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# THE COURT AND THE VISUAL: IMAGES AND ARTIFACTS IN U.S. SUPREME COURT OPINIONS

NANCY S. MARDER\*

## INTRODUCTION

United States Supreme Court justices' use of images in their judicial opinions is one of the oldest practices and yet it has received little attention to date. One of the few articles on the subject suggests that the Supreme Court justices should not use images in their opinions; rather, they should only use words.<sup>1</sup> I disagree. There are times when images can be very useful. As the old adage suggests: "A picture is worth a thousand words." Undoubtedly, images will play a growing role in the law. Even today, images are ubiquitous in our everyday lives—from the surveillance camera to the cell-phone camera. It is not surprising to find images, whether as video presentations or Power-Point slides, readily accepted and expected in the courtroom. The justices have a longstanding practice of including images in their opinions. This practice is likely to become far more prevalent in the coming years.

Justices use an array of images in opinions and they use them in different ways. By images, I mean any form of visual presentation. Usually the image appears on the page, but occasionally it is an artifact or photograph that has been attached to the page. The images that typically appear in Supreme Court opinions are maps, artifacts, charts, graphs, diagrams, photographs, and tables. In Part I, I provide a snapshot view of the images that the justices used during a thirteen-year

\* Professor of Law and Director, Justice John Paul Stevens Jury Center, IIT Chicago-Kent College of Law. I thank Carolyn Shapiro and Chris Schmidt for organizing this Symposium and inviting me to participate in it. I am also grateful to Keith Bybee, Jeremy Eden, Judith Resnik, and Jessica Silbey for discussing this paper with me and to my colleagues at Chicago-Kent for their helpful suggestions during lunchtime conversations and at a research workshop. I had the opportunity to present this paper at The Supreme Court and the Public Symposium at Chicago-Kent and the Association for the Study of Law, Culture and the Humanities 16th Annual Conference at Birkbeck Law School, University of London. I received valuable feedback from participants at both conferences. I benefitted enormously from the research assistance of Sam Castree and the library assistance of Clare Willis.

1. Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704 (1997).

period (1997-2009) that spans thirty-eight volumes of the *U.S. Reports*. This is the first comprehensive list of cases with images of which I am aware, though it covers only thirteen years.

After providing an overview of how often the justices use images in their opinions, which justices use them, and speculations as to why, I focus on three paradigmatic uses of images in Part II. I examine three different types of opinions (concurrence, dissent, and majority opinion) in three different cases that use three different types of images—a map, an artifact, and photos. Part II focuses on the use of the reapportionment map in *Karcher v. Daggett*<sup>2</sup>, the cruise-line ticket in *Carnival Cruise, Inc. v. Shute*<sup>3</sup>, and the three photos in *Brown v. Plata*.<sup>4</sup>

The use of images in these three cases suggests that images work most effectively when the justices explain why they have included them and what they think they show. They also work best when those justices who reach a different result in the case challenge the interpretation of the images. They work least effectively when they are included without any explanation, as were two photos in *Brown v. Plata*. Without any explanation by the majority and without any comment by the dissent, it remains unclear what the first two photos in *Brown v. Plata* are supposed to show. However, the third photo of a small, wire cage where prisoners in the throes of a mental health crisis are kept is quite powerful in its simplicity. In addition, it bears a caption that explains what the cage is used for and the majority opinion includes a poignant description of those who are placed in such cages.

In Part III, I consider the benefits and harms of such images, drawing from the three cases discussed in Part II. Although I conclude that, on balance, the benefits of including images outweigh the harms, I do see photographs as having the potential to do harm. In areas of the law where emotions run high and public opinion is deeply divided, the justices need to be particularly careful about the photos they select. It is not hard to imagine that a photo on a divisive subject, such as abortion or the death penalty, can elicit strong reactions, and the justices need to proceed with caution. The use of images should convey information that words alone cannot convey. The point is to foster discussion and debate, not to obscure it. Just as the justices choose the words

2. 462 U.S. 725, 744 app. (1983).

3. 499 U.S. 585, 605 app. (1991).

4. 131 S. Ct. 1910, 1949-50 (2011).

in their opinions carefully, so too must they select the images in their opinions carefully.

### I. A SNAPSHOT VIEW

United States Supreme Court justices have used images in their judicial opinions since the early days of the Court,<sup>5</sup> though the practice has burgeoned in modern times. One commentator noted that there were few images included in Supreme Court opinions during the tenure of Chief Justice Marshall,<sup>6</sup> which began in 1801 and ended in 1835. One explanation for the paucity of images during this early time period was that publishing Court opinions was of “dubious profitability,” and if the Court made the task too burdensome by including expensive images then no Reporter of Decisions would publish the opinions.<sup>7</sup> It was not until the Reporter’s Act of 1817 that Reporters even received a small government salary.<sup>8</sup> Before then, they were entrepreneurs who struggled to remain in business. Even after the Act, the office of Reporter remained “a largely, and precariously, entrepreneurial one.”<sup>9</sup> Thus, it was not that justices did not want to include images in their opinions, but rather they were reluctant to do so because of the cost it imposed on the Reporter.<sup>10</sup>

Although there is no compendium of all of the Supreme Court cases that contain images, there have been a few attempts to identify some of the cases. Ross Davies identified several recent cases with images (from 2001-2012), but he did not claim that his list was comprehensive.<sup>11</sup> Hampton Dellinger, one of the few writers to focus on

5. The earliest image that my research assistant was able to uncover by searching the *U.S. Reports* was *Geyer v. Michel*, 3 U.S. (3Dall.) 285, 293 n.\*(1796) (containing a commission and endorsements, which were included “to illustrate this case, as well as to gratify curiosity at a future period”). The next image appeared in *Jones v. Le Tombe*, 3 U.S. (3Dall.) 384, 384 (1798) (including a form of a bill of exchange).

6. Ross E. Davies, *From the Bag: Marshall’s Maps, the U.S. Reports, and the New Judicial Restraint*, 15 GREEN BAG 2D 445, 449 (2012). Davies identified two cases with images that were included in opinions during Chief Justice Marshall’s tenure: *Clark v. Washington*, 25 U.S. 40, 44 (1827) (lottery ticket) and *Mechanics’ Bank of Alexandria v. Bank of Columbia*, 18 U.S. 326, 327 (1820) (bank check).

7. Davies, *supra* note 6, at 448.

8. Act of Mar. 3, 1817, ch. 63, 3 Stat. 376.

9. Davies, *supra* note 6, at 449.

10. Davies argued that Chief Justice Marshall displayed his propensity for including lavish images in other texts he wrote, such as *The Life of George Washington*, because the added costs did not come out of his pocket. *Id.* at 447-48. In addition, he did not have to worry about the survival of his book publisher, as he did with the Reporter of Decisions.

11. Davies mentioned eight cases from 2001-2012: *Williams v. Illinois*, 567 U.S. –, slip op. at 16-18 (2012); *Brown v. Plata*, 131 S. Ct. 1910, 1949-50 (2011); *United States v. Stevens*, 559 U.S.

this topic, wrote a commentary, which was published in *The Harvard Law Review* in 1997.<sup>12</sup> In his commentary, he included a footnote listing ten Supreme Court cases with images.<sup>13</sup> In his Introduction, he mentioned another eleven cases with images.<sup>14</sup> He, too, did not claim that his collection of twenty-one cases with images was comprehensive, but it does provide a starting point for future researchers.

In order to provide a snapshot view of how often justices use images in their opinions, I decided to build upon the work that Dellinger had done. From 1997, when Dellinger published his commentary, until 2009, which is the most recent volume of *U.S. Reports* that is available, there were twenty-three cases, spanning thirty-eight volumes of the *U.S. Reports*, that used images.<sup>15</sup> This list is comprehensive for this thir-

–, slip op. at 21 (2010); *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 620 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 815, 869-72 (2007); *Van Orden v. Perry*, 545 U.S. 677, 706 app. A-B (2005); *id.* at 736 app.; *Alaska v. United States*, 545 U.S. 75, 112 app. A-D (2005); *United States v. United Foods, Inc.*, 533 U.S. 405, 430 app. (2001). See Davies, *supra* note 6, at 451 n.21 & accompanying text; *id.* at 452 nn.24-25.

12. Dellinger, *supra* note 1, at 1704.

13. In a footnote, *id.* at 1705 n.9, Dellinger included the following cases: *Miller v. Johnson*, 115 S. Ct. 2475, 2495-96, 2508-09 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 605 app. (1991); *Greer v. Spock*, 424 U.S. 828, 871-72 (1976); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 214 app. (1973); *Estes v. Texas*, 381 U.S. 532, 586 app. (1965); *United States v. California*, 381 U.S. 139, 212 app. A-D (1965); *Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960); *Colegrove v. Green*, 328 U.S. 549, 560-63 (1946); *S. Pac. Co. v. United States*, 307 U.S. 393, 402-03 (1939); *Appleby v. City of N.Y.*, 271 U.S. 364, 368-69 (1926).

14. The remaining cases with images that Dellinger identified in his Introduction include: *Shaw v. Hunt*, 116 S. Ct. 1894, 1899 (1996); *United States v. Hays*, 115 S. Ct. 2431, 2438-39 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2463-64 (1995); *Shaw v. Reno*, 509 U.S. 630, 658 (1993); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 622 (1989); *Mississippi v. Arkansas*, 415 U.S. 289, 302 (1974); *Arkansas v. Tennessee*, 397 U.S. 91, 92 apps. (1970); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 513 (1968); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 37 app. (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964); *Missouri v. Iowa*, 165 U.S. 118, 124, 142 (1897). Dellinger, *supra* note 1, at 1705 nn.2-6, 8 & accompanying text; *id.* at 1706 n.11; *id.* at 1708 n.26.

15. My research assistant went through each of the 38 volumes of *U.S. Reports* that were published between 1997 through 2009 inclusive, and completed a coding sheet for each volume in which he identified any case that contained an image. The coding sheet includes the case citation, a description and copy of the image, who wrote the opinion, and the page on which the image appears. He found images in the following cases: *Burlington N.*, 556 U.S. at 620; *Parents Involved in Cmty. Sch.*, 551 U.S. at 815, 869, 870, 871, 872; *Van Orden*, 545 U.S. at 706 app. A-B, 736; *Alaska v. United States*, 545 U.S. at 112 app. A-D; *Vieth v. Jubelirer*, 541 U.S. 267, 342 (2004); *Nike, Inc. v. Kasky*, 539 U.S. 654, 685-86 (2003); *Williams v. United States*, 535 U.S. 911, 922 app. A-C (2002); *United States v. Arvizu*, 534 U.S. 266, 278 app. (2002); *Overton v. Ohio*, 534 U.S. 982, 986 (2001); *United Foods, Inc.*, 533 U.S. at 430 app.; *Kyllo v. United States*, 533 U.S. 27, 52 (2001); *New Hampshire v. Maine*, 532 U.S. 742, 756 app. (2001); *Easley v. Cromartie*, 532 U.S. 234, 258 app. A-D (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (2001); *United States v. Alaska*, 530 U.S. 1021, 1180 app. (2000); *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 737 (2000); *New Jersey v. New York*, 526 U.S. 589, 602 (1999); *Hunt v. Cromartie*, 526 U.S. 541, 554 app. (1999); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 (1999); *United States v. Louisiana*, 525 U.S. 1, 32 app. (1998); *New Jersey v. New York*, 523 U.S. 767, 820 (1998); *Abrams v. Johnson*, 521 U.S. 74, 102 app., 120 (1997); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 405-07 (1997).

teen-year time period. There were actually twenty-five opinions with images because in two cases there were two justices who wrote separately and included images in their opinions.<sup>16</sup> There was also one case, *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>17</sup> in which Justice Breyer included five separate images in his dissent.<sup>18</sup> The opinions during this thirteen-year period included nineteen maps,<sup>19</sup> seven artifacts,<sup>20</sup> three photos,<sup>21</sup> eight charts or graphs,<sup>22</sup> and four diagrams.<sup>23</sup> The justices who used images in their opinions included Justice Breyer (twenty-five images in twelve opinions),<sup>24</sup> Justice Stevens (five images in five opinions),<sup>25</sup> Justice Kennedy (five im-

16. See *Van Orden*, 545 U.S. at 706 app. A-B (Breyer, J., concurring in judgment) (including one fold-out map and one photo); *id.* at 736 (Stevens, J., dissenting) (including a fold-out photo); *Abrams*, 521 U.S. at 102 app. (Kennedy, J., majority opinion) (including a fold-out map) *id.* at 120 (Breyer, J., dissenting) (including a fold-out map).

17. 551 U.S. at 701.

18. *Id.* at 815 (Breyer, J., dissenting) (newspaper clipping); *id.* at 869 (chart); *id.* at 870 (chart); *id.* at 871 (graph); *id.* at 872 (chart).

19. See *Burlington N.*, 556 U.S. at 620; *Van Orden*, 545 U.S. at 706 app. B; *Alaska v. United States*, 545 U.S. at 112 app. A-D (including four maps); *Vieth*, 541 U.S. at 342; *Arvizu*, 534 U.S. at 278 app.; *New Hampshire v. Maine*, 532 U.S. at 756 app.; *Easley*, 532 U.S. at 258 app. A-D (including four maps); *United States v. Alaska*, 530 U.S. at 1180 app.; *New Jersey v. New York*, 526 U.S. at 602; *Hunt*, 526 U.S. at 554 app.; *United States v. Louisiana*, 525 U.S. at 32 app.; *Abrams*, 521 U.S. at 102 app.; *id.* at 120.

20. See *Parents Involved in Cmty. Sch.*, 551 U.S. at 815 (newspaper clipping); *Nike*, 539 U.S. at 685-86 (two letters); *Overton*, 534 U.S. at 986 (warrant); *United Foods, Inc.*, 533 U.S. at 430 app. (mushroom advertisement and recipes); *Egelhoff*, 532 U.S. at 161 (designation of beneficiary form); *New Jersey v. New York*, 523 U.S. at 820 (sample Ellis Island landing card).

21. See *Van Orden*, 545 U.S. at 706 app. A; *id.* at 736; *Kyllo v. United States*, 533 U.S. 27, 52 (2001). Note that *Brown v. Plata*, which will be discussed *infra* in Part II.C, required a search of the Supreme Court website because the *U.S. Reports* volumes for such recent cases are not yet available.

22. See *Parents Involved in Cmty. Sch.*, 551 U.S. at 869; *id.* at 870; *id.* at 871; *id.* at 872; *Williams v. United States*, 535 U.S. 911, 922 app. A-C (2002); *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 737 (2000).

23. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 (1999); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 405-07 (1997) (including three diagrams).

24. See *Parents Involved in Cmty. Sch.*, 551 U.S. at 815 (Breyer, J., dissenting) (newspaper clipping); *id.* at 869 (chart); *id.* at 870 (chart); *id.* at 871 (graph); *id.* at 872 (chart); *Van Orden*, 545 U.S. at 706 app. A-B (Breyer, J., concurring in the judgment) (one photo and one map); *Nike*, 539 U.S. at 685-86 (Breyer, J., dissenting from dismissal of the writ as improvidently granted) (two letters); *Williams*, 535 U.S. at 922 app. A-C (Breyer, J., dissenting from denial of cert.) (two graphs and one chart); *Overton*, 534 U.S. at 986 (Breyer, J., statement with respect to denial of cert.) (warrant); *United Foods, Inc.*, 533 U.S. at 430 app. (Breyer, J., dissenting) (mushroom advertisement); *Easley*, 532 U.S. at 258 app. A-D (Breyer, J.) (four maps); *Egelhoff*, 532 U.S. at 161 (Breyer, J., dissenting) (beneficiary form); *Pub. Lands Council*, 529 U.S. at 737 (Breyer, J.) (graph); *Kumho Tire*, 526 U.S. at 143 (Breyer, J.) (diagram); *Abrams*, 521 U.S. at 120 (Breyer, J., dissenting) (map); *Schenck*, 519 U.S. at 405-07 (Breyer, J., concurring in part and dissenting in part) (three diagrams).

25. See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 620 (2009) (Stevens, J.) (map); *Van Orden*, 545 U.S. at 736 app. (Stevens, J., dissenting) (photo); *Vieth v. Jubelirer*, 541

ages in two opinions),<sup>26</sup> Justice Thomas (one image in one opinion),<sup>27</sup> Justice Ginsburg (one image in one opinion),<sup>28</sup> and Chief Justice Rehnquist (one image in one opinion).<sup>29</sup> Images appeared in nine majority opinions,<sup>30</sup> three Court or supplemental decrees,<sup>31</sup> one concurrence in the judgment,<sup>32</sup> one concurrence in part and dissent in part,<sup>33</sup> and eleven dissents.<sup>34</sup>

One way to understand the use of images in judicial opinions is as a tool to support an argument. It is not surprising, then, to find that those in dissent made use of images slightly more often than those in the majority. Dissenters need to use whatever tools are available to try to persuade the other justices to see the case their way. Interestingly, only Justice Breyer and Justice Stevens made use of this tool when they were in dissent.<sup>35</sup> The use of images in a dissent could also be a way of revealing the intensity of one's views.<sup>36</sup> In one dissent, Justice Breyer

U.S. 267, 342 (2004) (Stevens, J., dissenting) (map); *Kyllo*, 533 U.S. at 52 (Stevens, J., dissenting) (photo); *New Jersey v. New York*, 523 U.S. at 820 (Stevens, J., dissenting) (landing card).

26. See *Alaska v. United States*, 545 U.S. 75, 112 app. A-D (2005) (Kennedy, J.) (four maps); *Abrams*, 521 U.S. at 102 (Kennedy, J.) (map).

27. See *Hunt v. Cromartie*, 526 U.S. 541, 554 app. (1999) (Thomas, J.) (map).

28. See *New Hampshire v. Maine*, 532 U.S. 742, 756 app. (2001) (Ginsburg, J.) (map).

29. See *United States v. Arvizu*, 534 U.S. 266, 278 app. (2002) (Rehnquist, C.J.) (map).

30. See *Burlington N.*, 556 U.S. at 599, 620 (Stevens, J.); *Alaska v. United States*, 545 U.S. at 75, 112 app. A-D (Kennedy, J.); *Arvizu*, 534 U.S. at 266, 278 app. (Rehnquist, C.J.); *New Hampshire v. Maine*, 532 U.S. at 742, 756 app. (Ginsburg, J.); *Easley v. Cromartie*, 532 U.S. 234, 258 app. A-D (2001) (Breyer, J.); *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 737 (2000) (Breyer, J.); *Hunt*, 526 U.S. at 541, 554 app. (1999) (Thomas, J.); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 (1999) (Breyer, J.); *Abrams*, 521 U.S. at 74, 102 app. (Kennedy, J.).

31. *United States v. Alaska*, 530 U.S. 1021, 1180 app. (2000) (Court decree); *New Jersey v. New York*, 526 U.S. 589, 602 (1999) (Court decree); *United States v. Louisiana*, 525 U.S. 1, 32 app. (1998) (supplemental decree).

32. See *Van Orden v. Perry*, 545 U.S. 677, 706 app. A-B (2005) (Breyer, J., concurring in the judgment).

33. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 405-07 (Breyer, J., concurring in part and dissenting in part).

34. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting); *id.* at 815; *id.* at 869; *id.* at 870; *id.* at 871; *id.* at 872; *Van Orden*, 545 U.S. at 736 app. (Stevens, J., dissenting); *Vieth v. Jubelirer*, 541 U.S. 267, 342 (2004) (Stevens, J., dissenting); *Nike, Inc. v. Kasky*, 539 U.S. 654, 685-86 (2003) (Breyer, J., dissenting from dismissal of the writ as improvidently granted); *Williams v. United States*, 535 U.S. 911, 922 app. A-C (2002) (Breyer, J., dissenting from denial of cert.); *Overton v. Ohio*, 534 U.S. 982, 986 (2001) (Breyer, J., statement with respect to denial of cert.); *United States v. United Foods, Inc.*, 533 U.S. 405, 430 app. (2001) (Breyer, J., dissenting); *Kyllo v. United States*, 533 U.S. 27, 52 (2001) (Stevens, J., dissenting); *Egelhoff v. Egelhoff*, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting); *New Jersey v. New York*, 523 U.S. 767, 820 (1998) (Stevens, J., dissenting); *Abrams*, 521 U.S. at 120 (Breyer, J., dissenting).

35. See *supra* note 34 (listing the cases when images were used as part of dissents).

36. Reading one's dissent from the bench is another way to express the intensity of one's views; it is also a way to give the public a sense of the disagreements that Justices have that might



made use of images five times;<sup>37</sup> he also used images in his dissents from denial of certiorari and a dismissal of the writ as improvidently granted.<sup>38</sup> Of course, even if dissenters fail to convince other justices, no matter how strongly they might feel, their opinions, including the images, speak to future litigants and offer arguments that can be used when the issue arises again.

It is interesting that Justice Breyer used images more often than any other justice. He used five times as many images as Justice Stevens, who was next in line. Justice Breyer accounted for about two-thirds of the images used in opinions during this thirteen-year period. One reason for Justice Breyer's use of images could be that he is a visual person, as evidenced by his interest in architecture.<sup>39</sup> Another reason could be that he uses images to inform himself and the reader as fully as possible, just as he uses text, history, tradition, precedent, purpose, and consequences to inform himself as fully as possible when interpreting a statute.<sup>40</sup> Yet another reason could be because he was a professor before he was a judge, and professors recognize the power of images to reach their audience and to convey an idea.<sup>41</sup> However, Justice Ginsburg was also a professor before she was a judge, and she rarely used images in her opinions. Justice Breyer's recourse to images also shows no signs of abating. In 2005, he used a full-color photo and a black-and-white map in his opinion concurring in the judgment in

not be fully expressed in their written opinions. *See, e.g.*, JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 158 (2011).

37. *See Parents Involved in Cmty. Sch.*, 551 U.S. at 815; *id.* at 869; *id.* at 870; *id.* at 871; *id.* at 872.

38. *See Nike*, 539 U.S. at 685-86 (Breyer, J., dissenting from dismissal of the writ as improvidently granted); *Williams*, 535 U.S. at 922 app. A-C (Breyer, J., dissenting from denial of cert.); *Overton*, 534 U.S. at 986 (Breyer, J., statement with respect to denial of cert.).

39. Justice Breyer was a judge on the Court of Appeals for the First Circuit when the new federal courthouse was built in Boston. One article described that courthouse as "Justice Breyer's baby" in that "[h]e and Judge Douglas P. Woodlock of the federal district court there took it on in the 1990s, when Justice Breyer was an appellate judge there." Robin Pogrebin, *Breyer Invited to Make a Case for Architecture*, N.Y. TIMES, Oct. 6, 2011, at A1. Justice Breyer played an active role in the design of the building, which won acclaim for being open and accessible to the public. *Id.* Justice Breyer was named to be a juror on the panel that awards the Pritzker Prize, which is architecture's greatest honor. One Pritzker official explained that Justice Breyer was selected to be on the panel because of his "intelligence, disposition, and enthusiasm for architecture." *Id.*

40. *See* STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 88 (2010) ("When judges interpret that [ambiguous statutory] language, they look to the words at issue, to surrounding text, to the statute's history, to legal traditions, to precedent, to the statute's purposes, and to its consequences evaluated in light of those purposes.").

41. *See, e.g.*, Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*, A.B.A. J., Aug. 2003, at 26, 26 ("People learn in different ways . . . . A good teacher will try to incorporate as many different learning preferences into his or her instruction as possible.").

*Van Orden v. Perry*,<sup>42</sup> and in 2007, he used a newspaper clipping, a graph, and three charts in his dissent in *Parents Involved in Community Schools*.<sup>43</sup> Indeed, in the most recent Supreme Court opinions (those appearing between 2009 and the beginning of 2013), which have not yet been published in *U.S. Reports* but have appeared on the Supreme Court website,<sup>44</sup> Justice Breyer included images in three separate opinions.<sup>45</sup> The only other justices to include images in an opinion during this time period were Justices Ginsburg and Alito in 2010<sup>46</sup> and Justice Kennedy in 2011.<sup>47</sup>

## II. THREE PARADIGMATIC TYPES OF IMAGES IN SUPREME COURT OPINIONS

In Part I, I provided a snapshot view of images in Supreme Court opinions, and in this part, I focus on three paradigmatic images: maps, artifacts, and photos. Maps and artifacts were used most often and photos pose potential risks that are worth exploring. In this part, I examine how the image works in the context of the particular case in which it appears. It becomes clear that the images advance the justices' arguments, particularly when the images are explained in the text of the opinion. This is the case with maps and artifacts. Photos can be effective when the justices explain them in the text of their opinions, but they are less effective when they appear without any explanation or useful caption.

### A. *The New Jersey Reapportionment Map in Karcher v. Daggett*

Maps are used in a variety of cases, from state boundary disputes to reapportionment cases. It is not surprising that the justices occasionally include maps in reapportionment cases because they often have to decide whether there has been an unconstitutional gerrymander. Although the shape of the districts and how compact they are can

42. 545 U.S. 677, 706 app. A-B (2005).

43. 551 U.S. at 815, 869, 870, 871, 872 (Breyer, J., dissenting).

44. See <http://www.supremecourt.gov>.

45. See *Lozman v. City of Riviera Beach, Fla.*, No. 11-626, slip op. 1, 16-17 (S. Ct. Jan. 15, 2013) (Breyer, J.) (two photos); *Williams v. Illinois*, No. 10-8505, slip op. 1, 16-18 (S. Ct. June 18, 2012) (Breyer, J., concurring) (summary of lab processes); *Wetzel v. Lambert*, No. 11-38, slip op. 1, 4 (S. Ct. Feb. 21, 2012) (Breyer, J., dissenting) (activity sheet).

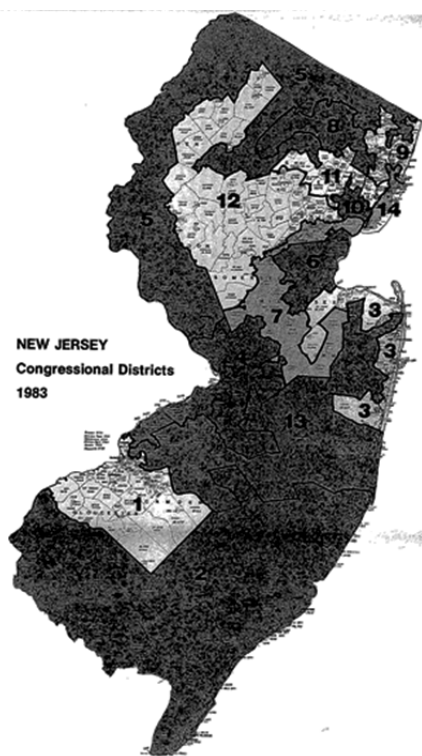
46. See *Schwab v. Reilly*, No. 08-538, slip op. 1, 17-22 (S. Ct. June 17, 2010) (Ginsburg, J., dissenting) (containing Schedules B and C, and inventory attached to the forms); *United States v. Stevens*, No. 08-769, slip op. 1, 21-28 (S. Ct. Apr. 20, 2010) (Alito, J., dissenting) (chart).

47. See *Brown v. Plata*, No. 09-1233, slip op. 1, 51-52 (S. Ct. May 23, 2011) (Kennedy, J.) (three photos).

be described in words, the map provides a visual depiction of what the words try to convey. The adage “a picture is worth a thousand words” is particularly apt in this kind of case. The decision to include a map strikes me as an easy call. A map offers much information to the reader, particularly when the justices explain in their opinions what they think the map shows.

*Karcher v. Daggett*,<sup>48</sup> a reapportionment case, includes a map of New Jersey’s revised districts to illustrate that the shape of the new districts was a consideration that, at least Justice Stevens in his concurring opinion<sup>49</sup> and Justice Powell in his dissenting opinion,<sup>50</sup> were willing to take into account. The map immediately follows the Court’s opinion.<sup>51</sup> In this case, the map was an integral part of the debate and was referred to in the text of several opinions.

*Map from Karcher v. Daggett*



48. 462 U.S. 725 (1983).

49. *Id.* at 755.

50. *Id.* at 786.

51. *Id.* at 744 app.

The case arose in New Jersey after the 1980 census revealed a decrease in population leading to a loss of one of New Jersey's seats in the U.S. House of Representatives.<sup>52</sup> The New Jersey Legislature, in which both houses were controlled by Democrats, and the governor, who was also a Democrat, eventually accepted a plan, known as the Feldman Plan, in which several districts had a variance in population.<sup>53</sup> The variance was under one percent and the plan's defenders argued that it was *de minimis*.<sup>54</sup> Several groups, including New Jersey Republican Members of the U.S. House of Representatives, challenged the plan in federal district court. The three-judge district court held that the plan violated the Equal Protection Clause, and the Supreme Court affirmed.

The Court explained that the plan violated the Equal Protection Clause because it permitted variances, albeit small, in the population of several districts. Thus, New Jersey failed to achieve absolute equality without having provided a good-faith effort or a legitimate state objective for adopting a plan that permitted even a small variance. The majority opinion refers to, but does not discuss, the map that appears at the end of its opinion, and immediately before Justice Stevens' concurring opinion.<sup>55</sup>

Justice Stevens had sought to include the map because it is integral to his point about gerrymandering.<sup>56</sup> Justice Stevens joined the majority's holding, but wrote a concurrence to explain his views. Although he thought that equality in numbers was key to a reapportionment that was consistent with the Equal Protection Clause, he also suggested that numbers did not always tell the whole story. The shapes of the districts could also be revealing.<sup>57</sup> In his view, "dramatically irregular"<sup>58</sup> or "bizarre"<sup>59</sup> configurations could be indicia of gerryman-

52. *Id.* at 727.

53. *Id.* at 728.

54. *Id.* at 732.

55. *Id.* at 728 ("A map of the resulting apportionment is appended *infra*.").

56. See STEVENS, *supra* note 36, at 103 ("As a glance at the map attached to the opinion demonstrates, it was an obvious gerrymander."). However, Chief Justice Burger was concerned about the cost of adding a map to the opinion, but Justice Stevens justified it by pointing out that he had only two law clerks, and thus, he saved the Court money by not hiring the full allotment of three law clerks. See Carol Lee, *Reminiscences of Justice Stevens by His Law Clerks: Three Memorable Opinions*, 94 JUDICATURE 9 (2010) ("The chief justice objected that [the map] would be too expensive. Justice Stevens responded that the extra printing cost was less than the amount that he saved the Court by having only two law clerks.").

57. *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) ("drastic departures from compactness are a signal that something may be amiss").

58. *Id.* at 755.

59. *Id.* at 762 (quotations omitted).

dering, which would raise questions about a proposed apportionment plan. He included the map of New Jersey to show its strange configurations, which, in his view, “prompt[ed] an inquiry into the process that led to its adoption.”<sup>60</sup>

The map provided a visual depiction that made gerrymandering easier to discern. Gerrymandering was like obscenity in this respect: it could be identified by sight, even if it could not always be explained in words. Justice Stewart had identified this difficulty with obscenity when he famously declared: “I know it when I see it.”<sup>61</sup> Although in the end Justice Stevens could not conclude that the New Jersey Plan was an unconstitutional gerrymander, he could agree with the majority that the population variance did not meet the equality standard and that the state had not provided any neutral objective to justify the variance.<sup>62</sup>

Justice Powell, writing in dissent, also relied on “[t]he extraordinary map of the New Jersey congressional districts,”<sup>63</sup> that Justice Stevens had included at the end of the Court’s opinion. Justice Powell, like Justice Stevens, suggested that the shape of the districts could be revealing as to whether gerrymandering had occurred. Justice Powell, like Justice Stevens, thought gerrymandering could raise a constitutional violation. If districts cut through communities, their legislators would be unable to represent their constituents adequately, which was at odds with “the apportionment goal of ‘fair and effective representation.’”<sup>64</sup> Justice Powell relied on the map, which in his view “illustrates this far better than words describe.”<sup>65</sup> Justice Powell, like Justice Stevens, cited Judge Gibbons, who had dissented in the three-judge district court opinion below and who had described the reapportionment map as creating several districts that were “anything but compact, and at least one district which is contiguous only for yachtsmen.”<sup>66</sup> Judge Gibbons had found the reapportionment of the districts to be the result

60. *Id.* at 763.

61. *Id.* at 755 (quoting Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)).

62. *Id.* at 765 (“I cannot conclude with absolute certainty that the New Jersey plan was an unconstitutional partisan gerrymander.”).

63. *Id.* at 786.

64. *Id.* at 787 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

65. *Id.*

66. *Id.* at 789 (Powell, J., dissenting) (quoting Judge Gibbons); *id.* at 764 n.33 (Stevens, J., concurring) (quoting Judge Gibbons).

of a partisan process that had not respected community interests and that had left him, “as a citizen of New Jersey, disturbed.”<sup>67</sup>

Although Justice Powell concluded that the shapes of the districts were motivated only by the most partisan politics and that the plan was an unconstitutional gerrymander, he did not find this issue decisive in this case because the district court had not reached it. Instead, Justice Powell decided the case based only on the issue of population equality, and concluded that the Constitution permitted some variation from absolute equality.

The inclusion of the map in this case was integral to Justice Stevens’ and Justice Powell’s separate opinions. As both justices acknowledged, gerrymandering can be discerned most readily by aid of a map which shows the shapes of the districts. Although words can convey the shapes, such as one commentator who described the new Fifth District as “the Swan” with “[i]ts long neck and twisted body stretched[ed] from the New York suburbs to the rural upper reaches of the Delaware River” and the new Seventh District as “the Fishhook” with its “curving partisan path through industrial Elizabeth[, N.J.], liberal, academic Princeton and largely Jewish Marlboro in Monmouth County,”<sup>68</sup> the combination of words and image are powerful. The Seventh District really does look like a fishhook. Justice Stevens’ inclusion of the map, along with a discussion of the map in his concurring opinion and Justice Powell’s discussion of the map in his dissenting opinion, made the point more forcefully than words alone would have accomplished. Here, the map was integral to the discussion and highlighted the points being made. *Karcher v. Daggett* is an easy case, at least in my view, for including the map.

Unfortunately, the only readers who will see the map are those who read the opinion in the *U.S. Reports* or *Supreme Court Reporter*. Those who peruse the opinion online using LEXIS or LEXIS Advance will see no image at all; the same is the case for readers who use HeinOnline. Those who read the opinion online using Westlaw or WestlawNext will see an image only when they print the opinion and even there the image is small, though there is a link to a larger image. The opinion is too early to be included on the Supreme Court’s website. Thus, online readers for the most part will not have access to the map, even though it is an integral part of two justices’ opinions. The only

67. *Id.* at 789; *id.* at 764 n.33.

68. *Id.* at 762-63.

readers who will see the map are those who go back to the bound volume of the *U.S. Reports* or *Supreme Court Reporter*. Only those who go back to *U.S. Reports* will see the map in color. As libraries carry fewer volumes and readers do more of their research online,<sup>69</sup> the images included in Supreme Court opinions, even if they are integral to the opinion, are likely to be lost to online readers. Online databases need to include images in the online versions of Supreme Court opinions.

*B. The Ticket in Carnival Cruise v. Shute*

Artifacts are another type of image that appear in U.S. Supreme Court opinions and that convey information that is difficult to convey through words alone. The justice who includes an artifact will usually explain why he or she has done so. An artifact is enough out of the ordinary that it requires some explanation in the text. An artifact, like a map, is an easy case, at least in my view, for including in Supreme Court opinions. Artifacts buttress the point being made in the text, but they add a dimension that is difficult to convey through words alone. The justice who includes an artifact hopes that “seeing is believing.”

*Carnival Cruise Lines, Inc. v. Shute*<sup>70</sup> is a good example of a justice using an artifact in support of his opinion to convey information that words alone cannot convey. Justice Stevens, writing in a dissent joined by Justice Marshall, included a fold-out, actual-size reproduction of a ticket issued by Carnival Cruise to passengers on its cruise ships.<sup>71</sup> The issue in the case was whether Mrs. Shute, who was injured in a slip-and-fall accident aboard a Carnival Cruise ship, could sue Carnival Cruise in her home state of Washington or whether she had to sue Carnival Cruise in Florida as the forum-selection clause on the reverse side of the ticket provided.<sup>72</sup> Justice Stevens included the ticket at the end of his opinion and referred to it at the beginning of his opinion.

69. See, e.g., Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm* (Temple Univ. Beasley Sch. of Law Legal Studies Research Paper Series, Paper No. 2012-34), available at <http://ssrn.com/abstract=2125278> (noting that a 2011 ABA Legal Technology survey found that 98% of respondents conduct legal research online, and suggesting that “[w]hile print materials have not been abandoned altogether” they are “used less frequently today”).

70. 499 U.S. 585 (1991).

71. *Id.* at 597, 605 app.

72. *Id.* at 587.







## TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

1. (a) Wherever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and tenders. The term "Passenger" shall include, in the plural where appropriate, all persons engaging to and/or traveling under this Contract. The masculine includes the feminine.
- (b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this contract.
2. This ticket is valid only for the person or persons named herein as the passenger or passengers and cannot be transferred without the Carrier's consent written hereon. Passage money shall be deemed to be earned when paid and not refundable.
3. (a) The acceptance of this ticket by the person or persons named herein as passengers shall be deemed to be an acceptance and agreement by each of them of all the terms and conditions of this Passage Contract Ticket.
- (b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. The Vessel may or may not carry a ship's physician at the election of the Carrier. The fare includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral waters.
4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever whatsoever arising and however caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract.

5. The Carrier shall not be liable for losses of valuables unless stored in the Vessel's safety depository; and then not exceeding \$500 in any event.
6. If the Vessel carries a surgeon, physician, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the passenger and any such person in dealing with the passenger is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or these under his orders or assisting him with respect to treatment, advice or care of any kind given to any passenger.
7. The surgeon, physician, masseuse, barber, hair dresser or manicurist shall be entitled to make a proper charge for any service performed with respect to a passenger and the Carrier shall not be concerned in any way whatsoever in any such arrangement.
8. The Carrier shall not be liable for any claims whatsoever of the passenger unless full particulars thereof in writing be given to the Carrier or their agents within 185 days after the passenger shall be landed from the Vessel or in the case the voyage is abandoned within 185 days thereafter. Suit to recover any claims shall not be maintainable in any event unless commenced within one year after the date of the loss, injury or death.
9. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to the Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.
10. The Carrier, in arranging for the service called for by all above legends, disclaims all responsibility and in no event shall be liable for any loss, damage, injury or delay to or of said person and/or baggage, property or effects in connection with said services, nor does Carrier guarantee the performance of any such service.

## CONTRACT PAGE 1

10. Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge. Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of only such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the station in life of the passenger and for the purpose of the journey.
11. No tools of trade, household goods, presents and/or property of others, jewelry, money, documents, valuables of any description including but not limited to such articles as are described in Section 4281 Revised Statutes of the U.S.A. (46 USC § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are contained in any receptacle or container presented by him as baggage hereunder, and if any such article or articles are shipped and the passenger's baggage in breach of this warranty no liability for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereto.
12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed \$100.00 (hull ticket: \$50.00) and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier prior to embarkation a sum (in U.S. Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value.
13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and assist other vessels in any circumstances to return to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage.
14. If the performance of the proposed voyage is hindered or prevented) or in the opinion of the Carrier or the Master is likely to be hindered or prevented) by war, hostilities, blockade, ice, labor con-

licts, strikes on board or ashore, Restraint of Rulers or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding to, attempting to enter, or entering or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee or person having under the terms of the War Risks Insurance on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or discharge of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.
16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger.
- (b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 based on the passenger and his baggage being landed at any port or place at which the Vessel calls or be carried back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained.

## CONTRACT PAGE 2

17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.
18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any fines or penalties imposed on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of immigration, Customs and Excise or any other Government regulations whatsoever.
19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.
20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof.
21. The passenger warrants that he and these traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger.

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.
23. The Carrier reserves the right to increase published fares without prior notice. In the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.
24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States of America (46 USC Sections 182, 183, 183A, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or deprive the Carrier of any such statutory limitation of or exoneration from liability.
25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

Justice Blackmun, writing for the Court, began his opinion with the relevant forum-selection clause contained on the reverse side of the ticket. He prefaced the clause with the large, bold capital letters that appear on the front side of the ticket: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES **IMPORTANT!** PLEASE READ CONTRACT - ON LAST PAGES 1, 2, 3."<sup>73</sup> He indented this warning in his opinion.

73. *Id.*

He also included the clause (paragraph 3a) that appears on the reverse side of the ticket, which indicates that acceptance of the ticket means acceptance of all its terms.<sup>74</sup> In addition, he included the relevant forum-selection clause (paragraph 8): “It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under . . . this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.”<sup>75</sup>

By including just these two paragraphs from the reverse side of the ticket, and having them appear indented and in standard typeface and font-size in the text of the opinion, the terms appear to be clearer and more prominent than they were in the context of the ticket. The language of the forum-selection clause and its placement as isolated text at the beginning of Justice Blackmun’s opinion make it appear that Mrs. Shute should have known what she had agreed to and that it was reasonable for her to be bound by the clause. Furthermore, Justice Blackmun explained that it was reasonable for Carnival Cruise to have such a clause because the cruise line carries passengers from many different places; the clause makes clear where the company can be sued; and this clarity could reduce some litigation and even lead to lower ticket prices for passengers.<sup>76</sup>

Justice Stevens, by including the ticket in its entirety at the end of his dissent, provided the context for the forum-selection clause, and in doing so, enabled the reader to *see* how the clause contained in paragraph eight would appear to the average consumer. Its language and presentation would make its meaning difficult for a layperson to discern.

The reproduced fold-out ticket makes clear what information is provided and how the information appears. On the front side of the ticket is the cruise information: the names of the passengers, whether they are adults or children, their cabin number, their fare, and the booking agent.<sup>77</sup> On the reverse side of the ticket are twenty-five numbered paragraphs in fine print. The title of the second side is “Terms and Conditions of Passage Contract Ticket.”<sup>78</sup> What follows is boilerplate language strewn with legal phrases, such as “jointly and several-

74. *Id.*

75. *Id.* at 587-88.

76. *Id.* at 593-94.

77. *Id.* at 605 app.

78. *Id.*

ly,” “liability,” and “agent for the holder,” and legal formulations, such as “including but not limited to.”<sup>79</sup> In addition, the text is lengthy (extending to three contract pages) and the font-size is tiny. The language and the presentation would be off-putting to a layperson. The information contained on the second side is precisely what a layperson would have a hard time reading and understanding, and therefore, would be likely to ignore.

In addition, the consumer could hardly bargain for the terms of the contract. As Justice Stevens pointed out in his dissent, the consumer was likely to receive the ticket, with all of its fine print, after he or she had purchased it.<sup>80</sup> It was a take-it-or-leave-it contract and another clause (paragraph 16a) did not allow for a refund.<sup>81</sup> If the consumer wished to challenge any provision of this contract, he or she was still obligated to go on the trip because a refund was not an option. Since most cruise lines employed the same kind of terms and conditions, if one wanted to take a cruise, then one had to accept the terms. Of course, one did not need to take a cruise, but entire industries—many providing basic necessities in today’s world—use the same kind of contracts. Consumers do not read the terms because they have no power to alter them. Their only choice is to forgo the purchase.

In his dissent, Justice Stevens used the fold-out ticket to show how confusing the terms appear to the layperson. He began his opinion by explaining that he appended a facsimile of the ticket to show what a passenger would see.<sup>82</sup> The forum-selection clause is buried in a sea of fine print on the reverse side of the ticket. Here, the entire ticket “speaks for itself” and challenges the Court’s presentation of the forum-selection clause as clear and apparent. As Justice Stevens observed, only “the most meticulous passenger” would find the clause if he or she were willing to go to the reverse side of the ticket and wade through numerous paragraphs.<sup>83</sup> Thus, the context in which the forum-selection clause appears is important and Justice Stevens provided this information by appending the ticket to his opinion. Later in his dissent, he explained that contracts that limit a passenger’s right to trial had been generally prohibited as contrary to public policy, and a Supreme

79. *Id.*

80. *Id.* at 597.

81. *Id.*

82. *Id.*

83. *Id.*

Court opinion, *The Bremen v. Zapata Off-Shore Co.*,<sup>84</sup> which involved “a freely negotiated international agreement between two large corporations,”<sup>85</sup> should not change the traditional rule, at least in his view.<sup>86</sup>

Justice Stevens’ use of the ticket is integral to his argument, and yet only readers of the actual volume of the *U.S. Reports* will have the benefit of seeing the ticket. Even those readers who peruse a xerox of the opinion from the *U.S. Reports* will not be able to see the ticket; when the ticket is xeroxed it is fairly illegible. Different reporters handle the ticket in different ways. In both the *Supreme Court Reporter*<sup>87</sup> and the *Lawyers’ Edition*,<sup>88</sup> the ticket is xeroxed on several pages. There are two pages containing the front side of the ticket and three pages containing the numbered paragraphs with the terms and conditions. For online readers, what one sees depends on which service one uses. Those who read the opinion on LEXIS or LEXIS Advance will not see a ticket. Rather, they will see only the following: “[See Exhibit in Original].”<sup>89</sup> Those who read the opinion on Westlaw or WestlawNext<sup>90</sup> will see copies of the ticket that are similar to what readers of the *Supreme Court Reporter* and the *Lawyers’ Edition* see: two pages containing a copy of the front of the ticket and two or three pages containing a copy of the terms and conditions of the ticket. However, in the online WestlawNext version, the ticket is completely unreadable; it looks like hieroglyphics.

As a practical matter, then, the use of an artifact, even though it is integral to an argument, does not reach all readers. The absence of the ticket online will lead readers to miss an important element of the argument, though of course it is only one of several arguments that Justice Stevens makes in his dissent.

The use of an artifact—the cruise ticket—in this opinion conveys to the reader information that would be difficult to acquire any other way. Even the xeroxed copy, which is flat on the page, falls short be-

84. 407 U.S. 1 (1972).

85. *Carnival Cruise Lines, Inc.*, 499 U.S. at 601.

86. *Id.*

87. *See Carnival Cruise Lines, Inc.*, 111 S. Ct. 1522, 1534-38 (1991) (providing a xerox of the ticket).

88. *See Carnival Cruise Lines, Inc.*, 113 L. Ed. 2d 622, 640 (1991) (providing a xerox of the ticket on several pages that are unnumbered).

89. *See Carnival Cruise Lines, Inc.*, 499 U.S. at 605, 1991 U.S. LEXIS 2221 (indicating, but not providing, the exhibit).

90. *See Carnival Cruise Lines, Inc.*, No. 89-1647 (April 17, 1991) (Westlaw Classic, S.Ct. database); *Carnival Cruise Lines, Inc.*, No. 89-1647 (April 17, 1991) (WestlawNext, U.S. Supreme Court cases).

cause it does not remind the reader that the terms and conditions appear on the reverse side, a side most consumers would not bother to consult, the warning notwithstanding. Of course, Justice Stevens could have described the ticket in words, but any description, even one offered by as clear a writer as Justice Stevens, cannot capture the nuances of the object as well or as efficiently as seeing the object itself. It is only when one looks at the ticket, turns it over, and sees a blur of text in fine print and legal jargon that one can fully appreciate the position of consumers, such as Mrs. Shute, and how inscrutable the terms would have appeared to her if she had managed to read them.

### C. *The Photos in Brown v. Plata*

The use of photos in an opinion is not as easy a call as the use of maps and artifacts. Photos, like maps and artifacts, need to be explained, but the justices do not always offer any explanation. They seem to think that the photo “speaks for itself” and can only be interpreted in one way; however, this is not the case. Photos need to be explained by the justices who include them and critiqued by the justices who take a different view of the case. Photos need to be made part of the debate, just as footnotes and precedents are. Moreover, photos present an unusual risk: they can be very powerful and the viewer can have almost a visceral reaction to them. There is the need to step back, to study the photo, and to consider what was included and what was excluded by the photographer. These are not easy exercises and the justices need to set forth their interpretation if they are going to include photos in their opinions.

In *Brown v. Plata*<sup>91</sup>, a prison case challenging whether a court-mandated population limit was necessary to remedy the violation of prisoners’ constitutional rights, the Court’s opinion, written by Justice Kennedy, concluded with an appendix containing the relevant part of the Prison Litigation Reform Act of 1995 (PLRA) and three black-and-white photographs. Two of the photographs depict overcrowded rooms in two California prisons and the third photo depicts two small wire-mesh cages in which prisoners in the midst of mental health crises were held.

91. 131 S. Ct. 1910 (2011).

*Photos from Brown v. Plata*



*Mule Creek State Prison, Aug. 1, 2008*



*California Institution for Men, Aug. 7, 2006*





*Salinas Valley State Prison, July 29, 2008  
Correctional Treatment Center (dry cages/holding cells for people  
waiting for mental health crisis bed)*

The photos appear at the end of Justice Kennedy's opinion, and he refers to them at the beginning of his opinion. Yet, neither the dissent by Justice Scalia<sup>92</sup> (joined by Justice Thomas) nor the dissent by Justice Alito<sup>93</sup> (joined by Chief Justice Roberts) alludes to the photos. No mention of the photos is made in the text of the dissents or in any of their footnotes. The photos function like an exclamation point at the end of

92. *Id.* at 1950.

93. *Id.* at 1959.

Justice Kennedy's opinion. They emphasize the points he has made in his opinions, but the emphasis is ignored by the dissenting justices.

*Brown v. Plata* involved the systemic mistreatment of prisoners with serious medical and mental health conditions who were held in California prisons. The problem was ongoing and long-term, and was challenged by two class actions, *Plata v. Brown* and *Coleman v. Brown*,<sup>94</sup> which were eventually consolidated. In *Plata*, in which plaintiffs challenged medical care for state prisoners in the custody of the California Department of Corrections, the State conceded in a stipulated injunction that the system's level of care was constitutionally inadequate and demonstrated "deliberate indifference." In *Coleman*, in which the plaintiffs challenged the provision of mental health treatment of prisoners, the magistrate judge found, and the district court judge agreed, that the California prison system imposed cruel and unusual punishment in violation of the Eighth Amendment.<sup>95</sup>

The violations in both these cases, however, were not remedied in a timely fashion, and ultimately the two district court judges concluded that the plaintiffs had made the requisite showing to convene a three-judge district court. The Chief Judge of the Ninth Circuit, Mary Schroeder, convened a three-judge district court, which included the two district court judges and Judge Stephen Reinhardt from the Ninth Circuit. The three-judge district court tried to help the parties reach a negotiated settlement, but when that failed, the district court ordered a reduction in the number of prisoners held in these prisons so that they did not exceed their design capacity by more than 137.5%.<sup>96</sup> The order left state officials to decide how to reduce the number of prisoners. The state challenged the order, but the U.S. Supreme Court held that the order was authorized under the PLRA because the overcrowding had led to the inhumane treatment of prisoners, whose mental and medical needs had gone unmet and had oftentimes led to death.<sup>97</sup>

Justice Kennedy's opinion is replete with statistics, examples, and expert testimony from the record. It is measured in tone, even though it describes "cruel and unusual" treatment of these prisoners. The numbers are shocking: California's prisons were operating at 200% of design capacity for at least eleven years.<sup>98</sup> Prisoners were "crammed"

94. *Id.* at 1922, 1926.

95. U.S. CONST. amend. VIII ("nor cruel and unusual punishment inflicted").

96. 131 S. Ct. at 1928.

97. *Id.* at 1923.

98. *Id.* at 1923-24.



into spaces.<sup>99</sup> For example, one gymnasium held 200 prisoners.<sup>100</sup> Justice Kennedy refers the reader to Appendix B,<sup>101</sup> which contains two photos showing overcrowded rooms. Prisoners with mental health problems, including suicidal inmates, were kept in “telephone-booth sized cages without toilets.”<sup>102</sup> Justice Kennedy refers the reader to Appendix C,<sup>103</sup> which contains the single photo of the metal cages. Later in his opinion, he refers to mentally-ill prisoners awaiting care, who “are held in tiny, phone-booth sized cages.”<sup>104</sup> He does not cite Appendix C again, but the reference to “phone-booth sized cages” recalls the earlier reference to “telephone-booth sized cages.”<sup>105</sup>

What purpose do the three photos at the end of Justice Kennedy’s opinion serve? One purpose is that they introduce a human element to an otherwise almost clinical description of the prisoners’ plight. The two photos in Appendix B serve this purpose, even though the faces of the prisoners in the photos have been obscured, presumably to protect their privacy. The blurring of their faces, however, makes them appear less human and more dangerous than if their faces had been shown.<sup>106</sup> In an opinion replete with statistics, the two photos convey just how cramped the prisoners’ living situation has become. Both photos show myriad prisoners, standing in crowded aisles or sitting on top of bunk beds. The viewer gets a sense of just how crowded the room is because bunk beds appear everywhere, almost helter-skelter. Indeed, the room looks like it could have been a former gymnasium, and Justice Kennedy refers the reader to the photo after pointing out in the text of his opinion that “[a]s many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers.”<sup>107</sup> People seem to be milling about; clothing is draped over bed frames. The first photo gives the viewer a sense of how many bunk beds there are in a section

99. *Id.* at 1924.

100. *Id.*

101. *Id.* (citing, but not describing, app. B).

102. *Id.* at 1924.

103. *Id.* (citing app. C).

104. *Id.* at 1933.

105. Justice Kennedy’s references to “telephone-booth sized cages,” *id.* at 1924, and later to “phone-booth sized cages,” *id.* at 1933, would conjure an image only to readers of a certain age. Young readers, who grew up with cell phones, would be unfamiliar with phone booths, which serve little purpose today and are hard to find. Thus, Justice Kennedy’s reference to a “phone-booth sized” cage, though descriptive to some readers, would admittedly provide little information to other readers.

106. I am grateful to Jason Mazzone who pointed this out to me at The Supreme Court and the Public Symposium, held at IIT Chicago-Kent College of Law on Nov. 16, 2012.

107. 131 S. Ct. at 1924.

of the room and the second photo gives the viewer a sense of the people who are living en masse.

The problem with the two photos in Appendix B is that the viewer is not quite sure what he or she is looking at, and unfortunately, scant explanation is provided. The caption under the first photo reads: "Mule Creek State Prison, Aug. 1, 2008."<sup>108</sup> The caption under the second photo reads: "California Institution for Men, Aug. 7, 2006."<sup>109</sup> Both photos show beds with people living in conditions that look very crowded. Although the chaos of the living arrangements comes through, the photos do not really show how the prison is failing to meet the medical and mental health needs of its prisoners. Instead, the two photos raise more questions than they answer: Are these two shots representative of the prisons involved in the two lawsuits? Are these two photos representative of other photos that were submitted as evidence? Why are people milling about? Where are they going and what are they doing? What time of day is it? Why does there appear to be no supervision? Are these prisoners with medical or mental health needs? Who is the prisoner in the wheelchair and what are his medical needs? How big are these rooms? Where were the shots taken from? It would have been useful to see the entire room, if there were a vantage point from which such a photo could have been taken.

In contrast, the third photo, which appears in Appendix C, speaks eloquently once the viewer has been given a little information. This photo is accompanied by the following caption: "Salinas Valley State Prison, July 29, 2008, Correctional Treatment Center (dry cages/holding cells for people waiting for mental health crisis bed)."<sup>110</sup> The photo is stark and chilling. It shows two metal cages, and a small portion of a third cage. Each cage has two locks, of the kind that one would use to secure a storage locker. The cages contain nothing, though the viewer cannot see all of the cages. The cages also appear to be quite small because the ceiling is much higher than the top of the cage. Although the viewer cannot see the back of the cage, the viewer can see the back wall of the room, which makes the cages seem like they do not have much depth. Justice Kennedy's description of a telephone booth (for those of us who can recall telephone booths) seems quite apt. Although the viewer cannot see the entire room, the cutoff

108. *Id.* at 1949.

109. *Id.*

110. *Id.* at 1950.

third cage suggests that the room contains a long line of these solitary cages.

What is striking about the photo is that the cages are empty. This presents a contrast to the preceding two photos, which showed people milling about everywhere. So, in this photo the viewer confronts what it would be like to be locked in the tiny, metal cage. If a prisoner had been shown in the cage, it might have been a less effective photo. With the empty, locked cage, however, the viewer can imagine himself or herself inside the cage, waiting for a mental health crisis bed to become available.<sup>111</sup>

Putting a person inside such a cage seems inhumane—an affront to an individual's dignity. There would be no place to move and no place for privacy; one would just be able to sit on the floor or stand upright. There is a number ("2") that appears on the cage, and there is a number ("102") that appears on the entryway to the room that holds the cages, and indeed, it seems that when an individual is placed in the cage, he becomes a number, rather than an individual. When the viewer considers that the individual to be placed in that cage is one who is in the midst of a "mental health crisis," it is not surprising to learn that suicide is a common occurrence.

This photo is very powerful, and adds a different kind of support—beyond the statistics and the words of experts—to Justice Kennedy's opinion. The photo makes clear the inhumane conditions in which prisoners in the throes of a mental health crisis are held until a bed becomes available. In the text of his opinion, Justice Kennedy mentioned that one prisoner was held in such a cage for almost twenty-four hours, and emerged, after standing in a pool of his own urine, unresponsive and nearly catatonic.<sup>112</sup> The photo adds a powerful image to his text. The viewer is likely to remember the image of the tiny, wire cage long after he or she forgets how many prisoners were held in these cages or for how long they were held.

Why do the dissenting justices not discuss the photo and try to dismiss it, the way they would a footnote with which they disagreed? One reason might be that the justices, including the justice who added the photo to his opinion, might think that a photo does not need any explanation because it speaks for itself. But as Law and Film scholar

111. Cf. Carol J. Clover, *Movie Juries*, 48 DEPAUL L. REV. 389, 390-99 (1998) (describing early film portrayals of juries as silent so that viewers could put themselves in the place of the jurors and consider how they would decide the case).

112. 131 S. Ct. at 1924.

Jessica Silbey has observed, “[i]mages do not speak for themselves. Advocates (and audiences, be they juries or judges) speak for them.”<sup>113</sup> Another reason might be strategic. Perhaps the dissenting justices decided not to comment on the photo because they wish to avoid drawing further attention to it. If they were to refer to the photo and to challenge what it showed, then the viewer would return to the photo and study it more closely and perhaps find it even more powerful than the initial viewing of it.

On a practical level, the dissenting justices might not respond to the photo and seek to question what it showed because the photo might not have been included when Justice Kennedy’s draft opinion had been circulated amongst the justices. The photo might have only been added later on, close to the time when the opinion was being prepared to go to print. Although law clerks and justices have personal computers and prepare their opinions for publication—unlike the days of the mainframe computer when a print shop prepared the opinion for publication—it still might be that a photo or other artifact gets added toward the end of the process, leaving little time for other justices to respond to images in their separate opinions.<sup>114</sup>

On another practical level, the online legal databases are inconsistent in how well they reproduce these photos. LEXIS has clear photos, but has only included two photos and used the wrong caption for one of these photos.<sup>115</sup> The third photo, which is the most powerful one, is omitted from the opinion altogether. However, the third photo’s caption appears underneath the second photo, so that the photo and caption are mismatched. The Westlaw version of the opinion has all three photos,<sup>116</sup> but they are dark and grainy and difficult to decipher. Once again, online readers, who constitute a large segment of the readership, cannot rely on the photos they see, and even when the photos

113. Jessica Silbey, *Images in/of Law*, 57 N.Y.L. SCH. L. REV. 171, 172 (2012-13).

114. This was certainly the practice when I was a law clerk to Justice Stevens (1990-1992). The Court handed down *Carnival Cruise* during the first year of my clerkship, when the Court still used a mainframe computer. The Court switched to personal computers the next year (1991-1992). Justice Stevens’ attachment of the ticket was not added until late in the process. This was also the practice in 1996, when there was still “no internal practice requiring that attachments accompany circulated opinions.” Dellinger, *supra* note 1, at 1751 (citing Telephone Interview with Francis J. Lorson, Chief Deputy Clerk, Supreme Court (Nov. 27, 1996)). However, this might no longer be the practice today because today’s software makes it easier to integrate images and text than it had been in the past.

115. See *Brown v. Plata*, 131 S. Ct. 1910, 1949, 2011 U.S. LEXIS 4012.

116. See *Brown v. Plata*, 131 S. Ct. 1910, 1950-51, 2011 WL 1936074.

are included, they do not appear with sufficient clarity for an online reader to have a strong sense of what he or she is seeing.

### III. THE BENEFITS AND HARMS OF IMAGES

In this Part, I explore the benefits and harms of the justices' use of images in their opinions. On balance, the benefits outweigh the harms. In this respect, I disagree with an earlier commentator, Hampton Dellinger, who concluded that images add little to the opinions and open the door to misinterpretation.<sup>117</sup> He counseled against their use.<sup>118</sup> In contrast, I counsel in favor of their use, but recognize that they need to be used with care.

In my view, the image with the greatest potential harm is the photograph, which can be very powerful and can elicit a strong emotional response from viewers. One way to address this problem is for the justices to include an explanation as to why they have selected a particular photo and what they think it shows. The most important safeguard, though, is for the justices to choose carefully which photos to include. They should use only photos that add to the argument and debate and avoid photos that elicit a strong visceral response from the viewer.

#### A. *The Benefits*

##### 1. Strengthening the Argument

The images that the justices use in their opinions can be seen as another tool that enables them to make their argument more effectively. As noted in Part II, these images work best when they convey information that words alone cannot easily convey.

The justices can try to make their point using words, but the image adds another level of understanding for the reader. For example, the irregularly-shaped districts become more apparent when the reader looks at the apportionment map in *Karcher v. Daggett*.<sup>119</sup> So, too, the attached ticket in *Carnival Cruise, Inc. v. Shute*<sup>120</sup> makes clear just how hidden the forum-selection clause is. In spite of the clear wording of the forum-selection clause, the reader sees where the clause is placed

117. Dellinger, *supra* note 1, at 1710.

118. *Id.*

119. 462 U.S. 725, 744 app. (1983).

120. 499 U.S. 585, 605 app. (1991).

in the contract and how difficult it is for a consumer to find it on the reverse side of the ticket in a sea of small print. In both cases, the justices who used the images explained what they saw when they looked at them. The images strengthened their argument and countered or questioned an argument made by the author of the majority opinion.

The photo of the tiny wire cage in *Brown v. Plata*<sup>121</sup> shows that when text and image work together, they can be a powerful combination. The photo of the cage, which is stark and spare, has a caption that explains its use. In the text of his opinion, Justice Kennedy offered the poignant description of one prisoner who was placed in such a cage in the midst of a mental health crisis: the prisoner was found almost twenty-four hours later in a near catatonic state.<sup>122</sup> Both description and photo are haunting, and not easily forgotten.

## 2. Revealing the Reasoning Process

The images are also important when they reveal the justices' reasoning process. If Justice Stevens found it useful to look at the reapportionment map in *Karcher v. Daggett*<sup>123</sup> in order to consider whether there had been an unconstitutional gerrymandering, even if he did not ultimately decide the case on that ground, then it is useful for him to make the map available to the reader. As Justice Powell explained, the map illustrated whether there had been gerrymandering "far better than words describe."<sup>124</sup> The images were part of the record below and were filed with the Court. They informed the justices' understanding of the case, just as the briefs and oral argument did. The justices cite cases or advance arguments that they rely on to reach their result; so too should they include images when they rely on them.

## 3. Making Opinions More Accessible

Images also could make the opinions more accessible to today's law students and young lawyers, all of whom have been raised on images and icons. We live in a visual culture. As Richard Sherwin has observed, "[n]o walk of life, no matter how far flung or esoteric, is immune to the influence of contemporary visual culture."<sup>125</sup> From the apps on smartphones to the videos that go viral on YouTube, there is

121. 131 S. Ct. 1910, 1950 (2011).

122. *Id.* at 1924, 1950.

123. 462 U.S. at 755.

124. *Id.* at 787.

125. Richard K. Sherwin, *Visual Jurisprudence*, 57 N.Y.L. SCH. L. REV. 11, 18 (2012-13).

an image for everything. If an image helps the reader to focus on a justice's argument and to grasp it more thoroughly, then it serves a useful purpose. The judiciary, as Justice Kennedy once explained, uses the written word rather than the sound bite to do its job.<sup>126</sup> Although images are no substitute for the written word, they can work hand in hand with it. Images can grab a reader's attention and make clear an argument that might otherwise remain elusive.

Images in Supreme Court opinions also can make opinions more accessible to the general public. Although a reapportionment map or a cruise-ship ticket is unlikely to have the broad appeal of an iPhone app, an image in a Supreme Court opinion could draw more members of the public to the opinion than might otherwise be the case. The image can serve as an aid and help to crystallize the argument for laypeople. Although Supreme Court opinions are written for a legal audience and are unlikely to attract a general audience, images are one way to reach readers unfamiliar with legal reasoning and legal language. An image might serve as a starting point for making the opinion intelligible to a broader audience than lawyers.

#### 4. Providing a Cultural Repository

The images that justices choose to include in their opinions form a cultural repository for future generations. Although this is unlikely to be an intended purpose of any justice, it is an unintended consequence. The images that the justices include in their opinions—from the Ellis Island landing card provided by Justice Stevens in *New Jersey v. New York*<sup>127</sup> to the seven pages of large black-and-white photographs depicting early cameras in the courtroom appended by Chief Justice Warren in *Estes v. Texas*<sup>128</sup>—offer fascinating glimpses into our past. For example, the photos in *Estes* show a courtroom scene in which the only participants were white men, smoking was permitted in the courtroom, and cameras were large and required bright lights and wires everywhere. As quaint as the photos from *Estes* look to us today, the infrared images in *Kyllo v. United States*<sup>129</sup> and the mushroom adver-

126. See, e.g., Linda Greenhouse, *2 Justices Indicate Supreme Court Is Unlikely To Televisify Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16 (appearing before the House Appropriations subcommittee, Justice Anthony Kennedy explained that the absence of cameras in the U.S. Supreme Court was a "positive" because "[w]e teach that our branch has a different dynamic . . . . We teach that we are judged by what we write.").

127. 523 U.S. 767, 820 (1998) (Stevens, J., dissenting).

128. 381 U.S. 532, 586 app. photographs 1-7 (1965) (Warren, C.J., concurring).

129. 533 U.S. 27, 52 (2001) (Stevens, J., dissenting).

tisements and recipes in *United States v. United Foods, Inc.*<sup>130</sup> are likely to look to future generations. The justices' decision to include an image in an opinion, though unlikely to be based on creating a repository of cultural artifacts, is likely to have this effect. In my view, this is an indirect benefit, but a benefit nonetheless.

## B. The Harms

### 1. Lack of Explanation and Critique

A potential harm of images in Supreme Court opinions arises when the justices include images without any explanation. They do this because they think no explanation is needed. In such cases, they seem to take the view that the object "speaks for itself" and that only one interpretation is possible. The justices seem particularly prone to this view when including photos or video links. There is a sense that "our eyes do not deceive us." However, a photo or video requires interpretation because there are multiple ways of viewing it. It is not as straightforward as the justices think.

For example, two of the photos in *Brown v. Plata*<sup>131</sup> are appended to the majority opinion without any textual explanation. As mentioned earlier,<sup>132</sup> Justice Kennedy did not explain in the text of his opinion why he included these photos and what he thought they showed. The captions, identifying only the name of the prison and the date of the photo, add little information. Perhaps Justice Kennedy assumed that the photos make clear the crowded conditions in which prisoners were held in two California prisons, but it is unclear how representative the photos are of the other prisons and how the photos are related to the medical and mental health needs of the prisoners. The fact that there are a lot of bunk beds in one large room does not convey a sense of the extent of the overcrowding. Nor does it contribute to a better understanding of the unmet medical and mental health care needs of the prisoners. A far more useful photo would have been one of the medical clinic in the prison.

In addition, the photos do not elicit any response from the dissent. The photos need to be part of the debate between the majority and the

130. 533 U.S. 405, 430 app. (2001) (Breyer, J., dissenting).

131. 131 S. Ct. 1910, 1949 (2011).

132. See *supra* Part II.C.



dissent, just as a precedent would be.<sup>133</sup> If the justices are not going to explain why they included the photo and what they see in it, and if those who disagree do not challenge the photo and any concomitant explanation, then the photo functions more as a distraction than as an integral part of the opinion.

Videos are another type of image that the justices have begun to use by including links to the video in their opinion.<sup>134</sup> The justices are likely to include videos more often in the future because videos have become increasingly prevalent in everyday life—from surveillance cameras to citizen-journalists' videos—and in the courtroom.<sup>135</sup> Videos, like photos, require explanation and are open to different interpretations. For example, in *Scott v. Harris*,<sup>136</sup> the majority opinion included a link to the video of a car chase, which captured a police officer in pursuit of a driver who had failed to stop when summoned to do so. The video was archived on the Supreme Court's website and is also on file at the office of the Clerk of Court.<sup>137</sup> Justice Scalia, writing for the majority, and in response to Justice Stevens' dissent, chose to include the link to the car chase: "We are happy to allow the videotape to speak for itself."<sup>138</sup> Justice Scalia, along with seven other justices, saw a car chase that "resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."<sup>139</sup> Justice Breyer, writing a concurrence, also referred to the link in the Court opinion and urged readers to watch the video.<sup>140</sup> He did not think that anyone who watched it, including a reasonable jury, could find that the officer involved in the car chase had used excessive force and acted in violation of the U.S. Constitution.<sup>141</sup>

133. As Rebecca Tushnet observed, "judicial treatment of images can be improved. Courts could consider images as arguments, neither ineffable nor representations of reality." Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 684, 709 (2012).

134. The cases collected in Part I do not include links to video, which would require an online search rather than a search of the *U.S. Reports*. I leave it to future researchers to collect U.S. Supreme Court cases that include links to online videos.

135. See, e.g., NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION & JUDGMENT* xi (2009).

136. 550 U.S. 372 (2007).

137. *Id.* at 378 n.5 ("See Record 36, Exh. A, available at [http://www.supremecourtus.gov/opinions/video/scott\\_v\\_harris.html](http://www.supremecourtus.gov/opinions/video/scott_v_harris.html) and in Clerk of Court's case file.").

138. *Id.*

139. *Id.* at 380.

140. *Id.* at 387 (Breyer, J., concurring).

141. *Id.*

Underlying Justice Breyer's words is the view that there is only one interpretation of the video and that everyone who watches it will see it in the same way. However, this was not the case, even with the justices, as Justice Stevens filed a dissent based on a different interpretation of the video.<sup>142</sup> Justice Stevens saw a car chase in which the headlights appeared as bursts of light. He surmised that if his fellow justices had "learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."<sup>143</sup> As Justice Stevens pointed out in his dissent, even the district court judge and the three judges on the Court of Appeals had interpreted the video differently than the Court,<sup>144</sup> suggesting that there is more than one interpretation. Just as reasonable judges could differ in their interpretation, so too, could reasonable jurors, and therefore, the video should have gone to the jury.<sup>145</sup>

## 2. The Need to Exercise Restraint

Images, especially photos, can be very powerful and the justices need to exercise restraint in deciding whether to include a photo in a highly contested area of the law. The most serious potential harm with photos is that they could arouse a strong, visceral response in viewers in an area that is controversial or emotionally charged. In such cases, the photos, rather than adding to reason and argument, will undermine them.

The photo of the cage in *Brown v. Plata* was moving, not because of the image itself—a small, padlocked, wire-mesh cage—but because of the insight it gave the viewer as to where a prisoner in the midst of a mental health crisis would be kept. The photo did not cross the line—or at least the dissent did not charge that it did—but one could easily imagine photos that do cross the line. In some areas of the law, such as abortion or death penalty, where there is a deep societal divide and people on both sides of the issue feel strongly, the inclusion of a photo could be deeply divisive. One can imagine a photo of a fetus or a photo of an execution, which would elicit a response that would not be shaped by reason and argument but by emotion and outrage. In this

142. *Id.* at 389 (Stevens, J., dissenting).

143. *Id.* at 390 n.1

144. *Id.* at 395.

145. *Id.* at 396.

age of images that go viral, this should be of particular concern to the Court. Thus, it remains up to the justices to exercise restraint and to choose their photos wisely. The photo should add to the reasoning process, not obscure it, and should foster discussion, not drown it out. Just as the justices choose the words in their opinions carefully because they are writing for the ages, so too should they choose their photos carefully because they, too, are for the ages.

### 3. Practical Problems

One practical problem with the justices' use of images in their opinions is that the online versions do not always include these images, or if they do, the images are often difficult to decipher. If the images are part of the opinion, then they need to be included in the online opinions as well. Although online services might not have been able to reproduce the images when they first started making Supreme Court opinions available online, this is no longer the case. In fact, given the integration of text and image throughout the Web, readers of online opinions should be able to see images that have amazing clarity. Such clarity should be available now that opinions can be read not just on computer screens, but also on mobile devices, such as smartphones and tablet PCs. A touch of the screen should bring up an image with great resolution. Rather than the online viewer seeing an incomplete or an inferior version of the opinion, he or she should see an enhanced version. Although online databases still do not provide such service, it is not due to a technological impediment. LEXIS might once have been limited by technology and unable to include images in text, but this no longer holds true. In the early days, LEXIS might have had no choice but to indicate an image by the phrase "[See Exhibit in Original]," but those days have long since passed.<sup>146</sup>

### CONCLUSION

Justices who want to include an image in their opinion should do so, but they should think carefully about what the image adds. If it strengthens their argument or reveals their reasoning, then it plays a useful role and should be included in the opinion. Every time the justices include an image, they should explain in the text why they have included the image and what they think it shows. Even though some

146. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 605, 1991 LEXIS 2221 (indicating, but not providing, the exhibit).

justices think that images speak for themselves, this is not the case. Photos and videos, in particular, offer multiple interpretations, and the justices need to explain what they see and why they have included the photo or the video. Similarly, those justices with a contrary view of the case need to challenge images, just like they would challenge arguments and precedents. They need to explain why an image raises a question or fails to resolve an issue. They need to point out the distortions in images and explain what has been omitted and what editorial decisions have been made in creating the image. Just as justices need to critique images, we as viewers need to become more critical in our assessment of images, particularly with respect to photos and videos. We need to question what we see—whether in a graph, a photo, or a video—and even more challenging, we need to question what we do not see. In sum, we need to acquire what Richard Sherwin has described as “visual prudence.”<sup>147</sup>

As a practical matter, if images are part of an opinion, then they need to be included in online versions of the opinion. This is critical because more readers are reading opinions online than ever before. Technology might not have permitted images in online opinions originally, but this is no longer the case today. Although reporters and online databases have the technological capacity to include images with great ease and at little cost, this should not inspire the justices to use images with abandon. Rather, they need to proceed with care. They should use images only when they make a point that is hard to convey with words alone.

Most important, just as the justices think carefully about the words they use in their opinion and recognize that their opinion once published is part of the public domain, they need to think carefully about the images they use. They need to make sure that the images they choose are ones that will enhance, rather than diminish, public debate, particularly when the subject matter elicits strongly-held and deeply-contested points of view.

147. Richard K. Sherwin, Prof., N.Y. Law School, Panel on Bodies of Law: Real, Virtual, and Mythic, Association for the Study of Law, Culture and the Humanities 16th Annual Conference (Mar. 22, 2013) (notes on file with author).