COMMENTARY

WORDS ARE ENOUGH: THE TROUBLESOME USE OF PHOTOGRAPHS, MAPS, AND OTHER IMAGES IN SUPREME COURT OPINIONS

BY

HAMPTON DELLINGER

Reprinted From
HARVARD LAW REVIEW
Vol. 110, No. 8, June 1997

COMMENTARIES

WORDS ARE ENOUGH: THE TROUBLESOME USE OF PHOTOGRAPHS, MAPS, AND OTHER IMAGES IN SUPREME COURT OPINIONS

*Hampton Dellinger**

In this Commentary, Mr. Dellinger defines and analyzes a heretofore unrecognized class of United States Supreme Court decisions: those in which a photograph, map, replica, or reproduction is attached to a Justice's opinion. Such attachments, all relying on visual attributes that uniquely differentiate them from words, have appeared in a number of seminal decisions. Mr. Dellinger argues that the use of visual attachments poses special dangers. Because their neutrality and accuracy are so readily assumed, such attachments often elude the skepticism with which the written portions of Court opinions are generally reviewed. Yet their inherent distortions and vulnerability to manipulation make the Justices' reliance on them problematic. Mr. Dellinger reviews the past use of attachments and finds their use to have been generally unnecessary and unhelpful. He then argues that the Court should forgo any future reliance on visual attachments. In the alternative, the Justices, the companies that reproduce Court opinions, and readers should improve significantly the ways in which they respectively use, publish, and review these attachments.

Customarily, United States Supreme Court opinions come unadorned, words on paper and nothing more. For the most part, the Justices rely on this venerable means of communication to great benefit. Written opinions have an aura of dignity, and offer an opportunity for explication and reflection, that helps to elevate the High Court above the soundbite-driven arena in which the political branches often do battle. Even the Court's cherished reputation as the "least dangerous" governmental branch is arguably attributable, at least in part, to the unprepossessing medium on which its members so heavily rely.

More than two hundred years after its adoption by the Court, however, the traditional words-only opinion has inherent limitations that seem particularly acute when compared with modern media such as photography, television, and computers.[1] Pure prose frustrates with its relative lack of immediacy and its inability to record or re-create visual reality. At the same time, as a conduit for conveying information,

---

* Special Counsel to the Attorney General, North Carolina Department of Justice. Deep gratitude goes to my mother, Anne M. Dellinger, for the encouragement that got me started; to my wife, Jolynn Childers Dellinger, for the love, support, and laughter that kept me going; and to both, as well as my father, Walter E. Dellinger, for the comments that helped me finish. This writing is dedicated to my late grandmother, Grace Lawing Dellinger.

[1] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 608 (Kermit L. Hall, James W. Ely, Jr., Joel B. Grossman & William M. Wiecek eds., 1992) (noting that, during the Court's first decade, most opinions were not captured in writing).

words are not above suspicion, capable of being enlisted to cajole, obfuscate, and appeal to the emotions.

For these reasons, various Justices have occasionally elected to work with more than words. Often, the circumstances are mundane — a boundary dispute between two states that a photograph[2] or map[3] (or both)[4] assists in settling, or a patent case in which diagrams elucidate the alleged infringement.[5] But seminal decisions have also employed attachments, ranging from the purportedly "bizarre" outline of North Carolina's congressional districts appended to the majority's opinion in *Shaw v. Reno*,[6] to the seven pages of photographs accompanying Chief Justice Warren's concurrence in the first major challenge to the televising of trials,[7] to the allegedly libelous newspaper advertisement affixed to the opinion of the Court in *New York Times Co. v. Sullivan*.[8] In fact, the bound volumes that collect the Court's opinions contain a treasure trove of photographs, maps, replicas, and reproductions.[9]

The intermittent resort to visual[10] augmentation for written opinions is unlikely to abate. For example, opinions in three of the five

---

[2] *See, e.g.*, Missouri v. Iowa, 165 U.S. 118, 142 (1897). Attached to the century-old opinion in this boundary-dispute case is a "[p]hotograph of a section of the oak tree at the Fifty-second mile point, supposed to be [the] witness tree in the Iowa-Missouri boundary." *Id.* at 142. This photograph appears to be the first attached to a Supreme Court opinion. Interestingly, the caption accompanying the photograph notes that the tree cross-section is "[o]ne-third natural size." *Id.* As discussed below, photographs in later opinions, shot from camera angles or perspectives that distort the depicted object's "natural" or actual size, have failed to include such useful information. *See infra* section I.A.3.

[3] *See, e.g.*, Mississippi v. Arkansas, 415 U.S. 289, 302 (1974).

[4] *See, e.g.*, Arkansas v. Tennessee, 397 U.S. 91, 92 apps. A-I, A-II (1970).

[5] *See, e.g.*, Graham v. John Deere Co., 383 U.S. 1, 37 app. (1966).

[6] 509 U.S. 630, 658 (1993).

[7] *See* Estes v. Texas, 381 U.S. 532, 586 app. photographs 1–7 (1965) (Warren, C.J., concurring).

[8] 376 U.S. 254, 292 (1964).

[9] In addition to the opinions cited in this introduction, other cases with attachments include *Miller v. Johnson*, 115 S. Ct. 2475, 2495–96, 2508–09 (1995) (maps depicting congressional districts in Georgia and North Carolina); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 605 app. (1991) (Stevens, J., dissenting) (replica of cruise-line ticket); *Greer v. Spock*, 424 U.S. 828, 871–72 (1976) (Brennan, J., dissenting) (photographs of entrances to various army bases); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 214 app. (1973) (map of elementary school boundaries); *Gomillion v. Lightfoot*, 364 U.S. 339, 348 (1960) (chart showing Tuskegee, Alabama, before and after redistricting); *Colegrove v. Green*, 328 U.S. 549, 560–63 (1946) (opinion of Frankfurter, J.) (maps detailing various congressional districts in several states); *Southern Pacific Co. v. United States*, 307 U.S. 393, 402–03 (1939) (Butler, J., dissenting) (blue and red map of railroad lines); and *Appleby v. City of New York*, 271 U.S. 364, 368–69 (1926) (orange map of lot referred to in the deed). In terms of the sheer amount of attachments, volume 381 of the *United States Reports* is exceptional. It contains four maps, one dramatically oversized, accompanying Justice Black's dissenting opinion in *United States v. California*, 381 U.S. 139, 212 app. A–D (1965) (Black, J., dissenting), and the seven pages of photographs in *Estes v. Texas*, 381 U.S. 532, 586 app. photographs 1–7 (1965).

[10] For purposes of this Commentary, visual or graphic attachments are defined as attachments whose appearance is an important feature of their being or their purpose. *See* Chris Jenks, *The*

decisions handed down on the final day of the 1994–95 Term included attachments.[11] Moreover, Justices have shown an affinity for affixing maps to opinions in political redistricting cases, an area of doctrinal uncertainty likely to require the Court's continuing attention.[12] And cases involving recurring First Amendment issues, such as religious symbols or symbolic speech, or those arising under laws like the recently passed Visual Artists Rights Act (VARA),[13] offer tempting targets for attachments.

The Justices' desire to incorporate photographs, maps, and other attachments in their written work is understandable. First, visual attachments appear to possess a neutral, objective quality that written opinions (as their very name suggests) lack. Second, readers might presume such attachments to be accurate in ways different from, and superior to, written opinions: "photography has traditionally been seen as a medium of truth and unassailable accuracy,"[14] and maps can "present a factual statement about geographic reality."[15] Replicas or

---

Centrality of the Eye in Western Culture, *in* VISUAL CULTURE 1, 16 (Chris Jenks ed., 1995). Such a definition encompasses photographs and maps, as well as replicas and reproductions. Although the items in the last group (for example, newspaper advertisements) do contain words, their inclusion as an actual attachment (rather than a mere retyping of the items' relevant passages) highlights the importance of their sight-based attributes. *See infra* section I.C.

[11] *See Miller*, 115 S. Ct. at 2508–09 (maps); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2463–64 (1995) (Souter, J., concurring in part and concurring in the judgment) (photographs); United States v. Hays, 115 S. Ct. 2431, 2438–39 (1995) (maps).

[12] *See, e.g.*, Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 45 ("The unresolved issues of race and politics appear[ ] likely to condemn the decennial redistricting process to a decade's worth of litigation."); *The Supreme Court — Leading Cases*, 110 HARV. L. REV. 135, 186 (1996) (noting "[t]he Court's persistent interference with redistricting, despite its continuing inability to devise a satisfying test [for evaluating the constitutionality of challenged districts]").

[13] 17 U.S.C. § 106A (1994). VARA prevents the destruction of works of visual art of "recognized stature." *Id.* Although the Supreme Court has not decided a case involving VARA yet, challenges under the Act have been heard by the federal district and appellate courts. *See, e.g.*, Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 85 (2d Cir. 1995).

[14] Christine A. Guilshan, *A Picture is Worth a Thousand Lies: Electronic Imaging and the Future of the Admissibility of Photographs into Evidence*, 18 RUTGERS COMPUTER & TECH. L.J. 365, 365 (1992). As author Susan Sontag has put it, "a photograph — any photograph — seems to have a more innocent, and therefore more accurate, relation to visible reality than do other mimetic objects." SUSAN SONTAG, ON PHOTOGRAPHY 6 (1977); *see also* James F. Fagan, Jr., *Smile. How Prejudicial Can the Candid Camera Be? The Admission of Photographs in a Criminal Trial*, 9 ST. JOHN'S J. LEGAL COMMENT. 145, 146 n.8 (1993) ("'Seeing is believing,' and consequently a picture, as is true for other real evidence, possesses unusually strong persuasive force.") (quoting MCCORMICK ON EVIDENCE § 212, at 664 (Edward Cleary ed., 3d ed. 1984)); David Sternbach, *Hanging Pictures: Photographic Theory and the Framing of Images of Execution*, 70 N.Y.U. L. REV. 1100, 1122 (1995) ("The truth-claims made for photography are unique, [whereas] memory, experience, and written recording are generally understood to be more or less subjective and fallible.").

[15] DENIS WOOD, POWER OF MAPS 18 (1992) (quoting J.B. Harley, *Text and Contexts in the Interpretation of Early Maps*, *in* FROM SEA CHARTS TO SATELLITE IMAGES: INTERPRETING NORTH AMERICAN HISTORY THROUGH MAPS 3, 4 (David Buisseret ed., 1990)); *see also* MARK MONMONIER, DRAWING THE LINE: TALES OF MAPS AND CARTOCONTROVERSY 1 (1995) ("At the

reproductions of actual objects appear similarly credible because they seem to do nothing more than, in effect, speak for themselves. Finally, photographs, maps, and other attachments operate as communicative vehicles of economy, all offering the possibility of an impact more powerful than words.[16]

Yet the unique attributes of these attachments pose special dangers. Because their neutrality and accuracy are so readily assumed, attachments elude the skepticism with which written opinions are generally reviewed. However, an analysis of the major cases in which the Court has used various attachments suggests that such automatic deference is undeserved. Take, for example, the photograph attached to a dissenting opinion in the most recent religious symbols case, *Capitol Square Review and Advisory Board v. Pinette*.[17] The low angle from which the picture is shot makes a ten-foot Latin cross appear substantially taller than it is.[18] In the redistricting cases, the fact that "map[s] must offer a selective, incomplete view of reality"[19] creates a critical but generally overlooked problem with the invalidation of districts that appear significantly more "bizarre" on paper than they do to resident-voters in reality. These opinions, and others, suggest ways in which the manipulable properties of attachments — including color, angle, size, and perspective, as well as the inevitable exclusion of critical context[20] — can individually or in combination result in a particularly subjective version of the "facts." The Court's reliance on these atypical depictions may contribute, in turn, to the formulation of questionable legal arguments and conclusions.[21]

---

root of [maps'] power is our frequently unquestioning acceptance of cartographic messages. Even folks who are routinely suspicious of written text equate maps with fact . . . .").

16 *See* Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996) (noting that a map "portray[ed] [the issue] far better than words"); VICKI GOLDBERG, THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES 7 (1991) (noting that photographs provide "a swifter and more succinct impact than words").

17 115 S. Ct. 2440, 2474 (1995) (Stevens, J., dissenting).

18 *See id.* Photographs relied on in an earlier case of contested religious displays contain similar, though slightly less obvious, distortions. *See* County of Allegheny v. ACLU, 492 U.S. 573, 622 (1989) (opinion of Blackmun, J.).

19 MARK MONMONIER, HOW TO LIE WITH MAPS 1 (1991).

20 Pictures and maps, in particular, contain an additional and inherent distortion: they are two-dimensional representations of three-dimensional reality. *See, e.g.*, MARSHALL HOUTS, PHOTOGRAPHIC MISREPRESENTATION § 3.03, at 3-3 (1969) ("The camera begins with a strike against it since it must attempt to portray three dimensions when it is physically limited to only two."); MONMONIER, *supra* note 19, at 1 ("To portray meaningful relationships for a complex, three-dimensional world on a flat sheet of paper . . . , a map must distort reality.").

21 The author does not mean to suggest in any way that Justices have intentionally used attachments to mislead or confuse. Rather, as discussed below, the argument is that the capacity of, in particular, photographs and maps to distort reality can easily go unrecognized and, of course, is open to debate.

Even when an attachment's accuracy is not in dispute, its "swift[ ] and . . . succinct impact"[22] can unduly influence what the Justices, or readers, see; in the language of the Federal Rules of Evidence, an attachment's probative value can be outweighed by its prejudicial effect.[23] As one commentator has noted, photographs have the power "to open the gates of emotion."[24] Other visual and actual objects can have a similar, though less profound, impact.[25] Even when the effect is more muted, such objects can act as a *deus ex machina*, allowing the Justice to resolve a difficult legal point too easily by distracting the reader with an eye-catching attachment.[26]

Apart from the substantive problems posed by photographs, maps, and other images, their use raises a number of technical difficulties. An immediate dilemma exists in the present inability of online legal services to reproduce pictorial attachments on computer screens clearly, if at all.[27] In the future, the situation could easily be reversed.[28] For example, once online services can accommodate advanced graphics, a Justice may choose to include some video footage

---

[22] GOLDBERG, *supra* note 16, at 7.

[23] *See* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

[24] GOLDBERG, *supra* note 16, at 246; *see also* Benjamin V. Madison III, *Seeing Can Be Deceiving: Photographic Evidence in a Visual Age — How Much Weight Does It Deserve?*, 25 WM. & MARY L. REV. 705, 715–16 (1984) ("Improper influence diminishes the evidentiary value of photographs by evoking emotional responses instead of rational ones, and causes the factfinder to give the photographic evidence more weight than it deserves.").

[25] *Cf.* United States v. Hamilton, 583 F.2d 448, 451 (9th Cir. 1978) (Kennedy, J.) ("Expression in cartography is not so different from other artistic forms seeking to touch upon external realities . . . .").

[26] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 513 (1968) (Stewart, J., dissenting) ("The Court today adds as an Appendix to its opinion — like a *deus ex machina* — Judge Wyzanski's findings of fact.").

[27] Today, the ability to view attachments to Supreme Court opinions online varies greatly depending on which online provider one uses. For example, those reading the Court's opinion in *Estes v. Texas*, 381 U.S. 532 (1965), on either Westlaw or LEXIS are unable to view the attached photographs on the computer screen. Although Westlaw users do have the option of printing out the attached photographs, *see, e.g.*, *Estes*, 381 U.S. at 586, *available in* Westlaw ("<Image 1 (4.75" × 5.5") is available via Offline Print . . . ."), LEXIS users do not, *see, e.g.*, Estes v. Texas, No. 256, 1965 U.S. LEXIS 2339, at ***89 (indicating that LEXIS users should "SEE PHOTOS IN ORIGINAL"). Some Internet sites do reproduce some attachments on-screen. *See, e.g.*, *U.S. Supreme Court Database* (visited Apr. 1, 1997) <http://www.usscplus.com> (reproducing maps but not photographs). Moreover, the Clerk of the Supreme Court operates an electronic bulletin-board system, which can be accessed by modem at (202) 554-2570 and which enables users to download cases decided during the previous three years and to print out black-and-white attachments that have been digitized as parts of the WordPerfect documents containing the opinions.

The common denominator of every online service that offers the option to view attachments is the relatively poor quality of the reproduced attachment — on-screen images appear indistinct, while printed versions depend largely on printer quality. The written portions of all Supreme Court opinions are, of course, identically reproduced, whether in bound volumes or online.

[28] *See* M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681, 1699 (1995) ("Computers were originally even more textually oriented than print. As machines have become more powerful and as network transmission speeds have

that would be accessible only to those who can afford the necessary technology.[29] By using more than words, the Court denies to some readers, both now and in the future, access to some parts of certain opinions.[30]

Despite the serious issues raised by the Court's reliance on attachments, there are no standards governing their use. And, surprisingly, the Court's use of visual images has gone almost wholly without comment, either from the Justices[31] or from the legal community.[32] The

---

increased, however, graphical capabilities for communication and expression have expanded as well.").

[29] Already the Court has considered cases that involve, to varying degrees, videotaped evidence. *See* Koon v. United States, 116 S. Ct. 2035, 2041 (1996) (recounting events of Rodney King's beating that were "captured on videotape"); Schlup v. Delo, 115 S. Ct. 851, 855 (1995) (discussing events recorded on "videotape from a camera in the prisoners' dining room" on which petitioner had "relied heavily" at trial). Even more recently, a challenge to the constitutionality of the Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133–36, introduced the Court to the new frontier of cyberspace. *See* ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554, 554 (1996). One amicus group submitted its brief for the Court on CD-ROM in addition to its hardcopy filing, suggesting another visually oriented item, not universally available, that a Justice might feel an urge to use. *See* Brief and Appendix of Amici Curiae American Association of University Professors in Support of Respondents, Reno v. ACLU, 117 S. Ct. 554 (1996) (No. 96-511).

[30] Another issue relates to attachments appearing differently among the various hard copy reporters. For example, the map attached to the majority's opinion in *Shaw v. Reno* is multicolored in the *United States Reports* version (the official Court edition) but appears in black and white in the *Supreme Court Reporter* and *Lawyer's Edition* (two commercial publications). As discussed below, the two-tone coloring is inaccurate and unfairly suggestive. *Compare* 509 U.S. 630, 658 (*United States Reports* version) *with* 113 S. Ct. 2816, 2833 (*Supreme Court Reporter* version) *and* 125 L. Ed. 2d 511, 536A (*Lawyer's Edition* version). Even more disconcerting is the fact that, as reprinted in *United States Law Week*, the *Shaw* opinion includes no map at all.

[31] The Court's silence is both striking and puzzling. The critiques made in this Commentary of various Justices' use of attachments over the last 50 years could just as easily have been noted by colleagues in their own contemporaneous opinions. And it was at the turn of the last century that the Supreme Court first acknowledged, when extending copyright protection to photographs and illustrations, that even the most simple visual images involve creativity and subjectivity. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) ("The least pretentious picture has more originality in it than directories and the like, which may be copyrighted."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (finding photographic portrait of writer Oscar Wilde "to be an original work of art, the product of plaintiff's intellectual invention"). A few Justices have explicitly questioned the accuracy or utility of photographs, maps, or visual images generally in cases containing no specific attachment. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29 (1971) (Burger, C.J.) ("Maps do not tell the whole story . . . ."); United States v. Rabinowitz, 339 U.S. 56, 71 (1950) (Frankfurter, J., dissenting) ("Photographs can be so taken as to make a midget look like a giant, and vice versa."); Taylor v. Alabama, 335 U.S. 252, 278 (1948) (Murphy, J., dissenting) ("Suffice it to say that photographs can be most deceiving . . . .").

[32] A handful of commentators, either as part of a book or an article assessing a particular opinion, have made brief reference to the presence of an attachment. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 169 (1991) (noting that Justice Brennan's decision to attach a copy of the advertisement to his opinion was "an effective device"); John McKinley Kirby, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Lines v. Shute, 70 N.C. L. REV. 888, 904 n.132 (1992) ("Justice Stevens felt that the contract itself so eloquently illustrated the argument for invalidating the

oversight is especially noteworthy given the unique and undeniable impact of attachments. Put simply, a visual attachment, like the words that precede it, should be viewed as an opinion.

Part I of this Commentary seeks to address this neglected area of Supreme Court scholarship by focusing on the cases in which a photograph, map, or other image is attached to a published opinion. This review strongly suggests that the attachment of visual aids to the Justices' written work has been unnecessary and largely unhelpful, both to the Court and to its audience. The very novelty of such a review highlights an additional problem created by the Court's resort to visual aids: the absence of any established methods for interpreting visual accompaniments to written legal texts. As Justice Holmes warned at the beginning of this century, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[33] Yet, by including visual attachments, Justices continue to force both themselves and readers into such a "dangerous undertaking."[34]

Part II of this Commentary argues that, in light of the Court's undistinguished use of visual attachments and their inherent susceptibility to manipulation, the Court should forgo future reliance on such attachments. At a minimum, the Justices must provide more objective information about the attachments they use, and readers should receive them more skeptically.

I. The Supreme Court's Use of Attachments

Reviewing the major cases in which the Court has used attachments serves several purposes. First, concentrating on visual objects often provides a clearer, more complete understanding of the written opinions to which they are attached. To the extent that questions can be raised about an attachment's fairness, accuracy, or neutrality, they are often symptomatic of an opinion whose factual basis may be sus-

---

contract that he appended a copy of the relevant ticket provisions to the opinion."); Charles R. Nesson & Andrew D. Koblenz, *The Image of Justice:* Chandler v. Florida, 16 Harv. C.R.-C.L. L. Rev. 405, 406 (1981) (commenting on the irony of Chief Justice Warren's concurrence in *Estes v. Texas*, which relied on one medium, photography, to bar another, television, from the courtroom); *The Supreme Court — Leading Cases*, 110 Harv. L. Rev. 135, 189 n.43 (1996) (asserting that Justice Stevens appended maps of three non-majority-minority districts in *Bush v. Vera* "[t]o make the point that shape proved nothing"). But there has been no extended analysis of any particular photograph, map, replica, or reproduction, and no general review of attachments to the Supreme Court's, or any other court's, opinions.

[33] *Bleistein*, 188 U.S. at 251. The difficulty of analyzing visual attachments is compounded by the fact that they must be reviewed both on their own and in relation to the written texts they accompany. To the extent there is a conflict — as in *Estes* or *Spock*, for example, where the description of a scene or event seems inconsistent with its photographic depiction, *see infra* pp. 1712–21 — the issue arises whether the image or the text (or both) constitutes the opinion's holding, thereby becoming precedent.

[34] *Bleistein*, 188 U.S. at 251.

pect or whose legal reasoning weak. Second, focusing on the past use of attachments suggests the potential for future abuse and the ways in which it could occur. Finally, assuming the Court is not prepared to abandon its reliance on attachments, both the authors and readers of opinions with attachments should review them critically and subject them to the same scrutiny applied to a Justice's written work. The best way to build such analytical skills is to look back at the Court's prior use of attachments, which has so far escaped even mild scrutiny.[35]

Although similarities exist in how photographs, maps, replicas, and reproductions can be manipulated, and in their effect on the reader (or "viewer"), characteristics peculiar to each type of visual aid make separate consideration appropriate.

A. Photographs: What Measure of Truth?

Although the Court has relied on photographs relatively infrequently,[36] each instance raises doubts, ranging from the ineffectiveness of photographs and their propensity to distract, to problems with their authentication and reproduction, to their capacity to present a compelling, yet skewed or distorted, version of a place or event.[37]

---

[35] Among the closest readers of Supreme Court opinions are, of course, the lower federal and state courts that are bound by them. To the extent that the use of attachments leads to confusion, inaccuracy, or incomplete doctrinal development, the interpretive task of lower courts is made more difficult. Moreover, if the Supreme Court is slipshod in its use of attachments, it discourages rigor in the lower courts. Interestingly, in every case discussed in this Commentary save one, *United States v. Hays*, 115 S. Ct. 2431 (1995), the court below did not include an attachment to its written opinion, but the Supreme Court did. This fact suggests that, although they may be useful, attachments are not necessary.

[36] Aside from boundary-dispute cases, photographs have been attached only to the four Court decisions discussed herein: *Estes*, *Spock*, *Allegheny*, and *Capitol Square*. By comparison, the Court has included maps much more frequently.

[37] As discussed below, photographs attached to Supreme Court opinions suffer from the distorting effects of perspective, angle of view, light, and color. *See infra* section I.A.3. In the field of photography generally, these problems are considered more prevalent than those caused by the intentional altering (or "doctoring") of photographs. As Benjamin Madison wrote:

> [Deception caused by] [v]ariations in lenses and camera position can be inadvertent. Other variables, such as changes in lighting, can create deceptive images that are even less likely to result from conscious deception. Indeed, photographic deception probably is due more to ignorance of the variables that affect photographic quality than to conscious manipulation of the photographic process.

Madison, *supra* note 24, at 716 n.70 (citing George S. Heilpern & Arthur H. Schatz, *Responsibilities of the Legal Profession to Forensic Sciences: Responsibilities to the Courtroom Photographer*, 6 J. FORENSIC SCI. 207, 207 (1961)).

While there is no evidence to suggest that any photographs attached to Supreme Court opinions were altered by a party (or by the original photographer) before their submission into the record before the Court, the threat of undetectable manipulation has increased significantly in recent years with developments such as electronic photography. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 34.35, at 402 (3d ed. 1995) ("Electronic photographs can be altered without leaving a trace (unlike conventional photographs)."); Guilshan, *supra* note 14, at 370 ("The electronic photograph has appeared and is challenging such long-held beliefs as 'the

1. Estes v. Texas. — There was nothing subtle about the Supreme Court's first use of photography in a non-boundary dispute case, or the opinion to which the pictures were attached. In 1965, *Estes v. Texas*[38] presented the Court with the question of whether televising a criminal trial violated a state defendant's right to due process under the Fourteenth Amendment. The defendant was Billie Sol Estes, a Texas financier and confidant of President Lyndon Johnson. Estes's prosecution for swindling gained national notoriety and sparked intense interest in the Dallas area. At the pretrial hearing, which was televised, the defendant sought to prevent the broadcasting of his upcoming trial. Despite the fact that "[c]ables and wires were snaked across the courtroom floor,"[39] with the result that the hearing was "not one of that judicial serenity and calm to which petitioner was entitled,"[40] the judge denied the motion.[41] At the subsequent trial, parts of which were also televised, though by significantly less obtrusive cameras, the jury voted to convict.[42]

A fractured Supreme Court reversed the conviction.[43] Writing for the plurality,[44] Justice Clark reasoned that the presence of cameras unconstitutionally prejudiced the defendant, in part by distracting the trial participants.[45] Moreover, Justice Clark assumed that a televised trial would lead the jury to conclude that the defendant was notorious and thus guilty.[46] Writing in dissent,[47] Justice White would have sustained the jury's guilty verdict on the ground that there was neither evidence of actual prejudice to the defendant, nor evidence that a "prophylactic rule" was currently needed.[48]

The photographs were included in a concurring opinion written by Chief Justice Warren.[49] Like Justices Clark and Harlan,[50] Chief Jus-

---

camera never lies' and 'a picture is worth a thousand words.' Throughout the past decade, advances in computer technology have been emerging which may well alter society's reliance on the photograph as a documentary tool.").

[38] 381 U.S. 532 (1965).

[39] *Id.* at 536.

[40] *Id.*

[41] *See id.* at 535.

[42] *See id.* at 534, 537.

[43] *See id.* at 534.

[44] Chief Justice Warren and Justices Douglas and Goldberg joined Justice Clark's opinion.

[45] *See Estes*, 381 U.S. at 545–50.

[46] *See id.* at 550–51 (stating that the trial court's decision to allow proceedings to be telecast "emphasized the notorious nature of the coming trial").

Justice Harlan provided the critical fifth vote for reversing the conviction but joined the plurality's opinion only "to the extent indicated in [his concurring] opinion." *Id.* at 587 (Harlan, J., concurring). Although Harlan's concurrence essentially embraced the same rationale as the plurality, it emphasized his belief that, although televising this trial violated the Due Process Clause, less notorious cases might be constitutionally televised. *Id.*

[47] Justices Black, Brennan, and Stewart joined Justice White's dissent.

[48] *See Estes*, 381 U.S. at 616 (White, J., dissenting).

[49] Justices Douglas and Goldberg joined Chief Justice Warren's concurrence.

tice Warren concluded that both the presence of cameras in the courtroom and the broadcast of the trial prejudiced the defendant, compelling a reversal of the conviction.[51] But unlike a majority of the Justices, he was willing to preclude a future reassessment of the issue of televising criminal trials: "this is the appropriate time to make a definitive appraisal of television in the courtroom."[52] Chief Justice Warren was convinced television cameras should be banned because the televising of criminal trials inherently constituted a denial of due process.[53]

Beyond cataloging the myriad ways in which cameras could prejudice the court proceedings,[54] Chief Justice Warren, relying on strong rhetoric, contended that the broadcast of criminal trials "runs counter to the evolution of Anglo-American criminal procedure over a period of centuries."[55] He also compared the use of cameras in American courtrooms to the Soviet Union's infamous sham, Cold War-era trial of captured American pilot Francis Gary Powers.[56] According to one commentary, "[Chief Justice] Warren's only apparent purpose in writing was to show that he could outdo the other Justices in imagining the horribles that television would create."[57]

Fulminating and arguably hyperbolic, Chief Justice Warren's words paint a vivid picture. For him, however, words were not enough. To supplement his text, he appended seven separate, fold-out photographs, each the size of two pages of text.[58] Three of the pictures show the array of television cameras at the pretrial hearing;[59] two record the presence of the cameras at the subsequent trial;[60] and one portrays the "television motor van" set up outside the courthouse during the pretrial hearing.[61] A final photograph, according to Chief

---

50 For a brief discussion of Justice Harlan's opinion, *see supra* note 46.

51 *See Estes*, 381 U.S. at 578 (Warren, C.J., concurring) ("I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings. . . .").

52 *Id.* at 552.

53 *See id.*

54 *See id.* at 579–80.

55 *Id.* at 557.

56 *See id.* at 575–76.

57 Nesson & Koblenz, *supra* note 32, at 406.

58 The fold-out version of the photographs appear exclusively in the *United States Reports* version of the opinion. Other reporters reduce the pictures to one per page. Although the difference means little in the context of *Estes*, it is symptomatic of the larger problem of Supreme Court opinion reporting services reproducing the same visual attachments in different ways, or, for those reading opinions on computer screens, not at all.

59 *See Estes*, 381 U.S. at 586 app. photographs 1, 2, 5 (Warren, C.J., concurring).

60 *See id.* at 586 app. photographs 6, 7.

61 *Id.* at 586 app. photograph 3.

Justice Warren's caption, "shows petitioner trying to make his way into the courtroom for the September [pretrial] hearing" (IMAGE 1).[62]

In the text of his opinion, Chief Justice Warren further described the incident of "merciless badgering" that he contended this photograph captured: "As [the defendant] approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face."[63]

The inclusion of the photographs is problematic on several levels. First, they are, in the main, irrelevant to the issue before the Court, and thus unhelpful to readers. Of the seven photographs, two portray events occurring outside the courthouse. The three photographs of the pretrial hearing are also arguably irrelevant, because the Court, in granting certiorari, specifically declined to review the state appeals court finding that the defendant was not prejudiced by the pretrial publicity.[64]

The pictures are even less helpful to Chief Justice Warren than to readers, for they do little to bolster his argument. Rather, they expose the excesses of his rhetoric, work to contradict rather than confirm his specific contentions, and undermine his broader goals. For example, Chief Justice Warren asserted that the defendant was the victim of a news media feeding frenzy. Yet the photograph he attached to substantiate this point, supposedly depicting the "microphone-shoving" "army" that "merciless[ly] badger[ed]"[65] the defendant, actually presents a very different scene: two demure reporters standing a respectful distance from the defendant, with their microphones pointing innocuously upward.[66] The pair of photographs detailing the place-

---

[62] *Id.* at 586 app. photograph 4.

The author believes that the reproduction here of one of the photographs accompanying Chief Justice Warren's concurrence in *Estes* (along with other photographs, maps, and visual images reproduced in this Commentary) is not inconsistent with his thesis — that it is unnecessary and unhelpful for Justices to attach visual aids to their written work. Although the attachments are identical to those in the opinions, except for their dimensions, which have generally been reduced, the purpose for which they appear is fundamentally distinct. As used in this Commentary, the reproductions of the attachments are meant only to confirm their appearance as attachments in two-dimensional Supreme Court opinions. As used in the Court's opinions, the attachments purport to depict accurately an underlying (and usually three-dimensional) reality.

[63] *Id.* at 577.

[64] *See Estes*, 381 U.S. at 587 (Harlan, J., concurring) (stating that "[t]he precise question" before the Court is the televising of "the courtroom proceedings of a criminal trial"); *id.* at 610 (Stewart, J., dissenting) ("Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, [and] that issue is simply not here."); Todd Piccus, Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1059–60 (1993) (noting that while "the plurality and the three-Justice concurrence extensively considered the pretrial environment, . . . the three dissenting opinions and Justice Harlan's concurrence properly focused exclusively on the trial itself").

[65] *Estes*, 381 U.S. at 577 (Warren, C.J., concurring).

[66] *See id.* at 586 app. photograph 4.

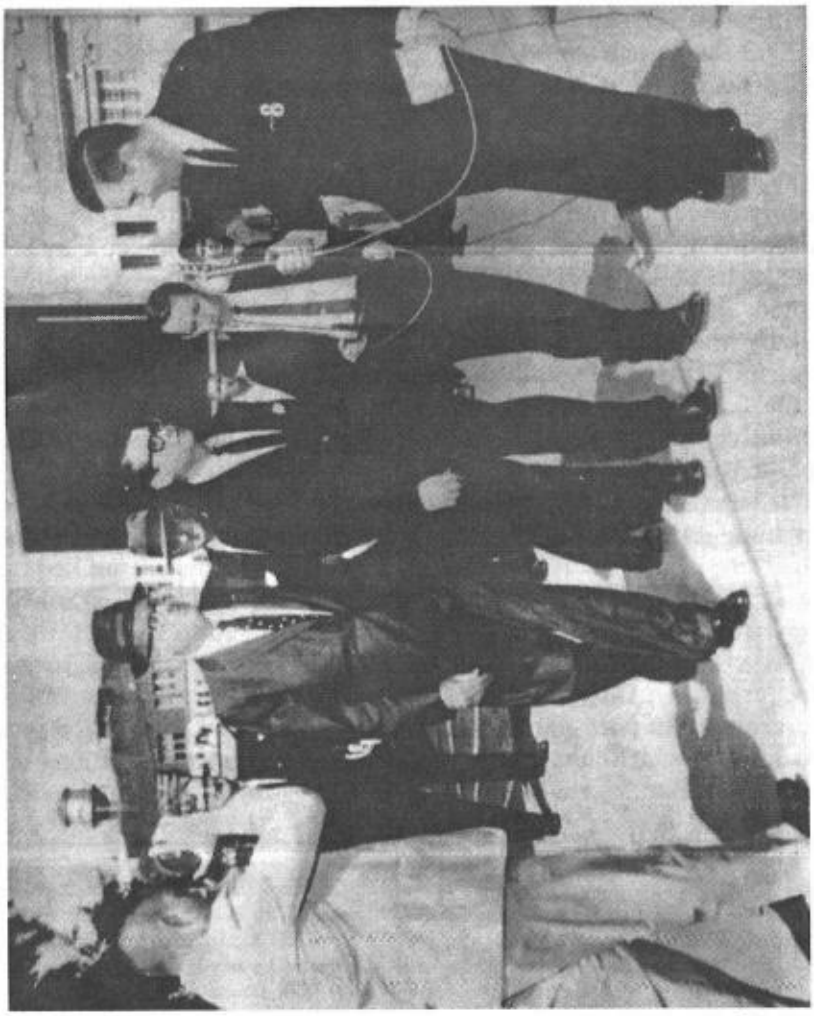


IMAGE 1. *One of the seven photographs attached to Chief Justice Warren's concurring opinion in* Estes.

ment of the television cameras in the courtroom during the trial — obscured behind a screenlike "television booth" unobtrusively erected in the back corner of the courtroom — are similarly unexceptional.[67] These two photographs also undermine the contention, made both by Chief Justice Warren and by the plurality, that cameras "distracted" those in the courtroom. To the contrary, both participants and in-court spectators appear utterly oblivious to the fact that the trial is being broadcast.[68] At the same time, the pictures can neither record nor reveal the human mind: even if the jury were distracted, the photographs do not help establish the point.

Nor do the photographs further Chief Justice Warren's overriding goal of a "definitive"[69] finding that cameras in the courtroom are prejudicial. The photographs depict the appearance of cameras in only one courtroom and during only one trial. In fact, as the photographs demonstrate, the complaints about the cameras at the pretrial hearing did not even apply at the subsequent trial. To the extent the cameras disrupted the initial proceeding, the problems appear to have been solved by the barely observable television booth used at the subsequent trial. Ultimately, the photographs divert the reader's attention from the facts of the case and set back Chief Justice Warren's effort to be definitive. By highlighting the peculiar conditions present in *Estes*, the photographs make the case unique and more easily distinguishable.[70] Thus, Chief Justice Warren's hope — that the photographs would highlight the facts of this particular case, give the case context, and thereby transform it into a paradigm — remains unfulfilled.

2. Greer v. Spock. — The Court's next use of photographs, by Justice Brennan in a 1976 dissenting opinion,[71] reinforces *Estes*'s lesson that visual attachments can all too easily undermine a Justice's written argument. Additionally, at least one of the pictures raises a more serious issue: its partisan perspective and lack of clarity reveal the extent to which photographs are subjective representations of a scene, rather than literal transcriptions of an objective visual reality.

---

[67] *See id.* at 586 app. photographs 6–7. Other commentators have reached a similar conclusion. *See* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1818 n.33 (1995) ("The *U.S. Report* includes photographs of the press coverage at the *Estes* trial which make it look quaint by recent standards."); Nesson & Koblenz, *supra* note 32, at 406 ("Television cameras were built into a booth in the rear of the courtroom and were barely visible.").

[68] The photographs of the pretrial hearing, which show an admittedly more chaotic scene, merely accentuate the serenity of the subsequent trial. *See Estes*, 381 U.S. at 586 app. photographs 1, 2, and 5.

[69] *See id.* at 552.

[70] This is exactly what the Court did 16 years later, when it allowed cameras in the courtroom. *See* Chandler v. Florida, 449 U.S. 560, 582 (1981) ("Nothing of the 'Roman circus' or 'Yankee Stadium' atmosphere, as in *Estes*, prevailed here . . . .")

[71] *See* Greer v. Spock, 424 U.S. 828, 871–72 app. (1976) (Brennan, J., dissenting).

Greer v. Spock involved a First Amendment challenge by the famed pediatrician and political activist Benjamin Spock to the Army's prohibition of political speeches on military bases and restriction of leafleting to pre-approved literature.[72] On its face, the case appeared similar to one decided by the Court four years earlier, *Flower v. United States*.[73] In *Flower*, the Court reversed the conviction of a civilian distributing pacifist leaflets on a sidewalk along a street "within the limits" of Fort Houston, a military base in San Antonio, Texas.[74] The six Justices joining the per curiam opinion in *Flower* reasoned:

> Whatever power the authorities may have to restrict general access to a military facility . . . here the fort commander chose not to exclude the public from the street where petitioner was arrested. . . . Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.[75]

The *Spock* majority, however, summarily distinguished *Flower*. It explained that the military authorities of *Spock*'s Fort Dix, unlike those of *Flower*'s Fort Houston, had "*not* abandoned" any claim of special interest to the avenue and adjoining sidewalk at issue.[76]

In his dissenting opinion, Justice Brennan, joined by Justice Marshall, found the majority's attempt to distinguish *Flower* "unconvincing"[77] because "Fort Dix, at best, is no less open than Fort Sam Houston."[78] To support this proposition, he invited readers to "[s]ee Appendix to this opinion for photographic comparison of both forts."[79] The photographic comparison Justice Brennan attached consists of three pictures. A photograph of an entrance to Fort Dix is set directly above a photograph of an entrance to Fort Houston (IMAGE 2), with a third photo set perpendicularly on the next page (IMAGE 3).[80] Accord-

---

[72] *See id.* at 833–34. Benjamin Spock was the 1972 presidential candidate for the People's Party, which advocated the immediate withdrawal of United States troops from Vietnam. *See id.* at 832. Spock and other political activists sought to enter Fort Dix, in rural New Jersey, to distribute campaign literature and make speeches to service personnel and their dependents. *See id.* at 832–33.

[73] 407 U.S. 197 (1972).

[74] *Id.* at 199–200.

[75] *Id.* at 198 (citations omitted).

[76] *Spock*, 424 U.S. at 837. In addition to distinguishing *Flower*, the majority emphasized the unique nature of military bases for purposes of the Court's public-forum jurisprudence. *See id.* at 838 ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.")

[77] *See id.* at 849 (Brennan, J., dissenting).

[78] *Id.* at 851.

[79] *Id.*

[80] *See id.* at 871–72 app.

ing to the succeeding caption, the third photo depicts two of the defendants "distributing pamphlets, just prior to their arrest."[81]

As with most of the photographs in *Estes*, the efficacy of the first two photographs in *Spock* in buttressing the dissent's argument is questionable. Justice Brennan wrote that he intended the photographs to emphasize that both forts are "open."[82] Indeed, as the caption under the photograph of Fort Dix points out, a "Visitors Welcome" sign is visible, albeit barely, in the photograph, whereas the photograph of Fort Houston contains no such sign.[83] Yet, any power the sign might possess is overwhelmed by a much starker contrast between the two photographs: the photograph of Fort Houston displays an inviting open vista, whereas the photo of Fort Dix features an imposing brick and iron-barred gate.[84] Although Justice Brennan uses the Fort Dix photo to point out one feature (the presence of a "Visitors Welcome" sign), it more palpably suggests another (an imposing gate, the antithesis of openness, intended to keep out unwanted visitors). Unintentionally, the photo lends credence to the majority's distinction between the two cases and undermines Justice Brennan's attempt to equate them.

Justice Brennan's third photograph, standing alone on a second page, is arguably more effective in promoting his position. According to the caption, the photograph depicts two of the defendants engaging in the unlawful activity of distributing unapproved leaflets on the Fort Dix army base.[85] The photograph challenges at least two critical assumptions of the majority's opinion. First, there is virtually no visual evidence of the army base itself, the unique entity whose inviolate protection from political activity is at the heart of the case. The principal horizontal feature — occupying the top third of the photograph — is

---

[81] *Id.* at 872 app.

[82] *See id.* at 850–51.

[83] *See id.* at 872 app. A review of the briefs and joint appendix submitted to the Supreme Court in *Spock* reveals that neither party included, or even referenced, the photograph of Fort Houston taken during the earlier *Flower* case. The photograph of Fort Houston was not attached to the *Flower* opinion, but rather was included in the appendix to the petition for the writ of certiorari. As reprinted as part of Justice Brennan's opinion in *Spock*, the photo of Fort Houston is reversed, presumably inadvertently. *Compare* Appendix at 36a, Petition for Writ of Certiorari, Flower v. United States, 407 U.S. 197 (1972) (No. 71-1180) (photo of main entrance to Fort Houston), *with Spock*, 424 U.S. at 871 (identical photo except image reversed). Such a mistake is easy to make. *See* 1 CHARLES C. SCOTT, PHOTOGRAPHIC EVIDENCE § 46, at 31 (2d ed. 1969) ("People are always getting things turned around. . . . [I]t is even easier for a photograph to be turned around, so that it is reversed right as to left.").

The author is grateful to William J. Mahannah, Assistant Legal Reference Librarian, Law Library, Library of Congress, for his research assistance in connection with this footnote and the discussion of the joint appendix photographs in *County of Allegheny v. ACLU* below. *See infra* p. 1724 & n. 98.

[84] *See Spock*, 424 U.S. at 872 app.

[85] *See id.* ("Respondents Ginaven and Misch distributing pamphlets, just prior to their arrest, inside Wrightstown, N.J., entrance to Fort Dix.").

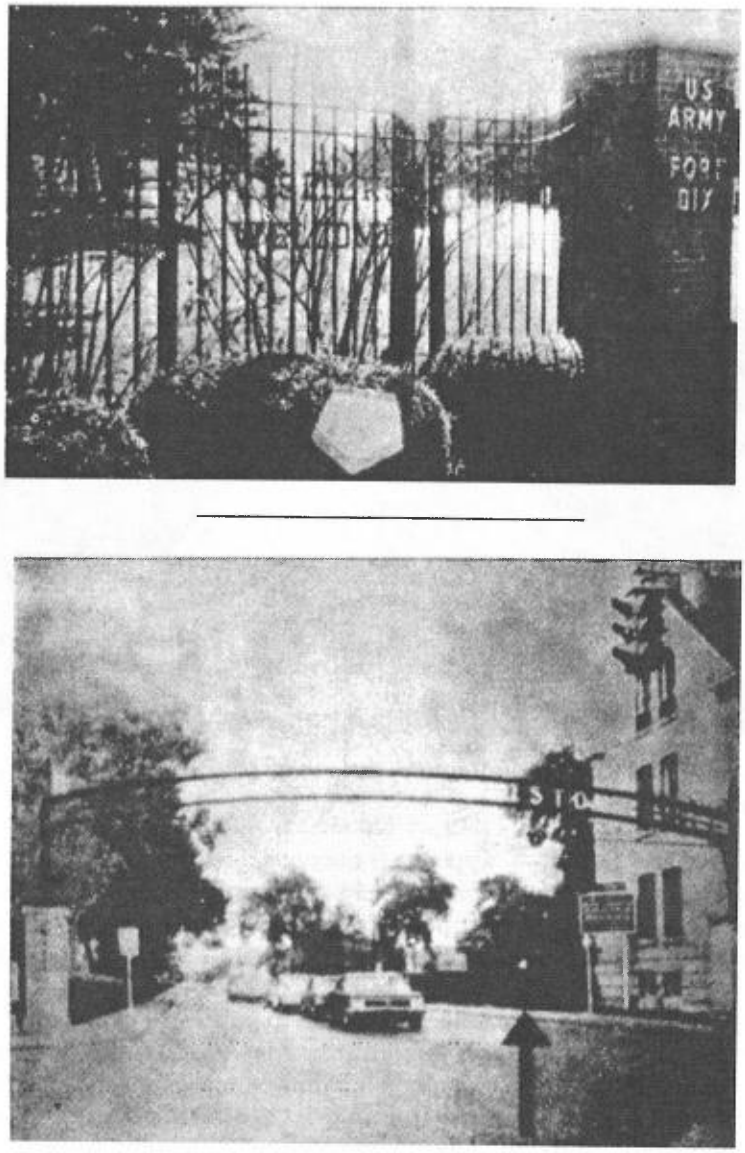


IMAGE 2. *Justice Brennan's photographic comparison of the entrance to* Spock*'s Fort Dix* (top) *and* Flower*'s Fort Houston* (bottom).

the sky. The chief vertical component is a broad sidewalk adjacent to an obviously public street lined with commercial stores and civilian cars. From the caption, the viewer surmises that a dark grassy area on the other side of the sidewalk is the base, but nothing in the picture confirms that assumption. Second, the activity depicted — the

IMAGE 3. *The third photograph attached to Justice Brennan's dissent in* Spock.

distribution of leaflets — appears innocuous. In the grainy black and white photograph, one can only barely discern the two leafleteers, both wearing white shirts. It is impossible to tell whom, if anyone, they are approaching. The dominant impression is of a mundane, quotidian scene, not a shocking "threat to the independence and neutrality of the military"[86] for which someone should go to jail.

But the combination of the grainy, black-and-white photograph and a favorable perspective creates an image too good to be relied on comfortably. Indeed, the photograph is a striking example of the power of photography to make a subjective viewpoint appear objective and precise. A duplicate photograph of the scene located in the record of the case is in color, and thus presents a significantly clearer, and much more troubling, image.[87] In the color photograph, the recipients of the literature are clearly military officers, and the reader has a sense that the officers' nonpartisanship has been breached. Such differing impressions are not surprising, for "[c]olor photographs are less subject to distortion by filters and generally portray their subjects

[86] *Id.* at 841–42 (Burger, C.J., concurring).

[87] *See* 1 Appendix at E-2, Greer v. Spock, 424 U.S. 828 (1976) (No. 74-848).

more accurately than comparable black-and-white photographs."[88] In fact, the distorting effects of black-and-white photography were well publicized in the years before the *Spock* decision. As Charles Scott wrote in his leading treatise:

> Today there can be no question that good color photography is more realistic and reliable than black-and-white photography for all but a few evidential purposes. As far as natural scenes and three-dimensional objects are concerned, black-and-white pictures cannot begin to compete with color pictures as a means of showing the trier of fact approximately how the original subject looked.[89]

In sum, Justice Brennan's photographs in *Spock* magnified the problems reflected in Chief Justice Warren's use of pictures in *Estes*. The *Spock* photographs contradicted Justice Brennan's verbal comparison of the two forts, even more than the *Estes* photographs damaged Chief Justice Warren's argument. Moreover, the leafleting photograph in *Spock* raises significant concerns about distortion. Specifically, the lack of color clearly distorts the scene, and the photograph's perspective substitutes one view of reality for another. Further, as in *Estes*, none of the photographs are necessary. The words of Justice Brennan's opinion make an effective comparison between the two cases, while leaving a succinct, lasting image no picture could capture: "The military certainly could retain the right to exclude civilian traffic, but it could not choose freely to admit all such traffic save for the traffic in ideas."[90]

3. County of Allegheny v. ACLU *and* Capitol Square Review and Advisory Board v. Pinette. — The concerns of accuracy and objectivity raised by *Spock*'s inclusion of the grainy, black-and-white picture taken from a particularly favorable perspective reappear in the Court's two most recent decisions including photographs, *County of Allegheny v. ACLU*[91] and *Capitol Square Review and Advisory Board v. Pinette*.[92] Both involve the same basic question of the display in public fora of symbols traditionally associated with religion. In both instances, the Justices attempt to make nuanced distinctions about how reasonable observers would view the objects in the context of the particular physical settings at issue. But the accompanying photographs demonstrate that physical settings are not static. The same dis-

---

88 Madison, *supra* note 24, at 720. *See also* ENCYCLOPEDIA OF PHOTOGRAPHY 148 (1984) ("The translation of color into shades of gray is a basic distortion.").

89 2 SCOTT, *supra* note 83, § 756, at 151–53. *See also* HOUTS, *supra* note 20, § 30.01[1], at 30-2 ("For certain [evidentiary] purposes, colored pictures are much more effective than black and white photographs."); 3 SCOTT, *supra* note 83, § 1353, at 201 (noting that "[w]ithout exception the appellate courts have recognized the fact that a color photograph is superior to a black-and-white picture for evidential purposes" and collecting cases).

90 *Spock*, 424 U.S. at 861 (Brennan, J., dissenting).

91 492 U.S. 573 (1989).

92 115 S. Ct. 2440 (1995).

IMAGE 4. *The two photographs attached to Justice Blackmun's opinion for the Court in* Allegheny.

play can appear very different, depending on various factors that a photographer can manipulate and a camera can record. In the 1989 case, *Allegheny*, the manipulations are relatively subtle; in *Capitol Square*, decided in 1995, the bias is more blatant.

(a) Allegheny. — In *Allegheny*, the Court considered Establishment Clause challenges to two different winter holiday displays erected by the city of Pittsburgh: a créche inside the local courthouse and an eighteen-foot-high Chanukkah menorah standing next to a forty-five-foot-high Christmas tree outside another government building nearby.[93] Four Justices believed both displays survived Establishment Clause challenge,[94] while three Justices thought both displays infirm.[95] Two Justices, Blackmun and O'Connor, determined the case's outcome because they believed that the menorah was acceptable, but the créche was not.[96] To support a distinction that seven other Justices found untenable, Justice Blackmun attached a photo of each display to his opinion for the Court.[97]

Although none of the four other opinions acknowledges it, the photographs that accompany Justice Blackmun's opinion subtly slant the argument (IMAGE 4). The photograph of the constitutionally acceptable menorah was taken from a distance, which diminishes the menorah's apparent size. Moreover, the picture's wide angle emphasizes a prominent emblem of the secular world — automobiles. Four cars are clearly visible in the foreground of the picture. The photo also includes at least three pedestrians (suggestive of the "reasonable observers" about whose perceptions a majority of the Court is so concerned), all of whom are seemingly oblivious to the display. In contrast, the créche, which was held unconstitutional, is shot from a tight angle, thereby exaggerating its size. As photographed, the scene is also devoid of oblivious "observers." Instead, it depicts a silent, still, almost altarlike setting.

The photographs might give viewers the opposite impression if they showed passers-by ignoring the minor créche and staring transfixed at the seemingly giant menorah-and-Christmas-tree combination. In fact, the joint exhibit includes color pictures of the interior créche scene that appear very different from the one attached to the opinion of the Court.[98] The greater clarity of these color photographs reveals the tiny size of the créche figures. In addition, several of the joint exhibit pictures record passers-by ignoring the display, seemingly no more constitutionally offended than the pedestrians moving imperturb-

---

[93] *See Allegheny*, 492 U.S. at 587.

[94] *See Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part). Justice Kennedy was joined by Chief Justice Rehnquist and Justices White and Scalia.

[95] *See Allegheny*, 492 U.S. at 637 (Brennan, J., concurring in part and dissenting in part). Justice Brennan was joined by Justices Marshall and Stevens.

[96] *See Allegheny*, 492 U.S. at 579 (opinion of Blackmun, J.); *Allegheny*, 492 U.S. at 626–27, 632 (opinion of O'Connor, J.).

[97] *See Allegheny*, 492 U.S. at 622 app. A and B (opinion of Blackmun, J.).

[98] Joint Exhibit at 3-8, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (Nos. 87-2050, 88-90, 88-96).

ably past the Court-sanctioned Christmas tree. Yet, by choosing different photographs, Justice Blackmun made a hard case appear a little easier.

(b) Capitol Square. — In *Capitol Square*, only one display was before the Court — a ten-foot high Latin cross that the Ku Klux Klan had sought permission to erect in a public plaza surrounding Ohio's statehouse.[99] In the plurality opinion, Justice Scalia wrote that religious expression that is purely private and occurs in a traditional or designated public forum does not violate the Establishment Clause. As the concurring and one of the dissenting Justices argued, and even Justice Scalia repeatedly conceded, the per se approach permits religious expression even when a reasonable person may believe (albeit mistakenly) that the government has sponsored, or at least has given its imprimatur to, the private religious expression.[100]

However, the various pictures used by Justices Souter and Stevens — who both argued for application of the endorsement test to private religious expression in a public forum[101] — illustrate the problems with a standard that relies so heavily on the viewer (or "reasonable observer") and, in particular, on photographs to demonstrate what the reasonable observer supposedly sees. Justice Souter, who was troubled by the display but ultimately concurred in the plurality's judgment that it did not constitute impermissible endorsement,[102] attached two photographs of the public plaza containing the contested cruciform. The second photo de-emphasizes the cross in two significant ways, both attributable to properties present in photographs but missing from any "reasonable" observer's assessment of the scene (IMAGE 5). First, as reprinted in the *Supreme Court Reporter*, excessive graininess renders the cross invisible and the entire photo nearly inscrutable. Second, the photo records a panorama — including nearly three-quarters of a four-way intersection in front of the plaza — that no human eye, let alone a reasonable one, could take in at any one time. As one commentator has noted:

---

[99] *See* Pinette v. Capitol Square Review and Advisory Bd., 844 F. Supp. 1182, 1183 (S.D. Ohio 1993).

[100] *See* Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. at 2448 (opinion of Scalia, J.) ("That proposition [that private religious speech easily confused with government speech is prohibited by the Establishment Clause] cannot be accepted, at least where, as here, the government has not fostered or encouraged the mistake."); *id.* at 2449–50 (recognizing that "hypothetical observers may — even reasonably — confuse an identical benefit to religion with state endorsement"); *id.* at 2450 n.4 (acknowledging that an "uninformed viewer who does not have time or inclination to inquire whether speech in *Capitol Square* is publicly endorsed speech might be misled").

[101] *See Capitol Square*, 115 S. Ct. at 2457–58 (Souter, J., concurring in part and concurring in the judgment); *Capitol Square*, 115 S. Ct. at 2466 (Stevens, J., dissenting).

[102] *See Capitol Square*, 115 S. Ct. at 2457, 2458 (Souter, J., concurring in part and concurring in the judgment).

IMAGE 5. *The display at issue in* Capitol Square, *as depicted in a photograph attached to Justice Souter's concurring opinion.*

> [P]hotography does not replicate human vision. This is because of the differences between unbounded, binocular human vision and the fixed, monocular perspective of the camera, and between the centralized focus of human vision, with its unfocused periphery, and the picture's clarity of focus from edge to edge and across every plane.[103]

The photograph diminishes the presence of the cross, but does so only by defying the properties of human vision.

The situation is reminiscent of Justice Brennan's use of a similarly grainy, wide-angle photo in *Spock*. In both instances, the photographs are too good to be considered "true" in the sense that they do not represent what a typical observer standing at the spot the picture was taken would actually behold. By adding photographs vulnerable to such criticism, the Justices only subtract from the sound legal arguments propounded in their respective opinions.

Unlike Justice Souter, Justice Stevens strongly believed that the cross violated the Establishment Clause, and the photograph he attached punctuates the point (IMAGE 6). Appearing in a very tight shot, the cross fills the entire picture. In addition, the photograph is shot

---

[103] Sternbach, *supra* note 14, at 1107 (footnote omitted); *see also* Joel Snyder, *Picturing Vision*, *in* 6 CRITICAL INQUIRY 499, 505 (1980) (distinguishing between human vision and photographic images).

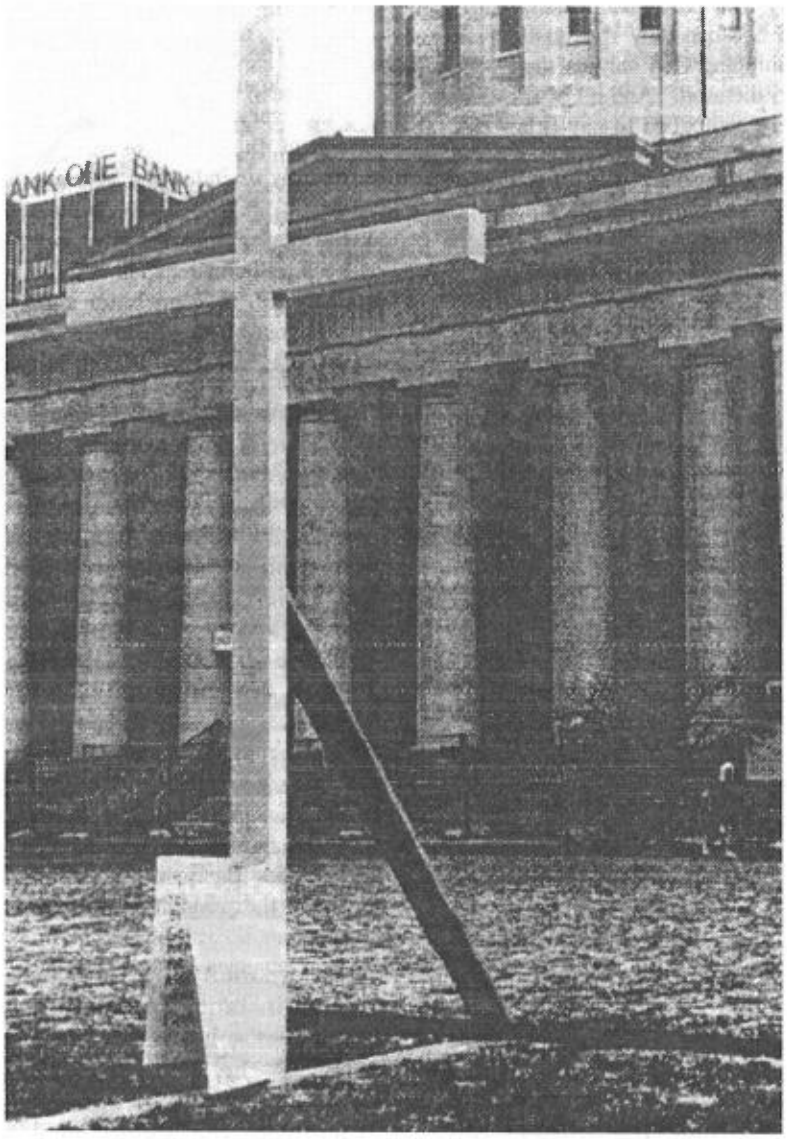


IMAGE 6. *The display at issue in* Capitol Square, *as depicted in a photograph attached to Justice Stevens's dissenting opinion.*

from a low angle — so low that the photographer must have been crouching, or possibly prone, when taking the picture. If so, this low angle of view would violate a basic evidentiary tenet relating to the admission of photographs: pictures should be shot at or near the aver-

age eye level of a standing person — between five and six feet from the ground.[104] As the *Encyclopedia of Photography* cautions, "[a] low angle of view looking up at a subject tends to exaggerate its height and therefore its assumed importance."[105] Another commentator notes that photographic distortion is exacerbated when the photographed object is inanimate.[106]

For the unwary reader, the unfamiliar inanimate object, together with an unnaturally low angle, creates the impression of a giant cross — a cross larger than surrounding buildings, capable of crushing an innocent bystander (discernible on the edge of the right side of the picture and seemingly only a fraction of the cross's height) should it fall.[107] Equipped with such a powerful aid, it is no surprise that Justice Stevens concluded that the message conveyed by this "unattended, freestanding wooden cross" necessarily violated the Establishment Clause.[108]

This photograph carries to an extreme the trend, initiated in *Allegheny*, of pictures emphasizing or diminishing a display's presence and

---

104 *See* HOUTS, *supra* note 20, § 6.01, at 6-1 ("[T]he camera should be held routinely between four-and-a-half and five feet above the ground. This distance is selected because it represents the eye level of the average person . . . . *If camera height is substantially altered above or below the desirable medium, misrepresentation may result.*"); 1 SCOTT, *supra* note 83, § 157, at 181–82 (noting the "general rule" in traffic accident cases that the "camera should be at or near average adult eye level, between five and six feet from the ground" and that "[a] variation of a foot or two in the position of the camera, up or down and to the right or left, often makes a material difference"); *see also* Richard D. Friedman, *Still Photographs in the Flow of Time*, 7 YALE J.L. & HUMAN. 243, 252 & n.24 (1995) (book review) (citing Scott and noting the "well-known capacity of photography to distort the image of a scene").

105 ENCYCLOPEDIA OF PHOTOGRAPHY, *supra* note 88, at 29.

106 As Benjamin Madison wrote:

> The danger of distortion due to lens variation is present in photographs of any subject. The danger is most significant, however, with photographs of places and objects. A photographic expert can detect distortion in photographs taken through telephoto or wide-angle lenses, but the average person cannot. A layman may detect the distortion if the subject of the photograph is a human figure because people know how a human figure should look. The average person unfamiliar with an object or place that is the subject of a photograph, however, has no preconceived idea of the subject's appearance. As diverse as the appearance of human beings may be, the appearance of places and objects is infinitely more variable. The likelihood of undetected photographic distortion, therefore, is much higher.

Madison, *supra* note 24, at 717.

107 The *Encyclopedia of Photography* suggests that a photograph with such a distorted perspective should not have been admitted into evidence:

> The single most important requirement for a forensic photograph is that it appear entirely natural. Judges will not admit a picture that seems to have been tampered with or that distorts any aspect of the scene. In particular, a lens and subject-to-camera distance must be selected that will render a normal perspective. That is, the size relationships of objects in the photograph should be equivalent to what they actually are.

ENCYCLOPEDIA OF PHOTOGRAPHY, *supra* note 88, at 208.

108 Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct 2440, 2465 (1995) (Stevens, J., dissenting). Two other opinions in *Capitol Square* make reference to the photograph. *See Capitol Square*, 115 S. Ct. at 2462 n.1 (Souter, J., concurring in part and concurring in the judgment); *Capitol Square*, 115 S. Ct. at 2475 (Ginsburg, J., dissenting). However, both fail to note the photograph's significant misrepresentation of the cross's true size.

religiosity according to whether the Justice attaching the photo believes that the display constitutes an Establishment Clause violation. When the four cases involving the attachment of photographs — *Estes*, *Spock*, *Allegheny*, and *Capitol Square* — are assessed as a whole, the impression is that the photographs at best merely repeat rather than advance the arguments of the Justice who attached them. At their worst, they seriously challenge, if not disprove, the notion that photographs provide only neutral, objective, or accurate representations of the world. Just as readers of the Court's written opinions do not accept without question the verity of every "thousand words," so too should the same readers approach the Court's use of pictures with skepticism.

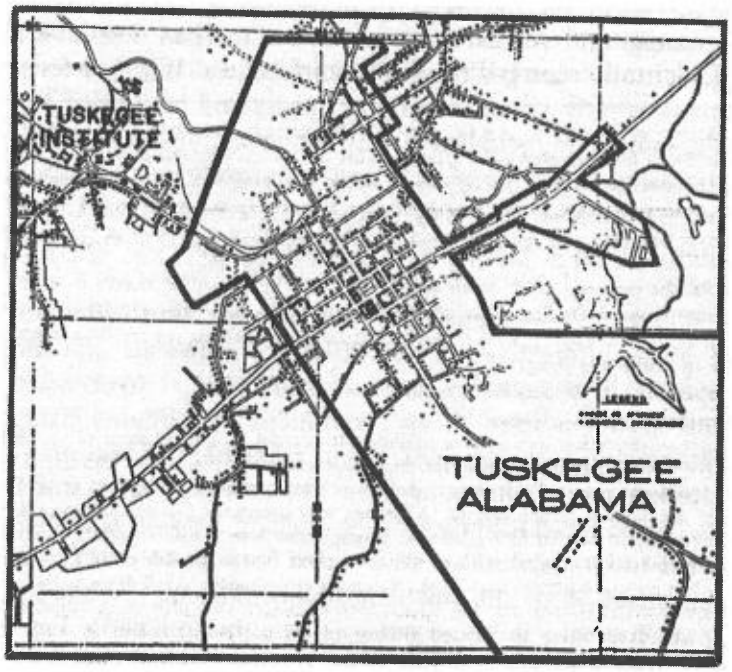


IMAGE 7. *The map attached to Justice Frankfurter's opinion for the Court in* Gomillion.

B. Maps: Mismarked Exits from the "Political Thicket"

While photographs recur in religious-symbol and other First Amendment cases, maps are intertwined with the Court's voting-rights jurisprudence, particularly in the ever-changing law of redistricting. Over the last fifty years, the use of maps in such cases has come full

circle. In a 1946 decision, *Colegrove v. Green*,[109] Justice Frankfurter introduced the practice of attaching essentially extraneous maps of political-district boundaries and then disparaging their appearance.[110] The trend continued in *Gomillion v. Lightfoot* (IMAGE 7),[111] *Karcher v. Daggett*,[112] and *Davis v. Bandemer*.[113] In each instance, a map of the district at issue was attached and subjected to aesthetic criticisms, again with no apparent effect on the outcome of the case. However, four years ago, in *Shaw v. Reno*[114] (*Shaw I*), the Court reversed course. It found the shape of an electoral district, as illustrated by an appended map, dispositive (IMAGE 8).[115] *Miller v. Johnson*[116] marked a return to the Court's prior practice of criticizing attached maps despite their basic irrelevance to the questions presented by the cases. Most recently, in *Bush v. Vera*,[117] the visual images attached to the opinion announcing the judgment of the Court are disconcertingly primitive, with decontextualized "outlines" substituted for true maps (IMAGE 9).

Ultimately, a review of the map cases suggests that the attachments have contributed in at least two significant ways to the confusion that is the ignoble hallmark of the Court's contemporary voting rights jurisprudence. First, the maps have proven to be a distraction, catching the Court's eye and needlessly diverting its attention from the task of fashioning cohesive case law. Second, apart from being unnecessary, the criticisms of the maps have been increasingly simplistic, anachronistic, and, in some cases, arguably inaccurate.

1. Colegrove v. Green *and* Gomillion v. Lightfoot.

(a) Colegrove. — Given the Court's recent reliance on maps to justify reviewing and nullifying the districting determinations of popularly elected state legislatures, it is ironic that maps were initially marshaled as evidence in favor of keeping the federal courts out of such cases.

In *Colegrove v. Green*, the Court was presented with a legal challenge to Illinois's severely malapportioned congressional districts. The most populated Illinois district, for example, had 914,053 voters, while the least populated contained only 112,116; voters in the more concen-

---

109 328 U.S. 549 (1946).

110 *See id.* at 555.

111 364 U.S. 339 (1960).

112 462 U.S. 725 (1983).

113 478 U.S. 109 (1986).

114 509 U.S. 630 (1993).

115 Subsequently, in *Shaw v. Hunt* (*Shaw II*), the majority opinion pointedly referred readers back to the *Shaw I* map. *See* Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1996); *see also infra* pp. 1738–39.

116 115 S. Ct. 2475 (1995).

117 116 S. Ct. 1941 (1996).

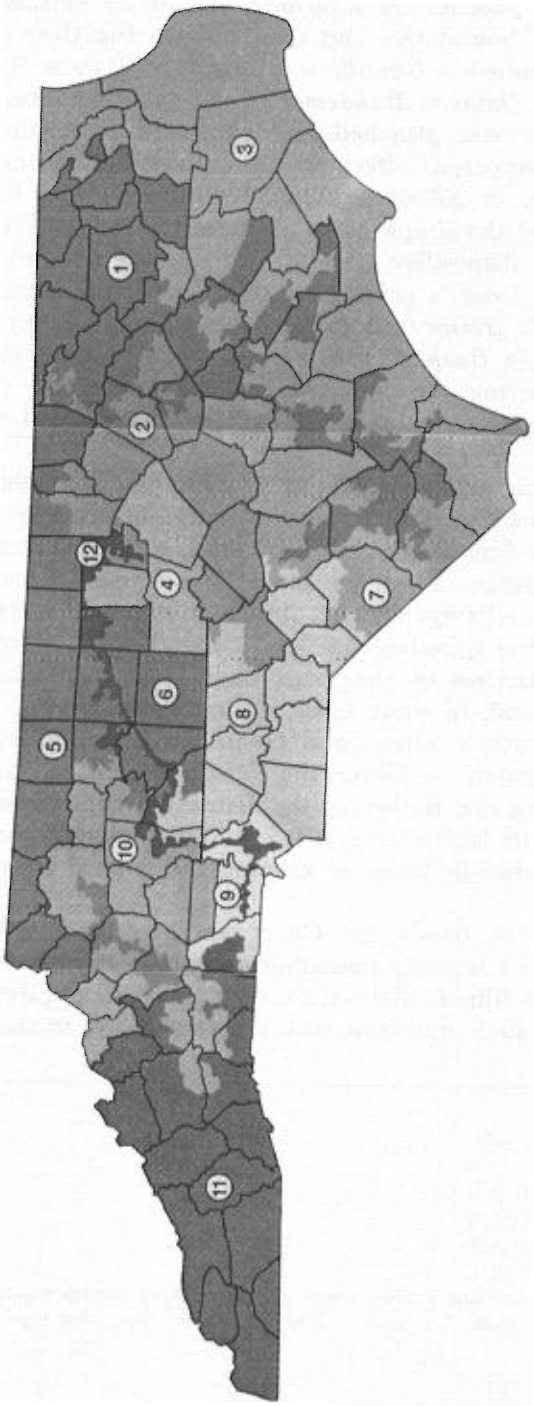


IMAGE 8. *The map attached to Justice O'Connor's opinion for the Court in* Shaw I.

trated districts complained that the disparity was unconstitutional.[118] With only seven Justices sitting,[119] four voted to affirm the district court's dismissal of the complaint.[120]

With its evocation of the "political question" doctrine,[121] and its articulation of the dangers posed by judges wishing to answer such questions rather than leaving their resolution to the political branches of government,[122] Justice Felix Frankfurter's controlling opinion in *Colegrove* is best remembered as a misguided paean to judicial restraint.[123] However, it is also notable for its use of maps. To the sparse seven-page opinion, Justice Frankfurter attached the congressional districting maps of four states — Alabama, California, Illinois, and Pennsylvania — one to a page. The stated rationale for including the maps is striking. According to Justice Frankfurter, "[t]hroughout our history, whatever may have been the controlling [federal law], the most glaring disparities have prevailed as to the contours . . . of districts. . . . Appendix II [the maps] gives fair samples of prevailing gerrymanders."[124] In other words, the unwillingness or inability of

---

118 *See* Colegrove v. Green, 328 U.S. 549, 550 (1946).

119 Chief Justice Stone died six weeks after oral arguments in the case. Justice Jackson, in the midst of his service as lead prosecutor for the United States at the Nazi war criminal trials in Nuremberg, did not participate. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 1, at 58.

120 Justice Frankfurter wrote the opinion of the Court, which Justices Reed and Burton joined. Justice Rutledge concurred only in the result. Justices Black, Douglas, and Murphy dissented. *See Colegrove*, 328 U.S. at 550, 564, 566.

121 *See id.* at 552 (stating that the Court previously had refused to intervene in certain controversies because "due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination").

122 *See id.* at 553–54, 556 ("It is hostile to a democratic system to involve the judiciary in the politics of the people. . . . To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.")

123 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 195 (1986) (suggesting the metaphor of "a crack in the judicial gate that should not have been closed in *Colegrove v. Green*"); Charles L. Black, *Inequities in Districting for Congress:* Baker v. Carr *and* Colegrove v. Green, 72 YALE L.J. 13, 14 (1962) ("*Colegrove* asserts the impropriety of judicial intervention, but does not convincingly show wherein that impropriety consists.").

124 *Colegrove*, 328 U.S. at 555. Appendix I, a numerical table, "summarizes recent disparities in the various Congressional Representative districts throughout the country." *Id.* Specifically, it lists the populations of the largest and the smallest congressional districts in 15 states at three points in time: 1897, 1928, and 1946. The table serves Justice Frankfurter's purposes in at least two ways. First, its visual attributes are important because they enable Justice Frankfurter literally to obscure the startling numerical disparity between Illinois's largest and smallest congressional districts. Although Justice Black directly refers to the difference — 914,053 inhabitants versus 112,116 — four times in his dissent, Justice Frankfurter leaves the specific numbers unmentioned in the text of his opinion and instead consigns them to the middle of the smaller-print, data-filled page that constitutes Appendix I. Second, the table shows that, although the problem of unequally populated districts was widespread throughout the first half of the century, it was most egregious in Illinois. This fact would presumably give the decision more precedential value and at the same time offer at least a modicum of comfort to readers concerned that the inequality between the Illinois districts at issue in *Colegrove* may not even have been the worst example.

IMAGE 9. *One of the "maps" from* Vera.

government to curb ill-configured districts in the past justified present inaction, at least by the Court.

But Justice Frankfurter's point regarding the shape of the districts was essentially irrelevant to the primary issue before the Court: whether political districts with grossly unequal populations violated the Equal Protection Clause and other constitutional provisions. Instead, the maps served at least two other purposes for Justice Frankfurter. First, the maps allowed him to raise the specter of the

judiciary redrawing political lines and to conjure up visually the "political thicket" that he admonished his brethren against entering.[125] Second, the maps deflected attention from the powerful numerical disparities that Justice Frankfurter had no choice but to concede,[126] and the dissenters sought to make most prominent.[127] Not surprisingly, Justice Black and the other dissenters did not make reference to the maps.

Colegrove's holding was, of course, later "decisively repudiated"[128] in *Baker v. Carr*,[129] whereas its admonition against judicial intervention in political questions has been ignored in *Shaw* and its progeny. *Colegrove*'s didactic use of attachments, however, is a tactic that has persisted.

(b) Gomillion. — Before *Baker*, another voting rights case emerged that, unlike *Colegrove*, a majority of the Court felt could not be ignored. *Gomillion v. Lightfoot*[130] involved the Alabama state legislature's racist redrawing of the municipal boundaries for the city of Tuskegee in 1957. As in *Colegrove*, Justice Frankfurter authored the controlling opinion. He noted that the "effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident."[131] As an appendix to the opinion, Justice Frankfurter included a map "showing Tuskegee, Alabama, before and after" the district redrawing.[132] As a caption to the map within a map, he noted that "[t]he entire area of the square comprised the City prior to [the] Act. The irregular black-bordered figure within the square represents the post-enactment city."[133] Earlier, in the text of the opinion, Justice Frankfurter summarized the plaintiffs' description of the post-enactment district represented in the map as "uncouth" and "a strangely irregular twenty-eight-sided figure."[134]

Although Justice Frankfurter included the arresting map and the plaintiffs' aesthetic-based epithets, he noted several times that the shape of the district was essentially irrelevant.[135] What mattered was

---

125 *See id.* at 556; *see also id.* at 553 ("Of course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid.").

126 *See id.* at 550.

127 *See supra* note 124.

128 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3–13, at 100 (2d ed. 1988).

129 369 U.S. 186 (1962).

130 364 U.S. 339 (1960).

131 *Id.* at 341.

132 *Id.* at 348.

133 *Id.* at 348.

134 *Id.* at 340, 341.

135 *See, e.g., id.* at 347 ("According to the allegations here made the Alabama legislature has . . . deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries.").

that the legislation may have had the purpose and the effect of denying the franchise to the entire African-American community of Tuskegee.[136] In determining that the plaintiffs had stated a valid constitutional claim against the city's redistricting,[137] Justice Frankfurter went to great lengths to distinguish the case from *Colegrove*. "[T]he decisive facts in [*Gomillion*] . . . are wholly different from the considerations found controlling in *Colegrove*."[138] According to Justice Frankfurter, the difference between the two cases was that the *Colegrove* plaintiffs alleged a dilution of voting strength consequent to legislative inaction, while the *Gomillion* plaintiffs complained that "affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords."[139] Later in the opinion, he wrote: "While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*."[140]

As in *Colegrove*, however, the map's utility is dubious. Despite Justice Frankfurter's protestations that the two cases are different, the map attached in *Gomillion* is an inevitable (and confusing) reminder of the maps in *Colegrove*. Ultimately, the Tuskegee town lines, as redrawn, present a district that is strange-looking but not measurably dissimilar to those illustrated in *Colegrove*.[141] This visual reminder of

---

[136] As the opinion put it, the plaintiffs' allegations, if proven at trial, would yield the irrestistible conclusion, "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* at 341.

[137] In fact, what was done in Tuskegee was not redistricting, but rather undistricting: African-Americans were removed from one political entity and denied a place in an equivalent one. Put simply, they were disenfranchised. *See id.* ("The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections."); Miller v. Johnson, 115 S. Ct. 2475, 2502 n.2 (1995) (Ginsburg, J., dissenting) (noting that the Act in question disenfranchised Tuskegee's black community); *see also* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 289 n.11 (1996) (noting that Tuskegee's redistricting act deprived black residents of their ability to vote in municipal elections).

[138] *Gomillion*, 364 U.S. at 346.

[139] *Id.*

[140] *Id.* at 347.

[141] As Professors Pildes and Niemi have put it:

> If the Tuskegee boundaries are extreme simply because of the way they look, the majority of congressional districts would be equally extreme. What actually makes *Gomillion* easy and exceptional is that, in the context of Tuskegee, this particular pattern of line drawing had such a racially differential effect that it could only be a blatant example of a racist design to exclude black residents from the political boundaries of the town. Any intuition that the appearance of this twenty-eight-sided figure [in *Gomillion*], standing alone, is an example of extreme manipulation of district appearance would be considerably misguided.

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 552–53 (1993).

Colegrove, no doubt unintended by the Court, is unfortunate given that, as Justice Frankfurter rightly claimed, the cases were so substantively different. The facts in *Gomillion*, together with the Court's words, spoke for themselves; the map was unnecessary. *Gomillion*, which was an easy case of racial discrimination as a matter of legal precedent, is a less convincing legal opinion because it includes a map reminiscent of the map used in an earlier, more difficult, case of non-race-based vote dilution.[142]

2. Karcher v. Daggett *and* Davis v. Bandemer.

(a) Karcher. — Maps reappeared in 1983 in *Karcher v. Daggett*,[143] another population equality case.[144] *Karcher* marks an important transition in the Court's use and criticism of maps. As in earlier cases, the map that the majority of the Court attached to its opinion was not dispositive of the legal issue before the Court. In his opinion for the Court, Justice Brennan included the map, but did not refer to it, much less rely on it. Justice Stevens, who provided the critical fifth vote, proffered an extended and detailed discussion of the map in his concurring opinion, but joined the Court in invalidating the districting plan solely on equal-population principles. Yet, both Justice Stevens's opinion and Justice Powell's dissent portended the Court's coming obsession with political district shapes.

Justice Stevens found that the mere shape of the districts represented on the attached map was both important and troubling: "A glance at the map . . . shows district configurations well deserving the kind of descriptive adjectives — 'uncouth' and 'bizarre' — that have

---

142 The *Gomillion* Court could have found controlling the line of prior Supreme Court decisions establishing that any activity — whether whites-only primaries, grandfather clauses, or literacy tests — that had the intent or effect of disenfranchising African-Americans violated the Fourteenth or Fifteenth Amendment. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 661–62 (1944) (holding that the right to vote in a primary is protected under the Fifteenth Amendment from racial discrimination by the government); Guinn v. United States, 238 U.S. 347, 367–68 (1915) (declaring a grandfather clause in violation of the Fifteenth Amendment); Davis v. Schnell, 81 F. Supp. 872, 878, 880 (S.D. Ala.), *aff'd*, 366 U.S. 933 (1949) (holding that a state literacy test violated both the Fourteenth and Fifteenth Amendments). Alternatively, Justice Whittaker, who concurred in *Gomillion*, found clear resolution of the case under the Equal Protection Clause of the Fourteenth Amendment and thus, for different reasons, made no appeal to Justice Frankfurter's map. *See Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring).

143 462 U.S. 725 (1983).

144 The twenty-year hiatus between map appearances cannot be explained by lack of opportunity; during that period, the Court decided numerous redistricting cases that called into question various electoral boundaries. *See, e.g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 531, 533–36 (1969) (holding that Missouri had failed to justify population variances following a redistricting plan). One explanation for the absence of maps is that, in the mid-1960s, the Court began to recognize the growing irrelevance and imprecision of the concept of "compactness," and consequently the minimal utility of maps that revealed little about a particular political district except its geographic outline. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 580 (1964) ("Modern developments and improvements in transportation and communications make rather hollow . . . most claims that deviations from population-based representation can validly be based solely on geographic considerations.").

traditionally been used to describe acknowledged gerrymanders."[145] Justice Stevens thought that a prima facie case of gerrymandering could be presented not only by statewide statistical analysis, but also by the "shape of the district configurations themselves."[146]

At the same time, Justice Stevens recognized that the "irregularity" of an electoral district shape symptomizing gerrymandering may be defined in many ways. Moreover, he noted an important distinction between *geographical* compactness and *sociopolitical* compactness:

> [G]eographic compactness may differ from sociopolitical compactness. As one geographer has noted: "In many regions, the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district. If so, then a modified criterion, the ratio of the maximum to the minimum travel time, would be a preferred measure [of compactness]."[147]

As discussed below,[148] this important distinction, somewhat tangential to the equal-population issue central to *Karcher*, suggests a way in which the interstate highway-hugging district at issue in *Shaw v. Reno* is *not* irregular, but rather "compact" when considered from a sociopolitical perspective.

Compared with Justice Stevens's careful review of the map and the corollary compactness issue, Justice Powell's analysis in dissent was less developed. He called the map "extraordinary" and the districts it represented "contorted."[149] But Justice Powell's most lasting contribution to the growing consensus on the Court that decisionmaking can rely legitimately on nonverbal material was his suggestion that maps can substitute for written explanations: "The map attached to the Court's opinion illustrates this [gerrymandering] far better than words can describe."[150]

(b) Davis. — Three years after *Karcher*, in *Davis v. Bandemer*,[151] Justice Powell, concurring in part and dissenting in part, found that claims that partisan gerrymandering violated the Equal

---

[145] *Karcher*, 462 U.S. at 762 (Stevens, J., concurring) (quoting *Gomillion*, 364 U.S. at 339) (footnotes omitted).

[146] *Id.* at 755. "One need not use Justice Stewart's classic definition of obscenity — 'I know it when I see it' — as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation." *Id.* (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)) (footnote omitted).

[147] *Id.* at 758 n.20 (quoting RICHARD L. MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 22 (1981)) (citations omitted).

[148] *See infra* section I.B.3.a.

[149] *Karcher*, 462 U.S. at 786, 789 (Powell, J., dissenting).

[150] *Id.* at 787.

[151] 478 U.S. 109 (1986).

Protection Clause were justiciable and that the particular group of Indiana Democrats who brought the case had successfully made out such a claim.[152] The decision on justiciability had the support of six Justices, although the finding of an actual violation did not enjoy a majority. Again, the shape of the districts was critical to Justice Powell — so much so that he interjected two maps into footnotes in his opinion, rather than relegating them to an attachment at the end.[153] Again, he was fixated on the aesthetics of the line-drawing, at one point observing (irrelevantly and rather obscurely) that "[t]hough many of the voting districts appearing in the plans challenged here have bizarre shapes, House District 66 perhaps most closely resembles a salamander."[154] Justice Powell's discussion of the maps (coupled with his decision to include them) was beside the point to every Justice save Justice Stevens,[155] but it set the stage for Justice O'Connor's opinion for the Court in *Shaw v. Reno* by elevating the significance of bizarre shapes. As Justice Powell stated:

> In *Karcher v. Daggett*, Justice Stevens, echoing the decision in *Reynolds v. Sims*, described factors that I believe properly should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges. The most important of these factors are the *shapes* of voting districts and adherence to established political subdivision boundaries.[156]

In a footnote, Justice Powell continued: "In some cases proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering. In addition to the maps appended to this opinion, see the redistricting maps appended to the Court's opinion[s] in [*Gomillion* and *Karcher*]."[157]

As discussed above, the maps appended to earlier cases were not necessarily "convincing," and what they show is certainly debatable. Nonetheless, Justice Powell advocated close judicial scrutiny of shape and a critical role for maps.

---

[152] *See Davis*, 478 U.S. at 165, 185 (Powell, J., concurring in part and dissenting in part).

[153] *See id.* at 181 n.21, 183 n.24.

[154] *Id.* at 164 n.3. The reference in Justice Powell's opinion is to the shape of Essex County, Massachusetts, pursuant to a redistricting bill signed into law by Governor Elbridge Gerry in 1812. Critics at the time noted that the unusual district configuration resembled the outline of a salamander, which led to the coining of the phrase "gerrymander." *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 588 n.1 (1993); Paul V. Niemeyer, *The Gerrymander: A Journalistic Catch-Word or Constitutional Principle? The Case in Maryland*, 54 MD. L. REV. 242, 249–53 (1995).

[155] *See Davis*, 478 U.S. at 142 (opinion of White, J.) ("[T]he valid or invalid configuration of the districts was an issue we did not need to consider."); *Davis*, 478 U.S. at 144 (opinion of O'Connor, J.) ("[P]artisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch . . . .").

[156] *Davis*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part) (emphasis added) (citation omitted).

[157] *Id.* at 173 n.12.

3. Shaw v. Reno *(*Shaw I*) and* Shaw v. Hunt *(*Shaw II*)* — In 1993, after decades of being a mere accouterment to a majority opinion or the object of aesthetic sniping from a dissenter, an attached map finally played a leading role in a voting rights case. Throughout her opinion for the Court in *Shaw v. Reno* (*Shaw I*),[158] Justice O'Connor referred to the appearance of North Carolina's congressional districts[159] and included a map of the state's "Congressional Plan" as an appendix. In particular, Justice O'Connor focused on the white plaintiffs' claim that the shape of the Twelfth District, one of two in which African-Americans comprised a majority of the voting-age population, was "bizarre."[160] The district encompassed a geographical area long known as the "Piedmont Crescent," an elongated arc of four urban communities linked by a major highway, Interstate 85.[161] The outline of this district, in conjunction with the fact that state lawmakers sought to influence the racial composition of the district when they drew the lines, caused Justice O'Connor to find that the white plaintiffs had stated a cognizable claim under the Equal Protection Clause. The Court remanded the case to the district court to determine whether the district was narrowly tailored to further a compelling governmental interest.[162]

After the lower court found that it was and it did,[163] the Supreme Court chose to review North Carolina's redistricting plan again, and again reversed. Writing for the majority in *Shaw v. Hunt* (*Shaw II*),[164] Chief Justice Rehnquist emphasized the visual appearance of both majority-minority districts as represented on a map: "By anyone's measure, the boundary lines of Districts 1 and 12 are unconventional. A map portrays the districts' deviance far better than words, see the Appendix to the opinion of the Court in *Shaw I* . . . ."[165]

Yet, even with so much riding on the *Shaw* map, its relevance and accuracy are questionable. First, by reflecting only the boundaries of

---

[158] 509 U.S. 630 (1993). Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Justice O'Connor's opinion.

[159] *See, e.g.*, *id.* at 633 (noting the "dramatically irregular shape" of the district boundary lines); *see also id.* at 647 (noting generally that "reapportionment is one area in which appearances do matter").

[160] *See id.* at 655–56.

[161] *See, e.g.*, NORTH CAROLINA ATLAS: PORTRAIT OF A CHANGING SOUTHERN STATE 6 (James W. Clay, Douglas M. Orr, Jr. & Alfred W. Stuart eds., 1975) ("[The] Piedmont Crescent [is] an elongated, curved urban area that follows the axis of the old North Carolina Railroad. . . . Indeed, this is the urban core of the state and a key urban region in the South."); Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-*Shaw *Era*, 49 VAND. L. REV. 227, 250 (1996) (stating that the I-85 district "captured a community of interest that can be defined as the Piedmont industrial area").

[162] *See Shaw I*, 509 U.S. at 658.

[163] *See* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994).

[164] 116 S. Ct. 1894 (1996).

[165] *Id.* at 1899.

the congressional districts while omitting any landmarks familiar to actual voters such as highways, airports, or mountains, the map fails to account for the realities of modern politics and obscures a way in which the Twelfth District can be considered logical, and even "compact." Second, reproduced in black and white (as it is in the *Supreme Court Reporter* and online printers), the map unfairly suggests a monolithic racial voting bloc, when in fact the district is one of the most integrated in the nation.

(a) Compactness. — Despite extensive analysis, the Court and legal commentators have generally overlooked how the map in *Shaw* misleads,[166] for a reason suggested as far back as *Reynolds v. Sims*: it gives no sense of "[m]odern developments and improvements in transportation."[167] Because it follows a major interstate highway, the district at issue in *Shaw* is tightly compact under a transportation-based definition of compactness, cited by Justice Stevens in *Karcher*.[168] As one cartographer recently wrote: "Because travel time is more relevant to human interaction than straight-line distance — especially in the rugged terrain of western North Carolina — districts based on a high-speed road such as I-85 might well be more functionally compact than their irregular shapes suggest."[169] This conception of compactness is especially appropriate for North Carolina, long known as "the Good Roads State,"[170] and for the highway-hugging Twelfth District in particular.[171] Another map expert noted that "roads really *are* what

---

166 *See, e.g.*, Jerome McCristal Culp, Jr., *Color-Blind Remedies and the Intersectionality of Oppression*, 69 N.Y.U. L. REV. 162 (1994); Symposium, *The Future of Voting Rights After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); Symposium, *Voting Rights After* Shaw v. Reno, 26 RUTGERS L.J. 517 (1995).

167 Reynolds v. Sims, 377 U.S. 533, 580 (1963); *see also* Hampton Dellinger, A Second Look at the Twelfth: In a Crucial Sense the *Shaw* District Epitomizes Compactness (Feb. 1, 1994) (unpublished manuscript, on file with the Harvard Law Library).

168 *See* Karcher v. Daggett, 462 U.S. 725, 758 n.20 (1983) ("[A]n elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district.") (quoting MORRILL, *supra* note 147, at 22) (internal quotation marks omitted); *see also* Ripley Eagles Rand, *The Fancied Line:* Shaw v. Reno *and the Chimerical Racial Gerrymander*, 72 N.C. L. REV. 725, 753 n.243 and vol. 72 errata (1994) (noting Dellinger's idea that the sociopolitical theory of compactness espoused by Richard Morrill and referred to by Justice Stevens in *Karcher* had potential application to North Carolina's Twelfth District).

169 MONMONIER, *supra* note 15, at 215.

170 WILLIAM S. POWELL, NORTH CAROLINA: A HISTORY 193 (1988).

171 Representative Melvin Watt easily tours the district in a single workday. Because a major airport serves each of the district's three population centers, Congressman Watt can fly into Charlotte, drive north on I-85 to Greensboro and Winston-Salem, and then continue on to Durham. At the end of the day, he departs from the Raleigh-Durham Airport. The key to this efficiency is that he does not need to use any secondary roads. Representative Watt has mobile assistants who enjoy the same efficiency. *See* Telephone Interview with Don Baker, District Director for Rep. Melvin Watt (Jan. 28, 1994). Yet the map attached to *Shaw I* gives no indication of these real and important attributes of sociopolitical compactness. *See* Shaw v. Reno, 509 U.S. 630, 658 app. (1993). By comparison, the map of Tuskegee, Alabama, accompanying the Court's opinion in

North Carolina's all about."[172] In fact, North Carolina's highway system purports to be the nation's largest state-maintained network.[173]

Because "compactness" should not be an end in itself, the *Shaw* Court did a particular disservice by attaching a map that accentuates an antiquated definition of "compactness" while ignoring its modern conception. Compactness is intended to facilitate the attainment of other goals, most notably constituent-representative interaction. It is a means, not an end; with technological and communication advances, the relevance of compactness as a district attribute has only decreased. This is an elementary, but critical, notion, one that several lower courts[174] and legal scholars[175] have recognized and embraced.

The Court has regressed. Once upon a time, the Court understood that maps could mislead, and it ironically articulated this concern while discussing the same geographic area at issue in *Shaw*. In *Swann v. Charlotte-Mecklenburg Board of Education*,[176] a major post-*Brown v. Board of Education*[177] decision approving busing as a means of achieving school desegregation in a portion of the same congressional district that the *Shaw* majority found suspect, the Court noted:

> Maps do not tell the whole story since noncontiguous school zones may be more accessible to each other in terms of the critical travel time, because of traffic patterns and good highways, than schools geographically

---

Gomillion does demarcate streets and roads, as well as major geographical landmarks such as lakes. *See* Gomillion v. Lightfoot, 364 U.S. 339, 348 app. (1960).

[172] WOOD, *supra* note 15, at 102.

[173] *See* PUBLIC AFFAIRS DIVISION, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, QUICK FACTS (1996). In addition, the state expresses its commitment to the value of highways by freely distributing at least 1.6 million North Carolina highway maps annually. *See* WOOD, *supra* note 15, at 107, 221 n.15.

[174] *See, e.g.*, Burton v. Sheheen, 793 F. Supp. 1329, 1356 (D.S.C. 1992) (holding that a "functional view of compactness in light of effective representation is a sound approach to the problems of compactness" and that a "critical aspect" of such an approach is "the degree to which the elected representative can effectively represent the district. The district created must be 'manageable' from the standpoint of constituent services."); Prosser v. Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992) ("Compactness and contiguity . . . reduce travel time and costs, and therefore make it easier for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent."); Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1466 (M.D. Ala. 1988) ("The degree of geographical symmetry or attractiveness is . . . a desirable consideration for districting, but only to the extent it aids or facilitates the political process . . . . [A] district is sufficiently geographically compact if it allows for effective representation.").

[175] *See, e.g.*, BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 32–51 (1984) ("[T]he historical reason for compact [political] districts — to lessen transportation and communication costs — is less apllicable in the modern era . . . ."); Jon M. Anderson, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. PA. L. REV. 183, 220 n.213 (1987) (noting several legal scholars who have questioned the value of compact political districts today).

[176] 402 U.S. 1 (1971).

[177] 347 U.S. 483 (1954).

> closer together. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.[178]

(b) Color. — The second way in which the attached map misleads is more symbolic: the map, as reproduced in bench copies, "slip" opinions,[179] the *Supreme Court Reporter*, and online printers, represents the disputed district in black, a color unavoidably suggestive of African-Americans.[180] In fact, the district — essentially half-black, half-white — is one of the most integrated, not segregated, in the country. Presenting the district in black distorts the image received by viewers. Although this effect may not have been intended in *Shaw I*, the Court and the companies that reproduce its opinions should carefully avoid repeating it in the future.

> The conscientious map user must . . . be wary of the deliberate or inadvertent use of color to make a feature or proposal appear attractive or unattractive . . . . [E]ven if no deliberate manipulation is intended, because of embedded emotions or culturally conditioned attitudes some colors carry subtle added meaning that could affect our interpretation of a map or our feelings about the map or the elements it portrays.[181]

Rendering the district as an African-American monolith was not the only option. In *Miller v. Johnson*, Justice Ginsburg demonstrated as much when she attached a different version of the same map, with the district in gray rather than black.[182]

Whether the majority in *Shaw I* considered the North Carolina map in color or in black-and-white, the Justices paid it too much attention, while ignoring the important ways in which the Twelfth District made sense for reasons beyond the shared race of half its inhabitants. As the Court recognized in *Swann*, and as with maps generally,[183] the map in *Shaw I* does not tell the whole story.

---

178 *Swann*, 402 U.S. at 29.

179 "Initial publication of Supreme Court opinions occurs in two stages: bench copies available on the day of the decision and slip opinions that circulate within three days of decisions." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 1, at 798–99.

180 As attached to the opinion in the *United States Reports*, the map depicts the Twelfth District in green, rather than black. *See* Shaw v. Reno, 509 U.S. 630, 658 app. (1993). Any reproductions from the color original will suffer from "the Xerox effect." MONMONIER, *supra* note 15, at 260 (internal quotation marks omitted). "This increasingly common problem occurs when a colored map is reproduced on a black-and-white copier . . . . To avoid misinterpretation, a conscientious map author . . . adds a cautionary note that the map was originally printed in color . . . ." *Id.*

181 MONMONIER, *supra* note 19, at 153.

182 *See* Miller v. Johnson, 115 S. Ct. 2475, 2508 (1995) (Ginsburg, J., dissenting); *see also* Pildes & Niemi, *supra* note 141, at 561 (containing map of North Carolina congressional plan representing two integrated districts in gray). Better even than the gray-shaded maps would be one — such as that utilized by the majority's opinion in *Miller v. Johnson* to represent one of Georgia's integrated districts — using alternating black and white parallel lines.

183 *See, e.g.*, MONMONIER, *supra* note 15, at 1 ("[N]o map is capable of including all information or telling all possible stories. In fact, the process of mapmaking requires cartographers to

4. Miller v. Johnson *and* Bush v. Vera. — In *Miller v. Johnson*,[184] decided two years after *Shaw I*, the Court was confronted with the map of a predominantly African-American political district that appeared quite different from the supposedly "bizarre" North Carolina district. As both the majority and the dissenting opinions acknowledged, the contested Georgia congressional district, although not square, was much more compact, at least geographically.[185] More importantly, it appeared to comport with the *Shaw I* standard in that it was not "extremely irregular" and took into regard "traditional districting principles."[186] As a result, the Court bloc opposed to consideration of race in redistricting enlisted a different invalidating principle — whether race was a "predominant factor" in the creation of an apportionment plan — to replace *Shaw I*'s reliance on a district's ungainly outline.[187] So the *Miller* majority de-emphasized the importance of a district's appearance, even as it attached maps. Once again, maps appear at the end of an opinion, not as a coda but rather as an afterthought;[188] like model children in the old saying, they are seen, but not heard. After doing the critical work in *Shaw I* by providing the basis for a Court majority to invalidate benign race-based redistricting, the maps are again superfluous.

Finally, in *Bush v. Vera*,[189] Justices in both the majority and the dissent attached several maps.[190] It is disconcerting to see that the maps in *Bush* are now completely decontextualized, a Rorschach test of individual black blots[191] floating in a white background, devoid of any identifying information beyond the number of the particular district rendered.[192] As such, these images cannot fairly qualify as maps

limit content in order to create a readable map and so allows them to manipulate their audience with the information they choose to include.").

184 115 S. Ct. 2475 (1995).

185 *See Miller*, 115 S. Ct. at 2489 (opinion of Kennedy, J.) ("[B]y comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face . . . ."); *Miller*, 115 S. Ct. at 2502 (Ginsburg, J., dissenting) ("In contrast to the snake-like North Carolina district inspected in *Shaw*, Georgia's Eleventh District is hardly 'bizarre', 'extremely irregular', or 'irrational on its face.'") (quoting *Shaw I*, 509 U.S. at 642, 644, 652).

186 *Shaw I*, 509 U.S. at 642.

187 *Miller*, 115 S. Ct. at 2488 (opinion of Kennedy, J.). On the *Miller* majority's "creative misreading" of *Shaw*, see Karlan, cited above in note 137, at 301–06.

188 *See Miller*, 115 S. Ct. at 2489 ("Although this evidence [of racial gerrymandering illustrated by the maps] is quite compelling, we need not determine whether it was, standing alone, sufficient to establish a *Shaw* claim . . . .").

189 116 S. Ct. 1941 (1996).

190 *See Bush*, 116 S. Ct. at 1965–67 app. A–C (opinion of O'Connor, J.); *Bush*, 116 S. Ct. at 1994–96 app. A–C (opinion of Stevens, J.).

191 As in *Shaw I*, the use of black to represent what is in reality a truly integrated district is misleading. *See supra* section I.B.3.b.

192 *See Bush*, 116 S. Ct. at 1965–67 app. A–C (opinion of O'Connor, J.); *Bush*, 116 S. Ct. at 1994–96 app. A–C (opinion of Stevens, J.). In *Miller*, Justice Kennedy began the trend toward decontextualized maps by attaching a "Population Density Map" of the "11th Congressional District of Georgia" that used color shades to depict dense population centers but gave no indication

because "[t]raditional maps are pictorial representations of geographic and demographic facts organized to allow the user to readily understand and easily extract the factual information portrayed."[193] Further, these decontextualized maps improperly focus the Court's and the reader's attention on compactness as a primary goal. Because these maps fail to present information about political subdivisions, natural landmarks, and roads, they again provide a distorted picture of compactness.

Critics of the Court's current voting rights and redistricting jurisprudence argue that the opinions have been difficult to follow and offered little guidance to state legislatures and lower courts.[194] The increasing attachment of maps providing little or no information about a district other than its outline both symbolizes and contributes to the shortcomings of this line of precedent.

C. Replicas and Reproductions: Content Plus Context

Significant differences exist between the Justices' use of maps and photographs and their use of newspaper advertisements, cruise tickets, and political flyers, which have also been attached to various Supreme Court opinions over the last thirty years. Most fundamentally, maps and pictures are not words, whereas the other objects are primarily composed of written text. And, unlike maps and photographs, which represent three-dimensional spaces as only two, replicas and reproductions of text-based items do not subject the reality they depict to any such radical transmutation. Because of the minimalist nature of their visual attributes, the replicas and reproductions offer less of a contrast with the written opinions that they accompany and are significantly less susceptible to manipulation.

At the same time, these attachments are not part of the written opinion proper even though they could be if retyped. In fact, in every case, important written passages in the attachment appear verbatim in the written opinion. Because the words themselves generally are substantively superfluous, the inclusion of the ads and other items, as with photographs and maps, seems attributable to a desire for visual as well as written content. In addition to sharing the common denominator of non-textual characteristics, these items illustrate several of

---

of how the district fit into a map of the state or even surrounding districts. *Miller*, 115 S. Ct. at 2496.

193 Dennis S. Karjala, *Copyright in Electronic Maps*, 35 JURIMETRICS J. 395, 395 (1995).

194 *See, e.g.*, Issacharoff, *supra* note 12, at 69–70 (arguing that the Court had generally created a "doctrinal morass" with its recent redistricting jurisprudence and in *Shaw* and *Miller*, in particular, "left the hard issues clouded behind harsh rhetoric and a cautious definition of actual legal standards"); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 246 ("[I]n *Shaw v. Reno*, the Court plunged itself and the lower federal courts into a previously unexplored and particularly tangled precinct of the 'political thicket.'") (footnote omitted).

the same drawbacks and pitfalls as photographs and maps. First, they are not necessarily effective. Second, they are not consistently duplicated by the various hard-copy and online services that reproduce the Court's decisions. Finally, the arbitrariness of their use — present in one case, absent in another with nearly identical issues — belies any claim that they are essential.

1. New York Times Co. v. Sullivan. — It is hard to overlook the attachment to Justice Brennan's majority opinion in the seminal First Amendment case of *New York Times Co. v. Sullivan*[195] — a lifesize reproduction of the full-page newspaper advertisement that an Alabama sheriff claimed to be libelous. It is the largest item ever attached to an opinion.[196] Despite the significant attention paid the case,[197] it is still not clear what Justice Brennan was trying to accomplish with the attachment.[198] Certainly, by reproducing the ad as it appeared, he offered to each reader the experience of reading a newspaper. By doing so, he helped keep literally before the reader's eyes the fact that the ad appeared in a newspaper, a forum to which First Amendment law jurisprudence has traditionally afforded significant protection.[199] In addition, by presenting the ad in its entirety, he diluted the impact of the few contested passages.

On the other hand, a reader unversed in the Court's then-emerging First Amendment jurisprudence might have expected that, because the statements were printed in a newspaper, those in charge of producing the paper had ensured its truth and would not be careless with facts. This suggestion of accuracy is accentuated by the ad's inclusion of a quote from a "*New York Times* editorial."[200]

Of course, as suggested above,[201] the issue of the effectiveness of the attachment as a lifesize reproduction of a newspaper page is a moot one for all readers save those relying on the hard-copy version reprinted in the *United States Reports*. For the rest, the ad appears no larger than a standard business letter. This variation in scale for the same attachment among different reporters raises additional issues. Common sense confirms that the size of an object can have an effect on the impression it makes. To the extent the attachment in *Sullivan*

---

195 376 U.S. 254 (1964).

196 The attachment's unusual size would be known only to readers of the case in the *United States Reports*. Other hard copies, and electronic versions, reduce the ad to the borders of the page. *Compare* 376 U.S. 254, 292 (13.5" × 22.5") *with* 84 S. Ct. 710, 740–41 (9.75" × 13") *and* 11 L. Ed. 2d 686, 715 (6.5" × 9.5").

197 *See, e.g.*, LEWIS, *supra* note 32, at 169.

198 *Cf. id.* (characterizing Justice Brennan's attachment as "an effective device").

199 *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251–57 (1974) (noting prior Court cases promoting newspapers' First Amendment-based protections).

200 *Sullivan*, 376 U.S. at 292 app.

201 *See supra* note 196.

was intended to simulate the experience of reading a newspaper, rather than a letter, the difference is profound.

2. Austin v. Michigan Chamber of Commerce. — Sometimes, as in *Austin v. Michigan Chamber of Commerce*,[202] the differences in the reproduction of the same attachment in various reporters are even more blatant than the newspaper's vacillating size in *Sullivan*. In *Austin,* decided in 1990, the Court upheld a state law prohibiting nonprofit corporate speakers from expending funds on behalf of specific candidates. Dissenting, Justice Kennedy attached to his opinion a copy of the political flyer at issue.[203] In the version of the opinion published in the *Supreme Court Reporter*, the words "plaintiff's trial exhibit" and "plaintiff's exhibit" are superimposed in two places on the ad (IMAGE 10).[204] However, in the official *United States Reports* version, this identifying information is missing (IMAGE 11). The omission offers a disconcerting example of the inconsistency with which attachments can be reproduced, and the ease with which mistakes and errors can be introduced, particularly when an attachment's accuracy and authenticity is taken for granted. Of course, which party submits a particular attachment is useful information that is omitted in virtually every case, not just in some versions of *Austin*.

3. Carnival Cruise Lines v. Shute. — Another actual-size replica was attached to the Court's opinion in *Carnival Cruise Lines v. Shute*,[205] in which the Court upheld a forum-selection clause contained in a cruise-line ticket. The majority opinion quoted from the disputed ticket passage.[206] The quote appears at the beginning of Justice Blackmun's opinion for the Court in large, and seemingly accurate, type.[207]

To combat what he implied to be a factual distortion, Justice Stevens included a replica of an actual ticket in his dissenting opinion.[208] Justice Stevens argued:

> The Court prefaces its legal analysis with a factual statement that implies that a purchaser of a Carnival Cruise Lines passenger ticket is fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket. . . . I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in

---

202 494 U.S. 652 (1990).

203 *See Austin*, 494 U.S. at 714 (Kennedy, J., dissenting).

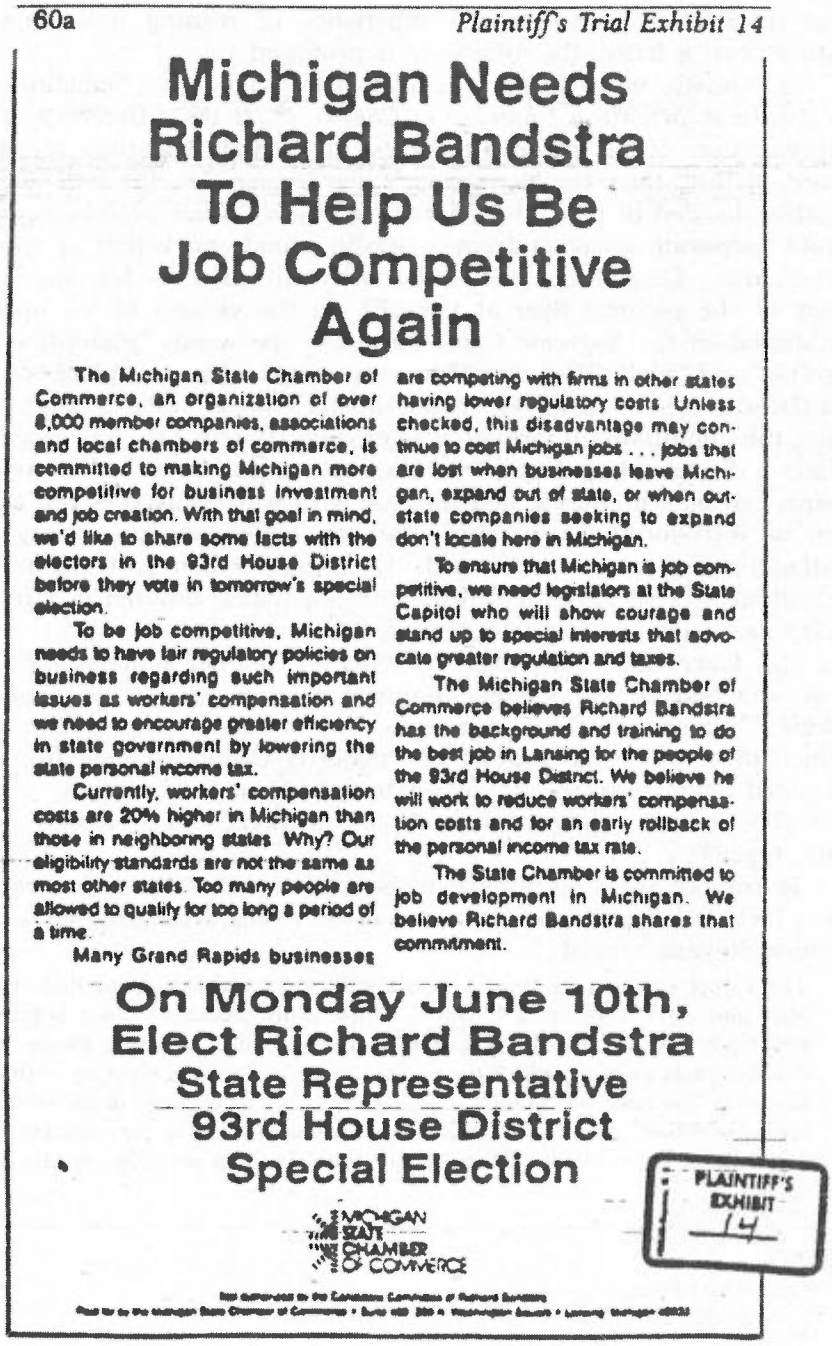
204 110 S. Ct. 1391, 1427 (1990).

205 499 U.S. 585 (1991).

206 *See id.* at 587.

207 *See id.*

208 *See Carnival Cruise Lines*, 499 U.S. at 605 poster 1 (Stevens, J., dissenting).



60a *Plaintiff's Trial Exhibit 14*

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

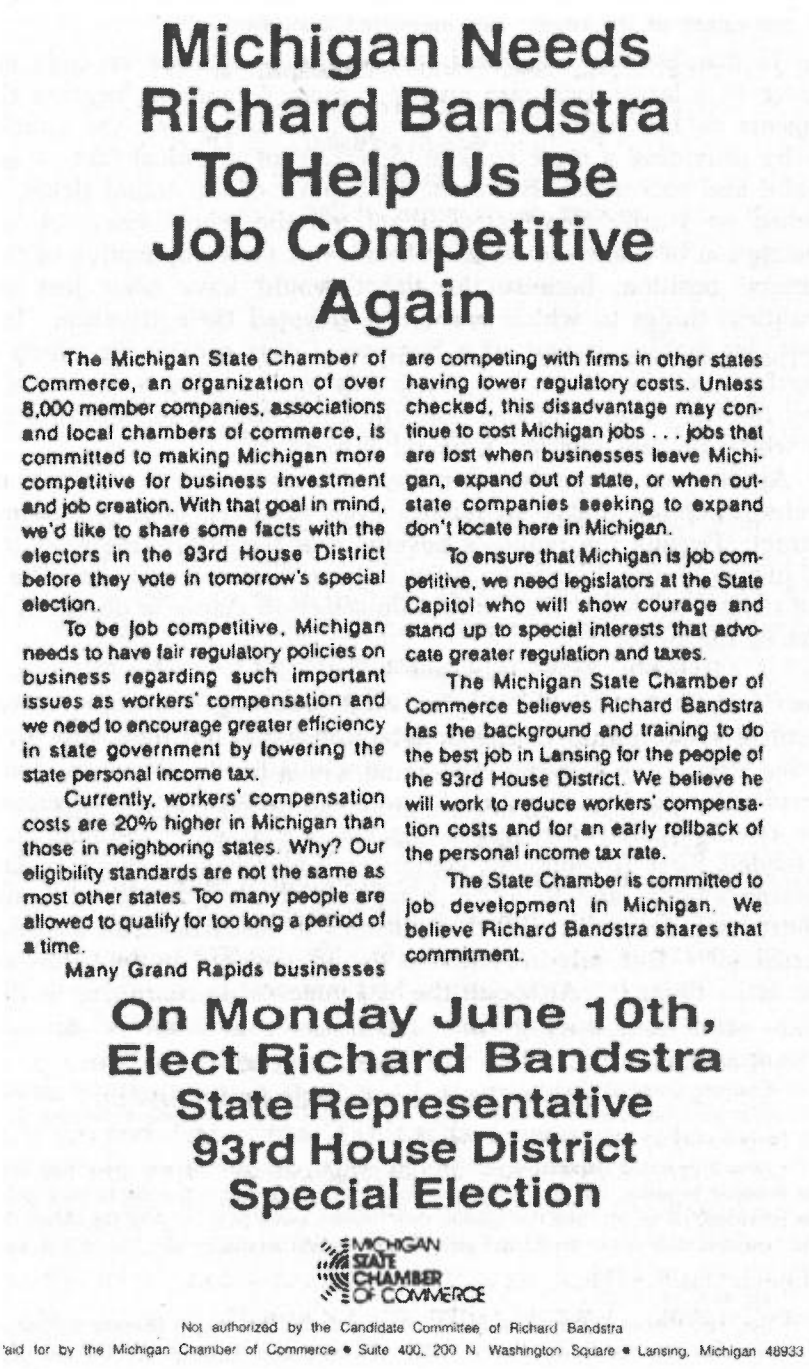
The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th, Elect Richard Bandstra State Representative 93rd House District Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

PLAINTIFF'S EXHIBIT 14

IMAGE 10. *The political flyer attached to Justice Kennedy's dissenting opinion in* Austin, *as printed in the* Supreme Court Reporter.



Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th, Elect Richard Bandstra State Representative 93rd House District Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

Not authorized by the Candidate Committee of Richard Bandstra

Paid for by the Michigan Chamber of Commerce • Suite 400, 200 N. Washington Square • Lansing, Michigan 48933

IMAGE 11. *The political flyer, as represented in the* United States Reports.

> the ticket itself. A careful reader will find the forum-selection clause in the eighth of the twenty-five numbered paragraphs.[209]

As Justice Stevens suggested, the majority opinion reproduced the clause in a larger type size and in a more prominent location than it appears on the cruise ticket at issue.[210] In this sense, the attachment — by providing a more realistic depiction of a critical fact — is both useful and successful. But even the replica of the actual ticket, as attached by Justice Stevens, does not tell the whole story. A written description of reality could have been even more supportive of the dissenters' position, because the ticket would have been just one of countless things to which purchasers devoted their attention. In contrast, by making it part of a Supreme Court opinion in which every word is presumably studied, Justice Stevens invited a degree of scrutiny for the ticket, and therefore the contested forum-selection clause, to which no real purchaser would subject it.

Apart from its equivocal utility, the replica is an example of the undue attention that attachments, even relatively mundane ones, can attract. Despite the replica's novelty, and the efforts required to affix it, Justice Stevens's opinion relies only to a minor extent on the claim the replica supports: that the forum-selection clause is obscured in the text of the ticket.[211]

4. Bates v. State Bar *and* In re R.M.J. — In *Bates v. State Bar*[212] and *In re R.M.J.*,[213] the small attorney newspaper advertisements reproduced are rather mundane visually, but they raise an interesting point: the Court's use of attachments has been random and devoid of a guiding principle for when an attachment is necessary. In the twenty years since Justice Blackmun's majority opinion in *Bates* extended First Amendment commercial speech protections to lawyers seeking clients, and included a reproduction of the ad at issue, the Court has considered similar challenges to restrictions on attorney advertising.[214] But only in *R.M.J.* is the ad attached to the Court's opinion as in *Bates*.[215] Although the attachments' appearances in the two

---

[209] *Id.* at 597.

[210] *Compare Carnival Cruise Lines*, 499 U.S. at 587–88 (excerpting a selected portion of the contract in large type), *with Carnival Cruise Lines*, 499 U.S. at 605 poster 1 (Stevens, J., dissenting) (reproducing an exact replica of the ticket).

[211] After two initial paragraphs, the opinion quickly concedes the one point that the replica was intended to prove, that only a "meticulous passenger" would notice the ticket's forum-selection provision, *id.* at 597, and the opinion then devotes seven pages to why the clause should be held "unenforceable under traditional principles of federal admiralty law," *id.* at 598–605.

[212] 433 U.S. 350 (1977).

[213] 455 U.S. 191 (1982).

[214] *See, e.g.*, Florida Bar v. Went for It, Inc., 115 S. Ct. 2371 (1995); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[215] In *R.M.J.*, Justice Powell, writing for a unanimous Court, held that the First Amendment prohibited states from restricting what type of biographical information attorneys could put in advertisements, provided that the information was not misleading, and to whom they could dis-

opinions are innocuous, they are also unnecessary, because the decisions turn on what the ads said, rather than how they appeared.[216] Moreover, for those surveying the Court's jurisprudence in this area, the unexplained alternation between the presence and absence of attachments can be disconcerting.[217]

II. An Eye Toward Improvement

As Part I demonstrated, the Court's use of photographs, maps, and other attachments has been both rich and problematic: rich in that attachments have accompanied opinions in a number of critical cases, and problematic in that their presence has been more distracting than illuminating. At worst, as with the "giant" cross in *Capitol Square*, the visual attachments freeze a badly atypical, and thus misleading, version of reality. The foregoing analysis of the Supreme Court's use of attachments reveals clear failings. And there is little reason to be sanguine about the future. Egregious examples of the misuse of attachments have continued to appear in recent years. With developing computer technologies, attaching sight-based objects will only get easier, while the susceptibility of such objects to manipulation will only increase. In addition to the recurrence of cases in areas that invite the use of visual attachments, lower courts are suggesting even more ways to use visual attachments.[218] What should be done?

A. Stop Using Attachments

In no decision of the Court have attachments been indispensable. The parties to a case decided by the Court do not need a map or

---

seminate it. The disputed advertisements, as they appeared in a newspaper and a telephone book's yellow pages, follow as an "APPENDIX TO OPINION OF THE COURT." *In re R.M.J.*, 455 U.S. at 207–08.

216 Ironically, the one decision in the area of attorney advertising that did present a question of the appearance of a solicitation did not include a reproduction of the ad in dispute. *See Zauderer*, 471 U.S. at 647–49.

217 Of course, the erratic use of visual attachments is not limited to attorney advertising cases. As discussed above, *see supra* note 144, maps have variously appeared, disappeared, and then reappeared in the Court's redistricting decisions over the last half century. The inclusion of photographs in religious symbol cases has also been inconsistent. *Compare* County of Allegheny v. ACLU, 492 U.S. 573, 622 app. A–B (1989) (opinion of Blackmun, J.) (finding a government-sponsored crèche unconstitutional but a menorah permissible and including photographs of both displays), *with* Lynch v. Donnelly, 465 U.S. 668, 672 (1984) (upholding a government-sponsored display of a nativity scene against an Establishment Clause challenge, but not including a photograph of the contested display).

218 *See, e.g.*, Petrucelli v. Bohringer and Ratzinger, GMBH, 46 F.3d 1298, 1315 (3d Cir. 1995) (Becker, J., concurring in part and dissenting in part) (attaching, in a civil procedure case, a copy of a certificate of service); United States v. Green, 46 F.3d 461, 468 (5th Cir. 1995) (attaching, in a criminal procedure case, two "mugshot" photographs: one of the defendant, one of a man for whom the defendant claimed he was mistaken); AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 14–25 (1st Cir. 1994) (reproducing, in a First Amendment case, 12 pages of public service ads promoting the use of condoms).

photograph to understand what the Court has done, because they are already intimately familiar with the factual record. And the public does not appear to have been aided by the presence of attachments. The extraneousness of attachments is further suggested by the fact that, in every case in which the Court has used an attachment, the Court has decided a nearly identical case without one.[219] Given the serious issues arising from their use, why employ attachments at all? The Court could adopt a rule, or an internal practice, of not attaching photographs, maps, replicas, or reproductions to its opinions.[220]

Ceasing the use of attachments will not cloak the Court in secrecy. Nor is it a Luddite-like response to modernity. Rather, such a prohibition would enhance the accuracy and clarity of the Court's work. The members of the Court have traditionally been capable writers, possessed of more than adequate powers of description and assisted by able law clerks. "If I could tell the story in words," the famed photographer Lewis Hine once said, "I wouldn't need to lug a camera."[221] Such is not the case with Supreme Court Justices. If their point of view cannot be expressed with words alone, it is likely a sign that they should change it.

Interestingly, the majority in the most recent religious-symbol case, *Capitol Square*, like the majority in the recent voting-rights decision, *Miller*, de-emphasizes the viewer. Both cases reject older, viewer-centered models that are more amenable to attachments. These decisions contrast with prior cases like *Shaw* and *Allegheny* that emphasize viewers and what they see. Of course, to require the Court to rely on rationales that do not require attachments might be simplistic and restraining. And there is clearly a downside: photographs, maps, and other visual attachments can be useful because they let the Court be case-specific and incrementalist. But even if this approach were normatively desirable and thus worth encouraging, the use of attachments would still pose the problem of inconsistent holdings: one textual and one visual.[222] Avoiding such a confusing bifurcation is another argument for precluding attachments.[223]

---

[219] *See supra* note 217.

[220] Purely written attachments, like Justice Breyer's exhaustive bibliography in *United States v. Lopez*, need not be affected. *See* United States v. Lopez, 115 S. Ct. 1624, 1665–71 (1995) (Breyer, J., dissenting).

[221] SONTAG, *supra* note 14, at 185.

[222] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985) (noting that "[t]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and *it may also serve to impart information directly*") (emphasis added).

[223] The argument that the Justices should stop attaching visual images to their opinions is not intended to suggest that the Court should decline to consider such items when attempting to resolve an issue. The Federal Rules of Evidence explicitly provide for the admissibility into evidence of photographs, maps, videotapes, motion pictures, and other visual images, and, in the context of an adversarial proceeding, including Supreme Court oral arguments, the consideration

B. *Use Attachments Better*

1. The Court Should Do Better. — If the Justices insist on continuing to attach photographs, maps, and other images to their opinions, they should take several steps to give viewers a more accurate understanding of the picture they are seeing. Some improvements would apply to all types of visual attachments, whereas others would be object-specific.

(a) General Measures. — In all cases, the opinion should identify explicitly the party submitting the attachment,[224] and no case should include an attachment that the trial court did not properly admit in evidence. Second, the Court should provide more objective information to explain what the viewer is seeing. For example, the height of inanimate objects depicted in an attached photograph, or the reduction scale used for a map, should be included in the caption.[225] Third, attachments should always be circulated among the Justices' chambers along with their respective written opinions. Currently, there is no internal practice requiring that attachments accompany circulated opinions.[226] This ad hoc approach diminishes the opportunity for fellow Justices to comment on, or criticize, a colleague's attachment. Finally, the Court needs to address the situation of online users. The Court's electronic dissemination system for its own opinions, Project Hermes, does not include visual images attached to opinions. If the Court refuses to curb its attachments practice, it should at least provide for their inclusion in Project Hermes. In addition, the commercial enterprises that reproduce Court opinions online should improve their ca-

---

of such items, assuming sufficient skepticism, can be advantageous. For example, many Court observers believe the Justices erred in refusing to allow a demonstration of the Internet during oral arguments in the case involving the Communications Decency Act of 1996, ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa.), *prob. juris. noted*, 117 S. Ct. 554 (1996). *See, e.g.*, Tony Mauro, *Internal Conflict on Internet Case*, LEGAL TIMES, Mar. 17, 1997, at 8 (noting that an Internet demonstration "convinc[ed] the [appellate] judges that selective blocking [of pornography] is not feasible on the wide-open Internet"). It is specifically in the context of a Court opinion, in which there is often little or no objective information about what is being depicted and no opportunity to examine a party on the visual image's reliability, that visual images do more harm than good.

224 As David Sternbach wrote:

> Who took the image? What is the photographer's relationship to the issue in question? What choices are represented in the selection of the image (how else might the image have been constructed)?
>
> These . . . questions touch on the fairly obvious issue of bias in framing, composition, lighting, and other means of affecting emphasis in an image. If the images are made by an interested party, courts will want to pay special attention to the photographer's choices.

Sternbach, *supra* note 14, at 1138–39 (citations omitted).

225 Nowhere in the *Capitol Square* opinions, for instance, does the Supreme Court give the specific height of the Latin cross at issue. By contrast, the lower court opinion records that the cross is approximately ten feet tall. *See* Pinette v. Capitol Square Review and Advisory Bd., 844 F. Supp. 1182, 1183 (S.D. Ohio 1993).

226 *See* Telephone Interview with Francis J. Lorson, Chief Deputy Clerk, Supreme Court (Nov. 27, 1996).

pacity to display attachments, both on computer screens and when printed.

(b) Photographs. — To diminish the distortions that have repeatedly appeared in attached photographs, the Court should take measures beyond the general ones noted above. First, attached photographs must be presented in color, rather than black-and-white. Nearly thirty years ago, Charles Scott wrote that "[w]e can be almost certain that the day will soon come when all photographic evidence intended to show a scene or object as it appears to the eye will be in the form of color photography."[227] With regard to the Supreme Court's practice, Scott's prediction has proved too sanguine. The Court has yet to attach a photograph in color, and there is no indication that it will do so in the near future.[228] This oversight occurs despite the fact that color reproductions are feasible: the Court, through the Government Printing Office, has the capability to reprint attached photographs in color.[229] Second, if a photograph, particularly of an inanimate object, is not taken from eye level, the opinion should explain the reason behind the use of a different angle, and its effect on the image.

(c) Maps. — To make the presentation of maps in redistricting cases more accurate, the Court must stop depicting the borders of a political district, devoid of any other geographical or geopolitical context. If the goal is to understand whether a particular political district is reasonable, the best maps are city or state roadmaps. These maps, unlike the ones used by the Court in recent cases, represent both the natural and social features that shape our communities and facilitate (or limit) the ability of representatives to interact with their constituents. In addition, maps, like photographs, should be reproduced in color. Roadmap readers are accustomed to the use of color, and color enables readers to avoid being influenced subliminally by exclusively black or white visual representations of political districts.

(d) Replicas and Reproductions. — With replicas, as with oversized photographs and maps, greater consideration needs to be given to the inability or unwillingness of several reporters of Supreme Court opinions to reproduce items larger than a standard page. Publishers who reduce the size of replicas should state so explicitly in a caption and provide the items' dimensions as they appeared in the official *United States Reports*.

---

227 2 SCOTT, *supra* note 83, § 756, at 152.

228 *See* Telephone Interview with Francis J. Lorson, Chief Deputy Clerk, Supreme Court (Mar. 20, 1997).

229 *See* Telephone Interview with Frank D. Wagner, Reporter of Decisions, Supreme Court (Apr. 2, 1997). The Supreme Court's publications department handles black-and-white work and sends any work requiring oversized or color attachments, such as color photographs, to the Government Printing Office. *See id.*

2. And So Should Readers. — Readers should examine photographs, maps, and other attachments with an understanding of and appreciation for the views of the Justices who attached them. If the Court is unwilling to reform the process, readers and commentators should be vigilant. When confronted with an attachment, readers should ask: why has a Justice included it? Is it an atypical perspective? Is critical objective information omitted, and if so, why?

III. CONCLUSION

From its inception, the great work of the United States Supreme Court has been done by words alone and nothing more. Nor less. This history should not come as a surprise, for the law is a "word-oriented institution."[230] The legal documents that have bound and bettered our nation — from the Declaration of Independence to *Brown v. Board of Education*[231] — have been plain and unencumbered, yet clear and powerful. A review of the Supreme Court's use of photographs, maps, replicas, and reproductions shows the items generally to be incompatible with such ideals. Visual attachments are much more likely to obscure the best available legal answer rather than reveal it. Unless the Court is willing to adopt measures to enhance the accuracy of visual attachments, or at least disclose their inherent distortions, this unnecessary practice should stop.

---

230 Katsh, *supra* note 28, at 1698.

231 347 U.S. 483 (1954).