1. Context

1.1 STATE COURTS – A COMPARATIVE PERSPECTIVE

Given the growth of federal judicial power since the 1930s and particularly its shift towards nationalizing individual rights protection, we are confronted today with important questions regarding the role of state courts. Do state courts really matter in the broader consequential or influential sense? Is not the emphasis on the role of federal courts so evident in academic scholarship and popular discourse an indication of the diminishing importance of state courts in our national life? Or stated simply, why should we really care about these institutions, how they work, and what makes them different? There are a number of ways to examine such questions. One could, for instance, consider the impact of state courts from a purely quantitative perspective examining the number of cases they handle comparable to their federal counterparts and extrapolating “impact” or “consequentialness” based purely upon numbers. In 2012, for example, the combined caseload of the federal courts was approximately 1.8 million cases of which some 1.37 million cases were bankruptcy cases.\(^1\) By comparison, in 2012, the state trial courts alone handled nearly 96 million cases or an average of nearly one case for every three members of the public.\(^2\) While there are approximately 870 authorized Article III federal judges, responsibility for the administration of justice in the states is vested in almost 17,900 state court judges representing a wide diversity in jurisdictional authority, qualifications, training, and selection processes. Consequently, from a purely quantitative perspective one could argue that when the scope of state judicial power is considered in a statistical aggregate alongside federal judicial power, state courts have overwhelmingly greater reach simply as a matter of volume. But relying


on numbers alone to establish consequential effect is dubious at best. How much “consequentialness,” for example, should we assign to the almost 50 million traffic cases processed each year by state courts?³

Statistics, therefore, tell only one part of a very complex story arguably simplifying that story to something easily dismissed as devoid of qualitative meaning. One could, therefore, add qualitative meaning to numbers by examining the underlying nature of the caseloads distributed between the federal and state courts. One reason that federal court caseloads are considerably smaller than the combined (and frequently individual) caseloads of state courts is because state judiciaries constitute the nation’s general jurisdiction courts⁴ charged with responsibility for adjudicating virtually all manner of disputes, including many federal causes of action. Federal courts, in contrast, are courts of limited jurisdiction⁵ confined in the exercise of their powers by Article III, the enumerated character of the Federal Constitution, and the considerable authority of Congress to shape the structure, jurisdiction, and powers of the federal courts.⁶ Federal courts generally exercise no jurisdiction over domestic relations cases,⁷

³ Although most traffic stops are routine, some produce results that have profound national consequences. See, e.g., Carroll v. U.S., 267 U.S. 132 (1925) (inherent mobility of automobiles makes rigorous enforcement of warrant requirement impracticable); U.S. v. Robinson, 414 U.S. 218 (1973) (search of person incident to a traffic stop is reasonable); Michigan v. Long, 463 U.S. 1032 (1983) (warrantless protective search of the passenger compartment reasonable).

⁴ Martin v. Hunter’s Lessee, 14 U.S. 304, 339, 340 (1816) (Constitution does not require Congress to establish inferior federal courts); ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (inferior federal courts are not required to exist under Article III; Supremacy Clause requires that “the Judges in every State shall be bound” by federal law).


⁶ Insurance Corp. of Ireland, Ltd v. Compagnie Bauxites Guine, 456 U.S. 694 (1982). See also Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (under Rocker-Feldman Doctrine lower federal courts may not review state court decisions unless Congress has authorized such jurisdiction). See also 28 U.S.C. § 2283 (2014) (federal court may not grant injunction to stay state court proceedings except as authorized by Congress or where necessary in aid of jurisdiction or to protect or effectuate judgments).

⁷ See Barber v. Barber, 62 U.S. 582 (1858) (explaining domestic relations exception to federal diversity jurisdiction); Ex parte Burrus, 136 U.S. 586, 593, 594 (1890) (subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states); Ankenbrandt v. Richards, 504 U.S. 689, 703
suits between citizens of the same state where no federal question exists, most crimes, virtually all probate matters, a wide swath of personal and real property disputes, and cases involving important state constitutional questions. In cases involving juvenile violations of federal law, federal courts, with limited exception, are statutorily “encouraged” to transfer such cases to state courts, which are generally seen as having more expertise and experience in juvenile delinquency matters. Notwithstanding the dual constitutional structure of the American judiciary, state courts often share concurrent jurisdiction with their federal counterparts exercising authority over matters that on their face would seem to rest exclusively within the purview of the federal courts. In point of fact, there is a strong (1992) (domestic relations exception is not a constitutional restriction on federal court jurisdiction but exception remains valid given tradition and no expressed congressional preemption). But see De La Rama v. De La Rama, 201 U.S. 303 (1906) (federal courts have jurisdiction over domestic relations in U.S. territories).


10 See, e.g., Estate of Tenenbaum v. Comm'r of Internal Revenue, 112 F.3d 251, 252 (6th Cir.1997) (state law governs devolution of property at death and ultimately the impact of federal estate tax).

11 See, e.g., United Commercial Insur. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir.1992) (state law applies to the interpretation of contracts even if the underlying cause of action is federal).


13 See, e.g., Holder v. State, 847 N.E.2d 930 (Ind. 2006) (holding that when interpreting state constitutional provisions that are substantially identical to federal provisions, court may part company with other courts based on the text, history, and decisional law elaborating particular state constitutional rights); Commonwealth v. Baker, 78 A.3d 1044, 1054 (Pa. 2013) (in interpreting a provision of Pennsylvania Constitution, court is not bound by decisions of the Supreme Court which interpret similar (yet distinct) federal constitutional provisions).


15 See, e.g., The Federalist No. 82 (Alexander Hamilton) (“I am of the opinion, that in every case in which they are not expressly excluded by the future acts of the national legislature, [state courts] will of course take cognizance of the causes to which those acts may give birth.”). See also Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) (nothing in federal sovereignty or jurisdiction precludes a state court from exercising jurisdiction over cases arising in its territory and governed by federal law); Tafflin v. Levitt, 493 U.S. 455, 458–459
presumption in favor of concurrent jurisdiction, the Supreme Court having long noted that state courts are fully competent to adjudicate cases involving federal rights and interests. As the Supreme Court held in *Haywood v. Down*, “So strong is the presumption of concurrency that it is defeated only in two narrowly defined circumstances: first, when Congress expressly ousts state courts of jurisdiction, and second, ‘[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts[].’” Thus, while federal courts may exercise supplemental jurisdiction and resolve state law claims within the context of federal litigation in order to promote judicial economy and fairness, state courts often exercise concurrent jurisdiction over many federally-created

(1990) (absent Congress vesting exclusive jurisdiction in the lower federal courts, state courts are presumptively competent to adjudicate claims arising under federal laws); ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) (state courts possess authority to render binding decisions that rest on their own interpretations of federal law).

16 The factors to be considered in determining whether federal courts have exclusive jurisdiction over an area of federal law include (1) the desirability of uniform interpretation, (2) the expertise of federal judges in federal law, and (3) the assumed greater hospitality of federal courts to federal claims. Gulf Offshore Co. v. Mobil Oil Corp, *supra* note 15, at 484.

17 Claflin v. Houseman, 93 U.S.130, 136 (1876) (there is a presumption in favor of concurrent jurisdiction).

18 *Haywood v. Drown* 556 U.S. 729, 73–5 (2009) (“This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law ‘together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.’”).

claims under their original jurisdiction as the nation’s general jurisdiction courts. For example, various tort claims under the Outer Continental Shelf Lands Act are cognizable in state courts, as are most federal civil rights violations, some Lanham Trademark Act infringement cases, retaliation claims under the federal False Claims Act, and federal civil Racketeering Influenced and Corrupt Organizations (RICO) cases. State courts provide an alternative adjudication forum, not a supplemental forum. Daniel J. Meltzer has noted that:

State courts regularly adjudicate questions of federal law. Federal courts lack jurisdiction, for example, over federal defenses in state law actions or other federal questions not arising on the face of a “well-pleaded complaint.” Increasingly restrictive notions of standing and justiciability close the federal courthouse to a range of claims, while others are barred by statutory or judicially created doctrines limiting federal jurisdiction when related proceedings are pending in state court. Moreover, even when federal courts are available, litigants may prefer state courts for a variety of reasons.

Because of the continuing significance of state courts in adjudicating federal rights, state court procedures can have enormous practical importance for federal rightholders.


21 Gulf Offshore Co. v. Mobil Oil Corp, supra note 16, at 483–484.


25 Taflin, 493 U.S. 455, 45–9 (1990) (recognizing that state courts have concurrent jurisdiction over federal claims under normal circumstances unless Congress ousts them under the Supremacy Clause). See also id. at 801 (Scalia J. concurring) (“It . . . takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction – an exercise of . . . the power of Congress to withdraw federal claims from state-court jurisdiction”).

26 Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 HARV. L. REV. 1128, 113–131 (1986). See also Paul Bator, supra note 20, at 627 (“[U]nder our constitutional structure it is the state, and not the lower federal, courts that
In theory, through the Supremacy Clause, Congress could vest jurisdiction over most federal causes of action in the state courts, which could then consider such matters under their own procedural standards and sometimes in a manner that would make the result unreviewable in federal courts.\textsuperscript{27} Eugene Kontorovich has observed that, “[S]tate courts have concurrent jurisdiction, and Congress can leave matters to them. But this is because the state courts already had jurisdiction, which was preserved by the Constitution: Congress does not give them Article III powers; state courts would have jurisdiction of federal law issues if Congress did nothing.”\textsuperscript{28} Additionally, there are entire categories of quasi-judicial activities such as managing and disciplining the bar over which federal courts exercise extremely limited authority.\textsuperscript{29} Consequently, the reach of state courts in terms of subject-matter is vast, embracing a wide range of issues not only exclusive to the states but that are also coterminous with federal rights and interests.

One could argue, nevertheless, that while the federal court caseloads are smaller they are nevertheless “weightier” having far greater force and impact on the nation’s life generally. But is this entirely true? On balance state governments tend to have a greater effect on daily life if only because they are responsible for adopting most of the laws and regulations under which Americans live and providing most of the services the public enjoys. Thus, if we delve deeper into the question of consequentialness and add the qualitative element of the independent interpretative powers of state constituite our ultimate guarantee that a usurping legislature and executive cannot strip us of our constitutional rights.”).\textsuperscript{27} See Matthew I. Hall, \textit{Asymmetrical Jurisdiction}, 58 UCLA L. REV. 1257 (2011) (noting that in recent decades the Supreme Court’s justiciability decisions have created a category of cases in which state courts may exercise jurisdiction over questions of federal law but the Supreme Court may not review their decisions on appeal).\textsuperscript{28} Eugene Kontorovich, \textit{Three International Courts and their Constitutional Problems}, 99 CORNELL L. REV. 1353, 1376 (2014).\textsuperscript{29} Gadda v. Ashcroft, 377 F.3d 934, 945–46 (9th Cir. 2004) (state bar may discipline attorney for misconduct in federal immigration proceedings because practice before Board of Immigration Appeals is limited to attorneys in good standing of a state bar); State \textit{ex rel. York v. West Virginia Office of Disciplinary Counsel}, 744 S.E.2d 293 (W.Va.2013) (holding that rules of professional conduct extend to all attorneys engaged in the practice of law in the state even if practice is exclusive to federal courts and attorney is not a member of state bar); Graham v. State Bar Ass’n, 548 P.2d 310 (Wash. 1976) (regulation of the practice of law is within inherent power of state supreme court). See also Alden v. Maine, 527 U.S. 706 (1999) (Congress cannot subject states to private suits in their own courts even to achieve objectives within the scope of Congress’s enumerated powers).
courts we see that much of the nation’s legal system is framed by what state courts say every day about the laws that directly impact daily life.30 “State courts, in appropriate cases, are not merely free to – they are bound to – interpret the United States Constitution.”31 Moreover, even in cases where ostensibly federal questions are present state courts can invoke alternative state constitutional grounds in adjudicating claims when the protections offer by the latter are greater – not less – than those afforded by federal law. As the Supreme Court held in Michigan v. Long, “If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent [state] grounds, we, of course, will not undertake to review the decision.”32 Thus, although the Supreme Court may be final, in 2012 it was so in just 79 cases only 11 of which concerned review of state high court decisions. By comparison, the supreme courts of the three most populous states (California, Texas, and New York) issued over 400 decisions interpreting and enforcing both state and federal law. Given that state courts can and often “share” and “borrow” legal interpretations, a significant informal national network of constitutional interpretation is constantly operating below the Supreme Court level providing state courts significant and often underestimated collective jurisprudential reach.33 The interpretative latitude of state courts is certainly constrained by the Supremacy Clause and, to some extent, the


31 Arizona v. Evans, 514 U.S. 1, 8 (1995). See also Robb v. Connolly, 111 U.S. 624, 637 (1884) (“Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States[,]”).


33 See, e.g., State v. Hernandez, 268 P.3d 822 (Utah 2011) (court’s interpretation of state constitution may consider well-reasoned and meaningful decisions of courts of last resort in other states with similar provisions); Curlee v. Kootenai Cnty. Fire & Rescue, 224 P.3d 458 (Idaho 2008) (when confronted with matters of first impression, state courts may gain insight from the interpretations proffered in other states concerning similar provisions); Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (extensive discussion on “good faith” exception to the exclusionary rule applied in other states); People v. Chavez, 605 P.2d 401 (Cal. 1980) (interpretations of other state courts provide valuable guidance in interpreting California constitution). See also Dan Friedman, Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland, 71 Md. L. Rev. 411(2012) (noting that where one state’s constitutional
authority of the Congress and the United States Supreme Court as to certain jurisprudential standards, but it is not defined exclusively by any of them. Thus, while the Constitution may set certain limits on states’ courts, state judges possess considerable independent authority to define rights, responsibilities and the exercise of public power within a state, often with a high degree of independent finality that can be of significant influence as to the decision of other states’ high courts. State courts are not bound to follow a decision of a federal court, including the United States Supreme Court, when dealing with state law matters. Thus, while federal courts are bound to follow state court interpretations of state law, provision has been authoritatively interpreted by its courts other states are understood to have adopted the provision as interpreted).

34 See Grubb v. Public Utilities Comm’n of Ohio, 281 U.S. 470 (1930) (absent provision for exclusive federal jurisdiction, state courts may render binding judicial decisions that rest upon their own interpretations of federal law). See also Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case–by–Case Adoptionism or Prospective Lockstepping?, 46 WM. & MARY L. REV. 1499, 1521 (2005) (“[S]tatements [adopting federal constitutional doctrine] . . . should neither bind lawyers in their arguments nor the court itself in future cases. It is beyond the state judicial power to incorporate the Federal Constitution and its future interpretations into the state constitution.”). But see Jordi de la Torre, The Hague Choice of Court Convention and Federal Power over State Courts, 45 GEO. J. INT’L L. 219, 236 (2013) (“If state court jurisdiction and procedures enjoy the same constitutional protection that prevents Congress from commandeering state executive officers and legislatures, then the Supremacy Clause would be irrelevant[,]”).

35 See, e.g., Bradshaw v. Richey, 546 U.S. 74 (2005) (state court interpretation of murder statute binding in federal habeas proceedings); Evenstad v. Carlson, 470 F.3d 777, 782 (8th Cir. 2006) (except for extreme circumstances, federal courts lack authority to review state courts’ interpretation and application of state law); Dolven v. Bartleson, 253 B.R. 75, 84 (9th Cir. BAP 2000) (Chapter 11 plan is a contract; law of the state in which the plan was confirmed governs its interpretation); Bagby v. Sowders, 894 F.2d 792 (6th Cir. 1990) (when case reviewed by state’s highest court it would be impossible for federal court to find an error of state law where that court did not).

36 Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (state courts are the ultimate expositors of state law and federal courts are bound by their constructions except in extreme circumstances); Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745 (Ill. 2013) (state constitution’s privacy clause must be interpreted without reference to any federal counterpart); State v. Ates, 46 A.3d 550 (N.J. Super. A.D. 2012) (state grants greater privacy rights than federal constitution); State v. Harrington, 222 P.3d 92 (Wash. 2009) (state constitution grants greater privacy rights than the Fourth Amendment); Ex parte Tucci, 859 S.W.2d 1, 5 (Tex. 1993) (constitution provides greater freedom of expression than federal equivalent); People v. Goodwin, 245 N.W.2d 96 (Mich. App. 1976) (right to a jury trial is broader under state constitution than federal constitution).

state courts are not bound to follow federal court interpretations of state law.38 Because state courts operate under a dual constitutional scheme they arguably have a wider range of interpretative possibilities than their federal counterparts, who are bound to a single constitutional scheme ultimately defined exclusively by the United States Supreme Court.39

Another way of gaining greater comparative insight into the consequentialness of state judicial power is to move beyond the role of adjudication and consider the diversity of tasks assigned to state courts in many arguably non-judicial matters. As will be discussed in greater detail in Chapters 5–7, state courts are often tasked with roles that would be anathema to their federal counterparts. The Oregon Supreme Court, for example, is charged with reviewing legislative apportionment and, if necessary, directing state officials to make appropriate corrections.40 The Missouri Supreme Court alone tries impeachments of public officers.41 The governor of South Dakota can require the state Supreme Court to issue advisory opinions “upon important questions of law involved in the exercise of his executive power and upon solemn occasions.”42 The Idaho Supreme Court must consult with district court judges and annually “report in writing to the governor, to be by him transmitted to the legislature, together with his message, such defects and omissions in the Constitution and laws as they may find to exist.”43 In Arizona, the chief justice and governor must be present when the secretary of state canvases votes on initiatives and referenda.44 The Arkansas Constitution provides that it is the duty of the judiciary to appoint two of three city tax commissioners to administer

38 Embs v. Pepsi–Cola Bottling Company of Lexington, Kentucky, Inc., 528 S.W.2d 703 (Ky. 1975) (state court is not bound by the holding of a federal court construing state law in arising out of a diversity action).

39 See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (states have sovereign right to provide more expansive liberties than those conferred by the Constitution); Cooper v. California, 386 U.S. 58 (1967) (states may reject federal holdings if state action does not fall below the minimum standards provided in the Constitution). See also State v. Knapp, 700 N.W.2d 899 (Wis. 2005) (textual similarity in state constitution is important in determining whether to depart from federal jurisprudence; it is not conclusive lest state court forfeits its interpretative power to the federal judiciary).

40 ORE. CONST. art. IV, § 6 (d).

41 MO. CONST. art. VII, § 2.

42 S.D. CONST. art. V, § 5. See also FLA. CONST. art. V, § 3 (b) (10) (attorney general may request advisory opinion from state supreme court).

43 IDAHO CONST. art. V, § 25. See also, NEB. CONST. art. V, § 25 (supreme court may, when requested by legislature, certify its conclusions as to desirable amendments or changes in the general laws governing practice and proceedings).

44 ARIZ. CONST. art. IV, § 1 (13).
a tax to aid industries. And state constitutional provisions restricting legislative power provide citizens (and therefore state courts) with ample opportunities to define not simply the substantive law but the very processes by which laws are created. No federal court can claim such broad and extensive authority.

The point here is not to contest the importance of the federal courts or to question their extensive authority over the matters committed to them. The federal courts have had a remarkable impact on the course of America’s social, political, and economic life, more so than any other national judiciary in the world. The substantive meaning of many rights Americans enjoy have been defined by the federal courts and inculcated into state jurisprudential practices, often times because the states themselves would not give substantive meaning and protection to the exercise of fundamental rights. America’s state courts are not better than its federal courts. Rather, they are different and understanding those differences requires a broader view of the exercise of American judicial power and even what constitutes the exercise of such power in a large, diverse, and federally-structured nation. Is monitoring election returns an exercise

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45 Ark. Const. amend. 18.
46 See, e.g., Legends Bank v. State, 361 S.W.3d 383 (Mo. 2012) (when legislative procedures for enacting a bill violate the constitution, severance is appropriate if a court is convinced that specific provisions in question are not essential to the bill).
50 See, e.g., State v. Robinette, 685 N.E.2d 762 (Ohio 1997) (courts should harmonize Ohio’s protection against unreasonable search and seizure with the Supreme Court’s interpretation of Fourth Amendment unless there are persuasive reasons not to). But see State v. Bauer, 36 P.3d 892 (Mont. 2001) (Montana constitution provides higher standards in search and seizure cases because it guarantees a right to privacy).
51 See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (mandating the right to counsel in state court proceedings). It should be noted, however, that the federal courts have not always been in the vanguard of rights protection. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954)); Vaqueria Tres Monjitas, Inc. v. Comas, 980 F. Supp.2d 65 (D. Puerto Rico 2013) (holding in part that extraordinary federal judicial remedies are appropriate when obstinate and recalcitrant state and local governments refuse to protect constitutional rights).
of judicial power? Is creating a judges’ commission to draw legislative districts an exercise of judicial power? Is advising the legislature on omissions in the law an exercise of judicial power? Is issuing advisory opinions to elected officials an exercise of judicial power? Is appointing city tax commissioners an exercise of judicial power? In each of these circumstances, and many others, the answer is apparently “yes” not because there is a universal definition of American judicial power but precisely because there is no such definition. Consequently, what constitutes American judicial power is a rich, complex, and constantly evolving question that continues to be refined even after some 200 years of experience. While federal courts can bring a certain national coherency to the American legal system, the independent and varying powers of the state courts give that system its unique character and richness.

1.2 ENUMERATED VERSUS PLENARY POWER AND STATE COURT AUTHORITY

Why is a discussion regarding the differences between federal enumerated power and state retained police powers important in a book examining the exercise of state judicial power? After all, on balance are not all courts in America similar in that they are the official government forums for resolving private and public law disputes between litigants? The rules of procedure are often quite similar across the various courts with both state and federal courts having substantially similar rules of evidence, and civil and criminal rules of procedure. Although applicable substantive law often varies from state to state, state courts are constrained to some degree by certain unifying principles of constitutionalism that provide a level of national decisional and jurisprudential coherency. Critical concepts such as equal protection, substantive and procedural due process, freedom

54 Thomas E. Baker, The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip, 19 Ga. L. Rev. 799, 841 (1985) ("[A] federal interest present by virtue of the federal question and still relevant despite the state law ground is the Supreme Court’s leadership role in maintaining doctrinal coherence in matters of national concern.").
of expression and so forth have been nationalized by the Fourteenth Amendment’s expansive reach, compelling significant national jurisprudential congruity to the protection of core constitutional rights. Given the precedential nature of the judicial systems, all American judges (mostly appellate) “make law” in the context of deciding what law applies in a case and whether the applicable law comports with fundamental constitutional requirements. Thus, questions of public power sourcing within the American federal system might strike some as largely academic bearing little connection to what happens in courtrooms and judges’ chambers every day.

Yet in a larger sense understanding that there are two organic concepts (and sources) of public power in America provides important nuances in understanding the unique and diverse roles evident in the nation’s courts. Understanding these two distinct methods to the sourcing of governing authority in American federalism is far more than an academic question. It drives to the very role that courts – both federal and state – perform, most particularly in managing the nation’s system of checks and balances. As Robert F. Williams notes, “The typical American state constitution . . . differs from its federal counterpart in many ways. Consequently, state court judicial review of state statutes or executive actions is, or should be, qualitatively different from federal judicial review of the same statutes or actions.” Such differences are rooted in American federalism and its delicate but highly important distinction between federal enumerated power and plenary state police power. This distinction, often ignored in analyzing the exercise of judicial power, is important for a single reason: the powers of the two primary polities of American government are anchored in different conceptual and normative frameworks as to origin, purpose, and functionality. The two respective judicial systems are both empowered and restrained by these two conceptual frameworks. This is not to suggest that

55 But see David S. Schwartz, High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States, 35 Cardozo L. Rev. 567, 601 (2013) (“The framers deemed it less onerous on state autonomy to implement federal supremacy through the courts rather than Congress. Judicial review . . . takes place after a state law has been enacted, and – a point that is less well understood – it does not reduce the state law to the same status as if it had never been enacted.”).


57 Robert F. Williams, The Law of American State Constitutions 299 (Oxford Univ. Press, 2009). Professor Williams also notes that, “Standing and other prudential justiciability barriers are usually lower at the state level. The ‘political questions’ doctrine is often applied differently from the federal doctrine in state courts.” (Citations omitted) Id. at 298–99.
this power distinction between enumeration and plenary state police power is so striking as to create autonomous polities rather than interdependent and interconnected polities. As the Supreme Court noted in *Bond v. United States*, “The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it.”58 It is, however, to suggest that the 51 constitutions of the Nation not the nation’s Constitution defines the diverse attributes of American judicial power. James Madison noted this distinction when he observed that: “The Federal and State Governments are in fact but different agents and trustees of the people, constituted with different powers, and designated for different purposes (emphasis added).”59 Despite wide-ranging similarities in America’s courts, the organic foundations of judicial power differ within its federal system and these differences impact a range of issues concerning independence, authority, jurisdiction, justicability, structure, roles, and even the degree of appropriate “judicial activism.”

American federalism presents a difficult task in line drawing regarding the allocation of governing authority between the states and federal government60 because it creates two parallel systems of power that cooperate, compete, and at times conflict with one another.61 Neither the states nor the federal government retain full sovereign authority over the nation’s affairs; governing in America is comprised of simultaneous vertical and horizontal interdependencies and independencies within its various institutions, including its judicial systems. The entire system has evolved over the years to maximize independence and interdependence as a means for constraining governing power. Unlike many other federal systems in the world where the national government enjoys plenary power with the constituent polities exercising enumerated powers, the United States

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59 See, e.g., *The Federalist* No. 46 (James Madison) (1788).
60 See, e.g., Pennington Cnty. v. State ex rel. Unified Judicial system, 641 N.W. 2d 127 (S.D. 2002) (county does not have standing to sue state in its sovereign capacity in its own courts; counties are but political subdivisions of the state). See *also* Colorado General Assembly v. Salazar, 541 U.S. 1093 (2004) (constitution only requires that states provide a republican form of government; how they decide to internally allocate governing power does not raise a federal question).
61 Cf. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”).
American judicial power

has reversed this power allocation equation. Moreover, other federal systems, e.g., Canada, India, or Malaysia, often more clearly allocate governing authority between the national government and the constituent polities, where American federalism, with limited exception, generally addresses power allocation through broad sweeping principles that vests extensive enumerated powers in the national government while leaving vast and unspecified residual powers in the states. What this means is that governing in America is a shared exercise whose parameters are constantly changing, particularly with regard to how the courts handle power allocation disputes between the states and the federal government. For example, from 1935 through the 1960s Americans witnessed a significant expansion of federal power through the federalization of “rights” jurisprudence. Beginning in the late 1970s, this expansion slowed significantly as an arguable “rebalancing” of federal and state power took place.

It is difficult, therefore, to draw absolute delineations in authority between the two polities because not only does each polity possess its own independent source of power that is interdependent with the other’s, but also because the power roles assigned to the two polities tactically ebb and flow over time in response to the sociological, economic, and political factors at play in the moment. It is useful, therefore, to examine

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62 See generally Ronald L. Watts, Comparing Federal Systems 29–52 (Institute of Intergovernmental Relations, 2008). Watts notes that where unitary governments have become federal, e.g., Belgium, Spain, their enumeration is applied to the constituent polities while residuary power rests in the national government.


67 For example, pre-Depression era views on governing authority were quite different than post-Depression era views of that supposedly same authority. Compare Lochner, supra note 49 (rejecting state law limiting bakers’ working hours as violating right to contract), with West Coast Hotel Co. v. Parrish, 300
the diversity inherent in American judicial power in reference to the two most basic concepts that frame the sourcing and distribution of governing authority in the United States: (1) the enumeration of federal powers; and (2) the retention of state sovereignty and state police powers. These concepts provide the overarching context for understanding that judicial structures, sources of judicial power, and forms of judicial inquiry (particularly into questions concerning the exercise of governing authority) can be quite different in a comparative analysis between state courts, and between state courts and federal courts. These differences are oftentimes subtle but that does not make them meaningless, insignificant, or unimportant.

From its earliest inception the federal government has been considered a government of enumerated and thus limited powers confined in the exercise of its authority to that articulated in the Constitution. Chief Justice William Rehnquist identified enumeration as one of the “first principles” of American constitutional law:

The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” . . . This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”

The federal government possesses no general or residual police powers similar to those held by the states. As the Supreme Court noted in *National Federation of Independent Business v. Sebelius*:

The Federal Government “is acknowledged by all to be one of enumerated powers.” That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. . . . The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not

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U.S. 379 (1937) (upholding Washington state minimum wage law and ending the so-called “Lochner Era”).

68 See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 195 (1824) (“The enumeration presupposes something not enumerated[].”).


70 See, e.g., U.S. v. Morrison, 529 U.S. 598, 61–9 (2000) (“We always have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power.”).
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enumerated.” The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.”71 (Citations omitted)

Enumeration provides both a textual and contextual limitation on the exercise of federal power through exclusion; that is, by defining the exercise of federal power with reference to particular spheres of governance the Constitution acknowledges that more general powers of government reside in the states.72 (This is the reason why state courts can exercise broad concurrent jurisdiction over most legal matters in America while the federal courts can exercise only limited and supplemental jurisdiction.) The exact parameters of these spheres are, in practice, quite elastic because of the often broad and imprecise language that expresses enumerated federal powers. The constitutional design of America’s federal system is contained in just seven articles and twenty-seven amendments. In comparison, the constitutional design of Germany’s federal system is spread over 141 articles, many of which are drafted with great specificity.73 The elasticity in the enumerated powers of the federal government is reinforced by provisions that speak with sweeping language (or have been interpreted in sweeping terms) such as the Necessary and Proper Clause,74 the Commerce Clause,75 and the Spending Clause.76 Enumeration also

72 Cf. U.S. v. Comstock, 560 U.S. 126 (2010) (while the federal government is one of enumerated powers, which means that every law enacted by Congress must be based on one or more of those powers, at the same time, a government entrusted with such powers must also be entrusted with ample means for their execution; the Necessary and Proper Clause makes clear that grants of specific federal legislative authority are accompanied by broad power to enact laws that are convenient, or useful, or conducive to the authority’s beneficial exercise).
73 Compare U.S. Const. art. I (Congress) with Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBl. I (Ger.), arts. 38–48 (Bundesrat).
74 See Gibbons, 22 U.S. (9 Wheat) 1, 34 (1824) (observing that the Constitution grants Congress both expressed powers and implied powers under the Necessary and Proper Clause that must be construed liberally). But see U.S. v. Kebodeaux 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J. concurring) (implied powers must be incidental to and not independent of enumerated powers).
75 Wickard v. Filburn, 317 U.S. 111 (1942) (commerce power is not confined in its exercise to the regulation of commerce among the states but extends to activities intrastate which affect interstate commerce).
76 U.S. v. Butler, 297 U.S. 1 (1936) (under Spending Clause expenditure of federal money is not limited by enumerated powers); South Dakota v. Dole, 483 U.S. 203 (1987) (using Spending Clause power Congress may pursue public
acts to insulate the federal spheres from encroachment by depriving the states of concomitant powers in the same areas. The Constitution contains a number of safety valves to ensure that states stay within their relative sphere of authority. Nevertheless, courts have consistently held that the federal government is one of limited, not general powers, and this has a significant impact on how governing responsibilities are divided between the national government and the states.

The concept of enumerated federal powers also has consequences for the exercise of federal judicial power. First, the jurisdictional enumerations in Article III impose limitations on federal courts consigning them to particular spheres in exercising their jurisdictional powers. In *Spencer v. Kemna* the United States Supreme Court explained that, “[A] parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a ‘means of “defin[ing] the role assigned to the judiciary in a tripartite allocation of power,”’, and ‘a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States.’” Thus, the federal courts can exercise their authority only over those subject-matter disputes cognizable under the Constitution through Article III, which remains the fundamental prerequisite for invoking federal judicial power. For example, the case-in-controversy requirement contained in Article III limits federal courts to that of resolving federal questions concerning “the legal rights of litigants in actual policies that it would not otherwise have the power to do under its enumerated powers); Nat’l Fed’n of Indep. Bus., *supra* note 71 (in exercising its spending power Congress may offer funds to states and condition those offers on compliance with specified conditions; such offers may well induce the states to adopt policies that the Federal Government itself could not impose). *But cf.* Printz, *supra* note 66.

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See Caroline Broun et al., *The Evolving Use and Changing Nature of Interstate Compacts: A Practitioner’s Guide* 1, 2 (American Bar Association 2006) (discussing the numerous provisions in the constitution that act as a check on state power).  
Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 253 (1996) (“In the 1930s the powers of the national government were expanded in an extraordinary way, in favor of a system that exercised something close to general police powers.”).  
See generally Alden, *supra* note 29.  
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controversies." This requirement ensures that the federal courts confine themselves to the constitutionally limited role of adjudicating actual and concrete disputes involving federal law, the resolutions of which have direct consequences on the parties involved. An actual controversy must exist throughout all stages of review, not merely at the time the complaint is filed. The main impact of Article III’s jurisdictional enumerations renders the federal judiciary courts of limited jurisdiction.

Second, unlike many state constitutions in relation to the exercise of state judicial power, Article III of the Federal Constitution intimately ties the practical exercise of federal judicial power to the authority of Congress. The United States Supreme Court is arguably the only federal judicial body textually required by the Federal Constitution and whose jurisdiction is secured by the Constitution. In the 1812 case of United States v. Hudson, the United States Supreme Court articulated this fact noting that:

Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.

The federal courts, unlike many states, rely heavily upon a legislative body to define their structure and the breadth and limits of their jurisdiction, even when exercising many aspects of their constitutional jurisdiction. There are clear limitations on Congress’s authority to alter the United States Supreme Court’s original jurisdiction, i.e., Marbury v.

82 See Valley Forge Christian College, supra note 81, at 471.
84 See, e.g., Nat’l Treasury Emp. Union v. Nixon, 492 F.2d 587, 612, fn. 51 (D.C. Cir. 1974) (noting that Supreme Court is subject to constitutional checks by virtue of the congressional power to impeach and to regulate its appellate jurisdiction).
85 U.S. v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812). But see Martin v. Hunter’s Lessee, 329–30 (the constitutional command that judicial power shall be vested in one Supreme Court and such other inferior courts as Congress may establish suggests that Congress must establish some form of inferior courts without directing what form that must take).
Madison, but the exercise of its appellate jurisdiction, which represents the overwhelming number of cases before that court, is an entirely different matter given Article III’s exceptions clause proviso. The Congress’s authority to define federal court jurisdiction extends throughout the system. In *Newman-Green, Inc. v. Alfonzo-Larrain*, for example, the United States Supreme Court held that the exercise of federal diversity jurisdiction is “based on the diversity statute, not Article III of the Constitution.”

Thus, “over the years Congress has repeatedly re-enacted or amended the statute conferring diversity jurisdiction, leaving intact this rule of complete diversity. Whatever may have been the original purposes of diversity-of-citizenship jurisdiction, this subsequent history clearly demonstrates a congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant.”

Third, and more generally, the fact that federal courts conceptually have limited jurisdiction flows from the very concept of the federal government as one of enumerated powers. It should be noted that constitutional grants of specific federal subject-matter authority are often supported by broad powers to enact laws that are convenient, useful or conducive to the enumerated power’s “beneficial exercise.” Congress can “legislate on that vast mass of incidental powers which must be involved in the constitution.” The Constitution leaves the choice of means primarily to the judgment of Congress.

If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.

But in the end whether federal action is constitutionally authorized is determined in reference to a “means-ends-rationality” between an action

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86 The Exceptions Clause states, “[i]n all . . . Cases . . . the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.” U.S. Const. art. III, § 2, cl. 2. See *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (while Framers believed the federal government needed its own court system, they left to Congress the power to decide what if any cases should be channeled to the federal courts). The United States Supreme Court’s appellate jurisdiction is provided for in 28 U.S.C. § 1257 (2014).


89 See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 413, 418 (1819).

90 *Id.* at 421.

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taken by the Congress and the enumerated power that it claims gives rise to that action. Both the concept of enumeration and the actual powers enumerated establish the overall context in which federal judicial power operates. Federal courts could not, for example, direct the states to exercise their sovereign powers in a particular manner if Congress itself was constitutionally deprived of such authority. Enumeration establishes the sphere of federal power and indirectly the course of judicial power and rules of judicial inquiry.

In contrast to the federal government, which holds no plenary power, states operate under the principle of residual or plenary police powers; that is, there is an assumption that states retain all the traditional powers associated with sovereigns necessary to provide for the public health, welfare, safety and morals of their citizens, and that have not otherwise been ceded to the federal government. State action may be restricted by provisions of the U.S. Constitution, e.g., various sections of the Bill of Rights, but states do not draw their powers from that document nor are they political subdivisions of the national government exercising only those powers and under such conditions as that government may direct. Absent a federal constitutional prohibition upon state action, states have wide latitude to use their considerable police powers in the interests of promoting public welfare. In *House v. Mayer*, the Supreme Court explained the relationship between federal enumerated and state residual or police powers as follows:

There are certain fundamental principles which . . . are not open to dispute. . . . Briefly stated, those principles are: That the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police

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93 See THE FEDERALISTS NO. 82 (Alexander Hamilton). Hamilton wrote:

[T]he states will retain all pre-existing authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is in express terms granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states, or where an authority is granted to the union with which a similar authority in the state would be utterly incompatible.
power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among the powers of the state, not surrendered, which power therefore remains with the state, is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.94

The precise and universally accepted definition of state police powers is hard to come by. Some courts have defined police powers as those powers “inhering in every sovereign for the preservation of the public safety, the public health, and the public morals.”95 Courts have held that state police power, even when constitutionally delegated to units of local government under so-called “home rule” provisions, is ultimately a power that belongs exclusively to the state as one of only two sovereign polities within American federalism.96 Other courts have defined the term as the “right of legislature, or on proper occasion right of courts, to regulate, deal with, curtail, or even prohibit certain engagements, conduct, or acts tending to suppress or injuriously affect movements, measures, or schemes in furtherance of permissible and authorized public policy.”97 Still other courts have defined the term as “the inherent power of [state] government to promote the general welfare. . . . It covers all matters having a reasonable relation to the protection of the public health, safety or welfare.”98 As noted, the Federal Constitution may restrict how state governments exercise their police powers but it is not the source of those powers.99 State police power in America stems from the status of states as quasi-sovereign polities inherently vested with the authority to perform many of the vital functions of government. The exercise of state police powers is not codependent upon the federal government’s exercise of its powers as, for example, might be

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95 State v. Stewart, 247 S.W. 984 (Tenn. 1919).
96 Cleveland Tel. Co. v. City of Cleveland, 121 N.E. 701 (Ohio, 1918).
97 Workmen’s Comp. Bd. v. Abbott, 278 S.W. 533 (Ky. 1925).
99 In re Rameriz, 226 P. 914 (Cal. 1924) (police power is inherent in state government empowering it to enact laws to protect order, safety, health, morals, and general welfare of society).
the case with regards to German federalism\textsuperscript{100} or Indian federalism.\textsuperscript{101} Moreover, “As the police power of a State extends to the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of the public morals, the legislature cannot, by any contract, divest itself of the power to provide for these objects.”\textsuperscript{102}

There are three important points to be emphasized: (1) states as constituent polities retain much of the general domestic governing power of the nation and state courts draw their authority not from the Constitution through the Supremacy Clause but from the broad general power inherent in the very nature of the states; (2) state police powers are broad and imprecise and exercised not pursuant to enumeration but are rather assumed, limited only by state and federal constitutional provisions of restraint \textit{and} mandate;\textsuperscript{103} and (3) given the virtually unlimited nature of state police power, one of the most critical roles of state courts is to ensure that the use of such power is exercised by state governments within constitutional boundaries – those defined by limitations and those defined by positive mandates. Professor Emily Zackin has noted, for example, that with regards to citizen rights many constitutional scholars “have leapt effortlessly, and indeed unconsciously, from the assertion that the Federal Constitution lacks positive rights to the claim that America lacks positive rights.[.] The texts of state constitutions force us to question the ubiquitous assertions that America lacks positive constitutional rights.”\textsuperscript{104} Thus, where the Federal Constitution is arguably a “certificate of delegation” conferring certain powers upon the federal government and thus depriving states of those powers, a state constitution is arguably a “certificate of restraint and mandate” directing state officials to exercise the state’s otherwise plenary police powers in particular ways. In the former what is not granted is deemed denied. In the latter what is not denied is deemed granted. As the Supreme Court of Missouri held, “The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative

\textsuperscript{100} \emph{Grundgesetz für die Bundesrepublik Deutschland} (Basic Law) arts 83–85 (federal oversight of Länder administration).
\textsuperscript{101} \emph{India Const.} part I (Union and its Territory) § 3 (Parliament may admit new states, increase the area of a state, diminish the area of a state, alter the boundaries of a state, alter the name of a state).
\textsuperscript{102} \textit{See} \textit{Beer Co. v. Massachusetts}, 97 U.S. 25, 29 (1878).
\textsuperscript{103} \textit{But see} \textit{Killingsworth v. West Way Motors, Inc.}, 347 P.2d 1098 (Ariz. 1959) (legislative regulation in exercise of state’s police power must have some relation to an objective resulting from public necessity).
power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute.”105 Hence the reason state constitutions contain a wide range of specific restrictions and mandates on how state governments exercise their powers.106 Some forty state constitutions, for example, afford the right to a remedy through open courts, a right absent from the Constitution.107 Unlike a federal court, therefore, a state court may be called upon to determine whether government has failed to act in exercising its plenary police powers not simply whether it has over-reacted in the exercise of such powers.108 It is here that similarities between the exercise of federal and state judicial power part company. State courts, like state legislatures and state executives, may exercise those powers necessary as comports with the Federal Constitution and the constitutions of their respective states – both as to restraints and mandates.

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105 State ex rel. Danforth v. State Envtl. Improvement Auth., 518 S.W. 2d 68, 72 (Mo. 1975) (citing Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951)). See also Americans United v. Rogers, 538 S.W. 2d 711 (Mo. 1976) (act of legislature is presumed valid unless it clearly and undoubtedly contravenes some constitutional provision).

106 See, e.g., State v. Jones, 281 S.E. 2d 91 (N.C. App. 1981) aff’d 290 S.E2d 675 (N.C. 1982) (substantive due process requires police power be exercised only as it promotes legitimate public health, safety or general welfare).


108 Federal courts may make life determinations based on entitlements that exist under state law. See Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990) (state law specifically mandated that children be provided protective services that cannot be deprived in violation of due process standards).