

# ROOTED: METAPHORS AND JUDICIAL PHILOSOPHY IN *ARTIS V. DISTRICT OF COLUMBIA*

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## ABSTRACT

This Article examines how the metaphors in judicial opinions reveal judicial theories of lawmaking and judicial philosophies. It does so through a close reading of Justice Ginsburg's majority opinion and Justice Gorsuch's dissenting opinion in *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).

*Artis* was about what the phrase "shall be tolled" means in the federal supplemental jurisdiction statute, 28 U.S.C. §1367. Does it pause the statute of limitations while a state-law claim is in federal court or keep it running? In holding that Congress used "stop the clock" tolling, an "off-the-shelf" legal device that pauses the statute of limitations, Justice Ginsburg's majority opinion uses conventional, mechanistic metaphors. Justice Gorsuch's dissent uses more elaborate, agrarian metaphors to argue that Congress used a stricter "grace period" version of tolling because "[w]hen Congress replants the roots of preexisting law in the federal code, this Court assumes it brings with it the surrounding soil."

This Article shows that Justice Ginsburg's mechanistic metaphors describe lawmaking like engineering and bespeak a mode of judicial interpretation based on purpose and precedent—while Justice Gorsuch's agrarian metaphors hark back to a pastoral conception of lawmaking and interpretation "rooted" in a mythical common-law history and tradition. It then compares Justice Ginsburg's more understated use of conventional metaphors to Justice Gorsuch's more performative metaphorical technique, arguing that their different rhetorical strategies reflect their different visions of lawmaking and interpretive philosophies. And it closes by showing how close attention to the metaphors they

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use can reveal the flaws in each approach.

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#### INTRODUCTION

The U.S. Supreme Court is sharply divided between Justices who favor interpretive approaches based on purpose and precedent and those who favor approaches rooted in history and tradition.<sup>1</sup> This division manifested itself in the figurative language used in the majority and dissenting opinions in the 2018 case *Artis v. District of Columbia*. That case interpreted the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367.<sup>2</sup> The Court's two opinions on this procedural issue employ different kinds of metaphors that bespeak different judicial philosophies and ideologies about the nature of law and the process of lawmaking. Justice Ginsburg's majority opinion uses straightforward mechanistic metaphors that suggest a pragmatic view of law based on purpose and precedent. Justice Gorsuch's dissenting opinion uses elaborate naturalistic metaphors that bespeak a commitment to a certain history and tradition.

The question in *Artis* was what happens to the statute of limitations when a

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1. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2450 (2022) (“The problems with elevating history and tradition over purpose and precedent are well documented.”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2325-26 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (explaining that the Framers “defined rights in general terms to permit future evolution in their scope and meaning”); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2176-79 (2022) (Breyer, J., dissenting) (explaining the pitfalls of a “near-exclusive reliance on history” and offering examples of when the Court has “misread” history in the past); *Brown v. Davenport*, 142 S. Ct. 1510, 1535 (2022) (Kagan, J., dissenting) (noting the inaccuracies risked when courts “play amateur historian”).

2. *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).

state-law claim filed in federal court based on supplemental jurisdiction is dismissed.<sup>3</sup> How long does the plaintiff have to refile the state-law claim in state court? The supplemental jurisdiction statute provides that the “period of limitations” for such claims “shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”<sup>4</sup> *Artis* considered whether that tolling provision meant that the state-law statute of limitations was paused or allowed to run while the claim was in federal court.<sup>5</sup>

The plaintiff, Stephanie Artis sued the defendant, the District of Columbia, in federal court, asserting both a federal claim (with federal question jurisdiction) and state-law claims (with supplemental jurisdiction).<sup>6</sup> When she filed her complaint, she had nearly two years left on her state-law statutes of limitations.<sup>7</sup> About two and a half years later, the federal court granted summary judgment on her federal claim and declined to exercise jurisdiction over her state-law claims—but it noted that she would “not be prejudiced . . . because 28 U.S.C. § 1367(d) provides for tolling of the statute of limitations during the period the case was here and for at least 30 days thereafter.”<sup>8</sup> Nonetheless, when Artis re-filed her state-law claims in the District of Columbia courts,<sup>9</sup> they saw it differently, ruling that her claims were time-barred.<sup>10</sup>

The U.S. Supreme Court had to choose between two readings of the tolling provision: the D.C. courts’ “grace period” reading which gave plaintiffs thirty days to re-file in state court; and Stephanie Artis’ “stop-the-clock” reading which gave plaintiffs thirty days *plus the time that was left on the statute of limitations when they first filed*.<sup>11</sup> The Court split 5-4 on this question. Justice Ginsburg, writing for the majority (joined by Justices Roberts, Breyer, Sotomayor, and Kagan), adopted the stop-the-clock reading.<sup>12</sup> Justice Gorsuch, writing for the dissent (joined by Justices Kennedy, Thomas, and Alito), would have adopted the grace-period reading.<sup>13</sup>

The two opinions differ not only in how they answered the question presented but in the figurative language they use to frame it. Justice Ginsburg’s majority opinion adopting the “stop the clock” reading of tolling describes Congress as

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3. *Id.* at 598.

4. 28 U.S.C. §1367(d).

5. *Artis*, 138 S. Ct. at 598.

6. *Id.* at 599.

7. *Id.*

8. *Id.* at 599-600 (quoting *Artis v. District of Columbia*, 51 F. Supp. 3d 135, 142 (D.D.C. 2014)).

9. District of Columbia courts function as State courts for purposes of § 1367. 28 U.S.C. § 1367(e).

10. *Artis*, 138 S. Ct. at 599-600 (citing *Artis v. District of Columbia*, 51 F. Supp. 3d 135, 142 (D.D.C. 2014)).

11. *Id.* at 601, 600 n.3.

12. *Id.* at 598.

13. *Id.* at 608-17 (Gorsuch, J., dissenting).

using an “off-the-shelf” legal “device” (tolling) that pauses the statute of limitations.<sup>14</sup> Justice Gorsuch’s dissent, which would have held adopted the thirty-day “grace period” version of tolling, describes the lawmaking process differently: “[w]hen Congress replants the roots of preexisting law in the federal code, this Court assumes it brings with it the surrounding soil.”<sup>15</sup>

This Article examines the import of these metaphorical choices. What difference does it make a difference that Justice Ginsburg uses mechanistic imagery while Justice Gorsuch uses naturalistic imagery? What difference does it make that Ginsburg’s use of metaphor is more conventional and understated, while Gorsuch’s is more performative and ornamental?

This Article proceeds in two parts. Part I begins with a brief explanation of metaphor and then canvasses the scholarly views of its role in legal discourse. Section I.A describes two more traditional, skeptical views of metaphor: that it is a deceptive supplement or, at best, a distracting ornament that obscures the rational core of legal reasoning. Section I.B then considers more recent, more favorable views of metaphor: that it is central to the formulation of abstract legal concepts and that it enables a productive tension that fuels the imaginative evolution of legal thought.

Part II uses that theoretical background to engage in close readings of the *Artis* opinions. It begins with a summary of Justice Ginsburg’s and Justice Gorsuch’s legal arguments (Section II.A) before turning to an analysis of their metaphorical approaches. Section II.B describes their different metaphoric subject matter—showing that Ginsburg’s mechanistic metaphors describe the law like a machine, suggesting a judicial philosophy based on progress, purpose, and precedent, while Gorsuch’s agrarian metaphors describe the law like a plant with roots, suggesting a judicial philosophy based on history and tradition. Section II.C examines the Justices’ different rhetorical techniques when deploying their chosen metaphors and the effects of those choices. Ginsburg’s understated use of largely conventional metaphors crafts a convincing majority opinion based on common sense and logical reasoning. But Gorsuch’s more performative rhetoric persuades, and perhaps has a more lasting influence, through its impressionistic invocation of a mythical tradition. Finally, Section II.D explores how each Justice’s metaphors exceed their control. Ginsburg’s mechanistic metaphors ironically highlight the role of human intervention in shaping the law. And Gorsuch’s agrarian metaphors only succeed to the extent that he can obscure the troubling implications of the traditions they invoke.

### I. METAPHORS IN LEGAL DISCOURSE

Like all discourse, legal discourse is full of metaphors and figurative language. “We live in a magical world of law where liens float, corporations reside, minds hold meetings, and promises run with the land. The constitutional landscape is dotted with streams, walls, and poisonous trees. And these wonderful

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14. *Id.* at 606-08.

15. *Id.* at 613-14 (Gorsuch, J., dissenting).

things are cradled in the seamless web of law.”<sup>16</sup>

Before considering how metaphor and figurative language operate in legal discourse, let me begin by describing how I am using those terms: a metaphor is a figure of speech where one object is described (explicitly or implicitly) in terms of another. It “involves a transfer of meaning from the word that properly possesses it to another word.”<sup>17</sup> According to Aristotle, “[m]etaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species, or on grounds of analogy.”<sup>18</sup>

I intend a broad meaning for the term “metaphor,” encompassing any figurative language that uses language appropriate for one thing to describe or draw a comparison to another thing.<sup>19</sup> Thus, my use of the terms “metaphor” and “metaphoric language” includes traditional metaphors (calling one thing by the name of another: “But, soft! What light through yonder window breaks? It is the east, and *Juliet is the sun*”).<sup>20</sup> It includes specific types of metaphor like personification (referring to a nonhuman in human terms: “Because I could not stop for Death— / He kindly stopped for me”)<sup>21</sup> or synecdoche (referring to something by the name of part of it: “I should have been a pair of ragged claws / Scuttling across the floors of silent seas”).<sup>22</sup> It also includes similes (which make otherwise implicit metaphorical comparisons explicit by using “like” or “as”: “The lights of the town and of the harbour and of the boats seemed like a phantom net floating there to mark something which had sunk”).<sup>23</sup> And it includes implied metaphors (where the comparison is implied by using descriptive terms for one thing to describe another: “Hope is the thing with feathers”).<sup>24</sup>

It is conventional to distinguish between living metaphors (those “offered & accepted with a consciousness of their nature as substitutes for their literal equivalents”) and dead metaphors (those that “have been so often used that

16. Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1053 (1989).

17. THOMAS McLAUGHLIN, *Figurative Language*, in CRITICAL TERMS FOR LITERARY STUDY 83 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995).

18. ARISTOTLE, THE BASIC WORKS OF ARISTOTLE 1476 (Richard McKeon ed., Random House 1941).

19. See generally, DAVID HILLS, *Metaphor*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017); WARD FARNSWORTH, FARNSWORTH’S CLASSICAL ENGLISH METAPHOR (2016).

20. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (emphasis added).

21. Emily Dickinson, *Because I Could Not Stop for Death* (479), available at <https://poets.org/poem/because-i-could-not-stop-death-479> [<https://perma.cc/9CQL-EEVS>] (last visited Oct. 2, 2022).

22. T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in PRUFROCK AND OTHER OBSERVATIONS (1917), available at <https://poets.org/poem/love-song-j-alfred-prufrock> [<https://perma.cc/4PRY-PP6B>] (last visited Oct. 2, 2022).

23. VIRGINIA WOOLF, TO THE LIGHTHOUSE 67 (Houghton Mifflin Harcourt 1981).

24. Emily Dickinson, *Hope Is the Thing with Feathers* (254), available at <https://poets.org/poem/hope-thing-feathers-254>, [<https://perma.cc/BYT4-5R25>] (last visited Oct. 2, 2022).

speaker & hearer have ceased to be aware that the words used are not literal”).<sup>25</sup> “She walks in beauty, like the night / Of cloudless climes and starry skies”<sup>26</sup> is a living metaphor; “this chair has arms” is a dead one. But it is a spectrum, and the difference between living and dead metaphors depends on context and usage, “the dead being sometimes liable, under stimulus of an affinity or a repulsion, to galvanic stirrings undistinguishable from life.”<sup>27</sup>

In short, metaphors are a form of figurative language that use language applicable to one thing to describe a different thing. Rhetoricians call the two parts of a metaphor the “tenor” (the thing being described) and the “vehicle” (the thing doing the describing).<sup>28</sup> In “Juliet is the sun,” “Juliet” is the tenor and “the sun” is the vehicle. The key feature of a metaphor—what distinguishes figurative language from literal language—is that it does not make literal sense. The tenor and the vehicle are unrelated.

It can help to distinguish metaphors from another kind of comparison that is common in legal discourse: analogies.<sup>29</sup> Whereas analogies assert that ‘this thing is like that thing’ (and so, in a legal context, they should be treated similarly), metaphors draw a comparison between the tenor and vehicle *without* asserting that they are alike.<sup>30</sup> The rhetorical and conceptual power of metaphors depends on the fact that the two are decidedly dissimilar and that the comparison does not make literal sense. Thus, while analogies are an accepted component of legal

25. HENRY WATSON FOWLER, *Metaphor*, in A DICTIONARY OF MODERN ENGLISH USAGE: THE CLASSIC FIRST EDITION 348-49 (Oxford Univ. Press 2009).

26. George Gordon Byron, *She Walks in Beauty* (1814) available at <https://poets.org/poem/she-walks-beauty> [<https://perma.cc/6LXT-QJ9W>] (last visited Oct. 2, 2022).

27. FOWLER, *supra* note 25, at 349.

28. I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 96 (Oxford Univ. Press 1965).

29. See, e.g., Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Angela Condello, *Metaphor as Analogy: Reproduction and Production of Legal Concepts*, 43 J.L. & SOC’Y 8 (2016); Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249 (2017); Brian N. Larson, *Law’s Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663 (2019). Although Aristotle considered analogies to be a type of metaphor (see *supra* note 18), most modern scholars distinguish the two.

30. See Sunstein, *supra* note 29, at 748 n.26 (“Consider the statement: ‘Abortion is murder,’ a statement that in the abstract, could be intended and received as a literal truth, a metaphor, or an analogy. If it is a metaphor, we know that the speaker believes that abortion is not literally murder, but is seeking to cast some light on the subject precisely by departing from literal description. (‘Holmes was a lion of the law.’ ‘Michael Jordan is God.’) But, if the statement is an analogy, the speaker is claiming, and should be understood to be claiming, that abortion really is murder in the relevant respects; there is no acknowledgement that the statement is literally untrue.”). But see Condello, *supra* note 29, at 25-26 (noting the “common ground of metaphor and analogy” and arguing that they share a similar poetic force in the law); DEDRE GENTNER ET AL., *Metaphor is Like Analogy*, in THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE 199, 243 (Dedre Gentner et al. eds., 2001) (arguing that metaphors are processed psychologically like analogies).

analysis<sup>31</sup> (indeed, analogies are inherent in the idea of precedent), metaphors—where the writer is always, in some sense, not saying what they mean—are viewed more skeptically.

#### *A. Skeptical Views of Metaphor*

Traditionally, scholars have distrusted metaphors in legal discourse. According to this skeptical view, metaphors do not help in the development of legal meaning or understanding, and their aesthetic and persuasive effects are misleading deceptions or, at best, entertaining distractions.

##### *1. Metaphors as Deception.—*

“[P]oetry makes nothing happen.”<sup>32</sup>

Skepticism about figurative language in reasoned discourse has a lengthy history. In Plato’s *Republic*, Socrates declares that “there is an ancient feud between philosophy and poetry,” and Plato famously bans all poets from his ideal city-state.<sup>33</sup> For Plato—who lived in a society where poetry (including theater and recitations of epic poetry) was understood to contain truthful lessons about personal conduct and governance—poetry was suspect for two related reasons. First, poetry is an “imitation” (*mimesis*) of reality; it is not an examination of reality itself (much less of the transcendental Truth of the Platonic forms, of which reality itself is a mere reflection). Poetry is an inaccurate reflection of reality—or at least less accurate than reason and philosophy. Second, poetry is actively misleading (“it is capable of corrupting, with few exceptions, even the good men”) because it elevates emotion, pleasure, and illogic over reason (“if you admit the honeyed muse, in the form of songs and epic verse, pleasure and pain will rule in our State instead of law and reason.”)<sup>34</sup>

This distrust has not disappeared since ancient times.<sup>35</sup> As literary theorist Paul de Man observes, “[m]etaphors, tropes, and figural language in general have been a perennial problem and, at times, a recognized source of embarrassment for

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31. See, e.g., LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2d ed. 2016). But see Brewer, *supra* note 29.

32. W.H. Auden, *In Memory of W.B. Yeats*, available at <https://poets.org/poem/memory-w-b-yeats> [<https://perma.cc/C4ZF-SSRW>] (last visited Oct. 2, 2022).

33. PLATO, *THE REPUBLIC* 575 (Alexander Kerr trans., Charles H. Kerr & Co. 1918). In *Sophist*, Plato warned that “a wolf is very like a dog, the wildest like the tamest of animals. But the cautious man must be especially on his guard in the matter of resemblances, for they are very slippery things.” PLATO, *SOPHIST*, in *PLATO IN TWELVE VOLUMES*, VOL. 12, 231a (Harold N. Fowler trans., Harvard Univ. Press; William Heinemann Ltd. 1921), available at <http://data.perseus.org/citations/urn:cts:greekLit:tlg0059.tlg007.perseus-eng1:231a> [<https://perma.cc/XS5V-DUMY>].

34. PLATO, *THE REPUBLIC*, *supra* note 33, at 572, 575.

35. See Raymond W. Gibbs Jr. & Josie Siman, *How We Resist Metaphors*, 13 *LANGUAGE AND COGNITION* 670 (2021), <https://www.cambridge.org/core/journals/language-and-cognition/article/abs/how-we-resist-metaphors/DDCA242235DEF4CC8B4785675E8AE6FA> [<https://perma.cc/8KXT-5L5Y>].

philosophical discourse and, by extension, for all discursive uses of language.”<sup>36</sup>

In the legal sphere, the distrust of metaphor is well established. Judge Cardozo famously warned that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>37</sup> As Judge Posner opined more recently: “The danger, when judges try to be literary is not that they will make pompous fools of themselves, though often they will, or make the worse appear the better cause. It is that they will muddy the law.”<sup>38</sup>

The skepticism about figurative language is shared by legal formalists and realists alike.<sup>39</sup> For formalists, figurative language distracts from the clarity of logical reasoning and textual analysis.<sup>40</sup> For realists, figurative language obscures the political, social, or economic realities underlying legal decisionmaking.<sup>41</sup> “When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.”<sup>42</sup>

## 2. *Metaphors as Ornamentation.*—

*“Perhaps ‘tis pretty to force together  
Thoughts so all unlike each other”*<sup>43</sup>

Another skeptical view of metaphors in legal discourse is that—while they may not be part of legal reasoning, per se—they serve an ornamental and thus a persuasive purpose. Since persuasion is part of the development of the law, this could be considered a positive feature, enabling more persuasive writing and communication.<sup>44</sup> But more often than not this version remains wary of

36. Paul de Man, *The Epistemology of Metaphor*, 5 CRITICAL INQUIRY 13, 13 (1978).

37. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926); *noted in* *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 182 (1998) (Souter, J., dissenting).

38. RICHARD A. POSNER, *LAW AND LITERATURE* 357 (Harvard Univ. Press 3d ed. 2009).

39. Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 187 (2004).

40. *Id.*

41. *Id.*

42. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

43. Samuel Taylor Coleridge, *Christabel* (1800), available at <https://www.poetryfoundation.org/poems/43971/christabel> [<https://perma.cc/6VZM-LZW3>] (last visited Oct. 5, 2022).

44. See, e.g., Tsai, *supra* note 39, at 190-95 (discussing the use of metaphor as part of the performative aspects of legal opinions); Benjamin L. Berger, *Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text*, 39 CT. REV.: J. AM. JUDGES ASS’N 30, 30 (Oct. 2002), <https://digitalcommons.unl.edu/ajacourtreview/133> [<https://perma.cc/GG6M-GL9N>] (“the judicial opinion is not just a reflection of an opinion and a representation of authority, but also a device that must persuade while maintaining the legitimacy of the legal system”).



metaphor's seductive ability to beguile.

Like the view of metaphor as deception, this view has a long history outside of the law. A classic example is found in John Locke's *An Essay Concerning Human Understanding*, in the chapter entitled "Of the Abuse of Words."<sup>45</sup> There—after first conceding that figurative language is useful “in discourses where we seek rather pleasure and delight than information and improvement”—Locke declares that “if we would speak of things as they are”:

all the artificial and figurative application of words eloquence hath invented, are for nothing else but to insinuate wrong ideas, move the passions, and thereby mislead the judgment; and so indeed are perfect cheats: and therefore . . . they are certainly, in all discourses that pretend to inform or instruct, wholly to be avoided; and where truth and knowledge are concerned, cannot but be thought a great fault, either of the language or person that makes use of them. . . .

It is evident how much men love to deceive and be deceived, since rhetoric, that powerful instrument of error and deceit, has its established professors, is publicly taught, and has always been had in great reputation: and I doubt not but it will be thought great boldness, if not brutality, in me to have said thus much against it. Eloquence, like the fair sex, has too prevailing beauties in it to suffer itself ever to be spoken against. And it is in vain to find fault with those arts of deceiving, wherein men find pleasure to be deceived.<sup>46</sup>

This view recognizes, but bemoans, the attractions of figurative language, viewing it “as a sort of happy extra trick with words . . . a grace or ornament or *added* power of language”<sup>47</sup>—to be distrusted, like an attractive member “of the fair[er] sex.”<sup>48</sup>

This skepticism about the ornamental function of metaphorical language is found in legal-writing guides which advocate using metaphors and figurative language sparingly for their persuasive effect, but caution against their overuse. For example, in *Point Taken: How to Write Like the World's Best Judges*, Ross Guberman collects choice examples of metaphors and similes from judicial opinions in a section entitled “The Words: ‘Nice-to-Haves’ in Style” (by contrast with the previous section entitled “The Words: Style Must Haves,” which covers syntactical strategies aimed at clarity and readability).<sup>49</sup> When it comes to

45. JOHN LOCKE, *Of the Abuse of Words*, in AN ESSAY CONCERNING HUMAN UNDERSTANDING bk.3, ch.X, ¶34 (1690).

46. *Id.*

47. See RICHARDS, *supra* note 28, at 90.

48. LOCKE, *supra* note 45, at bk.3, ch.10, ¶34. Locke's metaphoric comparison of rhetoric and its beauties with “the fair sex” is not only ironic. It underscores how he aligns literal language and plain speech with masculine rationality and figurative language and eloquence with the siren song of feminine seduction.

49. ROSS GUBERMAN, *POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES* 157,

metaphors and other figurative linguistic devices, Guberman advises that such devices are “nonessential ‘nice to haves’ that make an opinion not just easy and even enjoyable to read, but provocative and even enduring,” but cautions that “[l]ess is more, and for most opinions, you’ll do well to include just a single burst of creativity drawn from just one of the techniques in this section.”<sup>50</sup>

### *B. Favorable Views of Metaphor*

There are more favorable views of the function of figurative language in legal discourse. These views reject the idea that metaphor is only deceptive or ornamental. They posit instead that metaphors help shape mental concepts and thus help formulate legal ideas. Metaphor is not only “a peculiar or aberrant form of naming things” after other things but also “a potentially logical act of predication attributing a [meaningful] resemblance.”<sup>51</sup> The idea is that metaphors are inherent in human cognition and allow us to consider ideas and concepts in ways that we could not conceive of without them.

To explain how this happens, it helps to examine further how metaphors work, particularly the relationship between the tenor and the vehicle. As explained above, metaphors do not make literal sense because the tenor and vehicle are unrelated. They come from different contexts. As I.A. Richards put it, a metaphor is a “transaction between contexts.”<sup>52</sup> It is that transaction that enables new meanings and implications to be created.

One influential way of understanding that transaction between contexts is based on the distinction between metaphor and metonymy.<sup>53</sup> Metonymy is another kind of figurative language which entails calling something by the name of something associated with it: using “ears” to mean “listening attention” in “Lend me your ears;” calling the judiciary “the bench”; or calling the presidency “the White House.”<sup>54</sup>

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235 (2015) (Part five The Words: “Nice-to-Haves” in Style / It Is What It Is: Metaphors).

50. *Id.* at 163, 237.

51. PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 105 (1987).

52. RICHARDS, *supra* note 28, at 94.

53. See ROMAN JAKOBSON, *The Metaphoric and Metonymic Poles*, in ROMAN JAKOBSON & MORRIS HALLE, *FUNDAMENTALS OF LANGUAGE* (1956), *reprinted in* *CRITICAL THEORY SINCE PLATO* 1041-44 (Hazard Adams ed., Revised ed. 1992). The structural distinction between metaphor and metonymy is based on the work of psychological linguist and literary critic Roman Jakobson. *Id.* Jakobson understood metaphor and metonymy not just as rhetorical tropes but as the fundamental features of language and cognition. *Id.* He observed that when children were asked to free associate one word based on a prompt, they tended to provide a word that was either a metaphoric substitute for or metonymic association with the prompt. *Id.* at 1042. He also noted that different varieties of aphasia (the psychological syndrome of inability to speak) seemed to be impairments of either the metaphoric associative faculty or the metonymic associative faculty. *Id.* at 1041.

54. As explained further below, metonymy can be considered a type of metaphor, but it can also be distinguished from metaphor, because metonymy is built on a pre-existing association between the things being compared, whereas metaphor is based on creating a new comparison

Metonymy differs from metaphor because it describes one thing in terms of another thing with which it is *already* associated. Unlike metaphor, which brings together things from unrelated contexts, metonymy “accomplishes its transfer of meaning on the basis of associations that develop out of [*i.e.*, within] specific contexts.”<sup>55</sup> For example, referring to a monarch as the “head of state” is a metaphor based on a comparison between the political and bodily contexts. Referring to a monarch as “the crown” is a metonymy, based on the pre-existing association between monarchs and the crowns they wear.

The relationship between metaphor and metonymy is often understood through a spatial analogy.<sup>56</sup> Metaphor is said to operate along a vertical axis, because it highlights similarities between two things (the tenor and vehicle) from two different (vertically distinct) contexts. Metonymy is said to operate on a horizontal axis, based on a pre-existing (horizontal) chain of associations between related things within the same context.<sup>57</sup>

This basic model explains how metaphors can enable new concepts. By creating a connection between things in different contexts, metaphor enables writers and readers to think of one thing (the tenor) in terms of the metonymic associations that apply to the other thing (the vehicle). The metaphor brings along the metonymic associations from one context to the other.<sup>58</sup>

*1. Metaphors as Concepts.—*

“*[P]oetry is not a luxury. . . . Poetry is the way we help give name to the nameless so it can be thought.*”<sup>59</sup>

One favorable view of metaphor understands it as a tool for making abstract concepts more comprehensible. This conceptual view posits that human beings understand unfamiliar, abstract concepts through metaphors comparing them to familiar, concrete objects and relations. Because so many of the concepts that are important to us are either abstract or not clearly delineated in our experience (emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, physical objects, etc.).<sup>60</sup> Metaphor “carries the reader from a world of common objects,

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between unassociated things. *See id.*

55. MCLAUGHLIN, *supra* note 17, at 83.

56. *See* JAKOBSON, *supra* note 53, at 1041-44.

57. *Id.*

58. The word “metaphor” is derived from the Greek word “*metaphora*,” meaning “a transfer,” or literally “a carrying over” or “translation.” *See* ANDREAS T. ZANKER, GREEK AND LATIN EXPRESSIONS OF MEANING: THE CLASSICAL ORIGINS OF A MODERN METAPHOR 164-90 (2017), available at <http://books.openedition.org/chbeck/1609> [<https://perma.cc/ZXJ9-SGP9>].

59. AUDRE LORDE, *Poetry Is Not A Luxury*, reprinted in *SISTER OUTSIDER: ESSAYS AND SPEECHES* (1984).

60. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 115 (Univ. of Chi. Press 1980).

and their attendant qualities, to the realm of ideas.”<sup>61</sup>

Scholars from literary theorists to linguists to cognitive scientists have theorized that this conceptual metaphorical thinking—using concrete, physical metaphors to understand abstract concepts—is an inherent part of human cognition.<sup>62</sup> Cognitive scientists believe that “human thought is grounded in physical experience and extended by means of idealized cognitive models and metaphoric projections.”<sup>63</sup> Lakoff and Johnson have famously found that these “conceptual metaphors” are “one of the central devices” we use to engage in abstract thought.<sup>64</sup> A conceptual metaphor “involves a conceptual mapping from a highly structured source domain, typically some sensory-motor domain, to a less highly structured target domain, typically some abstract notion, such as justice, freedom, or mind.”<sup>65</sup> Or, in traditional rhetorical terms, we use metaphors about physical objects (the vehicle) to conceptualize abstract ideas (the tenor).<sup>66</sup> Or, in the linguistic terms introduced above, we use metonymic associations from a concrete context to conceptualize ideas from an abstract context.

Relatedly, through clinical experiments and observations of childhood development, psychologists have identified widely held “primary metaphors” whereby abstractions are understood through physical, embodied experiences like: “Affection Is Warmth” (“I received a warm reception in Norway”); “Bad Is Stinky” (“Something smells fishy with this contract”); and “Knowing Is Seeing” (“I finally see the answer to our problem”).<sup>67</sup> These primary conceptual metaphors seem to be unconscious and widely shared within a given cultural context.<sup>68</sup> Then, “[t]hrough various types of blending and composition” of different conceptual metaphors, “we develop vast coherent systems of metaphorically defined concepts.”<sup>69</sup> Ultimately, “all of the key concepts in [a host of] disciplines [including law] are defined by multiple, often inconsistent, metaphors, and we reason using the internal logic of those metaphors.”<sup>70</sup> Such conceptual metaphors

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61. Berger, *supra* note 44, at 34.

62. See, e.g., RICHARDS, *supra* note 28, at 91 (“[H]istorians of language have long taught that we can find no word or description for any of the intellectual operations which, if its history is known, is not seen to have been taken, by metaphor, from a description of some physical happening.”); JAKOBSON, *supra* note 53; JAMES GEARY, I IS AN OTHER 23-28 (2011) (describing fundamental physical metaphors); *id.* at 35 (“Pattern recognition is the most primitive form of analogical reasoning, part of the neural circuitry for metaphor.”); see also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1384 nn. 70-74 (1988).

63. Winter, *supra* note 62, at 1384-85; see also LAKOFF & JOHNSON, *supra* note 60, at 14-19.

64. Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 856 (2007).

65. *Id.*

66. See, e.g., Winter, *supra* note 62, at 1388-89 (explaining how metaphor enables us to conceptualize the abstract concept of legal standing (the tenor) through the image of a litigant physically standing to be heard in a courtroom (the vehicle)).

67. Johnson, *supra* note 64, at 859-63.

68. *Id.* at 863-64.

69. *Id.* at 864.

70. *Id.* at 865.

are so ingrained in our thought processes that we often do not think of them as metaphors at all. They seem like literal statements or dead metaphors, until we pay close attention and recognize the associations bound up with them.

The idea of cognitive conceptual metaphors is not foreign to legal theory. Over 100 years ago, Wesley Hohfeld observed that “as regards legal terminology,” “many of our words were originally applicable only to physical things; so that their use in connection with legal relations is, strictly speaking, figurative or fictional.”<sup>71</sup> As others have put it, because “legal thought often operates in the realm of the abstract,” legal writing often turns to metaphors “to bridge the abstract and concrete, using elements of similarity to effect a seemingly natural appeal to common sense, and to mold the future development of jurisprudence.”<sup>72</sup>

Many famous legal metaphors seem to follow this pattern: the “fruit of the poisonous tree,” the “wall of separation between church and state,” and the “chilling effect” of various legal rules.<sup>73</sup> Scholars have pointed out how concrete physical metaphors underlie foundational legal understandings like property as a bundle of sticks,<sup>74</sup> tort law as a lottery,<sup>75</sup> intellectual property,<sup>76</sup> and standing to sue.<sup>77</sup> And, while the meanings of such concepts are now generally fixed and accepted, their initial formation enabled and guided a certain type of understanding of otherwise abstract ideas.<sup>78</sup>

## 2. Metaphors as Imagination.—

“[I]maginary gardens with real toads in them”<sup>79</sup>

A somewhat different favorable view of metaphoric language in legal discourse is that it enables understanding not by simplifying abstract ideas into

71. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 24 (1913) (citation omitted). For Hohfeld, this figurative basis caused “much of the difficulty” with legal terminology, and he sought to strip it away when he found it misleading. *Id.*

72. Berger, *supra* note 44, at 34, 30.

73. See generally HAIG A. BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992).

74. See, e.g., Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869 (2013).

75. See, e.g., Timothy D. Lytton et al., *Tort as a Litigation Lottery: A Misconceived Metaphor*, 52 B.C. L. REV. 267 (2011).

76. See Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 673 n.53 (2010).

77. Winter, *supra* note 62, at 1371.

78. James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984); see generally Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRS. 169 (2004); BOSMAJIAN, *supra* note 73.

79. Marianne Moore, *Poetry* (1919), available at <https://poets.org/poem/poetry> [<https://perma.cc/QU4Y-WE7P>].

something concrete but by complicating ideas and freeing thinking. According to this imaginative view of metaphor, the tension found in every metaphor—the ongoing mismatch between the tenor and the vehicle—makes metaphorical language inescapable and invaluable in legal discourse.<sup>80</sup>

Like the conceptual view, this view understands metaphor as a fundamental aspect of human cognition. But, while the conceptual view focuses on conventional metaphors that structure everyday thought, the imaginative view focuses on novel metaphors that enable new ways of thinking.<sup>81</sup> Unlike the conceptual view—that conventional metaphors conform new ideas to pre-existing conceptual patterns in a Procrustean fashion—the imaginative view traces the power of metaphor to the fact that the fit between new and old is never quite right. The two ideas being metaphorized to one another always exceed and conflict with one another. And that conflict spurs imagination, enabling us to conceive of new concepts.

According to philosopher Paul Ricoeur, metaphors give rise to new ways of thinking through a simultaneous two-step process that he calls “split reference.”<sup>82</sup> First, metaphors enact “a suspension and seemingly an abolition of the ordinary reference attached to descriptive language.”<sup>83</sup> Then they create a “second-order” reference, “an indirect reference built on the ruins of the direct reference.”<sup>84</sup> That is to say, by asserting that two different things are alike (which is not literally true), a metaphor requires the reader to suspend literal reasoning and search for another way for the metaphor to make sense. But—unless the metaphor has lost all trace of its original meaning and become a dead metaphor—some trace of the original tension, the improper fit between the tenor and vehicle remains. That conceptual tension opens up a space for new ways of thinking about an idea and the (always incomplete) resolution of that tension results in a new way of thinking.

One sign of the power of metaphors to form new concepts is the fact that novel metaphors seem to be particularly prevalent in judicial opinions when the law is changing, when it is shifting registers. “A critical component of the judge’s linguistic toolbox is metaphor and . . . this device is most necessary and effective at these turning points in law.”<sup>85</sup>

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80. See Murray, *supra* note 78, at 715-16.

81. Although they focus mostly on conceptual metaphors discussed above, Lakoff and Johnson also recognize the effect of novel metaphors. LAKOFF & JOHNSON, *supra* note 60, at 157-58 (“New metaphors, like conventional metaphors, can have the power to define reality. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which forces us to focus *only* on those aspects of our experience that it highlights, leads us to view the entailments of the metaphor as being *true*. Such ‘truths’ may be true, of course, only relative to the reality defined by the metaphor.”).

82. Paul Ricoeur, *The Metaphorical Process as Cognition, Imagination, and Feeling*, 5 CRITICAL INQUIRY 143, 153 (1978).

83. *Id.*

84. *Id.*

85. Berger, *supra* note 44, at 30.

An even more forceful version of this imaginative view is articulated by Paul de Man. As noted above, de Man recognized that figurative language is a “perennial problem” and “source of embarrassment” for discursive communication.<sup>86</sup> For de Man, metaphors and figurative language are inescapable.<sup>87</sup> They crop up in any attempt at communicative discourse, because figural language underlies all attempts at communication—and not just in the conceptual sense where established physical metaphors structure our thinking, and not just in Ricouer’s sense where novel metaphors simultaneously undermine literal sense and give rise to new meanings.<sup>88</sup> For de Man, that is because figurative language always evades authorial control—and discourses that try to eliminate figurative language or to cabin it by speaking rationally inevitably reproduce the very metaphoric processes they seek to avoid.<sup>89</sup>

Thus, for example, when de Man reads the passage from Locke’s “Of the Abuse of Words” quoted above,<sup>90</sup> he observes that “[n]othing could be more eloquent than this denunciation of eloquence,” and he traces out the passage’s extended metaphor likening figurative language to a seductive, misleading woman.<sup>91</sup> He concedes that such an obvious extended metaphor is unlikely to mislead readers.<sup>92</sup> But he goes on to identify more subtle metaphors throughout Locke’s essay—language as a pipe or conduit, translation as motion, etc.—and to observe that “one may wonder whether the metaphors illustrate a cognition or if the cognition is not perhaps shaped by the metaphors.”<sup>93</sup> As he (metaphorically, of course) explains it:

We have no way of defining, of policing, the boundaries that separate the name of one entity from the name of another; tropes are not just travellers, they tend to be smugglers and probably smugglers of stolen goods at that. What makes matters even worse is that there is no way of finding out whether the do so with criminal intent or not.<sup>94</sup>

Thus, for de Man, not only is metaphor an inevitable part of communication and conception (à la Lakoff and Johnson), and not only does it open up new possible conceptions (à la Ricouer), but we have little control, try as we might, over those new conceptions. Metaphors—which, again, we cannot avoid—bring over metonymic associations from one context to another, whether we want them to or not.

Ultimately, for de Man, any Lockean attempt to “speak of things as they are” becomes a discussion of *how* we speak of them: “not a question of ontology, of

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86. de Man, *supra* note 36, at 13.

87. *Id.*

88. *Id.*

89. *Id.* at 23-29.

90. LOCKE, *supra* note 45.

91. de Man, *supra* note 36, at 15-16.

92. *Id.* at 16.

93. *Id.* at 16.

94. *Id.* at 19.

things as they are, but of authority, of things as they are decreed to be.”<sup>95</sup> Metaphors both enable us to imagine new ideas and also shape and reveal how we do that imaginative work.

## II. READING *ARTIS V. DISTRICT OF COLUMBIA*

### A. Legal Argument in *Artis*

Turning to the *Artis* opinions, let us begin by focusing only on their legal and interpretive arguments, leaving aside (as much as possible) the Justices’ use of metaphorical language.

In 1990, Congress adopted 28 U.S.C. § 1367 – Supplemental Jurisdiction by adapting the judge-made doctrines of pendent and ancillary jurisdiction to grant federal district courts jurisdiction over certain state law claims.<sup>96</sup> Under subsection (a) of § 1367, district courts have supplemental jurisdiction to hear state law claims if they “form part of the same case or controversy” as a claim with federal jurisdiction.<sup>97</sup> Thus, when one incident gives rise to both state law claims and federal law claims, district courts may usually exercise jurisdiction over both. However, under § 1367(c), district courts may decline to exercise supplemental jurisdiction in certain circumstances, such as when the state-law issues are more substantial or complicated than the federal-law issues or, most commonly, when the federal-law claims have been dismissed.<sup>98</sup>

When district courts decline to exercise supplemental jurisdiction, plaintiffs are free to refile their state-law claims in state court.<sup>99</sup> But, if the state-law statute of limitations had expired while a plaintiff’s claims were pending in federal court, then those claims could be time-barred.<sup>100</sup> To avoid this unfairness, Congress included a tolling provision in § 1367(d):

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.<sup>101</sup>

In *Artis*, the plaintiff Stephanie Artis was a health inspector employed by the District of Columbia.<sup>102</sup> Thirteen months after she was fired, she sued the District in federal court.<sup>103</sup> She alleged a violation of Title VII of the Civil Rights Act of

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95. *Id.* at 15, 19.

96. Judicial Improvements Act of 1990, Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified as amended in scattered sections of 28 U.S.C.).

97. 28 U.S.C. § 1367(a).

98. 28 U.S.C. § 1367(c).

99. *See Artis v. District of Columbia*, 138 S. Ct. 594, 598-99 (2018).

100. *Id.* at 599 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 352 (1988)).

101. 28 U.S.C. § 1367(d).

102. *Artis*, 138 S. Ct. at 599.

103. *Id.*



1964,<sup>104</sup> a federal-law claim over which the federal court had federal-question jurisdiction.<sup>105</sup> And she alleged three related violations of D.C. law (the D.C. Whistleblower Act,<sup>106</sup> the D.C. False Claims Act,<sup>107</sup> and wrongful termination against public policy under D.C. common-law), which were state-law claims over which the federal court had supplemental jurisdiction.<sup>108</sup> When she first brought suit, Artis had almost two years left on the three-year state-law statutes of limitations.<sup>109</sup> Two and a half years later, the federal court granted summary judgment against Artis on her federal-law claim and then dismissed the state-law claims.<sup>110</sup> Fifty-nine days after that, Artis re-filed her state-law claims in the D.C. Superior Court.<sup>111</sup> But the D.C. Superior Court held, and the D.C. Court of Appeals affirmed, that her claims were time barred because § 1367(d) only gave her thirty days to refile in state court, rejecting her argument that the word “tolled” in § 1367(d) meant that the limitations period had been paused while her claims were in federal court.<sup>112</sup>

The U.S. Supreme Court granted certiorari to resolve a conflict between two readings of the § 1367(d) tolling provision: the D.C. courts’ “grace period” reading (adopted by the high courts of D.C., California, and the Northern Mariana Islands) under which plaintiffs have thirty days to re-file their claims in state court after they have been dismissed from federal court; and Stephanie Artis’ “stop-the-clock” reading (adopted by the high courts of Maryland and Minnesota, and by the Sixth Circuit) under which plaintiffs have thirty days *plus the time that was left on the statute of limitations when they first filed* to re-file their claims in state court after they have been dismissed from federal court.<sup>113</sup> As Justice Ginsburg paraphrased it:

Does the word “tolled,” as used in § 1367(d), mean the state limitations period is suspended during the pendency of the federal suit; or does “tolled” mean that, although the state limitations period continues to run, a plaintiff is accorded a grace period of 30 days to refile in state court post dismissal of the federal case?<sup>114</sup>

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104. Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e to 2000e-17).

105. *Artis*, 138 S. Ct. at 599.

106. D.C. CODE § 1-615.54 (2001).

107. *Id.* § 2-381.04.

108. *Artis*, 138 S. Ct. at 599. For purposes of supplemental jurisdiction, claims under District of Columbia, Puerto Rico, and territorial laws are considered state-law claims. 28 U.S.C. § 1367(e).

109. *Artis*, 138 S. Ct. at 600. Two of Artis’ state-law claims had three-year statutes of limitations; her whistleblower claim had a one-year statute of limitations, but the parties disputed when it began. *Id.* at n.2.

110. *Id.* at 599-600. Federal courts may decline to exercise supplemental jurisdiction over state law claims in some situations, including when “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. 1367(c).

111. *Artis*, 138 S. Ct. at 600.

112. *Id.*; *see* 28 U.S.C. 1367(d).

113. *Artis*, 138 S. Ct. at 600 n.3.

114. *Id.* at 598.

In her majority opinion, Justice Ginsburg adopted the first reading, holding that “toll” means “pause” in this context, and thus, the state statute of limitations period is suspended during the pendency of a federal suit, leaving plaintiffs whatever time remained on the state statute of limitations plus the thirty-day grace period to refile their claims in state court.<sup>115</sup> She called this the “stop the clock” reading.<sup>116</sup>

In his dissent, Justice Gorsuch would have held that “toll” meant “take away” or “bar” in this context and thus that §1367(d) should remove the effect of the state statute of limitations rather than pause it, leaving plaintiffs only the thirty-day grace period to refile their claims in state court.<sup>117</sup> He called this the “grace period” approach.<sup>118</sup>

Both opinions begin with definitions of the word “toll.” Justice Ginsburg relies on the ordinary legal usage of “toll” and “toll” in “the context of a time prescription like § 1367(d).”<sup>119</sup> She quotes Black’s Law Dictionary which states that toll, “when paired with the grammatical object ‘statute of limitations,’ means ‘to suspend or stop temporarily.’”<sup>120</sup> She cites federal and state statutes employing that stop-the-clock reading<sup>121</sup> and notes that neither the District of Columbia courts nor the dissent identify a single a federal statute using “toll” or “toll” to mean “something other than ‘suspended,’ or ‘paused,’ or ‘stopped.’”<sup>122</sup> She collects Supreme Court opinions showing that her reading and the stop-the-clock approach are “generally applied in federal courts.”<sup>123</sup>

Justice Gorsuch uses general-purpose dictionaries defining “toll” to mean things like “bar, defeat, [or] annul” and “to take away; to vacate; to annul” to reason that “when a statute speaks of tolling a limitations period it can, naturally enough, mean *either*” pausing or eliminating the statute of limitations.<sup>124</sup> Gorsuch points to *Chardon v. Fumero Soto* as a case where the Court recognized both possible understandings of the term “tolling effect.”<sup>125</sup> He argues that both the

115. *Id.*

116. *Id.*

117. *Id.* at 608-09 (Gorsuch, J., dissenting).

118. *Id.* at 609.

119. *Id.* at 601 (majority opinion).

120. *Id.* (quoting BLACK’S LAW DICTIONARY 1488 (6th ed. 1990)).

121. *Artis*, 138 S. Ct. at 601, n.4.

122. *Id.* at 602-03.

123. *Id.* at 601-02 (citing *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 560-61 (1974); *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014); *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam)). Justice Ginsburg did acknowledge a single Supreme Court case, *Hardin v. Straub*, “characterized a state statute providing a one-year grace period as ‘tolling’ or ‘suspend[ing]’ the limitations period ‘until one year after the disability has been removed.’” *Id.* at 603 (quoting *Hardin v. Straub*, 490 U.S. 536, 537 (1989)) (alterations in original). But she described that “atypical use” of “tolling” as “a feather on the scale against the weight” of the many decisions using the stop-the-clock reading. *Id.*

124. *Id.* at 609 (Gorsuch, J., dissenting) (citations omitted).

125. *Id.*

stop-the-clock and the grace-period approaches were used at common law, but for different things.<sup>126</sup> He posits that the stop-the-clock approach was mostly used when the “plaintiff was prevented from coming to court due to some disability,” while the grace-period approach was “commonly used in cases where, as here, the plaintiff made it to court in time but arrived in the wrong court and had to refile in the right one.”<sup>127</sup> According to Gorsuch, the grace-period approach finds its “roots in a common law rule known as the ‘journey’s account’” which, in 17th century England, gave parties who had filed in the wrong court the number of days they needed to travel to the correct court.<sup>128</sup>

Justices Ginsburg and Gorsuch both also consider statutory context. Ginsburg rejects Gorsuch’s (and the District of Columbia Court of Appeals’) view that “tolled” here means to “remove or take away an effect,” just as it would mean when “tolling any other fact, right, or consequence”<sup>129</sup> because the object of the term here is a statute of limitations, noting that the meaning of “tolled” would likewise be different if its object were “highway traveler” or “bell.”<sup>130</sup> She asserts that the dissent’s reading would entail a strained interpretation of “period of limitations” to mean “the effect of the period of limitations as a time bar.”<sup>131</sup> And she finds that reading renders the first part of the tolling provision (“while the claim is pending”) superfluous, since it would always be a thirty-day grace period.<sup>132</sup>

Justice Gorsuch also considers statutory context, focusing on § 1367’s two uses of the term “toll” in the sentence “shall be *tolled* while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer *tolling* period.”<sup>133</sup> He argues that “toll” must have the same meaning in both instances.<sup>134</sup> Therefore—since he believes that the latter usage, the state law “tolling period,” is normally a grace period granting a fixed number of days to refile (modeled on the “journey’s account”)—he reasons that the former must also be understood to refer to the grace-period approach.<sup>135</sup>

Both opinions assert that adopting the other’s reading will cause absurd outcomes. Justice Ginsburg says the grace-period reading could result in an “absurdity” in cases where the state-law statute of limitations has already run out before the plaintiff files in federal court because, under that reading, filing in

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126. *Id.*

127. *Id.* at 609-10. Justice Ginsburg rejected this distinction and pointed to federal and state statutes applying stop-the-clock tolling in situations that “do not involve ‘disabilities,’” but rather, “like § 1367(d), they involve claims earlier commenced in another forum.” *Id.* at 601 n.4 (majority opinion).

128. *Id.* at 610 (Gorsuch, J., dissenting).

129. *Id.* at 603 (majority opinion).

130. *Id.* at 603-04.

131. *Id.* at 604.

132. *Id.*

133. *Id.* at 610 (Gorsuch, J., dissenting) (quoting 28 U.S.C. § 1367(d)).

134. *Id.*

135. *Id.* at 610-11.

federal court would remove the bar and then give the plaintiff an extra thirty days to refile in state court after the claim was dismissed from federal court.<sup>136</sup> She rejects the argument that the thirty-day grace period would be inconsequential in many cases, since it would be dwarfed by the time remaining on the state statute of limitations.<sup>137</sup> She explains that the thirty-day grace period will still be useful when the original claim was filed near the end of limitations period, and that it is “not unusual in stop-the-clock statutes” to “add[ ] a brief span of days to the tolling period.”<sup>138</sup>

Justice Gorsuch offers his own set of absurd outcomes for the stop-the-clock reading, based on his view that, because the tolling period applies “unless State law provides for a longer tolling period,” courts would have to compare the state’s grace period to the time the case spent in federal court plus thirty days.<sup>139</sup> Justice Ginsburg calls those circumstances “extraordinary” and “not presented by this case,” explaining that the more natural comparison is between the time the plaintiff would have to refile under the applicable state law and under § 1367(d).<sup>140</sup>

Justice Ginsburg also considers and rejects the argument that Congress adopted the grace-period approach from another source. She disagrees with the D.C. Court of Appeals’ conclusion that Congress had “embraced an ALI recommendation” to provide a thirty-day grace period, noting that Congress used different language, expressly providing for tolling, whereas the ALI had proposal had not.<sup>141</sup>

Justice Gorsuch does not argue that Congress adopted the ALI grace-period model. Instead, he pays particular attention to what he calls “contextual clues” about what Congress was doing when it enacted § 1367(d).<sup>142</sup> By “context” he does not mean the legislative history or the historical context in 1990 when the statute was written; he means the interpretive assumption that Congress knows and legislates against the background of the common law.<sup>143</sup> Accordingly, Gorsuch argues that the Court should assume that, when it enacted § 1367(d), Congress imported the common-law and state-law grace-period and “journey’s account” approaches he identified earlier.<sup>144</sup> Justice Ginsburg, however, rejects an approach based on the “ancient common-law principle of ‘journey’s account’,”

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136. *Id.* at 603-04 (majority opinion).

137. *Id.* at 605.

138. *Id.* at 605 (noting a number of federal statutes that add additional days after a tolling period has ended). She adds that the additional protections of § 1367(d)’s final phrase—“unless State law provides for a longer tolling period”—would likewise help plaintiffs who filed near the end of the state statute of limitations, if the state provided a longer period to refile. *Id.* at 606 (citing state statutes providing for an additional three years to refile, or for the statute of limitations to “run[ ] anew”).

139. *Id.* at 610-14 (Gorsuch, J., dissenting).

140. *Id.* at 606 n.12 (majority opinion).

141. *Id.* at 604-05.

142. *Id.* at 610, 613-14 (Gorsuch, J., dissenting).

143. *Id.* at 613-14.

144. *Id.*

noting that there is no indication that the 101st Congress in 1990 “had any such ancient law in mind when it drafted § 1367(d).”<sup>145</sup>

Each Justice also considers whether their preferred reading would pose a constitutional problem by violating the Necessary and Proper Clause, Art. I, § 8, cl. 18, or principles of federalism.<sup>146</sup> Justice Gorsuch argues that it was neither necessary nor proper for Congress to adopt the stop-the-clock approach because it serves no identifiable federal interest not sufficiently addressed by the grace-period approach.<sup>147</sup> And he argues that the stop-the-clock approach intrudes too much on states’ “traditional interests” in controlling the “appropriate lifespan of state law claims.”<sup>148</sup>

Justice Ginsburg turns to precedent and practical considerations to refute these constitutional concerns. She explains that *Jinks v. Richland County* already held that § 1367(d) did not violate the Necessary and Proper Clause because tolling was necessary and proper to effectuate Congress’s power to create inferior federal courts.<sup>149</sup> She rejects the dissent’s view that the Court must adopt the grace-period reading because it would intrude less on states’ sovereignty, pointing out that “both devices are standard, off-the-shelf means of accounting for the fact that a claim was timely pressed in another forum,” and that “[r]equiring Congress to choose one over the other would impose a tighter constraint on Congress’ discretion” than the Court had ever imposed before.<sup>150</sup> Moreover, she explains that any threat to state sovereignty “may be more theoretical than real” because, if the Court adopted the grace-period rule, “cautious plaintiffs” would just file parallel cases in federal and state court and then ask the state court to hold one in abeyance while the federal case was pending, thereby increasing litigation expenses and cluttering state court dockets.<sup>151</sup>

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In sum, if one leaves aside the metaphorical and figurative language, *Artis* addresses a technical, procedural question of how to calculate the time remaining on a statute of limitations. Practically speaking, such time limit–calculation questions are the kind of questions where courts and litigants benefit most from clarity.<sup>152</sup> Regardless of which reading of the tolling provision was adopted, having a bright line rule about how to do the calculation would benefit everyone.

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145. *Id.* at 605 n.11 (majority opinion).

146. *Id.* at 606-08; *id.* at 614-17 (Gorsuch, J., dissenting).

147. *Id.* at 615-16.

148. *Id.* at 616-17.

149. *Id.* at 606-07 (majority opinion) (citing *Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003)).

150. *Id.* at 607.

151. *Id.*

152. See *Wilson v. Garcia*, 471 U.S. 261, 275, 275 n.34 (1985) (describing the risks and costs of “uncertainty in the applicable statute of limitations”); see also *Young v. United States*, 535 US 43, 47 (2002) (noting the “basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities”) (alternation in original).

But the majority and dissent are unable to reach a practical agreement about the question. Instead, they disagree about everything from which dictionaries to use to the gravity of constitutional issues at stake. And the two opinions seem to be talking past one another. Each points to past usages of the term “toll” that seem to support their readings and minimizes the other’s examples. Each points out the supposed advantages of its own reading and the supposed absurdities of the other’s. Especially given that Congress could amend § 1367 and the states could amend their statutes of limitations if they disagreed, why don’t the Justices reach a practical compromise? Because there is another dispute going here, at a rhetorical level—one that depends not on *what* Justices Ginsburg and Gorsuch says but on *how* they say it. Each Justice’s metaphorical choice bespeaks a different understanding of the nature of lawmaking and the role of courts in interpreting laws.

### *B. Metaphors for Law in Artis*

In *Artis*, both Justices Ginsburg and Gorsuch address the question, what was Congress doing in 1990 when it enacted § 1367(d)? But they employ different distinctive rhetorical figures to present their answers to it.

Justice Ginsburg’s majority opinion uses mechanistic and technological metaphors, while Justice Gorsuch’s dissent uses agrarian and naturalistic ones. These metaphorical choices bespeak different views about the nature of lawmaking: a technocratic view of law as tinkering and engineering versus a naturalistic view of lawmaking as preserving the past.

1. *Justice Ginsburg’s Mechanistic Metaphors.*—In the majority opinion, Justice Ginsburg uses two related metaphors. She describes the “stop the clock” understanding of tolling, and she refers to the two possible understandings as “off-the-shelf” legal devices.<sup>153</sup>

The most prevalent metaphor in Justice Ginsburg’s opinion is the “clock” metaphor. It is a concrete, physical metaphor to describe how tolling the statute of limitations works: imagine that there is a clock counting down the time remaining on a statute of limitations, pause it while the federal case is ongoing, and restart it when the federal court declines to hear the state-law claims. Ginsburg uses it at least thirty-six times in her opinion, in such phrases as “stop-the-clock reading,” “the limitations clock,” “to hold it [the limitations period] in abeyance, *i.e.*, to stop the clock,” etc.<sup>154</sup>

This clock metaphor is a conventional one with an established meaning. Judicial opinions often use the image of a clock to describe limitations periods. In *Artis*, Justice Ginsburg quotes *United States v. Ibarra*, where the Court wrote that “[p]rinciples of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.”<sup>155</sup> Justice Alito, a few months after

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153. *Artis*, 138 S. Ct. at 607.

154. *Id.* at 601-07.

155. *Id.* at 602 (quoting *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (per curiam)).

joining Justice Gorsuch’s dissent in *Artis*, wrote that part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “acts as a stop-time rule, preventing the [statute’s] continuous-presence clock from continuing to run.”<sup>156</sup> Justice Thomas has noted that, under Title VII, “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.”<sup>157</sup> And courts discussing the seventy-day time limit within which a criminal trial must commence often describe the “speedy trial clock” starting, stopping, and ticking.<sup>158</sup>

Justice Ginsburg uses another metaphor as well, one based on the idiom “off-the-shelf.” She asserts that both approaches—the stop-the-clock and the grace-period readings—are “devices [that] are standard, off-the-shelf means of accounting for the fact that a claim was timely pressed in another forum.”<sup>159</sup> This is another concrete, physical metaphor. The comparison is not, as one might think, to law books on a shelf<sup>160</sup> but rather to standardized machine parts.<sup>161</sup> The idiom “off the shelf” describes “ready-made goods,” interchangeable parts that are “available as a stock item [or] not specially designed or custom-made.”<sup>162</sup>

Like the stop-the-clock metaphor, the off-the-shelf metaphor is also based on established, albeit newer, idiom. The phrase “off the shelf” was first used to describe standardized, manufactured parts and products in the mid-20th century.<sup>163</sup> The Supreme Court has used the phrase in that (more) literal sense to describe actual machine parts and consumer goods. In a patent case, *KSR v. Telflex*, the Court noted that a “modular sensor” can be “taken off the shelf and

156. *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

157. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).

158. *See, e.g., United States v. Tinklenberg*, 563 U.S. 647, 2011, 2012, 2015 (2011); *id.* at 2017 (“Since Veterans Day, Thanksgiving Day, and three weekends all fell within the 20-day period, only 2 days, not 10 days, were considered excessive, during which the 70-day Speedy Trial Act clock continued to tick.”); *Zedner v. United States*, 547 U.S. 489, 507, 509 (2006).

159. *Artis*, 138 S. Ct. at 607.

160. Elsewhere, Justice Gorsuch employs that seemingly related, but ultimately different metaphor: “The common law offers a vast legal library. Like any other, it must be used thoughtfully. We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratching out bits we don’t, all before pasting our own new pastiche into the U. S. Reports. That does not respect legal history; it rewrites it.” *Torres v. Madrid*, 141 S. Ct. 989, 1014 (2021) (Gorsuch, J., dissenting). Despite referring to taking books “off the shelf,” Justice Gorsuch’s metaphor, and his point, is the opposite of Justice Ginsburg’s in *Artis*. He is accusing the *Torres* majority of selectively choosing and recombining unique elements from a “vast library,” the opposite of Justice Ginsburg’s description of Congress employing a standardized part. As discussed below, Justice Gorsuch levels a similar metaphorical critique against Justice Ginsburg’s majority opinion here.

161. *Shelf*, n.1(e), OXFORD ENGLISH DICTIONARY (2022) (“off the shelf: from a supply of ready-made goods”).

162. *Id.*; *see also Off-the-shelf*, MERRIAM-WEBSTER, available at <https://www.merriam-webster.com/dictionary/off-the-shelf> [<https://perma.cc/TK6L-F3R3>] (last visited Nov. 4, 2022).

163. *Shelf*, n.1(e), *supra* note 161.

attached to mechanical pedals of various sorts.”<sup>164</sup> Justice Ginsburg—dissenting in the personal jurisdiction case, *McIntyre Machinery v. Nicastro*—quoted the machinery manufacturer’s brochure advertising that its machines used “off-the-shelf hydraulic parts” to ensure easy serviceability.<sup>165</sup> And multiple lower courts have used the phrase in this literal sense.

Notably, in *Artis* Justice Ginsburg does not use the off-the-shelf idiom in this more literal sense to describe actual mechanical parts. She uses it to describe the two possible readings of § 1367(d) as legal “devices” (a term she also uses, which slightly echoes and expands the legal-concept-as-machine-part metaphor).<sup>166</sup> (Justice Gorsuch, for his part, picks up on this metaphor when, in his response to Ginsburg’s “off-the-shelf” metaphor, he calls the two different readings “legal tool[s]” and states that the Court should be looking on a different shelf altogether.)<sup>167</sup>

In this way, Justice Ginsburg’s off-the-shelf metaphor is somewhat novel. But for the most part she does not elaborate on her mechanistic metaphors, and they retain only a hint of metaphorical double-meaning. Although not completely dead, Ginsburg’s metaphors are straightforward and conventional compared to Gorsuch’s more florid figurative language discussed below.

Justice Ginsburg’s “stop the clock” and “off the shelf” metaphors for congressional lawmaking express a particular view of law and lawmaking: Law is like a machine, different legal devices are like mechanical parts, and Congress is like a mechanic or engineer plugging in parts and tinkering with them.<sup>168</sup> It is

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164. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 409 (2007) (“In addition to patents for pedals with integrated sensors inventors obtained patents for self-contained modular sensors. A modular sensor is designed independently of a given pedal so that it can be taken off the shelf and attached to mechanical pedals of various sorts, enabling the pedals to be used in automobiles with computer-controlled throttles.”).

165. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 894 (2011) (Ginsburg, J., dissenting) (“McIntyre UK represented in the brochure that, by ‘incorporat[ing] off-the-shelf hydraulic parts from suppliers with international sales outlets,’ the 640 Shear’s design guarantees serviceability ‘wherever [its customers] may be based.’”). The Court used the same idiom in other contexts. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 269 (1974) (“Some items are standardized and may be purchased ‘off the shelf’ from various distributors and suppliers. Other items must be made to the company’s specifications, and the requisition orders may be accompanied by detailed blueprints and other technical plans.”); *Bartnicki v. Vopper*, 532 U.S. 514, 522 n.6 (2001) (“information concerning techniques and devices for intercepting cell and cordless phone calls can be found in a number of publications, trade magazines, and sites on the Internet, . . . and at one set of congressional hearings in 1997, a scanner, purchased off the shelf and minimally modified, was used to intercept phone calls of Members of Congress.”).

166. *Artis v. District of Columbia*, 138 S. Ct. 594, 607 (2018).

167. *Artis*, 138 S. Ct. at 617 n.10 (Gorsuch J., dissenting); *see infra* text accompanying note 206.

168. *See id.* at 607 (majority opinion). In addition to suggesting a physical clock, Justice Ginsburg’s “stop the clock” metaphor also brings to mind a sport like basketball or (American) football, where the game clock is stopped to resolve an issue or conflict before the game can proceed. This suggests a different familiar metaphor, comparing litigation to a game or a sport. *See* Megan E.



a pragmatic vision of law as a collective technological project, improving incrementally over time through the creation and application of legal devices and precedents.

2. *Justice Gorsuch's Agrarian Metaphors.*—Justice Gorsuch employs a different set of metaphors, with different implications. Perhaps because it is a dissenting opinion and perhaps because Gorsuch is a more rhetorically adventurous writer than Justice Ginsburg,<sup>169</sup> Gorsuch's dissent is more overt and expansive in its use of figurative language.

Justice Gorsuch's dissenting opinion begins with a reference to “Chesterton's fence”:

Chesterton reminds us not to clear away a fence just because we cannot see its point. Even if a fence doesn't seem to have a reason, sometimes all that means is we need to look more carefully for the reason it was built in the first place. The same might be said about the law before us.<sup>170</sup>

The concrete metaphor underlying this principle (a law is like a fence) makes intuitive sense: laws can restrict conduct just as fences can restrict movement. Indeed, fences often mark the borders that are policed by laws like trespass and immigration law.

The Chesterton who “reminds us” is G.K. Chesterton, an early 20th century English essayist who articulated the following “plain and simple principle”:

There exists . . . a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, “I don't see the use of this; let us clear it away.” To which the more intelligent type of reformer will do well to answer: “If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it.”<sup>171</sup>

Thus, the Chesterton's fence metaphor is an argument for stability and against reform (or, at least, against unthoughtful reform).

Immediately after deploying this fence metaphor, Justice Gorsuch moves on from (and seemingly contradicts) it. He switches to a different metaphor when he describes the tolling provision as being “[g]rown from a rich common law and

Boyd, *Riding the Bench—A Look at Sports Metaphors in Judicial Opinions*, 5 HARV. J. SPORTS & ENT. L. 245 (2014). However, the sport metaphor is not intuitively related to the off-the-shelf metaphor, and thus the mechanistic, technological reading seems to predominate in Justice Ginsburg's opinion.

169. See Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75 (2018); Adam Liptak, *#GorsuchStyle Garners a Gusher of Groans. But Is His Writing Really That Bad?*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/us/politics/justice-neil-gorsuch-writing-style.html> [<https://perma.cc/92ND-263J>].

170. *Artis*, 138 S. Ct. at 608 (Gorsuch, J., dissenting).

171. GILBERT KEITH CHESTERTON, *THE THING* 35 (1929).

state statutory tradition.”<sup>172</sup> Now he describes the tolling provision not as something that was not built like a fence, but as something that grew like a plant. Although Gorsuch returns to the fence metaphor at the end of his opinion, he uses such plant metaphors much more.

Most obviously, Justice Gorsuch relies on a particular canon of construction: “When Congress replants the roots of preexisting law in the federal code, this Court assumes it brings with it the surrounding soil . . .”<sup>173</sup> He uses this root-ball metaphor<sup>174</sup> to liken congressional lawmaking not to building a fence but to replanting a plant. He then extends this metaphor considerably, making repeated agrarian and vegetal references in the following paragraph:

Respect for Congress, this Court has held, means assuming it knows and “legislate[s] against a background of [the] common law . . . principles” *found in the field where it is working*. And, as we’ve seen, the state law of tolling Congress expressly referenced and *replanted* in section 1367(d) comes *heavily encrusted* with meaning. In cases involving dismissal and refile, state statutory law and the common law *from which it grew* have long afforded a grace period to allow the litigant an appropriately tailored time to find his way to the proper court. Meanwhile, a stop clock approach isn’t usually *part of this ecosystem* for nothing has disabled the litigant from reaching a court in the first place and all he must do is journey from the old court to the new one. We don’t assume Congress *strips replanted statutes of their soil*, and we should not assume Congress displaced so much tradition in favor of something comparatively foreign.<sup>175</sup>

Accordingly, Gorsuch argues, the Court should adopt the grace-period reading because grace periods “*find their roots* in a common law rule known as the ‘journey’s account.’”<sup>176</sup>

The metaphor of law as a plant “rooted” in something else—prior law, common law, tradition, etc.—is not new (although most judges do not elaborate on it as much as Justice Gorsuch does). Judges and scholars often compare the common law to a tree, for example.<sup>177</sup> Judges refer to laws and principles having “roots” or even “taproots” in common law and earlier history.<sup>178</sup> More

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172. *Artis*, 138 S. Ct. at 608.

173. *Id.* at 613-14.

174. Thanks to Professor Judy Cornett for coining this term.

175. *Artis*, 138 S. Ct. at 614 (alterations in original) (citations omitted) (emphases added).

176. *Id.* at 610.

177. See Isabelle Richard, *Metaphors in English for Law: Let Us Keep Them!*, 8 LEXIS J. ENG. LEXICOLOGY 7-9 (2014) (collecting examples of metaphors comparing the common law (and civil law, and Roman law) traditions to a tree).

178. *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (“The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege ‘has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries’ and was ‘taken as a matter of course by those who severed the Colonies from

specifically, Justice Gorsuch's root-ball metaphor is likely drawn from Justice Felix Frankfurter's 1947 article "Some Reflections on the Reading of Statutes," where Frankfurter observed that, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."<sup>179</sup> Although Gorsuch provides no citation in *Artis*, he has cited Frankfurter's article for this principle elsewhere.<sup>180</sup>

Justice Gorsuch's root-ball and other vegetal metaphors suggest a different view of the law and lawmaking than Justice Ginsburg's mechanistic ones. They describe the law as an ecosystem with different legal devices as plants, and Congress as a farmer or gardener tending to them. Whereas Ginsburg's metaphors suggest a pragmatic, progressive view of the law, Gorsuch's seem to suggest a view of the law as complex, interrelated system prone to change and growth, to be tended like a garden but ultimately subject only to limited congressional or judicial alteration.

But a closer look at Justice Gorsuch's metaphors complicates this interpretation. Although he points out how Justice Ginsburg's off-the-shelf metaphor exceeds her intended meaning,<sup>181</sup> his own metaphors seem even more out of his control and prone to causing reader confusion.

First of all, upon close inspection, Justice Gorsuch's invocation of Chesterton's fence seems self-contradictory. Even leaving aside the inevitable, if momentary, confusion of using a fence metaphor to discuss tolling (which brings up images of toll booths and gates), the metaphor does not quite fit his argument. Gorsuch's metaphorical argument is that his grace-period approach would preserve the "fence" and Justice Ginsburg's stop-the-clock approach would tear it down. But what exactly is the fence he is arguing should be preserved? Under either reading, the tolling provision tears down a fence, namely the state statute of limitations which it sets aside. That is what a tolling provision does. Under Gorsuch's grace-period approach, which sets a separate thirty-day limit, the

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the Crown and founded our Nation.'") (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)).

179. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

180. See, e.g., *Hammond v. Stamps.com, Inc.*, 844 F.3d 909, 911 (10th Cir. 2016); *United States v. Adame-Orozco*, 607 F.3d 647, 654 (10th Cir. 2010); *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1155 (10th Cir. 2010). There is another possible source for the root-ball metaphor—Justice Jackson's description of interpreting the First Amendment as "transplant[ing]" the Bill of Rights from the eighteenth-century "soil which also produced a philosophy that the individual was the center of society, that that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs" to the twentieth-century "soil in which the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls." *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 639-40 (1943). That usage, however, seems to contradict Justice Gorsuch's (and Justice Frankfurter's) in that it describes transplanting as an act of change and adaptation that need not inevitably bring along the original surrounding soil.

181. See *Artis v. District of Columbia*, 138 S. Ct. 594, 608-11 (2018) (Gorsuch, J., dissenting).

tolling provision both tears down one fence (the state statute of limitations) and erects a new one (the grace period which, depending on the specific case, may be shorter or longer than the state limitations period). But the Chesterton's fence metaphor is not about re-erecting fences; it suggests that the fence should not be torn down at all (or only for a good reason). Moreover, when Gorsuch returns to Chesterton's fence at the end of his opinion, he shifts the tenor of the metaphor with little explanation, using the fence to describe the "basic boundary between federal and state power," an entirely different boundary.<sup>182</sup>

Secondly, recall the mismatch between Justice Gorsuch's two metaphors: the fence that was built by someone and the plant that grew there.<sup>183</sup> Likening the tolling provision to both a fence and a plant contradicts Chesterton's own "common sense" explanation for his fence metaphor: "The gate or fence did not grow there. . . . Some person had some reason for thinking it would be a good thing for somebody," and thus it should not be torn down with knowing that reason.<sup>184</sup> By saying that the tolling provision grew out of the "soil" of the common law, Gorsuch seems to imply that it was a natural growth, meaning no one had a "reason for thinking it would be a good thing."<sup>185</sup>

Indeed, Justice Gorsuch's plant metaphors seem designed *not* to suggest one of typical implications of plant metaphors: the capacity for natural growth and change.<sup>186</sup> They do not call to mind the famous observation of the Canadian Supreme Court that the meaning of the Canadian Constitution had changed to permit women to serve as senators because its drafters had "planted in Canada a living tree capable of growth and expansion within its natural limits."<sup>187</sup> Nor do they suggest the possibility of weeding out past wrongs, like the U.S. Supreme Court's directive in *Green v. County School Board* that racial discrimination in schools be "eliminated root and branch."<sup>188</sup> Instead of suggesting growth and change, Gorsuch's root-ball metaphor argues for things to remain the same as they ever were.

What to make of these contradictions? Is it just an unfortunate mix of incompatible metaphors? Fences that are paradoxically plants? Roots without growth? No. Although Justice Gorsuch's figurative language does not cohere logically, his mixed metaphors work together to create an impressionistic contrast to Justice Ginsburg's view of law as technological progress—an idyllic, agrarian vision of law rooted in an imagined vision of tradition.

Pastoral images of an idealized past have long been associated with an

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182. *Id.* at 617.

183. *See supra* text accompanying notes 170-76.

184. CHESTERTON, *supra* note 171, at 35.

185. *Id.*

186. *See* FARNSWORTH, *supra* note 19, at 26, 61.

187. *Edwards v. A.G. Canada*, [1930] A.C. 124.

188. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (observing that, under prior desegregation cases, "[s]chool boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

imagined purity or rustic truth. Cultural critic Raymond Williams, in his book *The Country and the City*, explores the long literary history of tropes comparing rural and urban life.<sup>189</sup> He demonstrates that throughout English literature authors depict rural life as a quasi-prelapsarian, pastoral ideal; a “myth functioning as a memory” that they contrast with urban life, depicted as the site of modernity, technology, and capitalist production.<sup>190</sup> In Williams’ remarkable second chapter “A Problem of Perspective,” he traces out the tradition of English authors bemoaning the loss of a more honest, more innocent, rural way of life.<sup>191</sup> And he demonstrates that, although every author claims that they remember that idyllic pastoral life and that it disappeared within their lifetime, authors have been making that same claim for centuries.<sup>192</sup> Indeed, he traces the trope of lost pastoral simplicity back to *Piers Plowman* in the 14th century and beyond.<sup>193</sup> Williams identifies that vision of “an earlier and happier rural England” with an imagined “golden age,” “an idealisation of feudal and immediately post-feudal values: of an order based on settled and reciprocal social and economic relations of an avowedly total kind.”<sup>194</sup>

A similar mythologized vision of an agrarian golden age exists in the American psyche. Henry Nash Smith, in *Virgin Land: The American West as Symbol and Myth*, connects it to westward expansion and the American foundational myth of the frontier.<sup>195</sup> And Leo Marx’s *The Machine in the Garden* identifies in American literature a recurrent thematic tension between an idyllic pastoral landscape and the technology of modernity, a “yearning for a simpler, more harmonious style of life,” that “hangs over our urbanized landscape” like a “soft veil of nostalgia,” “a vestige of the once dominant image of an undefiled, green republic, a quiet land of forests, villages, and farms dedicated to the pursuit of happiness.”<sup>196</sup>

This nostalgic connection of an idyllic, agrarian past with an imagined tradition and truth explains how Justice Gorsuch mixes the Chesterton’s fence and the root-ball metaphors. What they have in common is that they call to mind a pastoral, agrarian English past, the mythical source for our common law tradition.

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Ultimately, Justice Ginsburg’s mechanistic metaphors for law and lawmaking describes a particular judicial philosophy. By likening the law to a machine built over time by Congress and the courts, Ginsburg suggests a judicial philosophy

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189. RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 9-12, 43 (1975).

190. *Id.*

191. *Id.* at 9-12.

192. *Id.*

193. *Id.* at 11.

194. *Id.* at 35.

195. HENRY NASH SMITH, *VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH* (1950), available at <http://xroads.virginia.edu/~Hyper/HNS/home.htm> [<https://perma.cc/FWQ4-MSJZ>].

196. LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 6 (1964).

based on precedent and policy. It is a practical and progressive view of the law, where each component of the legal machine (each legal device or precedent) is invented, implemented, and improved on over time, and then employed by lawmakers and judges.

Justice Gorsuch's root-ball metaphor for lawmaking describes a different judicial philosophy, one rooted in an imagined history or tradition, where the interventions of Congress and the courts are necessarily limited by an inherently conservative natural reality, an imagined past tradition that clings to any such intervention, like the encrusted soil that can never be fully dislodged from the transplanted root-ball.

### *C. Metaphorical Effects in Artis*

The previous section examined the *meanings* of the metaphors in *Artis* and the different visions of law and lawmaking offered by their mechanical and agrarian vehicles. This section examines *how* Justices Ginsburg and Gorsuch deploy their chosen metaphors and the rhetorical effects of those choices.

Interestingly, each Justice's chosen metaphors seem to describe not only their vision of lawmaking, but also their own rhetorical practice in *Artis*: Justice Ginsburg uses metaphors more mechanically, and Justice Gorsuch uses them more organically. To be sure, neither of them use only dead metaphors, with fixed, literal meanings. But his are certainly livelier than hers. Ginsburg's mechanistic metaphors are more conventional and controlled, near the dead-metaphor end of the spectrum—while Gorsuch's agrarian ones are more novel and lively. Ginsburg's metaphors are more like off-the-shelf mechanical parts with fixed meanings. Gorsuch's are more like transplanted plants with root balls laden with implications.

Justice Ginsburg uses more conventional metaphors (“stop the clock” and “off the shelf”) with well-established meanings that serve as a shorthand to guide legal thinking. Because they draw on conventional idioms, they are relatively unburdened by metonymic associations and implications. They are, in other words, like off-the-shelf components ready to be installed in the machinery of legal thought. Just as an engineer selects an off-the-shelf component (and a legislature selects an off-the-shelf legal device), Ginsburg selects an established legal idiom (stop the clock). And just as the engineer installs it into a machine (and the legislature uses it into a statute), Ginsburg uses the idiom without explicitly invoking the metonymic associations.

Justice Ginsburg's metaphors do not call attention to themselves. They have established meanings from which she does not deviate. They serve a clear function in the logical machinery of her legal argument. But that is not so say that Ginsburg's metaphors are inartful or her deployment of them is unthinking. Plain speech is a rhetorical device. Using clear concrete metaphors, mostly shorn of other associations and implications, gives the impression of “a seemingly natural appeal to common sense.”<sup>197</sup> By deploying more conventional metaphors that downplay their figurative nature, Ginsburg gives the impression of speaking

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197. Berger, *supra* note 44, at 34, 30.

plainly, approaching the Lockean ideal of “speak[ing] of things as they are.”<sup>198</sup>

Justice Gorsuch deploys his root-ball and other plant metaphors differently. His use of metaphor is more showy, calling attention to the rhetorical and figurative nature of his writing. As explained above, Gorsuch’s metaphors also have conventional origins. But his elaborate, extended use of them ensures that readers do not quickly parse them and move on. They aren’t like mechanical components; they are like transplanted plants. They bring over ideas from other contexts and traditions, carrying with them at least some of the “soil” of their origins. Just as a farmer transplants a root from one field to another (and a legislature transplants a term from another area to a statute), Gorsuch transplants images from one metaphoric context (the agrarian, naturalistic one) to another (the legal one). And, just as the farmer brings along the soil (and the legislature brings along related concepts), Gorsuch deliberately brings along the metonymic associations of history and tradition.

Justice Gorsuch’s different deployment of metaphor creates different rhetorical effects. The most obvious effect of showy metaphors is ornamental. They make Gorsuch’s discussion of an otherwise fairly dry procedural point more fun.<sup>199</sup> And they make the opinion more memorable. Unlike Ginsburg’s plain-speech approach—which seems designed to be ignored or forgotten, subsumed to the apparent clarity of the legal argument—Gorsuch’s extended rhetorical flourishes are designed to be noticed and remembered.

Another effect of Justice Gorsuch’s elaborate metaphors is to create a connection with the reader. By inviting a reader to take an active part in deciphering the non-literal use of language, metaphors can create a sense of intimacy between the author and the reader.<sup>200</sup> Here, by not only using the root-ball metaphor, but by elaborating on it so extensively, Gorsuch invites the reader into a sort of game, identifying and recognizing the repeated vegetal or agrarian references. And each repeated reference has the cumulative effect of reinforcing the metaphorical connection and making the comparison seem stronger.

Indeed, although it is a dissent with no precedential power, Justice Gorsuch’s use of Justice Frankfurter’s root-ball metaphor has already influenced subsequent legal argument at the Supreme Court. In the twenty-eight years before *Artis* was decided, Justice Frankfurter’s metaphor was only invoked during oral argument at the Court one time.<sup>201</sup> In the three years of oral arguments since *Artis*, advocates

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198. LOCKE, *supra* note 45.

199. Justice Gorsuch’s use of natural metaphors also helps insulate his reasoning from criticism. As A.O. Scott commented, describing the poet Shelley’s metaphor likening a poem to a flower, “the effect, and perhaps the intention, of construing works of art as natural phenomena is to place them beyond the reach of criticism. Who but a lunatic or an idiot would critique a rose or a mountain or a sunset, or for that matter an earthquake or a thunderstorm?” A.O. SCOTT, *BETTER LIVING THROUGH CRITICISM* 131 (2016).

200. See Ted Cohen, *Metaphor and the Cultivation of Intimacy*, 5 *CRITICAL INQUIRY* (SPECIAL ISSUE ON METAPHOR) 3 (1978).

201. Transcript of Oral Argument at 29, *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) (No. 18-489). (“For civil contempt, we think that the text of 524 is what controls. The text of 524 says that a

and Justices have referenced it at least eleven times.<sup>202</sup>

And in *Dobbs v. Jackson Women's Health Organization*, the Court recently revived and reinvigorated the *Glucksberg* test for whether an unenumerated constitutional right exists, which asks whether the right is “deeply rooted in this Nation’s history and tradition.”<sup>203</sup> A pragmatic vision of lawmaking built on precedent (like that suggested by Justice Ginsburg’s mechanistic metaphors) would not have allowed for such a ruling.<sup>204</sup> To be sure, when overturning *Roe v. Wade* because the right to abortion was not “deeply rooted” in history and tradition, Justice Alito did not explicitly invoke the root-ball metaphor or cite the *Artis* dissent. But that is the nature of metaphorical influence. It can operate without explicit citation or recognition.

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Both Justice Ginsburg’s and Justice Gorsuch’s uses of figurative language seem effective, albeit in different ways. The difference between Ginsburg’s more understated, conventional metaphors and Gorsuch’s more performative, lively metaphors accounts for their different rhetorical effects. Ginsburg’s more restrained use of mostly conventional metaphors gives the impression of plain speech and legal logic, working like a machine to present a convincing majority opinion. Gorsuch’s more ornamental use of more lively metaphors is more entertaining and inviting, with a more subtle, underground influence, as it were.

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discharge order operates as an injunction, and not to borrow Justice Frankfurter’s sort of horticultural analogy, but that brings all the old soil with it, the word ‘injunction.’”)

202. See Transcript of Oral Argument at 46, 74-75, *George v. McDonough*, 142 S. Ct. 858 (2022) (No. 21-234) (“[I]t exists in the very context that Congress is codifying it, that it is presumed to take the old soil with it. And it doesn’t require that Congress said, oh, yeah, we want — we like this bit of grass and we like this bit of soil. You just take the whole thing writ large.”); Transcript of Oral Argument at 92-93, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429) (“We know that when Congress transplants language from one legal source to another, the language carries the old soil with it. And here the old soil includes a mens rea element.”); Transcript of Oral Argument at 4, *Shular v. United States*, 140 S. Ct. 779 (2020) (No. 18-6662); Transcript of Oral Argument at 44-45, *Kemp v. United States*, 142 S. Ct. 752 (2022) (No. 21-5726); Transcript of Oral Argument at 19, *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) (No. 18-938); Transcript of Oral Argument at 44-45, *Greer v. United States*, 141 S. Ct. 2090 (2021) (No. 20-444); Transcript of Oral Argument at 5-6, *United States v. Briggs*, 141 S. Ct. 467 (2020) (Nos. 19-108; 19-184); Transcript of Oral Argument at 83, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298 (2021) (No. 20-440); Transcript of Oral Argument at 34-36, 37, 40-41, *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 2022 WL 18033755 (2022) (No. 21-806); Transcript of Oral Argument at 18, *Sackett v. EPA*, 2022 WL 18033741 (2022) (No. 21-454); Transcript of Oral Argument at 56-57, *Bartenwerfer v. Buckley*, 2022 WL 18033770 (2022) (No. 21-908).

203. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

204. See *id.* at 2317-50 (Breyer, Sotomayor, and Kagan, JJ., dissenting).



*D. The Excess of Metaphors in Artis*

But both Justice’s metaphors also exceed their control. Despite Justice Ginsburg’s attempts to speak plainly of things as they are, even her conventional metaphors carry with them implications and associations. And Justice Gorsuch toils mightily to downplay or obscure the associations (the surrounding soil) he does not want his own metaphors to call to mind.

Justice Ginsburg’s metaphors do not fit seamlessly into the “machinery” of discursive logic. They are, it seems, only mostly dead, and “mostly dead is slightly alive.”<sup>205</sup> An attentive reader, like Justice Gorsuch, can re-animate them, like a rhetorical Dr. Frankenstein. Here, he responds to Ginsburg’s off-the-shelf metaphor:

The Court’s reply—that stop clock tolling is “standard” and “off-the-shelf”—is no answer. The propriety of a legal tool in one area does not establish its propriety in all; while stop clock tolling may be standard and off-the-shelf in other contexts (such as for equitable tolling) that doesn’t mean it is necessary and proper here. Indeed, and as we’ve seen, the “standard” and “off-the-shelf” solution to the problem of dismissal and the need to refile is the one adopted at common law and by state law: a grace period. If we’re interested in looking for the right shelf, that’s the one.<sup>206</sup>

The intended effect of Justice Ginsburg’s off-the-shelf metaphor is to suggest that tolling is a simple concept with an understood meaning, like a standard tool or machine part with a simple use, that Congress simply adopted. And because it is a largely conventional metaphor, it largely succeeds at conveying that intended meaning. But, by repeating, elaborating on, and calling attention to Ginsburg’s metaphor, Justice Gorsuch destabilizes it. He makes the metaphor explicit by observing that the right “legal tool” for one job may not be right for another. And he complicates it by arguing that, depending on the context, there could be multiple tools on multiple shelves and that the Court should be “looking for the right shelf.”<sup>207</sup> By extending the seemingly straightforward off-the-shelf metaphor, Gorsuch highlights what the metaphor is designed to obscure, that Congress was not necessarily just re-using a standard available part when it enacted § 1367(d), it was making a policy choice.<sup>208</sup> Indeed, he shifts the focus from the choice made by Congress in enacting the statute to the choice made by the Ginsburg in interpreting it. He reveals the work done by her metaphor to obscure the interpretive, and policy, choice being made.

But Justice Gorsuch’s own elaborate metaphors fare no better. As discussed above, they are prone to contradiction and confusion.<sup>209</sup> But even more tellingly,

205. THE PRINCESS BRIDE (20th Century Fox 1987).

206. *Artis v. District of Columbia*, 138 S. Ct. 594, 617 n.10 (2018) (Gorsuch, J., dissenting) (citations omitted).

207. *Id.*

208. *See id.* at 610-12.

209. *See* discussion *supra* Sections II.B.2. For another example of how metaphoric associations

in order to advance his argument for law based on history and tradition, Gorsuch downplays the history and original context of the figurative language he employs. Or, in metaphorical terms, despite his insistence that transplanted roots necessarily bring along old soil, Gorsuch tries to strip away the soil encrusting his chosen metaphors. In this regard, it is telling that Gorsuch does not provide real citations for either the Chesterton's fence or the root-ball metaphor.

Recall that Justice Gorsuch begins his dissent with "Chesterton reminds us . . ." and provides no further citation for his invocation of Chesterton's fence.<sup>210</sup> On the one hand, this oblique invocation of Chesterton serves a rhetorical purpose. It invites the reader to imagine an "us" who are already familiar with Chesterton and the fence metaphor. If the reader knows who G.K. Chesterton is, then the offhand reference brings to mind a certain tradition of British literature. If they don't know who G.K. Chesterton is, then the offhand reference implies that they *should*, creating an impression of tradition and authority to which the reader lacks access. Either way, using the phrase "Chesterton reminds us" instead of an actual citation conjures up an imagined literary and intellectual tradition, not unlike that invoked by his use of pastoral agrarian imagery later on.

On the other hand, the lack of a clear citation obscures crucial information about the nature of that intellectual tradition. The origin of the Chesterton's fence trope is an essay entitled "The Drift from Domesticity," from Chesterton's 1929 collection of essays *The Thing*.<sup>211</sup> The original tenor of the metaphor—the "fence" that Chesterton wanted to preserve—was "the fundamental human creation called the Household or the Home."<sup>212</sup> That is to say, Justice Gorsuch is invoking a rhetorical figure from an anti-feminist essay, arguing for the preservation of traditional gender roles. Perhaps especially because he is responding to an opinion by feminist icon Justice Ginsburg, Gorsuch avoids explicitly citing a conservative essayist defending traditional notions of domesticity and railing against the rise of feminism.

Likewise, despite his extensive reliance on the root-ball metaphor, Justice Gorsuch does not credit Justice Frankfurter with it. By omitting the citation, he avoids other associations and implications from Frankfurter's "Reading of Statutes" article with which he would not agree. For one thing, Gorsuch uses the root-ball metaphor differently than Frankfurter. Frankfurter was discussing legislators' use in legislation of particular words—terms of art with established meanings in other contexts.<sup>213</sup> Gorsuch does not use it to refer the transplanting of particular *words* (likely because there is no evidence that terms "toll" or

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escape the author's control, consider how invoking history and tradition through pastoral metaphors involving roots and soil (in a dissent from a Justice Ginsburg opinion) could be read to imply a contrast with urban rootlessness, an anti-Semitic stereotype that Justice Gorsuch certainly did not intend.

210. *Artis*, 138 S. Ct. at 608.

211. CHESTERTON, *supra* note 171, at 35.

212. *Id.* at 36.

213. Frankfurter, *supra* note 179, at 537.

“tolling” had the limited grace-period meaning he advocates). Instead, Gorsuch uses the “roots of preexisting law” to describe the underlying *concept* of tolling when a case has been filed in the wrong court, and the “surrounding soil” is the principle of using a grace period found in the common law rule of the journey’s account, which he argues must be transplanted here.<sup>214</sup>

For another thing, other parts of Justice Frankfurter’s article (the “surrounding soil”) contradict Justice Gorsuch’s approach to statutory interpretation. There are, to be sure, some points of agreement between the two: Like Gorsuch,<sup>215</sup> Frankfurter says judges should begin with the text of the statute.<sup>216</sup> Like Gorsuch,<sup>217</sup> Frankfurter advocates for judicial humility and not importing judges’ policy preferences into statutes.<sup>218</sup> But in other ways, Frankfurter’s interpretive theory seems to be at odds with Gorsuch’s. Unlike Gorsuch,<sup>219</sup> Frankfurter expresses an openness to legislative history, asserting that, “[i]f the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.”<sup>220</sup> Unlike Gorsuch,<sup>221</sup> Frankfurter is wary of canons of construction.<sup>222</sup>

Perhaps most tellingly, Justice Frankfurter’s article is based on his own distrust of the kind of strict textualism that Justice Gorsuch advocates. For Frankfurter, statutory interpretation is a “practical problem.”<sup>223</sup> It is an inherently inexact process given the “very nature of words,” which “seldom attain[ ] more than approximate precision,” especially as used in legislation because a statute must be understood as “an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts.”<sup>224</sup> For Frankfurter, the “intrinsic difficulties of language and the emergence after of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction,” not just an unearthing, as it were, of a fixed, original textual meaning.<sup>225</sup> Indeed, for Frankfurter, the most “troublesome” and ultimately

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214. *Artis*, 138 S. Ct. at 610, 613-14.

215. *See, e.g., Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017) (“we begin, as we must, with a careful examination of the statutory text”).

216. Frankfurter, *supra* note 179, at 535.

217. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*.”)

218. Frankfurter, *supra* note 179, at 535.

219. *See, e.g., Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (stating that legislative history cannot be considered when the text is sufficiently clear).

220. Frankfurter, *supra* note 179, at 541.

221. *See, e.g., Epic Sys. Corp.*, 138 S. Ct. at 1630 (invoking “the canon against reading conflicts into statutes” and “other traditional canons”).

222. Frankfurter, *supra* note 179, at 544-45.

223. *Id.* at 529.

224. *Id.* at 528.

225. *Id.* at 529.

insoluble question of statutory construction was the very one that Gorsuch's invocation of the root-ball metaphor is meant to elide: "the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it."<sup>226</sup> "What is below the surface of the words and yet fairly a part of them?"<sup>227</sup>

Although Justice Frankfurter is often seen as a proponent of judicial restraint, a position that Justice Gorsuch has also advocated, Frankfurter's version of judicial restraint embraced living constitutionalism,<sup>228</sup> a position Gorsuch does not endorse.<sup>229</sup> And, of course, Frankfurter joined the unanimous opinion by Chief Justice Warren in *Brown v. Board of Education*, with its famous declaration that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted" and that "[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>230</sup> As Professor Morton J. Horwitz has explained, arguing for the Warren Court as a paradigm of living constitutionalism, "[o]ut of this seed in *Brown v. Board of Education* there sprouted, during the Warren Court's tenure, a very powerful view held among several of the Justices that constitutions cannot be static, but are designed to change."<sup>231</sup> It may be that Gorsuch avoids citing Frankfurter precisely because the surrounding soil could contain seeds of living constitutionalism that Gorsuch does not want to unearth.<sup>232</sup>

In sum, while Justice Gorsuch wants the rhetorical effect of an appeal to tradition and origins (the "old soil"), he wants to selectively edit and shape the tradition he invokes. He does not want to call to mind the sexist origins of Chesterton's fence or the living-constitutionalist tendencies of Justice Frankfurter. And, ironically, he can only avoid those associations by stripping away the surrounding soil of the sources he relies on.

#### CONCLUSION

Despite the conventional mistrust of figurative language in legal discourse, metaphors abound in judicial opinions. Whether or not they are an inescapable part of all conceptual thinking, as scholars have argued, metaphors certainly play

226. *Id.*

227. *Id.* at 533.

228. See Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 Tex. L. Rev. 215, 246 (2019) ("Justice Frankfurter and his followers continued to advance the idea of living constitutionalism as a theory of judicial restraint.").

229. See Neil M. Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [<https://perma.cc/Z2CN-EYU8>].

230. 347 U.S. 483, 492-93 (1954).

231. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8 (1993).

232. See Balkin, *supra* note 228, at 263 ("Felix Frankfurter's star may rise again among liberal legal academics").

a role in judges' conception and articulation of legal principles.

The majority and dissenting *Artis* opinions employ different kinds of metaphors, in different ways, with different effects. Justice Ginsburg's mechanistic metaphors describe the law like a machine, designed and modified by legislators and judges over time, suggesting a judicial philosophy based on progress, purpose, and precedent. Justice Gorsuch's agrarian metaphors describe the law like a plant rooted in the past, suggesting a judicial philosophy based on unchanging history and tradition.

The two Justices also differ in how they deploy their chosen metaphors. Justice Ginsburg makes inconspicuous use of more conventional metaphors, striving to minimize ornamental distraction and persuade through the appearance of reason and practicality. Justice Gorsuch's technique is less conventional and more performative, relying on metaphoric associations to persuade through entertaining, impressionistic invocations of a mythical naturalized tradition.

This is not to say that there is a one-to-one correspondence between different metaphorical approaches and judicial philosophies or politics. Despite their usual implications, mechanistic metaphors are not inherently progressive, and agrarian metaphors are not inherently conservative. Nor are conventional metaphors necessarily modern, or lively extended metaphors necessarily traditional.

But close attention to judges' use of metaphor—which ones they choose, how they use them, and especially where they lose control of them—can reveal otherwise unspoken ideas and disputes. By likening law to an inhuman (mechanical or natural) process over which lawmakers and courts have little influence, Justices Ginsburg and Gorsuch both work to obscure the human policy choices involved in lawmaking and judicial interpretation. And a close reading of those metaphors can reveal the stubborn soil of hidden implications and associations clinging to the roots of their judicial philosophies.