will withhold money if you do not do what we want. One example that university-age students can relate to concerns the drinking age, which in the United States is currently generally age 21, subject to some technical exceptions. The drinking age is state law and until the mid-1980s varied among the states, generally ranging from 18 years old to 21 years old. As one can expect, young people who lived near a state line next to a state with a lower drinking age would go to the other state with friends to drink. In 1984, the federal government under the Reagan Administration put pressure on states with a drinking age lower than 21 to raise their drinking age to that age, by Congress enacting legislation that would result in the withholding of 5 percent of federal funds for their highways if they failed to comply. Wanting the money, the states raised their drinking age to 21. The legislation enacted by Congress was upheld by the U. S. Supreme Court, which ruled that Congress had not exceeded its spending powers or violated the 21st Amendment to the U. S. Constitution dealing with state authority to regulate alcohol in *South Dakota v. Dole*.[22]

E. The Supremacy of Federal Law

Federal law is supreme by virtue of the Supremacy Clause[23] found in the

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(21) For more detailed information on types of federal funding as well as on the constitutional basis, history, practice and advantages and disadvantages of federalism and for additional readings and also a quiz on federalism, *see* SparkNotes Editors, *SparkNote on Federalism*, SparkNotes LLC, (2010), http: //www. sparknotes. com/us-government-and-politics/american-government/federalism/.

(22) 483 U. S. 203 (1987).

(23) This clause provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every↗

second paragraph of Article VI of the U. S. Constitution. The U. S. Constitution is America's top law based on that clause as well as the U. S. Supreme Court's decision in the landmark case of *Marbury v. Madison*.[24] Valid state law generally prevails over local law as it is the states that delegate authority to local governments to exist and enact and enforce local law.[25]

Ⅲ. THE PRACTICAL CONSEQUENCES OF FEDERALISM IN THE UNITED STATES

A. Separate Sovereign Jurisdictions

The federal government jurisdiction and each of the states are separate sovereign jurisdictions in which the law they respectively make is applicable. Each state as a sovereign issues its own licenses, such as drivers' licenses, marriage licenses and professional and occupational licenses such as licenses to practice law or medicine or to work as a construction contractor. The federal government also issues licenses regarding subject matters over which it has legal authority, such as those issued by the Federal Communications Commission (F. C. C.).

Examples of some practical results of this separate sovereignty include the fact that charges brought for violation of federal criminal law and charges brought for violation of a state's criminal law, or criminal charges brought by two different states, are not considered to violate the Double

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↘ state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding".

(24) 5 U. S. 137 (1803). The case is also highly noteworthy because it forms the basis for the Supreme Court's power of judicial review, that is, the power of the Court to hold legislation enacted by Congress (or an executive act) unconstitutional and therefore invalid if it conflicts with the U. S. Constitution.

(25) For a discussion of the doctrine of preemption and its practical implications, *see* Sections IV. A and IV. F.

Jeopardy Clause[26] of the U. S. Constitution. As is discussed below in the section on how federal and state law can work together to achieve justice, in some special cases where specific factual circumstances exist, even if a person is acquitted of a crime in one jurisdiction, charges arising out of the same wrongful conduct may be brought in another.[27]

Another example involves extradition, defined by Black's Law Dictionary as "[t]he surrender of a criminal by a foreign state to which he has fled for refuge from prosecution to the state within whose jurisdiction the crime was committed, upon the demand of the latter state, in order that he may be dealt with according to its laws . . ."[28] A person charged with a crime in one state who is in another state will not automatically be sent to the charging state; an extradition process must be undertaken. However, the process is sanctioned and facilitated by the Extradition Clause, or Interstate Rendition Clause,[29] of the U. S. Constitution as well as a federal statute implementing extradition, 18 United States Code Section 3182,[30] and is much easier than the processes involved in international extraditions.

A third example is that a judgment of a court from a different U. S. state (a "sister state") or territory is referred to as a "*foreign* judgment". However, due to the Full Faith and Credit Clause[31] of the U. S. Constitution

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(26) This clause, found in the 5th Amendment to the U. S. Constitution, provides, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

(27) *See* Section IV. D.

(28) http : //thelawdictionary.org/extradition/ (*underlining and color deleted*).

(29) This clause, found in Article IV, Section 2, Clause 2 of the U. S. Constitution, provides, "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime".

(30) The text of the statute can be read at https : //www.law.cornell.edu/uscode/text/18/3182.

(31) This clause, found in Article IV, Section 1 of the U. S. Constitution, provides, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which↗

and laws such as the Uniform Enforcement of Foreign Judgments Act[32], it is much easier to enforce a sister state judgment than a judgment from a foreign country jurisdiction, the enforcement of which is generally based on the principle of comity, with recognition and enforcement out of courtesy, good will and mutual respect.

Other examples are the Privileges and Immunities Clause[33] in Article IV, Section 2 of the U. S. Constitution and the Privileges or Immunities Clause[34] in its 14th Amendment, Section 1 which have been interpreted to prohibit states from discriminating against individual citizens coming from other states and thereby promote interstate travel, including specifically with respect to the latter clause the ability to resettle in another state.[35]

As one can see, although there are multiple sovereign jurisdictions in the United States, numerous constitutional and other legal bases have been designed to enable the legal systems and laws and government bodies to work together for the benefit of one united country and its people.

B. Multiple Court Systems

In addition to federalism resulting in various separate sovereign jurisdic-

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↘ such acts, records and proceedings shall be proved, and the effect thereof".

(32) This act is described as "a simplified way of enforcing judgments entered in another state, implementing full faith and credit". Uniform Law Commission, *Enforcement of Foreign Judgments Act*, http : //www. uniformlaws. org/Act. aspx? title=Enforcement %20of%20Foreign%20Judgments%20Act. Note that, as reported by the Uniform Law Commission as of October 2, 2017, this uniform act has not been enacted by California, Vermont, Massachusetts or Puerto Rico, although a bill to enact it was introduced in Massachusetts in 2017. Ibid. *See also*, Bryan M. Grundon, *Enforcing an Out-of-State Judgment in California*, (February 14, 2017), http : //www.grundonlaw.com/news/2017/2/14/enforcing-an-out-of-state-judgment-in-california.

(33) This clause provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states".

(34) This clause provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

(35) *Saenz v. Roe*, 526 U. S. 489 (1999).

tions, it also results in multiple court systems. There are federal courts as well as state courts, with each state having its own court system. Special federal military courts and Native American tribal courts[36] also exist. Therefore, one must refer to the legal systems of the United States in the plural.

The subject matters of the cases heard in federal and state courts are also generally dictated by federalism. Federal courts have exclusive jurisdiction over certain types of cases — such as those involving admiralty matters, patent and copyright issues and federal crimes. Most cases are heard in state courts; the majority of law in the United States is state law. Federal and state courts have concurrent jurisdiction in two types of cases — federal question cases, i. e., those involving a federal law, that are not subject to the exclusive jurisdiction of the federal courts, and diversity of citizenship cases, e. g., civil cases involving a plaintiff and a defendant from different states. Where the amount in controversy in a diversity of citizenship case exceeds U. S. $75,000[37], it may be tried in a federal court. However, in such a case, although the Federal Rules of Civil Procedure will be used, the substantive law applied by the court would be the same as that which would be applied pursuant to the state's conflict-of-law rules by a state court in the state where the federal court is located[38]. Having state courts allowed to hear cases involving some matters of federal law is useful and convenient as many cases involve multiple causes of action (legal theories for recovery) based on both state law and federal law. That said,

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(36) *See* Section III. E.

(37) There has been a trend to try to limit the number of diversity of citizenship cases heard in federal courts. Over the years, the minimum amount in controversy jurisdictional requirement which is provided in 28 United States Code Section 1332 has been raised, for example, from exceeding U. S. $10,000 to exceeding U. S. $50,000 in 1988 and then from that amount to exceeding U. S. $75,000 in 1996.

(38) This is the result of the landmark U. S. Supreme Court case, *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938).

federal question issues are always subject to review by federal courts.

Further complexity regarding court jurisdiction in the United States results from the federal court system being divided into 13 judicial circuits. There are 12 regional circuits, i. e., 11 numbered geographical circuits and the D. C. (District of Columbia) Circuit, each constituting a separate jurisdiction with a U. S. Court of Appeals and district courts.[39] The courts within a particular circuit are bound by the applicable decisions of the U. S. Court of Appeals of their respective circuit, which can differ from the decisions of the U. S. Courts of Appeals in other circuits, resulting in various interpretations of federal law throughout the United States.

In addition to the 12 federal regional circuits, there is the Federal Circuit with a U. S. Court of Appeals which has nationwide jurisdiction to hear specific types of cases such as patent cases and appeals from the Court of Federal Claims and the Court of International Trade. The Federal Circuit was created in 1982 to provide for more uniformity in the law involving these matters.

The highest court for federal issues is the U. S. Supreme Court. For solely state law issues, i. e., where no federal law is involved, the most authoritative court is the highest court in the particular state. Care must be taken regarding state court names. Whereas the highest court in some states like California is called the 〈state name〉 Supreme Court, in other states like New York the highest court has a different name (in New York, the New York Court of Appeals) and the courts called the "supreme court" are actually lower courts.

(39) For a map of the federal judicial circuits, *see* http: //www. uscourts. gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

C. Multiple Layers of Governments and Lawmakers

Federalism also results in multiple layers of government which make different types of law. The federal government organization is established in the U. S. Constitution and each state's government organization is set up in the respective state constitution. Each of the branches of the federal government makes its own type of law either by itself or in combination with another branch pursuant to the system of separation of powers and checks and balances, as discussed in the following section. The same is true regarding the state governments. Moreover, states have delegated authority for the establishment of local governments and lawmakers, resulting in even more government authorities who make law. There are also Native American tribal governments who make tribal law.[40]

D. Multiple Layers of Law

1. Overview

Along with the multiple layers of government come multiple layers of law, put simply, federal law, state law and local law.

Principal federal law includes the U. S. Constitution as well as federal statutes enacted by Congress subject to the veto power of the president, treaties made by the president with the advice and consent of two-thirds of the senators, federal executive orders and proclamations made by the president and federal administrative rules and regulations made by federal administrative agencies.

Significant state law for each state includes the state constitution as well as state statutes enacted by the state legislature subject to the veto power of the governor, state executive orders and proclamations made by the governor and state administrative rules and regulations made by state

(40) *See* Section III. E.

administrative agencies.

Major local law includes municipal charters as well as local ordinances enacted by the local legislative body subject to the veto power of the mayor, local executive orders and proclamations made by the mayor and local administrative rules and regulations made by local administrative agencies.[41]

In a number of states, voters can amend the state constitution and make state and local statutory law through referendums.

To add to all the "written law" there are countless court decisions, referred to as "unwritten law" in contrast, made by federal and state judges that constitute important judicial precedents.

As stated above,[42] federal law is supreme by virtue of the Supremacy Clause and valid state law generally prevails over local law.

2. U. S. Constitution and State Constitutions

The U. S. Constitution establishes the system of federalism, sets up the federal government organization and system of separation of powers and checks and balances and provides for certain rights and privileges, many of which are found in the Bill of Rights.

State constitutions are much more detailed and complex than the U. S. Constitution and set up the state government organization and system of separation of powers and checks and balances and provide for certain rights and privileges which generally add on to the ones provided in the latter.

Moreover, state constitutions are much easier to amend than the federal one. As mentioned in the preceding section, some state constitutions can

(41) Local government structures and names tend to vary even more widely than those of state governments.

(42) *See* Section II. E.

even be amended by voters' referendums. There are only twenty seven amendments to the U.S. Constitution, including one (the 21st) that repealed another (the 18th), the prohibition amendment. Of these, only seventeen have been ratified since 1791 when the first 10 amendments constituting the Bill of Rights were ratified. The history of the 1992 ratification of the last amendment ratified, the 27th Amendment, is of particular interest to university students and professors as well as others; the ratification resulted from a campaign by a university student seeking vindication following his receipt of a bad grade on a term paper.[43]

The majority of the provisions in the Bill of Rights were originally aimed at preventing excesses and abuses by the federal government. However, over the years through a process called "selective incorporation", the U.S. Supreme Court in case law has made many of those protective provisions applicable to state governments as well through the 14th Amendment Due Process Clause.[44] Two of the provisions that have not been incorporated are

(43) The 27th Amendment, which provides, "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened", was actually proposed in 1791 along with the 10 amendments which became the Bill of Rights and one other no longer relevant. A student at the University of Texas at Austin wrote a term paper for a government class in 1982 arguing that the proposed amendment could still be ratified because there was no expiration date for ratification. His professor obviously disagreed and gave the student a grade of "C" on the paper. Wanting to prove that he was right, the student started a campaign to get the amendment ratified by writing letters to federal and state legislators and eventually succeeded in proving his contention. An epilogue to the story: In early 2017, the professor requested that the university change the former student's grade from a "C" to an "A". *See* Matt Largey, *The Bad Grade That Changed The U.S. Constitution*, NPR, (May 5, 2017), http://www.npr.org/2017/05/05/526900818/the-bad-grade-that-changed-the-u-s-constitution; Evan Andrews, *The Strange Saga of the 27th Amendment*, History, (May 5, 2017), http://www.history.com/news/the-strange-case-of-the-27th-amendment. [Special note to the author's students: all grades given are very fair and generous which is very fortunate because trying to amend the Japanese Constitution is apparently much more difficult than the U.S. Constitution, as Prime Minister Abe would attest.]

(44) For the full text of Section 1 of the 14th Amendment, including its Due Process Clause,↗

the 7th Amendment right to a jury trial in civil lawsuits involving more than U. S. $20 and the 5th Amendment right to indictment by a grand jury for a capital, or otherwise infamous crime.[45]

3. The Law in Each State is Different

As a result of federalism, the law in each state is different, which creates the situation described at the beginning of this note whereby a killing in New York is subject to different law than a killing in California.

There are two main reasons why the law in each state is different. The first is that each state has its own state law, including the state constitution.

The second is that the interpretation of federal law can vary from one federal circuit to another and the courts in each circuit are bound to follow their own circuit's interpretation. For example, the Second Circuit U. S. Court of Appeals which covers the states of New York, Connecticut and Vermont may hold a federal statute unconstitutional, whereas the Third Circuit U. S. Court of Appeals which covers the states of Delaware, New Jersey and Pennsylvania may hold the very same federal statute constitutional. In the past, the U. S. Supreme Court often accepted to hear cases when there was a split between the circuits so as to establish one uniform interpretation of a federal law throughout the United States, but in recent years the number of cases being accepted by the court for appellate review has significantly decreased.[46] This not only leads to more differences in law throughout the country, but also provides fewer judicial precedents for guidance, a large hindrance to the United States common law system

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↘ *see* Note 76.

(45) For more detailed information on selective incorporation, *see* Legal Information Institute, *Incorporation Doctrine*, https : //www.law.cornell.edu/wex/incorporation_doctrine.

(46) *See, e. g.*, Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest In 70 Years*, FiveThirtyEight, (May 17, 2016), https : //fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/.

which is based on case law.

As for the variation in state law, similar to the trend internationally to try to harmonize certain laws to make it easier to deal with cross-border transactions and other activities, there is a trend in the United States to have uniform codes or acts[47] in legal fields where it is particularly useful to have the laws be more uniform such as in business, and model codes where similar law would be helpful but is not as necessary. Two examples of the former are the Uniform Commercial Code, or U. C. C.[48] (not coffee!), and the previously mentioned[49] Uniform Enforcement of Foreign Judgments Act, while an example of the latter is the Model Penal Code.

However, it must be emphasized that these codes and acts are not the actual law and only recommendations to the state legislatures, who are free to enact them or not and to use the same or different language. The codes and acts themselves sometimes provide alternative language.[50] The actual state law is whatever the particular state legislature enacts and how the particular state courts interpret the statutes. Therefore, the law still varies from state to state. However, a state court might be more willing in the case of uniform and model codes or acts to consider the interpretation of similar statutory language by a court in another state despite it being a

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(47) For information on uniform laws and their status, a very useful website is that of the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) at http : //www.uniformlaws.org/Default.aspx. *See also,* Note 32.

(48) The U. C. C. covers sales; leases; negotiable instruments; bank deposits and collection; funds transfers; letters of credit; bulk transfers and bulk sales; warehouse receipts, bills of lading and other documents of title; investment securities and secured transactions. It has been adopted in whole or in part by all of the states and the District of Columbia; the state of Louisiana has not adopted Article 2 (sales) or Article 2 A (leases), preferring to rely on its civil law traditions.

(49) *See* Section III. A. and Note 32.

(50) For example, U. C. C. Section 2-318 provides Alternatives A, B and C for Third Party Beneficiaries of Express or Implied Warranties. *See* https : //www.law.cornell.edu/ucc/2/2-318.

different jurisdiction, especially in a case of first impression, that is, a case where a particular legal issue is being considered for the first time in a jurisdiction.

One consequence of the existence of multiple court systems and various jurisdictions in which the law is different is "forum shopping", the practice whereby a litigant who has a choice of courts with jurisdiction over the defendant and the subject matter of the case will choose to file suit in the court that is likely to hand down the most favorable judgment for the litigant.

E. Native American Jurisdiction, Courts, Lawmakers and Law

In addition to the various sovereign jurisdictions, court systems, governments and lawmakers and law discussed above, there is even more complexity in the law and legal systems in the United States in the form of Native American law and legal systems — something even most Americans do not know much about. However, the legal existence of the casinos they visit, the bingo they play and other gaming they do on Indian reservations is in part the result of the U. S. Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*[(51)] that due to tribal sovereignty, state civil regulatory laws on gaming did not apply on reservations.[(52)]

Based on their powers of self-government in their respective areas of "Indian Country", tribes have established their own governments, tribal laws and tribal courts taking into account their traditions.

Tribal sovereignty is limited by federal law, however, as Congress was

(51) 480 U. S. 202 (1987).

(52) *See, e.g.,* Terria Smith, *Tribes celebrate the California v. Cabazon decision*, News from Native California, (March 6, 2017), http : //newsfromnativecalifornia.com/blog/tribes-celebrate-the-california-v-cabazon-decision/. Gaming on Indian reservations is now regulated under the 1988 Indian Gaming Regulatory Act, 25 U. S. C. §2701 et seq.

given the power to deal with the Indian tribes in Article I, Section 8 of the U. S. Constitution.[53] Further, under Public Law 280, Congress has transferred criminal and civil jurisdiction to 6 states — California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska — mandatorily and offered such transfer optionally to other states, "which significantly changed the division of legal authority among tribal, federal, and state governments"[54] and created even more complicated criminal and civil jurisdictional issues, some of which have been the subject of U. S. Supreme Court cases.[55]

Ⅳ. FEDERALISM IN PRACTICE IN THE UNITED STATES

A. Overview

Long story short, when a client walks into a lawyer's office in the United States with a question, the lawyer must consider whether there is any federal law, any state law and any local law — or any other applicable law — involved with respect to the relevant issues. Many areas of law, including consumer protection, environmental protection and worker protection, are regulated on multiple levels due to federalism and, as mentioned above,[56] multiple causes of action based on federal, state and/or

(53) *See* Notes 9 and 12.

(54) Ada Pecos Melton and Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, American Indian Development Associates, http : //www.aidainc.net/publications/pl280.htm.

(55) Due to the limited practical impact of this field of law for most people in or dealing with the United States as well as space limitations, only a very brief general mention of it is made here. For more detailed information on Native American law and legal systems, relevant laws, the division and sharing of jurisdiction among tribes, the federal government and states and other related matters in this complex but interesting legal area, *see. e. g.*, ibid.; U. S. Department of the Interior Indian Affairs, *Frequently Asked Questions*, https : //www.bia.gov/frequently-asked-questions; Tribal Court Clearinghouse, *General Guide to Criminal Jurisdiction in Indian Country*, Tribal Law and Policy Institute, http : //www.tribal-institute.org/lists/jurisdiction.htm.

(56) *See* Section III. B.

local law may be brought in one lawsuit. Basically, federal law, including the U. S. Constitution, provides minimum rights and states may furnish more rights in their constitutions and other laws, and local lawmakers may bestow even more, subject to the doctrine of preemption, that is, the concept "that a higher authority of law will displace the law of a lower authority of law when the two authorities come into conflict[57]".

As stated above[58], federal law is supreme as provided in the Supremacy Clause of the U. S. Constitution, and states and local governments cannot provide fewer or lesser rights and privileges than those given at the federal level. Similarly, valid state law generally prevails over local law.

A problem occurs if federal and state or local laws conflict. Congress can expressly state in a federal statute that it is preempting state and local law on a specific subject matter or a court can hold that a state or local law is preempted due to an actual direct conflict between it and a federal law. A court can also find preemption in cases where the federal law is so pervasive and detailed that it shows Congress's intent to "occupy the field".

Similarly, there can be issues of state preemption of a local ordinance[59]. As mentioned below[60], there is currently such a preemption movement in a number of states due to political reasons.

B. An Example Case — Minimum Wage

A good example of how the multiple layers of law work in practice is the

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(57) Legal Information Institute, WEX Law Dictionary, https : //www. law. cornell. edu/wex/preemption.

(58) *See* Section II. E.

(59) For more detailed information on federal preemption and state preemption, *see* Legal Information Institute, WEX Law Dictionary, Note 57 and Rottenstein Law Group, *What does 'preemption' mean in law?*, http : //www. rotlaw. com/legal-library/what-does-preemption-mean-in-law/.

(60) *See* Section IV. F.

case of minimum wage. There is a federal minimum wage law, the majority of states have a minimum wage law and there are even some cities with minimum wage laws, as well as relevant administrative agencies with authority to enforce the laws. In short, a covered non-exempt employee would get the highest amount under applicable valid federal law, state law and local law.[61]

Take as an example an office worker in San Francisco who is covered under the minimum wage laws. As of July 1, 2017, the federal minimum wage was U. S. $7.25 per hour,[62] the California State minimum wage was U. S. $10.00 per hour for employers with 25 employees or fewer and U. S. $10.50 per hour for employers with 26 employees or more[63] and the San Francisco minimum wage was U. S. $14.00.[64] In such a case, the minimum wage per hour applicable to the office worker would be U. S. $14.00.

C. Historical Evolution in Federalism and the Roles of the Federal, State and Local Governments

When examining American law and legal systems, it is essential to know that federalism in the United States and the roles of the federal, state and

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(61) For a useful map and charts with information on Minimum Wage Laws in the States as of July 1, 2017 and how the system works, *see* the website of the United States Department of Labor Wage and Hour Division at https : //www.dol.gov/whd/minwage/america.htm. For further information as of July 10, 2017, *see also*, Economic Policy Institute, *Minimum Wage Tracker*, http : //www.epi.org/minimum-wage-tracker/.

(62) United States Department of Labor Office of the Assistant Secretary for Policy, *FAQs*, https : //webapps. dol. gov/dolfaq/go-dol-faq. asp? faqid=218&faqsub=Minimum+Wage& faqtop=Wages+%26+Work+Hours&topicid=1. Note that there are special minimum wage rates applicable in the Commonwealth of the Northern Marianas and American Samoa.

(63) State of California Department of Industrial Relations, *Minimum Wage*, https : //www. dir.ca.gov/dlse/faq_minimumwage.htm.

(64) City and County of San Francisco Office of Labor Standards Enforcement, *Minimum Wage Ordinance*, http : //sfgov.org/olse/minimum-wage-ordinance-mwo.

local governments are not static and have evolved significantly over the course of the country's history, with many shifts in the actual balance of power sometimes tied to the perspectives and policies — and sometimes whims — of the president in power. Several different forms of federalism in American history have been coined, including "dual federalism", or "layer-cake federalism", with a relatively clear division of powers and roles between the federal and state governments (1789 to 1930s); "cooperative federalism", or "marble cake federalism", in which the federal and state governments work together to provide services and the line between them is more blurred (1930s to 1960s); "creative federalism", or "picket fence federalism", in which the federal government deals directly with local governments with respect to specific policy areas, i. e., the "pickets", and bypasses the state governments (1960s to around 1980); and "new federalism" or "competitive federalism" with more power returned to the states (around 1980 onward). Some scholars have a classification for "federalism under (George W.) Bush" with its emphasis on federal power due to national security concerns following 9/11 and "progressive federalism" during Barack Obama's administration.(65)

Most importantly, the balance of powers and roles of the governments are still subject to change in the future and when researching and contemplating law on the books and in practice one must search for and find the most up-to-date information and current trends.

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(65) For further details about different types of federalism, *see* student study aids such as Florida International University, *The Federalist Structure of U. S. Government,* http : //www2.fiu.edu/~ganapati/3003/federalism.html; Julia Levine and Trevi Yavorek & Taylor Bond, ed., *Types of Federalism,* APGovernmentCHS, https : //apgovernmentchs.wikispaces.com/Types+of+Federalism; Aziza Alam and Jon Qian, *Evolution of Federalism*, APGovernmentCHS, https : //apgovernmentchs.wikispaces.com/Evolution+of+Federalism ; *Types of Federalism, The Basis for American Government,* American Politics for Dummies Cheat Sheet (UK Edition), http : //www.dummies.com/education/politics-government/types-of-federalism-the-basis-for-american-government/.

D. Federal, State and Local Governments and Law Work Together

In many areas affecting the lives of people in the United States, federal, state and sometimes local governments and law work together. Just to name a few: highways, health, education, environmental protection, labor, disaster response and relief and law enforcement.[66] The exact nature of the cooperation and degree of integration varies, with sometimes only or mostly federal funding involved, other times a partnership with shared authority and financing — such as with the federal / state Medicaid program that pays for health and long-term care services for people with very low incomes — and still other times the sharing of information and other resources, for example, the F. B. I. data banks, just to name a few possible scenarios. In a number of situations, states might be presented with choices regarding the relationship. For example, with respect to state establishment of Obamacare health insurance exchanges, or marketplaces — which are under attack by the Trump Administration at the time of writing, states have been able to either "[r]un the marketplace on their own[,] [h]ave the federal government run the marketplace[, or] [w]ork with the federal government to run a partnership marketplace[67]".

Even when laws are not specifically designed to work as one whole, the laws of the different government levels and the programs and other benefits provided under them can be combined and used by persons in a complementary way to further their interests. For example, most low-

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(66) For additional information on the interrelationships of the governments, particularly with respect to education and environmental matters, *see* Norwich University Online, *Intergovernmental Relationships: How The Three Levels of Government Work Together*, http : //graduate.norwich.edu/resources-mpa/infographics-mpa/intergovernmental-relationships-how-the-three-levels-of-government-work-together/.

(67) Claire McAndrew, *States and the Federal Government Working Together to Run Health Insurance Marketplaces*, FamiliesUSA, (October, 2012), http : //familiesusa.org/product/states-and-federal-government-working-together-run-health-insurance-marketplaces.

and middle-income students will apply for both federal and state financial aid to help pay for their college education. Further, the laws at the various government levels can be used to make claims and seek justice, as discussed herein,[68] especially with respect to worker protection, consumer protection and the like.

In some rare but newsworthy cases, federal and state criminal law may be used in conjunction to achieve justice in certain cases, especially when people feel one jurisdiction's criminal justice system has failed to do so. For example, in the Rodney King case, two out of four Los Angeles police officers were successfully prosecuted and sentenced to prison in federal court for violation of Mr. King's civil rights after all the officers had been acquitted (although the jury deadlocked on one charge against one officer) in a California state court of beating Mr. King, despite video evidence of the beating, an acquittal that led to the devastating 1992 L. A. riots. In the Oklahoma City bombing case involving the deaths of 168 people in the domestic terrorist truck bombing of the city's Alfred P. Murrah Federal Building on April 19, 1995, Oklahoma state criminal charges were used to prosecute Terry Nichols in the hope of securing the death penalty against him after he failed to be sentenced to death and was sentenced to life imprisonment without the possibility of parole following his conviction in federal court, unlike his co-conspirator, Timothy McVeigh, who was subsequently executed by the federal government. Although he was convicted in state court as well, the jury deadlocked on the death penalty just as the federal jury had and Mr. Nichols was sentenced to 161 consecutive life terms without the possibility of parole.[69]

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(68) *See* Sections III. B., IV. A. and IV. B.

(69) In the federal case, Terry Nichols was "found guilty of conspiracy to use a weapon of mass destruction and eight counts of involuntary manslaughter in the deaths of eight federal agents" and in the state case he was charged with and convicted of "160 counts of first↗

E. Conflicts Between the Federal and State Governments

1. Overview

However, all is not rosy in the relationship among the federal, state and local governments. Since the U. S. Constitution was first being considered there have been power struggles and policy differences. A number of landmark court cases have resulted dealing with constitutionality issues concerning whether the government in question had exceeded its authority. Cases in which there are claims that the federal government has exceeded its constitutional powers *vis*-à-*vis* those of the states are usually referred to as "states' rights" cases.

With respect to any type of actual conflict, it must be emphasized that where the federal government does have constitutional authority over a specific subject matter, its authority is supreme and controls due to the Supremacy Clause and doctrine of preemption as discussed above.[70]

2. States' Rights and Federal Power Cases

One of the cases in which states' rights prevailed is the U. S. Supreme Court case, *United States v. Lopez*,[71] involving a federal gun control law. In *Lopez*, the Court invalidated the 1990 Gun-Free School Zones Act, a federal criminal statute[72] that prohibited "any individual knowingly to possess a

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↘ degree murder and one count each of conspiracy to commit murder and aiding in the placing of a bomb against a public building" as well as "with one count of manslaughter over the death of an unborn child". The state charges were brought not only to seek the death penalty again, but also to obtain justice for the 160 victims whose deaths were not addressed in the federal case due to jurisdictional reasons. There was a great debate over whether a state trial should be held in light of the emotional trauma and financial costs involved. Oklahoma National Memorial & Museum, *JUSTICE : THE STATE TRIAL OF TERRY NICHOLS*, https : //oklahomacitynationalmemorial. org/wp-content/uploads/2015/03/okcnm-justice-state-trial-of-terry-nichols.pdf.

(70) *See* Sections II. E. and IV. A.

(71) 514 U. S. 549 (1995).

(72) 18 U. S. C. §922(q).

firearm at a place that [he] knows . . . is a school zone", ruling that Congress had exceeded its authority under the Commerce Clause because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce[73]".

Examples of cases where the federal government prevailed are the landmark *Heart of Atlanta Motel* and *Katzenbach* cases addressed above[74] regarding the use of the Commerce Clause as authority to enact federal statutes. Another is the more recent landmark case, *Obergefell v. Hodges*[75], in which the U. S. Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the 14th Amendment to the U. S. Constitution[76] and therefore that all states are required to license same-sex marriages and recognize same-sex marriages lawfully licensed and performed in other states[77].

Overall, however, "[s]ince the 1980s, the [U. S.] Supreme Court has increasingly sided with the states in disputes with the federal government[78]".

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(73) Quoting from *Lopez*. Case read at https : //www.law.cornell.edu/supct/html/93-1260.ZO.html.

(74) *See* Section II. D.

(75) 576 U. S. ___ (2015).

(76) The 14th Amendment, ratified after the Civil War between the northern and southern states, provides in its Section 1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

(77) This was a situation where the U. S. Supreme Court did take a case to decide a split between the U. S. Circuit Courts of Appeals.

(78) SparkNotes Editors, *SparkNote on Federalism*, SparkNotes LLC, (2010), http : //www.sparknotes.com/us-government-and-politics/american-government/federalism/quiz.html.

3. The Conflict Over the Legalization of Marijuana in a Growing Number of States

Prevalent in the news in recent years has been the conflict between the federal and state governments with respect to the legalization of marijuana. Marijuana is regulated and considered illegal under Schedule I of the federal Controlled Substances Act.[79] In stark contrast, there has been a growing movement in the states to legalize marijuana for medical purposes and even recreational purposes, with the anticipation of the accompanying increase in tax revenues for states for sales of a now legal substance. As of September 14, 2017, 29 states as well as the District of Columbia and the territories of Guam and Puerto Rico had legalized marijuana for medical purposes;[80] 8 of those states and the District of Columbia[81] had legalized it for recreational purposes as well.[82] As with other state legislation, the exact systems and rules vary among the jurisdictions.

The situation of Washington, D. C., whose law allows the possession for personal use of up to 2 ounces of marijuana and limited cultivation by a person who is at least 21 years old but still prohibits the sale of the drug,[83] presents a particularly interesting issue with respect to the conflict in that

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(79) 21 U. S. C. §801 et seq.

(80) National Conference of State Legislatures, *State Medical Marijuana Laws*, NCSL, (September 14, 2017), http : //www. ncsl. org/research/health/state-medical-marijuana-laws.aspx. The NCSL is a useful source of information on the varying laws in the different states and other U. S. jurisdictions with respect to many legal subject matters.

(81) The jurisdictions and the respective years of legalization of marijuana for recreational purposes are: Colorado (2014), Washington (2014), Oregon (2015), Alaska (2016), California (2016), Maine (2016), Massachusetts (2016), Nevada (2016) and Washington, D. C. (2015). Aaron Smith, *10 things to know about legal pot,* CNN Money, (May 26, 2017), http : //money.cnn.com/2017/04/19/news/legal-marijuana-420/index.html.

(82) For a map of the status of legalization and other information on marijuana laws, *see* National Conference of State Legislatures, *Deep Dive Marijuana*, NCSL, (2016), http : //www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx.

(83) FindLaw, *District of Columbia Marijuana Laws*, http : //statelaws. findlaw. com/dc-law/district-of-columbia-marijuana-laws.html; Metropolitan Police Department, *The Facts on DC Marijuana Laws*, DC. gov, https : //mpdc.dc.gov/marijuana.

it is a federal district and its laws are subject to congressional review and impact by riders attached to federal spending bills, resulting in a "tortured relationship" with the federal government.[84] One such rider has been used to prevent the spending of any funds from the city's budget on marijuana laws, thereby preventing marijuana commercialization and its regulation and taxation; another rider was introduced in 2017 to prohibit the city's spending even of its reserve funds on such laws.[85] Since marijuana stores cannot be set up as allowed in other jurisdictions where the drug has been legalized, an elaborate system of "gifts" of marijuana — such as upon the purchase of very highly-priced goods, like a U. S. $45 T-shirt — has developed with the police basically looking the other way.[86]

Although the federal–state conflict over marijuana legalization has presented a number of challenges to persons involved in marijuana businesses allowed under state law, including the inability to take advantage of tax breaks and limited access to banking, as of the end of November 2016, the federal government had reportedly not taken any major action against marijuana businesses authorized under state law such as by conducting law enforcement raids or suing states.[87] Many people, however, are

(84) Ashraf Khalil, *Legal loophole in DC creates bizarre pot* bazaar, AP, (September 28, 2017), https : //www. apnews. com/4621c3fd499e4ca38a9be73c4f017d9e/Giving-the-gift-of-green-in-the-'District-of-Cannabis'. Particularly vexing for its residents is that the District of Columbia has no voting rights in Congress because it is not a state. It has no senator and only a delegate in the House of Representatives who can just vote in congressional committees and on procedural matters.

(85) Perry Stein, *D. C.'s ability to advance its marijuana laws could be further restricted in new federal spending bill*, Washington Post, (May 3, 2017), https : //www.washingtonpost.com/news/local/wp/2017/05/03/d-c-s-ability-to-advance-its-marijuana-laws-could-be-further-restricted-in-new-federal-spending-bill/?utm_term=.46f1a500a299.

(86) Ashraf Khalil, Note 84. This loophole system calls to mind the system of pachinko parlors with separate small cash windows in Japan.

(87) Kristen Wyatt, *How marijuana legalization could play out in Donald Trump's America*, Summit Daily (AP), (November 28, 2016), http : //www.summitdaily.com/news/how-marijuana-legalization-could-play-out-in-donald-trumps-america/.

concerned that this might change under the Trump Administration.[88] Attempts have already been made to prevent renewal of the law[89] in force since 2014 prohibiting "the U. S. Department of Justice from using federal funds to interfere with state medical marijuana programs, or from prosecuting [medical marijuana] businesses compliant with state law".[90] Fighting back, at least one lawsuit has been filed against the federal government in July, 2017 by 5 diverse plaintiffs alleging that marijuana's Schedule I status is unconstitutional.[91]

The extreme political nature of this conflict is underscored by the location of the articles about it — in the "Politics" section of the news.[92] It is just one of many examples of the influence of politics on federalism and on the roles and practical powers of and interrelationships among the federal, state and local governments.

4. The Death Penalty

As previously discussed, both the federal government and some states have the death penalty on their books for certain crimes.[93] On occasion there have been cases where the federal government sought the death penalty in

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(88) *See, e.g.*, ibid.

(89) Rohrabacher-Blumenauer Amendment, formerly known as the Rohrabacher-Farr Amendment, a rider to the Omnibus Appropriations Bill.

(90) John Schroyer, *Rohrabacher-Blumenauer Amendment extended until December*, Marijuana Business Daily, (September 8, 2017), https : //mjbizdaily.com/rohrabacher-blumenauer-amendment-extended-december/. The law has been extended until December 8, 2017. Ibid.

(91) Alex Pasquariello, *Federal lawsuit against Sessions and DEA says marijuana's Schedule I status unconstitutional*, The Cannabist, (July 25, 2017), http : //www. thecannabist. co/2017/07/25/marijuana-schedule-i-lawsuit-unconstitutional/84473/.

(92) *See, e.g.*, Avantika Chilkoti, *States Keep Saying Yes to Marijuana Use. Now Comes the Federal No.*, The New York Times, (July 15, 2017), https : //www.nytimes.com/2017/07/15/us/politics/marijuana-laws-state-federal.html.

(93) *See* Section I and Note 1.

a criminal case in a federal court in a state which did not have the death penalty under state law. One such case occurred in Hawaii involving a former soldier who was convicted of murdering his 5-year-old daughter in their federal military base lodgings in 2005. The jury could not reach a unanimous verdict as required to sentence Naeem Williams to death and he was sentenced to life imprisonment without the possibility of parole in 2014.[94]

In another case, the federal court death penalty retrial of a man charged with abducting a woman in Vermont and taking her to New York and killing her there in 2000 is currently pending in Vermont, another death penalty-free state, awaiting the outcome of an appeal on a pretrial ruling. Donald Fell had previously been convicted and sentenced to death for the murder, but the conviction and sentence were overturned based on juror misconduct.[95]

The Death Penalty Information Center website reported that, as of July 25, 2017, there were 6 inmates on federal death row who were sentenced to death in 5 states that did not have the death penalty at the time of the sentences[96] and 4 other inmates who were sentenced in 3 states that did away with the death penalty after their sentencing.[97] Among the former is

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(94) The defendant was not charged in a military court so that he and the daughter's stepmother, who was also charged with her murder, could appear in the same court, a civilian one. Associated Press in Honolulu, *Hawaii holds death penalty trial despite having abolished capital punishment*, The Guardian, (March 8, 2014), https : //www.theguardian.com/world/2014/mar/08/hawaii-death-penalty-trial-naeem-williams; Jim Mendoza, *Naeem Williams gets life in prison for killing 5-year-old daughter*, Hawaii News Now, (2014), http : //www.hawaiinewsnow.com/story/25890316/jury-declines-death-penalty-sentences-former-soldier-naeem-williams-to-life-in-prison-details-at-hawaiinewsnowcom.

(95) Alan J. Keays, *Judge: New trial in Fell death penalty case may be delayed more than a year*, VTDigger, (July 28, 2017), https : //vtdigger.org/2017/07/28/judge-new-trial-fell-death-penalty-case-delayed-year/#.WddUpf5lKUk.

(96) Massachusetts (2 inmates), Iowa (1 inmate), Michigan (1 inmate), North Dakota (1 inmate) and Vermont (1 inmate). https : //deathpenaltyinfo.org/federal-death-row-prisoners.

(97) Maryland (2 inmates), Illinois (1 inmate) and Connecticut (1 inmate). Ibid.

one of the Boston Marathon bombers. Because Massachusetts does not have the death penalty, the sentencing judge had to determine the manner of execution based on the law of a state with the death penalty and chose the law of Indiana,[98] where the federal death row is located and where the 3 federal executions since 2001 took place after federal executions resumed following a hiatus of 38 years.[99]

F. Conflicts Between State and Local Governments

States may also try to prevent counties, cities, municipalities and other local governments from passing legislation that differs from state law, particularly if it extends protections and gives more rights than state law allows, by passing "preemption" laws — and even very broad "super preemption" laws — that prevent local governments from taking any action that is contrary to state law. There has been a trend toward such preemption laws recently due to the political climate in some states where conservative Republicans make up the majority of the state lawmakers while some local governments are controlled by the more liberal Democrats. Many of these preemption laws are being challenged in court. Some subjects that have been the target of such preemption laws are minimum wage and other labor law matters and LGBTQ protections.[100]

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(98) Death Penalty Information Center, *The case of Dzhokhar Tsarnaev-Boston bombing*, https : //deathpenaltyinfo.org/node/6394.

(99) Ibid. Death Penalty Information Center, *Federal Executions 1927-Present*, https : //deathpenaltyinfo.org/federal-executions-1927-2003. The first federal execution after its resumption was that of Timothy McVeigh, one of the Oklahoma City bombers in the case discussed in Section IV. D.

(100) "According to the National League of Cities, 24 states have laws on their books preempting local laws raising the state minimum wage, while 18 states preempted local laws pertaining to the guarantee of paid sick days. Some 37 had laws restricting local measures regulating ridesharing and 17 states blocked municipalities from establishing broadband service. Some of the most high-profile fights over state legislation have been over preemption laws". Adam Edelman, *Cities Have a Good Idea? Not Unless the State Says*↗

Ⅴ. CAUTIONS FOR STUDYING AND UNDERSTANDING THE LAW AND LEGAL SYSTEMS OF THE UNITED STATES AND ELSEWHERE(101)

A. Federalism is Completely Separate and Distinct from Separation of Powers

It is essential to remember that federalism — the division of powers between the federal and state governments — and the concept of separation of powers and related system of checks and balances are entirely different and separate matters. Separation of powers involves the separation of powers among three branches(102) of government — the executive branch, the legislative branch and the judicial branch. Combined with this separation of powers is a system of checks and balances whereby each branch provides a check on the others so that no one branch is too powerful.

The system of separation of powers and checks and balances is established in the U. S. Constitution for the federal government and in each state constitution for the state governments. On the local level, a system of separation of powers and checks and balances for the executive mayor and the local legislative body is generally set forth in the municipal or other local charter that sets up the system of local government.

Whereas Japan does not have a system of federalism, it does have a system of separation of powers and checks and balances established in the

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↘ *So.*, NBC News, (October 1, 2017), https : //www.nbcnews.com/politics/politics-news/cities-have-good-idea-not-unless-state-says-so-n805951.

(101) These cautions are based on concepts with which a number of students have had some comprehension difficulties over the author's many years of teaching.

(102) Due to their immense powers, administrative agencies — some of which are considered part of the executive branch and some of which are considered to be independent — are nicknamed "the fourth branch of government".

Japanese Constitution. One major difference between the Japanese and U. S. systems is that in the latter there is complete separation of the branches; the federal and state executive (president and governor, respectively) are elected separately from the corresponding legislative branch. On the other hand, the Japanese prime minister is selected from among the elected Diet members.

B. Federalism is Completely Separate and Distinct from Common Law

Federalism must also be distinguished from common law, also known as Anglo-American Law. The common law system originated in England and emphasizes case law, i. e. "unwritten law", and contrasts with the civil law system such as that in Japan which originated in Ancient Rome and prioritizes codes or statutes, i. e., "written law".

The United States has both a system of federalism and a system of common law (except for the state of Louisiana which has a civil law system due to its historical connection with France). However, the systems are completely separate and distinct. This is easily seen from the fact that there are countries with federalism and common law (e. g., the United States, Canada [except the province of Quebec] and Australia), countries with federalism and civil law (e. g., Germany, Mexico and Brazil), countries with unitary centralized governments and common law (e. g., New Zealand, United Kingdom [except Scotland] and Fiji) and countries with unitary centralized governments and civil law (Japan, France and Spain).

C. Each Country and Other Jurisdiction Must be Considered Separately

It is also extremely important that each country and other jurisdiction be considered separately as each has its own distinctive law and legal system.

Although many countries have federal systems, what is classified as federal law and what is classified as state law as well as what may be

governed by both varies from jurisdiction to jurisdiction. For example, in the United States there are both federal crimes and state crimes, with most crimes being classified as state crimes. On the other hand, Canada also has a federal system but it has a federal Criminal Code[103] that codifies most criminal law and procedures for the country. Similarly, in the United States, basic contract law issues are generally governed by state law, whereas in Germany, contract law is found in the Bürgerliches Gesetzbuch (BGB), its federal Civil Code. When setting up a business in the United States, it is important to know that corporation law is mostly state law, with companies incorporated as Delaware corporations, New York corporations, California corporations and the like under the respective state laws.

Likewise, although systems of separation of powers and checks and balances exist in different jurisdictions, the exact characteristics of each of the systems vary, as seen by the example above[104] regarding Japan and the United States. In the United States, there is a much stronger power of judicial review, the power of a court to hold a law or an executive act unconstitutional, in part likely due to the American common law system which emphasizes case law. The Japanese Supreme Court has rarely held a law to be unconstitutional. As of the beginning of October, 2017, it had done so in only 10 instances since 1947.[105]

Furthermore, the specific laws and legal systems and practices of common law (as well as civil law) jurisdictions also vary and each

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(103) R. S. C., 1985, c. C-46.

(104) *See* Section V. A.

(105) For written statistics and information as of December 16, 2015, *see* Rob Fahey, *Don't look to Japan's SupremeCourt for Social Change*, http : //www.robfahey.co.uk/blog/japan-supreme-court-social-change/. That the number of cases of rulings of unconstitutionality was still 10 and had not increased since the foregoing article was written was confirmed orally with a Japanese law professor specializing in Japanese constitutional law at the beginning of October, 2017.

jurisdiction must be considered separately. Although American law has its basis in English law and many concepts are similar (e. g., the requirement of consideration for a valid contract), the specific law has changed and can be different. In the United States, as reiterated above, each state has its own law and the United Kingdom currently has E. U. law. In the United States, juries are used in both civil and criminal cases, whereas in England, the use of a jury in a civil case is very limited.[106]

Ⅵ. CONCLUSION

As one can see, the American system of federalism and the resulting multiple jurisdictions, court systems, lawmakers, law and intergovernmental relationships are extremely complex, especially in comparison with the law and legal system in Japan.

This note merely skims the surface of the topic and provides just a few examples out of many for some key points with the aim of providing a very simplified introduction to enable Japanese learners of American law to understand some theoretical and practical concepts that are essential to know before studying and dealing with specific legal issues.

It is hoped that the text as well as the references in the footnotes will provide a basic albeit simplistic foundation of the topic and subtopics mentioned and enable further research for more details.

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(106) Interestingly, Scotland, which is part of the United Kingdom but which has a civil law system, recently reintroduced a civil jury in the All-Scotland Sheriff Personal Injury Court. Scottish Courts and Tribunal, *First civil jury trial for All-Scotland Sheriff Personal Injury Court*, SCTS News, (May 9, 2017), https : //www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2017/05/09/first-civil-jury-trial-for-all-scotland-sheriff-personal-injury-court.