Ruth Bader Ginsburg and a Jurisprudence of Legal Pluralism

*Paul Schiff Berman**

Abstract

The idea of legal pluralism is that law must always negotiate situations when multiple communities and legal authorities seek to regulate the same act or actor. In such situations, judges must develop strategies for determining how best to balance the competing claims of multiple communities: does the law of one community triumph, does the law of the other community triumph, or is some hybrid solution possible?

This Article surveys the jurisprudence of Justice Ruth Bader Ginsburg, revealing that across a variety of substantive legal areas Justice Ginsburg often chose a path that provided maximum play among the legal systems at issue. Beginning with her earliest scholarly writings, she tended to oppose doctrines allowing one legal system to block another from adjudicating a dispute, and throughout her later career Justice Ginsburg likewise tended to reject bright-line rules that chose one legal system over another. Instead, she seemed to prefer procedural arrangements that sought accommodation and flexibility, in order to ensure that multiple legal systems and a variety of norms and processes were respected.

By taking stock of Justice Ginsburg's navigation of legal pluralism in a set of representative writings, we can better theorize her contribution to a jurisprudential approach that seeks ongoing negotiation in an interlocking world of multiple jurisdictions and multiple legal norms. Just as important, this discussion provides a case study for thinking more broadly about possible judicial responses to the reality of legal pluralism.

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* Walter S. Cox Professor of Law, The George Washington University Law School. This Article was presented at a symposium on the legacy of Justice Ruth Bader Ginsburg held at The George Washington University Law School in February 2022. Some material derived from Paul Schiff Berman, *Ruth Bader Ginsburg and the Interaction of Legal Systems*, *in* The Legacy of Ruth Bader Ginsburg (Scott Dodson ed. 2022).

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INTRODUCTION

Law often operates based on the convenient fiction that human activity is only subject to the rules of one legal system at a time. Yet jurisdictional overlap is unavoidable, and law therefore must inevitably negotiate situations when multiple communities and legal authorities seek to regulate the same act or actor. Scholars studying interactions among these multiple communities have often used the term "legal pluralism" to describe the intermingling of these normative systems.[1]

So, how should law respond to the reality of multiple overlapping legal systems? Often, these hybrid legal spaces have been viewed simply as a problem to be solved. This is perhaps why forum-shopping is often referenced pejoratively. Thus, even when jurisdictional overlap or regulatory interdependence is undeniable, we see what Robert Ahdieh has termed "the standard dualist response."[2] Law seeks to delimit each entity's jurisdiction and authority more effectively and thereby eliminate such overlap. This paradigm of jurisdictional line drawing has been prevalent both in the international/transnational realm[3] and in discussions of federalism,[4] as courts and scholars try to

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1 For a brief summary of legal pluralism scholarship, see generally Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

2 Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 867 (2006).

3 For example, debates in the United States about judicial citation of foreign authority have often centered around delineating when it is permissible and impermissible to reference foreign or international law. *See, e.g.*, Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 630 (2007). Similarly, theories of jurisdiction and choice of law have long sought to provide a single answer to the question of which law should apply to a cross-border dispute. *Compare* Pennoyer v. Neff, 95 U.S. 714, 733–34 (1877) (holding that states have complete authority within their territorial boundaries but no authority outside those boundaries), *with* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the due process clause of the U.S. Constitution on the basis of whether the defendant had sufficient contacts with the relevant state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))); *compare also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 378 (AM L. INST. 1934) ("The law of the place of wrong determines whether a person has sustained a legal injury."), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM L. INST. 1971) (providing a more flexible inquiry aimed at determining the place with the "most significant relationship" to the dispute in question).

demarcate distinct spheres for state and federal authority. As Ahdieh notes, "Such reactions are hardly surprising. At heart, they reflect some visceral sense of law's project as one of categorization, clear definition, and line-drawing."[5]

Yet this single-minded focus on certainty and clarity not only fails to describe a world of inevitable cross-border jurisdictional overlap, but also ignores the crucial question of whether leaving open space for such overlapping regulatory authority might actually be *beneficial*. Indeed, while jurisdictional overlap is frequently viewed as a problem because it potentially creates conflicting obligations and uncertainty,[6] we might also view jurisdictional redundancy as a necessary adaptive feature of a multivariate, pluralist legal system. The very "existence of overlapping jurisdictional claims often leads to a nuanced negotiation—either explicit or implicit—between or among the various communities making those claims."[7]

In focusing on the pluralist opportunities inherent in jurisdictional overlap, we can draw on the insights of Robert Cover's article *The Uses of Jurisdictional Redundancy*.[8] Cover analyzed American federalism and celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions.[9] Such benefits include a greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation.[10] Moreover, when decision makers are forced to consider the existence of other possible decision makers, they may tend to adopt, over time, a more restrained view of their own power and come to see themselves as part of a larger tapestry of decision making in which they are not the only potentially relevant voice.[11] Finally, though Cover acknowledged that it might seem perverse "to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict," he nevertheless argued that we should "embrace" a system "that permits the tensions and conflicts of the social order" to

4 *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 246 (2005).

5 Ahdieh, *supra* note 2, at 867.

6 *See* Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders 236–43 (2012).

7 *Id.* at 237.

8 Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 Wm. & Mary L. Rev. 639 (1981).

9 *See id.* at 642–43.

10 *See id.* at 649.

11 *See id.* at 678.

be played out in the jurisdictional structure of the system.[12] Judith Resnik likewise has noted the "multiple ports of entry" that a federalist system creates[13] and has argued that what constitutes the appropriate spheres for "local," "national," and "international" regulation and adjudication changes over time and should not be essentialized.[14]

Building on these principles, we can perhaps identify two different strategies for responding to legal pluralism.[15] On the one hand, judges facing an issue of intersystemic complexity can seek to bring order by engaging in line drawing and delimiting separate spheres of authority. This is what Cover calls a "jurispathic" approach because it necessarily requires the decision maker to anoint one jurisdiction as the legitimate authority and decree that all other jurisdictions are disabled from applying their norms.[16] In doing so, the decision maker "kills off" conflicting interpretations and authorities.[17] The contrasting approach is what Cover would call "jurisgenerative."[18] This pluralist approach seeks modes of accommodation, deference, and hybridity that will allow multiple jurisdictions to continue to speak to a particular legal problem, without blocking the dialogue among systems.[19] Thus, the pluralist framework provides a way of analyzing jurisprudence concerning the interaction of legal systems in terms of whether it preserves or cuts off intersystemic dialogue. This framework can also reveal patterns in the jurisprudence of individual judges across a variety of substantive legal areas.

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12 *Id.* at 682.

13 Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1579 (2006).

14 *See* Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 473–74 (1996) ("My point is not only that particular subject matter may go back and forth between state and federal governance but also that the tradition of allocation itself is one constantly being reworked; periodically, events prompt the revisiting of state or federal authority, and the lines move.").

15 It is worth noting that *responding* to legal pluralism is not the same as *eliminating* it. Legal pluralism is inevitable. For example, a supreme court may be supreme within the contours of a particular formal legal system, but even its edicts are subject to contestation, resistance, and alternative assertions of authority.

16 *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

17 *See id.*

18 *See id.* at 11–15.

19 *See* Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 18, 25 (2005) ("[Cover] wanted the state's actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.").

From her early days writing *Civil Procedure in Sweden*,[20] to her time as law professor, judge, and Justice, Ruth Bader Ginsburg was acutely sensitive to the fact that legal systems are not hermetically sealed from each other. There must always be ways of negotiating the interactions among such systems. In the United States, such interactions often involve navigating a federalist structure of fifty-one different sovereignties, in addition to the District of Columbia, tribal governments, and a number of semi-autonomous territories. Internationally, the interaction of legal systems may involve the degree to which U.S. constitutional norms govern officials abroad, the impact of foreign judgments in the United States, and the potential influence of international or transnational law in domestic cases.

This Article begins by outlining some of the philosophical and jurisprudential principles underlying a more pluralist approach to the inevitable overlapping of normative communities and legal systems. Then, it surveys some of Justice Ginsburg's key writings on the interaction of legal systems, both in law journals and judicial opinions. This analysis reveals a theme in Justice Ginsburg's jurisprudence. Across a variety of substantive legal areas, Justice Ginsburg often chose a path that provided maximum play among the legal systems at issue. Beginning with her earliest scholarly writings, she tended to oppose doctrines allowing one legal system to completely block another from adjudicating a dispute. Throughout her later career, Justice Ginsburg likewise tended to reject bright-line rules that chose one legal system over another. Instead, she often seemed to prefer procedural arrangements that sought accommodation and flexibility in order to ensure that multiple legal systems and a variety of norms and processes were respected. These principles also carried over to Justice Ginsburg's views about international and transnational law. A committed internationalist, Justice Ginsburg advocated the importance of seeking wisdom from others. This nondogmatic, deferential approach to plural legal systems characterized much of her jurisprudence on intersystemic conflicts. By taking stock of Justice Ginsburg's navigation of legal pluralism in a set of representative writings, we can better theorize her contribution to a jurisprudential approach that seeks ongoing negotiation in an interlocking world of multiple jurisdictions and multiple legal norms. Just as importantly, this discussion provides a case study for thinking more broadly about what it would mean to pursue a jurisprudence of legal pluralism.

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20 *See* RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965).

I. Towards a Jurisprudence of Legal Pluralism

Imagine two communities: call them clans, villages, tribes, states, nations, or anything you wish. At some point, people or businesses located in one of those communities are bound to affect people in the other community. That is particularly true if the communities are located near each other geographically, but physical proximity is not necessary given cross-border travel, trade, e-commerce transactions, supply chains, social media groups, data storage, environmental harms, health crises, and so on.[21] Thus, at some point, it is likely that a member of one community will try to bring a legal action against a member of the other community.

At that point, the question is how law, which is historically delimited based on territorial location, should respond to this reality of legal pluralism. Whose legal system has jurisdiction, what law should that legal system apply, and should a decision issued by a legal authority in one community be recognized in the other community? These are the age-old questions that are often grouped under the rubric of conflicts of law. Most conflicts questions, however, are framed in binary terms: either one law applies, or another does. But we might also ask: are there ways of establishing institutional relationships between the communities that can somehow help resolve the differences?

Two strategies for addressing legal pluralism problems immediately present themselves, which in prior work I have called sovereigntist territorialism and universalism.[22] Sovereigntist territorialism seeks a regime where only one of the two communities has primacy in imposing its legal jurisdiction.[23] And this primacy will most often be established based on the territorial location of a relevant act or actor.[24] Here, we see the old idea that if you are located within the territory of a sovereign, then that sovereign can exercise dominion over you. This regime often works just fine. If I am from Community A and I choose

21 As a thought experiment, one can imagine an "effects map," in which one identifies a territorial locality and plots on a map every action that affects that locality. Five hundred years ago, the effects would almost surely have been clustered around the territory, with perhaps some additional effects located in a particular distant imperial location. One hundred years ago, those effects might have begun spreading out. But today, while locality is surely not irrelevant, the effects would likely be diffused over many corporate, governmental, technological, and migratory centers. *See* David G. Post, *Against "Against Cyberanarchy,"* 17 Berkeley Tech. L.J. 1365, 1381–83 (2002) (articulating this thought experiment).

22 *See* Berman, *supra* note 6, at 61–140; *see also* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1180–91 (2007).

23 *See* Berman, *supra* note 6, at 61–127.

24 *See id.*

to drive in Community B, it is relatively uncontroversial that Community B can assert jurisdiction over me and impose its laws if I cause an accident there. But as soon as I assert that the reason for the collision was that my brakes failed, the question becomes more complicated because the brakes may have been designed in a third community, built in a fourth, with possibly defective parts from a fifth, shipped to a sixth, sold through a distributor in a seventh, and then sold to me. Now, where should my lawsuit be heard and whose laws should apply? Here the problem is that the dispute involves actors in multiple territorial locations.

In addition, even when there is an obvious physical location, that location may be arbitrary and unrelated to the underlying dispute. For example, if an Alabama railroad employee wants to sue an Alabama company based on negligence committed by other employees in Alabama, should Mississippi law apply just because that is where the ultimate injury manifests?[25] Finally, sometimes a physical location is difficult to establish. Where does an e-commerce transaction occur? Where is an e-mail message located? Where is a bank account? And so on.[26]

It is not that there is no way to try to address these questions. Indeed, there are numerous legal doctrines that have evolved to try to resolve them. But the point is that legal pluralism creates *difficult* questions, and the solutions that sovereigntist territorialist legal systems have devised to solve them are always necessarily imperfect and troubling. In the end, there is no perfect solution because sovereigntist territorialism always insists that only one legal system must govern, and in situations of legal pluralism the whole point is that there is no single legal regime that has obvious primacy.

Perhaps even more troubling, the assumption that communities are or should be hermetically sealed from one another makes it difficult to address cross-border problems precisely at a time when many of the problems facing the world increasingly require coordinated solutions and *more* interaction among legal and political systems, not less. Such problems include issues of how to effectively maintain life on this planet (climate change, biodiversity, ecosystem losses, and water deficits); issues of how human beings will sustain themselves on it (poverty, conflict prevention, and global infectious diseases); and

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25 *See* Ala. Great S.R.R. v. Carroll, 11 So. 803 (Ala. 1892).

26 For further discussion, see generally Paul Schiff Berman, *Legal Jurisdiction and Virtual Social Life*, 27 CATHOLIC U. J. L. & TECH. 103 (2019) (summarizing a variety of jurisdictional problems raised because of human activity that is not particularly tied to any territorial location).

issues of how to develop global cooperative rules for living together given that much human activity crosses territorial borders (nuclear proliferation, toxic waste disposal, data protection, trade rules, finance and tax regimes, and so on).[27] These sorts of problems cannot plausibly be addressed solely within one legal system.

In response to these problems of legal pluralism and the limitations inherent in sovereigntist territorialism, universalism may at first seem a welcome alternative. After all, if instead of multiple communities there were only one normative community with one authorized interpreter of law, then in theory there would no longer be a legal pluralism problem to solve. Thus, if our two hypothetical communities banded together to form one community with one legal system, then there would no longer be a conflicts-of-law concern.

As with sovereigntist territorialism, universalism can sometimes be an important mechanism for normative authority. In United States history, of course, the independent colonies ultimately became part of one country with a federal Constitution, a Supremacy Clause declaring federal law the supreme law of the land,[28] and a U.S. Supreme Court to be the ultimate arbiter of national law.[29] And even on the international level, a wide variety of institutions, treaties, courts, tribunals, arbitral bodies, industry standards, corporate codes, and normative assertions wield various forms of universal authority, albeit often without a clear and undisputed enforcement mechanism.[30] In one way or another, all of this activity represents the desire to harmonize conflicting norms and normative systems. And on many fronts, both in public and private law, norms may converge to a degree, whether through hegemonic imposition or global embrace. Moreover, such harmonization has important benefits because it tends to lower transaction costs and uncertainty as to what norms will be applied to any given activity.[31] Yet again, as with sovereigntist territorialism, there are reasons to question both the desirability and the feasibility of universalism.

As to desirability, it is not at all clear that universalism is an unalloyed good. Just as it is problematic to divide ourselves into sealed-off communities, it is also problematic to think of ourselves solely as citi-

27 *See* David Held, Cosmopolitanism: Ideals and Realities 49–55 (2010).

28 U.S. Const. art. VI.

29 U.S. Const. art. III, § 1.

30 *See* Held, *supra* note 27, at 51–53.

31 *See, e.g.*, Emanuela Carbonara & Francesco Parisi, *The Paradox of Legal Harmonization*, 132 Pub. Choice 367, 369 (2007).

zens of the world because we will tend to dissolve the multi-rootedness of community affiliation into one global community. Universalism, by definition, ignores the extreme emotional ties people still feel toward distinct transnational or local communities and therefore tends to ignore the very attachments people hold most deeply.

In addition, universalism inevitably erases diversity. This is a problem for three reasons. First, such erasure may involve the silencing of less powerful voices. Thus, the presumed universal may also be the hegemonic. Second, preserving legal diversity can be seen as a good in and of itself because it means that multiple forms of regulatory authority can be assayed in multiple local settings. Just as states in a federal system can potentially function as "laboratories" of innovation,[32] so too the preservation of diverse legal spaces makes innovation possible. Voices unheard in one legal community can be heard in another. For example, in the United States more liberal states can establish alternative regulatory regimes when conservatives control the federal government, and vice versa.[33] Likewise, a voice unheard within a local political and legal system might gain power by leveraging external authority. Third, a legal system that provides mechanisms for mediating diversity without dissolving difference necessarily also provides an important model for mediating diversity in day-to-day social life. Thus, a legal system that demands dialogue across difference rather than the erasure of difference is more likely to create the context for a functioning pluralist society than one that, in contrast, seeks uniformity as its goal.

Nevertheless, even if one rejects these normative arguments and embraces universalism as a goal, it is difficult to believe that, as a practical matter, harmonization processes will ever fully bridge the significant differences that exist among communities. This is because many differences both in substantive values and attitudes about law arise from fundamentally different histories, philosophies, and worldviews.[34] People are therefore likely to be either unable or unwill-

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32 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed" when "considerable disagreement exists about how best to accomplish [a] goal" because "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

33 *See, e.g.*, Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY, https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/ [https://perma.cc/GRP4-EFTM].

34 *See, e.g.*, CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983) (arguing that law provides a "distinctive manner of imagining the real" and therefore must be studied in cultural context).

ing to trade in their perspectives for the sake of universalist harmony. Indeed, even when communities do band together to form more universal units, there is inevitably resistance. Nation-states form and then pull apart. Ethnic conflicts persist. Secession talk is ever present. Universalism is therefore inevitably a slow, laborious undertaking—think of the European Union—and one that immediately faces resistance as soon as it is established. Accordingly, even the most optimistic universalist would have to acknowledge that normative conflict among communities is at the very least a constant reality that will require alternative processes to address.

Although sovereigntist territorialism and universalism are very different strategies for dealing with legal pluralism, they share in common the assumption that legal pluralism is a problem to be solved. Thus, they each seek ways to ensure that one legal system and set of norms governs while alternative systems and norms are suppressed. Accordingly, these approaches are both jurispathic in that they aim to kill off all but one legal regime.

A jurisprudence of legal pluralism seeks an alternative. Rather than eliminating the multiplicity, we might seek to manage and balance it, while giving voice to the various competing systems and norms to the extent possible. As a philosophical grounding for such a jurisprudence, we might look to Hannah Arendt. In *Understanding and Politics,* Arendt advocates "a mental capacity appropriate for an active relation to that which is distant."[35] Thus, we can address conflicts-of-law problems with an approach that encourages an active relationship with other legal systems. That does not mean one always defers to those other systems; only that one actively considers the claims of those systems and self-consciously seeks to restrain one's own jurispathic voice to the extent possible.

This active relationship can be understood as similar to Emmanuel Levinas's concept of "responsivity."[36] In the encounter between

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35 Phillip Hansen, *Hannah Arendt and Bearing with Strangers*, 3 CONTEMP. POL. THEORY 3, 3 (2004); *see also* HANNAH ARENDT, *Understanding and Politics (The Difficulties of Understanding)*, *in* ESSAYS IN UNDERSTANDING: 1930–1954, 307, 307, 322 (Jerome Kohn ed., 1994).

36 *See generally* EMMANUEL LEVINAS, HUMANISM OF THE OTHER (Nidra Poller trans., 2003) (locating the humanity of human beings in their recognition of others). In focusing on Levinas and an ethic of responsivity in thinking about conflicts-of-law problems, I draw from Horatia Muir Watt, *Hospitality, Tolerance, and Exclusion in Legal Form: Private International Law and the Politics of Difference*, 70 CURRENT LEGAL PROBS. 111 (2017) and Ralf Michaels, *Private International Law as an Ethic of Responsivity*, *in* DIVERSITY AND INTEGRATION IN PRIVATE INTERNATIONAL LAW 11 (Verónica Ruiz Abou-Nigm & María Blanca Noodt Taquela eds., 2019).

Self and Other, Levinas argues that as an ethical matter the claims of the Other should neither be rejected, nor should they be merely tolerated.[37] Rather, the claims of others create an obligation to respond, to take seriously, to engage in dialogue.[38]

Thus, instead of trying to eliminate the conflict among competing norms and systems, a more pluralist jurisprudence recognizes that such conflict is unavoidable and so seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants in the conflict into a shared social space. This approach builds on Ludwig Wittgenstein's idea that agreements among people are reached principally through participation in common forms of life, rather than through agreement on substance.[39] The goal is to transform "enemies"—who have no common symbolic space—into "adversaries." Those adversaries still might vociferously disagree with one another, but at least they are part of the same system of language, procedure, and institutional structure. In this vision, the Other is neither treated as wholly external, nor is it asked to assimilate into a universal. The goal instead is dialogue across difference through procedural and institutional mechanisms that ask decision makers to consider alternative normative systems, recognize that their vision is not the only vision, and always consider restraining their own jurispathic voice in order to accommodate competing voices.

A more pluralist approach may in fact be a better way to bridge divides among people. It is often assumed that such bridging requires a form of universalism: each side must come to see the other's shared humanity.[40] "The goal is for people to listen to others' experiences and feelings and to walk out saying, 'That person isn't so different from me,' or, 'If I'd gone through that experience, I might feel exactly the same way.'"[41] This sounds reasonable, but the implicit belief underlying this style of bridging is that we can only learn to love each other by seeing that we are all deeply the same. Yet, as April Lawson, founder of a not-for-profit called Braver Angels Debate, points out, "this misses a fundamental insight about relationship that most of us know from experience: We have the capacity to build relationship *through*

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37 *See* Levinas, *supra* note 36, at 32–33.

38 *See id.*

39 *See* Ludwig Wittgenstein, Philosophical Investigations para. 241, at 88 (G.E.M. Anscombe trans., 3d ed. 1967).

40 April Lawson, *Building Trust Across the Political Divide*, Comment (Jan. 21, 2021), https://comment.org/building-trust-across-the-political-divide/ [https://perma.cc/UQ48-YVNW].

41 *Id.*

conflict."[42] Indeed, sometimes the ethic of toleration itself, though it seems neutral and open, "denudes public argument of its profound spiritual dimensions and thereby guts the richness of pluralism."[43] Tolerance treats the Other as separate and wrong. Ralf Michaels has therefore called tolerance "secret contempt": we tolerate that which we disagree with.[44] Obviously, tolerance is better than intolerance, but it is still not the same as active engagement with the Other. In contrast:

> [C]reating space for . . . people to have their conflicts in relatively constructive ways can . . . be productive for the group. It is a way for the participants to engage together on a joint enterprise, despite their many disagreements, and thus to preserve the enterprise as a going concern that binds them.[45]

Of course, even a more pluralist approach that seeks engagement with competing systems will sometimes find a particular foreign norm or system to be such an anathema that the norm will not be enforced. But when such "public policy" exceptions are invoked within a pluralist framework, they should be treated as unusual occasions requiring strong normative statements regarding the contours of the public policy. This means that, as Cover envisioned, a jurispathic act that "kills off" another community's normative commitment is always at least accompanied by an equally strong normative commitment.[46] The key point is to make decision makers self-conscious about their sometimes necessary jurispathic actions.[47] Such an approach helps prevent adversaries from turning into enemies.

II. A Jurisprudence of Legal Pluralism Applied

It is unclear whether Justice Ginsburg was aware of legal pluralism scholarship or whether she explicitly considered legal pluralism in her own thinking about law. However, from the beginning of her scholarly career, Justice Ginsburg was clearly interested in questions

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42 *Id.*

43 *Id.*

44 *See* Michaels, *supra* note 36, at 18 (quoting Karl Jaspers, Origin and Goal of History 221 (Michael Bullock trans., Routledge 2014) (1953)); *see also* Muir Watt, *supra* note 36, at 118 (Tolerance "suggests disapproval of whatever or whomever is being tolerated. It is sufferance rather than respect . . . .").

45 Monica Hakimi, *The Integrative Effects of Global Legal Pluralism*, *in* The Oxford Handbook of Global Legal Pluralism 557, 558 (Paul Schiff Berman ed., 2020).

46 *See* Cover, *supra* note 16, at 53 (describing judges as inevitably "people of violence" because their interpretations "kill" off competing normative assertions).

47 *See* Resnik, *supra* note 19, at 25.

of intersystemic interaction. And a close reading of her work as both a professor and a justice strongly suggests that she often pursued a jurisprudence of legal pluralism, even if she never named it. We can see this emphasis in her work regarding the attempts by courts to interfere in the legal processes of other courts, her efforts to navigate the contours of federal-state authority, and her understanding of the relationship of foreign and international sources of law to U.S. constitutional jurisprudence. This Article considers each of these areas in turn.

A. Policing Court Rulings that Interfere with the Processes of Other Courts

A court ruling that reaches into the legal processes of another court is a fundamentally jurispathic act in that it prevents the other court from coming to its own conclusions about a legal issue. Such assaults on legal pluralism were a concern of Justice Ginsburg throughout her career. Indeed, her first major law review article focused largely on the problem of antisuit injunctions.[48] Entitled *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, then-Professor Ginsburg considered in this article what should happen when a court in one state enjoins parties before it from proceeding in a lawsuit in another state.[49] In particular, she asked whether such antisuit injunctions should receive full faith and credit in the second state, thereby blocking the litigation process in that state.[50]

After noting the U.S. Supreme Court's silence on this issue, Ginsburg set forth the two extreme possible options in response. First, one might view the Full Faith and Credit Clause of the U.S. Constitution[51] as such an exacting command that even an antisuit injunction must be respected by the second court.[52] Ginsburg suggested that such a rule would be "consistent with the generally strict line the Supreme Court has taken on full faith and credit to judgments," but she also observed that "[s]tate courts on the receiving end of such injunctions have not

48 Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

49 *Id.*

50 *Id.* at 798–99.

51 U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

52 Ginsburg, *supra* note 48, at 828.

found this a palatable solution."[53] Second, there could be "a general rule denying the states authority to issue injunctions directed at proceedings in other states."[54] Although such a rule would protect the interests of the second court in pursuing its judicial process, the rule would disable the first court from issuing the relief sought by one of the parties. Thus, either option seems jurispathic, cutting off the legal process of one or the other of the courts at issue.

Significantly, Ginsburg rejected both of these jurispathic options and argued in favor of a middle ground approach: "permitting the injunction to issue but not compelling any deference outside the rendering state."[55] Thus, the initial court could still issue the injunction, but such an injunction would not be binding on the second court. Instead, the injunction *might* be accorded respect—and enforcement—by the second court, but only "as a matter of comity."[56]

Given how much this article foreshadows Ginsburg's later jurisprudence, it is worth pausing to consider her solution to the problem of antisuit injunctions. Neither court ends up wielding absolute authority independent of the other; neither court fully silences the other. Although the second court seems on the surface to retain the ultimate power to accept or reject the first court's injunction, such power cannot be wielded without significant cost because, under Ginsburg's approach, the second court would lose credibility and legitimacy if it rejected the first court's injunction without at least addressing the first court's reasoning. Thus, even if the second court retains ultimate authority, it must engage the first court's views before wielding jurispathic power. This built-in intersystemic dialogue—whereby one court asks another to refrain from litigation and the other court then must decide how much it can defer to the first court's order—respects both courts as adjudicatory actors and leaves resolution of individual cases to a dialogic and dialectical process among courts exercising restraint, deference, and comity.

As a Justice, Ginsburg took a similar approach to the Full Faith and Credit Clause in two U.S. Supreme Court cases. First, in *Matsushita Electric Industries Co. v. Epstein,*[57] the Court considered whether a Delaware class-action settlement should preclude litigation in a California federal court pursued by class members who argued that they

53 *Id.*

54 *Id.* at 829.

55 *Id.*

56 *Id.* at 830.

57 516 U.S. 367 (1996).

were not adequately represented in Delaware.[58] Although the Court granted preclusive effect to the Delaware settlement, thereby blocking the California litigation, Justice Ginsburg dissented in relevant part.[59] Justice Ginsburg argued that the Full Faith and Credit Clause should not automatically bar the California litigation, especially given the assertion that the lawyers in Delaware did not represent the interests of all class members.[60] Indeed, she suggested that in this case the attorneys for the class may have too easily relinquished the class's rights to pursue the federal litigation in order to pocket their attorneys' fees.[61] Accordingly, due process, Justice Ginsburg argued, required an inquiry regarding the adequacy of class representation in the first litigation before the second litigation should be blocked by full faith and credit.[62] Thus, although preclusion doctrine is somewhat different from the antisuit injunctions discussed in her earlier article, Justice Ginsburg similarly rejected automatic enforcement of an injunction that would have the effect of blocking litigation elsewhere.

Two years later, in *Baker v. General Motors Corp.*,[63] Justice Ginsburg returned to the realm of antisuit injunctions—even citing her own early law review article[64]—and commanded a majority for her view regarding the proper operation of the Full Faith and Credit Clause when one court's order aims to block the operation of a second court's judicial process.[65] *Baker* concerned a stipulated injunction submitted to and signed by a Michigan court to settle a lawsuit between General Motors ("GM") and Ronald Elwell, a former GM employee.[66] Among other terms, the stipulated injunction purported to prevent Elwell from testifying against GM in subsequent legal proceedings.[67] The question posed before the U.S. Supreme Court was whether, in a separate wrongful death suit brought in a Missouri federal court by the Bakers against GM, Elwell could be called as a plaintiff's witness or whether, instead, the Michigan injunction blocked Elwell from testifying.[68] And while it was clear that the Michigan judgment could not preclude the *Bakers*, who were not parties to the

58 *Id.* at 369–73.
59 *See id.* at 388 (Ginsburg, J., concurring in part & dissenting in part).
60 *See id.*
61 *See id.*
62 *See id.* at 399.
63 522 U.S. 222 (1998).
64 *Id.* at 236 n.9.
65 *Id.* at 225–26.
66 *Id.* at 228–29.
67 *See id.*
68 *See id.* at 225–228.

Michigan proceedings, the difficult question was whether it could bind *Elwell*, who had been a party in Michigan, and therefore keep him from testifying.[69] The Missouri federal district court judge ruled that allowing such a result would run counter to public policy and therefore invoked a public policy exception to the Full Faith and Credit Clause, whereby rendering courts would be free to ignore prior court judgments anathema to the rendering court's local policies.[70]

Thus, the Supreme Court appeared to be faced with a binary choice. On the one hand, the Court could endorse the Missouri district court's ruling and allow courts to extricate themselves from the Full Faith and Credit Clause simply by deeming a sister jurisdiction's judgment contrary to public policy. On the other, the Court could enforce the Michigan court's order, thereby allowing Michigan's ruling to prevent any other court in the country from hearing Elwell's testimony in cases against GM.

Not surprisingly, as with the antisuit injunctions discussed in her article, Justice Ginsburg rejected both of these jurispathic options. Writing for the Court, she first made it clear that, although choice-of-law doctrines permit courts to use public policy objections in choosing the *law* to apply in a cross-jurisdictional case, the command of the Full Faith and Credit Clause with regard to prior *judgments* is far more "exacting" and permits no such set of broad exceptions. According to the opinion, "A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."[71] Thus, the Missouri court could not simply ignore the Michigan judgment based on assertions of public policy.

At the same time, the Michigan court could not automatically block the adjudication in Missouri. "Michigan's judgment," she wrote, "cannot reach beyond the Elwell-GM controversy to control proceedings against GM brought in other States, by other parties, asserting claims the merits of which Michigan has not considered."[72] The problem with the Michigan order, according to Justice Ginsburg, was that "Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify

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69 *See id.* at 237 n.11.

70 *See id.* at 230.

71 *Id.* at 233.

72 *Id.* at 238.

and what evidence is relevant and admissible in their search for the truth."[73]

Thus, Ginsburg aimed to maintain a system in which courts respect each other's authority and judgments. Michigan's judgment could not silence Missouri in matters that Missouri had a right to adjudicate, just as Missouri could not simply ignore a lawful Michigan judgment by interposing local public policy concerns.[74] A Full Faith and Credit Clause without a public policy exception helps ensure an interlocking system of justice whereby parties cannot evade legal judgments simply by fleeing the jurisdiction. But at the same time, Justice Ginsburg called on courts to be restrained in the kinds of judgments they issue, remaining mindful of the prerogatives of other courts to pursue their own proceedings unfettered by foreign judgments.[75] As a result, both the need for interdependence and independence within a federalist court system can be maintained. Her decision therefore preserves pluralist, intersystemic interaction.

Justice Ginsburg reached a similar result in *Marshall v. Marshall*,[76] when, writing for the Court, she clarified that no broad exception to traditional jurisdictional rules should allow a state probate court decision to divest federal bankruptcy courts of jurisdiction in a case involving claims related to an inheritance dispute.[77] As in *Matsushita* and *Baker*, Justice Ginsburg rejected the idea that an exercise of power by one court should be transformed into a broad assertion of *exclusive* power that would prevent other courts from litigating issues over which they would otherwise have jurisdiction.[78] Instead, though she acknowledged that a probate court, once it exercised jurisdiction over the assets of an estate, might retain exclusive jurisdiction over the distribution of those assets, she limited the scope of exclusivity only to the administration of a decedent's estate.[79] The probate court could not, she wrote, "bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction."[80]

In each of these instances Justice Ginsburg opted to establish and preserve spaces of concurrent jurisdiction among multiple courts, neither foreclosing courts from speaking to issues before them, nor

73 *Id.*
74 *See id.* at 240–41.
75 *See id.* at 233–39.
76 547 U.S. 293 (2006).
77 *Id.* at 299–305.
78 *See id.* at 314.
79 *Id.* at 311–12.
80 *Id.* at 312.

permitting them to foreclose subsequent courts from litigating related matters on their own. The danger, according to Justice Ginsburg's jurisprudence, lies in decisions that usurp power over the judicial processes of other courts. Instead, these opinions suggest that mutual voice, restraint, deference, and comity are more the touchstones of her judicial vision.

B. Navigating Federalism

These same principles of deference carried over to areas of federalism, where Justice Ginsburg often demonstrated her willingness to defer to state prerogatives in interpreting state law. This deference may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases. Certainly, Justice Ginsburg supported a muscular interpretation of federal constitutional rights. After all, her most prominent pre-judicial role was as the head of the Women's Rights Project of the American Civil Liberties Union.[81] And of course her forceful advocacy in the 1970s[82]—as well as her own decision for the U.S. Supreme Court in *United States v. Virginia*[83]—helped establish gender as a category for heightened scrutiny in equal protection analysis.

Yet, though she was clearly a strong advocate for protecting federal rights, Justice Ginsburg was often likely to seek ways to defer to and accommodate state interests to the extent possible. Indeed, she was far more deferential to the prerogatives of states than one might expect if one focused only on the gender cases.[84] This Section first surveys four dissents in which Justice Ginsburg argued against federal intrusion into traditional state-law domains. Then, it turns to three cases either applying the so-called *Erie* doctrine or federal preemption doctrine, two areas where courts are asked to negotiate the fault lines between state and federal law. These cases show Justice Ginsburg seeking creative ways to effectuate both state and federal interests to the extent possible.

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81 *See* Karen O'Connor & Barbara Palmer, *The Clinton Clones: Ginsburg, Breyer, and the Clinton Legacy*, 84 JUDICATURE 262, 265 (2001).

82 *See* Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 226–27 (2010).

83 518 U.S. 515 (1996).

84 *See* Russell A. Miller, *In a Dissenting Voice: Justice Ginsburg's Federalism*, 43 NEW ENG. L. REV. 771, 774 (2009) ("In the shadow of [Ginsburg's] progressive gender equity jurisprudence resides a commitment to state autonomy, a position generally viewed as the prerogative of the right. This belies the claims of conservative commentators and empirical scholars who view Justice Ginsburg as one of the Court's most consistently liberal and activist justices.").

1. Deference to State Law Domains

In the 1994 case of *Honda Motor Co. v. Oberg*,[85] the U.S. Supreme Court considered a provision of the Oregon Constitution prohibiting judicial review of the amount of punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict."[86] The Court ruled that such a provision violated the Due Process Clause of the federal Constitution.[87] Justice Ginsburg dissented, focusing on the variety of ways in which Oregon statutory law already protected against excessive punitive damage awards.[88] In particular, Justice Ginsburg noted that, under Oregon law, the plaintiff in product liability cases must prove by "clear and convincing evidence" that the defendant "show[ed] wanton disregard for the health, safety and welfare of others."[89] Moreover, the statute set forth seven substantive criteria to cabin the discretion of the factfinder.[90] And Oregon permitted judges to overturn a jury punitive damages award "if reversible error occurred during the trial, if the jury was improperly or inadequately instructed, or if there is no evidence to support the verdict."[91] Given these protections, Justice Ginsburg saw no reason for federal due process concerns to trump the Oregon constitutional provision forbidding general reexamination of a jury's punitive damage awards.[92]

Four years later, Justice Ginsburg again dissented from a U.S. Supreme Court decision overturning a state law punitive damages verdict. In *BMW of North America, Inc. v. Gore*,[93] the Court found an Alabama jury award "grossly excessive," in violation of the Fourteenth Amendment's Due Process Clause.[94] Justice Ginsburg, in contrast, argued that the award should be policed by the Alabama courts and that the U.S. Supreme Court should "resist unnecessary intrusion into an area dominantly of state concern."[95] Significantly, Justice Ginsburg's dissent rested on two core arguments. First, she suggested that the Court should defer to the Alabama Supreme Court, which

85 512 U.S. 415 (1994).

86 *Id.* at 418.

87 *Id.*

88 *See id.* at 436–51 (Ginsburg, J., dissenting).

89 *Id.* at 439 (quoting Or. Rev. Stat. § 30.925 (1991)).

90 *See id.* at 440–42 (quoting Or. Rev. Stat. § 30.925(3) (1991)).

91 *Id.* at 436.

92 *See id.*

93 517 U.S. 559 (1996).

94 *Id.* at 562, 585–86.

95 *Id.* at 607 (Ginsburg, J., dissenting).

"report[ed] that it 'thoroughly and painstakingly'" reviewed the jury's award according to federal due process criteria.[96] According to Justice Ginsburg, this judgment was entitled to a "presumption of legitimacy,"[97] and the U.S. Supreme Court should not "be quick to find a constitutional infirmity."[98]

Second, she noted that, by entering this traditional state domain with a constitutional ruling binding on all the states, the U.S. Supreme Court would be deprived of the wisdom that comes from having multiple courts develop jurisprudence in concert.[99] Indeed, she juxtaposed the Court's new punitive damages review process with what typically occurs in habeas corpus review under 28 U.S.C. § 2254.[100] In contrast to such habeas cases, Justice Ginsburg pointed out, the Court, when reviewing punitive damages verdicts under *Gore*, "will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area."[101] Thus, by refusing to defer to states and by building its own ad hoc review process, Justice Ginsburg opined, the Supreme Court would be left to review damage awards with neither the potential guidance of the state courts nor the potential wisdom of other federal courts.[102] In short, she objected to the hierarchical lack of pluralism in the emerging jurisprudence.

Ginsburg argued for greater deference to state processes in other contexts as well. *City of Chicago v. International College of Surgeons*[103] began as a case involving state court review of a municipal agency's denial of demolition permits.[104] Such review is generally deferential under state law, limited to whether there was adequate evidence in the record to support the agency's discretionary judgment.[105] Nevertheless, the U.S. Supreme Court permitted federal courts to exercise supplemental jurisdiction—and possibly full de novo review—over such claims if appended to other federal claims.[106] While acknowledging that the "bare words" of the federal jurisdictional statute

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96 *Id.* at 610–11.

97 *Id.* at 611.

98 *Id.*

99 *See id.* at 613.

100 *Id.*

101 *Id.*

102 *See id.*

103 522 U.S. 156 (1997).

104 *See id.* at 159–60.

105 *Id.* at 175 (Ginsburg, J., dissenting).

106 *Id.* at 174 (majority opinion).

permit the exercise of jurisdiction in such cases,[107] Justice Ginsburg dissented, arguing that the statute should not be read to extend federal jurisdiction over these sorts of state appellate reviews of state agency decisions.[108] According to Justice Ginsburg, permitting such "cross-system appeals" would encroach upon areas traditionally within state authority.[109] She criticized the majority for "displac[ing] state courts as forums for on-the-record review of state and local agency actions."[110] And she worried that:

> [a]fter today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions. Exercising this cross-system appellate authority, federal courts may now directly superintend local agencies by affirming, reversing, or modifying their administrative rulings.[111]

One could imagine an even more pluralist approach than Justice Ginsburg's. For example, the Court might have permitted federal jurisdiction but incorporated the state standard of deferential review. Alternatively, the Court might have developed a form of abstention doctrine that permits federal courts to proceed, but only after allowing state courts a first crack at resolving the issue. However, both of these avenues would be complicated given the language of the jurisdictional statute. Thus, Ginsburg's position likely went as far as she could: denying federal supplemental jurisdiction over such claims but allowing the exercise of that authority to be checked by federal constitutional review, thereby preserving intersystemic dialogue. In contrast, the interpretation of the jurisdictional statute adopted by the majority allows the federal court to function as a fully independent alternative appellate forum in diversity cases, one that could trump state practices and standards of review.

This same concern for preserving the states' ability to interpret their own laws carried over to Justice Ginsburg's opposition to the U.S. Supreme Court's 1983 decision in *Michigan v. Long*.[112] In *Long*, the Court had determined that in criminal cases, when it is unclear whether a state court decision rests on state or federal law, the federal court should assume that the state court relied on federal law, thereby

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107 *Id.* at 176 (Ginsburg, J., dissenting).

108 *See id.* at 176–80.

109 *Id.* at 176–77.

110 *Id.* at 176.

111 *Id.* at 175.

112 463 U.S. 1032 (1983).

subjecting the state court decision to federal review.[113] This presumption, according to Ginsburg, gets it backwards. Although she was not on the Court when *Long* was decided,[114] in a subsequent dissent she wrote: "The *Long* presumption, as I see it, impedes the States' ability to serve as laboratories for testing solutions to novel legal problems."[115] Instead, she argued that "this Court should select a jurisdictional presumption that encourages States to explore different means to secure respect for individual rights in modern times."[116]

In all four of these dissents, Justice Ginsburg was concerned that federal courts were inappropriately displacing the ability of states to have voice regarding matters of traditional state dominion. However, that does not mean that Justice Ginsburg always simply opted for greater state autonomy in every case. For example, she joined the dissents in both *United States v. Lopez*[117] and *United States v. Morrison*,[118] in which the Court curtailed Congress' Commerce Clause power. And of course, she advocated for more robust federal enforcement of constitutional equal protection norms in gender discrimination cases. Thus, it might be more appropriate to view Justice Ginsburg as a cooperative or dialogic federalist rather than a separate-spheres federalist.[119] She seemed most concerned with giving states voice in a multisystem conversation rather than displacing federal authority altogether.

2. *Solomonic Effectuation of Plural Interests*

This emphasis on accommodating both state and federal authority is most easy to see in those cases in which Justice Ginsburg explicitly sought to effectuate both sets of interests simultaneously. As noted above, many of the doctrines aimed at navigating the relative domains of state and federal sovereignty are built on binary decision making and clear lines of demarcation. Either a case is within state or federal jurisdiction; either state law or federal law applies, and so on. But Justice Ginsburg tended to favor overlapping jurisdictional schemes and more deferential accommodation of multiple interests. In

113 *See id.* at 1040–41.

114 Justice Ginsburg's position regarding *Michigan v. Long* echoes the concerns originally expressed by Justice Stevens in *Long* itself. *See id.* at 1065–72 (Stevens, J., dissenting).

115 Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting).

116 *Id.* at 30.

117 514 U.S. 549 (1995).

118 529 U.S. 598 (2000).

119 I am grateful to Scott Dodson for suggesting this particular encapsulation of my views regarding Justice Ginsburg's federalism jurisprudence.

the three cases that follow, she worked mightily to achieve this sort of pluralist resolution, even when the path for doing so was less than obvious.

The first case is *Gasperini v. Center for Humanities, Inc.*[120] Here, the U.S. Supreme Court continued a line of cases considering when a federal court hearing a state claim should apply state or federal law.[121] Ever since the Court's landmark decision in *Erie Railroad Co. v. Tompkins*,[122] federal courts hearing state claims are required to apply state substantive law, essentially as if the case were being decided in a state court.[123] But what happens if applying the state law conflicts with the rules governing the general operation of federal courts? These are some of the knotty problems in what has become known as the *Erie* doctrine.

Gasperini presented a particularly difficult application of the doctrine because both the state and federal interests at stake were so strong. New York had passed a tort reform statute that sought to rein in what were perceived to be excessive jury awards.[124] Under the statute, state appellate courts were empowered to review the size of jury verdicts and to order new trials whenever the jury's award "deviate[d] materially from what would be reasonable compensation."[125] Thus, it would seem that, if such a situation happened to arise in a state law case brought in federal court, the federal appellate court should, pursuant to *Erie* and its progeny, apply the New York law allowing appellate reexamination of the jury verdict. However, under the Seventh Amendment of the U.S. Constitution, which governs proceedings in federal court but not in state court, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[126] This provision would normally block a federal court from conducting the sort of review mandated by the New York law. Accordingly, the U.S. Supreme Court was faced with the question of which rule would prevail in a diversity suit brought in a federal court in New York.[127]

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120 518 U.S. 415 (1996).

121 *See, e.g.*, *id.* at 419.

122 304 U.S. 64 (1938).

123 *See id.* at 64, 78.

124 *Gasperini*, 518 U.S. at 423.

125 N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

126 U.S. CONST. amend. VII.

127 *Gasperini*, 518 U.S. at 418–19.

Justice Scalia, in dissent, took the jurispathic path, arguing categorically that federal courts must follow the Seventh Amendment's command, regardless of what a New York court would do.[128] Thus, the New York law would have no impact at all in a federal diversity suit. In contrast, Justice Ginsburg worked hard to create a Solomonic solution whereby both New York's tort reform interests and the Seventh Amendment could be accommodated.[129]

To do this, Justice Ginsburg construed the Seventh Amendment's Reexamination Clause to apply to federal *appellate* courts but not to the traditional power of federal *trial* judges to grant new trials notwithstanding a contrary jury verdict.[130] Thus, she reasoned that New York's law reviewing compensation awards for excessiveness or inadequacy could be given effect, without detriment to the Seventh Amendment, if the review standard set out in the state statute were applied by the federal trial court judge, with appellate control of the trial court's ruling confined to "abuse of discretion."[131] Under this approach, the trial judge could apply state law reviewing the jury verdict, thereby retaining this state policy choice in state law cases tried in federal courts,[132] while the Seventh Amendment prohibition on reexamining jury verdicts would continue to bind the federal appellate court—absent a flagrant abuse of discretion.[133]

Whatever one thinks of the soundness of Justice Ginsburg's historical and jurisprudential analysis, what is most significant is the extraordinarily creative way in which she worked to accommodate both state and federal interests. Had the Court adopted Justice Scalia's approach, a litigant from outside New York involved in a state lawsuit with a New Yorker would be able to avoid the state's tort reform provision simply by filing that case in, or removing that case to, federal court. On the other hand, had the Court simply applied the state law without limitations, it would have been ignoring the significant command of the U.S. Constitution regarding the sanctity of jury verdicts. By splitting the difference, the Court arguably protected the core of both the state and federal interests at stake.

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[134] Justice Ginsburg again sought to vindicate both state and fed-

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128 *See id.* at 450 (Scalia, J., dissenting).

129 *See id.* at 418–39 (majority opinion).

130 *See id.* at 432–35.

131 *Id.* at 419.

132 *See id.* at 437–39.

133 *See id.* at 419.

134 559 U.S. 393 (2010).

eral interests in an *Erie* case. This time the question was whether, in a federal court, Rule 23 of the Federal Rules of Civil Procedure, governing class actions, would override another New York state law, this one aimed at preventing certain kinds of suits from being brought as class actions.[135] Justice Scalia's plurality opinion took the jurispathic position that because the state law addressed class-action suits it was necessarily trumped by Rule 23 in cases heard in federal courts.[136] Justice Ginsburg, in dissent, chose a more nuanced reading. She took Justice Scalia to task for "relentlessly" making choices that would override state law.[137] Instead, she pointed out—in true pluralist fashion—that "before undermining state legislation" the Court should ask whether the federal and state laws truly conflict.[138] Thus, in contrast to the plurality opinion, she "would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies."[139] Taking this approach, she read Rule 23 to dictate only the *procedures* for certifying and pursuing a class-action claim. In contrast, she argued, the New York state law addressed what sort of *relief* could be pursued through the class mechanism.[140] And, as with *Gasperini*, regardless of whether one agrees with her particular way of accommodating both federal and state law, there can be no doubting her passion to pursue an approach to *Erie* that attempted to provide maximum space for the effectuation of important state policy judgments.

Justice Ginsburg's approach to federal preemption law reveals the same impulse towards mutual accommodation and splitting the difference. For example, in *American Airlines, Inc. v. Wolens*,[141] the question was whether the federal law deregulating the airline industry preempted state consumer-fraud and breach-of-contract claims brought against American Airlines related to changes the airline made unilaterally and retroactively to its frequent-flyer program.[142] Two Justices argued that federal law preempted both the fraud and contract claims,[143] while another argued that neither type of claim should be

135 *Id.* at 397–398.

136 *See id.* at 398–406.

137 *Id.* at 437 (Ginsburg, J., dissenting).

138 *Id.*

139 *Id.*

140 *Id.* at 446–47.

141 513 U.S. 219 (1995).

142 *Id.* at 221–223.

143 *Id.* at 238 (O'Connor, J., concurring in the judgment in part and dissenting in part).

deemed preempted.[144] Ginsburg, writing for the Court, took the middle ground, holding that federal law preempted the fraud claims but not the contract claims.[145] The Airline Deregulation Act explicitly preempted state-imposed regulation "relating to [air carrier] rates, routes, or services,"[146] which would include consumer fraud claims based in state law.[147] However, the contract claims, she concluded, were based not on state regulation but on claimed breaches of terms agreed upon by the parties themselves.[148] Thus, they could be maintained without running afoul of the Airline Deregulation Act.[149]

In each of these cases, we see Justice Ginsburg working mightily to make subtle distinctions to preserve space for both federal and state interests to be vindicated. Indeed, none of the conclusions she reached was clearly dictated by the cases, rules, or statutes she interpreted.[150] Thus, they are best understood as efforts to maintain a pluralist structure to American federalism, one that will allow sufficient play in the joints and overlapping jurisdiction so that all sovereignties are afforded an opportunity to weigh in with policy judgments. In short, understanding Justice Ginsburg's pluralist jurisprudence creates a way of interpreting these cases as part of a broader approach to the interaction of legal systems.

C. Deference to International and Transnational Law and Process

Of course, principles of deference are often easier in domestic cases because, although federalism opens up a wide range of structural pluralism, both state and federal governments sit within one constitutional system. This Section turns to Justice Ginsburg's attitude towards foreign law as interpreted and applied by courts and tribunals from around the world. Here, Justice Ginsburg showed her willingness to learn from foreign judges, her interest in comparative examples, and her efforts to build deferential principles into cases with transnational implications. Yet, at the same time, Justice Ginsburg believed that foreign law cannot displace core U.S. constitutional principles when U.S. officials act abroad. Thus, both foreign norms and U.S. norms operate in an active relationship.

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144 *Id.* at 235 (Stevens, J., concurring in part and dissenting in part).

145 *Id.* at 222 (majority opinion).

146 *Id.* at 221–22 (quoting 49 U.S.C. app. § 1305(a)(1)).

147 *Id.* at 228.

148 *Id.* at 233.

149 *Id.* at 228–29.

150 *See, e.g.*, Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1657–58 (1998) (criticizing the decision).

Justice Ginsburg was interested in comparative law from the beginning of her career. As an academic, she attended multiple gatherings of the International Academy of Comparative Law.[151] She also was affiliated with the Columbia Law School Project on International Procedure, was a member of the American Foreign Law Association, and served from 1964 to 1972 on the Board of Editors of the American Journal of Comparative Law.[152] These experiences, she later stated, "powerfully influenced" her work as a lawyer, law professor, and judge.[153]

Perhaps for this reason, she often looked to foreign law in a way that emphasized the ongoing interaction of legal systems in dialogue with each other:

> [M]y own view is simply this: If U.S. experience and decisions may be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so too can we learn from others now engaged in measuring ordinary laws and executive actions against fundamental instruments of government and charters securing basic rights.[154]

Of course, as she recognized, political, historical, and cultural contexts vary from country to country, and so the fit from system to system is imperfect. But that should not, she argued, "lead us to abandon the effort to learn what we can from the experience and wisdom foreign sources may convey."[155]

In 2011, Justice Ginsburg went so far as to predict that the U.S. Supreme Court would over time more assiduously follow the lead of the Declaration of Independence by according "'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility."[156] Note those two words: comity and humility. Both were core to Justice Ginsburg's pluralist jurisprudence. By invoking comity, she recognized that "projects vital to our wellbeing—combating international terrorism is a prime example—require trust and cooperation of nations the world over."[157] And by focusing on humility, she sug-

151 *See* Ruth Bader Ginsburg, Introductory Remarks, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 26 AM. U. INT'L L. REV. 927, 927 (2011).

152 *Id.*

153 *Id.*

154 *Id.* at 929.

155 *Id.* at 931.

156 *Id.* at 933–34 (alteration in original).

157 *Id.* at 934.

gested that legal systems should not see themselves as sealed off and unable to learn from the innovations that may exist elsewhere.[158] Thus, judges may gain wisdom and learn from the experimentation of others. This is one of the core reasons that pluralist processes may sometimes be preferable to more jurispathic approaches.[159]

Justice Ginsburg's pluralist perspective regarding the need to accommodate foreign legal processes carried over to cases involving the interlocking day-to-day functions of courts transnationally. For example, in *Intel Corp. v. Advanced Micro Devices, Inc.*,[160] Justice Ginsburg, writing for the Court, broadly interpreted a federal statute that permits a party in a foreign or international tribunal to seek discovery in federal district courts from persons subject to the federal courts' jurisdiction.[161] Significantly, Justice Ginsburg rejected the broad exception urged by Intel that federal courts should not permit such discovery if the foreign court could not itself have obtained such discovery under its local laws.[162] Instead, she reasoned that the foreign court's inability or refusal to order discovery itself says nothing about whether it would be happy to receive assistance from a U.S. court that is willing to do so.[163] Thus, a blanket prohibition on such discovery might actually thwart the wishes of the foreign jurisdiction.[164] Instead, she wrote, the best way to effectuate the aim of helping with the discovery needs of foreign jurisdictions is to permit—without requiring—such discovery, instead of imposing categorical limitations.[165] Of course, as in many Ginsburg opinions, she emphasized that district judges retain discretion to refuse or limit discovery based on a myriad of factors particular to each case.[166] But she refused to place broad prohibitions on such intersystemic discovery and thereby cabin such case-by-case discretion. In the end, this approach allowed both the foreign court and the U.S. court to engage in dialogue without categorical rules either requiring or preventing discovery.

Another key aspect of intersystemic interaction is the principle that one should not be able to evade local law simply by relocating. As

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158 *See id.*

159 *See* Berman, *supra* note 22, at 1190–91.

160 542 U.S. 241 (2004).

161 *Id.* at 246–47.

162 *Id.* at 261–62.

163 *See id.* at 261 ("A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts.").

164 *See id.* at 262.

165 *See id.* at 264–65.

166 *See id.*

shown above, Justice Ginsburg was clear that, at least in the domestic context, there can be no broad public policy exceptions to the Full Faith and Credit Clause in order to prevent such evasion. But what about regulatory evasion in the transnational context, where there is no constitutionally mandated Full Faith and Credit Clause? This issue can arise if a litigant relocates abroad, but even more controversially when a U.S. governmental official acts abroad in ways that would be impermissible under the U.S. Constitution.

In this long-running debate about whether "the Constitution follows the flag,"[167] Justice Ginsburg took the position that U.S. officials cannot evade constitutional limitations by acting abroad rather than on U.S. soil. For example, in *DKT Memorial Fund Ltd. v. Agency for International Development*,[168] she wrote: "[J]ust as our flag 'carries its message . . . both at home and abroad,' so does our Constitution and the values it expresses."[169] Accordingly, she concluded, "wherever the United States acts, it can only act in accordance with the limitations imposed by the Constitution."[170] Similarly, in *United States v. Balsys*,[171] Justice Ginsburg argued that "the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct generally to be followed by our Nation's officialdom" and "should command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign."[172]

Finally, it is significant that Justice Ginsburg cited, with approval, the intriguing decision in *United States v. Tiede*.[173] In *Tiede*, a foreign national accused of hijacking a Polish aircraft abroad was tried under German substantive law in Cold War Berlin in a court created by the United States.[174] The U.S. court held that, despite the use of German substantive law, the foreign national was entitled to a jury trial as a matter of U.S. constitutional right because the U.S. court must act in accordance with the Constitution even when situated beyond U.S. ter-

167 *See generally, e.g.*, KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009) (tracing the history of debate about whether the U.S. Constitution's commands apply outside the physical borders of the United States).

168 887 F.2d 275 (D.C. Cir. 1989).

169 *Id.* at 307–08 (Ginsburg, J., concurring in part & dissenting in part) (alteration in original) (citing Texas v. Johnson, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting)).

170 *Id.* at 308 (internal quotation marks omitted).

171 524 U.S. 666 (1998).

172 *Id.* at 701–02 (Ginsburg, J., dissenting).

173 86 F.R.D. 227 (U.S. Ct. Berlin 1979); *see DKT Mem'l Fund*, 887 F.2d at 308 (Ginsburg, J., concurring in part & dissenting in part).

174 *Tiede*, 86 F.R.D. at 228–29.

ritorial borders.[175] According to the court, "It is a first principle of American life—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution."[176] Thus, Justice Ginsburg appears to have taken very seriously the idea that the U.S. government is bound by the U.S. Constitution even beyond its borders.

All of these different aspects of Justice Ginsburg's transnational jurisprudence had a common theme: the desire to maintain a functioning global legal order characterized by respect among different systems, productive interaction among those systems, and the maintenance of cooperative efforts to cut off regulatory evasion while recognizing difference. These are core aspects of a pluralist cross-border jurisprudence. Indeed, Justice Ginsburg's background as a comparative proceduralist made her well positioned to articulate how this sort of intersystemic perspective might work in day-to-day legal decisions.

Conclusion

It is difficult, of course, to pick out a handful of cases from decades of jurisprudence in order to spot trends. And there is always the danger of cherry-picking those cases that seem to support a thesis, while ignoring other decisions that might point in a different direction. Moreover, each case presents different facts and different substantive law contexts, making broad generalizations inherently problematic.

Nevertheless, a pronounced preference for legal pluralist approaches can be discerned in Justice Ginsburg's scholarship and in her judicial opinions. When faced with questions involving the interaction of legal systems, Justice Ginsburg often chose a path that emphasized mutual accommodation, deference, and the opportunity for different systems to pursue their processes and speak to an issue. Justice Ginsburg eschewed bright-line rules that closed off avenues through which a system might be allowed to articulate its norms, and she bent over backward to seek Solomonic solutions that would effectuate multiple interests. In the international arena, she humbly sought wisdom abroad, aimed to accommodate foreign processes if possible, and made sure U.S. officials abroad followed constitutional commands.

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175 *Id.* at 244–51.

176 *Id.* at 244.

All of these jurisprudential paths aimed to make the United States a partner in the world system, not a hierarchically dominant voice.

Just as importantly, this analysis suggests that we can evaluate judicial opinions, legacies, and philosophies through the lens of legal pluralism. This interpretive lens focuses less on substantive outcomes or political labels such as liberal or conservative, and more on the way in which the judge understands his or her role in an interlocking, multijurisdictional legal tapestry. And given that judges inevitably face questions involving the interaction of legal systems, we can legitimately ask how each judge seeks to navigate the hybrid spaces that result. Thus, a pluralist framework provides an untapped means of considering jurisprudential legacies. In the case of Justice Ginsburg, an emphasis on mechanisms for managing pluralism illuminates tendencies in her judicial approach that otherwise may have escaped notice.