CONSTITUTIONAL LAW—Eleventh Amendment Bars State Court Damage Suit Against the State Based upon Congressionally Created Claim for Relief. Mossman v. Donahey, 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976).

The eleventh amendment to the United States Constitution represents one of the most highly fictionalized and conceptually cloudy areas of constitutional law. For well over a century the Supreme Court of the United States has grappled with the problem of the amenability of the states to suit, but the Court has failed to articulate clearly the effect of the eleventh amendment upon that problem. Recently the Supreme Court of Ohio added to the confusion when it decided the case of Mossman v. Donahey. Although the eleventh amendment refers only to the "judicial power of the United States," the court in Mossman concluded that it also precluded a state's being sued for damages in state court by one of its own citizens upon a claim arising under federal law. The Ohio court arrived at this troublesome conclusion because of the failure of the United States Supreme Court to identify and consider the possible meanings of the eleventh amendment, and to choose from among them the meaning most consistent with its spirit. This failure on the part of the United States Supreme Court has led to a body of law interpreting the eleventh amendment that is replete with confusion, ambiguity, and fictions.

This Note will deal with this confused area of law—i.e., the effect of the eleventh amendment upon suits for damages initiated by an individual against a state. The possible effects of differing constructions of the eleventh amendment upon such suits will be discussed in the context of claims for relief based on state law and those based on federal law. The discussion of claims based on federal law will focus primarily on Mossman. Although the specific issue in

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1 The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

2 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976).

3 Damage suits by individuals against states are the exclusive focus of this Note. It will not deal with other types of suits involving states, such as suits for injunctive relief, judicial review of state court decisions, or suits by the United States against a state.

The congressionally created remedies treated are only those based upon the commerce clause. Remedies created pursuant to § 5 of the fourteenth amendment, such as the Civil Rights Act of 1964, are not considered because "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment . . . ." Fitzpatrick v. Bitzer, 96 S. Ct. 2666, 2671 (1976). See note 87 infra.
Mossman is now moot, its novel application of the eleventh amendment in granting states a constitutional immunity from suits for damages under federal law in state courts makes Mossman an excellent vehicle for exploring the possible meanings of the eleventh amendment.

I. THE HISTORICAL BACKGROUND OF THE ELEVENTH AMENDMENT

A. The Common-Law Concept of Sovereign Immunity

One of the general principles of the English common law was the doctrine of sovereign immunity, which embodied the notion that a sovereign "was not amenable to the jurisdiction of his own court unless he assented to such jurisdiction." The doctrine was based on the observation "that it would be a logical anomaly for the King to issue or enforce a writ against himself." As a result, the doctrine primarily determined the procedural recourse to be followed—petition rather than writ—in order to obtain redress from the Crown. It "did not seriously impair the subject's right to recovery in accordance with the substantive law," however, because it was not premised on the notion that the King was above the law. On the contrary, the King was considered the fountain of justice who "could not refuse to redress wrongs when petitioned to do so by his subjects." Indeed, the expression "the King can do no wrong" originally meant that the King was not entitled to do wrong. Consequently, Wes...
quently, regular methods developed for obtaining redress for wrongs suffered at the hands of the sovereign or his servants. Right was generally correlative with remedy: "[T]he King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions 'let justice be done,' thus empowering his courts to proceed."14

Thus, under the common law of England, "the immunity of the sovereign from suit (sovereign immunity) and his capacity to violate or not violate the law ("The King can do no wrong") are distinct and independent concepts."5 Professor Jaffe concludes that in England "the so-called doctrine of sovereign immunity was largely an abstract idea without determinative impact on the subject's right to relief against government illegality."6

In America, however, the newly independent states adopted a more stringent form of sovereign immunity in which right was not always correlative with remedy. The idea that a sovereign could not be sued without his consent was rigidly adhered to. The English methods for obtaining relief from the sovereign were not adopted intact in the colonies, or in the states after expulsion of the British.7 "[C]laims upon the government in the American colonies and states were commonly made by petition to the legislature."8 It has been suggested that the primary reason for adopting a stricter version of the immunity doctrine was the states' fear of being called to answer for debts incurred during the Revolutionary War that were unsatisfactorily retired or defaulted upon altogether.9 Since the doctrine of sovereign immunity insulated a state from suit, creditors lacked an enforceable legal remedy.

Concern arose that the states' failure to satisfy foreign and out-

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13 For a detailed discussion, see Jaffe, supra note 6, at 2-18. Jaffe summarizes the methods for relief as follows:

Claims in form "against the Crown" were to be pursued by petition of right. These included certain of the claims involving property in which the Crown had an apparent interest, but by no means all of them. The monstrans de droit at common law, the petition in the Exchequer, bills, it may be, in Chancery, and the prerogative writs might determine claims to real and personal property, and to money in the Treasury. Contracts could be enforced by petition of right. There was a wide range of actions for damages against officials. Officials who acted in excess of jurisdiction or refused to act could be reached by prerogative writs. The one serious deficiency was the nonliability of government for torts of its servants.

Id. at 18-19.

14 Id. at 4.

15 Id.

16 Id. at 18.

17 Id. at 19; C. JACOBS, supra note 6, at 8.

18 Jaffe, supra note 6, at 19 n.56.

19 Id. at 19; C. JACOBS, supra note 6, at 8-9.
of-state creditors would lead to internal and international disharmony:

Default and repudiation of state debts were in the air, posing serious threats of friction between the states, as well as foreign reprisals. The holders of state obligations were concentrated in a few states, and among the states there were marked differences in attitude toward fulfilling outstanding obligations.20

The establishment of a national judiciary was seen by many as the solution to the problem.21 If the states could be sued in a national judiciary, "certain creditors—and precisely those who by reason of their noncitizenship would exercise the weakest claims upon the good faith of a debtor state—would be afforded effective redress in an impartial forum."22 Thus, "subjection of the states to federal judicial authority probably was deemed essential for preservation of national peace and harmony."23 One of the proposals for the creation of a national judiciary is now embodied in article III of the United States Constitution.


There has been considerable debate about the original understanding of those who framed and ratified the Constitution regarding the amenability of the states to suit in federal tribunals.25 The first clause of article III, § 2 permits federal courts to hear "all Cases, in Law and Equity, arising under this Constitution" and under "the Laws of the United States," as well as controversies "between a State and Citizens of another State." On its face article III does not distinguish between cases in which a state is a plaintiff and cases in which a state is a defendant, nor does it explicitly mention consent. One could infer from article III that states could be compelled to appear in federal courts and defend against suits initiated by citizens of another state, whether the state consented to be sued or not.

During the ratification process the possibility of just such a construction of article III caused concern. Critics of article III contended not only that states would be subject to suit in the federal tribunals if article III were adopted, but that the states could be pushed to the brink of financial ruin by being compelled to honor sizable debts

20 C. Jacobs, supra note 6, at 24.
21 Id. at 8-26.
22 Id. at 22.
23 Id. at 24.
24 See generally C. Jacobs, supra note 6, at 3-40.
25 See note 29 infra.
incurred during the Revolutionary War or to answer for confiscations of Tory property.26 Defenders of article III placed a different construction upon it. James Madison argued that article III did not permit states to be sued without their consent in federal courts:

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.27

Alexander Hamilton’s view paralleled that of Madison:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.28

Historians have not all agreed that those who ratified the Constitution did so with the understanding that states, without their consent, would be beyond the jurisdiction of the federal courts.29 Regard-

27 Id. at 533. The remarks of John Marshall are in the same vein:

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

Id. at 555-56 (emphasis in original).
29 Compare 1 C. Warren, The Supreme Court in United States History 91 (1922):
less of what the original understanding may have been, the question of whether article III permitted a state to be sued for damages by a noncitizen in a federal court was soon answered in the affirmative by the Supreme Court of the United States in *Chisholm v. Georgia*.

C. Chisholm and the Eleventh Amendment

*Chisholm v. Georgia*\(^{20}\) was a common-law action of assumpsit against the State of Georgia filed by Alexander Chisholm as executor of the estate of Robert Farquhar. Farquhar, a citizen of South Carolina, had negotiated a contract with the State of Georgia for the purchase and sale of war supplies. The merchandise was delivered, but payment was never made by the state.\(^{31}\) The suit was filed in the Supreme Court of the United States to collect the debt still owed to Farquhar, who had since died.

When Georgia refused to appear in the Supreme Court, the plaintiff moved for a default judgment. Four of the five justices voted to grant the motion. They reasoned, in separate opinions, that article III granted federal courts jurisdiction to hear controversies between a state and the citizens of another state, irrespective of whether a state was plaintiff or defendant and despite the asserted immunity of the state.

The Supreme Court's interpretation of article III provoked widespread anger and resentment among the states. The lower house of the Georgia legislature reacted by making any attempt to enforce

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The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

with C. Jacobs, *supra* note 6, at 40:

On balance, the weight of expressed opinion seems to have been with those who believed, with either apprehension or satisfaction, that the states might be impleaded as defendants without their consent in suits instituted by citizens of other states and by foreign subjects in the federal courts. Whether the Constitution would have been ratified, in the absence of assurances that the states would not be suable, cannot be ascertained. But in any case, the legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity.


\(^{31}\) Farquhar had not been successful in obtaining payment during his lifetime. A claim was presented to the Georgia legislature on behalf of his estate, but was rejected. Although advised to sue the commissioners who had negotiated the contract on the state's behalf, Chisholm instead filed suit against the state in the United States Circuit Court for the Georgia District. The suit was dismissed, however, upholding Georgia's assertion of immunity as a challenge to the court's jurisdiction. C. Jacobs, *supra* note 6, at 47.
the mandate of *Chisholm* a felony punishable by hanging without benefit of clergy.\textsuperscript{32} Congressional reaction was also swift. A proposal for a constitutional amendment restricting the power of the federal judiciary was introduced in the Senate only two days after the decision in *Chisholm*. Within five years the eleventh amendment to the Constitution was ratified. It is generally recognized as overruling *Chisholm*.\textsuperscript{33}

Various explanations for the widespread support for the eleventh amendment have been suggested. The states’ actions have been ascribed to a desire to avoid suits upon their war debts, or to a desire to reinstate the original understanding of article III.\textsuperscript{34} Professor Jacobs, however, points out that “there is practically no evidence that Congress proposed and the legislatures ratified the Eleventh Amendment to permit the states to escape payment of existing obligations,”\textsuperscript{35} and he also questions whether there was a general understanding at the time the Constitution was ratified that states would be immune from suit under article III.\textsuperscript{36} He offers a different explanation for the support for the amendment by the proponents of states’ rights:

The amendment was a way to repudiate *Chisholm*. And, in the eyes of states’ rights advocates, *Chisholm* cried for repudiation, perhaps not so much because it subjected the states to federal judicial process as because the principal opinions in the case expounded Federalist constitutional philosophy and all but denied the sovereignty of the states.\textsuperscript{37}

Jacobs resolves the difficulty in explaining the support of the Federalists—“who believed, as a matter of political doctrine and economic interest, that the satisfaction of public debts was a sacred obligation”\textsuperscript{38}—by noting that, inasmuch as the bulk of the existing obligations of the states had been secured,\textsuperscript{39} “the amendment’s implicit

\textsuperscript{32} Id. at 56-57. Other states were enraged by the decision. Massachusetts and Virginia passed resolutions strongly condemning the Court’s action. “And, during the fall and winter of 1793, virtually every state governor referred to *Chisholm* and the Massachusetts and Virginia resolutions in messages to their respective legislatures.” Id. at 65.

\textsuperscript{33} Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

\textsuperscript{34} See note 29 supra.

\textsuperscript{35} Id. at 70.

\textsuperscript{36} C. Jacobs, supra note 6, at 67-68.

\textsuperscript{37} Id. at 70.

\textsuperscript{38} Id. at 70.

\textsuperscript{39} Id. at 70.

\textsuperscript{39} This was accomplished “by national assumption of state debts and by the Hamiltonian funding system.” Id. at 74. Professor Jacobs adds:

Moreover, [the Federalists] may have understood quite well that federal judicial protection against impairments of contracts, tender laws, and other state infringe-
concession to state sovereignty may have seemed more formal than substantial. Thus a reconstruction of historical intent, based upon inferences drawn from the ratification of the eleventh amendment, is a controversial matter. While it is agreed that the ratifiers of the eleventh amendment desired to "overrule" Chisholm, why they desired to do so is unclear.

The historical materials, however, make clear at least one thing: the focus of the framers and ratifiers of the eleventh amendment was specifically the type of suit involved in Chisholm, i.e., a suit for damages in federal court, based upon a common-law claim, prosecuted against a state. There is no indication that other types of suits against states were actively considered or debated, or that other provisions of article III were called into question. The present historical record, however, does not clearly indicate that the Chisholm-type suit was the exclusive focus of the eleventh amendment, nor does it indicate what the framers and ratifiers of the eleventh amendment contemplated beyond this type of suit.

Applying the eleventh amendment to situations not contemplated by the framers and ratifiers—e.g., suits for damages based upon federal statutes—is not, then, a matter of history and intent. It is rather a matter of drawing inferences from the language of the appropriate texts and the structure of the federal system of government established by the Constitution in order to arrive at the result that best comports with this language and structure. Indeed, attempts to apply the eleventh amendment to situations beyond the Chisholm-type suit by relying on original history and intent are misleading, for there simply is no history or intent, outside the narrow scope of Chisholm, upon which to rely.

II. THE MEANING OF THE ELEVENTH AMENDMENT

A. Two Possible Interpretations of the Eleventh Amendment

If one starts with the premise that the eleventh amendment was designed at least to overrule Chisholm, i.e., to preclude suits in federal court for damages against states based upon the common law, it is evident that there are various ways to achieve that objective. Different methods of overruling Chisholm will produce different ef-

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fects on suits outside its narrow scope. Thus it is important to consider the possible alternatives.

There are two views of the eleventh amendment which would have the minimum effect of overruling Chisholm. The first has as its premise that the eleventh amendment acts in a negative fashion as a limitation on the power of the federal judiciary. This jurisdictional view of the eleventh amendment attributes a relatively narrow purpose to the eleventh amendment: to control the power of the federal judiciary over the states. This view builds on the idea that the states should be free to handle their fiscal affairs in their own way without interference from the federal tribunals.

The second view of the eleventh amendment, although perhaps not readily apparent from its language, is founded on a more broadly conceived purpose—a constitutional recognition of the traditional concept that a state is immune from suits for damages unless it consents to be sued. This view is based on the idea that states, as sovereign entities, may not be compelled to submit to being sued for damages by individuals in either their own courts or the courts of another sovereign, e.g., the federal courts. Under this second view, the eleventh amendment would act in an affirmative fashion, conferring upon the states a constitutional right of immunity from suit.

Although the jurisdictional view is rooted in deference to the sovereignty of the states, it does not necessarily follow that that view is synonymous with the constitutionalization of sovereign immunity for the states. The jurisdictional view is concerned only with the states' immunity to the extent that the power of the federal judiciary impinges on that immunity. The broader, constitutional immunity view, however, is concerned with any infringement on a state's immunity as sovereign, and thus may have consequences for suits brought in state as well as federal forums.

B. Two Possible Applications of the Eleventh Amendment

When dealing with suits against a state based on common-law claims, such as the suit in Chisholm, it makes little difference whether the eleventh amendment is construed to grant a constitutional right of sovereign immunity or to limit the power of the federal judiciary. Since common-law claims may be barred in state courts by the common-law doctrine of sovereign immunity or equivalent provi-
sions in state constitutions or statutes, a constitutional amendment was necessary only to preclude common-law claims in federal courts. Whether that end was accomplished by limiting the power of the federal judiciary directly, or as a result of an affirmative grant of a constitutional right to the states is only of academic interest.

When dealing with suits for damages against a state based upon federal claims for relief, the problem becomes more complicated. Extension of the eleventh amendment beyond the type of claim involved in *Chisholm* is arguably proper, since there is no indication that the *Chisholm*-type suit was specifically intended to be the exclusive focus of the eleventh amendment. In deciding whether or not the eleventh amendment should be construed to reach federal claims, one must consider whether federal claims are sufficiently different from common-law claims to require different treatment. If one answers that question in the negative and construes the eleventh amendment to reach suits for damages based upon federal claims for relief, different results obtain depending upon whether the eleventh amendment is viewed as a jurisdictional provision or as a constitutional grant of sovereign immunity. Under the jurisdictional view, individuals would be precluded from suing a state for damages upon a federal claim for relief in a federal court, but would be entitled to sue in a state court. Under the sovereign immunity view of the eleventh amendment, however, individuals would be precluded from suing a state for damages upon a federal claim in both federal and state courts, unless the state consented to be sued.

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47 Theoretically, federal claims for relief would include both statutory claims and claims based upon self-executing provisions of the Constitution. As of now, no affirmative claims for relief in the form of money damages have been judicially created as enforcement techniques for any constitutional provision that applies against the states. Assuming the Supreme Court has the power to create a damage remedy enforceable against the states as an enforcement technique for any particular constitutional provision, cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating a federal cause of action against federal officers for violations of the fourth amendment), such a claim for relief would not seem to be so different from a congressionally created claim as to warrant different treatment for the purposes of the eleventh amendment. The Supreme Court's decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), however, casts doubt on whether the Supreme Court in fact has such power.

49 A state cannot constitutionally prohibit federal claims in state courts when it permits analogous state claims to be brought in its courts. Testa v. Katt, 330 U.S. 386 (1946).

For an articulation of the view that suits upon congressionally created claims for relief are prohibited in federal courts, but not in state courts, see Employees v. Missouri Pub. Health Dep't, 411 U.S. 279 (1973) (Marshall, J., concurring).
Reading the eleventh amendment as a grant of a constitutional right of sovereign immunity that precludes suits for damages against a state in state courts may seem strained. Yet that was the very interpretation given the amendment by the Supreme Court of Ohio in *Mossman v. Donahey*. The interpretation of the eleventh amendment in *Mossman* is the broadest possible extension of the eleventh amendment beyond the scope of *Chisholm*. For that reason, *Mossman* will serve as a backdrop for studying the logical and functional strengths and weaknesses of the views described above.

C. The Eleventh Amendment and Congressionally Created Claims for Relief

1. *Mossman v. Donahey*

*Mossman v. Donahey* involved a suit against the State of Ohio brought in an Ohio court by an Ohio citizen to recover minimum and overtime wages and compensatory damages allegedly owed by the state under the provisions of the Fair Labor Standards Act (FLSA). Nelson Souder, the person on whose behalf the suit was filed, had been involuntarily committed in 1940 to a home for the mentally retarded which was owned and operated by the state. Until his release in 1973 Souder had worked at the home for up to twelve and one-half hours a day, receiving two dollars each month from the state in compensation.

Souder, through a next friend, filed a suit pursuant to § 216(b) of the FLSA in the Court of Common Pleas of Franklin County against the State of Ohio and various state officials and employees, seeking to recover unpaid wages and compensatory damages. The complaint was dismissed upon the state’s motion on the ground that the suit was barred by the doctrine of sovereign immunity. That dismissal was affirmed by the Court of Appeals for Franklin County.

In the Supreme Court of Ohio, there was no dispute that the FLSA by its terms reached the persons and activities involved in *Mossman*. The sole question to be decided was “whether the state

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46 Ohio St. 2d 1, 346 N.E.2d 305 (1976).

Id.


No. 74-CV-04-1146 (C.P. Franklin Cty. June 26, 1974).


In a previous class action to which the State of Ohio was not a party, Souder had obtained a declaratory judgment that the minimum and overtime wage provisions of the FLSA applied to patient workers in institutions for the mentally ill and mentally retarded. Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973).
may assert sovereign immunity as a defense to claims based upon federally-created rights under the FLSA, in an action brought by an individual in a state court." In affirming the dismissal of the suit, the court, in paragraph 1 of its syllabus, answered that question in the affirmative: "A state cannot, without its consent, be sued for damages in a state court by one of its own citizens upon a claim arising under federal law. (Eleventh Amendment to the United States Constitution construed.)" Inasmuch as the court applied the eleventh amendment to preclude suits against the state in state courts, it adopted the constitutional immunity view of the amendment. In so doing, the court applied the eleventh amendment beyond the scope of Chisholm in two important ways: (1) to suits in state courts; and (2) to suits based upon congressionally created claims for relief. The next section of this Note will analyze the considerations involved in suits of this type in order to determine the soundness of the extensions of the eleventh amendment made in Mossman.

2. Extending the Eleventh Amendment Beyond Chisholm

It has been forcefully argued elsewhere that the eleventh amendment should not be construed to apply to suits based upon congressionally created claims for relief when congressional intent to create a claim for relief is clear. The basic idea underlying the eleventh amendment, whether the amendment is viewed as a jurisdictional provision or as a grant of constitutional immunity, is that states have a right deriving from their sovereign status to control their own financial policies and priorities. Permitting states to be sued for damages in federal courts upon a common-law claim when that very claim could not be brought in state courts is an instance of interference with state finances over which states obviously have no control. But when congressionally created claims for relief are involved, the states do exercise control, by voting in Congress to create those claims. By enacting a law creating a claim for relief that is specifically enforceable against them, the states, acting collectively through Con-

46 Ohio St. 2d at 3, 346 N.E.2d at 307.
46 Ohio St. 2d at 1, 346 N.E.2d at 306.

The extent of that control, however, depends upon whether the amendment is viewed as a jurisdictional provision or as a grant of constitutional immunity.
gress, have theoretically considered the impact of that law on the finances of the state and have consented to the burden. When an individual state in litigation arising under that law raises a defense of sovereign immunity to bar the suit, that state is pitting its individual will against the express will of Congress, and, by contradicting its prior consent, places itself in opposition to the enforcement of federal law.

There are three possible ways to resolve the federal-state tension thereby created. One solution is to say that the eleventh amendment has no applicability to the situation at all, thereby permitting suits against states upon congressionally created claims in both federal and state courts. A second solution is to say that the eleventh amendment, viewed as a jurisdictional provision, is a bar to such suits in federal courts, but not in state courts. The third solution—adopted in *Mossman*—would be to apply the eleventh amendment as a constitutional grant of immunity, thereby precluding these suits in both federal and state courts. Since the history of the eleventh amendment is not determinative of the outcome, the choice of a solution is essentially a matter of policy. Inferences may be drawn from the nature of our system of government that will help to guide the choice, but it is to no avail to ask what the framers of the eleventh amendment intended, since the possibility of congressionally created claims for relief, for all we know, never occurred to them.

The United States Supreme Court has not been very clear in analyzing the application of the eleventh amendment to congressionally created claims for relief. In federal court litigation the Supreme Court seems to have settled on a theory of implied waiver of sovereign immunity when congressionally created claims for relief are involved. This theory states that when Congress explicitly creates a claim for relief enforceable against the states as part of a regulatory scheme, any state that participates in the regulated activity will be held to have consented to be sued upon that claim. In *Parden v. Terminal Railway of Alabama*, for example, the State of Alabama was held to have consented to be sued pursuant to the FELA when

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40 See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For additional discussion of Congress' power to create a claim for relief enforceable against the states, see section III infra.

41 See text accompanying note 41 *supra*.

42 For a review of the relevant precedents, see Tribe, *supra* note 58, at 688-93; Nowak, *supra* note 58, at 1415-22.


it began to run a railroad some twenty years after the FELA was enacted. Similarly, in Petty v. Tennessee-Missouri Bridge Commission, a suit under the Jones Act was brought by an individual in a federal court against a commission created by Tennessee and Missouri pursuant to a congressionally authorized bi-state compact. Consent to be sued was inferred from the states' acceptance of the terms of the congressional authorization, which included a "sue and be sued" clause.

Implementation of this doctrine, however, has been less than enthusiastic. In Employees v. Missouri Public Health Department, for example, the Court avoided the application of the doctrine by failing to find congressional authorization of a claim for relief enforceable against the states, despite strong evidence of the existence of such authorization. Employees involved a suit under the FLSA in a federal court, and thus is the federal court counterpart of

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64 This is the narrowest reading of Parden. Other language in the opinion, however, suggests that Alabama could not have asserted a defense of sovereign immunity to a suit under the FELA even if it had begun to run its railroad prior to the enactment of that Act:

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. Then a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.

377 U.S. at 192, 196.

67 U.S. Const. art. I, § 10, cl. 3 reads in part: "No State shall, without the Consent of Congress ... enter into any Agreement or Compact with any other state ... ."

377 U.S. at 289-90 (Marshall, J., concurring):

Insofar as the Court may now be suggesting that the Congress has not effectively lifted the State's immunity from private suit in the context of the FLSA, I cannot agree. In the 1966 amendments, § 3(d), 29 U.S.C. § 203(d), which defines "employer" for the purposes of the FLSA was altered to cover expressly "employees of a State, or a political subdivision thereof, employed ... in a hospital, institution, or school ... ." In the face of such clear language, I find it impossible to believe that Congress did not intend to extend the full benefit of the provisions of the FLSA to these state employees. It is true—as the Court points out—that in 1966 Congress did not amend § 16(b) of the Act, 29 U.S.C. § 216(b), which provides for private suit by the "employee" against the "employer" to recover unpaid compensation. But this is readily explained by the fact that no amendment to the language of § 16(b) was necessary to make the desired extension to state employees; the alteration of the definition of "employer" in § 3(d) clearly sufficed to achieve Congress' purpose and to express its will. Indeed, to suggest that § 16(b) may not provide for suit by state employees, despite the alteration of § 3(d) to include state employers, ignores the basic canon of statutory construction that different provisions of the same statute normally should be construed consistently with one another. [Footnotes omitted.]
Mossman. In refusing to permit a suit in federal court for lack of congressional authorization, the Court noted that § 216(b)

allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys' fees. It is one thing, as in Parden, to make a state employee whole; it is quite another to let him recover double against a State. Recalcitrant private employers may be whipped into line in that manner. But we are reluctant to believe that Congress in pursuit of harmonious federalism desired to treat the States so harshly. The policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.\textsuperscript{71}

Yet the Court suggested that suits by employees may be brought in state courts.\textsuperscript{72} Mossman, however, stated that such suits were impermissible in state courts as well.\textsuperscript{73}

Permitting suits upon congressionally created claims for relief in either federal or state courts when congressional authorization is clear would not seem to violate any of the functions of the eleventh amendment posited previously. The states in Congress have considered the impact of damage claims and have consented to the burden. It would be anomalous to then permit states individually to raise the issue of consent again in litigation. Permitting one state to thwart the collective will of all the states voiced in Congress would put great strains on federal-state relations and challenge the constitutional principle of the supremacy of national law. Common-law suits, such as the suit involved in Chisholm, involve two parties—the individual and the state. The obligation is one “binding only on the conscience

\textsuperscript{71} 411 U.S. at 286. Section 216(c) of the FLSA permits the Secretary of Labor to bring suits against a state on behalf of state employees to recover unpaid wages. 29 U.S.C. § 216(c) (1970 & Supp. IV 1974).

\textsuperscript{72} 411 U.S. 279, 287 (1973): “Section [2][16(b), however, authorizes employee suits in ‘any court of competent jurisdiction.’ Arguably, that permits suits in the Missouri courts but that is a question we need not reach.”

\textsuperscript{73} Contra, Clover Bottom Hospital v. Townsend, 513 S.W.2d 505 (Tenn. 1974), which held that an employee could sue the state in state courts under § 216(b) of the FLSA. The court agreed with Justice Marshall that Congress did intend to extend the full benefit of the FLSA to state employees and did so by authorizing suits in state courts.

Without a private damage remedy, the FLSA, as it applied to the states, would have been a peculiarly ineffective piece of legislation. The Secretary of Labor lacked the manpower to enforce the law effectively. See Employees v. Missouri Pub. Health Dep't, 411 U.S. 279, 297 n.12 (1973) (Marshall, J., concurring). Therefore, as a practical matter, until a suit for injunctive relief was brought, Ex parte Young, 209 U.S. 123 (1908), a state could otherwise disobey the law with impunity. Cf. Edelman v. Jordan, 415 U.S. 651, 691-92 (1974) (Marshall, J., dissenting) (the federal-state Aid to the Aged, Blind or Disabled program lacks a private damage remedy).
of the sovereign." But suits upon congressionally created claims involve three parties—the state, the individual, and the federal government. The obligation runs not only to the individual but to the federal government, for the state is obliged to abide by the will of the majority as expressed in federal laws.

Refusing to allow suits in federal courts when congressional authorization of a claim for relief is clear might make sense if federal tribunals would be less likely to be sensitive to states' interests than would state tribunals. But damage recoveries, at least under the FLSA, are not discretionary, and permit little latitude on the court's part. Since the remedies are spelled out and mandatory, whether a state or a federal court awards a judgment would seem to make little difference.

There may be concern, however, that a federal court may be more likely than a state court to find congressional authorization of suits against the state when the decision is a close one. But Congressional authorization of a claim for relief is a question of federal law which, if disputed, could ultimately be decided by the Supreme Court of the United States regardless of which court originally decides the dispute. If a lower federal court finds congressional authorization of a claim for relief when none exists, the Supreme Court can reverse the decision. If, however, the lower court decision is affirmed, both state and federal courts will be bound by the Supreme Court's decision to award damages. On the other hand, if a state court fails to find congressional authorization when authorization does exist, the Supreme Court can reverse that decision, and, again, both state and federal courts will be bound by the Supreme Court's holding. Therefore, little would be gained by precluding suits upon congressionally created claims for relief in federal courts.

Of the three possibilities, the solution suggested in Mossman seems the least tenable. Permitting states to refuse to litigate congressionally created claims in either federal or state courts would reduce the damage remedy to a mere moral exhortation by Congress to the states. The resulting federal-state tension would certainly be undesirable. It would seem contradictory to say that Congress has the power to create claims for relief against the states, but that those claims are enforceable only at the whim of the states.

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75 One may question whether the differences between the judicial behavior of federal judges and that of state judges are of constitutional significance. While it is possible to suggest that the fear of federal judges led to the passage of the eleventh amendment, at the time it was passed the amendment precluded federal judges from doing what state judges could not do either—i.e., adjudicate suits for damages against states based on common-law claims.
The Supreme Court of Ohio apparently perceived the potential disruptiveness of its initial interpretation of the eleventh amendment in *Mossman*, for it immediately backed down from its original line of reasoning. Although the court "held" that "a state may not be sued for damages by an individual under federal law, without its consent," in either federal or state courts, the court sharply limited that "holding": "This right may well be a limited one in areas of primarily federal concern and regulation, and in those areas the states may be subject to private suits in the same manner as individuals, where Congress has so provided." The court went on to agree with the United States Supreme Court's holding in *Employees* that there was no congressional intent to create a claim for relief enforceable against the states under the FLSA. Since the Supreme Court of Ohio viewed the eleventh amendment as a constitutional grant of sovereign immunity, that immunity would have to be "waived" by Congress before suits could be brought in either federal or state courts.

Thus the Supreme Court of Ohio ultimately adopted the implied waiver doctrine articulated by the Supreme Court of the United States, although it extended the doctrine by applying it to suits in both federal and state courts. While this position is more tenable than the original position articulated by the court, it is still subject to criticism. First, it was possible for the court to conclude without manipulating the words of the eleventh amendment that the suit in *Mossman* could not be maintained in state courts. The court could have argued that since, according to the holding of the United States Supreme Court in *Employees*, Congress had not created a claim for relief enforceable against the states under the FLSA, the plaintiff lacked an enforceable claim against the state. The FLSA did not provide a remedy, and any common-law claim, such as one for restitution, could have been precluded by the common-law defense of sovereign immunity.

Second, the constitutional immunity theory itself may be an unduly broad reading of the language of the eleventh amendment. The amendment itself speaks only of the power of the federal judiciary, and uses the same terms as article III. While it is possible to discount the importance of that fact, since the framers of the amend-

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7a 46 Ohio St. 2d at 17, 346 N.E.2d at 315. See note 56 supra.
7b Id. at 17-18, 346 N.E.2d at 315.
7c Id. at 18, 346 N.E.2d at 315.
7d OHIO CONSTIT. art. I, § 16 provides that "[s]uits may be brought against the state . . . as may be provided by law." This waiver of immunity, however, is not self-executing. Without a statutory authorization of suits against the state, the state's immunity remains intact. State ex rel. Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).
ment probably never considered the possibility of congressionally created claims for relief, it is not necessary to torture the words of the eleventh amendment in order to preclude suits against states upon congressionally created claims for relief. There is a more direct route to that end.

III. AN ALTERNATIVE RESOLUTION OF THE ISSUES OF FEDERALISM RAISED BY CONGRESSIONALLY CREATED CLAIMS FOR RELIEF

Thus far it has been assumed with regard to congressionally created claims for relief that it is within the power of Congress to regulate the underlying activity in the first place. In this section the relationship of that assumption to the controversy over the applicability of the eleventh amendment to congressionally created claims for relief will be explored.

Federal regulation of a traditional state function, such as the allotment of wages for state employees, is bound to create a certain amount of federal-state tension. Indeed, the controversy over the amendments to the FLSA that made the Act applicable to the states began soon after they were enacted. In *Maryland v. Wirtz* the Supreme Court of the United States upheld those amendments against a tenth amendment challenge, and specifically reserved any eleventh amendment issues. However the availability of damage remedies to state employees evoked concern that culminated in the determination by the Supreme Court that the FLSA does not authorize suits by individuals against the states. This piecemeal way of dealing with the problems raised by the FLSA was abandoned by the Supreme Court in *National League of Cities v. Usery*, in which the Court overruled *Maryland v. Wirtz* and struck down the minimum wage provisions of the 1966 and 1974 amendments to the Act.

The Supreme Court's concern in *National League of Cities* was that the FLSA as it applies to the states "directly supplants considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment." The Court held that "insofar as the challenged amendments operate

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80 392 U.S. 183 (1968).
81 U.S. CONST. amend. X: "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."
82 392 U.S. at 200.
84 96 S. Ct. 2465 (1976).
85 *Id.* at 2472.
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to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3. Thus the real concern was not the damage remedies per se, but the underlying regulation those remedies were designed to enforce.

Similarly, the FLSA itself, and not merely the damage remedies incorporated in it, was the true source of concern in Mossman. Although the Mossman decision was purportedly based on the eleventh amendment, the tenth amendment issues raised explicitly in National League of Cities were addressed covertly in Mossman as well. Evidence of the concern with tenth amendment issues is found in the concurring opinion of Justice Brown, who characterized the suit in Mossman as "an incredible federal intrusion into internal state affairs," and spoke of the "bureaucratic interpretation" of the FLSA that led to the suit. Justice Brown questioned whether the FLSA could legitimately regulate the amount of wages that must be paid to patient workers at state hospitals, contending that treatment of the mentally ill "is a state activity like the administration of prisons, which historically has been an exclusive state function under the reserved powers of the Tenth Amendment." At stake, Justice Brown asserted, are "substantial state revenues" and "state policy choices of compelling magnitude." He was thus contesting, on tenth amendment grounds, the application of the FLSA to the activity underlying the suit in Mossman.

Justice Brown's concern with the intrusion of the FLSA on state affairs is reflected in the opinion of the majority in Mossman: "The concern expressed by the Court in Employees with extending the holding in Parden to an area with such 'manifold applications' as are involved in the instant case indicates a clear recognition of the problems involved in this area of law." In a footnote the court stated:

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86 Id. at 2474.
87 Compare Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976), which also involved a congressional act regulating wages to be paid to state employees. The law involved in Fitzpatrick—the Civil Rights Act of 1964—was enacted pursuant to § 5 of the fourteenth amendment, while the FLSA was enacted pursuant to the commerce clause. The Supreme Court in Fitzpatrick held that the eleventh amendment does not preclude an award against the state of back wages and attorneys' fees pursuant to the Civil Rights Act of 1964. See note 3 supra.
88 46 Ohio St. 2d at 18, 346 N.E.2d at 315. Justice Brown's concurrence was joined in by Justice Celebrezze.
89 Id. at 19, 346 N.E.2d at 315.
90 Id., 346 N.E.2d at 316.
91 Id. at 19-20, 346 N.E.2d at 316 (emphasis in original).
92 Id. at 20, 346 N.E.2d at 316.
93 Id. at 17, 346 N.E.2d at 315.
The extent of these applications goes beyond even employees in the same position as the plaintiff in this case, for the statute under which this action is brought . . . was amended, effective the day after this suit was filed, to include virtually all state employees except elected officials and their staffs.4

Thus, while Mossman purportedly concerned only eleventh amendment issues, the underlying concern was the effect of the FLSA on state prerogatives. This concern should result in a tenth amendment attack on the FLSA; but at the time of Mossman that attack was foreclosed by Maryland v. Wirtz. The struggle of the Supreme Court of Ohio to preclude the suit in Mossman by manipulating the eleventh amendment exemplifies the turmoil created by the application of the FLSA to the states.

States' interests are protected by the tenth amendment as well as the eleventh, and the tenth amendment is not confined by its terms to the judicial power of the United States. It is a check on the power of the federal government generally. If a congressional regulation that includes a damage remedy is alleged to be an unconstitutional intrusion on state prerogatives, the validity of the statute is at issue, not the means of its enforcement. The most logical and direct way of dealing with the problem would be to declare that Congress lacks the power to regulate that state activity at all.5 With respect to the FLSA, the Supreme Court of the United States has recently chosen that solution.6

IV. Conclusion

It is apparent that the creation of claims for relief enforceable against the states tends to disrupt the harmony of federal-state relations. But there are several ways of resolving this disharmony. Conceptual clarity is essential in order to determine precisely what problem is being confronted and how it may best be resolved. The resolution of the federal-state controversy over the FLSA was finally reached after nearly a decade of litigation waging tenth and eleventh amendment attacks upon the Act. The final determination was that the substantive rights created by the law unconstitutionally invaded the domain of state affairs—a tenth amendment analysis—although the Supreme Court had earlier raised eleventh amendment barriers

4 Id. at 17 n.10, 346 N.E.2d n.10 (citations omitted).
5 However, a court may agree with Professor Wechsler that the states' interests are adequately protected by their participation in Congress, and thus disallow a tenth amendment attack on the law. See note 60 supra and accompanying text.
to litigation pursuant to the FLSA. It is essential for the Supreme Court to clear up the confusion about the eleventh amendment to prevent the frustration of federal regulatory programs that do not unnecessarily intrude into state affairs.

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