

---

# Commentary

---

## A MODEST PROPOSAL FOR THE REDUCTION OF THE SIZE OF THE FEDERAL JUDICIARY BY TWO- THIRDS

by Brian M. Cogan

### Note from the Editor:

This is the first article in a new *Commentary* section in the *Federalist Society Review*. In this section, we will feature interesting ideas and provocative proposals related to the legal profession. Here, a federal district judge tells us from his point of view of a few simple things Congress could do to dramatically reduce federal judges' caseloads—largely by moving more state-law-based cases into state court.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

*It is a melancholy object to those who walk through the great federal courthouses of this country, when they see the courtrooms, the corridors, and clerks' offices, crowded with litigants, followed by three, four, or five lawyers, many in business casual dress, perhaps with ties in their pockets on the off-chance that they may see a federal judge, forced to undertake work under state law for want of substantial federal questions, who, as their practice matures, never learn the intricacies of trying a case under federal law before a federal judge.*

—Jonathan Swift  
(what he might have written had he been an  
observer of today's federal courts)

Federalism has become fashionable again. Kimberly Strassel of the Wall Street Journal, commenting recently on Scott Pruitt's nomination to head the EPA, summarized his career as "trying to stuff federal agencies back into their legal boxes," perhaps presaging a new era where the individual states are allowed to exercise their own prerogatives over environmental, health care, labor, and entitlement policy and reform. "Say hello to the federalist revival," she concluded. If this is going to happen, part of it is going to have to be getting the federal district courts out of the state law business.

Most non-lawyers would be surprised to learn the amount of time that federal district judges like me spend on a daily basis figuring out what to do with state law claims or state law issues that have been "federalized," perhaps out of a myopic assessment of efficiency, or out of a historical concern—which may no longer be valid but is never tested—that state courts cannot be trusted with important claims. The fact is that "making a federal case out of it" doesn't mean what it used to mean. Many state legislatures have sought to surpass the federal government in protecting their citizens' rights in civil cases, whether as members of a protected group, employees, consumers, the disabled, or just about any other classification that a state legislature feels might be in need of protection. Yet because of various overlapping jurisdictional rules, a sizeable proportion of those state law claims come to federal court.

Don't get me wrong. I'm not complaining at all. The federalism issues that require balancing competing federal and state law interests are a fascinating aspect of my job, and from a personal perspective, I have no interest in changing that. (Of course, I try to evenhandedly apply whatever statute the parties before me present.) But just as I suspect Jonathan Swift had plenty to eat when he wrote his *Modest Proposal*, I recognize that there may be larger interests at stake than my own intellectual stimulation. And with 80% of the cases in federal court consisting of civil disputes, and so many of those having state law issues that either overshadow, duplicate, drive, or affect the federal law claims that brought them to federal court in the first place, the question needs to be asked: are the marginal number of judges, courtrooms, staff, and resources, with their accompanying cost,

---

### About the Author:

Brian M. Cogan is a United States District Judge serving on the United States District Court for the Eastern District of New York.

part of the necessary allocation of sovereign authority between the federal and state governments?

The doctrines that often transform federal courts into state courts are well known to any law student—principally, concurrent jurisdiction, supplemental jurisdiction, and diversity jurisdiction. Yet with a few deft jurisdictional flicks of its wrist, Congress can restore the balance of judicial federalism that the Founders intended. It could also further Justice Brandeis' conception of the states as laboratories of social experimentation, rather than, as often happens now, placing the application of state law in the hands of federal judges who are unaccountable to the voters who elected the state legislators to pass such laws.

Let's look at just four of the innumerable examples, comprising about half of my docket, where a strong argument can be made that the federal courts should have a greatly curtailed role.

#### I. WAGE LITIGATION

As one plaintiff's lawyer quipped to me recently, "the minimum wage is all the rage." The federal statute, the Fair Labor Standards Act, known as the FLSA, has been the single greatest driver of the increase in federal district court caseloads in the last decade. It requires most employers to pay most employees a set minimum wage and overtime. It comprises the largest single component of cases on my docket. This was a great and overdue statute when Congress passed it in 1938. It was first proposed by Hugo Black when he was a Senator in 1932, in the midst of the Great Depression, obviously a time of the most significant labor market distortion in the last century.

What does it do today? Not so much. I am not saying it serves no function, but in my federal district court, and I suspect in many others, its main use is as a vehicle to get state law wage claims into federal court. State law often allows much better recoveries for underpaid workers. Twenty states raised their minimum wage as of January 1st of this year; all of them are higher than the \$7.25 required by the federal statute, some of them much higher—New York is moving from the current \$9 per hour to \$15 per hour phased in through 2018. And those are just the ones who have raised it. Currently, only seven states have their minimum wage raised by the federal rate, although some others are tied to it.

Aside from the superior wages required under many state laws, many of these state statutes have vastly superior benefits for workers as compared to the federal statute. The FLSA, for example, allows underpaid employees to reach back for, at most, three years of unpaid minimum wages and overtime. The New York Labor Law allows six years. The New York Labor Law allows class actions, a big fee incentive for plaintiffs' lawyers; the FLSA does not (it has a unique vehicle called a "collective action," but it is a cumbersome and poor cousin to a class action). The FLSA has nothing like the New York Labor Law's "spread of hours" premium, which requires an extra hour's pay, without regard to overtime, if the spread between the beginning and end of the work day exceeds 10 hours. These are just a few of the many ways that state law, responding to local concerns and local pressures, can better protect workers than the depression-era FLSA.

Although I could write separately on the factors that lead plaintiffs' attorneys to sue under the FLSA in federal court and, in those few FLSA cases brought in state court, defense attorneys to

remove them, the important fact is that I am flooded with FLSA cases, and virtually all of them include a parallel claim under the New York Labor Law. This is the result of the doctrine of supplemental jurisdiction, which essentially posits that it is more efficient to have one case in one court than two cases arising out of the same facts in two different courts, and therefore permits state claims to be brought alongside federal claims in federal court. That sounds fine until you give it a moment's thought—few plaintiffs would want to bring two cases, and thus, if called on to make a choice, plaintiffs would usually pick the law and court that gives them more relief. The irony is that the doctrine of supplemental jurisdiction, designed to create efficiency, often achieves little more in the real world than supplying a federal jurisdictional hook for claims that are ultimately determined as a matter of state law. It thus imposes a significant burden on the federal court with, in many cases, no demonstrable benefit to efficient administration.

In practice, the way this works is that in the vast majority of my FLSA cases, I have to put the FLSA on the shelf. Settlement or trial is based on the employer's much larger exposure under the New York Labor Law. In the end, I am left presiding over what is essentially a New York state law case, just as would a New York state court judge, with the federal law essentially eclipsed.

How to put things back in their place? The fix is simple. All that Congress has to do is amend either the FLSA or the supplemental jurisdiction statute to provide that if a district court determines that state law and the state courts of the district in which it sits provide an equal or superior remedy to the plaintiff, then the federal court is required to abstain from hearing the case, forcing the plaintiff to pursue the claims in state court. To those who would protest—"satellite litigation!"—I submit that such litigation would be brief. The Courts of Appeals would quickly establish which states within their circuits do and do not provide superior remedies, with the occasional revisit; but in many cases, like New York, the answer will be obvious.

Net effect on my New York docket: a caseload reduction of about 10%. Even if my docket does not proportionately reflect the national docket, even half or a third of that number would still mean a substantial savings in federal resources with no sacrifice of employee rights, as well as empowering state courts to lead the way in enforcing their own state laws.

#### II. FALSE ARREST/MALICIOUS PROSECUTION

Competing with the FLSA to produce the largest federal jurisdictional hook for state law claims on my docket is the Civil Rights Act of 1871, under which plaintiffs make claims against public authorities and the police officers they employ. Of course, not even a Modest Proposal would suggest that the federal courts surrender their unique role in addressing racial discrimination and racially-based police misconduct. But frankly, I see very little of that—maybe one out of 20 cases—in the multitude that I have on my docket. Instead, most of what I see is based on the Supreme Court's 1961 holding in *Monroe v. Pape* that if a police officer falsely arrests or causes the malicious prosecution of an individual, he has violated that individual's rights under the 14th Amendment, regardless of race, and the claim can be brought in federal court—or, importantly, at plaintiff's option, in state court—under the 1871 Act. Of course, in most states, the police

officer was already liable for false arrest and malicious prosecution under the common law, but in 1961, the Supreme Court was not confident in the willingness or ability of some states to neutrally apply the common law in this area.

Let's fast forward 56 years. Although the common law would cover the vast majority of false arrest, malicious prosecution, and excessive force cases that are before me just fine, I end up deciding these cases on constitutional grounds, that is, determining if there was a violation of the plaintiff's rights under the 14th Amendment, not under the common law, even though plaintiffs invariably assert common law claims through my supplemental jurisdiction. The doctrine of constitutional avoidance, which requires federal courts to avoid applying the Constitution if the case can be decided on state law grounds, has been turned on its head in this area. Federal courts avoid state law that in most cases would be fully adequate to address these torts in favor of applying the U.S. Constitution.

I don't think the Supreme Court in 1961 really had in mind some of the cases that appear on my docket; if it did, perhaps it's time to ask whether things have changed. In one case, for example, the police wrote a summons to a white circus performer who was riding his unicycle on the sidewalk through a high-crime neighborhood at 3 a.m. When the unicyclist had the summons dismissed in New York Criminal Court because the New York City ordinance prohibited only two and three-wheeled cycles on the sidewalk, not unicycles, he sued in my court for false arrest and malicious prosecution under the 1871 Act. Of course, he included supplemental jurisdiction claims for false arrest and malicious prosecution under the common law.

Or there is the case where an African-American man went on to a subway platform and turned his large, portable radio up to full volume, loud enough to actually drown out the train announcements. He refused to turn it down when a police officer asked him to, and so he was issued a summons for disorderly conduct. He brought the same kind of suit before me, with state law supplemental claims but no claims based on his race, and the defendants settled it for nuisance value. He had brought similar cases many times before; the "serial plaintiff" who deliberately or quasi-deliberately gets arrested to bring a nuisance-value suit is something many judges see in this area.

These cases are not outliers among those on my docket.

Of course there are some very serious cases brought under the 1871 Act, even if they are non-racial. Many judges, myself included, have presided over cases where an individual was wrongly imprisoned for decades as a result of false evidence, not because of race, but because of police incompetence to the point of recklessness or even malice. In those cases, the municipality ends up paying millions of dollars in settlement.

But no one is asking whether, in this day and age, enough confidence has been restored to the states, or at least some of them, that the common law antecedents for these federal rights might serve just as well. In New York, I think they would. I see no indication that the state courts in New York, and particularly state court juries, which are usually drawn from similar pools to those in federal courts, are particularly pro-police. In fact, on those few occasions when a plaintiff's lawyer commences the action in state court under the 1871 Act, as Congress has authorized

him to do, together with the common law antecedents of their constitutional claims, the City and police defendants invariably remove the case to federal court (which federal law, under the doctrine of concurrent jurisdiction, permits them to do because of the presence of the claims under the 1871 Act). It seems like both sides, for reasons having nothing to do with the neutrality of the forum, prefer to be in federal court.

The fix could be similar to that suggested above for FLSA cases: Congress should restrict federal court enforcement of the 1871 Act to civil rights claims with a racial component—at least in states where state constitutional, statutory, or common law claims, as well as the state judicial system to enforce them, are shown to be adequate. Or give federal courts at least an option, if not a mandate, to abstain in such cases if they determine that the state court can handle it. Perhaps there is even a role for the Civil Rights Division of the United States Department of Justice in making that determination on a state-by-state basis.

Net effect on my New York docket: another 10% reduction.

### III. DIVERSITY JURISDICTION

This jurisdictional grant allows a citizen of one state to sue in federal court if he is suing a citizen of another state, as long as the amount in controversy exceeds \$75,000. Diversity jurisdiction is authorized by the Constitution, and it requires the federal court to apply state law, usually the law of the state in which it presides. The reason for the grant of diversity jurisdiction in the Constitution seems obvious—in creating a union of separate sovereign states, state citizens were concerned, probably with some justification, that they might suffer prejudice before a local judge and jurors if sued in some other state. Federal jurisdiction was the device the Founders selected to ameliorate this potential local bias.

Today, the greatest use of diversity jurisdiction in my court—probably over 80% of two- and three-party cases—is traffic accident and other personal injury cases between citizens of different states. In these cases, only state law applies. But I frankly don't think it matters at all whether a New Jersey citizen injured in a traffic accident on the Brooklyn-Queens Expressway brings his claim against the New York driver in New York state court or my federal court. I don't believe New York state judges are prejudiced against people from New Jersey (or Georgia, or California, or France). They try to neutrally apply the law, and, as noted above, the jury pools for state and federal court don't seem distinct enough to make a difference.

There are exceptions where there is a perception of local bias. Most recently, Congress passed the Class Action Fairness Act (CAFA) in response to certain state courts, usually in rural areas, acting as "magnet" courts for plaintiffs' lawyers. Some local state courts did this by liberally construing their state class action laws to permit nationwide class actions against out-of-state corporations despite limited contacts between the state and the out-of-state defendant. The perceived bias of the judge and local jurors in favor of the local plaintiff forced many corporations to settle those class actions for huge amounts. Congress loosened the rules of diversity jurisdiction to permit such cases to be removed from state to federal court in an effort to limit the practice, but in doing so, it imposed strict criteria to ensure that truly national

interests are at stake, including a \$5 million minimum amount in controversy requirement.

Numerous solutions to the over-availability of diversity jurisdiction have been brought forward, but the \$5 million minimum in CAFA suggests an easy one, and one that Congress has used before. It last increased the jurisdictional minimum for ordinary diversity cases to \$75,000 twenty years ago. Seventy-five thousand dollars is a lot less today than it was then; a first-year lawyer, fresh out of law school, at a large New York law firm will earn more than double that amount. The Commercial Division of the New York State Supreme Court in Manhattan has a \$500,000 jurisdictional minimum. There probably aren't too many lawyers in urban centers that would want to bring a case worth anywhere near a mere \$75,000. Raising the jurisdictional minimum to \$1 million in federal court, coupled with a requirement that a plaintiff must make a reasonable showing that there is that much in controversy (unlike current law, which is very indulgent of the plaintiff's valuation), would eliminate many cases from the federal docket in which federal judges apply state law to claims that belong in state court. In fact, I believe a floating, five-year index that ties the jurisdictional amount to the cost of living would help ensure that only appropriately significant diversity cases wind up in federal court.

There are numerous other possible solutions. For example, Congress could apply the "local defendant rule" to all diversity cases. Under current law, when a case is commenced in state court and the litigants are diverse, the defendant cannot remove it to federal court if he resides in the state where the case is commenced. This is simply because that defendant cannot complain of local bias in his own state. But current law allows a local resident to sue an out-of-state defendant in federal court based on diversity. The same rule that applies to prevent removal by local defendants should apply to plaintiffs' initial filings, for the local plaintiff cannot be afraid of local prejudice. If he wants to sue a defendant in his (the plaintiff's) home state, there is no reason he cannot do it in state court.

And then there is, again, the abstention solution. Federal courts sitting in bankruptcy, for example, are required to abstain from exercising jurisdiction over state law claims if, among other things, an action can be timely adjudicated in state court. There is no reason that federal district courts should not have the same mandate in diversity cases, perhaps with the addition that the federal court must find that there is no federal policy interest that would be compromised by abstention.

That's another 10% of the cases off my docket. I'm getting to direct more and more attention to questions of federal law.

#### IV. TITLE VII

Title VII of the Civil Rights Act of 1964 is on everyone's list of the most significant congressional enactments of the 20th Century. This is not only because of the direct effect that judicial decisions under the statute have had in promoting racial and gender equality in the workplace; it is also because the very existence of the statute and the development of caselaw under it have helped incentivize major national companies to develop internal human resources policies to promote equality among workers. Depending on your viewpoint, it has either led or

accompanied market forces in establishing the need for equal opportunity in the workplace as part of the American work ethic.

But more than 50 years after its enactment, I am not seeing it used for these noble purposes. A surprising number of the Title VII cases brought before me, perhaps as many as half, are brought against City agencies or non-profit public service companies that perform strictly local functions. Because the requirement that the employer engage in "interstate commerce" is so liberally construed (in this statute and most others), and the threshold employment level is so low, the statute covers many businesses that are almost entirely local in nature—if a coffee shop buys its napkins from an out-of-state vendor, it is probably covered. It's not that employees of such companies aren't entitled to the same protections as their counterparts in large, private sector companies. But where the employer, public or private, is local, the question should be asked: is there a federal interest that can only be protected by a federal court?

As to a number of different kinds of employment discrimination, the answer is no. Both the New York Legislature and the New York City Council have enacted their own employment discrimination statutes that are in many ways more protective than Title VII. Unlike Title VII, the New York State Human Rights Law covers all of the grounds in Title VII plus sexual orientation (an open question under Title VII), marital status, domestic violence victim status, criminal record, and "criminal predisposition." Fewer employees are required to trigger the state statute than Title VII. At the administrative level, cases are investigated and resolved much faster by the State Division of Human Rights than they are by the Equal Employment Opportunity Commission. Individual managers can be sued under the state law, which increases a plaintiff's settlement leverage; under Title VII, only the employer is a proper defendant. And while the state statute does not expressly allow attorneys' fees in some kinds of discrimination cases, a clever plaintiff's lawyer will almost always be able to get an employer to pay attorneys' fees voluntarily if he prevails on his state law claim.

The New York City Human Rights Law is even more protective of the employee. It has all of the advantages of the state law, and an easier standard of proof. Under Title VII, an employee must prove that her protected status (for example, race or gender) was a substantial factor in the employer's wrongful decision or practice. Under the New York City law, the employee only needs to show that she was treated differently because of her status.

This gets a bit dicey before a jury, and it turns me into a state court judge applying the City law. Since the City standard is easier to prove, and gets the plaintiff all the relief she wants, I don't have to bother instructing the jury on the Title VII claim. If I put the City claim to the jury and the jury finds in favor of the defendant, that resolves the Title VII claim, because if the

plaintiff could not meet the easier burden of proof, we know she could not meet the harder one.

Net effect on my docket: another 10% reduction, and I can now focus on applying Title VII to claims that are substantial and important enough to warrant resolution in federal court.

## V. CONCLUSION

I have only given four examples above. But the fact is that I could take virtually any federal statute designed to protect consumers, employees, or individual citizens and apply a similar analysis. As I've noted above, I readily concede that this Modest Proposal is based on my own experience as a federal judge in New York City—they don't let us out much—but there may be opportunities in other federal courts for similarly adjusting the situations in which a federal court must consider state law or where state law would make it unnecessary to apply federal law. Like any national policy, the broad grants of federal law and jurisdiction don't leave much room for fine-tuning at the local level to accommodate federalism concerns. But it wouldn't take many statutory amendments to help restore a proper balance and get federal courts and federal law out of the state law business when federalism and the interests of justice would be served.

The only objection I've heard to reducing the federal courts' involvement in state law came from a retired New York Appellate Division judge when I presented some of these ideas at a bar association meeting. She said, "My God, if the federal courts actually make the state courts the near-exclusive tribunal for state law claims, the state courts will never have the resources to determine so many cases." That may be. But I see nothing in the Constitution creating a role for the federal courts as a safety valve for inadequately funded state courts. If aspects of this Modest Proposal cause state legislators to think about allocating more resources to their courts to accommodate the legislation that they're passing, I see that as healthy, not problematic.

Of course, most readers will recognize that, by calling this challenge a Modest Proposal, I have granted myself some liberties in describing what is achievable or even desirable for the purpose of directing attention to an issue. The goal of provoking discussion is more important to me than the specific examples set forth above. Nevertheless, putting aside the reduced role (and size) that federal courts would have under my proposal, wouldn't it be grand if federal courts could hew closer to the role envisioned for them by the Founders, and have the bulk of their dockets comprised of cases in admiralty, patent, bankruptcy, truly national statutory mandates, and those important issues of our great Constitution that should only be decided by federal courts?

