Revisiting *Erie, Guaranty Trust,* and *Gasperini:* The Role of Jewish Social History in Fashioning Modern American Federalism

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I. INTRODUCTION

In *Gasperini v. Center for Humanities, Inc.,* Justice Ruth Bader Ginsburg wrote that federal trial judges must apply state law when a jury's award of compensation is challenged as excessive or inadequate. Justice Ginsburg found that federal jury policy interests could and should be accommodated with state law standardization of compensation awards. What is surprising about *Gasperini* is that Justice Ginsburg felt compelled to apply state law at all. In his dissent in *Gasperini,* Justice Scalia forcefully points out that the proper roles of judges and juries in the federal system are solely a matter of federal law. Why *Gasperini* did not follow *Byrd v. Blue Ridge Rural Electric Cooperative* and *Hanna v. Plumer* in applying only federal law remains a mystery or a riddle.

Justice Ginsburg stretches out to include state law in *Gasperini* when she writes that "[t]he Seventh Amendment, which governs proceedings in federal court, but not in state court, . . . bears not only on

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2. *Id.* at 426.
3. *Id.* at 436–37.
6. 356 U.S. 525 (1958) (countervailing federal policy involving the distribution of functions between judge and jury in the federal courts requires the application of federal law).
7. 380 U.S. 460 (1965) (a Federal Rule of Civil Procedure applies where scope of federal rule is broad enough even when the application of the federal rule may vary the outcome between federal and state courts).
the allocation of trial functions between judge and jury . . . [;] it also
controls the allocation of authority to review verdicts . . . ."8

Justice Ginsburg's thinking in *Gasperini* reflects the state law bi-
ases contributed by Justices Brandeis and Frankfurter to modern judi-
cial federalism, as evidenced in *Erie Railroad Co. v. Tompkins*9 and
*Guaranty Trust Co. v. York,*10 respectively. *Erie* and *Guaranty Trust*
are viewed by legal scholars not only as the bases for modern judicial
federalism,11 but also as critical to the effort to adapt the state and fed-
eral courts to modern mobile society and commercialism.12 The *Erie*
doctrine remains accepted as axiomatic.13 The federalist thinking of
Justices Brandeis, Frankfurter, and Ginsburg implicates Jewish his-
torical social experience, and the mystery or riddle of why Justice
Ginsburg applied state law in *Gasperini* when federal law clearly ap-
plied can be explained by Jewish social experience in Europe and
America.

This article explores the connection between traditional Jewish
localism14 and the creation of modern American federalism that flows
from the *Erie* doctrine.15 First, the riddle of *Gasperini* is explored.16
Next, the federalist philosophies of Justices Brandeis and Frankfurter
in *Erie* and *Guaranty Trust* are discussed.17 Finally, the article ana-

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8. *Gasperini,* 518 U.S. at 432 (citation omitted).
9. 304 U.S. 64 (1938).
11. Frank J. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and
12. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION:
*ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-
CENTURY AMERICA* 3 (2000). *Erie* preserved state law even as the railroads and means of com-
munication created the need for a national law governing interstate transactions. *Erie* recognized
that the states had a role to play in regulating multistate transactions and business. Justice
Brandeis recognized that the persistence of state courts in developing common law prevented
national legal uniformity. *Erie,* 304 U.S. at 74. *Erie* guaranteed that the states maintained a role
in commercial and other regulations as American commerce became more national in scope.
14. Traditionally, many Jews have lived in isolated but religiously interconnected local
communities before and after the Fall of the Temple in Jerusalem. Jews have had to adapt to
local conditions while maintaining a universally shared religion. Jewish lawmaking and interpre-
tation were impacted by this attachment to local communities. See infra notes 143–186 and ac-
companying text.
15. Concerning the *Erie* doctrine, see generally Henry J. Friendly, *In Praise of Erie--And the
New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964); Thomas D. Rowe, Jr., *Not Bad for
Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halway Decent Job in Its
Erie-Hanna Jurisprudence?* 73 NOTRE DAME L. REV. 963 (1998); and Gregory Gelfand & How-
16. See infra part II.
17. See infra part III.
lyzes how Justices Brandeis, Frankfurter, and Ginsburg, as twentieth-century American Jews, embody the traditional Jewish minority experience that, at least in part, was informed by anti-Semitism.  

II. GASPERINI: CREATING THE RIDDLE

In Gasperini, Justice Ginsburg accommodates both Seventh Amendment doctrine and Erie concerns about the necessary application of state law. Through this accommodation, Justice Ginsburg avoids taking the next logical step that is implied by her own analysis, thereby creating a multilayered riddle. Justice Scalia suggests in dissent that applying a federal rule would be a simple solution. Rather than apply a federal rule, Justice Ginsburg creates an accommodation intended to further state law interests. This accommodation, though, has the opposite result, as it defies the New York State Legislature's intent to create statewide uniformity of legal standards.

A. Facts and Procedural History of Gasperini

William Gasperini served as a journalist covering events in Central America. While there, Gasperini photographed wars, politicians, and scenes from daily life. Upon request, Gasperini supplied the Center for Humanities, Inc., with three hundred slide transparencies it needed to produce an educational video, Conflict in Central America. The Center utilized over one hundred of the three hundred transparencies that Gasperini provided. At the end of the project, the Center could not return the transparencies to Gasperini, as it had promised, because the original transparencies were missing.

As a citizen of California, Gasperini brought a diversity action in United States District Court for the Southern District of New York against the Center, which was incorporated and had its principal place of business in New York. Gasperini alleged state law causes of action for breach of contract, conversion, and negligence; the Center conceded liability. Focusing solely on damages, the jury awarded Gasperini $450,000 in compensatory damages.

18. See infra parts IV and V.
20. Id. at 419, n.1.
21. Id. at 419.
22. Id. at 419, n.1.
23. Id. at 419.
24. Id. at 419–20.
The Center moved for a new trial, attacking the jury's verdict for various reasons including excessiveness. The District Court denied the motion, and the Center appealed. The Second Circuit Court of Appeals utilized a New York State statute to review the jury's verdict. The New York State Legislature had standardized judicial review for appeals of the size of jury awards. The New York jury award review statute provided the following: "In reviewing a money judgment . . . the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." The New York Legislature sought to contain costly malpractice premiums, especially in the context of medical and dental malpractice.

The Second Circuit Court of Appeals applied the New York standard to the Gasperini case and found that the District Court's verdict violated the New York standard by materially deviating from what is reasonable compensation. The Second Circuit vacated the judgment of the District Court, ordering a new trial unless Gasperini agreed to a $100,000 award. Gasperini then petitioned the United States Supreme Court, and the Court granted certiorari.

Gasperini contended that the New York jury award review statute is a procedural provision that allocates decisionmaking authority between judges and juries when making damage awards. Because the statute is procedural, Gasperini argued, a federal appellate court cannot give effect to the New York statute without violating the Seventh Amendment's Re-examination Clause, which provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the

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25. Id. at 420.
26. Id. at 420–21.
27. N.Y. CIV. PRAC. LAW AND RULES § 5501(c) (McKinney 1995).
28. Id. The provision stated:
   The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal . . . In reviewing a money judgment in an action . . . in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.
29. Gasperini, 518 U.S. at 423, n.3.
31. Id. at 428.
United States, than according to the rules of the common law." 33 The Center countered that the New York statute's "deviates materially" standard serves as substantive law that must be applied by federal appellate courts in diversity actions. 34 The United States Supreme Court utilized an Erie Railroad Co. v. Tompkins analysis. 35

B. The Supreme Court's Gasperini Opinion

The Supreme Court intertwined a substantive-procedural dichotomy analysis with an outcome-determinative analysis. 36 The Court found that the New York jury award review statute was both substantive and procedural because the statute controlled how much a plaintiff could obtain and assigned decisionmaking authority to the New York appellate courts. 37

Though the Court found a substantive component or character to the New York statute, it did not automatically apply the statute under Erie. Instead, the Court utilized the outcome-determinative test from Guaranty Trust v. York 38 to decide whether failure to apply the New York jury review standard would discriminate against New York citizens or would cause plaintiffs to choose federal court. 39 Using the outcome-determinative test, the Court found that by ignoring the New York statute in federal courts, there would be substantial variations between the outcomes in state and federal courts. The variations would occur because the New York statute's "deviates materially" standard requires a more probing review than the "shock the conscience" standard of federal courts. 40

Once utilizing the outcome-determinative test, the next logical step for the Gasperini Court would have been to affirm the Second Circuit's use of the New York jury award review statute. If using the traditional federal appellate standard to review jury awards creates the high risk of different outcomes in federal and state courts, federal ap-

33. Gasperini, 518 U.S. at 426; U.S. CONST. amend. VII.
34. Gasperini, 518 U.S. at 426.
35. Id. at 426–31, 436–38.
36. Id. at 426–31. In a substantive-procedural dichotomy analysis, state law applies if the issue is a substantive law issue, while federal law applies where the issue is a procedural issue. See Sibbach v. Wilson & Co., 312 U.S. 1 (1941). In an outcome-determinative analysis, a federal court in a diversity case must use the law that would assure a similar outcome if the case had been brought in the state courts of the state where the federal court is located. Guaranty Trust, 326 U.S. at 109.
40. Id. at 430.
peals courts under *Erie* and *Guaranty Trust* should be required to use the New York standard and not the federal standard. The *Gasperini* Court failed to follow that logic. Instead, the *Gasperini* Court focused on the Re-examination Clause of the Seventh Amendment.\(^41\)

Application of the Seventh Amendment to this case would result in the conclusion that the federal appellate court is not required to apply the New York statute. Though the Supreme Court in *Gasperini* allowed the federal courts of appeal to review federal trial courts' denials of motions to set aside jury verdicts as excessive,\(^42\) the Court also found that the Seventh Amendment allocates trial functions between judge and jury and controls the power to review jury verdicts.\(^43\) The *Gasperini* Court relied on *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*\(^44\) to acknowledge that the federal courts are an independent court system and that an essential characteristic of that independent system is the manner in which the system distributes functions between judges and juries.\(^45\)

After recognizing the independent nature of the federal judicial distribution of functions between judges and juries, the next logical step for the *Gasperini* Court would be to apply *Byrd* and bar the federal courts of appeal from using the New York jury award review statute, in spite of the risk of differing outcomes. If the federal courts are a separate court system, then the federal courts possess the essential characteristic of distributing decision-making functions between jury and judge. And because the Seventh Amendment controls the allocation of functions between juries and judges, the New York statute should not govern federal practice, whether trial or appellate. The trial and appellate federal courts, therefore, must determine their own standards for reviewing excessive jury awards.

The *Gasperini* Court again failed to follow that logic. Instead, the Court created a bifurcated legal standard. Because two courts existed in *Gasperini*, a federal trial court and federal appellate court, a choice between New York and federal law did not have to be made.\(^46\) The *Gasperini* Court applied both New York and federal law, because the federal and New York interests could be accommodated.\(^47\) The federal appeals court would use the traditional "shock the conscience"

\(^{41}\) *Id.* at 431–36.

\(^{42}\) *Id.* at 434–36.

\(^{43}\) *Id.* at 432.

\(^{44}\) 356 U.S. 525 (1958).

\(^{45}\) *Gasperini*, 518 U.S. at 432.

\(^{46}\) *Id.* at 436–37.

\(^{47}\) *Id.* at 437.
standard,\textsuperscript{48} while the federal district court would use the New York  
"deviates materially" standard,\textsuperscript{49} respecting New York's dominant in-
terest.\textsuperscript{50}

C. The Riddle Created by the Gasperini Opinion

The Gasperini Court's accommodation of state and federal law  
creates a multifaceted riddle. First, the Court twice neglected to take  
the next logical step. If the traditional standard of review of federal  
appellate courts in diversity cases causes the probable risk of varying  
outcomes between state and federal courts, state law should apply.  
And, if the Seventh Amendment and federal judicial policy require  
that federal courts develop and apply their own jury review standards,  
federal law should apply.

Second, Seventh Amendment law and policy, as constitutionally  
based law and policy, would seem to dominate in light of the Suprem-
acy Clause.\textsuperscript{51} However, Justice Ginsburg's Gasperini opinion de-
scribes New York's interest as dominant.\textsuperscript{52} As Justice Scalia points  
out in his dissent, Justice Ginsburg's application of New York law  
contradicts the basic principle that federal trial and appellate courts  
properly use federal law to review the size of jury verdicts.\textsuperscript{53} Requiring  
federal trial judges to do otherwise disrupts the federal system by  
allowing state law to govern the relationship between judge and jury in  
federal courts.\textsuperscript{54}

Third, the New York statute provides that "[t]he appellate divi-
sion shall determine that an award is excessive or inadequate if it devi-
ates materially . . .".\textsuperscript{55} The New York State Legislature established an  
appellate standard to be applied statewide in New York. The appel-
late courts in New York are required to state their reasons for rulings  
on the sizes of verdicts, thereby creating a set of norms throughout the  
state.\textsuperscript{56} Statewide standardization of a legal norm required appellate  
court attention. The Gasperini Court turns the New York policy prefer-
ence for appellate protection of consistent statewide norms on its

\textsuperscript{48} Id. at 438-39.
\textsuperscript{49} Id. at 438.
\textsuperscript{50} Id. at 437.
\textsuperscript{51} U.S. CONST. art. VI.
\textsuperscript{52} Gasperini, 518 U.S. at 437.
\textsuperscript{53} Id. at 448-69 (Scalia, J., dissenting).
\textsuperscript{54} Id. at 462–63.
\textsuperscript{55} N.Y. CIV. PRAC. LAW AND RULES § 5501(c) (McKinney 1995).
\textsuperscript{56} Gasperini, 518 U.S. at 423–24.
head by requiring a federal trial court—not a federal appeals court—to utilize the statutory standard.

Lastly, Justice Scalia points out in his dissent that the question of which judicial review standard should apply for review of jury awards can easily be resolved by simply following Rule 59 of the Federal Rules of Civil Procedure.\textsuperscript{57} Rule 59 states: "[A] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."\textsuperscript{58} For Justice Scalia, Rule 59 requires the application of federal law because the existence of a federal rule is a reason, as that term is used in the Rule.\textsuperscript{59}

Justice Ginsburg creates a multifaceted riddle in \textit{Gasperini}. The accommodation of federal and state law is an attempt to balance the Seventh Amendment with \textit{Erie} considerations. In making this accommodation, however, she overlooks federal law that could easily resolve the problem. As Justice Scalia notes, a federal rule of civil procedure exists that is on point.\textsuperscript{60} In addition, Justice Ginsburg recognizes Seventh Amendment doctrine that mandates the application of a federal standard, but instead of applying the federal standard, Justice Ginsburg applies state law. Application of the New York law defies the intent of the New York Legislature because its application requires a trial court to apply a standard that the legislature intended the state appellate courts to apply in an effort to standardize jury awards statewide.

Justice Ginsburg takes many extra analytical steps in order to accommodate state law when federal law would have quickly resolved the problem. But even after taking those steps, she reassigns a state-created appellate function to trial courts. The reasons why Justice Ginsburg constructs a blended and complicated federalism structure that includes state law and accords state policy so much importance, even while distorting that state policy, reach back to the philosophical bases of the \textit{Erie} doctrine and the federalist thinking of Justice Louis Brandeis and Justice Felix Frankfurter.

\textsuperscript{57} \textit{Id.} at 467-68.
\textsuperscript{58} \textit{FED. R. CIV. P.} 59.
\textsuperscript{59} \textit{Gasperini}, 518 U.S. at 467-68.
\textsuperscript{60} \textit{Id.} at 468.
III. FRANKFURTER AND BRANDEIS: THE BASIS OF THE ANSWER TO THE GASPERINI RIDDLE

A. Justice Frankfurter’s Early Law Review Argument in Favor of State Law

The federalist aspect to Gasperini, as well as the sympathy to state law reflected in the opinion, are traceable to a law review article written by Professor Felix Frankfurter in 1928. In the article, Frankfurter asserts that “the proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation.” Frankfurter argued in favor of strengthening state court jurisdiction and state power, and also contended that some federally protected rights would be better protected in state courts. Distribution of jurisdiction depended on the nature of the issue, even where the issue arose under the constitution and laws of the United States. Frankfurter even argued in favor of curtailing the reach of the federal penal code in deference to state criminal law, going so far as to enforce federal criminal law in state tribunals. Generally, Frankfurter would give jurisdiction to state courts “whenever federal rights arise out of transactions which are dominantly local and readily lend themselves to state remedies.” Further, Frankfurter argued, federal equitable jurisdiction should be limited.

Frankfurter questioned the continuing need for diversity jurisdiction, finding that “local prejudice has ever so much less to thrive on than it did when diversity jurisdiction was written into the Constitution.” For Frankfurter, diversity jurisdiction served as a politically unwise escape hatch for powerful litigants who desired to avoid state courts and the application of state law. Diversity jurisdiction created unfairness by allowing the nonresidents of a state the choice of two courts, federal or state, while the residents of a state could choose only state court.

62. Id. at 506.
63. Id. at 515.
64. Id. at 516.
65. Id. at 517.
66. Id. at 518.
67. Id. at 521.
68. Id. at 522.
69. Id. at 524.
Frankfurter expressed special ire with the legal principles and policies underlying *Swift v. Tyson*. The unfairness of diversity became magnified where, under *Swift*, the federal courts in a diversity action were not required to apply state law. Frankfurter's critique of *Swift* served as an analytical framework for Justice Louis Brandeis' opinion in *Erie Railroad Company v. Tompkins*, and Justice Frankfurter's opinion in *Guaranty Trust Company v. York*.

**B. *Erie* and *Guaranty Trust*: A Preference for State Law**

In *Erie* and *Guaranty Trust*, Justices Frankfurter and Brandeis share a strong commitment to, and sympathy for, state or local law.

In *Erie*, Tompkins was injured by a passing freight train owned by the Erie Railroad Company while walking along a railroad right-of-way. In *Guaranty Trust*, York received a gift worth $6,000 in notes issued by the Van Sweringen Corporation. Guaranty Trust served as the trustee for the note holders with the obligation of enforcing the rights of those note holders. Around the same time as becoming a trustee for the note holders, Guaranty Trust also made loans to companies affiliated with and controlled by Van Sweringen. These companies quickly ran into financial problems. Guaranty Trust cooperated with a plan to purchase notes at a discount for Van Sweringen stock. Because her donor refused to accept the discounted exchange, York received her gift of notes after the end of note exchange period.

The tort claim in *Erie* was brought in the United States District Court for the Southern District of New York, and the action for breach of trust in *Guaranty Trust* was also brought in federal court in New York. The Erie Railroad insisted that Pennsylvania property and tort law be applied, while Tompkins urged that federal general common law be applied. The District Court in *Erie* applied federal law, and the jury awarded Tompkins damages. The Court of Appeals affirmed, applying general federal common law.

In *Guaranty Trust*, the issue was whether the equity side of a federal district court was bound to apply a state statute of limitations or

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70. Id. at 524–30; *Swift v. Tyson*, 41 U.S. 1 (U.S. 1842).
73. *Guaranty Trust*, 326 U.S. at 100.
75. *Guaranty Trust*, 326 U.S. at 100–01.
77. Id. at 70.
78. Id.
whether it could apply federal doctrine. The District Court in Guaranty Trust found for the trust company; the Circuit Court of Appeals reversed, finding that the state statute of limitations did not apply.

Justice Brandeis delivered the majority opinion in *Erie*, and Justice Frankfurter delivered the majority opinion in *Guaranty Trust*. In those opinions, Justices Brandeis and Frankfurter both strongly criticized *Swift v. Tyson*, just as Frankfurter did in his federalism law review article years earlier. In *Erie*, Justice Brandeis cites to Frankfurter’s article at least four times, along with other scholars and articles. Justice Brandeis adopts Frankfurter’s law review analysis in *Erie* by clearly laying out the *Swift* doctrine, writing that *Swift* “held that federal courts exercising jurisdiction on the grounds of diversity of citizens need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court . . . .” Justice Brandeis, for the *Erie* Court, focuses on *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co.*, just as Frankfurter did in his article. To Justice Brandeis, *Black & White Taxicab* confirmed that *Swift* encouraged corporate manipulation of diversity jurisdiction, including forum shopping.

Justices Brandeis and Frankfurter point to *Black & White Taxicab* as an example of the bankruptcy of the *Swift* doctrine. *Black & White Taxicab* demonstrates how easily a corporate party could move to another state for the purpose of creating diversity jurisdiction and utilizing more favorable federal law. Such manipulative forum shopping favors out-of-state litigants who can take advantage of diversity jurisdiction.

Justice Brandeis notes in *Erie* that the *Swift* doctrine failed to create uniformity of law because state courts continued to develop

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80. *Id.* at 100–01.
86. *Id.* at 71.
87. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928). In *Black & White Taxicab Co.*, a Kentucky taxicab company sought to serve a railroad exclusively, but Kentucky common law prevented such a contract. The taxicab company reincorporated in Tennessee in order to bring a diversity action against a competitor Kentucky taxicab company to enjoin competition from the competitor taxicab company. *Id.* at 522–24.
their own common law doctrines.\textsuperscript{90} He also asserts that Swift created discrimination by noncitizens of states against citizens of states because "' rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court . . ."\textsuperscript{91} The doctrine rendered equal protection in diversity actions impossible.\textsuperscript{92} Brandeis found Swift in violation of constitutional principles that recognize and preserve "the autonomy and independence of the states—independence in their legislative and independence in their judicial departments."\textsuperscript{93} The Erie Court reversed the Court of Appeals, requiring that state law be applied.\textsuperscript{94}

Justice Frankfurter, in Guaranty Trust, also criticizes Swift as creating unfairness by quoting Judge Augustus Hand: "The main foundation for the criticism of Swift \textit{v. Tyson} was that a litigant in cases where federal jurisdiction is based only on diverse citizenship may obtain a more favorable decision by suing in the United States courts."\textsuperscript{95} Although Justice Frankfurter consistently expressed his dislike for Swift and seemed glad that Justice Brandeis overruled that case in Erie,\textsuperscript{96} he implicitly wrote Guaranty Trust as though a defect existed in Erie.

\textit{Guaranty Trust} involved a statute of limitations, and Justice Frankfurter refused to classify a statute of limitations as either procedural or substantive law.\textsuperscript{97} Justice Frankfurter implied in \textit{Guaranty Trust} that \textit{Erie} could be read narrowly, requiring application of state law only where the issue concerned substantive rather than procedural law. However, he chose not to read \textit{Erie} so narrowly, writing "\textit{Erie R. Co. v. Tompkins} was not an endeavor to formulate scientific legal terminology."\textsuperscript{98}

Instead of adopting an \textit{Erie} procedural-substantive law dichotomy standard, Justice Frankfurter in \textit{Guaranty Trust} created an outcome-determinative test, to be used "where the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."\textsuperscript{99} Justice Frankfurter in \textit{Guaranty Trust}, like Justice

\textsuperscript{90} Id. at 74.
\textsuperscript{91} Id. at 74–75.
\textsuperscript{92} Id. at 75.
\textsuperscript{93} Id. at 77–78.
\textsuperscript{94} Id. at 80.
\textsuperscript{95} Guaranty Trust, 326 U.S. at 111.
\textsuperscript{96} Id. at 101.
\textsuperscript{97} Id. at 100–01.
\textsuperscript{98} Id. at 109.
\textsuperscript{99} Id.
Brandeis in *Erie*, favored state law, a position consistent with his 1928 law review article. For Justice Frankfurter, *Erie* reflected underlying public policy that defined the distribution of judicial power between state and federal courts. In *Guaranty Trust*, Justice Frankfurter strongly emphasized that the source of substantive rights enforced by a federal court in a diversity action was the state law, and a federal court in a diversity action adjudicating a state right constituted "only another court of the state." Ultimately, the *Guaranty Trust* Court reversed the decision of the Court of Appeals, finding that the equity side of a federal court in a diversity case must apply state law, including a state statute of limitations.

C. *Erie* and *Guaranty Trust*: A Preference for Positivism

Justices Frankfurter and Brandeis criticized not only the policy impacts of *Swift*, but also, and more importantly, the underlying vision of the nature of law reflected in *Swift*. Justice Brandeis outlined the jurisprudential fallacy of *Swift*: General federal common law rested upon an assumption that a transcendental body of law existed outside of any state but obligatory within the state. Justice Frankfurter described this jurisprudence of *Swift* as conceiving of judge-made law as a brooding omnipresence of reason, and judicial decisions serving as merely evidence of that reason. This is similar to a definition of natural law: "In ethics, it consists in practical universal judgments which man himself elicits. These express necessary and obligatory rules of human conduct which have been established by the author of human nature . . . ."

Justice Brandeis insisted that law fails to exist with a definite authority behind it, and common law exists not generally, but as a result of the authority of the state where a court decides a common law rule or principle. This is very similar to a definition of positive law: "Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society."

100. See notes 61–71 supra and accompanying text.
102. *Id.* at 112.
103. *Id.* at 108.
104. *Id.* at 112.
109. BLACK'S LAW DICTIONARY, supra note 107, at 806.
Justices Brandeis and Frankfurter relied on the thinking of Justice Holmes to develop their criticisms of natural law and their support for proactive law. Justice Brandeis referred directly to Justice Holmes,\(^\text{110}\) and Justice Frankfurter referred generally to Justice Brandeis' jurisprudential analysis in *Erie*.\(^\text{111}\) However, much of Justice Brandeis' and Justice Frankfurter's support for positive law can be found in Frankfurter's law review article, published a decade before *Erie*. In his article, Frankfurter quoted extensively from Justice Holmes about the problems of natural law and the benefits of positive law.\(^\text{112}\)

Justices Brandeis and Frankfurter supported positive law jurisprudence. For them, law did not ooze out of the ether. Instead, law represented the product of a specific sovereign which, in the American context, came from state governments.\(^\text{113}\) In *Erie* and *Guaranty Trust*, the Justices applied state law and emphasized the importance of state government, legislatures, and courts. Justice Brandeis went as far as to say that "there is no federal general common law."\(^\text{114}\) For Justices Brandeis and Frankfurter, the state lawmaking powers and processes remained sacrosanct. Three generations later, Justice Ginsburg in *Gasperini* also emphasized the need to not overlook state law.\(^\text{115}\)

Justices Brandeis, Frankfurter, and Ginsburg share a need to emphasize the application of state law. One explanation for the emphasis that they place on the application of state law is their Jewish roots. The next section discusses the development of Jewish localism and the Jewish culture in which these Justices lived.

IV. EXPLAINING GASPERINI: THE JEWISH SOCIAL EXPERIENCE AND AMERICAN LOCALISM

A. An Early History of Jewish Localism

Early in Jewish history, the Jewish community was accorded self-government, including under the Ptolemaic kings and the early Hellenic Empire.\(^\text{116}\) A Jewish diaspora grew gradually and did not suddenly exist as a result of the destruction of Temple in Jerusalem in 70

\(^{110}\) *Erie*, 304 U.S. at 79.

\(^{111}\) *Guaranty Trust*, 326 U.S. at 101–03.

\(^{112}\) Frankfurter, supra note 61, at 527.

\(^{113}\) *Erie*, 304 U.S. at 78–79; *Guaranty Trust*, 326 U.S. at 112.

\(^{114}\) *Guaranty Trust*, 304 U.S. at 78.

\(^{115}\) See supra notes 36–60, and accompanying text.

\(^{116}\) MAX J. DIMONT, JEWS, GOD, AND HISTORY 84–87 (1994).
The destruction of the Temple permanently changed the Jewish religion by eliminating a cultic center, ruining the priesthood leadership, and allowing the rise of nonpriestly religious rabbinic teaching specialists. However, the destruction of the Temple made a diaspora the way of life for Jews. The Jews had to adapt to and survive in farflung dispersal, with Jews living in relatively small communities throughout and beyond the Mediterranean. Jewish survival depended on self-governance and the development of communal life and institutions. Law became the centerpiece of Jewish autonomy and communal survival.

Rabbinic Judaism centered on the study of the Torah. Through the synagogal study of the Torah, the rabbis developed the Mishnah, which served as "a collection of laws covering every field in which the rabbis had legal competence... not only ritual law, but also commercial transactions, property, inheritance, legal procedure, and torts..." The Talmud developed as a legal commentary to the Mishnah. The Babylonian Talmud became the authoritative source book for Rabbinic Judaism into the Middle Ages. The development of Jewish law was driven by rabbis in the context of Yeshivah discourses and scholarship and the rabbis expounded on the law to solve problems and to determine which law was authoritative under what circumstances.

Jewish law was flexible and could be amended or interpreted to cope with a variety of circumstances that arose when a people were dispersed throughout small and different communities. Jewish law had to be formulated to meet the needs of each local environment, but also had to enable all Jews, no matter where they lived, to share universal values. Ultimately, by the Middle Ages the Talmud was codified into a specific set of laws called the Shulhan Aruch.

120. Scheindlin, supra note 117, at 48.
121. Id., supra note 116, at 126–27.
122. Scheindlin, supra note 117, at 56.
123. Id. at 62.
124. Id. at 67.
125. Id., supra note 116, at 170–72.
126. Scheindlin, supra note 117, at 63.
128. Id. at 179–80.
The Shulhan Aruch allowed the ghettos of the late Middle Ages and the early enlightenment to maintain self-government. Overall, Judaism developed a type of legal federalism, with the local rabbis interpreting and applying law in the context of local circumstances while the law included within itself universal and unifying values for all Jews wherever they lived. A good example of the Jewish federalism can be found in the Islamic world, where local rabbis “functioned as judges and communal authorities[,] not just as experts in ritual and family law.” When local rabbis were faced with difficult legal questions, they directed those questions to regional rabbinic leaders called gaonim.

The Jewish law allowed the Jews to live dispersed in a variety of circumstances and yet remain a united people. The law allowed and encouraged Jewish localism because “[t]he latent force behind Talmudism was Jewish self-government.” Jews enjoyed varying amounts of self-governance in a variety of circumstances. The Jews were accorded what was described as “some measure of autonomy” and “semiautonomous status.” In the Middle Ages in Christian Europe, the Jews also possessed semiautonomous status. The experiences of the Jews in the Ottoman Empire mirrored those of the Jews in Christian medieval Europe and the early Islamic world. The Ottoman Empire left the Jews to govern their own affairs. An example of European self-government was the Dutch Jewish community in the late 1600s where the community organization imposed strict communal discipline, even where a broader Dutch society fostered tolerance.

B. The Growth of Jewish Localism

This section describes how Jewish localism in medieval Europe developed from the experience of being ostracized and living in autonomous, locally governed communities, while maintaining ties with the local non-Jewish governing establishment. Jews were isolated in medieval Europe, sometimes by force and sometimes by choice, be-
cause they were not accepted as part of the dominant Christian society.

In the mid-1500s, the Catholic Church began the process of ghettoizing the Jews.\textsuperscript{137} Ghettoization in Europe not only isolated and divided the Jews,\textsuperscript{138} but also tended to be a localized experience that was not uniform throughout Europe. However, even where Jews were not forced to live together, they tended to live and work together in Jewish quarters of European cities.\textsuperscript{139} Christendom through the Middle Ages had transformed the Jew into “the symbol of the abhorrent man in Western eyes.”\textsuperscript{140} The result was Jewish social isolation and the desire often for Jewish self-isolation. The shtetl in Eastern Europe provides a good example of Jewish communal life after 1600.

Shtetls were small towns where Jews and non-Jews lived.\textsuperscript{141} Though Jews lived among non-Jews in the shtetls, Jews created their own self-governing communities. The communities were controlled by a Kahal, a body of male elders, who “collected taxes, deployed the community’s finances, and adjudicated legal and doctrinal disputes.”\textsuperscript{142}

In the best of traditional Jewish federalism, balancing local Jewish interests with Jewish universalism,\textsuperscript{143} the local Kahals in Poland also organized a national Jewish assembly. This assembly, a type of nationwide Jewish parliament, dealt with broader communal issues.\textsuperscript{144}

The Jewish community in Poland possessed autonomy in relation to the Polish government.\textsuperscript{145} The Jews in Poland not only experienced their own communal federalism, but they also experienced a broader type of federalism in which the Jews were governed by their own semi-state within the Polish state. Overall, the Polish experience symbolizes well the historical Jewish social experience.

The diaspora Jews, dispersed over continents and in civilizations, organized themselves, with the permission of non-Jewish host governments, into Jewish states within broader host states. They governed themselves with Jewish law, which was adaptable by the rabbis

\begin{flushleft}
\textsuperscript{137} SCHEINDLIN, supra note 117, at 155.
\textsuperscript{138} DIMONT, supra note 116, at 236.
\textsuperscript{139} Id. at 253–54.
\textsuperscript{140} Id. at 236.
\textsuperscript{141} Id. at 257.
\textsuperscript{143} See supra notes 127–36 and accompanying text.
\textsuperscript{144} HOFFMAN, supra note 142, at 53–55.
\textsuperscript{145} Id. at 55.
\end{flushleft}
and community elders to the needs and demands of each community, and universal in binding the Jews together in one religion.146

Jewish autonomy and self-governance developed because the Jews lived for centuries, especially in Europe, as "an alien body in the midst of a Christian world."147 Jews and non-Jews, especially Christians, failed to share a worldview.148 In Europe, the Jews faced violence.149 Jewish autonomy was necessary to protect against the hostility of a wider society. However, self-governance came at a price: the Jews had to adapt to local non-Jewish political rule.150 Specifically, the Jews accommodated local political leaders through the politics of complementarity, "whereby the Jews attempted to win protection by supplying local needs."151 Without this protection from the local non-Jewish power structure, the Jews faced violence, against which they lacked a defense.152

Local rulers of locales in Europe invited the Jews to serve them as clients because the Jews possessed skills as merchants and business people. This relationship gave Jews a special status in the community and a direct relationship with local rulers.153 The Courtier-rabbis in Muslim Spain created a similar relationship between the Jewish community and a local royal court.154 During the early Middle Ages in Germany, the Jews moved from one duchy to another as local politics required.155 In Poland, Jews served, and identified with, the local aristocracy.156 The Jews not only developed a strong allegiance to local control even in the context of universal values, but they also learned through the necessity of physical survival to play politics with local power structures.

C. The Jewish American Experience

The Jewish American experience paralleled many aspects of European and Mediterranean Jewish life. However, America differed from historical Europe in one sense: the Jews in America were never

146. DIMONT, supra note 116, at 264–65.
147. SCHEINDLIN, supra note 117, at 200.
148. HOFFMAN, supra note 142, at 109.
149. DIMONT, supra note 116, at 244.
151. Id. at 128–29.
152. Id. at 130.
153. SCHEINDLIN, supra note 117, at 99–100.
154. Id. at 83–84.
155. DIMONT, supra note 116, at 248.
156. HOFFMAN, supra note 142, at 50.
formally restricted from participating in American society. In America, Jews had the opportunity to integrate into the American social system. Even in America, where no formal restrictions existed, Jews often lived and worked together, retaining the tradition of self-governance and local control.

1. Jewish Settlement and Societal Structure in the United States

At the very beginning of Jewish settlement in America in the 1650s, the Jewish immigrants to New Amsterdam settled close to each other in a neighborhood. The Puritans considered Jews to be outsiders. In the mid-1800s, Jews faced social exclusion because they were considered to be different. Even upper-class Jews faced social segregation. As a result, Jews tended to live together, often in response to their exclusion. When the large flow of Jewish immigration occurred in the late 1800s, Eastern Europeans came to America with a feeling of being separate from non-Jews. That sense of separateness could only be magnified by growing anti-Semitism in the late 1800s and early 1900s.

Centuries of Jewish social ostracism, isolation, and self-governance resulted in the focused settlement of Jews in only a few areas of America. Although by the late 1920s Jews lived in almost ten thousand incorporated and unincorporated locations in the United States, most Jews immigrated to only a few major American cities. Even early in American history, Jews tended to live in the new country’s few cities. By the late 1800s, a large number of Jews lived in urban ghettos such as the Lower East Side of Manhattan. Around the turn of the twentieth century, Jewish immigrants “made their way into . . . Philadelphia, Boston, Detroit, Cleveland, Chicago, but the majority remained in New York.”

By the end of the 1920s, when Felix Frankfurter’s article supporting the strengthening of state law was published, the Jewish popu-

157. SCHEINDLIN, supra note 117, at 196.
159. Id. at 32–33.
160. Id. at 103–04.
161. Id. at 126–27.
162. Id. at 158–59.
163. HERTZBERG, supra note 158, at 165–67, 176–79.
164. THE AMERICAN JEWISH YEARBOOK 5690, 305 (1929).
165. HERTZBERG, supra note 158, at 192.
166. Id. at 46.
167. Id. at 160–61.
168. DIMONT, supra note 116, at 373–74.
lation in America was concentrated in a few states and cities. In the late 1920s, 90 percent of American Jewry lived in the Northeast, East North Central, and West North Central regions of the United States. In 1927, over 4,200,000 Jews lived in the United States, and 1,900,000, or 45 percent, lived in New York State, while 1,765,000 Jews lived in New York City. Over 3,200,000 Jews lived in Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New York, Ohio, and Pennsylvania. That figure represents over three quarters of the Jews living in America in 1927. Large Jewish population centers included Baltimore with 68,000 Jews, Boston with 90,000, Chicago with 325,000, Detroit with 75,000, Newark with 65,000, Philadelphia with 270,000, and St. Louis with 50,000.

The urban centers of American Jewry developed a community structure to serve the Jewish community's social and economic needs. Early in American history, Jews banded together to create social organizations. In the 1880s and 1890s, American Jews created a network of charitable and community service organizations. These organizations reflected "a very old Jewish tradition which had been transplanted unimpaired from Europe." Anti-Semitism, social exclusion, and centuries of local autonomy in Europe and the Middle East allowed the American Jewish community to create their own cities and towns within cities and towns. The Lower East Side of Manhattan, for a period around the turn of the twentieth century, exemplified a Jewish city-within-a-city. Eventually, Jews migrated to other centers in New York, including the Upper West Side of Manhattan, Brooklyn, and the Bronx.

2. The Jewish American Experiences of Justices Brandeis, Frankfurter, and Ginsburg

Justices Frankfurter and Brandeis lived, and Justice Ginsburg grew up, during an era in which Jewish localism prevailed, and all

169. AMERICAN JEWISH YEARBOOK, supra note 164, at 305.
170. Id. at 302.
171. Id. at 309.
172. Id. at 302.
173. Id. at 307–09.
174. HERTZBERG, supra note 158, at 101–02.
175. Id. at 170–71.
176. Id. at 171.
177. Id. at 142–43, 160–61.
178. Id. at 237–38.
three Justices were or are Jewish. The Jews tended to live in discrete American communities that provided social and educational services to members of the communities. Jewish communities in large American cities were cities within cities.

Justice Frankfurter grew up in the Lower East Side of Manhattan, where he became "Americanized." Justice Ginsburg grew up in Brooklyn, one of the relatively new Jewish centers in New York. Justice Brandeis grew up in Louisville, Kentucky, which by 1927 had a Jewish population of over 12,000. However, he practiced law for more than two decades in Boston, Massachusetts, one of the major Jewish population centers.

Justices Frankfurter and Brandeis lived through an era when Jewishness meant social separation and social federalism in which Jews were localized within the broader American society. Justice Brandeis was born to Jewish Austro-Hungarian immigrants in Louisville, Kentucky. The Brandeis family was not religious, but the family also did not move away from Judaism. Though Justice Brandeis did not practice Judaism in a religious sense, Judaism and Judaic values influenced his personal values, especially his commitment to social welfare. He identified as a Jew and participated in Jewish causes, especially Zionism.

Justice Brandeis worked as an attorney in Boston. Though he integrated well into the Boston social structure, he remained aware of anti-Semitism in Boston and at Harvard. His nomination to the Supreme Court encountered anti-Semitic opposition. In death, Justice Brandeis was eulogized as goaded by morality, which served as a "Hebraic gift."

181. Halberstam, supra note 179, at 1443-44.
182. BAKER, supra note 180, at 21-22.
183. AMERICAN JEWISH YEARBOOK, supra note 164, at 302.
184. BAKER, supra note 180, at 26-27.
185. Id. at 18-20.
186. Id. at 21-22.
187. Id. at 35.
188. Id. at 70-71, 73-75. Zionism is a political-social movement that aims to reconstitute the Jewish people as a nation-state by establishing a Jewish state in Palestine. SCHEINDLIN, supra note 117, at 143.
189. BAKER, supra note 180, at 71.
190. Id. at 221.
191. Id. at 116.
192. Id. at 373.
Justice Frankfurter arrived as a twelve-year-old in the United States in 1894, having lived up to that point in the center of Vienna’s Jewish ghetto.\textsuperscript{193} Like many Jewish immigrants of the period, he lived with his family in the Lower East Side of Manhattan.\textsuperscript{194} He attended school and college in Manhattan, and worked for the New York City Tenement House Department.\textsuperscript{195} Though Justice Frankfurter practiced Judaism in his youth, he did not do so in adulthood.\textsuperscript{196} Like Brandeis, he was an active Zionist.\textsuperscript{197} Justice Frankfurter faced anti-Semitism in his employment as a law professor at Harvard,\textsuperscript{198} and like Brandeis, he faced anti-Semitic opposition when nominated to the Supreme Court.\textsuperscript{199}

Robert A. Burt described Jewishness as "distinctively associated with outsider status, with homelessness, for both Brandeis and Frankfurter."\textsuperscript{200} Justice Brandeis accepted his outsider status and would probably not attribute it himself to anti-Semitism, but he remained aware of the fact that centuries of anti-Semitism toughened him to hardships, social antagonism, and ostracism.\textsuperscript{201} Though he fashioned himself as an assimilated American insider, Justice Brandeis still remained an outsider as a result of anti-Semitism and other internal and external isolating circumstances.\textsuperscript{202}

Burt based much of his thinking about the marginal social status of Justices Frankfurter and Brandeis on Hannah Arendt’s insights on the Jewish experience in Europe. For Arendt, Jews played the roles of perpetual outsiders in Europe.\textsuperscript{203} Burt saw Justices Frankfurter and Brandeis playing that same Jewish social role in America.\textsuperscript{204}

Like Justice Brandeis, Justice Ginsburg was born in America to Jewish immigrants. Her parents’ families had come from Russia and

\textsuperscript{193} Id. at 41.
\textsuperscript{194} Id. at 41–42.
\textsuperscript{195} BAKER, supra note 180, at 43.
\textsuperscript{196} Id. at 76.
\textsuperscript{197} Id. at 77.
\textsuperscript{198} Id. at 220–22.
\textsuperscript{199} Id. at 366.
\textsuperscript{200} BURT, supra note 179, at 3.
\textsuperscript{201} Id. at 33–35.
\textsuperscript{202} Id. at 48–49, 52–53, 59.
\textsuperscript{203} Id. at 62–63. Arendt traced the history of Jewish assimilation in Europe, demonstrating that even as Jews became recognized as citizens of states and emancipated from lower social status, Jews were not fully accepted as members of society. Jews assumed an insider/outsider status in which they were citizens but not fully accepted as equals. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 56–68 (1958). The American Jewish immigrant experience reflects that earlier European experience in which educated, socially prominent Jews were included as citizens but still not fully accepted socially.
\textsuperscript{204} Id. at 62–64.
Poland. She grew up during the 1930s in one of the major Jewish local centers—Brooklyn, New York—when American anti-Semitism was at its height. As an adult she served as a member of national Jewish communal groups. Though the status of Jews in America has changed during the past sixty years with the rise of social assimilation, Justice Ginsburg grew up in an era when Jews were separate. The New York area where Ginsburg grew up still remains home to almost one-third of American Jews.

Justice Ginsburg is not a religiously observant Jew, but she remains conscious of her Jewishness. Born in 1933, Justice Ginsburg experienced some of the same anti-Semitic feeling expressed when Justice Frankfurter was nominated to be an associate Justice of the Supreme Court in the late 1930s. Justice Ginsburg reported at her Supreme Court nomination confirmation hearing that she was very aware of anti-Semitism in her childhood. For example, she recalled memories of a sign that read, "No Dogs or Jews Allowed."

3. Jewish American Involvement in Politics

Even though, or perhaps because, Jewish populations concentrated in localized areas, Jews sought to play a role in American politics. In the American context, Jewish involvement in lawmaking included participation in the political process.

As Jews growing up in Jewish communities and involving themselves in Jewish concerns and causes, Justices Brandeis, Frankfurter, and Ginsburg experienced the accumulated history of Jewish social life. They grew up and remained part of a social structure that developed discreetly over many centuries. That social structure of the Jewish community traditionally valued local autonomy.

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205. Halberstam, supra note 179, at 1443.
206. Hertzberg, supra note 158, at 274–75.
207. Halberstam, supra note 179, at 1442.
209. Halberstam, supra note 179, at 1441–42.
211. Halberstam, supra note 179, at 1441–42.
212. Id. at 1443.
214. Halberstam, supra note 179, at 1441–42.
Though Justices Brandeis and Frankfurter participated as advisors to presidents on a national scale,\textsuperscript{216} they also became involved with local political change\textsuperscript{217} and Jewish communal causes.\textsuperscript{218} Their participation reflected a broader Jewish involvement with politics. By the mid-1850s, Jews held political offices in New York City’s Tammany Hall.\textsuperscript{219} By 1910, the Jews had gained local power in specific states such as New York, Illinois, Pennsylvania, and Ohio.\textsuperscript{220}

Justice Brandeis did not conceptualize Jewish political and policy influence in national terms. Instead, he communicated about Jewish local influence that could create nationwide impact. He applied this concept of emerging local Jewish power to impact presidential electoral politics in 1930 when he met the British Ambassador to protest British inaction relating to the Jewish homeland in Palestine. Justice Brandeis warned the British Ambassador that Jewish political power in New York would strain American relations with England. He communicated to the ambassador that “because of New York having then the largest number of electoral votes in a presidential election, Jews had an impact on the selection of an American President disproportionate to their actual numbers in the United States.”\textsuperscript{221}

\textbf{D. Natural Law as the Insiders’ Law}

Justices Frankfurter and Brandeis rejected natural law as a model for the development of law. Instead, they adopted positivist views toward the development of law. Their Jewishness, and especially their sense of existing as outsiders in a Christian-dominated culture, compelled them to reject natural law. The attitudes of Frankfurter and Brandeis toward the implied natural law basis of \textit{Swift v. Tyson} demonstrate their American-outsider localist viewpoints. For them, \textit{Swift} rested upon a jurisprudential assumption that there is a transcendental body of law outside of each state that still creates obligations within each state.\textsuperscript{222} In \textit{Swift} and the cases that followed it, the law was seen as a brooding omnipresence of reason, which judges were free to ascertain. The law was out there as a natural phenomenon to be understood.\textsuperscript{223} Justices Frankfurter and Brandeis adopted a Holmesian posi-

\begin{itemize}
\item \textsuperscript{216} BAKER, supra note 180, at 81–96, 275–318.
\item \textsuperscript{217} \textit{Id.} at 45–47, 257–67.
\item \textsuperscript{218} \textit{Id.} at 75–80; Halberstam, supra note 179, at 1442.
\item \textsuperscript{219} Hertzberg, supra note 158, at 96–97.
\item \textsuperscript{220} \textit{Id.} at 180.
\item \textsuperscript{221} BAKER, supra note 180, at 340.
\item \textsuperscript{222} Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).
\item \textsuperscript{223} Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945).
\end{itemize}
tivist view of the nature of law and the development of law. For them, law was not law generally, but existed by authority of the state where that law was developed. Law only existed because of a definite authority. Hence, Justice Frankfurter could write: "The source of substantive rights enforced by a federal court under diversity jurisdiction is the law of the state. Whenever that law is authoritatively declared by a state ... such law ought to govern in litigation founded on that law." That Justices Brandeis and Frankfurter would adopt Holmes' skeptical view of natural law is no surprise. Natural law reflects the dominant Christian culture of Europe and America. Natural law is universal, divine, unwritten, eternal, and immutable. Natural law upholds the very nature of what is good in creation: common right grasped by reason. Natural law is a form of divine law emanating from G-d embedded in the Christian Gospel, representing "the general moral principles which God has implanted in human nature." Natural law is grounded in Christian Scripture. During the Middle Ages, Roman natural law was adapted to the teachings of Christianity, becoming part of Catholic canon law. The Catholic view of the divine Christian nature of natural law continued into the twentieth century. Early Protestants believed in the divine nature of natural law as well. Natural law has a strong Christian influence, relating general moral principles to the Christian Gospel. As a result,

224. Frankfurter, supra note 61, at 527–28. Holmes scoffed at the idea that humans could discern a universal law. For him, law came out of the pressures of human experience, often reflecting majoritarian and elite interests. What seemed to be a universal norm really reflected limited human consciousness of what is right and important. See Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40 (1919).

225. Erie, 304 U.S. at 79.

226. Guaranty Trust, 326 U.S. at 112.


230. HAINES, supra note 228, at 13.


232. HAINES, supra note 228, at 12.

233. Id. at 24–25.

234. BUDZISZEWSKI, supra note 231, at 207–08.
the dominant Christian culture of Europe and America is reflected in natural law.235

Because it represents Christianity and therefore the dominant culture, natural law does not mesh well with Jewish legal tradition. Natural law simply exists. It is there, whether it comes out of nature, or was placed into existence by G-d.236 Lawmaking is incomplete in the natural law context because no tangible, definable lawmaker and no specific textual law exist. Even if G-d, at some unknown points in time and space, places natural law into existence, the law fails to possess a certain defined shape. The law still must be discerned from an intangible, vague source. With natural law, G-d works only indirectly providing humans with law, and law is not recognized as a response to people's day-to-day needs.

In contrast to natural law, Jewish law did not develop vaguely or generally. Jewish law exists partially as the result of a tangible, divine event in which people played a role—namely, the receipt of the Ten Commandments. As one expert in natural law said, Jews "[w]ho reject [natural law] do so on grounds that Torah is divine revelation."237 G-d gave Moses the Ten Commandments,238 and Moses gave the Jewish people the Ten Commandments and other Jewish law.239 The Ten Commandments represent very specific legal commandments that impact people directly on a day-to-day basis.

Unlike natural law, Jewish law has a purposeful human evolution, connected to community and individual needs and protections. This style of lawmaking requires that the law possess a certainty as to its source and content. Jewish law developed over centuries as humans interpreted and applied G-d's original Ten Commandments in the context of local needs.240 Jewish law can be traced from the Torah to the Talmud to the Shulhan Aruch.241

Unlike natural law, Jewish law is not based on vague, universal values. The difference between Christian legal development and Jewish legal development is the difference between "[a] supranational community focused on a common faith rather than on a common history and on a legislated way of life."242 Justices Frankfurter and

236. HAINES, supra note 228, at 6–17.
237. BUDZISZEWSKI, supra note 231, at 202.
239. DIMONT, supra note 116, at 38.
240. SCHEINDLIN, supra note 117, at 51–69.
241. Id. at 62–63.
242. Id. at 60.
Brandeis latched onto a Holmesian view of legal development that paralleled traditional Jewish legal development. For them, the law is developed in a tangible context and by constituted authority, which, in America, is held by the sovereign states.\textsuperscript{243}

V. RESOLVING THE GASPERINI RIDDLE: THE EXPERIENCES OF JEWISH LOCALISM

The lives of Justices Frankfurter and Brandeis, influenced by the communities in which they lived and worked, explain their commitment to localism. Life was lived in the local community, and law flowed from the life of the local community. For centuries, Jews had lived in a federal system, as people dispersed into localized communities among larger cities, states, nations, and cultures. Law served as the binding force of that localism and federalism.\textsuperscript{244}

The Jews lived as aliens in a variety of societies, and functioned as a sub-society within these societies.\textsuperscript{245} For Jews, separate and local legal systems, unified by universal principles, were the norm. This explains why, almost sixty years after Justice Brandeis wrote the \textit{Erie} opinion, and almost seventy years after Justice Frankfurter wrote his law review article praising state law, Justice Ginsburg applied state law in \textit{Gasperini}. She applied state law notwithstanding the logic that commended federal law and the public policies underlying the Seventh Amendment.\textsuperscript{246}

Jewish Justices find it hard to move away from state law as the basic law that regulates daily life. For these Justices, daily life occurs in the tangible confines of the local community. People's day-to-day legal needs must be met within these local communities. Where Jews in America chose to live in proximity to each other, they could, through the democratic process, influence this concrete lawmaking process.

This lawmaking behavior reflects centuries of Jewish lawmaking and the Jewish social existence of living in isolation among neighbors. Even then, Jews as a community tried to influence the communities surrounding them, while developing their own legal system that allowed them to remain Jewish and adapt to local circumstances. Justices Brandeis, Frankfurter, and Ginsburg reflected a Jewish tradition that prized local lawmaking as a longstanding tradition, and \textit{Gasperini}

\begin{itemize}
\item \textsuperscript{243} \textit{Erie}, 304 U.S. at 79; Frankfurter, supra note 61, at 527–28.
\item \textsuperscript{244} DIMONT, supra note 116, at 19.
\item \textsuperscript{245} SCHEINDLIN, supra note 117, at 199–200.
\item \textsuperscript{246} See supra notes 36–60 and accompanying text.
\end{itemize}
is a result and example of that tradition, translated into the context of modern American federalism.

VI. CONCLUSION: THE JEWISH CONTRIBUTION TO AMERICAN FEDERALISM

Justice Ginsburg, in *Gasperini v. Center for Humanities*, applies state law even in the face of countervailing federal policy.\(^{247}\) Justice Ginsburg goes so far as to lodge the standard of review intended for a state appellate court in a federal district court in order to assure the application of "New York's dominant interest."\(^{248}\) In her determination to apply state law, Justice Ginsburg reflects a long Jewish tradition of commitment to localism.\(^{249}\) She follows in the footsteps of Justices Brandeis and Frankfurter, who supported the application of state law.\(^{250}\)

Those people, corporations, and political forces in America that prefer the application of state law to the application of federal law should be grateful to Jewish social and legal experience. Modern federalism, as developed by *Erie, Guaranty Trust*, and *Gasperini*, is a result of the contributions of American Jews. Just as the Protestant experience in Europe and Virginia helped to fashion modern Establishment Clause legal principles,\(^{251}\) the Jewish experience in Europe, the Mediterranean, and America helped to fashion modern American federalism. Justice Brandeis referred with approval to Justice Field's words: "There stands . . . the constitution of the United States which recognizes and preserves the autonomy and independence of the States . . . ."\(^{252}\) Almost sixty years later, Justice Ginsburg sought to preserve state autonomy, respecting "New York's dominant interest."\(^{253}\)

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247. See *supra* notes 36-60 and accompanying text.
249. See *supra* notes 116-156 and accompanying text.
250. See *supra* notes 61-104 and accompanying text.