VISUAL CONTRACTS IN U.S. COURTS

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ABSTRACT

Visual contracts are what they sound like: contracts that rely on graphic elements, often accompanied by text, to convey the meaning of an agreement. The visuals can include diagrams, cartoons, maps, flowcharts, timelines, and so on. Scholars have detailed many of the benefits of visual contracts, and their adoption has become increasingly common outside the United States, with corporations like Airbus and Shell utilizing them. However, in the United States adoption remains limited.

The tepid reception to visual contracts in the United States likely stems from lawyer's aversion to risk. Lawyers prefer established processes with predictable outcomes and often opt to repeat patterns that they and others have already used. But are visual contracts actually risky in the United States? While it's true that no U.S. courts have interpreted a visual contract, as defined in this Article, research indicates that U.S. courts regularly opine on visuals. They do so when deciding what visual aids to admit during trials and when adjudicating lawsuits where a visual makes up some part of the dispute. Some judges even add visuals to their opinions to clarify key points. This comfort with nontextual representations signals that U.S. courts are capable of, and willing to, interpret visuals and, therefore, would accept visual contracts. However, even stronger evidence that U.S. courts will welcome visual contracts exists: judges already adjudicate visuals in contractual disputes. While the contracts in these cases reference visuals outside the text of the contract, the cases they feature in show U.S. judges confidently interpreting visuals in adjudicating contract disputes. This Article details some of these examples and delves further into how they provide the support and predictability that lawyers need to move the visual contract field forward in the United States.

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Further bolstering the argument, research reveals that visual contracts are not new. In fact, they came centuries before written agreements. Unfortunately, while most people could comprehend these ancient agreements, only a select few can understand the dense prose that makes up most contracts today. Visual contracts offer a way back to the more accessible origins of contracting.

Why would lawyers depart from the methods they know? In addition to the reasons other scholars have already provided, this Article adds a few new ideas. Initially, visual contract adopters may need to spend more to create visual contracts, but they also stand to gain by establishing themselves as experts in a field. Plus, this Article details how utilizing designers can reduce drafting costs on a per contract basis.

As with all things new, visual contracts pose risks. However, the benefits they offer, and the potential profits early adopters could obtain, make them worthwhile. This Article digs into the details of implementing visual contracts under the U.S. legal system.

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I. INTRODUCTION

Can you imagine trying to assemble a piece of IKEA furniture (or anything else with detailed instructions) without any images? The instructions might start off like this:

> *Locate a medium-sized screw that is longer than the shortest screw but not as long as the longest one and has a wider head than the similar screw of the same length. Make sure it is the one with a flat, not a pointed, end. Next, find the board that is six inches by fourteen inches and has the large hole on the side opposite the slot in the bottom*.

And that is just to select the items needed to complete a step—we have not even gotten to how to put it together. Pictures make instructions easier to follow and comprehend. They can do the same in certain contractual situations. Of course, this will not work for all situations. A contract between two individuals will not gain much in understandability by substituting photos of the contracting parties for their names, nor will drawing out a calendar and circling the day performance will begin

make it easier to comprehend.[1] On the other hand, a contract that involves a detailed process or procedure, or one with a complex timeline with multiple possible scenarios, can benefit from visual representations.[2] IKEA, and most instruction creators, have recognized that offering text-heavy instructions only overloads users and leads to unnecessary confusion and frustration.[3] Why have contract drafters failed to make a similar realization?

In fact, contract creators outside the United States have realized the value of visuals and use them with increasing frequency.[4] The use of visual aids varies greatly in these agreements—from image heavy documents where visual representations replace text, to documents where images merely supplement the text, to ones where the "visual" portion is simply the addition of colors, different fonts, or a cleaner layout.[5] These visuals simplify and clarify contracts, reducing the chances of interpretation disputes, while also making them understandable to a much wider audience.[6] But even these recent examples from outside the United States do not represent a new innovation. In fact, visual contracts go back centuries, predating the text-based documents that dominate today.[7] Visual contracts actually came first and likely fell out of favor, in part, because the

1. *See* Gerlinde Berger-Walliser et al., *Promoting Business Success Through Contract Visualization*, 17 J.L. BUS. & ETHICS 55, 67 (2011).

2. *See id.*

3. *See Why Are There Only Photos in IKEA Assembly Instructions?*, IKEA, https://www.ikea.com/us/en/customer-service/knowledge/articles/f050cged-d77f-477b-8d60-ge5d56b88d2e.html [https://perma.cc/F96N-AKVZ] ("Using photo diagrams ensures our assembly instructions are accessible to all and as easy as possible to understand.").

4. *See* Kate Vitasek, *Comic Contracts: A Novel Approach to Contract Clarity and Accessibility*, FORBES (Feb. 14, 2017, 7:00 AM), https://www.forbes.com/sites/katevitasek/2017/02/14/comic-contracts-a-novel-approach-to-contract-clarity-and-accessibility/ (noting attorneys in South Africa, Finland, and even the United States have advocated for making contracts more accessible to people by including visuals); *see also* Mike Cherney, *Lawyers Turn to Comics for Help with Boring Contracts*, WALL ST. J. (May 31, 2019), https://www.wsj.com/articles/if-a-cartoon-lightbulb-explained-your-contract-would-you-read-it-11559317351 (commenting on how attorneys in South Africa and the United States have advocated for visuals in contracts).

5. *See, e.g.*, Robert de Rooy, *ClemenGold Comic Contract*, CREATIVE CONTS., https://creative-contracts.com/clemengold/ [https://perma.cc/3BUY-HMAK]; *Airbus NDA*, WORLD COM. & CONTRACTING, https://www.worldcc.com/portals/iaccm/images/Graphics/0303airbus1.png [https://perma.cc/385A-R77N].

6. *See* Gerlinde Berger-Walliser et al., *supra* note 1.

7. *See* Peter Prior, *Bulla to Bill of Lading: Evolutions in Freight Shipping*, MEDIUM: OFFICIAL MOTHERSHIP BLOG (Sept. 25, 2019), https://medium.com/official-mothership-blog/bulla-to-bill-of-lading-1c6f23008cc [https://perma.cc/G7JC-AD6N].

wealthy, more educated upper classes sought to assert their perceived superiority and quickly recognized that text-based agreements gave them an advantage when negotiating with those who had fewer means and less education.[8] In some instances, the intent to take advantage and deceive remains today, aided by the increasingly dense language utilized in contracts.[9] However, it appears that the intent to deceive has become increasingly rare and that most agreements provide the biggest benefit, both to the signatories and society, when all parties fully understand and can carry out their contractual commitments.[10]

Why does visual contract adoption remain limited in the United States? A cynic may posit that some lawyers do not want to adopt them for fear their increased accessibility will reduce their billing opportunities. While we suspect this is true in a small minority of cases, it is likely that lawyers' risk aversion plays a much larger role.[11] Lawyers want to avoid adopting new, untested (in court) techniques and instead opt to do things as they have been done.[12] This protects them and, while not necessarily optimal, provides their clients with greater predictability.[13] Are their fears of "unlitigated" visuals valid? Are visual contracts legally binding or too risky to consider? Here we seek to answer those questions with a focus on U.S. law.

The research indicates that fears regarding the enforceability of contracts that rely on visual elements are largely unfounded.[14] In fact, courts evaluate matters concerning visuals with some frequency, sometimes even in contract disputes.[15] So, there is little reason to think courts will struggle or refuse to interpret visual contracts. Unfortunately, visual contracting labels itself as a new and exciting

8. *See generally* Joy Cunanan, *From Barter to Written Agreements: A Look into the History of Contracts*, LEXAGLE (July 22, 2024), https://www.lexagle.com/blog-en-sg/from-barter-to-written-agreements-a-look-into-the-history-of-contracts [https://perma.cc/WW2A-CQLD].

9. *See, e.g.*, Rob Waller et al., *Visual Contracts for Shell*, WORLD COM. & CONTRACTING, http://www.flussobjekte.at/hpall/award/2630/nzknvgh8cz.pdf [https://perma.cc/334G-6AT2].

10. This Article seeks to be a practical guide for lawyers, judges, and academics on how visuals may be used in U.S. law. As a result, the Article will use just first-person language.

11. *See* Jay A. Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20 U. PA. J. BUS. L. 815, 837–38 (2018).

12. *See id.* at 826–27.

13. *See id.*

14. *See infra* Part IX.B.

15. *See, e.g.*, Leader Commc'ns, Inc. v. Fed. Aviation Admin., 757 F. App'x 763, 770 (10th Cir. 2018) (resolving the plain meaning of "graphics, illustrations, and charts" in a contract); Yanello v. Park Fam. Dental, 79 N.E.3d 294, 306 (Ill. App. Ct. 2017) (discussing the admissibility of a skull as demonstrative evidence); State v. Jones, 984 N.E.2d 948, 960–61 (Ohio 2012) (using a life size doll in a murder trial).

discipline. This marketing approach likely heightens the fears of risk-averse lawyers and actually reduces their willingness to adopt visual contracts.[16] However, put within the context of established contract law, visual contracting is merely a minor evolution of existing practices.[17] Parties have long relied on visual elements either as contractual addendums or typographical modifications, like the ill-advised and widely disparaged all-caps clauses.[18] Visual contracts simply increase reliance on these elements and better integrate them with the rest of the document.

Should lawyers use visual contracts just because courts will not invalidate them? Don't they need more to alter the current practices they know well? There is extensive research, much of it in the education field, on the value of visuals.[19] Given their value and adoption in other spheres, contracts are ripe to integrate this visual-value enhancement more fully.

Of course, nothing is perfect. Transitioning to contracts that utilize visual elements will involve significant change and upfront investment. Why would companies and clients consent to this expense? First and foremost, thoughtful incorporation of visual elements will lead to increased clarity during negotiations, permitting parties to resolve misunderstandings before finalizing contracts and allowing those that carry them out to do so more accurately and effectively.[20] This will reduce the risk of future litigation due to differing understandings, which will reduce costs and risks down the line.[21] Business-to-consumer industries have even more to gain as visual contracts give them an opportunity to greatly lower the

16. *See* Mitchell, *supra* note 11, at 837.

17. *See generally* Matthew Jennejohn et al., *Contractual Evolution*, 89.4 U. CHI. L. REV. 901, 910–13 (2022) (discussing theories of contract evolution and their impact on contract law).

18. *See* MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS 83 (Thomson Reuters, 2d ed. 2015).

19. *See, e.g.*, Juan C. Castro-Alonso et al., *Five Strategies for Optimizing Instructional Materials: Instructor- and Learner-Managed Cognitive Load*, 33 EDUC. PSYCH. REV. 1379, 1382–83 (2021) (discussing solutions to enhance learning using visuals); James M. Clark & Allan Paivio, *Dual Coding Theory and Education*, 3 EDUC. PSYCH. REV. 149, 165–67 (1991) (describing the benefits of visual learning using dual coding theory); *see also infra* Part V.

20. *See* Richard Suters, *Emergence of Visual Contracts: A Picture Is Worth a Thousand Words*, SWS LAWS. (Mar. 21, 2023), https://swslawyers.com.au/emergence-of-visual-contracts-a-picture-is-worth-a-thousand-words/ [https://perma.cc/Z9CD-CP73].

21. *See* Bruce Love, *Can Contracts Use Pictures Instead of Words?*, FIN. TIMES (Oct. 22, 2019), https://www.ft.com/content/032ddcb0-e6b1-11e9-b8e0-026e07cbe5b4 [https://perma.cc/H3DQ-8PHQ] (arguing having visuals, in addition to words, helps "keep the parties' expectations and interest aligned over the long term").

chances a court will side against them because of contracts too convoluted for consumers to comprehend.[22]

While a move toward visual contracts could reduce litigation revenues for lawyers, it presents a huge opportunity for the firms that are first able to gain expertise in this field. These firms can establish themselves as visual contract experts and, perhaps, charge a bit more upfront, marketing the contracts for their potential to reduce the chances of litigation. Early adopters must carefully evaluate current practices and create new workflows and, we recommend, bringing in designers to assist with contract creation.

This Article begins with an overview of visual contracts, their history, and examples.[23] Next, it examines how educational psychology frameworks illuminate the cognitive benefits of combining visuals with text, providing theoretical support for visual contracts' ability to enhance comprehension and accessibility.[24] It then establishes that courts can, and do, interpret visuals, and that visual contracts are legally binding documents in the United States.[25] Finally, it offers suggestions on how to adopt visual contracts, avoid potential issues, and how the legal industry might change—with the creation of new positions and processes—if they become widely used.[26]

II. WHAT ARE VISUAL CONTRACTS?

The variety of contractual documents that people currently refer to as "visual contracts" is surprisingly broad. Some contracts in this category rely heavily on images for certain clauses.[27] Others combine both images and text for increased clarity.[28] Visual contract drafters sometimes utilize comics where the cartoon characters speak contractual terms in speech bubbles.[29] Some visual contracts do

22. *See* HELENA HAAPIO ET AL., CONTRACT CLARITY AND USABILITY THROUGH VISUALIZATION 75 (Springer, Francis T. Marchese & Ebad Banissi eds., 2012) ("[T]he need for simplicity and usability also led to . . . the need for a combination of graphical and natural language for improved decision-making [in contracts].").

23. *See infra* Parts II–IV.

24. *See infra* Part V.

25. *See infra* Part VI.

26. *See infra* Part VII.

27. *See* Helena Haapio et al., *New Contract Genres*, CREATIVE CONTS. (Feb. 22, 2018) [hereinafter Haapio et al., *New Contract Genres*], https://creative-contracts.com/wp-content/uploads/2018/05/New-contract-genres-IRIS-2018-revised-draft-2-Jan-2018-cln.pdf [https://perma.cc/9BMP-2NFY] (discussing how "comic contracts" reduced employee onboarding time by more than three hours and are more comprehendible for the working class).

28. HAAPIO ET AL., *supra* note 22.

29. Haapio et al., *New Contract Genres*, *supra* note 27.

not have images or illustrations at all but instead rely on layout, font variations, simple shapes, patterns, and colored text for increased lucidity.[30] Still, to our knowledge, no contract relies exclusively on images to convey its meaning.[31] This Article will use a broad definition of visual contracts and include all the examples laid out above and any other method that relies on visuals or visual cues in a contract. While we are supportive of simplifying the text itself, the definition used in this Article does not include edits to the actual words of a contract—i.e., converting legalese to plain language would not qualify as a visual contract within this Article's definition.

A. *Visual Contracts Encompass More than Images*

This Article's definition of visual contracts includes significantly modifying the typography and layout of a contract's text to improve visual appeal and readability. Do these imageless visual contracts offer benefits comparable to those with images? Researchers have shown that, at least in some cases, they do.[32] Simply modifying fonts can increase retention with a level of effectiveness similar to the addition of images or illustrations.[33] The authors of the leading study in this area expanded on prior studies that demonstrated superior retention by a group of participants shown images when compared to one shown only text.[34] In their follow-up study, the authors found that by making text distinctive—adding colors, changing fonts and capitalization, and so on—study participants retained the distinctive text nearly as well as color images.[35] Further, when the authors made the images black and white, participants retained the distinctive text at the same level as the images.[36] This provides strong support for care in the layout, font selection, and other common considerations that go into contract drafting. However, copying the study's approach exactly may not be advisable as their design choices look haphazard and may lead contractual parties to mistrust the

30. *See* STEFANIA PASSERA, BEYOND THE WALL OF CONTRACT TEXT 90–91 (June 29, 2017) (Dr. Sci. Dissertation, Aalto University School of Science 2017) (on file with Authors).

31. Michael D. Murray, *Cartoon Contracts and the Proactive Visualization of Law*, 16 U. MASS. L. REV. 98, 144 (2021).

32. *See infra* Part V.

33. Tyler M. Ensor et al., *Increasing Word Distinctiveness Eliminates the Picture Superiority Effect in Recognition: Evidence for the Physical-Distinctiveness Account*, 47 MEMORY & COGNITION 182, 190 (2019).

34. *Id.* at 182, 184.

35. *Id.* at 190.

36. *Id.* In a third iteration of their experiment, the authors compared the distinctive text to black and white pictures that looked similar and were all displayed horizontally. *Id.* at 188. This may have implications for contracts using images—similar images may have no benefit over text, so having varying images is also important.

agreement.[37] For example, the authors represent "apple" in all capital letters filled with a brightly colored gradient, probably not appropriate for a serious legal agreement.[38]

Although no one has tested how a contract's appearance impacts trust, researchers have found that more visually appealing websites tend to increase visitor trust.[39] It seems reasonable to expect a similar impact if a contract's visual appearance is improved through better layout and typographical choices.

So, for those who prefer a more cautious approach in the visual-contracts realm, simply improving the layout and typography of contracts remains a valid option.[40] Plus, images will not always fit the contract. In many cases, words will remain superior. Where that is the case, lawyers should still consider improving the layout and typography of the contract for the same reasons they should utilize illustrations.[41]

B. *Examples of Visual Contracts*

Professor Jay Mitchell at Stanford Law School, discussed further below, noted in 2018 that there are no precedent legal document databases for visual contracts.[42] Fortunately, that has changed. The World CC Foundation created a "Contract Design Pattern Library" that offers a wide range of visual contract elements including: comic contracts; contract maps that show where key elements of an agreement can be found throughout the contract; delivery diagrams displaying when risk transfers from the buyer to the seller; flowcharts; swimlane diagrams detailing how tasks, rights, risks, and so on are distributed between the parties; timelines; and more.[43] Each design pattern has a description of the visual element, explaining what it is, when and how to use it, and so on.[44] Additionally, each pattern includes one or more examples of contracts actually using the

37. *See* Yung-Ming Li & Yung-Shao Yeh, *Increasing Trust in Mobile Commerce Through Design Aesthetics*, 26 COMPUTS. IN HUM. BEHAV. 673, 677 (2010) (finding increased trust in websites designed to be more aesthetically appealing).

38. Ensor et al., *supra* note 33, at 186.

39. *Id.*

40. *See id.*

41. *See generally* BUTTERICK, *supra* note 18. For those interested in this area, typographers have studied what makes documents easier to digest and more visually appealing, with Matthew Butterick leading the field in the legal arena.

42. Mitchell, *supra* note 11, at 826–27.

43. *Contract Design Pattern Library: Explore the Library*, WORLD CC FOUND., https://contract-design.worldcc.com/library [https://perma.cc/WUC5-TK6U].

44. *Id.*

discussed design pattern.[45] While this resource is a long way from the formbooks U.S. attorneys are used to, it is a start. We will briefly discuss some well-known examples here, but those seeking more examples should consult the Contract Design Pattern Library.[46]

Those new to the idea of visual contracts may assume they are a fringe technique adopted by edgy businesses willing to push the boundaries. In fact, large multinational corporations have created some of the most well-known visual contracts. For example, energy conglomerate, Shell, created one of the most widely discussed visual contracts.[47] Shell created the contract for its marine lubricant sale agreements.[48] The contract came as part of an effort to keep contract negotiations from destroying customer relationships built up through the significant efforts of Shell's account managers.[49] Shell's redesign of its contract included multiple visual elements.[50] To start, their marine division redid the layout and typography to make the contract more visually appealing and easier to navigate.[51] They added a timeline to illustrate the impact of late arrival by the receiving party.[52] A newly incorporated flow chart visually illustrates the process for addressing price changes.[53] Finally, illustrations show exactly when risk and title to the lubricants passes from one party to the other.[54] While we were not given permission to reprint the contract, we highly recommend viewing it—available with commentary here,[55] and discussed with screenshots in the video on this page,[56] full URLs in the footnotes.

Airbus, the multinational aerospace corporation, took a similar approach in creating a visual nondisclosure agreement (NDA).[57] Airbus strives to stay at the

45. *Id.*

46. *Id.*

47. *See* Love, *supra* note 21.

48. *Id.*

49. *Id.*

50. *See* Rob Waller, *Visual Contracting Journey at Shell, in Simpler Contracts by Design*, WORLD COM. & CONTRACTING, https://www.worldcc.com/Advocacy/Simpler-Contracts-by-Design [https://perma.cc/7BCR-82UB] (providing a short video explaining Shell's visual contracts).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.*; Waller et al., *Visual Contracts for Shell*, *supra* note 9.

56. Waller, *supra* note 50.

57. *See User Friendly NDA*, VISUAL CONTRS. (Sept. 2, 2020), https://visualcontracts.eu/blog/user-friendly-nda/ [https://perma.cc/7LV8-L6RY].

forefront of aerospace technology, which sometimes means collaborating with small startups.[58] Airbus discovered some startups felt intimidated by Airbus's size and consequently were hesitant to sign the NDAs needed to move potential projects forward.[59] To increase trust, Airbus opted to redesign their NDA.[60] The redesign significantly changes the layout and incorporates visual elements to increase clarity.[61] For example, Airbus's NDA includes visuals to illustrate where the NDA falls within the larger process of negotiations.[62] The NDA also adds helpful icons and utilizes a clean and easy way to navigate layout.[63]

Tony's Chocolonely took a more lighthearted approach, adding lots of color, playful typography, and light illustrations to their employment agreement.[64] The new agreement seeks to maintain the excitement that comes from starting a new role, rather than drag it down with the dense legal language typical in most employment agreements. The agreement also sought to reframe the relationship from one of mistrust to one of mutual trust.[65]

Robert de Rooy, an attorney based in South Africa, has created comic contracts designed to facilitate understanding when one of the parties is not fully fluent in the contract's language.[66] De Rooy's contracts include a greatly simplified version of the text used in traditional contracts, but instead of displaying the text single-spaced on a white page, the contracts feature cartoon characters who speak or demonstrate the terms.[67] For example, in a contract between a fruit farming

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See Airbus NDA*, *supra* note 5.

63. *See id.* For more on the redesign process, see Lieke Beelen, *Monthly Meetup* #221022020, VIMEO (Jan. 22, 2020, 4:04 AM), https://vimeo.com/386442653, featuring Ines Curtius from Airbus with Astrid Kohlmeier and Lieke Beelen who helped design the NDA.

64. *See* Pim de Morree, *A Ticket of Trust: The One-Page Employment Contract*, CORP. REBELS: BLOG (Oct. 14, 2020), https://www.corporate-rebels.com/blog/rethinking-the-employment-contract [https://perma.cc/6Y25-5XJY].

65. *Id.* An image of the colorful *Tony's Chocolonely Employment Contract* is available at https://storage.googleapis.com/corporate-rebels/general/1946-1140x0.jpg?v=1668449264 [https://perma.cc/6HZS-DBDP].

66. *See* Vitasek, *supra* note 4; Murray, *supra* note 31, at 101–04 (citing Robert de Rooy, *Why Comic Contracts?*, CREATIVE CONTRS., https://creative-contracts.com/our-story/why-we-do-it/ [https://perma.cc/EGL3-6MQP]) (providing an in-depth discussion and additional examples of comic contracts).

67. Vitasek, *supra* note 4; *see also Examples*, CREATIVE CONTRS., https://creative-contracts.com/examples/ [https://perma.cc/JXZ9-WD9A] (showing examples of comic contracts and case studies).

company and the fruit pickers it hires, de Rooy's contract shows a worker dejectedly leaving after failing to meet the quota.[68] In his fruit pickers employment agreement, de Rooy utilizes images to, in some cases, replace text completely.[69] This makes sense for the audiences' level of fluency.[70] In instances where all parties are fluent in the contract's language, de Rooy and others have utilized cartoons simply to break up the text and keep readers engaged.[71] In these instances, when possible, the characters are depicted in activities relevant to the contract, but the meaning of the agreement is actually conveyed through text in the characters' speech bubbles.[72]

III. EXISTING LITERATURE

When it comes to considering how courts treat visual contracts in the United States, the literature is sparse. Several authors have written at length on the general benefits of using visuals in contracts, both in the United States and elsewhere.[73] However, as of the time of this Article, only one article by Jay Mitchell has briefly explored how U.S. courts would treat a visual contract.[74] In addition to considering how courts may address visual contracts, Mitchell did an excellent job of summarizing and collecting existing sources on visual contracts.[75] This Article will focus on how his piece relates to our work, rather than reiterating what he has already provided.

Given Mitchell's article, is another even necessary? We believe so. Mitchell himself recognizes that more research is needed in order for attorneys to feel comfortable incorporating visuals into contracts.[76] Specifically, Mitchell calls for research in additional jurisdictions (Mitchell focused only on California) and an examination of how litigators already use visuals in the courtroom as evidence in

68. Vitasek, *supra* note 4; de Rooy, *supra* note 5. While de Rooy's work has been well-received, our analysis of U.S. case law indicates that comic contracts present some additional risks not present in other visual agreements, see *infra* Part VI for additional information.

69. De Rooy, *supra* note 5.

70. Murray, *supra* note 31, at 173–74 (explaining how de Rooy's work condenses the text to those who are illiterate in the language of agreement).

71. *Id.* at 180.

72. *See id.* at 181.

73. *See* Mitchell, *supra* note 11, at 817 n.1 (collecting sources).

74. *See generally id.*

75. *See generally id.* For those seeking additional background, the Authors recommend reading the Mitchell article in full. For additional sources regarding visual contracts, see also Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 LEGAL COMMC'N & RHETORIC 195, 197–203 (2021) (collecting additional sources).

76. Mitchell, *supra* note 11, at 852.

contract litigation and arbitration contexts.[77] This Article aims to present what Mitchell suggests, while also providing some additional insights. Further, while we agree more than we disagree with Mitchell, we do differ in several key areas, which will be highlighted here and throughout the Article.

Our disagreements with Mitchell start in the abstract, where he writes that "visual executions are not often observed in contract documents."[78] Then the introduction adds, "Real property agreements include parcel maps and plans. Product supply agreements include technical drawings."[79] From our view, the first quote conflicts with the second—we will delve deeper into why that is when discussing contract cases interpreting visuals appended to contracts.[80]

Mitchell goes on to say: "What isn't often observed, though, are visuals in the body of a contract itself."[81] While our research confirms this is true in the United States, Mitchell gives this distinction more weight than it deserves. Since contracts permit incorporation by reference of documents beyond the body of the contract itself,[82] we will argue that visuals not contained in the body of the contract but incorporated by reference, offer insight into how courts will handle visual contracts that include images in the agreement's body.

Turning to areas of agreement, Mitchell makes a strong point when he explains that lawyers tend to draft contracts for other lawyers, when in fact, the parties actually being bound by the contract—the ones who most need to understand their contractual obligations and duties—are rarely lawyers themselves.[83] We agree with Mitchell that the issue stems largely from the systems and "best practices" that have developed over the years: "Indeed lawyers listen closely to clients in order to shape terms and text such that the client can actually carry out its responsibilities at an acceptable cost."[84] Change within this entrenched system will present massive challenges but, as discussed below, will also reward those willing to pioneer a better way.

Our strongest agreement with Mitchell comes in his recognition that

77. *See id.* at 837–38, 852.

78. *Id.* at 815.

79. *Id.* at 816.

80. *See infra* notes 399–411 and accompanying text.

81. Mitchell, *supra* note 11, at 816.

82. 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:25 (4th ed. 2024) ("As long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . . .").

83. *See* Mitchell, *supra* note 11, at 820.

84. *Id.* at 836 n.62.

> [t]here is a vast literature, from psychology, cognitive science, engineering, architecture, design, art, user experience, and other disciplines, demonstrating the cognitive, collaboration, and communication benefits of visual thinking and expression. . . . A picture in some cases may in fact be worth a thousand words. Or, in today's practice environment, 40,000 words.[85]

IV. VISUAL CONTRACTS: THE ORIGINAL AGREEMENTS

While visual contracts may seem to be a rising or new trend in the legal world, one could argue the use of visual contracts and images in other legal materials has existed for millennia. Visuals and art once dominated most ancient cultures.[86] Before writing systems were established, people relied on images, visuals, symbols, and other representations to convey tangible thoughts, especially when exchanging ideas, interacting with one another, and forming knowledge.[87] The articulation of images was even used to trade with neighboring societies, nations, and civilizations.[88] Examples of early communication can be seen through portable ritual sculptures, cave and wall paintings, and grave markers.[89] Ancient societies also used visuals to memorialize their agreements.[90]

One of the earliest visual "contracts" is a bulla (or its plural form, bullae), an object that provided proof of the details of a negotiation between two individuals, groups, or early companies.[91] This form of documentation was also used heavily by accountants to note official transactions between multiple parties.[92] Bullae come in many sizes and are generally made from clay, shaped into a round ball with small engravings around it.[93] The sphere itself is hollow, and its key function was to hold small items known as tokens inside.[94] These tokens or visual objects inside of the bulla indicated what was traded or negotiated.[95] Once the ball of clay was formed and had hardened, the contract was sealed and the items denoting the

85. *Id.* at 822–24.

86. *See* Gillian M. Morriss-Kay, *The Evolution of Human Artistic Creativity*, 216 J. ANAT. 158, 173 (2010).

87. *See* Ira Spar, *The Origins of Writing*, THE MET (Oct. 1, 2004), https://www.metmuseum.org/essays/the-origins-of-writing [https://perma.cc/7LX2-F3US].

88. *See* Morriss-Kay, *supra* note 86, at 161.

89. *See id.* at 169.

90. Cunanan, *supra* note 8.

91. MARC VAN DE MIEROOP, A HISTORY OF THE ANCIENT NEAR EAST 29 (Blackwell Publ'g, 2d ed. 2007).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

agreement were protected inside.[96] No party could tamper with or alter the hardened ball without breaking it, thus creating an easy way to verify and authenticate the contract in the future.[97] If proof was ever needed about the transaction or if it was breached, the individuals could break open the bulla before the court or other authoritative audience to prove the terms of the negotiation at the time of agreement.[98]

Figure 1

Bulla and its contents, from the Uruk period (4000–3100 BC), on display at the Louvre.[99]

Visual representations of negotiations or recognition of transactions also came in other forms such as the proto-cuneiform seals used by merchants, officials, and traders as a stamp of approval (or to list out the terms of the transaction).[100] Proto-cuneiforms were first depicted as pictographs before they became

96. *Id.*

97. *See id.*

98. *See id.*

99. Joel W. Palka, *Not Just Counters: Clay Tokens and Ritual Materiality in the Ancient Near East*, 28 J. ARCHAEOLOGICAL METHOD & THEORY 414, 418 (2021).

100. *See* VAN DE MIEROOP, *supra* note 91.

standardized into their own writing form: cuneiform.[101] The images depicted by the proto-cuneiforms' seals usually represented the identity or narrative of who the merchants, accountants, and even scholars were and what they did, as well as relaying certain records and economic information.[102]

Premodern societies also used visuals to enhance understanding or justification of laws and cases that had originally been passed down orally.[103] This occurred in paintings and other art forms, such as books or illuminated manuscripts, to allow people to see things both visually and textually.[104] These early manuscripts of the law can be found in "coutumiers," commonly made before and around the thirteenth century.[105] Coutumiers existed during the transition from oral to written tradition when customary law was read aloud and then put into a "literary" form so that these rules and laws could be bound to something more permanent.[106] Before coutumiers existed, laws or the concept of laws were orally passed down.[107] They were also put into performances on stage so the public could listen and watch actors imitate and impersonate those who were involved in a trial and other legal-related narratives.[108] Not only was this done for entertainment, but it also allowed information to be provided visually for wider understanding.[109] Additionally, artists used these theatrical performances as the subjects of drawings

101. *Proto-Cuneiform Tablet with Seal Impressions: Administrative Account of Barley Distribution with Cylinder Seal Impression of a Male Figure, Hunting Dogs, and Boars*, THE MET, https://www.metmuseum.org/art/collection/search/329081 [https://perma.cc/LR2U-LGLJ].

102. *See* Prior, *supra* note 7; Kathryn Kelley et al., *Seals and Signs: Tracing the Origins of Writing in Ancient South-West Asia*, 99 ANTIQUITY 64, 69–70 (2025).

103. ADA MARIA KUSKOWSKI, VERNACULAR LAW: WRITING AND REINVENTION OF CUSTOMARY LAW IN MEDIEVAL FRANCE 265–68 (Cambridge Univ. Press 2022).

104. *Id.*

105. *Id.* at 269–70

106. *Id.* at 265–66. Though ironically, these coutumiers (or French law books) were originally created so that the "oral" versions of these law books could be shared on a wider scale. *Id.* The oral versions were passed down by the elite legal culture from the Romans—but only a few could pass it down orally because only a few selected groups could read and write Latin. *Id.* The idea of coutumiers was not just that laws would remain constant, but so that the French population could access laws more easily. *Id.* However, coutumiers eventually became only for the elite in French society, when the representations moved from performance art and images (or vernacular text) understood by everyone to fully written text understood by and produced only for the elite of French society.

107. *See id.* at 265.

108. *See id.*

109. *See id.*

and paintings on legal topics.[110] Creating coutumiers allowed the laws passed orally and through performances to become something more official.[111] The idea was these "living rules" that were once simply read aloud could finally become fixed so that they were no longer flexible or adaptable.[112] These creative forms of storytelling used to convey laws touched on contracts, civil and criminal procedure, and more—all of which eventually transitioned into written text.[113] By observing how people grasped legal issues, terms, or negotiations through these mixed media, we can recognize that visual arts have indeed, throughout centuries, existed in contracts and other early legally binding materials.[114]

Interestingly, the integration of art and law, especially in twenty-first century North America, is quite fragmented. Compared to other countries in Europe and Asia, visual contracts or negotiations have not been well-utilized in the United States.[115] This could be explained by the historical and social context of how the written word replaced visuals in Western culture.[116] As writing became more prestigious and considered more formal than visuals, images lost some of their impact as a means of communication.[117] At this point, there was a cultural shift in which writing, and the written word became intertwined with higher education and

110. *See id.* at 308; *see also* Cythina J. Brown, *Allegorical Design and Political Image-Making in Late Medieval France*, *in* TEXTUAL AND VISUAL REPRESENTATIONS OF POWER AND JUSTICE IN MEDIEVAL FRANCE (Rosalind Brown-Grant et al., eds, Routledge, 2015). Cynthina J. Brown's text provides some examples of visual staging that show how the imagery of politics allowed for political engagement.

111. KUSKOWSKI, *supra* note 103, at 268.

112. *Id.* at 265–66.

113. *See* sources cited *supra* note 110 and accompanying text.

114. *See generally* KUSKOWSKI, *supra* note 103; Brown, *supra* note 110. LAURA CLEAVER, EDUCATION IN THE TWELFTH CENTURY ART AND ARCHITECTURE (Boydell & Brewer, 2021).

115. There have been specialized agencies and companies in other parts of the world that focus on creating legal graphic designs which, in essence, create visual contracts. *See* Vandana Pai, *Visual contracts and their enforcement in India*, INT'L BAR ASS'N., https://www.ibanet.org/article/8DB509CE-33A8-4C55-BF96-E19EBF5A331F [https://perma.cc/E9BN-FQG6]. While there is a push in America for visual legal contracts, it is largely found in higher education or academic institutions and scholarly writing rather than practice. However, the Authors—at the time this Article was written—had not found strong examples of actual agencies, companies, or graphic design companies fully normalizing visual contracts yet.

116. For extensive background on the development on the written word and its connection to higher education, see 1 A HISTORY OF THE UNIVERSITY IN EUROPE 3–34 (Walter Ruegg et al., eds., Cambridge Univ. Press, 1992) [hereinafter HISTORY OF THE UNIVERSITY, VOL. 1]; 2 A HISTORY OF THE UNIVERSITY IN EUROPE 451–87, 531–61 (Walter Ruegg et al., eds., Cambridge Univ. Press 1996) [hereinafter HISTORY OF THE UNIVERSITY, VOL. 2].

117. *See* HISTORY OF THE UNIVERSITY IN EUROPE, VOL. 2, *supra* note 116, at 231–36.

the well-educated.[118] Having the ability to write or access higher education allowed an individual to attain a higher hierarchical status.[119] This then caused the legal world (and other fields) to become a more restricted community, reserved for those who could access and read the law.[120] Here, it is important to note that only about 18 percent of the population could read and write prior to the late medieval age.[121] Writing was not for the masses in general until the nineteenth century when public education was implemented and schools became more accessible.[122] Consequently, prior to the modern age, the lower classes still used images to maintain their understanding of what was going on around them. For example, architectural elements could note a building's purpose: medieval churches with Christian symbols (lamb, the orant sign, Chi Rho, etc.) depicted along the door frames and stained-glass windows painted with biblical stories so that people could recognize key religious figures.

Another example of how arts and visuals impacted policymaking can be seen through Europe and America's witch hunts. During the fifteenth and sixteenth centuries, both writing and images were circulated at a higher rate due to the Gutenberg Press.[123] People also used images to convey fear or anxiety during the witch hunts throughout both the medieval and early modern era.[124] Images of witches were passed around so that people could identify and guard themselves

118. *See* HISTORY OF THE UNIVERSITY, VOL. 1, *supra* note 116, at 8–12, 43–44.

119. *See id.* at 20–22, 244; HISTORY OF THE UNIVERSITY IN EUROPE, VOL. 2, *supra* note 116, at 397.

120. *See* HISTORY OF THE UNIVERSITY, VOL. 1, *supra* note 116, at 19–26, 259–62.

121. It was not until after the seventeenth century that literacy rates in Western Europe started rising to 53 percent. Many attribute this level of literacy increase to the invention of the Gutenberg Press. Tyrel C. Eskelson, *States, Institutions, and Literacy Rates in Early-Modern Western Europe*, 10 J. EDUC. & LEARNING 109, 112 (2021).

122. The nineteenth century included a major cultural shift toward education, especially after different countries' revolutions and the western world shifting from monarchy to more democratic institutions. Public schools were also on the rise in this period, improving literacy rates across all social classes. Furthermore, there was a concept of social mobility where one could move upwards through education and jobs. *See id.* at 117; *see also* Stephen Grove, *Education in 19th Century: A Glimpse into the Transformative Era of Learning*, 19TH CENTURY EVENTS & DEVS., https://19thcentury.us/education-in-19th-century-britain/ [https://perma.cc/5VAD-9SEV].

123. Syed Rafid Kabir, *Who Invented the Printing Press? Johannes Gutenberg's Gift to the World*, HISTORY COOP. (Sept. 5, 2023), https://historycooperative.org/who-invented-the-printing-press/ [https://perma.cc/TB6G-Q2Z8].

124. Kat Eschner, *How New Printing Technology Gave Witches Their Familiar Silhouette*, SMITHSONIAN MAG. (Oct. 30, 2017), https://www.smithsonianmag.com/smart-news/how-new-printing-technology-gave-witches-their-familiar-silhouette-180965331/ [https://perma.cc/7ZJL-4NC3].

against a person or neighbor whose appearance aligned with the image.[125] Witchcraft pamphlets made from printing presses were circulated every day, and their strong images made an enormous impact on the public's impression of women and anyone who fit a witch's description.[126] These visuals were produced alongside a witch-hunting book authored by two priests, leading to a two-century witch panic and related policies on witches, trials, torture, and persecution.[127] The images also led to the popular culture viewpoint that saw witches as women with pointed hats, carrying broomsticks, having hooked noses, and dancing nude or in the woods—portrayals that persist even today.[128]

As writings' status grew, things began to split—the common and lower classes were using limited, textual-based information and more images, while the higher classes relied more on textual sources for their understanding, and the images they viewed were curated specifically for them to delight in rather than to understand.[129] The written word was also associated with critical thinking.[130] A lot of this coincided with fear of the power of images due to the iconophobia that became rampant during the Renaissance, with some believing that art and images cause falsities or falsehoods.[131] As it became apparent that the written word was used by the higher classes, visuals became less and less utilized in written documents and began to merely supplement the text.

125. *Id.*; *see also* Charles Zika, *Images of Witchcraft in Early Modern Europe*, *in* THE OXFORD HANDBOOK OF WITCHCRAFT IN EARLY MODERN EUROPE AND COLONIAL AMERICA (Brian P. Levack ed., Oxford Acad., 2013) (discussing how artists created images of witchcraft imagery and where they got their ideas).

126. *See* Zika *supra* note 125, at, 149, 154–56.

127. Eschner, *supra* note 124.

128. *Id.*

129. *See generally* Eskelson, *supra* note 121.

130. *See generally* RICHARD W. PAUL ET AL., CALIF. COMM'N ON TEACHER CREDENTIALING, CALIFORNIA TEACHER PREPARATION FOR INSTRUCTION IN CRITICAL THINKING: RESEARCH FINDINGS AND POLICY RECOMMENDATIONS 8–12 (1997).

131. LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 6–8, 33–37 (Costas Douzinas & Lynda Nead, eds., Univ. of Chi. Press, 1999).

Figure 2

The political raree-show, or a picture of parties and politics, during and at the close of the last session of Parliament, June 1779.[132]

Furthermore, some illustrations were frowned upon during the eighteenth and nineteenth centuries because they were used in popular culture by the middle and lower classes.[133] For example, many people in the middle and lower classes printed cartoons in newspapers, oftentimes creating satirical commentaries regarding social classes, current affairs, and politics.[134] An example can be seen in Figure 2 where the two figures on the left side are peeping through a hole to see a

132. Fielding & Walker, *Print, Satirical Print* (print), *in* THE BRITISH MUSEUM, https://www.britishmuseum.org/collection/object/P_1868-0808-4594.

133. Julia Thomas, *Illustration*, CULTURE, LITERATURE, & THE ARTS (Aug. 23, 2024), https://routledgelearning.com/rhr-cultureliteratureandthearts/essays/illustration/ [https://perma.cc/UYH9-C3PW]; *see also Political Cartoons, Part 1: 1720-1800*, FIRST AMEND. MUSEUM, https://firstamendmentmuseum.org/exhibits/virtual-exhibits/art-politics-300-years-of-political-cartoons/political-cartoons-part-1-1720-1800/ [https://perma.cc/7P46-PBWY].

134. *Political Cartoons, Part 1: 1720-1800*, *supra* note 133; *see also, The History of Cartoons: Tracing Cave Paintings to the Simpsons*, WRITTEN FACTS https://writtenfacts.com/tracing-the-rich-history-of-cartoons/ [https://perma.cc/7QPC-7FHE].

variety of scenes unfold in Britain and beyond.[135] These types of cartoons led some visual imagery to be viewed as "less serious" or in "poor taste," which caused the public to see images as inferior to text.[136] During this era, casual imagery combined with words negated the importance of the visual content despite this mixed medium often leading to better understanding (or at least allowing a wider audience to engage with the topic).[137] Today, we study political cartoons in early America so that we can understand how these images allowed new forms of free speech, but when they were created, political cartoons caused an uproar among some in the upper classes.[138] These images about politics, the law, social events, and other policies, allowed for less literate members of the public to understand stories and events in a way they could not have had the visuals been omitted.[139] These images captured the human nature of the subjects and topics, humanizing the events being discussed by the public.[140] An example can be seen in Figure 3, where Thomas Nast created a print to convey the ideals of the Fifteenth Amendment.[141] To summarize, political cartoons enabled members of the public from various backgrounds to engage with what was going on around them, even if they did not recognize the full value of these images.[142]

135. *See* Figure 2.

136. RICHARD T. GODFREY, ENGLISH CARICATURE 1620 TO THE PRESENT 10–12 (Victoria & Albert Museum, 1984); *see also* Zazil Reyes Garcia, *Political Cartoons*, OXFORD RSCH. ENCYCLOPEDIA: COMMUNICATION (May 23, 2019), https://oxfordre.com/communication/display/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-213#acrefore-9780190228613-e-213-div1-4 [https://perma.cc/MZ34-3X9X].

137. *See* Gregory Pfitzer, *Introduction: Anti-Pictorialism and the Emergence of Visual Literacy*, CLIO VISUALIZING HIST. (2002), https://www.cliohistory.org/visualizingamerica/picturingpast/introduction [https://perma.cc/GU89-H84C].

138. *See* Harry Katz, *An Historic Look at Political Cartoons*, NIEMAN REPS. (Dec. 15, 2004), https://niemanreports.org/an-historic-look-at-political-cartoons/ [https://perma.cc/H7FQ-7F6K].

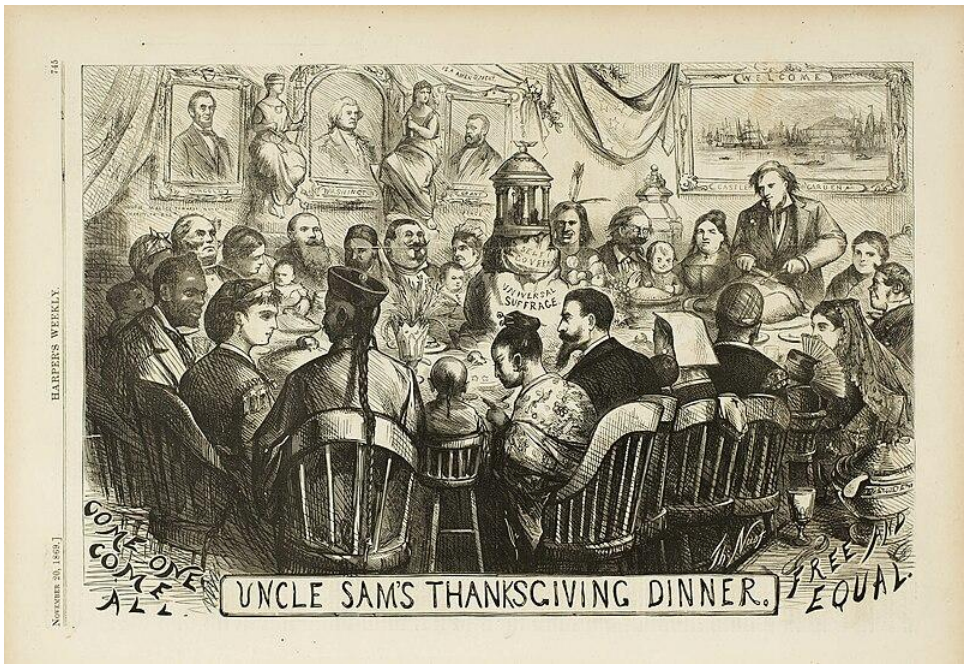
139. *See id.*

140. *See id.*

141. *See* Figure 3.

142. ALLAN NEVINS, A CENTURY OF POLITICAL CARTOONS: CARICATURE IN THE UNITED STATES FROM 1800 TO 1900 17–18 (Octagon Books, 1975).

Figure 3



Political cartoon print made by Thomas Nast regarding the Fifteenth Amendment in the United States.[143]

As cartoons and print art became a bigger part of the daily life of the middle and lower classes, fine arts and the written word were further associated with the higher classes.[144] With images and text being associated with different classes, it is not surprising that the field of law and other subjects also modified how they presented concepts; this may have contributed to the lack of images in today's contracts, legal materials, and other formal binding sources.[145] With images taken away from legal documents, the law simply became an arena for the highly

143. Thomas Nast, *Uncle Sam's Thanksgiving Dinner* (illustration) *in* THE NEW YORK HISTORICAL (Aug. 24, 2023), https://www.nyhistory.org/blogs/uncle-sams-thanksgiving-dinner-thomas-nasts-powerful [https://perma.cc/KRA9-LZJQ].

144. *See* Doug Singsen, *Comics: Newspaper Comics in the United States*, ART HIST. TEACHING RES., https://arthistoryteachingresources.org/lessons/newspaper-comics-in-the-united-states/ [https://perma.cc/TFT6-Y8NF].

145. *See* Anna Pegler-Gordon, *Seeing Images in History*, PERSPECTIVES ON HIST. (Feb. 1, 2006), https://www.historians.org/perspectives-article/seeing-images-in-history-february-2006/ [https://perma.cc/295F-5NFE] (arguing that images should be given the same historical consideration as text).

educated. The concept of legal instructions became "written by lawyers for lawyers" and not necessarily for everyone.[146] In this Part, we have shown how early contracts (for instance, bullae) allowed wide portions of society to understand and document agreements, but as contracts became text-only documents, they became inaccessible to all but the small group of people who could understand them.

V. FROM THE EDUCATORS DESK: THE VALUE OF COMBINING VISUALS WITH TEXT

The evolution of contracts from visually rich artifacts to purely textual documents presents fundamental questions about access to and comprehension of legal instruments. This shift toward text-only contracts has created a system that privileges those who can readily access and interpret complex legal language, while potentially excluding significant segments of the population—particularly those from socioeconomically disadvantaged backgrounds.[147] As established in the previous Part's historical analysis, this transformation from visual–textual contracts to purely textual contracts has implications for both legal practice and social equity.[148] Educational psychology offers empirically supported frameworks for understanding the cognitive benefits of combining visual and textual elements, particularly in complex informational contexts like legal documents.[149]

Educational psychology provides robust theoretical frameworks for analyzing how individuals process and comprehend complex information—frameworks that have direct implications for legal document design.[150] This Part examines three complementary theories that illuminate the cognitive benefits of combining visual and textual elements in contracts. First, cognitive load theory reveals how visual elements can reduce mental strain when processing complex

146. *See* Haapio et al., *New Contract Genres*, *supra* note 27.

147. *See id.* (discussing how "comic contracts" reduced employee onboarding time by more than three hours and is more comprehendible for the working class).

148. *See id.* (discussing the negative effect on modern contracts trading simplistic images for complex text); *see also* Singsen, *supra* note 144 (discussing the broad appeal of cartoons towards all socioeconomic classes).

149. *See* Roxana Moreno & Richard E. Mayer, *Cognitive Principles of Multimedia Learning: The Role of Modality and Contiguity*, 91 J. OF EDUC. PSYCH. 358, 358 (1999) [hereinafter Moreno & Mayer, *Cognitive Principles*] (describing "contribut[ions] to multimedia learning theory"); John Sweller, *Cognitive Load During Problem-Solving: Effects on Learning*, 12 COGNITIVE SCI. 257, 261 (1988) [hereinafter Sweller, *Cognitive Load*] (discussing the possibility that cognitive overload could prove the inefficiencies of conventional problem solving); Clark & Paivio, *supra* note 19.

150. *See* sources cited *supra* note 149.

legal information.[151] Second, dual coding theory demonstrates how engaging both the verbal and visual processing channels enhances comprehension and retention of contract terms.[152] Third, the cognitive theory of multimedia learning synthesizes these insights to provide specific principles for effective visual–textual integration.[153] While Mitchell has documented the broad benefits of visual thinking across disciplines, researchers from other backgrounds, notably Dr. Stefania Passera, a self-labeled "'legal design pioneer,'"[154] has extended two of these theories beyond educational psychology into the realm of visual contracts.[155] The analysis in this Part adds nuance found within these established psychological frameworks to legal contract design, offering evidence-based strategies for enhancing contract accessibility and comprehension from an educator's lens.[156]

A. *Cognitive Load*

Cognitive load theory (CLT), first proposed by Dr. John Sweller in 1988, emphasizes the limitations of working memory in handling complex information.[157] Cognitive load theory delineates three types of cognitive load—intrinsic, extraneous, and germane—that must be balanced to optimize learning and comprehension.[158] It is rooted in understanding human cognitive architecture and how instructional design can be tailored to align with it.[159] This framework provides critical insights into how individuals process information and offers strategies to enhance learning and problem-solving.[160]

151. *See* Sweller, *Cognitive Load*, *supra* note 149 (discussing cognitive load theory and its efficacy).

152. Clark & Paivio, *supra* note 19, at 148; *see also generally* ALLAN PAIVIO, IMAGERY AND VERBAL PROCESSES (Holt, Rinehart, & Winston, Inc., 1971) [hereinafter PAIVIO, IMAGERY].

153. Moreno & Mayer, *Cognitive Principles*, *supra* note 149, at 358–68.

154. *See Who*, STEFANIA PASSERA.COM, https://stefaniapassera.com/about/ [https://perma.cc/EF5D-VG72].

155. *See* Mitchell, *supra* note 11, at 822; PASSERA, *supra* note 30, at 31–32.

156. PASSERA, *supra* note 30, at 65–70, 96–129.

157. Sweller, *Cognitive Load*, *supra* note 149, at 266–75.

158. John Sweller, *Element Interactivity and Intrinsic, Extraneous, and Germane Cognitive Load*, 22 EDUC. PSYCH. REV. 123, 123 (2010) [hereinafter Sweller, *Element Interactivity*].

159. John Sweller, et al. *Cognitive Architecture and Instructional Design: 20 Years Later*, 31 EDUC. PSYCH. REV. 31, 261–92 (2019) [hereinafter Sweller et al., *Cognitive Architecture*].

160. *See id.*

B. *Cognitive Overload*

Cognitive overload is a fundamental concept in cognitive psychology and CLT, characterized by the demands on working memory surpassing its capacity.[161] This overload can impede learning processes and diminish performance.[162] Cognitive overload arises when individuals must manage more elements than their cognitive capacity allows, leading to task completion challenges.[163] This strain on cognitive resources can result in burnout and affect metacognitive processes, especially in demanding fields.[164]

Dr. Xu Aidi elaborates on cognitive overload, a state where the cognitive load surpasses the individual's processing capacity, leading to decreased performance and learning.[165] In educational settings, this can manifest as learners struggling to process information, leading to frustration and disengagement.[166] Recognizing cognitive overload is vital as it significantly impacts learning, task performance, and information management.[167] To prevent cognitive overload, instructional designers should aim to reduce extraneous cognitive load and manage intrinsic cognitive load effectively, ensuring that learners' cognitive resources are optimally utilized for learning.[168]

C. *Intrinsic Cognitive Load*

Intrinsic cognitive load (ICL) pertains to the inherent complexity of a task or information.[169] It is influenced by the number of interacting elements and the learner's prior knowledge.[170] For instance, understanding legal contracts is intrinsically complex due to their dense, technical language and logical structure.

161. *See id.*

162. *Id.* at 263.

163. *See* Mohammed Amine Belabbes et al., *Information Overload: A Concept Analysis*, 79 J. OF DOCUMENTATION 144, 144–45 (2023).

164. *Id.* at 155–56.

165. *See* Xu Aidi, *Cognitive Overload and its Countermeasures from the Angle of Information Processing*, 3 THIRD INT'L SYMP. ON INTELLIGENT INFO. TECH. APPLICATION 391 (2009).

166. *Id.* at 391–92.

167. *Id.*; *see also* Belabbes et al., *supra* note 163.

168. Richard E. Mayer & Roxana Moreno, *Aids to Computer-Based Multimedia Learning*, 12 LEARNING & INSTRUCTION 107, 110–12 (2002) [hereinafter Mayer & Moreno, *Aids to Computer-Based*].

169. Ines Zeitlhofer et al., *Complexity Affects Performance, Cognitive Load, and Awareness*, LEARNING & INSTRUCTION, Dec. 2024, at 2.

170. Sweller, *Element Interactivity*, *supra* note 158, at 124.

High ICL tasks require deliberate instructional design to make the content manageable without compromising its essence.[171]

By integrating visuals with text, complex legal concepts can be scaffolded effectively.[172] For example, flowcharts or annotated diagrams can illustrate contractual obligations, making abstract legal structures easier to comprehend.[173] Applied to legal documents, this could mean presenting clauses in hierarchical diagrams or interactive visuals, enabling users to process individual elements before synthesizing them into a cohesive understanding.[174] Such strategies reduce the mental effort required to decipher interrelated clauses, addressing ICL by presenting information in digestible, visual chunks.[175]

D. *Extraneous Cognitive Load*

Extraneous cognitive load (ECL) arises from poorly designed materials or distractions that impede comprehension.[176] In the legal context, dense text and convoluted formatting can create unnecessary cognitive hurdles. Effective instructional design minimizes ECL by prioritizing clarity and alignment with cognitive architecture.[177]

Visual images can help mitigate ECL by enhancing the organization and presentation of information, simplifying complex information, and clarifying concepts. Research demonstrates that multimedia principles, such as media which combines text with relevant visuals, reduce cognitive strain by eliminating redundant or irrelevant details.[178] Additionally, integrating diagrams with explanatory text can help learners understand abstract ideas more concretely.[179] Research by Dr. Richard E. Mayer and Dr. Roxana Moreno supports this, showing that multimedia presentations which combine visuals and text can enhance

171. *See* Jimmie Leppink et al., *Effects of Pairs of Problems and Examples on Task Performance and Different Types of Cognitive Load*, 30 LEARNING & INSTRUCTION 32, 33 (2014).

172. *See* Murray, *supra* note 31, at 103–04, 104 n.12 (citing de Rooy, *supra* note 66).

173. *See id.* at 127–32.

174. *Id.*

175. *See id*.

176. Paul Chandler & John Sweller, *Cognitive Load Theory and the Format of Instruction*, 8 COGNITION & INSTRUCTION 293, 294–96 (1991).

177. *See generally* RICHARD E. MAYER, MULTIMEDIA LEARNING 43–71 (3d ed. Cambridge Univ. Press, 2020) [hereinafter MAYER, MULTIMEDIA LEARNING].

178. *See id.*

179. *See* Richard E. Mayer & Roxana Moreno, *Nine Ways to Reduce Cognitive Load in Multimedia Learning*, 38 EDUC. PSYCH. 43, 43–44 (2003) [hereinafter Mayer & Moreno, *Nine Ways*].

learning by reducing cognitive load.[180] Effective design principles, such as the use of clean layouts, meaningful grouping, and relevant imagery, are instrumental in reducing ECL.[181] In legal contracts, using icons, flowcharts, or summary tables alongside text can simplify navigation and comprehension, especially for nonexpert readers.

E. *Germane Cognitive Load*

Germane cognitive load (GCL) reflects the mental effort directed toward schema construction and meaningful learning.[182] Unlike ICL and ECL, which should be managed or minimized, GCL should be actively fostered to promote deep understanding and retention.[183]

Combining visuals and text enhances germane load by encouraging active engagement.[184] Visuals act as cognitive anchors, aiding schema development and fostering deeper connections between concepts.[185] In the legal realm, infographics or decision trees can guide users through contract terms, helping them build mental models of obligations and rights.[186] This approach not only improves comprehension but also ensures legal documents serve their purpose across diverse audiences, including those with limited legal literacy.[187]

Integrating visuals can help manage cognitive load, making it easier for individuals to process information. CLT suggests that excessive cognitive load can hinder learning.[188] Visuals can simplify complex information, allowing users to focus on key elements without becoming overwhelmed by text.[189] The integration of visuals and text offers significant benefits for legal documents, particularly in reducing ECL and enhancing GCL. Effective multimedia design can reduce extraneous cognitive load while promoting germane cognitive load, which is

180. *See id.* at 49.

181. JOHN SWELLER ET AL., COGNITIVE LOAD THEORY, 120, 163–64, 187 (Springer, 2011) [hereinafter SWELLER ET AL., CLT].

182. *See id.* at 132, 191.

183. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177; Clark & Paivio, *supra* note 19, at 170.

184. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177; Clark & Paivio, *supra* note 19, at 151–56.

185. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177; Clark & Paivio, *supra* note 19, at 162–65.

186. *See* Murray, *supra* note 31, at 126–32.

187. *See id.* at 112–13.

188. *See* Castro-Alonso et al., *supra* note 19, at 1380; Sweller, *Cognitive Load*, *supra* note 149.

189. *See* Castro-Alonso et al., *supra* note 19, at 1382.

beneficial for learning. For instance, the use of relevant visuals that are well-integrated with textual information can help learners focus on essential content, thereby optimizing cognitive resources and enhancing learning efficiency.[190]

Visual aids, such as infographics, serve as cognitive scaffolds, enabling even novice users to navigate complex agreements effectively.[191] By visually highlighting critical contract elements, such as penalties or deadlines, legal professionals can reduce cognitive strain while increasing comprehension accuracy.[192] Additionally, visuals can improve decision-making by highlighting key terms or consequences. For example, a visual timeline of contract milestones or penalties for noncompliance can make the document actionable and user-friendly.[193] Such designs leverage dual coding theory principles, suggesting dual representations (visual and verbal) strengthen memory and understanding.[194]

The application of CLT to legal document design reveals several key insights. First, visual elements can effectively reduce extraneous cognitive load by clarifying complex legal relationships and hierarchies.[195] Second, when properly implemented, visual aids serve as cognitive scaffolds that help manage intrinsic cognitive load, making inherently complex legal concepts more accessible to diverse audiences.[196] Third, by reducing cognitive strain on working memory, visual–textual combinations can promote the germane load necessary for deep understanding of legal obligations and rights.[197] These cognitive benefits are particularly significant in contract design, where precise comprehension is essential and misunderstanding can have serious consequences. Beyond understanding how visual elements reduce cognitive strain, however, we must examine the fundamental ways in which the human brain processes different types of information.

F. *Dual Coding*

While CLT illuminates how visual elements can reduce mental strain in complex legal documents, this understanding is deepened by examining how the brain processes visual and verbal information in parallel.[198] Dual coding theory

190. *See id.* at 1380.
191. MAYER, MULTIMEDIA LEARNING, *supra* note 177.
192. *See id.*
193. *See* PAIVIO, IMAGERY, *supra* note 152.
194. *See id.*
195. *See* Castro-Alonso et al., *supra* note 19, at 1380.
196. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177.
197. *See id.*; PAIVIO, IMAGERY, *supra* note 152.
198. *See* PAIVIO, IMAGERY, *supra* note 152.

(DCT), developed by Dr. Allan Paivio, provides a robust framework for understanding this simultaneous processing of verbal and visual information.[199] DCT's insights into how the brain manages multiple information channels complement CLT's focus on cognitive capacity, particularly in explaining why visual–textual combinations prove so effective in complex legal documents.[200]

At its core, DCT posits that humans use two interconnected cognitive systems to encode and retrieve information: a verbal system for linguistic inputs and a nonverbal system for imagery and spatial representations.[201] By leveraging both systems, individuals can create richer mental representations, which are easier to understand, retain, and recall.[202]

One key principle of DCT is that when information is presented in both verbal and visual formats it activates dual encoding pathways, increasing the likelihood of successful comprehension and memory.[203] This multimodal approach strengthens memory traces by providing complementary avenues for understanding: text can provide precise explanations, while visuals can make abstract ideas concrete.[204] Additionally, visual aids often reduce reliance on working memory by presenting information in more digestible chunks, aligning with cognitive efficiency principles.[205]

Research demonstrates the integration of text and visuals improves learning outcomes by making abstract or complex information more accessible.[206] Dr. Amy Atkinson at Lancaster University discusses how dual coding can be implemented to engage learners through both verbal and visual channels, enhancing learning outcomes.[207] Dual coding enhances comprehension and retention, particularly for

199. *See id.*

200. *See id.*

201. *See id.*

202. *See* MARK SADOSKI & ALLAN PAIVIO, IMAGERY AND TEXT: A DUAL CODING THEORY OF READING AND WRITING 115–24 (2d ed., Routledge, 2013) [hereinafter SADOSKI & PAIVIO, IMAGERY].

203. *See* ALLAN PAIVIO, PSYCH SERIES, NO. 9, MENTAL REPRESENTATIONS: A DUAL CODING APPROACH 53–54 (Oxford Univ. Press, 1986) [hereinafter PAIVIO, MENTAL REPRESENTATIONS]; Clark & Paivio, *supra* note 19, at 173.

204. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177.

205. *See* Sweller, *Element Interactivity*, *supra* note 158, at 125.

206. *See* Clark & Paivio, *supra* note 19, at 173.

207. *See* A.L. Atkinson et al., *Does Value-Based Prioritization at Working Memory Enhance Long-Term Memory?*, 54 MEMORY & COGNITION 1983, 1983–84 (2024).

technical or intricate material, as it creates associative connections between verbal and visual elements.[208]

In legal document design, dual coding theory's principles demonstrate how visual–verbal combinations can enhance understanding and retention of complex legal concepts.[209] For example, contract terms that are traditionally conveyed through dense paragraphs of text can be complemented with visual representations that activate both processing channels. When key obligations are presented both textually and visually, readers can develop stronger mental representations of the contractual relationships and requirements. A visual timeline paired with written deadlines, for instance, creates dual pathways for processing temporal obligations, making them more memorable and actionable.[210]

Visual aids in contracts can also serve as cognitive anchors for abstract legal concepts. When legal principles are represented through both text and relevant imagery, readers can form connections between the concrete visual representation and the precise legal language.[211] This dual representation is particularly valuable when contracts must bridge varying levels of legal expertise, as it provides multiple routes to understanding key terms and conditions.[212]

The advantages of dual coding extend beyond initial comprehension to long-term retention and application of contract terms. Research demonstrates that information encoded through both verbal and visual channels is more readily accessible when needed for decision-making or dispute resolution.[213] For instance, when contractual rights and obligations are presented through complementary visual and textual formats, parties are better equipped to recall and apply these terms in practical situations.[214] This dual-channel approach to legal information

208. *See* SADOSKI & PAIVIO, IMAGERY, *supra* note 202; MAYER, MULTIMEDIA LEARNING, *supra* note 177.

209. *See* Shan Ge & Xiaoyun Lai, *Strategies for Information Design and Processing of Multimedia Instructional Software — Based on Richard E. Mayer's Multimedia Instructional Design Principles*, 10 INT'L J. OF EDUC. TECH. AND LEARNING, 40, 41 (2021); Mayer & Moreno, *Aids to Computer-Based*, *supra* note 168, at 110–12; MAYER, MULTIMEDIA LEARNING, *supra* note 177, at 43–71; PAIVIO, MENTAL REPRESENTATIONS, *supra* note 203; Sweller, *Cognitive Load*, *supra* note 149, at 261.

210. *See* Castro-Alonso et al., *supra* note 19, at 1382.

211. *See* Murray, *supra* note 31, at 103.

212. *See id.*

213. *See* Castro-Alonso et al., *supra* note 19, at 1380.

214. *See* Clark & Paivio, *supra* note 19, at 165–66 (discussing the theory of dual coding's beneficial effect on recall and "deep levels of processing").

aligns with how the brain naturally processes and stores information, potentially reducing misunderstandings and improving contract performance.[215]

DCT's insights into verbal and visual processing channels offer compelling evidence for the value of visual–textual combinations in legal documents. When contracts incorporate both textual explanations and visual representations, they engage these complementary processing systems, potentially improving comprehension and retention of complex legal concepts.[216] However, understanding that these dual channels exist is only the first step—legal professionals need evidence-based principles for effectively combining visual and textual elements to maximize understanding.[217]

G. *Cognitive Theory of Multimedia Learning*

The cognitive theory of multimedia learning (CTML), introduced by Dr. Roxana Moreno and Dr. Richard E. Mayer, bridges the gap between theoretical understanding and practical application.[218] Building on both DCT's insight into parallel processing channels and CLT's emphasis on managing mental effort, cognitive theory of multimedia learning provides specific principles for designing materials that optimize comprehension and retention.[219] These principles are particularly relevant for legal document design where precision and clarity are paramount.

CTML emphasizes the importance of working memory in the learning process.[220] Working memory has limited capacity, a principle drawn from CLT, and when multimedia materials are poorly designed they can overwhelm this capacity, leading to cognitive overload.[221] Mayer's research highlights that effective multimedia learning environments should be designed to align with the cognitive architecture of learners, ensuring the presentation of information does not exceed their cognitive processing limits.[222] This alignment is crucial for facilitating deeper learning and understanding, as learners are better able to

215. *See* Murray, *supra* note 31, at 102–05, 170 n.199 (discussing the purpose of the visualization movement and quoting Robert de Rooy's analysis of misunderstandings in text-based contracts).

216. *See id.*

217. *See infra* Part V.G.

218. *See* Moreno & Mayer, *Cognitive Principles*, *supra* note 149, at 358–68.

219. *See id.* at 358; MAYER, MULTIMEDIA LEARNING, *supra* note 177.

220. *See* Moreno & Mayer, *Cognitive Principles*, *supra* note 149, at 359.

221. Mayer & Moreno, *Nine Ways*, *supra* note 179, at 43, 45.

222. *Id.* at 50.

integrate new information with their existing knowledge when cognitive load is appropriately managed.[223]

CTML is built upon principles that guide the design of multimedia instructional materials, focusing on three key goals: reducing extraneous cognitive load, managing essential cognitive load, and fostering generative cognitive processing.[224] By minimizing unnecessary information and distractions while promoting active engagement, these principles enhance comprehension and retention.[225] In addition to cognitive mechanisms, CTML acknowledges the role of emotional and motivational factors in learning, suggesting that multimedia materials must balance aesthetic appeal with educational effectiveness.[226]

In legal document design, CTML principles provides several key strategies for enhancing contract comprehension.[227] First, the multimedia principle demonstrates how combining appropriate visuals with legal text can enhance understanding of complex terms.[228] Second, the coherence principle warns against including decorative but irrelevant visual elements that might distract from crucial legal content.[229] Third, the spatial contiguity principle emphasizes the importance of aligning visual representations with their corresponding textual explanations to help readers make immediate connections between written obligations and their visual representations.[230]

CTML's application to legal documents extends beyond basic comprehension to knowledge transfer and retention, known as meaningful learning.[231] When contracts incorporate CTML-based design strategies, they can achieve multiple benefits.[232] Visual elements help develop structured, mental frameworks that organize and simplify complex legal information.[233] These

223. SWELLER ET AL., CLT, *supra* note 181, at 45.

224. MAYER, MULTIMEDIA LEARNING, *supra* note 177, at 29.

225. *See generally id.* at 139–243.

226. *See* Ahmet Murat Uzun & Zahide Yildirim, *A Qualitative Analysis of Students' Experiences with Emotional Design in Multimedia*, 2023 J. OF QUALITATIVE RSCH. IN EDUC. 165, 165–86; Shelbi L. Kuhlmann et al., *A Multimedia Learning Theory-Informed Perspective on Self-Regulated Learning*, 2023 NEW DIRECTIONS FOR TEACHING & LEARNING 17, 17–23.

227. *See* Moreno & Mayer, *Cognitive Principles*, *supra* note 149, at 358.

228. *See id.*

229. Mayer & Moreno, *Aids to Computer-Based*, *supra* note 168, at 114.

230. Mayer & Moreno, *Nine Ways*, *supra* note 179, at 49.

231. *Id.* at 43.

232. *See id.*; Berger-Walliser et al., *supra* note 1; *see also* MAYER, MULTIMEDIA LEARNING, *supra* note 177, at 43–71.

233. *See* Berger-Walliser et al., *supra* note 1, at 75.

frameworks support both immediate understanding and long-term retention, particularly valuable in legal contexts where precise comprehension is essential. Research demonstrates that individuals better retain and apply information when it is presented through both visual and textual channels.[234]

Moreover, CTML-informed design can address the inherent challenges of legal texts, which often demand precise communication while grappling with high complexity.[235] By distributing cognitive demands across channels and providing multiple pathways to understanding, well-designed visual–textual combinations can make legal documents more accessible to diverse audiences. According to Dr. Edward Tufte, effective visualizations can minimize ambiguity, helping users to accurately understand their rights and obligations under a contract.[236] This approach not only enhances comprehension, but also reduces the likelihood of misinterpretation, which is particularly crucial in high-stakes legal contexts.

Understanding these three theoretical frameworks—CLT,[237] DCT,[238] and the CTML[239]—provides a robust foundation for analyzing the value of visual–textual combinations in legal documents. Each framework contributes unique insights: CLT illuminates how visual elements can manage cognitive demands; DCT reveals the power of engaging multiple processing channels; and CTML offers specific principles for effective integration of these elements.[240] Together they provide compelling evidence for the cognitive advantages of thoughtfully combining visual and textual elements in legal contracts.

Incorporating visuals with text in legal contracts offers the opportunity to enhance understanding, retention, and engagement across diverse populations. Visuals play a crucial role in effective learning and communication by reducing cognitive load, activating dual coding processes, facilitating meaningful connections, and supporting encoding.[241] This approach is particularly valuable in

234. *See, e.g.*, Roxana Moreno & Richard Mayer, *Interactive Multimodal Learning Environments*, 19 EDUC. PSYCH. REV. 309, 310 (2007) [hereinafter Moreno & Mayer, *Interactive Multimodal*] (describing multimedia principle that "student understanding can be enhanced by the addition of non-verbal knowledge representations to verbal explanations").

235. *See* Mayer & Moreno, *Nine Ways*, *supra* note 179, at 43 (discussing the need for multimedia instructional materials that are sensitive to cognitive load).

236. *See generally* EDWARD R. TUFTE, BEAUTIFUL EVIDENCE (Graphics Press, 2006).

236. *See* Sweller, *Cognitive Load*, *supra* note 149.

237. *See* PAIVIO, IMAGERY, *supra* note 152.

239. *See* MAYER, MULTIMEDIA LEARNING, *supra* note 177, at 43–71.

240. *See generally* Sweller, *Cognitive Load*, *supra* note 149; PAIVIO, IMAGERY, *supra* note 152; Mayer & Moreno, *Nine Ways*, *supra* note 179.

241. *See generally* SWELLER ET AL., CLT, *supra* note 181; PAIVIO, IMAGERY, *supra* note 152; Mayer & Moreno, *Nine Ways*, *supra* note 179.

fields where clarity and comprehension are paramount, such as law. More importantly, these frameworks suggest that the historical shift away from visual elements in contracts may have unnecessarily limited access to legal understanding.[242] By reintegrating visual elements based on these empirically supported cognitive principles, the legal field has an opportunity to create more equitable and accessible contracts that serve all members of society, regardless of their background or level of legal literacy. This evidence-based approach to contract design could help bridge the gap between legal professionals and the diverse populations they serve, ultimately supporting broader access to justice.

While these cognitive frameworks provide compelling evidence for the benefits of visual–textual combinations in legal documents, understanding how courts currently interpret visual elements is crucial for their practical implementation. The theoretical support for visual contracts must be complemented by legal precedent and judicial practice to facilitate their broader adoption in the U.S. legal system.

VI. COURTS' CURRENT INTERPRETATIONS OF VISUALS

One frequently mentioned reason for the slow adoption of visual contracts in the United States is the lack of clarity on how courts will interpret them, or if courts will even attempt to do so. Indeed, "it seems unlikely that lawyers would make meaningful use of visuals, in contracts or related business documents, in the absence of comfort with how courts would treat them in litigation."[243] Here we seek to assuage those fears by showing that courts already interpret visuals. While U.S. courts have yet to evaluate what this Article has defined as a "visual contract"—for example, U.S. courts have not evaluated Shell's previously discussed depiction of the distribution of risk and title during delivery,[244] nor Tony's Chocolonely's brightly colored employment contract[245]—courts frequently interpret other visuals, sometimes in contract disputes.[246] Consequently, there is no reason to think they would refuse to do so in the context of visual contracts. This is especially true when it is recognized that visual contracts are carefully drafted and agreed to by the parties with the intent of reducing confusion and increasing

242. *See supra* Part IV.

243. Mitchell, *supra* note 11, at 837.

244. *See* sources cited *supra* notes 47–56 and accompanying text.

245. *See* sources cited *supra* notes 64–65 and accompanying text.

246. *See* Mitchell, *supra* note 11, at 816 (describing the use of visuals during the contracting process despite the absence of the use of visuals in the core product of the contract); DANIEL J. BENDER ET AL., DEMONSTRATIVES: DEFINITIVE TREATISE ON VISUAL PERSUASION xv, 4, 47 (Am. Bar Assoc., 2017).

consensus, which is more than can be said for many other visuals that courts already interpret.

Where do U.S. courts already address visuals? To start, courts do so in the courtroom during litigation, where attorneys utilize a wide range of imagery to depict different events.[247] Courts' willingness to admit and interpret complex courtroom visuals demonstrates experience with, acceptance of, and the ability to evaluate visuals. Furthermore, in the litigation context, attorneys tend to use visuals to persuade the judge or jury to their side: "[Visuals in litigation] are not meant simply to provide facts, but are almost always meant to sway opinion."[248]

Courts have even gone a step further and interpreted visuals never intended to serve any legal function. For example, the meaning of cartoons has come up in defamation and election law cases.[249] In these instances, judges and juries must ascertain the meaning of cartoons to determine whether the claims succeed or fail.[250] As discussed below, these cartoons are not drafted with the care and precision typically present in visual contracts.

Contrasting these scenarios—skewed courtroom visual aids and cartoons never intended for litigation—with visuals in the context of a negotiated contract where both sides will typically have an agenda, but must agree on images that accurately reflect the agreement, provides a clear presentation of the rights and duties involved and typically benefits both sides.[251] Even in business-to-consumer contracts (i.e., terms and conditions) and other situations with one dominant party, the contract drafter remains motivated to create clear visuals because any ambiguities will be interpreted against them,[252] so that courts could find overly vague terms unenforceable.[253]

Visuals in the litigation context and defamation cases that evaluate cartoons show courts' willingness and ability to interpret visuals.[254] If courts can handle

247. BENDER ET AL., *supra* note 246, at xv, 47–49 ("[W]ith the advent of personal computers, the use of demonstratives has increasingly become a staple of the courtroom.").

248. *Id.* at 4.

249. *See, e.g.*, McKimm v. Ohio Elections Comm'n, 729 N.E.2d 364, 369 (Ohio 2000).

250. *See, e.g.*, *id.*

251. *See* Berger-Walliser, *supra* note 1, at 75 ("Contractual literacy and visualization of legal information can help cross-professional communication, so that contractual choices become easier to make and contracts are easier to design, understand, and use . . . .").

252. *See* LORD, *supra* note 82.

253. *E.g.*, CAL CIV. CODE § 3390 (West 2024) ("The following obligations cannot be specifically enforced: . . . An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.").

254. *See, e.g.*, *McKimm*, 729 N.E.2d at 369.

these challenging situations, courts can certainly handle visual contracts that are designed for clarity. But, even more relevant here, courts also interpret visuals when resolving contract disputes.[255] The research detailed here indicates this occurs most frequently when a contract references an external visual within its body text or when the parties refer to visuals during their negotiations and courts consider the visuals as extrinsic evidence to clarify ambiguous contract terms.[256]

As an aside, for our purposes, it does not matter if the cases we discuss have since been overruled. The point of our analysis is to: (a) show that courts are capable of evaluating and interpreting visuals and (b) offer insight into how they do so. It would, of course, be relevant if a later case overruled one of the cases this Article discusses by holding that courts cannot interpret visuals. However, in the research done for this Article, no cases with such a holding were found.

In this Part, we discuss examples of courts interpreting visuals in a range of scenarios. Our research and analysis indicate that courts analyze visuals in many contexts, including contractual disputes.[257] These example cases should allay fears that courts will throw out, disregard, or struggle to interpret visuals. The evidence shows courts will interpret visual contracts using a set of skills built up through years of relevant experience.[258] Further, this Article's review provides helpful insights into how courts might address visual contracts.[259]

A. *Examples of Visuals in the Courtroom*

The court in *Yanello v. Park Family Dental* affirmed the value of visuals:

> The great value of demonstrative evidence lies in the human factor of understanding better what is seen than what is heard." The use of demonstrative evidence, therefore, is looked upon favorably by the courts because it allows the trier of fact to have the best possible understanding of the matters before it.[260]

255. *See, e.g.*, Howe v. Schmidt, 90 P. 1056, 1057 (Cal. 1907) (analyzing visuals included in a contract); Young v. Borzone, 66 P. 135, 139 (Wash. 1901) (same).

256. *See* LORD, *supra* note 82, § 33:8 (discussing admission of written extrinsic evidence); *see, e.g.*, House v. Stokes, 311 S.E.2d 671, 675 (N.C. Ct. App. 1984) (discussing the admittance of a land survey to remove ambiguity from a contact for the purchase of a plot of land).

257. *See, e.g.*, *McKimm*, 729 N.E.2d at 369; *Howe*, 90 P. at 1057; *Young*, 66 P. at 139.

258. Mitchell, *supra* note 11, at 841–42.

259. *See infra* Part VI.A.

260. Yanello v. Park Fam. Dental, 79 N.E.3d 294, 304–05 (Ill. App. Ct. 2017) (citing Sharbono v. Hilborn, 12 N.E.3d 530 (Ill. App. Ct. 2014)).

This quote explains the widespread acceptance of visuals by U.S. trial courts. Because of their utility, the use of courtroom visuals (often called demonstratives) is common in the United States.[261] Diagrams and maps are utilized to reconstruct accidents and establish liability.[262] Attorneys display timelines in the courtroom to provide a clear chronology of events.[263] Prosecutors use life size dolls in murder trials.[264] The list goes on, with multiple treatises, practice manuals, and legal encyclopedias devoting significant space to the discussion of demonstrative evidence.[265] One resource has an "inspiration index" that covers nearly 100 pages and includes multiple flow charts, data charts, annotated calendars, timelines, maps, 2D and 3D illustrations, process diagrams, and organizational charts.[266] The authors do not clearly note where the items in the index came from, but a quick review indicates that most were used during litigation or at least prepared with the intent they would be used in the courtroom.[267] All this to say, trial courts deal with a wide range of visuals on a regular basis.

Demonstrative evidence can come in during a trial either on a limited basis to help clarify testimony or to simplify a material issue, or the court can formally admit the item as evidence.[268] But who decides which visuals the jury gets to see for help in understanding a confusing point? Who decides which items are formally admitted into evidence? And who decides which are completely excluded? Judges.

261. Note that some commentators distinguish between "real" and "demonstrative" evidence, defining real evidence as "evidence that was involved in the matter at the heart of the trial, and 'demonstrative evidence' [as] evidence that is simply used to help illustrate testimony." Ronald J. Rychlak & Claire L. Rychlak, *Real and Demonstrative Evidence Away from Trial*, 17 AM. J. TRIAL ADVOC. 509, 510 (1993). This Article will include all visual types of aids and evidence in its definition and discussion regardless of its role at trial.

262. *See* 8 AM. JUR. 2d *Automobiles* § 1157 (2024).

263. *See* 75 AM. JUR. 2d *Trial* § 415 (2024).

264. *E.g.*, State v. Jones, 984 N.E.2d 948, 960–61 (Ohio 2012).

265. *E.g.*, 29A AM. JUR. 2d *Evidence* § 981 (2024) (referencing the title of this section: "Admissibility of maps, diagrams, and drawings into evidence or as illustration"); ROBERT P. MOSTELLER, MCCORMICK ON EVIDENCE, § 214 (9th ed., 1999); 1 ASHLEY LIPSON, ART OF ADVOCACY—DEMONSTRATIVE EVIDENCE (LexisNexis 2023) (referencing the title of Chapter 2: "The Fundamentals of Demonstrative Evidence").

266. BENDER ET AL., *supra* note 246, at 134–230.

267. Email from Daniel J. Bender, Litig. Graphics and Bus. Dev. Manager, Digital Evidence Grp., to Nicholas R. Downey, Junior Staff, Drake L. Rev. (Feb. 6, 2025, 3:06 CST) (on file with the Drake L. Rev.) (confirming most demonstrative examples in the index were inspired by real cases).

268. *See* LIPSON, *supra* note 265, § 2.06 (stating visual evidence can be classified as either real evidence, which directly played a role in the incident, or demonstrative evidence, which, though not directly involved, serves to illustrate or clarify something for the trier of fact).

In addition to the aforementioned visuals, judges also decide the fate of simulations, animations, graphs, tables, comparisons, models, X-rays, schematics, and more.[269] All of these visuals are regularly admitted or excluded by judges. Mitchell sums up judges' experience with visuals in litigation well: "The use of demonstrative evidence . . . is common. Courts have considerable experience with such materials. Practitioner guides and other practice materials encourage lawyers to use visual aids in such cases."[270] The volume and diversity of visuals judges consider provide some of the strongest evidence that they have the skills and experience needed to evaluate visuals.[271]

Courts allow visuals despite risks of prejudice. The *Yanello* court cautioned,

> the same human factor that makes demonstrative evidence valuable—that people learn and understand better what they see, rather than what they hear—also makes it possible for parties to abuse the use of demonstrative evidence by giving a dramatic effect or undue or misleading emphasis to some issue, at the expense of others.[272]

Thus, in the courtroom context, judges value visuals so much that they regularly allow them even though most are intended to persuade the fact finder to the side of the party offering the visual.[273] Essentially, courts have determined that the value visuals offer frequently outweighs the risk of prejudice inherent in the admission of something created by a single party to sway the fact finder to their side.[274]

Placing this in our discussion of visual contracts, courts' acceptance of inherently biased visuals offers strong support for the use of visuals within negotiated contracts.[275] In negotiated contracts both parties have the opportunity to modify and adjust visuals until they agree the visuals represent their mutual understanding of the relationship.[276] Further, because visuals are so valuable and used with such frequency, judges regularly need to review and evaluate them when

269. *See* 29A AM. JUR. 2D *Evidence* § 932 (2024).

270. Mitchell, *supra* note 11, at 841–42.

271. *See id.*

272. Yanello v. Park Fam. Dental, 79 N.E.3d 294, 305 (Ill. App. Ct. 2017) (citation omitted).

273. *See* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1764 (2014) (indicating that courts typically exhibit reluctance toward granting motions to strike visual evidence).

274. *See id.*

275. *See id.*

276. *See* Mitchell, *supra* note 11, at 831.

deciding whether to allow them in the courtroom.[277] Given that negotiated visual contracts involve mutually created visuals and that judges already evaluate and accept unilaterally created visuals in the courtroom, there is little reason judges should refuse to give contractual visuals significant legal weight or claim they lack the skillset to properly evaluate them.[278]

B. *Courts on Typography*

Earlier, we mentioned that we include layout and typographic decisions in our definition of visuals, so, before turning to judicial opinions discussing images, we will consider these visual choices that even the most traditional transactional lawyers likely make on a regular basis. While these decisions do not involve any images, they do impact the visual appearance of documents significantly.[279] For example, choosing narrow or wide margins impacts both the appearance and readability of a contract.[280] The choice to bold certain words or PUT ENTIRE CLAUSES IN ALL CAPS also shapes the way a contract looks and how people perceive it, although often not as the drafters intended.[281]

Most contract design choices attorneys make regarding typography and layout are governed not by an understanding of design but by a desire to do what has always been done. "[L]awyers have been known to be susceptible to boilerplate syndrome: the superstitious refusal to deviate from the form or substance of a document that was successfully used by another lawyer, usually sometime before the Carter administration."[282] This results in some of the design choices (e.g., all caps) harming rather than helping comprehension.[283] Regardless of their efficacy,

277. *See* Porter, *supra* note 273, at 1687, 1736.

278. Admittedly, examining visuals for bias in determining whether to admit them is not exactly the same as probing them for their meaning in a contract dispute, but, in bench trials, judges are tasked with determining the meaning of the visuals presented to the court.

279. *See* ROBERT BRINGHURST, THE ELEMENTS OF TYPOGRAPHIC STYLE 25 (4th ed., Hartley & Marks, 2015).

280. *See id.* at 26.

281. *See* BUTTERICK, *supra* note 18, at 32.

282. *Id.* at 33.

283. *See id.* at 82 ("We read more lowercase text, so as a matter of habit, lowercase is more familiar and thus more legible. Furthermore, cognitive research has suggested that the shapes of lowercase letters—some tall (d h k l), some short (a e n s), some descending (g y p q)—create a varied visual contour that helps our brains recognize words. Capitalization homogenizes theses shapes . . . ."); *see also* Bernardino v. Barnes & Noble Booksellers, Inc., No. 17-CV-04570, 2017 WL 7309893, at *28 (S.D.N.Y. Nov. 20, 2017) ("Finally, in this reader's mind, B&N's use of upper and lower case letters makes the text more readable than Uber's, which is in all caps and, as such, makes it harder to distinguish one letter from another.").

courts' evaluation of these design choices supports the larger argument that judges can, and do, interpret visual elements in contracts.[284]

Turning now to consider how a few courts have treated typographic and layout choices in their opinions. In an unreported case from the U.S. District Court for the Southern District of New York, U.S. Magistrate Judge Katharine H. Parker evaluated Barnes & Noble's (B&N) motion to compel arbitration based on a customer clicking a "Submit Order" button with text, stating that doing so indicated assent to B&N's terms of use (TOU).[285] In evaluating the conspicuousness of the text establishing consent to the TOU, Judge Parker noted that "language alerting the user to the TOU was clear and obvious by virtue of its black sans-serif font contrasted against a white background, with blue font indicating the hyperlink to the TOU, also contrasted against a white background."[286] Judge Parker added that B&N's decisions to left-align the text and to avoid all-caps made the notice more readable, favoring B&N's argument that the customer was bound by the TOU.[287] Clearly, layout and typographic design decisions mattered in this case.

In another case, cited heavily by Judge Parker, the Second Circuit discussed font size and how text contrasted with the background in evaluating the conspicuousness of a similar notice on Uber's app.[288] In the case, the court also looked at the layout of the relevant screen, finding the close proximity between the link to Uber's terms and conditions and privacy policy to a registration button favored a conclusion that the notice was conspicuous.[289] Conversely, the Second Circuit found that whether Amazon's links to terms of use and a privacy notice were conspicuous was debatable because the text was not bolded or capitalized and was mixed in with many other links on the same webpage.[290] The court supported their assertion with a string cite to other cases which found layout and typographic choices determinative in evaluating consumer assent to terms and conditions.[291]

Judges clearly care (some deeply) about typography, and many are well-versed in its nuances.[292] In expressing strong disapproval for an attorney's choice

284. *See Bernardino*, 2017 WL 7309893, at *28.

285. *Id.* at *13.

286. *Id.* at *26–27.

287. *Id.* at *27.

288. Meyer v. Uber Techs., Inc., 868 F.3d 66, 78 (2d Cir. 2017).

289. *Id.*

290. Nicosia v. Amazon.com, Inc., 834 F.3d 220, 237 (2d Cir. 2016).

291. *Id.*

292. *See, e.g.*, *id.*; AsymaDesign, LLC v. CBL & Assocs. Mgmt., Inc., 103 F.4th 1257, 1260 (7th Cir. 2024); *Meyer*, 868 F.3d at 78.

of "Bernhard Modern" as their primary typeface, Judge Frank H. Easterbrook pointed to the typeface's low x-height, elongated ascenders, and relatively short descenders, when explaining why the font was a poor choice for a brief.[293]

He concluded the opinion by noting:

> Judges are long-term consumers of lengthy texts. To present an argument to such people, counsel must make the words easy to read and remember. The fonts recommended in our [Seventh Circuit's] Handbook and Typography for Lawyers promote the goals of reading, understanding, and remembering. Display faces such as Bodoni or Bernhard Modern wear out judicial eyes after just a few pages and make understanding harder.[294]

The cases laid out here only scratch the surface of those available: a search in Westlaw for just a few possible typographic terms in close proximity to contract, agreement, terms and conditions, or terms of use, maxes out the results at 10,000.[295] For further support, go to Corbin on Contracts and read through the text and footnotes of section 2.12, which discusses fonts and more in determining if website terms are sufficiently conspicuous.[296] Judge Easterbrook's quote hints at another source of support for judges familiarity with typography: court rules.[297] While the Seventh Circuit's *Practitioner's Handbook for Appeals* (cited by Easterbrook),[298] goes into considerable detail, it is far from the only set of court rules to have typographic requirements.[299] Further, the Federal Rules of Appellate Procedure also have typographic and other design requirements.[300]

Clearly courts consider typography and, in some instances, layout.[301] Given that typography is a design discipline that heavily emphasizes visual appearance, this is strong evidence that courts can, and will, interpret visuals when deciding

293. *AsymaDesign*, 103 F.4th at 1260.

294. *Id.* at 1261.

295. A search for adv: ("all caps" OR bold! OR font OR italic!) /s (contract OR agreement OR "terms #and conditions" OR "terms #of use") run in Westlaw Precision on May 10, 2024 returned 10,000 results in the "cases" database.

296. 1 JOSEPH M. PERILLO ET AL., CORBIN ON CONTRACTS § 2.12 (LexisNexis, 2024).

297. *See AsymaDesign*, 103 F.4th at 1261.

298. PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 170–77 (2020), https://www.ca7.uscourts.gov/forms/handbook.pdf.

299. *See, e.g.*, VA. SUP. CT. R. 5A:4 (requiring 14-point font, use of one of the fonts listed on the court's website, and more).

300. FED. R. APP. P. 32 (including requirements that the main body text be in 14-point font and include serifs and requiring a printed brief to have at least one-inch margins and be double-spaced).

301. *See, e.g.*, *AsymaDesign*, 103 F.4th at 1261.

contract disputes.[302] Examples of judges evaluating layout provide additional support.[303]

C. *Courts Interpreting Cartoons*

We found several examples of companies utilizing cartoons in contracts outside the United States,[304] but we failed to locate any U.S. cases discussing the interpretation of cartoon-based contracts.[305] We did, however, locate U.S. cases interpreting cartoons in other contexts.[306] The examples discussed here are only a selection, but they show that courts have familiarity with interpreting cartoons.[307] Given courts' prior experience, there is no reason to think courts will be unable to do so in the context of carefully drafted contracts;[308] although, as will be discussed below, the cases do provide indications that cartoons may not offer the best medium for visual contracts.[309]

Defamation and libel cases provide one context where courts interpret cartoons.[310] Interestingly, courts evaluating cartoons in the defamation context sometimes apply a "reasonably susceptible" standard that one could argue has similarities to the standard courts apply when determining if a contract is ambiguous—i.e., "reasonably susceptible to the interpretation urged by the party

302. BUTTERICK, *supra* note 18, at 20.

303. *See, e.g.*, Nicosia v. Amazon.com, Inc., 834 F.3d 220, 237 (2d Cir. 2016).

304. *See* Mike Cherney, *Lawyers Turn to Comics for Help with Boring Contracts*, WALL ST. J. (May 31, 2019, 11:42 AM), https://www.wsj.com/articles/if-a-cartoon-lightbulb-explained-your-contract-would-you-read-it-11559317351; Murray, *supra* note 31; *see also* Mark Anthony Giancaspro, *Picture-Perfect or Potentially Perilous? Assessing the Validity of 'Comic Contracts'*, COMICS GRID: J. OF COMICS SCHOLARSHIP, July 16, 2020, at 1, 1, 3, 6–7, 16, https://www.comicsgrid.com/article/id/3602/ [https://perma.cc/MLN2-AA3K] (discussing use of visuals in contracts by foreign companies in Australia and South Africa).

305. A search for "adv: 'cartoon contract'" run in Westlaw Precision on Mar. 30, 2025, returned no results. A search for "adv: 'cartoon +4 contract!" run in Westlaw Precision on Mar. 30, 2025, returned six results, all of which were unrelated to cartoons in the actual contract.

306. *See, e.g.*, Am. Legacy Found. v. Lorillard Tobacco Co., 886 A.2d 1, 11–16 (Del. Ch. 2005), *aff'd*, 903 A.2d 728 (Del. 2006) (discussing antismoking videos in the context of 1998 tobacco settlement).

307. *See id.* (interpreting video advertisements, a highly visual medium).

308. *See infra* notes 312–55.

309. *See infra* notes 312–55.

310. *See, e.g.*, Newman v. Delahunty, 681 A.2d 671, 682–84 (N.J. Super. Ct. Law Div. 1994) (discussing how cartoons are generally exaggerated, making it hard to understand the cartoon as a true statement of fact), *aff'd*, 681 A.2d 659 (N.J. Super. Ct. App. Div. 1996).

claiming ambiguity."[311] This overlap evinces a similarity in the methods required to interpret both visuals and text.

In *McKimm v. Ohio Elections Commission*, the Supreme Court of Ohio offered an in-depth discussion of a cartoon at the "heart" of a local election dispute, and—while the case concerned a provision of the Ohio Code—the court relied on libel cases and doctrines in reaching its conclusion.[312] In 1995, Dan McKimm decided to run against Randy Gonzalez for a local government position.[313] Part of McKimm's campaign materials included a multiple-choice quiz with cartoons accompanying several of the questions, shown below in Figure 4.[314] By the time the case made its way from the Ohio Elections Commission to the Supreme Court of Ohio, the key question was whether a cartoon illustration (Figure 5 below) in the brochure implied Gonzalez had accepted a bribe, a false assertion, in violation of Ohio's election laws.[315] In concluding that McKimm had in fact violated the election law's prohibition on making a false statement about an opponent, the Supreme Court of Ohio explored how a "reasonable reader" would interpret a cartoon drawing of a hand holding "a bundle of cash [with] small lines drawn around the bundle [to] give the reader the impression of motion—as if the hand is waving the cash back and forth underneath the table."[316] In explaining the governing standard, the court made clear it is the reasonable reader's understanding, not the publisher's intended meaning, that controls.[317] Ultimately, the Supreme Court of Ohio agreed with the trial court and found the cartoon in question "unambiguously depicts a hand passing money under the table."[318] In reaching this conclusion, the court rejected McKimm's claim that he should not be liable because the cartoon was capable of both an innocent and defamatory meaning.[319] In the court's view, the cartoon was only susceptible to one "reasonable" interpretation: money being passed under a table.[320] While the

311. *Compare* RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 4:33 (2d ed., Clark Boardman Callaghan 2024) (discussing standard used for defamation in context of cartoons), *with* LORD, *supra* note 82, § 30:5 (discussing the standard used in determining "ambiguity" in contracts).

312. *See* McKimm v. Ohio Elections Comm'n, 729 N.E.2d 364, 369–70 (Ohio 2000); OHIO REV. CODE ANN. § 3517.21 (West 2024).

313. *McKimm*, 729 N.E.2d at 367.

314. *Id.* at 376 app. 2.

315. *Id.* at 367–69, 375 app. 1.

316. *Id.* at 368, 370–71.

317. *Id.* at 371.

318. *Id.* at 374.

319. *Id.* at 372.

320. *Id.*

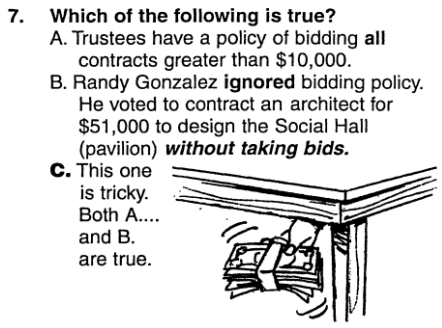
pamphlet at issue contained both text and images, the Supreme Court of Ohio and the trial court found the image, not the text, dispositive in discerning the meaning of the pamphlet.[321]

Figure 4 [322]

APPENDIX 2

Figure 5 [323]

APPENDIX 1



In *Newman v. Delahunty*, the court evaluated several cartoon flyers used in a 1989 mayoral campaign.[324] Here the court sought to determine if the elements of defamation were met, including whether the items at issue expressed facts or opinions.[325] In its review, the court found that one group of cartoons contained "elements of exaggeration, hyperbole and obvious overstatement."[326] The court held that these cartoons represented opinions, not facts and, therefore, were not

321. *See id.* at 374 ("But instead of merely disseminating his brochure with the bare facts that appeared in the text of Question No. 7, McKimm chose to accompany those facts with a cartoon. That cartoon, as we have already determined, unambiguously depicts a hand passing money under the table—a concept with which McKimm admitted he was personally familiar.").

322. *Id.* at 376 app. 2.

323. *Id.* at 375 app. 1.

324. Newman v. Delahunty, 681 A.2d 671, 673, 688–98 apps. A–I (N.J. Super. Ct. Law Div. 1994), *aff'd*, 681 A.2d 659 (N.J. Super. Ct. App. Div. 1996).

325. *Id.* at 682–83.

326. *Id.* at 684.

defamatory.[327] In discussing the nondefamatory group of cartoons, the court opined, "For example, as to [Figure 6, below], without more one cannot conclude the deeds in the belt of the colossal figure represent an allegation of corrupt money used to buy out of state properties."[328] After concluding that several of the cartoons were not defamatory, the court then held that one was a statement of fact, making it defamatory.[329] In reaching this conclusion, the court highlighted the use of the plaintiff's name, the reference to his business, and the consistency of the caricature's appearance with prior caricatures of the plaintiff.[330]

Most relevant to our discussion is the *Newman* court's willingness to evaluate the visual qualities of the caricatures at issue.[331] If the court had considered itself incapable of evaluating images or if it had viewed images as irrelevant in legal disputes, it would have simply ignored the visual portions of the cartoons and focused solely on the text.[332] Instead, the court evaluated and interpreted both the visuals and text.[333] It did this in finding for, and against, defamation.[334]

While the *Newman* court demonstrated judicial ability to interpret visuals, those seeking to create cartoon contracts should be aware of that court's general view. In discussing the standards that apply to cartoons in defamation cases, the court stated, "Generally cartoon and caricatures are so exaggerated in their comment that the reader cannot take it as being a true statement of fact."[335] By finding one of the caricatures defamatory, the *Newman* court showed that this general presumption can be overcome—i.e., in some instances, courts are willing to view cartoons as conveying factual information.[336] Still, anyone considering utilizing visual contracts in the United States should take note.

327. *Id*.

328. *Id.*

329. *Id.* (discussing the cartoon in Appendix G of the case); *id.* at 696 app. G.

330. *Id.* at 684 ("[T]his cartoon is defamatory fact [and] concerns the plaintiff (the cartoon uses his name 'Dan', a caricature that is consistent with others depicting Dan Newman, and refers to 'Pineland Plumbing', 'the Mayor owns the company') . . . .").

331. *Id.* at 682–84.

332. *See id.*

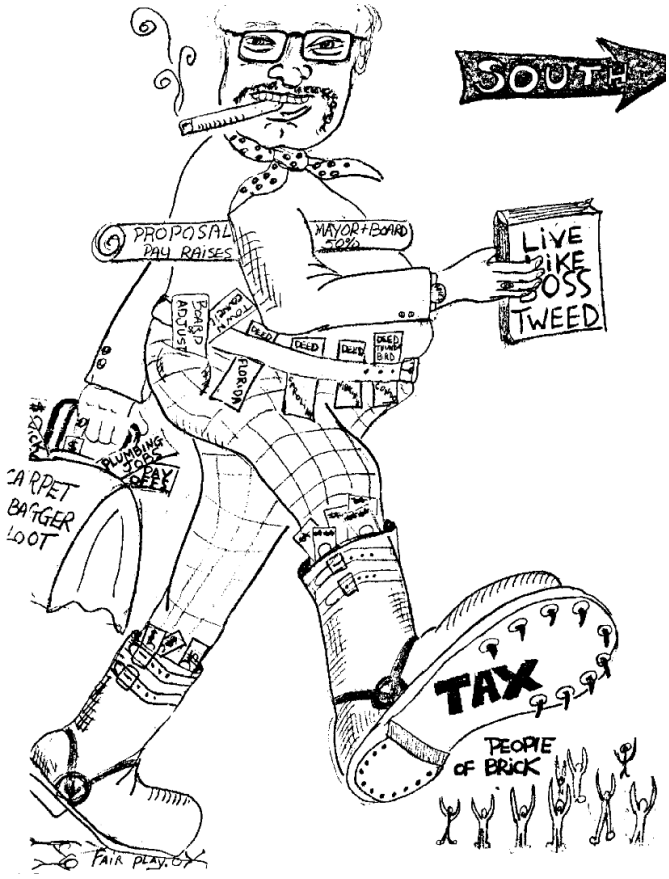
333. *Id.* at 683–84.

334. *Id.* at 684–85.

335. *Id.* at 682.

336. *Id.* at 683–84.

Figure 6 [337]



The Newman *court held this image, without more information, did not convey a fact.*

In a similar vein, the court in *King v. Globe Newspaper Co.* found that three cartoons published in the Boston Globe did not defame Massachusetts's former governor, while noting that "cartoons are seldom designed to disclose facts, but rather are ordinarily understood by reasonable viewers to be rhetorical, exaggerated means of expressing opinions,"[338] and citing the trial court's assertion that cartoons are "a form of expression that clearly draws upon overstatement and extravagant symbolism to make its point."[339]

337. *Id.* at 694 app. E.

338. King v. Globe Newspaper Co., 512 N.E.2d 241, 245 (Mass. 1987).

339. *Id.* at 246.

In another case from Ohio, *Celebrezze v. Dayton Newspapers, Inc.*, the court reviewed a political cartoon that

> depicted an automobile with a license plate reading "Celebrezze" [(the last name of the judge suing for defamation)] being driven down a street. Two persons are leaning out of the automobile firing machine guns at a storefront labeled "Ohio Bar Association." On the sidewalk in front of the storefront one man lies dead in a gutter and another is being shot down. A small skunk sits on the curb holding its stomach.[340]

The court held that the cartoon did not meet the statement of fact element required for a finding of libel because "[n]o reasonable person could conclude from viewing Priggee's cartoon that he was accusing Celebrezze[, the plaintiff,] of the criminal act of murder or attempted murder. The scene depicted was exaggeration[] [and] hyperbole"[341] The image also shows a potential issue with visuals discussed further below: databases and case reporters do not always reproduce images at a sufficiently high resolution.[342]

340. Celebrezze v. Dayton Newspapers, Inc., 535 N.E.2d 755, 756 (Ohio Ct. App. 1988).

341. *Id.* at 758; *see also* Matalka v. Lagemann, 486 N.E.2d 1220, 1223 (Ohio Ct. App. 1985) (assessing the meaning of two political cartoons and then concluding a reasonable viewer would not interpret them as assertions of fact).

342. *See infra* Part VIII.

Figure 7 [343]

Courts have also considered comic depictions in First Amendment cases.[344] In *Winter v. DC Comics*, the court considered a portrayal of musicians Johnny and Edgar Winter in DC Comics' *Jonah Hex* miniseries.[345] The court describes the comic at issue:

> The cover of volume 4 depicts the Autumn brother characters, with pale faces and long white hair. One brother wears a stovepipe hat and red sunglasses, and holds a rifle. The second has red eyes and holds a pistol. This volume is entitled, Autumns of Our Discontent, and features brothers Johnny and Edgar Autumn, depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground. At the end of volume 5, Jonah Hex and his

343. *Id.* at 760.

344. *See, e.g.*, Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959 (10th Cir. 1996); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).

345. Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003).

> companions shoot and kill the Autumn brothers in an underground gun battle.[346]

The court explained the statutory right to publicity that the plaintiffs sought recovery under could not be permitted to override DC Comics' First Amendment rights.[347] In determining that the First Amendment controlled in this case, the court pointed to a prior ruling and stated the key factor is if the comic depiction of plaintiffs Johnny and Edgar Winter contained "significant transformative elements."[348] Displaying its comfort in evaluating visuals, the court wrote that "[a]pplication of the test to this case is not difficult."[349] The court went on to explain in detail the ways in which the comic depictions added the "significant transformative elements" needed to receive protection under the First Amendment.[350] The court noted that the comics were "distorted for purposes of lampoon, parody, or caricature" and that "[p]laintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions."[351] Similar to the other cases discussed here, the court also indicated that comics tend to provide "humorous rather than serious commentary."[352]

As noted earlier, is only a sample of the cases we found.[353] These cases show courts' comfort with interpreting visuals, even when the visuals are not intended to be legally binding.

D. *Courts Analyzing Visuals in Contract Disputes*

Nothing in contract law prohibits the use of visuals:[354]

346. *Id.*

347. *Id.* at 475–76.

348. *See id.* at 478–79.

349. *Id.* at 479.

350. *See id.*

351. *Id.*

352. *Id.* (quoting Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959, 969 (10th Cir. 1996)).

353. A few of the other cases we found include *Buller v. Pulitzer Publ'g. Co.*, 684 S.W.2d 473, 477 (Mo. Ct. App. 1984) (discussing the impact of a psychic's expression in a cartoon while concluding the cartoon was libel per se under a Missouri law); and *Mullenmeister v. Snap-On Tools Corp.*, 587 F. Supp. 868, 873, 875 (S.D.N.Y. 1984) (holding that, given the commercial context, a cartoon including a swastika helmeted could only be "reasonably susceptible" of one interpretation: "as a shorthand symbol for German national origin, no doubt with disparaging connotations").

354. Mitchell, *supra* note 11, at 842–43.

> [Given] the clarity and accessibility of diagrams, and the care presumably reflected in a visual included in a commercial contract, it seems likely that a court may welcome a visual as a resource for determining [the parties'] intent—and is free to do so under applicable contract interpretation and evidence principles. . . . There is no requirement, even for contract formation and term content, that contractual terms be expressed only in words used by the parties in a written contract. Oral contracts are generally enforceable. Promises can be inferred from conduct. Terms can be implied or supplied by courts. Trade usage, course of dealing, and course of performance can be used to supply or interpret terms. These are sources of contract terms and meaning not expressed in words on the page.[355]

In fact, as Mitchell explains, existing doctrines support their admission.[356] In this Part, we aim to dive deeper into how courts already interpret visuals in contract cases and provide further support for Mitchell's statements.

While our research did not surface any U.S. court cases analyzing a visual contract as we have defined the term,[357] we did find several cases where courts evaluate and interpret visuals when deciding contract disputes.[358] These exist in a variety of contexts and provide the strongest indication that courts can and will interpret visual elements incorporated into contracts and will treat visuals intended to convey contractual terms as legally binding.[359] We found supportive cases in several jurisdictions and in both state and federal courts, indicating broad acceptance.[360]

1. *Background*

To facilitate the coming discussion of how visuals make their way into contract cases, we will provide a quick summary of the contract doctrines courts often discuss when dealing with visuals. To start, courts frequently consider visuals when a contract's text references an attached or external visual.[361] On the validity of referenced documents, *Williston on Contracts* states that where contracting

> parties have expressed their intention to have one document's provision read into a separate document. As long as the contract makes clear reference to the

355. *Id.*

356. *Id.*

357. *See infra* Part VI.D.2.

358. *See infra* Part VI.D.2.

359. *See infra* Part VI.D.2.

360. *See infra* Part VI.D.2.

361. *See, e.g.*, E & H Land, Ltd. v. Farmington City, 336 P.3d 1077, 1083 (Utah Ct. App. 2014).

> document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . . including a separate document which is unsigned.[362]

Thus, provided that a contract clearly identifies a visual, courts should consider the visual part of the agreement.[363] In fact, contracts incorporate visuals "by reference" often enough that formbooks include example clauses showing how a contract may do so: "The general conditions of the contract, the plans, specifications, and drawings, *[addition of other items]*, together with this agreement, form the contract, and they are as fully a part of the contract as if attached to or repeated fully in this agreement."[364] Further, Williston goes on to say that "[w]hen a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument. The incorporated matter is to be interpreted as part of the writing."[365] So, the fact that a visual is incorporated into the body text rather than referenced in a contract should have no impact on the visual's validity.

Visuals could also come in as parol evidence.[366] Briefly, parol evidence is any evidence outside the agreement (extrinsic evidence) and not clearly referenced in the agreement that the parties expressly assented to.[367] Under the parol evidence rule, courts generally do not consider this extrinsic evidence when resolving

362. LORD, *supra* note 82, § 30:25.

363. *E.g.*, Howe v. Schmidt, 90 P. 1056, 1057 (Cal. 1907) ("By the terms of the contract, Howe was to construct the building 'conformable to the drawings and specifications made by Edward Kendall and signed by the parties and hereunto annexed.'"); Levinson v. Linderman, 322 P.2d 863, 865 n.2 (Wash. 1958) ("The agreement signed by the parties expressly provides that such plans were to be a part of the contract. So much of the paper drawn up by the city engineer as disclosed these plans and details was admissible as proof of such plans, and, when proven, such plans entered into, and by the express provisions of the agreement signed by the parties became a part of, the contract.").

364. LORD, *supra* note 82, § 30F:7.

365. *Id.* § 30:25.

366. *See, e.g.*, Cadence Educ., LLC v. Vore, No. 17-2092-JWB, 2019 WL 917020, at *4, *10 (D. Kan. Feb. 25, 2019) (concluding the terms of a sublease were ambiguous thus suggesting extrinsic evidence, such as a diagram of the premises, could be admitted to determine the intent of the parties); Wiley v. Hayes, No. 23-ICA-143, 2024 WL 2377389, *1 n.2, *4 (W. Va. Ct. App. May 23, 2024) (holding parol evidence rule did not bar extrinsic evidence because the contract was ambiguous, and implying that had plaintiff entered his drawing of the construction plan as evidence it may have been admitted).

367. LORD, *supra* note 82, § 33:1.

contract disputes.[368] Of course, there are exceptions when courts allow visuals under the parol evidence rule.[369] However, courts do not always agree on when to admit parol evidence and a detailed discussion of the differing viewpoints is beyond the scope of this Article.[370] For our purposes, it is enough to be aware of this additional route through which visuals make their way into contract disputes.[371]

2. *Courts Interpreting Visuals in Contract Cases*

Mitchell writes, "There seem to be rather few contract interpretation cases involving diagrams and other visuals. Those that do exist involve use of maps or other exhibits, not graphics used to capture substantive terms."[372] We disagree and argue that "maps or other exhibits" do in reality "capture substantive terms." In the sale of a piece of land, the boundaries of the property are one of the most important elements of the agreement.[373] How could a map defining those boundaries not qualify as "substantive"? In fact, one could argue that the property boundaries are not merely substantive but, along with the price, the most critical terms in the sale of land.[374] Further, in manufacturing and construction contracts, diagrams, technical drawings, and blueprints regularly make their way, usually as exhibits, into contracts.[375] In these situations, defining what the purchasing party will receive in exchange for their financial investment is arguably not only substantive but an essential part of the agreement. So, while visuals do not come up nearly as often as text in contract disputes, when parties do include them, they often do so to define core terms.[376] We will examine some of those instances in this Part.

368. *Id.*

369. *See, e.g.*, *id.* (citing Four Season's Healthcare Ctr. Inc. v. Linderkamp, 837 N.W.2d 147 (N.D. 2013) (reversing lower court and applying parol rule exception to evidence offered to show difference in consideration price between oral agreement and written deed))).

370. *See, e.g.*, LORD, *supra* note 82, § 33:26 (citing Individual Healthcare Specialists, Inc. v. BlueCross BlueShield, Inc., 566 S.W.3d 671 (Tenn. 2019)).

371. Mitchell provides a similar discussion with a focus on California law and agrees with our broader assessment, "A visual in the contract itself presumably is assessed under contract interpretation principles. A visual outside the contract presumably is assessed under the parol evidence rule and general evidence admissibility principles." Mitchell, *supra* note 11, at 838.

372. *Id.* at 840.

373. *See* JOHN G. SPRANKLING ET AL., PROPERTY: A CONTEMPORARY APPROACH 503, 507–08 (6th ed., W. Acad. Publ'g, 2024).

374. *See id.*

375. *See, e.g.*, Mitchell, *supra* note 11, at 841 n.76.

376. *See* SPRANKLING ET AL., *supra* note 373.

Mitchell's search for visuals in contract cases, conducted on January 19, 2018, covered "all state and federal cases" in Westlaw and surfaced only 18 relevant cases.[377] By adding a few additional terms to Mitchell's search and increasing the threshold between terms from a sentence to a paragraph, we significantly increased the results[378] and found 2,217 cases across all state and federal courts in Westlaw, as of March 4, 2024.[379] Time constraints prevented a review of the entire set of results, but, out of the first 100 results, roughly one-third contained some discussion of a visual in a contract case. This indicates that our search modifications uncovered an entire new set of relevant cases.[380] The frequency with which parties utilize visuals in their agreements shows that the incorporation of visuals into contracts is a common and accepted practice. Given this, it is hard to see why offering visuals earlier—directly in the contract body, instead of as appendices—would present any issues at all. With that in mind, we turn to a few representative cases.

In *Blinderman Construction Co. v. United States*, the Court of Federal Claims evaluated several claims from a general contractor, Blinderman Construction Company (Blinderman), seeking damages from the U.S. Navy.[381] Blinderman had completed construction of a Naval training facility as part of a $10 million contract with the Navy.[382] During construction, the Navy rejected rebar column cages as not complying with a drawing (Drawing S–22) that was "made part of the contract specifications."[383] One count of Blinderman's suit sought

377. *See* Mitchell, *supra* note 11, at 840 n.74.

378. *Compare* Authors' search in WESTLAW, https://1.next.westlaw.com/ (search in search bar "adv: (contract OR agreement OR lease) /p ((diagram! OR draw! OR figure OR image) /s (illustr! OR depict!))," *with* Mitchell's search in WESTLAW, https://1.next.westlaw.com/ (search in search bar: "adv: diagram! /s (contract OR agreement) /s interpret!). Mitchell, *supra* note 11, at 840 n.74. After reviewing results in our initial search, we also ran a search that increased the required frequency of the terms: WESTLAW, https://1.next.westlaw.com/ (search in search bar "advanced: (ATLEAST5(contract) ATLEAST5(agreement) ATLEAST5(lease)) /p ((ATLEAST5(diagram!) ATLEAST5(draw!) ATLEAST5(figure) ATLEAST5(image)) /s (illustr! depict!)"). Even this search, which likely excludes some relevant cases, offers 873 results as of March 5, 2024.

379. We reviewed cases from this search starting on February 18, 2024. On February 18, the search returned 2,215 cases.

380. It has been five years since Mitchell ran his search. Could the additional cases we found be new cases that had not been published in 2019? No. Running Mitchell's search on March 5, 2024, reveals only 22 cases.

381. 39 Fed. Cl. 529, 533–34 (1997), *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998) (unpublished table decision).

382. *Id.*

383. *Id.* at 545–46.

damages for work it needed to do to modify the rebar to the Navy's satisfaction, with Blinderman claiming that the Navy's modifications went beyond the contract's specifications.[384] In deciding this count, the court found the drawing and the Navy's response to a Request For Information (RFI) dispositive:

> The parties' dispute over the rebar assembly method distills down easily into a simple question—whether the rebar specifications in Drawing S–22, as amplified by the Navy's RFI response, authorized plaintiff to employ the lapping method to assemble "B" and "C" bars into column cages at the ground floor level of the building. Therefore, we must construe Drawing S–22 and the Navy's RFI response to determine what was required of [Blinderman], a determination we address as a question of law.[385]

Following an in-depth discussion of Drawing S–22, the court describes the drawings using language that is surprisingly similar to what courts use when interpreting textual contract provisions:

> Plaintiff, in short, would have the court add to Drawing S–22 an arrow connecting the darkened circle in the pictorial legend over the VBLA diagram to one of the darkened circles in the TCBTA diagram, and this we are unwilling to do in the absence of any evidence suggesting that such a modification is proper. A far less strained interpretation of Drawing S–22 instructs that the typical method was intended to apply to "B" bars and "C" bars alike at the ground floor level, such that there was no need to darken some circles and leave others open in the TCBTA diagram.[386]

In continuing to evaluate Blinderman's claim, the court points again to Drawing S–22 and notes that, if the drawing were interpreted as Blinderman suggested it should be, then several columns would have no reinforcement, making them structurally unsound.[387] Then, the court turns to a common principle of contract interpretation to reject Blinderman's suggested interpretation: "[W]e are guided by the principle that an interpretation which renders portions of a contract meaningless is disfavored."[388] After further discussion of Drawing S–22, the court offers a final repudiation of Blinderman's argument that the contract contained an ambiguity: "From the foregoing discussion, it naturally follows that plaintiff has failed to prove that Drawing S–22 was tainted by latent ambiguity, which requires a finding that the contract 'is susceptible of two different and reasonable

384. *Id.* at 545.
385. *Id.* at 548.
386. *Id*. at 549.
387. *Id.*
388. *Id.* (citation omitted).

interpretations, each of which is found to be consistent with the contract language.'"[389] Here, far from rejecting visuals incorporated into a contract, the court relied heavily on them and adeptly applied standard principles of contract interpretation in a thorough evaluation of the relevant visuals.[390]

In *United States v. Ellicott*, the Supreme Court reviewed a U.S. Court of Claims case and gave great weight to a "drawing" (blueprint) of a barge incorporated by reference into a contract between the U.S. government and a manufacturer.[391] The contract stated that the barges should be completed, "in accordance with specifications contained in circular 310–C of the Isthmian Canal Commission, dated May 29th, 1906, with such modifications as are shown on drawing No. 2105."[392] The Supreme Court reversed the Court of Claims' and found for the manufacturing company because the visuals referenced in the just quoted section conflicted with the contract text, rendering the agreement "void for uncertainty."[393] Although it did not expressly state as much, the holding clearly demonstrated that the Court put the drawings on the same footing as the text of the contract: if the text controlled, then the Court would have simply ruled based on what the text stated and not found it void for uncertainty.[394] Looking to the date in this quote, this is obviously not a recent case, dealing with a cutting-edge trend; thus, visuals and contracts are clearly nothing new.[395]

In some situations, courts may expressly prefer visuals to text when an ambiguity arises between the text of an agreement and an incorporated visual.[396] For example, in a dispute over an easement, the Louisiana Court of Appeal in *Bernard v. Somme* cited to a string of prior cases describing the applicable law:

389. *Id.* at 550 (quoting Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993)).

390. *See id.* at 548–49.

391. 223 U.S. 524, 533–35 (1912).

392. *Id.* at 535.

393. *Id.* at 540–41.

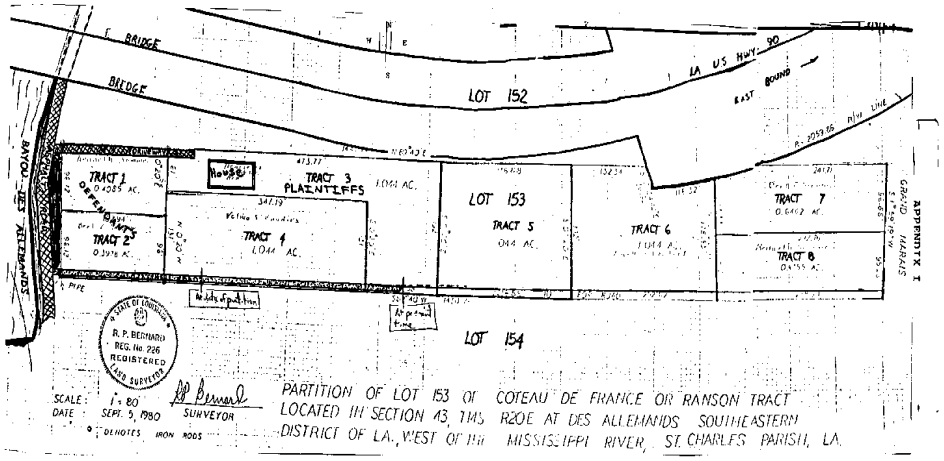
394. *See id.*

395. *See generally id.* (deciding the case in 1912).

396. *See* Bernard v. Somme, 501 So. 2d 893, 895 (La. Ct. App. 1987).

"When there is such a discrepancy between the document transferring title and the surveyor's plat referenced in the property description, the plat, which forms part of the description as if it were actually copied therein, controls."[397] The court then ruled in favor of the defendant based on its analysis of the surveyor's plat (below).[398]

Figure 8[399]



Plat referenced in Bernard v. Somme.

A Supreme Court of Louisiana case cited by the *Somme* court offered additional support for the use of visuals in legal documents:[400] "The annexing of

397. *Id.* (citing Werk v. Leland Univ., 99 So. 716 (La. 1924); Triangle Dev., Inc. v. Burns, 469 So. 2d 29 (La. Ct. App. 1985); Tate v. S. Cent. Bell Tel. Co., 386 So. 2d 139 (La. Ct. App. 1980); O'Reilly v. Poche, 162 So. 2d 787 (La. Ct. App. 1964)); *see also* Andermann v. Rouillier, 271 So. 3d 384, 406 (La. Ct. App. 2019) ("Louisiana law provides that when a discrepancy exists between the property description in the document transferring title and the surveyor's plat attached to or referenced in the conveyance, the plat controls." (citing *Bernard*, 501 So. 2d at 895; Barbera v. Midway Land Co., 453 So. 2d 645, 648 (La. Ct. App. 1984))).

398. *Bernard*, 501 So. 2d at 895; *see also Barbera*, 453 So. 2d at 648 ("Where there is a conflict between the map and the written description, the map controls." (citations omitted)).

399. *Bernard*, 501 So. 2d at 895.

400. Deeds are generally considered contracts, or at least contractual in nature, and under the "merger doctrine," contracts to sell land are merged into the deed. *See, e.g.*, 4 TIFFANY REAL PROPERTY § 981.05 (3d ed., Clark Boardman Callaghan, 2024) ("Under the 'merger doctrine,' when a deed is executed and accepted in performance of a prior preliminary contract, the deed, if unambiguous in its terms, and unaffected by fraud or mistake, must be looked to alone as the final agreement of the parties."); LORD, *supra* note 82, § 50:28; 26A C.J.S. *Deeds* § 3 (2024)

the map to the deed, and the reference to it in the description given in the deed, made the map as important a part of the description as if it had been actually copied in the deed."[401] Clearly, this is another example of a court approving the use of visuals.[402] And this is not a recent case decided amongst the growing visual contract movement taking place outside of the U.S.; rather this case, *Werk v. Leland University*, was decided in 1924.[403] Further, it relies on an 1834 case to support the assertion laid out above.[404] Again, court acceptance and reliance on visuals in contract interpretations is nothing new—it is a long-established practice.[405]

Still, not all courts give preference to visuals when a conflict with a contract's text arises. In *Jim Mahoney, Inc. v. Galokee Corp.*, the court stated, "[W]here there is a conflict between, or an inconsistency in, the provisions of a building contract and the provisions of the plans and specifications, the positive language of the contract should prevail."[406] In *Jim Mahoney*, the court did not actually evaluate the visual itself, but rather the text included in a schematic drawing.[407] The court found that where a discrepancy existed between the text of the contract and the text in a drawing, the text of the contract controlled.[408]

E. *Only Scratching the Surface of Courts Interpreting Visuals*

This Article has covered several instances where courts interpret visuals, but this is only a sample of what we found, and we suspect there are many other cases

("A deed is a written contract or in the nature of a contract. As otherwise stated, a deed is nothing more than a written, contractual agreement reflecting the parties' intent."); 26A C.J.S. *Deeds* § 222 (2024) ("Under the doctrine of merger, ordinarily, in the absence of fraud or mistake, when a contract to sell and convey real estate has been consummated by the execution and delivery of a deed, the preliminary contract is without further authority or legal consequence.").

401. Werk v. Leland Univ., 99 So. 716, 717 (La. 1924) (citations omitted).

402. *See id.*

403. *See id.*

404. *Id.* (citing Canal Bank v. Copeland, 6 La. 543 (1834)).

405. *See generally id.* (deciding the case in 1924).

406. 522 P.2d 428, 433 (Kan. 1974); *see also* Pickens v. Cunningham, 22 Pa. D. & C.3d 40, 43 (Pa. Ct. Com. Pl. 1981) ("At least as to other Jurisdictions than Pennsylvania, the general rule would appear to be that a contract prevails over the specifications or plans where there is a conflict.") (collecting cases); United Sur. Co. v. Summers, 72 A. 775, 782 (Md. App. Ct. 1909) ("It is a general rule of construction that, where words and figures are inconsistent, the words shall govern . . . ."). Some courts also expressly prefer words to numerals. *See, e.g.*, Duvall v. Clark, 158 S.W.2d 565, 567 (Tex. Civ. App. 1941) ("It is elementary that the written words of an instrument control and prevail over figures [numerals].").

407. *Jim Mahoney, Inc.*, 522 P.2d at 433.

408. *Id.*

that we did not discover. Further, we only considered a few of the categories where courts consider visuals. For example, courts also regularly interpret visuals in copyright, patent, and trademark cases.[409] A search in Westlaw for adv: diagram! /s (illustr! OR depict!)[410] pulls up nearly 5,000 cases,[411] and the Supreme Court recently evaluated Andy Warhol's Prince Series in a copyright case.[412] We will not delve into this intellectual property category of cases, but it is important to keep in mind that we have only touched on a few of the many instances where courts evaluate visuals.

F. *Courts Adding Their Own Visuals*

Some of the strongest support for the acceptance of visuals in U.S. courts comes from judges themselves, who sometimes create or use visuals to illustrate points in their opinions.[413] For example, in *Bonar, Inc. v. Schottland*, the court's opinion included the following diagram to illustrate the ownership hierarchy at issue.[414]

409. *See, e.g.*, Pfizer, Inc. v. Int'l Rectifier Corp., 545 F. Supp. 486, 522 (C.D. Cal. 1980), *aff'd*, 685 F.2d 357 (9th Cir. 1982) (discussing diagrams in a patent dispute); Enter. Mgmt. Ltd. v. Warrick, 717 F.3d 1112, 1119 (10th Cir. 2013) (analyzing visual in determining its copyrightability); Leigh v. Warner Bros. Inc., 212 F.3d 1210, 1216–17 (11th Cir. 2000) (analyzing a visual in a trademark dispute).

410. Hat tip to Jay A. Mitchell for the search. *See* Mitchell, *supra* note 11, at 841 n.74.

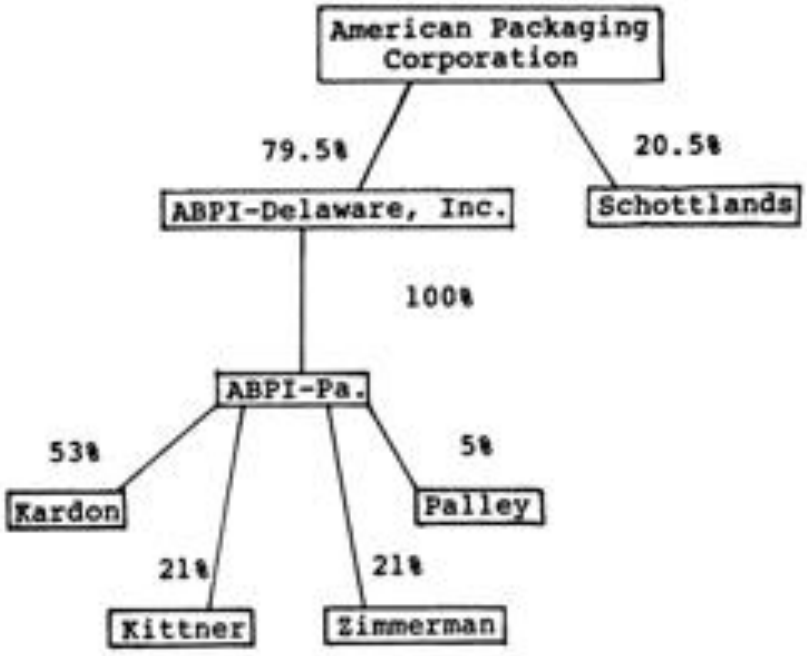
411. A Boolean search run on June 13, 2024, pulled up 4,773 cases.

412. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

413. Mitchell, *supra* note 11, at 841. Hat tip to Jay A. Mitchell for pointing this out!

414. 631 F. Supp. 990, 993 (E.D. Pa. 1986); *see also* Sampson v. Inv. Am., Inc., 754 F. Supp. 928, 930 (D. Mass. 1990) (showing a diagram that illustrates relationships between parties and the work they did).

Figure 9[415]



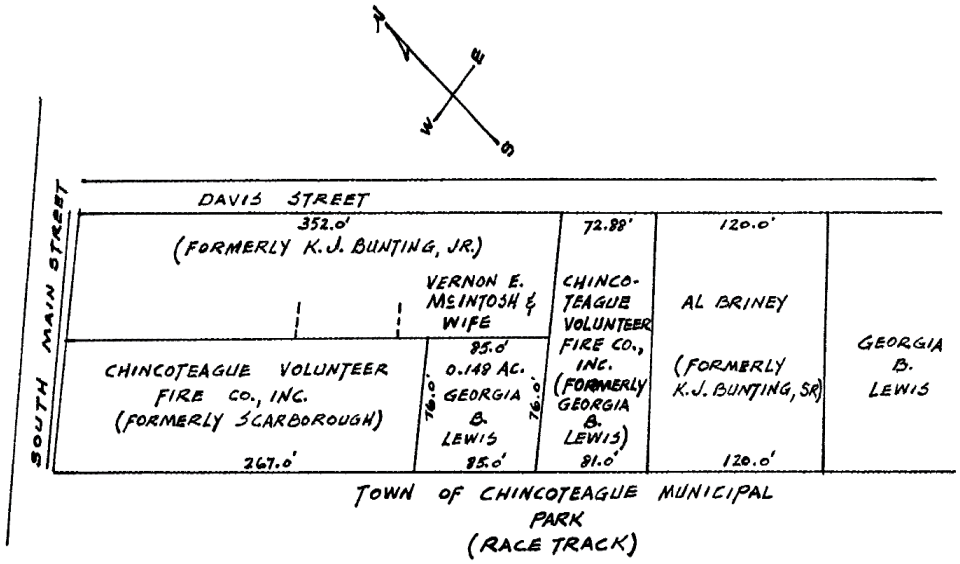
In *McIntosh v. Chincoteague Volunteer Fire Co.*, the court created a sketch to show the locations of properties relevant to an adverse possession dispute.[416] The court relied heavily on the sketch, simply referring the reader to it, without providing a written description of the relationship between the parcels.[417]

415. *Bonar*, 631 F. Supp. at 993.

416. 260 S.E.2d 457, 461 (Va. 1979).

417. *Id.*

Figure 10[418]



Judge Richard Posner went a step further. In *Sandifer v. United States Steel Corp.*, a case determining whether several items should be classified as gear or clothes,[419] Judge Posner had someone, likely a clerk, put on most of the items at issue.[420] He then included an image of the person wearing the items, introducing the image (below) in his opinion by writing, "since a picture is worth a thousand words, here is a photograph of a man modeling the clothes."[421]

418. *Id.*

419. 678 F.3d 590, 592 (7th Cir. 2012), *aff'd*, 571 U.S. 220 (2014). For an in-depth discussion of the case, including potential evidentiary issues, see Porter, *supra* note 273; Josh Blackman, *Judicial Fact Finding Run Amok: Judge Posner's Judicial Fashion Shows*, JOSH BLACKMAN: BLOG (Mar. 21, 2014), https://joshblackman.com/blog/2014/03/21/judicial-fact-finding-ron-amok-judge-posners-judicial-fashion-shows/ [https://perma.cc/2MJ6-E4ZH].

420. Blackman, *supra* note 419.

421. *Sandifer*, 678 F.3d at 592.

Figure 11 [422]

The case made it to the Supreme Court, where, during oral arguments, Justice Ruth Bader Ginsburg indicated she had viewed and been influenced by the image, stating, "[b]ut we're dealing with here, from the picture, that looks like clothes to me."[423]

Judges' use of visuals in their opinions supports our assertion that U.S. courts will gladly accept and interpret visual contracts. However, one judge takes a different view of visuals. Retired Judge Joyce J. George, who most recently served as a visiting judge in Ohio, writes that "[i]n drafting and preparing a decision or opinion, the use of illustrations, footnotes, appendices, headings, and titles should be kept to an absolute minimum. Authors should remember that it is desirable to have as few interruptions as possible in the progression of the main text itself."[424] Still, even Judge George goes on to admit that "it is sometimes more difficult to explain in words than by picture."[425] And Judge George never asserts that visuals are legally invalid—her issue stems from a preference for text so that readers do not need to pause to look at a visual.[426] So, in the end, Judge George has a similar

422. Blackman, *supra* note 419.

423. *See* Transcript of Oral Argument at 5, Sandifer v. U.S. Steel Corp., 571 U.S. 220 (2013) (No. 12-417).

424. JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 473 (5th ed. Williams Hein & Co., 2007).

425. *Id.* at 474.

426. *Id.* at 473–74.

viewpoint to the one we present here—visuals can provide value when used appropriately—but she tilts the scales toward text whenever feasible.[427]

G. *Recommendations Based on Existing Cases*

None of the cases discussed in this Part dealt with the type of visual contracts we advocate for in this Article, but all included examples of courts evaluating and interpreting visuals.[428] While the underlying law being applied will vary significantly between defamation and contract cases, the skills needed to evaluate visuals remain transferable. Consequently, if courts can evaluate visuals in defamation cases, they can also do so in visual contract cases; and, if they can evaluate visuals in contract cases, they can certainly render judgements on visual contracts. Beyond establishing that courts can and will evaluate visual contracts, these cases offer some potential insights for attorneys seeking to create visual contracts in the United States.[429]

We will start with the comic contracts subset of visual contracts and consider what the cases discussing cartoons in other instances reveal. While cartoons have the benefit of making contracts appear more approachable, they may be a riskier option for early visual contract creators in the United States. As several of the courts discussed above noted, the use of comics may imply informality, exaggeration, and humor.[430] This aligns with the traditional uses for comics: as sources of entertainment (*Calvin & Hobbes*, *The Simpsons*, *The Far Side*, and so on); political attacks (Thomas Nast being the most famous creator in this genre); and to convey fantastical stories (*X-Men*, *Spiderman*, *Batman*, and so many more).[431] One of the leading treatises on defamation agrees:

427. *Id.* at 473 ("Illustrations, footnotes, and appendices are justified only when they supply needed information that cannot be supplied as well in any other way.").

428. *See supra* Part VI.D.

429. *See supra* Parts VI.C, VI.D.

430. *See, e.g.*, Newman v. Delahunty, 681 A.2d 671, 682 (N.J. Super. Ct. Law Div. 1994), *aff'd*, 681 A.2d 659 (N.J. Super. Ct. App. Div. 1996) ("Generally cartoon and caricatures are so exaggerated in their comment that the reader cannot take it as being a true statement of fact."); Winter v. DC Comics, 69 P.3d 473, 479 (Cal. 2003) (describing the comic book illustrations as "humorous rather than serious commentary"); Keller v. Miami Herald Publ'g Co., 778 F.2d 711, 718 (11th Cir. 1985) ("Cartoons are seldom vehicles by which facts are reported; quite the contrary, they are deliberate departures from reality designed forcefully, and sometimes viciously, to express opinion."); King v. Globe Newspaper Co., 512 N.E.2d 241, 245 (Mass. 1987) ("[C]artoons are seldom designed to disclose facts, but rather are ordinarily understood . . . to be rhetorical, exaggerated means of expressing opinions.").

431. *See The History of Cartoons*, *supra* note 134.

> Since cartoons, unlike photographs, are almost always "false" in the limited sense that they intentionally distort and elaborate on reality, they do carry with them the inherent threat of libel litigation. The protection that cartoons receive, however, is extremely high, almost to the point of absolute immunity, not so much because they are incapable of being defamatory as that no reasonable reader will normally understand them as anything but hyperbole and opinion.[432]

At least one court has even quoted a portion of this statement positively indicating support and agreement with the assertion.[433] Given courts' statements and the traditional role of cartoons, it seems possible an aggrieved party to a comic contract may argue against its enforcement by saying they did not view it as a serious, legally binding document—the vulnerable and sometimes less educated parties that some comic contracts have been designed for may be in especially strong circumstances to make this argument. Still, these potential problems do not mean that cartoons cannot convey serious information, but contracts with comics will likely face additional scrutiny—at least until they gain broader acceptance. And, because courts evaluating comics often focus on the words used within the comics,[434] comic contracts will want to pay especially close attention to the words their characters speak and any other textual labels relied on.

Mark Giancaspro addresses another potential concern with comic contracts,

> the courts seek to establish the common intention of the parties by reference to what a reasonable person would have understood the terms of the agreement to mean. The parties' subjective interpretations are excluded from this assessment, whereas they are critical to the extraction of meaning from comic art. Accordingly, the concept of comic contracting requires a fusion of seemingly incompatible ideologies.[435]

One of the first creators of a comic contract, South Africa based attorney de Rooy (discussed above), may have recognized some of these issues and adjusted his comic illustrations to be more realistic:

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432. RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:33 (2d ed., Clark Boardman Callaghan, 2024) (collecting cases).

433. McWeeney v. Dulan, No. CA2003-03-036, 2004 WL 602306, at *3 (Ohio Ct. App. Mar. 29, 2004).

434. *See, e.g.*, *Newman*, 681 A.2d at 682 (discussing a defamatory comic, the court restates nearly all the comic at issue's text, indicating the court found the text important and informative).

435. Giancaspro, *supra* note 304, at 20.

> de Rooy and his team made exemplary use of business graphics-style artwork that is in no way "cartoony," and instead is dignified, respectful, and inclusive, which should improve the works' accessibility and comprehension within the target audience.[436]

So, while courts may enforce well-drafted comic contracts, cautious early visual contract adopters may prefer to mirror visual formats that are traditionally seen as conveying factual information—maps, diagrams, flowcharts, and so on.[437] By adopting one of these visual styles, attorneys can avoid the types of attacks courts have made on comics in other areas of the law.[438] However, it is important to maintain a balance. If the visuals become too technical or complex, then they will fail to provide the understandability and simplicity that make them advantageous.[439] Shell's visual contract did an excellent job of striking this balance by incorporating simple, yet clear images.[440]

Turning to another topic, Jay Mitchell mentions that some proponents of visuals recommend them as nonbinding, communicative aids to the contract formation process.[441] We advise against this approach. Visual contracts will have the most benefit if they are made part of the binding agreement. If they are not, the parties will be quick to discard them once it becomes to their advantage to do so.[442] An unreported case from the Fifth Circuit illustrates the issue, "[m]oreover, Claimant's reliance on the general depiction on the map for the boundary of the Wetlands claim zone is not justified because the map is explicitly 'for informational purposes only' and 'not an official designation.'"[443] Further, treating visuals as aids will undermine the work of those seeking to make them binding parts of legal documents. Finally, assuming courts will construe visuals merely as aids remains a risky approach: courts will bring in extrinsic evidence when the text

436. Murray, *supra* note 31, at 174.

437. *See supra* Part VI.D.2.

438. *See supra* Part VI.

439. *See* Moreno & Mayer, *Interactive Multimodal*, *supra* note 234, at 319 (discussing how complex animations and visuals can lead to a breakdown in processing information).

440. *See* Love, *supra* note 21.

441. Mitchell, *supra* note 11, at 832. Later Mitchell wonders whether visuals should be included in contracts, requiring the "same attention to precision and polish as given to the text." *Id.* at 855. We would argue that visuals should absolutely receive the same attention to detail as text. This is critical to their success. If they are done sloppily, they will likely increase confusion when disputes arise.

442. *See, e.g.*, Claimant Id 100299837 v. Expl. & Prod., Inc., 751 F. App'x 562, 563 (5th Cir. 2018) (per curiam).

443. *Id.*

of the contract is unclear.[444] This could certainly include visuals meant to clarify understanding. To summarize, drafting visuals with the assumption they will not be binding will lead to sloppy visuals at a time when they are new, and accuracy and clarity are most critical. *Blinderman Construction Co. v. United States*, illustrates how a well-done visual can decide a case.[445] The court held for the Navy in part because their drawing was "clear and unambiguous."[446] Drafting clearly will remain just as critical with visuals as it is with text.

The cases discussed above raise another issue: courts do not consistently prefer text or visuals, with some courts preferring visuals and others preferring text.[447] Given the inconsistencies in whether courts afford precedence to visuals over text, or vice versa parties should follow the example used in similar contractual situations and clearly state which controls.[448] For example, the U.S. Court of Claims held that where a conflict existed between the written specifications and the drawings, a clause indicating the specifications controlled was sufficient to eliminate the ambiguity and require adherence to the specifications.[449]

Finally, as touched on above, typography and layout decisions are still design choices that more cautious lawyers could begin by making.[450] On their own, "even basic document design, layout, and typographical considerations can yield substantial improvements in the accessibility and utility of legal documents."[451] Lawyers taking this approach must remember that while starting with typography and layout changes carries a lower risk, the cases covered in the typography discussion make clear that attorneys should take care even with these seemingly simple choices.[452]

444. *See, e.g.*, E & H Land, Ltd. v. Farmington City, 336 P.3d 1077, 1081–82 (Utah Ct. App. 2014) (considering extrinsic evidence because of a facial ambiguity in the contract caused, in part, by the contract's visual).

445. 39 Fed. Cl. 529 (1997).

446. *Id.* at 548.

447. *See supra* notes 431–47 and accompanying text.

448. *See* Stefania Passera & Helena Haapio, *Transforming Contracts from Legal Rules to User-Centered Communication Tools: A Human-Information Interaction Challenge*, COMMC'N DESIGN Q., April 2013, at 38, 44 ("An easy solution would be to assign priority, in case of inconsistencies, to the text of the agreement. This approach is already used when a contract in more than one language exists: the parties agree which language version prevails.").

449. Franchi Constr. Co. v. United States, 609 F.2d 984, 989–90 (Ct. Cl. 1979).

450. *See supra* Part II.A.

451. Mitchell, *supra* note 11, at 859.

452. *See supra* Part VI.B.

VII. CREATING VISUAL CONTRACTS

The written word has long made up the vast majority of contracts in the United States. This history has created a strong library of precedent documents and premade forms, giving attorneys a wealth of information to pull from when drafting text-based contracts.[453] Visual contracts lack a comparable set of ready-made images to pull from.[454] Consequently, inertia is against a transition to visually rich agreements, and initial change will not come easily.[455] However, early adopters have an opportunity to become dominant in an almost untapped market, and, with the right approach, the initial costs may not be as high as some would expect.

A. *Division of labor*

Creating visual contracts involves more than finding, copying and pasting a random image alongside a contract's text. Just as language must be crafted with care, so too must visual elements. Visual contracting companies have this expertise.[456] However, while these firms are gaining traction, they operate primarily outside the United States and may lack the infrastructure to support rapid and wide-scale adoption, especially in the United States.[457] Further, many law firms will not want to cede the potentially lucrative opportunity to bill the creation of visuals to an outside group. So, while existing visual-specialist businesses can help shoulder some of the load and provide training on current best practices, much innovation will likely come from within law firms and in-house attorneys.[458] This Part details our vision for how firms can evolve to add visual contracts to their list of services.

453. *See* Mitchell, *supra* note 11, at 826 n.23.

454. The World CC Foundation has started a library of visual contract clauses, but its breadth does not come close to what is available in the text world, and there are no examples from the United States as of this writing. *See Contract Design Pattern Library: Explore the Library*, *supra* note 43.

455. *See* Richard Stillerman, *Resistance to Change*, 48 J. PAT. OFF. SOC'Y 484, 485 (1966).

456. *E.g.*, *Making Legal Content Understandable*, VISUAL CONTS., https://visualcontracts.eu/ [https://perma.cc/T26E-F7KY].

457. *E.g.*, *id.* (headquarters in the Netherlands); *Home*, VISUAL LEGALS, https://www.visuallegals.com/ [https://perma.cc/Y3A2-KBQA] (headquarters in the United Kingdom).

458. Of course, in some cases U.S. firms may find a good fit with the people they consult with and opt to utilize their services rather than build out their own. The next Part assumes that has not happened.

1. *Start with an Expert*

Early adopters in the United States should begin their process by consulting with an expert. As visual contracts have not yet taken hold in the United States, attorneys may need to turn to European companies for insights into best practices.[459] Despite differences in legal systems, non-U.S. visual contract companies can offer U.S. law firms basic principles and best practices, picked up through their experience.[460] Firms can then modify these practices to the legal environment of the United States. For global law firms, U.S.-based practice groups may discover that this foundational expertise exists within their firms already, and getting started simply means connecting with colleagues in a different office. Once U.S. firms understand how visuals are designed for contracts outside the United States, they can turn to developing their own best practices.

2. *New Law Firm Roles for Designers*

Although some design principles have recently made their way into a few law school curriculums,[461] law schools tend to train lawyers primarily in the interpretation and expression of words. While legal research and writing courses may include some basic discussions of typography—just enough to comply with court rules—graphics and how best to convey meaning visually will rarely, if ever, come up.[462] So, unless lawyers have prior design experience or training, they lack the skills needed to create effective visuals and may "doubt both their drawing

459. *E.g.*, *Making Legal Content Understandable*, *supra* note 456.

460. *See Our Approach*, VISUAL CONTS., https://visualcontracts.eu/our-approach/ [https://perma.cc/8W76-PLPY] (discussing the anatomy and design process of a visual contract, which are relevant considerations in any jurisdiction).

461. *See, e.g.*, *Legal Design Clinic*, BYU L., https://law.byu.edu/explore/resources/centers-clinics/legal-design-clinic [https://perma.cc/6XZ3-XLNT] (offering a legal design clinic); *Legal Innovation Through Design Thinking*, HARV. L. SCH., https://hls.harvard.edu/courses/legal-innovation-through-design-thinking-3/ [https://perma.cc/GJK2-H8AN] (offering a course where students use design principles to address a challenge); *Legal Design Lab*, STANFORD L. SCH., https://law.stanford.edu/legal-design-lab/ [https://perma.cc/3CLS-2SPQ] (offering a legal design lab); *Course Details: Presentation Design & Visual Storytelling*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/academics/curricular-offerings/coursecatalog/details/?courseid=1820 [https://perma.cc/AZ88-GNZS] (offering a course where students use visuals to convey ideas to others).

462. *See, e.g.*, *Course Descriptions K-L*, DRAKE UNIV. L. SCH. (2025), https://www.drake.edu/law/students/academics/courses/k-l/ [https://perma.cc/U47D-XW9J] (describing legal research and legal writing programs offered with no mention of graphics or use of visuals).

skills and technical abilities" with software used for creating visuals.[463] Further, most attorneys rely heavily on word processing software, like Microsoft Word, for their drafting tasks.[464] Because the capacity of these word-processing tools to create visuals remains limited, even if attorneys want to become more adept at making visuals, they would need to learn not only design principles, but also a new set of design focused software, like Adobe's Creative Cloud suite.[465]

Thankfully, there is a large pool of designers with extensive experience who understand how to create visuals that can convey meaning and who have expertise in utilizing the design tools needed.[466] Law firms should lean on these experts who, while untrained in the law, possess the skills needed to create contract visuals if attorneys provide instructions.[467] Ultimately, incorporating visuals directly into contracts will produce the most clarity and make comprehension easiest—no need to flip back and forth between a visual exhibit and the text of the contract.[468] However, initial adopters may find it more expedient to add visuals as exhibits and reference them in the text of the contract, i.e., "the operation of this Section 6.8 is illustrated in the document attached as Exhibit D."[469] For some firms, adding designers will mean hiring new employees or developing relationships with the many excellent freelance designers open to new projects. Other firms will discover

463. Mitchell, *supra* note 11, at 827.

464. *See id.* at 856.

465. *See id.* at 827 (discussing the limitations of common software applications when it comes to graphic design).

466. *See generally* Matt Moran, *Graphic Design Statistics (How Many Graphic Designers Are There?)*, COLORLIB (Jan. 15, 2025), https://colorlib.com/wp/graphic-design-statistics/ [https://perma.cc/A4QP-RFWM] (noting there are 265,000 graphic designers employed in the United States).

467. The USPTO recently recognized the value designers can add by creating a new design patent practitioner bar that requires a design degree. *See* Dani Kass, *New Design Patent Bar Aims to Even the Playing Field*, LAW360 (Nov. 15, 2023), https://www.law360.com/articles/1767258/new-design-patent-bar-aims-to-even-the-playing-field. As this Article notes, the new rule is a bit confusing as it still allows practitioners without design degrees to prosecute design patents. *Id.*

468. Mitchell, *supra* note 11, at 856. Mitchell goes on to point out that exhibits have the advantage of allowing "businesspeople to . . . go straight to the exhibit without having to search in the text." *Id.* We believe that the focus should be on the contract's clarity and that finding visuals within the text is not overly burdensome; in fact, it is beneficial because it will reduce the chances people miss related text. Plus, images stand out from the text, so it should be easy to quickly spot them.

469. *Id.* (internal quotation marks omitted). Mitchell suggests using PowerPoint for visuals, but we recommend utilizing more advanced tools that visual designers will already have expertise in, like InDesign. *See id.*

that their existing branding and marketing teams have the requisite skills and familiarity needed to step in and create visuals for contracts.

In addition to being better able to convey meaning graphically, relying on designers will have several other benefits. Designers tend to command smaller salaries than attorneys, allowing firms to reduce the cost of their services, increase their profits, or both.[470] Further, because most lawyers do not have visual expertise, by not receiving additional training they will remain able to objectively evaluate the work of the designers they supervise. If a lawyer with no design background can understand a graphic, then the people tasked with implementing it (the contracting parties) will also be more likely be able to comprehend.

What should firms look for when hiring designers? Designers often specialize in specific disciplines.[471] Typographers craft fonts and make written works readable and attractive.[472] Illustrators have a variety of specialties from creating technical drawings to illustrations for children's books. UI designers seek to improve the appearance of online and digital platforms.[473] UX designers test and help develop a variety of interfaces, often with a focus on digital ones.[474] Design thinkers provide a framework for creating almost anything.[475] Of course, many designers have skills across multiple disciplines. Some designers are true generalists, versed in a range of disciplines, but even specialists will have knowledge of other fields—a UI designer will usually have a strong understanding of typographic rules.[476] So the type of designer firms should work with will likely vary depending on the type of contract the firm specializes in and the size of the firm's visual contracting practice. In business-to-business scenarios, a technical illustrator may prove best, while firms with a business-to-consumer bend may

470. *See generally* Moran, *supra* note 466 (providing various Bureau of Labor Statistics data, including the average salary of a designer in the United States being approximately $52,866/year).

471. *See Types of Graphic Design*, BERKELEY COLL. (Sept. 8, 2021), https://berkeleycollege.edu/berkeley-today/2021/09/the-8-types-of-graphic-design.html [https://perma.cc/MWP4-VY88] (listing specialized fields students will be exposed to while seeking a graphic design degree).

472. BUTTERICK, *supra* note 18.

473. ThoughtForm, *Design Disciplines: What's the Difference?*, MEDIUM (June 19, 2018), https://medium.com/@ThoughtFormInc/design-disciplines-whats-the-difference-75d7bd539914 [https://perma.cc/B56X-78HF].

474. *Id.*

475. *See id.*

476. *See* Gabriel Pana, *The Role of Typography in UI Design*, UINKITS (Dec. 3, 2024), https://www.uinkits.com/blog-post/the-role-of-typography-in-ui-design [https://perma.cc/2CWB-R9G5].

prefer a more approachable look and turn to illustrators able to produce that type of work.[477] Firms with smaller practices may seek designers with a range of skills so that the designers can work on more than just creating visuals for contracts.

How will the roles of lawyers change if designers have a role in contract drafting? The biggest change lawyers will see is a reduction in time spent drafting contracts. When visuals replace a portion of the text, lawyers will not need to write that portion or find a form that appropriately covers it. However, lawyers will need to take on the new role of supervising the designers, who will likely have very little legal experience. Aside from these changes, transactional lawyers' days should look similar to how they do now. Their involvement in contract negotiations will remain unchanged. They will still need to explain relevant laws and contract provisions to their clients, and so on.

Once firms begin to hire designers, they may find that designers can do more than produce graphics for contracts. They can also improve the typography of contracts (which, as we discussed above, may have an impact similar to the addition of images),[478] court filings, and so on. Firms with designers on staff can set up new workflows where attorneys draft legal documents, then designers work to improve the appearance and readability of the documents.

User testing is another design discipline that may help create more readily understandable contracts.[479] Generally, user testing involves showing a prototype to a neutral group of testers.[480] Designers, observe the testers interacting with the prototype and ask questions to determine if it works as intended.[481] Contract creators could share a draft of a visual contract with a group of testers and confirm whether the contract conveys the intended meaning. While this likely will not make sense in business to business (B2B) contracts, it almost certainly would in business to consumer (B2C) contracts. One can imagine multiple scenarios in which businesses could utilize user testing data to demonstrate the effectiveness of contractual provisions if litigation arises and plaintiff consumers argue for an unreasonable interpretation of the contract.

Still, it will not necessarily be smooth sailing initially. It will take time for lawyers and designers to become adept at communicating with each other. Further,

477. Tony's Chocolonely, discussed above, offers an example of this approach. *See* sources cited *supra* notes 64–65 and accompanying text.

478. *See* Ensor et al., *supra* note 33.

479. *See* Kate Moran, *Usability (User) Testing 101*, NIELSEN NORMAN GRP. (Dec. 1, 2019), https://www.nngroup.com/articles/usability-testing-101/ [https://perma.cc/UJG8-PK4D].

480. *See id.*

481. *See id.*

designers with no legal background will likely require some basic training to get up to speed. However, in the long term, firms investing in designers should see an excellent return.

3. *Deciding When to Use Visuals*

As Mitchell writes, "the point here is not that all contracts should have visuals, but that visuals are a powerful tool for dealing with contracts and can help lawyers do a better job of creating products for their clients."[482] When deciding where visuals will improve clarity, attorneys should start by identifying the clauses and concepts that most frequently lead to litigation. Litigation often stems from a misunderstanding between the parties; identifying frequent areas of confusion can provide possible starting points for where the improved clarity visuals offer can assist. Attorneys should also pinpoint areas they struggle with the most when drafting contracts. Could an image or a series of images convey the information better and with less attorney effort? Certain concepts are far easier to convey with an image than through text. Attorneys will need to think through and identify where these concepts exist. Early adopters should also consider where deals fall apart because parties struggle to understand each other and explore if visuals can help. Attorneys should also spend time with the designers charged with implementing the visuals, explain common contractual clauses to them, and ask for their advice on whether they could create a visual to increase clarity. As non-lawyers, designers will bring a fresh perspective, unclouded by past experiences doing what has always been done, and, at the very least, designers will offer suggestions to improve layout and typography.

Another area to consider: the type of relationship between the contracting parties. Mitchell argues that visual contracts will only make sense for long-term relationships because their costs will align with their benefits in those scenarios.[483] We disagree. Where visuals do make sense, their implementation will be worthwhile, regardless of whether the parties are in a long or short-term relationship. First, by utilizing designers to create the visuals, firms will take advantage of salary-cost savings.[484] Once a visual is created, it can be reused, just as contractual clauses are; attorneys tend to specialize, so while they may only

482. Mitchell, *supra* note 11, at 861.

483. *See id.* at 844–45.

484. *See id.* at 827 (discussing the doubt lawyers possess regarding their drawing skills and the limited graphic capabilities of lawyers' current software applications); Marta Andhov, *Say It with a Picture: Overcoming Legalese in Public Procurement Contracts*, THE CONVERSATION (Jan. 15, 2025, 5:59 PM), https://theconversation.com/say-it-with-a-picture-overcoming-legalese-in-public-procurement-contracts-244924 [https://perma.cc/D2HX-XQEM] (suggesting implementing visuals in contracts can reduce long-term costs).

draft one agreement for some clients, they will almost certainly draft very similar agreements for other clients, making the investment in visuals quick to pay off. Finally, it is hard to imagine a scenario where expending a little more time at the start of a relationship to reduce the chances of a dispute and the concomitant costly litigation will not ultimately make more business sense.[485]

4. *Consider Retaining Text Early On*

While the cases discussed above indicate that courts will find visual contracts to be legally binding documents, early adopters could play it safe by adding corresponding text for each visual element. Those that take this approach should include a clause indicating that visuals should control, but if a court finds any visuals invalid or unclear, then the corresponding text should apply. Judge George, introduced above, would disagree with this approach, arguing that any image lawyers use should stand on its own without need for text.[486] Once visual contracts become more common, it will be hard to argue with Judge George, but in the initial stages, a more cautious approach may be advisable.[487]

Creating text and visuals will require additional upfront investment—drafters will need to create both text and visuals. However, as we detail below, law firms that adopt visual contracts early are likely to gain a valuable competitive advantage, which will hopefully justify the cost of the back-up text.[488] The addition of supplementary text could also help convince reticent clients.

5. *Accompany Visuals with Clear Keys*

Over time language has developed rules that govern meaning.[489] Courts have fine-tuned these rules in a wide range of legal scenarios.[490] Since visuals lack this history, early on visual contract drafters must make sure to provide a key for anything that could potentially be misconstrued, similar to the definitions sections used in text-only contracts. For example, there is a U.S. Court of Claims case,

485. *See* Andhov, *supra* note 484.

486. GEORGE, *supra* note 424, at 474 ("Once the author has chosen to use an illustration, ideally the information communicated by the illustration should not be repeated in words.").

487. *See id.*

488. *See supra* Part VII.A.6.

489. *Evolution of Language*, NAT'L GEOGRAPHIC https://education.nationalgeographic.org/resource/resource-library-evolution-language/ [https://perma.cc/M483-YFL3].

490. *See, e.g.*, Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (interpreting what "chicken" means in a contract); Yates v. United States, 574 U.S. 528, 536 (2015) (interpreting the meaning of "tangible object" in a criminal statute).

centered on a diagram of Dulles International Airport and whether a contractor needed to remove and replace concrete either in areas the covered by hatch marks or the entire area enclosed by hatch marks.[491] Ultimately, the court ruled against the contractor who argued that they only needed to remove and replace the area covered by the hatch marks, not the area they enclosed.[492] In reaching this conclusion, the court pointed to common practices in the construction field.[493] Despite over two decades of experience, the contractor lacked knowledge of this practice and assumed only the areas covered by hatch marks needed to be removed and replaced.[494] Had the diagram included a key defining what the hatch marks meant, the parties could have avoided this issue.[495] Visual contract creators should do their best to prevent this sort of issue by defining anything that could be ambiguous. In time, rules of interpretation may negate the need for this but early on keys will increase clarity.

6. *First Adopters May Be Formbook Creators*

Mitchell astutely points out that, "[c]orporate lawyers need models, and they need tools."[496] This observation indicates an opportunity. Instead of creating visuals in contracts between actual parties, formbook editors could work with designers to go through their existing formbooks and come up with visuals where they make the templated agreements more comprehensible. The first formbooks to incorporate visuals will have a monopoly on this new market, and, while the monopoly may not last long, the value of establishing a publication as the first provides the potential for more lasting value. From attorney's perspective, having something published to point to will make it easier to convince clients of the value-add visuals provide. What's more, the existence of formbooks would reduce the entry costs for parties seeking to pioneer the first visual contracts in the United States. As mentioned previously, the World CC Foundation has created a "library" of existing visual contracts.[497] The current library has helpful examples but serves more as a source of inspiration than an easily replicable source for attorneys interested in visual contracts.[498] Further, from the U.S. law perspective, none of the example contracts are explicitly based on U.S. law.[499] So, publishers have

491. Alfred A. Altimont, Inc. v. United States, 579 F.2d 622, 624 (Ct. Cl. 1978).
492. *Id.* at 625.
493. *Id.*
494. *Id.* at 624.
495. *See id.*
496. Mitchell, *supra* note 11, at 855.
497. *Contract Design Pattern Library: Explore the Library*, *supra* note 43.
498. *See id.*
499. *See id.*

nothing to fear from the library—a U.S.-based visual contracts formbook would still be the first of its kind—but publishers may find helpful inspiration in the library. Formbooks that add visuals will also need to adjust from their current formats. For example, instead of allowing users to export templates to Word, publishers will need to facilitate exports to Adobe Illustrator, InDesign, and other design-focused products.

7. *Visual Contracts Curriculums and the Role of Law Schools*

A few law schools have started offering visual training to their students.[500] For innovative law schools seeking to incorporate design disciplines, we recommend a survey approach. Law students' education should still focus on the law. It is unlikely that a law school graduate will be able to match a well-trained visual designer, so, rather than trying to churn out dual role lawyer-designers, law schools should strive to mold visually literate lawyers.[501] These visually adept attorneys will have a common language with designers, making collaboration easier. Attorneys with basic visual skills will also be able to better evaluate the work designers produce.

VIII. POTENTIAL PROBLEMS

We have already hit on a few potential issues and solutions in our discussions of existing cases and how to divide labor when creating visual contracts. To summarize those findings:

a. Cartoon contracts present additional issues not present in other visual contract scenarios because, outside the contract context, they are often used in nonserious works.[502] So, while cartoons can reduce stress and fear for people unfamiliar with contract law, parties seeking enforcement may face additional hurdles when litigating cases.[503] Cautious lawyers should avoid cartoon contracts or utilize only illustrations that have a

500. *See, e.g.*, *Law and Visual Culture*, STANFORD L. SCH., https://law.stanford.edu/courses/law-and-visual-culture/ [https://perma.cc/5B7H-FZEJ] (referring to Stanford's course catalog); *About Visual Law Project*, YALE L. SCH., https://law.yale.edu/isp/initiatives/about-visual-law-project [https://perma.cc/X8NH-35RL].

501. *See generally Undergraduate Majors of Applicants to ABA-Approved Law Schools*, LSAC, https://www.yu.edu/sites/default/files/inline-files/applicants-by-major-2018-19%20%283%29.pdf [https://perma.cc/5LVS-PL7F] (stating that only 0.14 percent of law school applicants majored in art/design).

502. *See supra* Part VI.G.

503. *See supra* Part VI.G.

formal style appropriate for the gravity of the agreement they memorialize.[504]

b. Most contracts will include both text and visuals.[505] Regardless of whether the text and visuals are meant to supplement each other or exist separately, issues may occur when one or both are ambiguous.[506] To reduce potential problems, drafters should expressly add clauses stating whether text or visuals control in the case of a conflict.[507]

c. When lawyers use graphics in contracts for the first time, they do so with a higher risk that interpreting courts will not construe the graphics as intended.[508] To reduce the risk, early adopters could include fallback text provisions for the most important visual elements. As courts interpret and become familiar with visuals, the need for these will gradually dissipate.[509]

Now, we will examine a few additional issues and potential solutions. To start, while trials seem less likely when contracts use clear visuals, those that do occur could be more complex, requiring visual experts and an additional set of tools to evaluate agreements—i.e., visual and textual interpretation tools. We do not have a solution for this but do believe that with time, familiarity with visual contracts will grow and the need for experts will drop. Further, the risk of a more complex trial is outweighed by the reduced risk of a trial taking place to begin with.[510]

Relatedly, people may argue that we have a long history of case law demonstrating how words are interpreted, making them a more reliable option than visuals.[511] Setting aside the reality—we have an even longer history interpreting visuals[512]—the rewards still outweigh the risks. The first law firms to produce visual contracts will have a competitive advantage, while clients who use them stand to reduce litigation risks and increase chances of enforcement against parties that may struggle to comprehend the dense text dominating most current

504. *See supra* Part VI.G.
505. *See supra* Part VII.A.4.
506. *See supra* Part VI.G.
507. *See supra* Part VI.G.
508. *See supra* Part VI.G.
509. *See supra* Part VII.A.
510. *See supra* Part VII.A.
511. *See* Mitchell, *supra* note 11, at 826.
512. *See* VAN DE MIEROOP, *supra* note 91.

contracts.[513] Some will still argue that words are more precise. Clearly, they are in some instances. We are not suggesting lawyers replace all text with visuals, we are only suggesting the use of visuals where it will make agreements easier to understand.

We have discussed de Rooy's comic contracts previously. Here we discuss another issue surfaced by his detailed contracts.[514] While de Rooy's illustrated agreements are well-tailored to their tasks, the large number of complex illustrations and their interconnected nature mean changes to the contract will be time consuming.[515] Since de Rooy's contracts are designed for a situation with one dominant party, changes due to negotiations are unlikely.[516] However, situations involving negotiations will require modifications. So, formbooks and law firms creating bespoke visual contracts should consider ways to make their visuals flexible and readily editable. Reducing the interdependence of the visuals is one option. Using a design system with components that designers can easily swap in and out is another. In instances where the parties know their visual contract will make changes challenging, designers should keep the visuals at a low fidelity (limiting the time they spend on them) until the parties complete negotiations. Once negotiations conclude, designers can polish and finalize their visuals. Formbooks should also consider adapting their format to make changes easier. For example, if contract drafters could drag and drop different images, resize images, and so on, all within a formbook's interface, then designers and attorneys could more readily adapt agreements to their needs.

Mitchell points to another potential issue with visuals—how databases handle them.[517] Mitchell found that Westlaw and Lexis only sometimes include visuals in their reproduction of judicial opinions.[518] Clearly, this is a potential issue. If courts rely on visuals but databases do not reproduce them, fully comprehending the opinions will require significantly more effort—readers may need to find a way to access the original filings, which could be both costly and time consuming.

This leads to another issue that Professor Ross Davies touches on in a discussion of the Supreme Court's use of images: how legal databases reproduce

513. *See supra* Part VII.

514. *See supra* Part II.B, VI.G.

515. Murray, *supra* note 31, at 175 ("Unfortunately, these contracts are for all practical purposes non-negotiable because of the enormous investment in their creation.").

516. *See id.* at 149 (improving accessibility of contracts to agricultural workers is de Rooy's goal where these workers may not be as knowledgeable about business activities compared to their employer).

517. Mitchell, *supra* note 11, at 827–28.

518. *Id.* at 327 n.24.

images.[519] In reviewing Supreme Court opinions with images, Davies found that the U.S. Reports (under the direction of the Chief Justice and published by the Government Printing Office) sometimes include large, foldout, full color images, while the more profit-motivated Supreme Court Reporter reproduces the same images in black and white, downsized to fit the standard reporter page.[520]

Comparing some of the images in Westlaw, with those in the U.S. Reports indicates that reproducing the image alone is not always enough to convey its meaning.[521] In some cases, a certain level of fidelity is needed, or the images cannot convey the intended meaning. In these cases, when Westlaw fails to provide a high-resolution image, future readers will be unable to decipher the image and grasp its meaning.[522] For example, compare the color map featured in the reporter version of *United States v. Interstate Commerce Commission*,[523] with the one reproduced on Westlaw. From the images below, you can see that the Westlaw image has a few issues. Westlaw decided to chop it up into multiple pieces (below is just one section), making it much harder to read than the unbroken sheet provided in the print reporter.[524] The Westlaw edition also lacks the resolution needed to read all the words on the map—it is hard to tell from the reporter image below, but the full-size print version of the map shows several terms that are illegible in Westlaw's reproduction.[525] Westlaw's elimination of color presents an even bigger issue in this instance. The print map uses color to delineate different areas and railroads.[526] Not only do these essentially disappear in Westlaw's black and white version, but in some areas, the text overlaid on a colored background becomes unreadable.[527] Westlaw reproduces the Supreme Court Reporter version in PDF, which has a higher resolution but, because it is black and white, also remains difficult to

519. Ross E. Davies, *Marshall's Maps, the* U.S. Reports*, and the New Judicial Restraint*, 15 GREEN BAG 445, 451–52 (2012).

520. *Id.* at 450–52.

521. *See id.* at 449 (citing Stephen Breyer, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (Vintage 2011)) (including an appendix with color photographs and paintings so the reader can "recognize that behind each of the famous cases . . . there are real issues that have confronted real people")

522. *See, e.g.*, United States v. Interstate Com. Comm'n, 396 U.S. 491, 530 (1970).

523. *Id.* at 530 app A. The images on Westlaw include only black and white, piece-meal portions of the photograph, while the United States Reporter includes a full image in color.

524. *See id.*

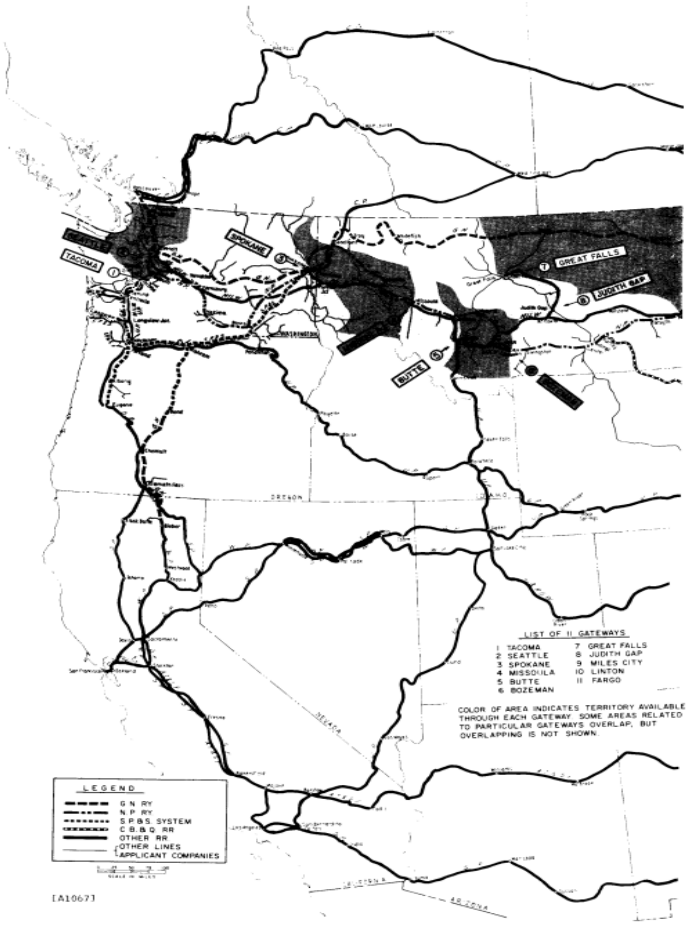
525. *See id.*

526. *See id.*

527. *See id.*

decipher.[528] Bad as Westlaw's attempt is, Lexis does worse, completely excluding the image.[529]

Figure 12: Westlaw Version of Map[530]

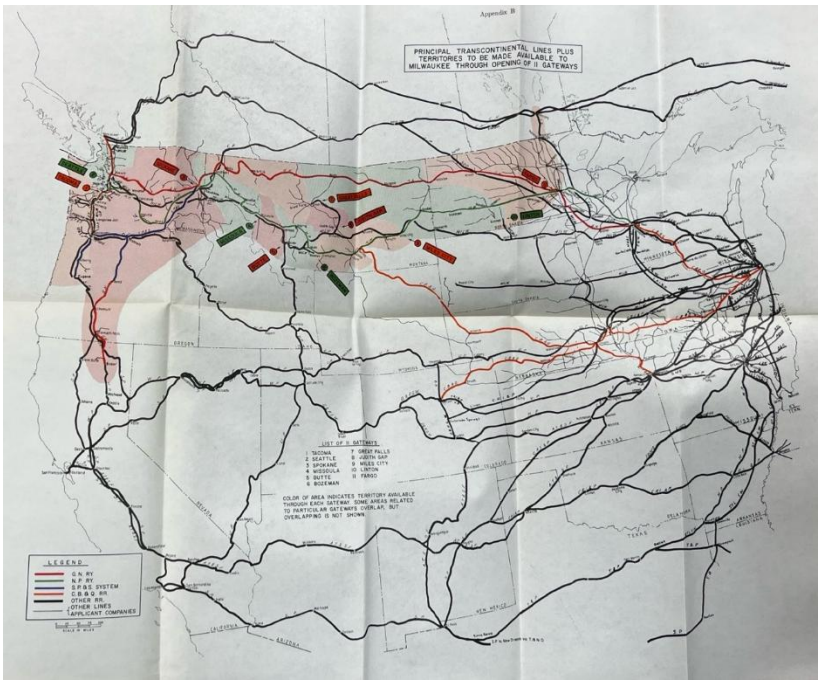


528. Color may become less of a problem. Davies points to a possible Supreme Court trend away from full color visuals, but the analysis concluded with 2008's slip opinions so it is not clear if this is in fact a trend and, if it is, how long it will last. Davies, *supra* note 519.

529. *Interstate Com. Comm'n*, 396 U.S. 491.

530. *Id.* at 530 app. A.

Figure 13: Image from Reporter[531]



Davies points out that the difference in treatment between the print reporters comes down to cost: glossy, full-color foldout images are much more expensive to produce than standard sized black and white ones.[532] Thankfully, the costs of providing full color images in digital formats is negligible.[533] Since cost should not hold online databases back, the main obstacle will likely be changing their current practices by adding measures to incorporate high quality digital images.[534] Westlaw appears to have already begun doing this, at least in some instances. In the previously discussed *Sandifer v. United Steel Corp.*,[535] the print reporter

531. *Id.*

532. *Id.*

533. Admittedly, scanning in images will add some cost in the form of employee time.

534. *See* Porter, *supra* note 273, at 1718 (discussing databases' practices of removing images given no pressing demand for databases to take extra steps to incorporate images from court documents).

535. 678 F.3d 590, 593 (7th Cir. 2012). For an in-depth discussion of the case, including potential evidentiary issues, see generally Porter, *supra* note 273.

includes a black and white image, while the digital version uses the full color image included in the previous Part of this Article.

A related integration that databases have yet to make but should strongly consider is adding an option to search images,[536] or, at least, filter results to cases containing images. If the visual contract movement begins to take off in the United States, having ready access to any litigated images will be invaluable to attorneys.

IX. IN FAVOR OF VISUAL CONTRACTS

We have previously covered several advantages of visual contracts and others have discussed them at length.[537] In this Part, we will look a little longer at some items we have already mentioned and discuss a few that we have not seen others evaluate.

A. *Visual Contracts Will Cost Less to Produce*

While there will certainly be exceptions, in most instances, graphic designers command lower hourly rates than attorneys.[538] As discussed above, we recommend that lawyers oversee the drafting of visual elements but that graphic designers actually draft the visuals.[539] This brings us to an area where we disagree with Mitchell. He asserts that visual contracts will increase the cost of drafting contracts.[540] Mitchell points out that forms and precedent documents are huge time savers and resources that drafters of visual contracts will not have.[541] Although initially that may be true initially, in the long run, visual contracts will be cheaper to produce for several reasons. First, Mitchell does not consider using designers instead of lawyers to create visual elements and the savings designers' lower rates will bring. Of course, hiring and training designers and providing lawyers the time needed to get up to speed on visual contracts will require an initial investment. Until this investment is recouped, visual contracts will cost more than standard

536. Porter, *supra* note 273, at 1691.

537. *See supra* Parts VI.G, VII; Mitchell, *supra* note 11.

538. Using May 2023 data, the mean hourly rate for graphic designers in the United States was $31.11, and $84.84 for lawyers. *Occupational Employment and Wage Statistics: National Estimates for Graphic Designers*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/current/oes271024.htm [https://perma.cc/UX4N-Q2NZ] (Apr. 3, 2024); *Occupational Employment and Wage Statistics: National Estimates for Lawyers*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/current/oes231011.htm [https://perma.cc/7CZP-F9VF] (Apr. 3, 2024).

539. *See supra* Part VII.A.2.

540. Mitchell, *supra* note 11, at 827 ("Deals are done under meaningful time pressure; adding visual executions to documents would add time and cost.").

541. *Id.* at 826.

contracts. But, over time, utilizing graphic designers should reduce the hours that lawyers need to spend creating new contract provisions. At that point the lower salaries and hourly rates that designers command should cause the cost of creating new contract provisions to drop. As firms create visuals, they will build precedent visual libraries. Further, while there are few examples of visuals used in contracts right now, designers already have access to a wealth of premade visuals through stock libraries.[542] Additionally, in some instances, detailed diagrams of the item (building, product, etc.) at the center of the contract will exist prior to the contract's formation. Leveraging these existing visuals more will allow for further cost savings—contract drafts can modify or simply insert these existing representations, obviating the need to create new visuals. Finally, creating appropriate visuals will save time compared to drafting convoluted descriptions.[543] For example, recall the IKEA instructions example provided in the introduction and consider the time required to draft text-based instructions versus the time it would take an experienced designer to visually represent the process.[544] Thus, visual contracts should cost less in the long run than current contract models. For in-house operations, the savings will result in lowering the cost of creating contracts and freeing up attorneys to work on other matters. Law firms will need to decide how (or if) they should pass the savings on to clients.

B. *Visual Contracts May Increase Chances of Agreement and Enforceability*

"Are consumer contracts usually comprehensible to target customers? In the US, the answer is an unqualified 'no.'"[545] At oral argument in a case centering on Uber's terms and conditions, Massachusetts Supreme Court Justice Scott Kafker asked Uber's attorney, "Why are you not doing it more clearly? You know people are reluctant to read these awful things, right?"[546] In the case of business-to-consumer agreements, visuals can serve multiple roles. First, there is evidence from other fields that consumers are more likely to trust things that look good—well done visuals (or even well-laid-out text) can easily beat dense all-caps-filled

542. Some examples of stock libraries include Shutterstock, Adobe Stock, Getty Images, and Envato Elements.

543. Love, *supra* note 21.

544. *See supra* Part I.

545. RESEARCH HANDBOOK ON CONTRACT DESIGN 114 (Marcelo Corrales Compagnucci et al., eds. Edward Elgar Publ'g Ltd., 2022).

546. Allie Reed, *Uber's Consumer Contract Faces Hostile Massachusetts High Court*, BLOOMBERG L. (Jan. 5, 2024), https://www.bloomberglaw.com/bloomberglawnews/litigation/XBSU5O4C000000?bna_news_filter=litigation#jcite; *see also* Massachusetts Supreme Judicial Court, *William Good v. Uber Technologies, Inc. et al., SJC-13490*, YOUTUBE (Jan. 8, 2024), https://www.youtube.com/watch?v=_x4Cm51ryrI (timestamp 13:07).

terms and conditions, increasing chances that consumers will not end a transaction because of overly convoluted terms and conditions.[547] Second, in the business-to-consumer context, litigation sometimes centers around claims that businesses may not enforce their terms and conditions against consumers because those terms and conditions are overly complex or not clearly displayed.[548] Third, visuals can make it easier for consumers to comprehend agreements, allowing more well-informed decision making.[549] Thus, businesses-to-consumer industries have strong incentives to utilize visual contracts.

In business-to-consumer contracts, courts tend to construe contracts against the business—businesses usually are the drafters and often considered the party with more bargaining power.[550] Courts sometimes refuse to enforce terms that are not clear enough or obvious enough.[551] Visualizations have the power to both simplify and emphasize important portions of contracts, reducing the risk of courts refusing to enforce contracts against consumers.[552] This could be a significant cost savings for businesses both in terms of reduced legal fees to defend themselves and fewer lost verdicts with large payouts. If business-to-consumer contracts use clear visuals, it will be harder for consumers to argue that they did not understand what they agreed to.[553] With this in mind, it should come as no surprise that many of the early adopters of visual contracts are the dominant party in contract formation.[554] These groups have the incentives and resources to invest in new ways of doing things when they can identify places where investments will pay off.[555] They also have the power to dictate and require adoption of new ideas, and, perhaps

547. *See* Li & Yeh, *supra* note 37, at 673.

548. *See, e.g.*, Good v. Uber Techs., Inc., 234 N.E.3d 262, 268–73 (Mass. 2024); *see also* Reed, *supra* note 546.

549. Gerlinde Berger-Walliser et al., *supra* note 1.

550. Blinderman Const. Co. v. United States, 39 Fed. Cl. 529, 536 (1997), *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998).

551. *See, e.g.*, Smith v. Smith, 561 P.3d 459, 463–64 (Idaho 2024) (holding part of a marital settlement agreement was unenforceable because it was "vague, indefinite, and uncertain").

552. *See* Murray, *supra* note 31, at 103.

553. *See id.* at 195 n.231 (observing how visual contracts can communicate complex legal terms to consumers in a way they can understand).

554. *See id.* at 172–74 (providing examples of comic contracts to provide agricultural workers); *see also* Vitasek, *supra* note 4 (discussing de Rooy's comic contracts as helpful to "people who are illiterate . . . not literate in the language of the contract, [and] employers with multicultural workplaces or companies that wish to transact with people who suffer from reading or intellectual disabilities").

555. *See* Vitasek, *supra* note 4 (describing the work de Rooy did to popularize comic contracts).

most importantly, they possess a strong interest in making clear contracts because they know courts will construe any ambiguous terms against them.[556]

What about consumers? Well, when was the last time you thoroughly read terms and conditions before checking the box? A legal document you signed? In one widely publicized example, online gaming store GameStation included a clause in their terms and conditions stipulating that by placing an order, users were giving GameStation a "non transferable" option to their soul.[557] GameStation included an option to nullify the soul transfer by simply clicking a link.[558] Only 12 percent of the purchasers clicked the link.[559] The other 7,500 gave up their souls.[560] GameStation did this as a prank, but visuals could help prevent the very real issues that do arise for consumers who do not read and understand what they are agreeing to. We can absorb visuals faster and remember them better.[561] If business to consumer visual agreements become more common, consumers will have the huge advantage of actually being able to understand and evaluate the terms they bind themselves to. This will allow them to avoid breaking the terms of an agreement or recognize that they would be better off forgoing the service or product rather than agreeing to the terms provided.[562]

A 2019 best practices guide from outside the United States sums up the issues well,

> When consumers do not know businesses' contractual terms and privacy policies, both consumers and businesses may suffer negative consequences. For consumers, low levels of readership and comprehension can leave them vulnerable to detriment such as unexpected costs and unintentionally sharing their data. For businesses, resolving disputes with consumers over contractual terms can be time consuming and costly.[563]

556. *See* Murray, *supra* note 31, at 102–03.

557. Catharine Smith, *7,500 Online Shoppers Accidentally Sold Their Souls to Gamestation*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/gamestation-grabs-souls-o_n_541549 [https://perma.cc/7GCU-VJJ5].

558. *Id.*

559. *Id.*

560. *Id.*

561. *See, e.g.*, THE BEHAVIOURAL INSIGHTS TEAM, BEST PRACTICE GUIDE: IMPROVING CONSUMER UNDERSTANDING OF CONTRACTUAL TERMS AND PRIVACY POLICIES: EVIDENCE-BASED ACTIONS FOR BUSINESSES 31 (Dep't Bus., Energy, & Indus. Strategy, 2019).

562. *See id.* at 3.

563. *Id.*

C. *Early Adopters Can Charge a Premium*

Additionally, because of the expertise required and the risks inherent in any new process, early on only a few firms will likely begin offering visual contracts. Therefore, early adopters will have less competition and, consequently, be able to charge higher prices for their work. These firms can market visual contracts as long-term cost savers—they reduce the chances of litigation—making them worth a higher initial investment. Because "in the US, contract interpretation remains the principal source of litigation between firms, or at least the most evident cause of controversy in contract disputes,"[564] clients will likely be willing to pay a bit more for something that will reduce the chances of litigation. Considering that firms will likely also save money by using designers, this could lead to a significant increase in per-contract profit for law firms. Alternatively, firms that develop early expertise can opt to pass their savings in labor costs to clients. By charging less, these firms will presumably increase market share and become more dominant in their position as visual contract experts.

D. *Visual Contracts Will Also Help Lawyers*

Much of the literature focuses on how visual contracts will help unsophisticated parties.[565] This is absolutely true. However, visuals will also help lawyers. The process of thinking through the contract in a visual medium will force lawyers to look at the agreement from a new angle and to review and make sure they truly understand it. This will be especially true if, as we suggest, lawyers work with designers to create contracts. Explaining the text to designers will ensure that lawyers themselves understand it. Plus, the designers will likely ask clarifying questions from a completely different perspective, further refining the document's meaning.

X. CONCLUSION

So, are visual contracts in the United States enforceable? Our analysis indicates they are. None of the cases, none of the treatises or articles, nor any other source we reviewed indicates courts will refuse to consider visuals solely because they are graphic representations and not text.[566] Considering the lack of any explicit rejection and the many examples of courts interpreting visuals in contractual and other contexts, we cannot see an argument that courts in the United States would refuse to interpret the visual elements of a contract in the body of the contract

564. *See* PASSERA, *supra* note 30, at 20.

565. *See, e.g.*, Mitchell, *supra* note 11, 829–33.

566. *See supra* Part VI.

itself.[567] Courts may find visuals ambiguous (as they do with text), they may say text controls if the contract is silent, but they will interpret visuals using the same basic principles of contract interpretation.[568] Further, the cases we found indicate courts have significant prior experience with visuals and are fully capable of assessing and adjudicating contracts that contain them.[569] Moving visuals to a more prominent place within contracts will avoid one of the key issues that current visual-centered litigation often encounters: whether the parties intend the visual to be a part of the agreement.[570] Finally, our examination of the history of contracts demonstrates that today's visual contracts are not a new trend, but the rediscovery of an ancient way of documenting agreements.[571]

Some industries have long recognized the value of visuals and incorporated them into their contracts by reference.[572] Examples we discussed above indicate this is the case in certain real estate transactions, as well as manufacturing and construction contracts.[573] We found no evidence that U.S. courts have any issue with the visuals incorporated into those contracts.[574] The question, then, is why other industries have failed to recognize the value of visuals and why industries that use them do not incorporate them directly into contracts and rely on them more often. The reticence around visuals likely stems from a few places. First, attorneys are likely apprehensive about using them because U.S. courts have yet to interpret a contract that incorporates visuals directly into the body of the contract.[575] Second, even if U.S. attorneys look outside the U.S., they will find relatively few examples of visual contracts to build from.[576] Third, the cost of creating images may be a factor—the industries where visuals tend to be incorporated by reference often have previously created visuals, reducing the costs of utilizing them in agreements.

567. *See supra* Part VI.

568. *See, e.g.*, United States v. Ellicott, 223 U.S. 524, 535, 540–41 (1912).

569. *See, e.g.*, McKimm v. Ohio Elections Comm'n, 729 N.E.2d 364, 369 (Ohio 2000) (analyzing cartoon); Howe v. Schmidt, 90 P. 1056, 1057 (Cal. 1907) (analyzing visuals included in contract); Young v. Borzone, 66 P. 135, 139 (Wash. 1901) (same).

570. Determining whether a visual is intended to be part of an agreement typically occurs when a contract references an external visual within its body text or when the parties refer to visuals during their negotiations. *See* LORD, *supra* note 82, § 33:8 (discussing admission of written extrinsic evidence); House v. Stokes, 311 S.E.2d 671, 675 (N.C. Ct. App. 1984) (discussing the admittance of a land survey to remove ambiguity from a contact for the purchase of a plot of land).

571. *See supra* Part IV.

572. *See supra* Part VI.D.2.

573. *See supra* Part VI.D.2.

574. *See supra* Part VI.

575. *See supra* Parts VI.D.1, VI.D.2.

576. *See* Cherney, *supra* note 304.

Starting with the first concern, if courts permit and interpret visuals when parties incorporate them by reference, there is no logical reason that visuals should not also be accepted directly in the body of contracts.[577] If parties can incorporate visuals into contracts by reference, then visuals can also be added directly to the body of a contract.[578] And, while no canons of visual contract interpretation exist,[579] carefully planned visuals offer far better evidence of parties' intent than much of the evidence courts currently consider when assessing contracts.[580] Further, the visuals we advocate for will be understandable even to those without legal training—certainly, trained practitioners will be capable of interpreting them. Finally, judges frequently need to adapt, adjust, and create ways of dealing with societal and business changes. Compared with all the adjustments brought on by artificial intelligence, interpreting visual contracts will be easy. Turning briefly to the second concern, our discussion of how to implement visual contracts offers a framework for those looking to change business as usual and implement visual contracts. While the first attorneys who create visual contracts will certainly face obstacles, including few examples of prior agreements, they also stand to lead the way in a potentially lucrative market.[581] This potential makes the extra investment worthwhile, a fact that also addresses the final concern surrounding the adoption of visual contracts: cost. So, although the reticence in the United States around the adoption of visual contracts is understandable, our research indicates it is misplaced.

Of course, while we see no evidence courts will refuse to interpret visual contracts, exactly how they will interpret them is hard to know until visual contracts are litigated. Given that a primary goal of visual contracts is to create a clearer meeting of the minds and avoid litigation, we may need to wait some time for that.

577. *See supra* Part VI.G.

578. *See* LORD, *supra* note 82. ("As long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document . . . .").

579. Mitchell, *supra* note 11, at 844.

580. *See id.*

581. *See supra* Part IX.