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THE MEANING OF VERTICAL AGREEMENT AND THE STRUCTURE OF COMPETITION LAW

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THE MEANING OF VERTICAL AGREEMENT AND THE STRUCTURE OF COMPETITION LAW

Louis Kaplow*

Abstract

Competition law's vertical agreement requirement is widely regarded to be perplexing and to offer a fairly limited unilateral action defense. These views prove to be understated. The underlying distinction is incoherent on a number of levels and difficult to reconcile with pertinent statutes, precedent, and practice. The requirement has little nexus with competition policy, and its satisfaction may even be associated with less, not more, anticompetitive danger. Furthermore, reflection on the thinness or nonexistence of the vertical agreement requirement renders problematic a central feature of competition law: the aim to subject myriad everyday actions of countless firms to more lenient scrutiny than that applicable to agreements, which on reflection are ever-present.

Forthcoming, *Antitrust Law Journal* (2016).

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Competition law is aimed primarily at agreements, mergers, and the actions of dominant firms. Of course, in each category, most acts are permissible. For agreements, the prohibition in the United States applies only to those that are unreasonable, interpreted as involving a suppression of competition.¹ But what constitutes an agreement? This question is most important in the horizontal context, particularly with regard to price fixing, which is per se illegal and subject to competition law's strongest sanctions. In that setting, the agreement requirement plays an important role and has generated some controversy.²

Regarding vertical agreements, such as between a manufacturer and its distributors, much of the scholarly debate and doctrinal evolution has centered on which agreements should be deemed illegal, in particular, per se illegal. In recent decades in the United States, per se rules against vertical nonprice restraints (such as customer and territorial restrictions), maximum resale prices, and minimum resale prices have each, in turn, been overruled, so that the rule of reason now governs all vertical agreements.³ In other jurisdictions, notably the European Union, vertical agreements are treated more strictly.⁴

Before, during, and after this period during which the U.S. Supreme Court reversed the applicable precedents, one would have expected that the question of what constitutes a vertical agreement would have become well settled. Moreover, there is reason to suppose that this question would usually yield a straightforward, affirmative answer. In the horizontal setting, there are important contexts, such as price fixing, where the firms involved are not otherwise in contractual relationships, and they also hope to keep their actions secret; as a consequence, defining and demonstrating the existence of an agreement can be difficult.⁵ But in the vertical setting, where one firm is supplying goods or services to another, there ordinarily exist supply contracts, ranging from formal to imputed, so it might appear that an agreement always exists.

In 1919, however, the Supreme Court famously held in *Colgate*⁶ that this was not necessarily so. Under some circumstances, a supplier's policies in connection with a contractual arrangement are deemed to be unilateral. These policies may be insisted upon and de facto accepted by the downstream firm, but they do not necessarily constitute an agreement on that account. Although subsequent cases had interpreted this unilateral action defense narrowly,⁷ it

¹ See *Standard Oil Co. v. United States*, 221 U.S. 1, 49–68 (1911); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690–91, 693–96 (1978).

² For a detailed analysis, with extensive discussion of the literature, see LOUIS KAPLOW, *COMPETITION POLICY AND PRICE FIXING*, pt. I (2013), and Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CALIF. L. REV. 683 (2011). Interestingly, the policy problem in the two rather different realms is much the same: the agreement requirement is used to distinguish behavior with the same economic consequences. As it turns out, for price fixing, the distinction more often has a negative correlation with competitive consequences, rather than the typical mere lack of correlation for vertical arrangements (see *infra* Section III.A).

³ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897–98 (2007).

⁴ See, e.g., COMMISSION REGULATION (EU) No 330/2010 of 20 April 2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102) 1, 5 (Article 4 on Hardcore Restrictions, including resale price maintenance).

⁵ See sources cited *supra* note 2.

⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁷ Much of a volume of Areeda and Hovenkamp's treatise is devoted to a detailed elaboration of these cases. 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW*, ch. 14D (3d ed. 2010). For a succinct summary, see Glen O. Robinson, *Explaining Vertical Agreements: The Colgate Puzzle and Antitrust Method*, 80 VA. L. REV. 577, 583–86

was given some degree of new life in the Court’s 1984 *Monsanto* decision.⁸

Ever since *Colgate*, the vertical agreement requirement and the unilateral action defense have proved enigmatic.⁹ Part I of this article analyzes the underlying phenomenon in order to elucidate why this is the case. It begins with a series of examples showing that the distinction between vertical agreement and unilateral action is even more difficult to draw than is generally thought. A central reason for this is that supply contracts are, after all, contracts, and this point extends to vertical restraints related to such contracts. Since contracts are named in Sherman Act Section 1’s prohibition, it is difficult not to see them as agreements.¹⁰ Another term in Section 1, and the one most often mentioned in courts’ opinions, is conspiracy, but it too readily encompasses the vertical restrictions in question, even when they are said to involve unilateral action by the upstream supplier. Some formulations of the vertical agreement doctrine, including the one in *Monsanto*’s famous footnote,¹¹ require something akin to offer and acceptance, but this too is arguably present in most if not all cases of unilateral action in the vertical realm. Rather than seeking to interpret the statute directly, many commentators have essentially thrown up their hands in attempting to summarize the cases—which in any event seem to allow only a fairly narrow unilateral action defense—and assert that just about anything more than simple unilateral action crosses the boundary into vertical agreement. This formulation is obviously difficult to rationalize. Its explanatory and predictive power is also limited because there exists neither a clear definition of the baseline—which, if exceeded even modestly, leads to a judgment of agreement—nor an indication of how much more, and along what dimensions, is required.

Part II turns to the law on vertical agreement, mainly focusing on the United States but briefly describing how the situation in the European Union is fairly similar. Sherman Act Section 1’s statement of the agreement requirement, which has received less attention from courts and commentators than one might have expected, is examined, and it is found to offer little support for a unilateral action defense. Nevertheless, given that the antitrust laws have been interpreted purposively, not literally, this conclusion hardly resolves the matter. Next, *Colgate* and *Monsanto* are revisited: despite extensive prior commentary, important features are not

(1994).

⁸ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

⁹ Phillip Areeda and Herbert Hovenkamp’s treatise suggests that the law and lower courts’ analyses of vertical agreements are tangled. See AREEDA & HOVENKAMP, *supra* note 7, at 7. Most other treatments advance a similar view. See, e.g., 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 23 (7th ed. 2012) [hereinafter ANTITRUST LAW DEVELOPMENTS] (“[L]ower courts have continued to struggle with the issue of what additional evidence is necessary to permit the factfinder to infer a conspiracy.”); Edward H. Levi, *The Parke, Davis–Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 326 (“[I]t is a matter of concern that the law should have failed to provide itself with a meaningful structure of theory.”); Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 686 (1962) (“Can these cases be fitted together in any rational way? The answer is clearly ‘no.’” Turner proceeds to describe the cases as “hopelessly irreconcilable.”); *id.* at 688 (“[O]nce *Dr. Miles* was applied to tacit as well as express agreements, any tenable line between ‘agreements’ and compliance with a manufacturer’s stated wishes wholly disappeared.”); see also Warren S. Grimes, *The Path Forward after Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L.J. 467, 490 (2008) (“[T]he *Colgate* defense requires ‘legal gymnastics’ that are costly, disruptive to dealer-manufacturer relations, and have no relevance to the procompetitive or anticompetitive effects of the underlying practice.”).

¹⁰ As explained in Section II.A, the term agreement does not actually appear in the statute itself (although it does in the European Union’s provision, see *infra* Section II.E) but has been used as a summary of the terms that do appear.

¹¹ See *infra* Subsection II.B.2.

adequately appreciated. Another often-neglected point is that vertical agreements may and often are demonstrated using circumstantial evidence, which renders the line-drawing problem even more precarious. Finally, it is observed that standard jury instructions—which, rather than statutes or precedents, are what actually purport to guide factfinding—seem to express the law in a manner that makes a unilateral action defense even more difficult to establish than one might conclude from other sources.

Part III shifts from the realm of legal exegesis to the domain of competition policy. First, it examines in much more detail than has been done in the past the linkages, if any, between the doctrine and policy. Specifically, it inquires into various ways that the vertical agreement requirement, along with the unilateral action defense, might relate to whether a contested vertical restraint might be pro- versus anticompetitive. Although some connections are identified, most seem attenuated, are highly contingent on the type of restraint and the context, and perhaps as often point in the wrong direction (that is, the presence of a vertical agreement rather than unilateral action may suggest that the restraint is less likely to be anticompetitive). Even if the correlation was higher and more systematically favorable, the analysis further suggests that it is hard to make the case for vertical agreement to be an independent element rather than one of many factors that may bear on a restraint's reasonableness, and this is so when one considers possible screening needs, including the benefits of dismissing weak cases at an early stage of adjudication.

Second, Part III juxtaposes the vertical agreement requirement and its unilateral action defense with the strong antiformalism exhibited by Supreme Court antitrust decisions in recent decades. It finds the conflict particularly stark. The leading decisions in this vein, which emphasize economic effects over legal form, are primarily cases involving vertical restraints, and the conflict between policy and previous doctrine was deemed sufficient in those cases to justify overturning precedents. Moreover, some of this line of cases—in this respect including *Monsanto* itself—explicitly reject that the distinction between unilateral action and vertical agreement can be justified as a matter of economic substance. These considerations also interact with the sometimes-mentioned point that perhaps the unilateral action defense is a product of the Court's discomfort with various per se rules, particularly governing resale price maintenance—rules that have now been reversed, raising further questions about the longevity of *Colgate* and *Monsanto*. Part III closes with the obvious but important point that, if a vertical agreement requirement was to make sense as a matter of policy, one would have wanted to craft the doctrine in the manner that best serves competition law's purposes rather than in a vacuum, but this has not been attempted.

Finally, Part IV examines the larger structure of competition law's prohibitions. The core of the analysis focuses on an important problem that has long been present in light of the narrowness of the unilateral action defense: What are we to make of the supposedly critical difference between competition law's regulation of actions by dominant firms (unilateral actions), which is deferential relative to the law on agreements, and competition law's regulation of vertical agreements, which under a narrow or nonexistent unilateral action defense covers most actions by dominant firms? The thinness (or nonexistence) of a vertical agreement requirement calls into question what courts, competition agencies, and commentators take—as both a descriptive and normative matter—to be the fundamental structure of competition law.

I. ELABORATION OF THE PROBLEM

A. ILLUSTRATIONS

Although most already believe that it is difficult to distinguish vertical agreement from unilateral action, subsequent analysis is facilitated by having some specific examples of the problem in mind. Throughout this article, it will be useful to be concrete and suppose that we have a manufacturer, *M*, who wants its retailers, *Rs*, to be subject to some particular restriction, say, resale price maintenance (RPM).¹² And, in some instances, discussion will suppose that the restraint would be deemed illegal under Sherman Act Section 1's rule of reason, so liability turns on the presence or absence of a vertical agreement.

Example 1: Written Contract.—Begin with a simple case in which the only evidence bearing on the existence of a vertical agreement is *M*'s contract with its *Rs*. If each (identical) supply contract merely states that *M* may terminate the particular *R* at will, and there is an entirely separate statement issued by *M* that it intends to terminate any *R* that fails to charge, at a minimum, its suggested retail price (its MSRP), the law is clear that there is no vertical agreement. In contrast, if the contract itself states that *R* must charge (at least) the MSRP, that failure to do so is breach, and that the (sole) penalty for such breach is that *M* may terminate *R*, there is undoubtedly a vertical agreement.

It is generally appreciated that this statement of blackletter law draws a rather fine distinction. Yet the dividing line between unilateral action (the former case) and vertical agreement (the latter) is even more slender than is ordinarily recognized. To see the severity of the challenge, consider the following sequence of cases (in each, suppose that there is no additional discussion or other indicia of agreement beyond what is stated):

- Contract states that *M* may terminate *R* at will, and there is an entirely separate statement of *M*'s RPM policy (the former case, above).
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*'s policies, and there is an entirely separate statement of *M*'s RPM policy.
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*'s policies, and there is an entirely separate statement of *M*'s RPM policy that is posted on *M*'s website.
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*'s policies, there is an entirely separate statement of *M*'s RPM policy that is posted on *M*'s website, and, at their meeting prior to signing, *M* had shown *R* the website, including this posting.
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*'s policies, and a written copy of the (identical) statement of *M*'s RPM policy is handed to *R* at the time the contract is executed.

¹² In addition, references to *M* and to *Rs* will sometimes treat them as people, whereas in fact *M* and *R* would typically be legal entities, and the individuals would be their agents.

- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*’s policies, and a written copy of the (identical) statement of *M*’s RPM policy is stapled to the contract at the time the contract is executed.
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*’s policies, “one of which is attached for *R*’s convenience,” and a written copy of the (identical) statement of *M*’s RPM policy is stapled to the contract at the time the contract is executed.
- Contract states that *M* may terminate *R* at will, including “of course” for violating various of *M*’s policies, “one of which is attached for *R*’s convenience and incorporated by reference,” and a written copy of the (identical) statement of *M*’s RPM policy is stapled to the contract at the time the contract is executed.
- Contract states that *R* must adhere to *M*’s RPM policy, and breach is punished by termination of *R* (the latter case, above).

We already knew that the first case, involving what is clearly deemed to be unilateral behavior by *M*, and the last case, which is an undoubted vertical agreement between *M* and *R*, were similar. As one examines the range of cases in between, the difficult problem of making the required distinction becomes impossible. Where would one draw the line between no agreement and agreement? How would one articulate the rule that dictates this result? Suppose that these questions were posed to groups of judges, lawyers who advise firms, and legal commentators, and each individual in total isolation had to draw the line and articulate with sufficient specificity the principle that dictates the proffered result. Would most of them choose the same division? (And what is that?) Because the total distance from the first scenario to the last is so small, the task seems difficult and arbitrary.

Example 2: Written Contract and Response by R.—Suppose that the contract merely states that *M* may terminate *R* at will, and that *M* also separately states its unilateral policy to terminate *R*s who violate its RPM policy. So far, the arrangement would not be a vertical agreement. To this, we will now add, at the time the contract is signed, a response of sorts by *R*. *R* might: nod, shake hands, say “I hear you,” say “OK,” say “sure thing,” or say “we have a deal.” Is there now a vertical agreement? (Keep in mind that our benchmark, which is deemed not to be an agreement, does include *R*’s signing of the contract with full awareness of the policy.)

To dissect this range of situations, it is useful to inquire whether these various responses refer solely to the written contract, solely to the unilateral policy, or to both. In the latter two instances, we would seem to have *R* indicating agreement to the RPM policy, at least in some of these instances. But one might wonder whether this is really so. “I hear you” could be taken literally, as indicating that an utterance of the RPM policy indeed was heard and nothing more. To any uncertainty we might have when *R*’s response refers to the RPM policy or to both, we now should revisit the ambiguity regarding whether the nod, remarks, or whatever indeed refer to the separately stated RPM policy—alone, or along with the written contract—or solely to the formal contract. It seems entirely plausible that a high-quality video recording of the event, even one good enough to capture facial expressions and body language, would leave us uncertain. One

reason for this is that *R* may not, subjectively, firmly distinguish between these possibilities. In such business interactions, it is natural to be expressive, not inert—so some sort of response by *R* is almost surely present in most instances—and people’s nods, handshakes, and brief remarks in such settings are not ordinarily accompanied by footnotes or appendices that detail the expressions’ scope and limitations. Moreover, because the responses are spontaneous, parties are unlikely to be thinking very carefully about the precise meanings of their own or other parties’ various gestures, platitudes, pleasantries, and other cryptic utterances.

This sort of case in which *R* offers some response (at least through facial expressions) is ubiquitous.¹³ Accordingly, even the sharpest cases of what is usually taken to be a unilateral policy by *M* include as well supplemental behavior that encompasses everything that various definitions of vertical agreement require. An omniscient observer who can penetrate the parties’ conscious thoughts may be unable to tell which is which. How, then, is a remote factfinder in contested legal proceedings supposed to be able to do so?¹⁴

Example 3: M’s Public Announcement of Its Policy to Rs.—This final example highlights one of the ways that *M* might communicate its policy to *Rs*. The background is a supply contract that allows *M* to terminate *R* at will and makes no reference to *M*’s separate RPM policy. *M* holds an annual event for its many *Rs* that serves such purposes as introducing new products, sharing information about *M*’s marketing strategy, providing training to *Rs*, and boosting *Rs*’ morale. At one session, advertised as being on the subject of “*M*’s Unilateral RPM Policy,” *M* appears by itself at the podium (projected on giant screens so all can see as well as hear) and explains its policy. We might imagine that it is introducing a new policy, restating an existing one, or going further and referring to the fact that it has heard some dealer complaints (an additional element that *Monsanto* states is not enough to render *M*’s policy one involving vertical agreement). *M*’s remarks have been carefully reviewed by its lawyers to make sure that every word is consistent with a *Colgate/Monsanto* authorized unilateral policy, and *M* sticks perfectly to the script.

If the session ends there, we have no vertical agreement. But suppose, at the conclusion, one or more *Rs* applaud? Or one says (in a low tone or loudly) “amen” or “finally!” Is there now an agreement? What if *M* can be seen to smile on the Jumbotron? Or says “thank you” before walking off the stage? Or what if, instead, *M* grimaces? Or says “I’m ignoring that” (but still smiles)?¹⁵

On one hand, if *M* is freely permitted to have a unilateral policy and if this very authorization necessarily entails permission to make it known to its *Rs*, such a session seems legally permissible: it does not cross the line to be tantamount to a vertical agreement. On the other hand, once even a single *R* applauds or in any other manner indicates approval, which similarly suggests assent, it seems that we have all the ingredients of a vertical agreement. To which we must add that the latter is an inevitable response to the former. Once again we have a demarcation that is exceedingly subtle and difficult to delineate even in principle, much less to distinguish in practice, including in the context of hard-fought litigation.

Summation.—None of these examples is far-fetched. Instead, they characterize run-of-

¹³ Exposition of this example does suppose that *M*’s policy is before *R* at the time the original supply contract is signed. If not, the same analysis would be applicable upon any contract renewal, and similar situations would be posed by various interactions between *M* and *R* about performance under the contract.

¹⁴ Consider also that, as Section II.C elaborates, agreement may be inferred from circumstantial evidence.

¹⁵ See *infra* Section D.

the-mill interactions between *M* and its *Rs*, without even adding many of the further interactions commonly addressed in the literature (such as pre-termination warnings and negotiations). It appears that the challenge of distinguishing unilateral conduct and vertical agreements is even greater than meets the eye.¹⁶ With this thought in mind, let us now consider various articulations of the law’s distinction between unilateral action and vertical agreement.

B. UNILATERAL CONTRACT: AN OXYMORON?

The difficulty in distinguishing the unilateral conduct of *M* toward its *Rs* from a vertical agreement between *M* and each of its *Rs* can be traced to the combination of two points: we are in a setting in which *M* is undoubtedly in a contractual relationship with its *Rs* involving the matter at hand, and a contract is an agreement. Hence, the question posed by the heading: Is the concept of a unilateral contract an oxymoron?

This Section focuses on the question of the contractual relationship. As will be elaborated in Section II.A, a contract is indeed an agreement under Sherman Act Section 1. Actually, as will be discussed, Section 1 does not even contain the word “agreement”; rather, that is a summary term that covers three items, one of which is, literally, “contract.” That is, we are asking whether a contract is a contract, and the *Colgate/Monsanto* rule states that some—those that entail so-called unilateral action—are not, for purposes of Section 1. Deferring this question of legal formalities, let us here explore further the contract itself, specifically, in an attempt to understand various senses in which contractual relationships may be unilateral and how these relate to our overall inquiry.

In the pure situation protected by the doctrine, a vertical restraint such as an RPM policy is seen to be unilateral in the sense that *M* is imposing this condition on its *Rs*. Most discussion of the subject by courts and commentators proceeds as though this feature is distinctive: not necessarily unique, but at least atypical by comparison to ordinary contract provisions. But this implicit depiction is false. Many contract provisions in a wide range of settings (including supply contracts, the subject of vertical restraints analysis) are unilateral in just this manner.

Consider an ordinary construction contract in which an owner of property hires a firm to erect a building. The former pays the latter some amount of money. This contract term is unilateral in the sense that there is no obligation to pay it back (here, loans and various other financial arrangements would be the exception). The latter agrees to construct the building. This obligation is likewise unilateral. Indeed, a standard lay definition of “unilateral” refers

¹⁶ The Introduction notes the widely accepted view that the distinction is elusive, but prior writing does not bring the problem fully into focus. For example, Areeda and Hovenkamp’s treatise advances a distinction based on the complexity of *M*’s efforts—see AREEDA & HOVENKAMP, *supra* note 7 (which is discussed in Section E)—but does not attempt to articulate the underlying distinction. Other treatments portray the conflict among the cases in various ways, but often without much attempt to explicate the predicament. See, e.g., ANTITRUST LAW DEVELOPMENTS, *supra* note 9, at 24–26 (citing a large numbers of cases, organized by lists of factors associated with opposing results).

specifically to this feature of many contractual provisions,¹⁷ and legal definitions are similar.¹⁸

The contract may further state consequences upon breach. For example, if the owner does not make timely payments (including perhaps an initial payment before work commences), the firm need not continue (or commence) construction. Similarly, if the firm does not do the work, the owner need not pay. These are some ordinary self-help remedies for breach of a contract that obviously is a contract, involving the agreement of two parties, but the provisions breached are understood to be unilateral. That is, contract terms involving unilateral obligations routinely coexist within an overall contract that is an agreement. This depiction accords with common understanding as well as contract law.

Examine, in particular, the obligation of an *R* to pay its *M* in an ordinary supply contract. As just explained, one can readily say that this is a unilateral provision imposed by *M* on *R*. *R*'s view of this term can be encapsulated in the following preference ranking, from best to worst: (1) *R* does not have to pay anything at all, but *M* still must deliver the goods. (2) *R* must pay *M*'s announced price, and *M* must deliver the goods. (3) *R* does not pay anything, and *M* delivers nothing—that is, there is no deal. Because *R* prefers (1) to (2), we can say that *M* is unilaterally imposing the price term on *R*. This is ordinarily true¹⁹ and is not very interesting. Because *R* prefers (2) to (3)²⁰ and, moreover, because (1) is not on the table, we can say that *M* and *R* have agreed on the price term. In fact, this is what one would ordinarily say.

Furthermore, the law normally deems there to be agreement on the price term, and this is so even in situations where the contract is less explicit. If *M* and *R* enter into a supply contract and the contract is silent on price, but *M* is known by *R* to have posted prices at which it sells, the law would hold that *R* owes *M* the posted amount when *R*, pursuant to the contract, submits an order to *M*, and *M* delivers the goods. Likewise, if I call a local pizzeria and order “the special,” which is routinely advertised at a price of \$14.95—and this price is currently posted at the shop and on the Internet—I owe the delivery person \$14.95 (plus any delivery charge and applicable tax) when the pizza arrives at my home. In these situations, not at all extraordinary, the separately posted price is incorporated by reference into the contract. It is not simply that, if *R* or I refuse to pay in these settings, *M* or the pizzeria, respectively, may (without being held in breach) refuse to fill subsequent orders, in their discretion. They can also sue for payment on the past order. There would be no valid defense that, because no obligation to pay was stated explicitly in the contract, placement of the order and/or acceptance of delivery failed to

¹⁷ See, e.g., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1368 (11th ed. 2007) (“constituting or relating to a contract or engagement by which an express obligation to do or forbear is imposed on only one party”); OED.com, Oxford English Dictionary | The definitive record of the English language [hereinafter OED] (“Made or entered upon by one party, esp. without reciprocal obligation on the part of another or others; binding or imposed upon one party only.”).

¹⁸ OED, *supra* note 17, illustrates the legal sense of a unilateral obligation by reference to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 354 (1832), who refers specifically to *promises* as something “in the language of jurists, ‘a convention *unilateral*.’” (A contract, of course, is ordinarily described as an exchange of promises, which is consistent with describing each of the promises exchanged as unilateral.) See also BLACK'S LAW DICTIONARY 374 (9th ed. 2009) (defining “unilateral contract” as “[a] contract in which only one party makes a promise or undertakes performance,” and elaborating by describing two settings, one a gratuitous promise and the other an offer that may only be accepted by action).

¹⁹ If *R* purchases a large share of *M*'s supply, and *M* is substantially better for *R* than are alternative suppliers, then *R* may prefer to pay so that *M* does not go bankrupt and exit.

²⁰ If *R* ranks (3) above (2), we simply have no contract, so the question whether one or another provision is “unilateral” under Sherman Act Section 1 is moot.

consummate any agreement with regard to payment.

This statement of *R*'s preferences regarding whether *M*'s price should be paid, and the consequences of placing an order and taking delivery, have nothing in particular to do with the term in question relating to price.²¹ In an ordinary vertical restraints case involving, say, RPM, a given *R* would have the following preference ordering: (1) *R*'s competitors are bound by the price minimum, but *R* is not. (2) All *R*s are bound. (3) No deal.²² If we merely compare (1) and (2), the RPM requirement could be described as *M*'s unilateral imposition on *R*, since *R* does not wish to be bound. But if we more realistically compare (2) and (3), then the arrangement is not unilateral, in the sense that (as with price) *R* prefers to be bound, because the alternative is no deal.

To summarize, what is routinely described as unilateral imposition and thus not vertical agreement under the *Colgate/Monsanto* rule is widely understood, in common parlance and under contract law, as an agreement (and a “contract”). Of course, under differing jurisdictions’ contract laws and varying degrees of ambiguity in the setting and contract terms in question, there may or not be a contract as a whole or an enforceable obligation with respect to one or another term, and if there is a contract and an enforceable obligation, there may be some room for dispute regarding what, precisely, the implicit obligation entails. But antitrust cases on the vertical agreement question do not look to whether the contract is enforceable or what the pertinent law would deem the vertical restraint in question to mean.²³ Instead, even in clear cases regarding enforceability and meaning, they purport to deem the contractually authorized restriction to be unilateral and hence not contractual under antitrust law. But, in other settings, the contract is deemed to be a contract. We can now see more clearly why distinguishing

²¹ Cf. Jeffrey L. Harrison, Dr. Miles’s *Orphans: Vertical Conspiracy and Consignment in the Wake of Leegin*, 45 WAKE FOREST L. REV. 1125, 1133 (2010) (finding support for the existence of an agreement in basic contract law when one party announces terms and the other adheres); *id.* at 1148 (extending the analysis to consignment arrangements by arguing that there is undoubtedly an agreement, the consignment arrangement itself, leaving only the question whether it restrains trade, which is unaffected by whether the resale price is itself a term of the formal agreement); Robinson, *supra* note 7, at 587 (“There is nothing odd in describing [the arrangement in *Colgate*] as a ‘contract.’ In fact, it seems downright odd to describe the usual supplier-dealer relationship as being other than contractual in a layman’s sense of that term; that is, one that does not rest on refined legal definition.”); *id.* (arguing that vertical restraints are like other contract terms that reflect a unilateral policy that is nevertheless part of the contract); *id.* (concluding that the *Colgate* defense rests on an odd and artificial conception of contracts and of Section 1).

²² One can also consider a variant where—either between (2) and (3), or below (3), or instead of (3)—we imagine the alternative under which no *R*s are bound but there is still a deal. The analysis of this supplemental or alternative setting is much the same. If, instead, this further option is ranked between (1) and (2), then it, compared to option (3), is analyzed in the same manner as the text’s comparison of (2) and (3).

²³ See, e.g., Robinson, *supra* note 7, at 581 (“Semantically, the typical resale price restraint is part of a contractual transaction. Whether the price restraint itself would be enforceable (apart from the antitrust prohibition) as part of the contract is not always clear in the cases, but the courts never examine this question in deciding whether there is a ‘contract’ for antitrust purposes.”). One can also consider the nature of contractual remedies available under different variations. One might distinguish contracts that *M* can enforce only by terminating *R*—that is, refusing to make further sales—from those under which *M* can also sue *R* for damages or perhaps insist that *R* return previously supplied goods that *R* has not yet sold. It does not appear that the distinctions ordinarily attempted in the cases or by commentators track such differences. For example, a clear contract requiring *R* to adhere to *M*'s policy but that is enforceable only by termination is generally regarded to satisfy the agreement requirement. Likewise, many cases that do not find the initial contract to meet the requirement deem various subsequent interactions between *M* and *R* to do so, even though the interaction is limited to discussion of continued supply versus termination, depending on whether *R* will agree, going forward, to adhere to *M*'s policy. Interestingly, however, the doctrine arguably had its origins in just such a distinction. See *infra* Subsection II.B.1 (discussing *Colgate*).

unilateral conduct from vertical agreement in this setting is challenging.²⁴

C. CONSPIRACY

Section II.A will discuss how the presence of a contract or a conspiracy is independently sufficient under Sherman Act Section 1 to reach the question of whether the arrangement under consideration is a restraint of trade under the rule of reason. Hence, whenever an *M*'s policy

²⁴ Consider also a refinement of the question that might be thought to avoid the notion that our contract can be unilateral and hence not a contract or agreement after all. Specifically, one might suppose that the supply contract between *M* and *R* is a contract or agreement, but that an implicit RPM term is unilateral. This idea seems to underlie Areeda and Hovenkamp's approach, which is discussed in Section E. The first sentences of their approximately 200-page treatment of vertical agreements states: "Unlike horizontal agreements among competitors, which are relatively uncommon, vertical agreements between actual and would-be suppliers and customers are everywhere. Sales, licenses, franchises, employment agreements, and information arrangements are commonplace." AREEDA & HOVENKAMP, *supra* note 7, at 3. They continue by explaining that, "Indeed, virtually every case alleging resale price maintenance or other vertical restraints involves firms who are parties to *some* agreement." *Id.* at 5. But these observations do not eviscerate the legal requirement because "it would be pointless to conclude that the agreement requirement is met because the manufacturer and dealer are engaged in buying and selling with each other. That would be tantamount to eliminating the agreement requirement altogether." *Id.* at 6. Their logic, however, begs the question: that contracts are contracts, which fact would deny the existence of an independent element in vertical cases under Section 1, cannot be right because, if it were, the requirement would be absent. It is fair to say that, as a descriptive matter, if courts in practice impose an additional requirement that sometimes is deemed not to be satisfied (*see infra* Part II), then courts must mean something other than a contract in the ordinary sense when imposing the agreement requirement. This view is consonant with their further statement that "[c]ourts often use the term 'unilateral' to state their conclusion that no unlawful agreement exists." AREEDA & HOVENKAMP, *supra* note 7, at 7; *see also id.* at 57 (observing that a dealer may claim that "it is more a victim than sinner" and thus should not be held liable, but this characterization is equally true of those who enter express vertical contracts).

There are two difficulties with this circumvention attempt. First, under Sherman Act Section 1, in asking whether a contract (or combination or conspiracy) is in restraint of trade and hence a violation, the relevant inquiry is not merely whether the words of the contract or its immediate consequences are anticompetitive. Instead, the question is whether its ultimate, foreseeable effects entail a suppression of competition. For example, an agreement on a facilitating practice can be a violation because the practice has the further consequence of raising the probability of an anticompetitive outcome. Even though the effects in a given case may well be contested, if the resolution is that the net impact is a reduction of competition, the defendants are not immunized on the ground that there is no contract or that the contract does not itself, literally and mechanically, restrain trade.

Second, returning to the preceding analysis, it was explained that, in many settings in which the *Colgate/Monsanto* defense is thought to be clearly applicable, the RPM policy is no less part of the contract than is the obligation of *R* to pay *M* for the goods, and for the pertinent supply price to be *M*'s independently posted (unilaterally announced) wholesale price. There remains the separate question of whether *M* indeed has an RPM policy (or whatever), so there may be a genuine dispute as to whether the alleged vertical restraint is present, just as silent or ambiguous terms regarding other dimensions of a contract may raise uncertainty about the subject of an agreement. (This point is important as a practical matter since a number of privately initiated vertical restraint cases are either additional claims in a suit by an *R* against its *M* involving an ordinary contractual dispute or, similarly, are raised by *R* against *M* as a defense to a breach of contract claim. Particularly in light of the Sherman Act's provision for treble damages and attorneys' fees, *R*'s adding such claims is often strategically advantageous. The possibility that *M* terminates *R* for failing to adhere to *M*'s policy, followed by *R* suing *M* for breach on account of such termination, raises an interesting conundrum. If the contract is interpreted such that *M* was not authorized to terminate *R* for noncompliance with *M*'s policy, then *R* wins because *M* is in breach, whereas if the contract is interpreted as authorizing *M* to terminate *R* for violation of *M*'s policy, we may ask if then *R* wins its antitrust claim instead (assuming that *M*'s policy, if indeed part of the contract in a manner that satisfies the vertical agreement requirement, is a restraint of trade.) But the *Colgate/Monsanto* defense is understood to protect *M* even when its policy is crystal clear and has been communicated to and fully understood by *R*. *See also infra* Section III.A (discussing whether and when the nature of the interaction between *M* and its *R*s may have evidentiary value with regard to the competitive consequences of a restraint).

toward its *Rs* is not deemed to be a contract, we in principle must ask whether it might be a conspiracy. Moreover, the caselaw in the United States more often employs the term conspiracy and related language, so it is important to explore this concept in its own right. This Section first discusses common understandings of the notion, which seem predominant in the commentary, and then examines the word conspiracy as a legal term of art, one used widely in the criminal law and with a fairly well-accepted meaning that predates the Sherman Act and has remained relatively stable since then.²⁵

A conspiracy is ordinarily understood to connote an agreement or action in harmony toward a common end.²⁶ Agreement, the oft-used term to cover Section 1’s threshold requirement—and also featured in TFEU Article 101 (see Section II.E)—is similarly taken to refer to a mutual understanding, concerted action, or a harmony of action or opinion.²⁷ Reflecting further overlap among these terms, an understanding is defined as a harmonious relationship or an informal mutual agreement.²⁸ Another phrase commonly used as a synonym is a meeting of the minds, which directs our attention to parties’ subjective states of mind regarding the matter (although in legal settings such states of mind are ordinarily assessed using objective indicators). In addition to its common usage, this phrase has legal significance, appropriately enough, in contract law regarding the existence of a contract, notably under the subjective theory of contractual agreement.²⁹

Considering any of these similar terms, it is easy to see how the sort of vertical arrangement under discussion—wherein *M* has a clearly announced policy that is communicated to *R*, which, say, succeeds in inducing compliance due to the threat of termination—can readily be seen as involving a conspiracy, an agreement, an understanding, concerted action, or a meeting of the minds. To be sure, one could also deem any of these terms inapt because *R* is forced to comply with *M*: *R*’s first choice, after all, is not to be bound (as long as the other *Rs*

²⁵ For elaboration in the context of horizontal agreements, see KAPLOW, *supra* note 2, at 29–43, 73–77, and Kaplow, *supra* note 2, at 704–10, 729–31.

²⁶ See, e.g., sources cited *supra* note 17. It is sometimes added (for example, in *Monsanto*’s famous statement, quoted in Section II.B.2) that the action be illegal (which is redundant in the present setting) or that it be in secret—which vertical restraints ordinarily are not, but this trait is not taken to render them outside the statute. Another question with respect to vertical restraints is whether the ends of *M* and a particular *R* are common, in light of the point in Section I.B that any given *R* would prefer not to be restrained (as long as other *Rs* are and *M* is nevertheless willing to deal). See, e.g., Jean Wegman Burns, *Rethinking the “Agreement” Element in Vertical Antitrust Restraints*, 51 OHIO ST. L.J. 1, 10–16 (1990) (arguing that vertical agreements differ from horizontal agreements in this respect); Marc A. Fajer, *Taming the Wayward Children of Monsanto and Sylvania: Some Thoughts on Developmental Disorders in Vertical Restraints Doctrine*, 68 TEMP. L. REV. 1, 41 (1995). Whether *M*’s and various *Rs*’ ends are aptly described as common may vary across vertical restraints and particular contexts, but in any case this matter is on its face unrelated to whatever is the distinction between unilateral action and agreement. See also *infra* Section III.A (discussing the extent of any nexus between the agreement requirement and competition policy).

²⁷ See, e.g., sources cited *supra* note 17. Like many commentators, Areeda and Hovenkamp focus on the term agreement, which “concept seems elastic enough to embrace a transaction whose clear sense is that the dealer will charge a manufacturer-specified price on pain of sanction if it does not.” AREEDA & HOVENKAMP, *supra* note 7, at 55; *id.* ¶ 1443 (elaborating the view); see also *id.* ¶ 1444 (presenting the theory that widespread compliance reflects agreement). *But see id.* ¶ 1446 (discussing *Monsanto*, which is seen as rejecting both views).

²⁸ See, e.g., sources cited *supra* note 17.

²⁹ See, e.g., BLACK’S LAW DICTIONARY, *supra* note 18, at 1072–73; see also *Meeting of the Minds Definition*, LEGAL-EXPLANATIONS.COM, www.legal-explanations.com/definitions/meeting-of-the-minds.htm (“The phrase ‘Meeting of the mind’ is used to represent the state of mind of the parties that the parties involved are thinking and understanding a situation, provision or stipulations etc. in the correct and similar meaning.”).

are). But even if the contract explicitly states *M*'s policy, to which *R* has undoubtedly assented, there is no agreement (and so forth) under this interpretation. That is, whatever is the distinction between *Colgate/Monsanto*-authorized unilateral contractual terms and ordinary contracts, or conspiracies, or agreements of a sort that are covered by Section 1, it is not related to which view of these highly overlapping definitions is adopted.

Another key term in caselaw and commentary is “independent”: Are *M*'s and one or more *R*s' actions part of an agreement (triggering Section 1) or are they instead independent, in which case there is no agreement?³⁰ Much the same problem arises in that applicable definitions of the term fail to distinguish the two sets of situations. Specifically, action (here, this would be an *R*'s decision to accept the contract or, in particular, to adhere to *M*'s price minimum) is independent when it is not subject to the authority of another party (here, *M*), not looking to another for guidance, or not relying on another; or, put more affirmatively, *R*'s actions would be independent if they were self-governing, autonomous, and free.³¹ If *R* is contractually bound to follow *M*'s policy, *R*'s subsequent actions are not independent in these senses. However, the same is true when *M* unilaterally states its policy, to be enforced on *R* by the threat of termination, and *R* is induced to adhere to this policy precisely because of the threat.³²

Finally, let us return to the term conspiracy, now considering it as a legal term of art. The core definition is much the same.³³ However, as one would expect, it has been subject to substantial refinement, especially because it is a criminal offense. “It is universally conceded that [to constitute a conspiracy] an agreement need not be express”³⁴ Conspiracy law's agreement notion is “more lax than elsewhere”; “[a] mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates agreement.”³⁵ Under this definition, *M* entering a contract with *R* that is terminable at will, wherein *M* has a clearly stated policy to which *R* must adhere, and *R* doing so on threat of termination, seems to constitute a conspiracy. Again, one could also say that it does not because there is no tacit understanding or real consensus because *R*, as always, would prefer to violate *M*'s policy (as long as other *R*s remain bound and *M* is still willing to deal with *R*). But, as we have seen repeatedly, under this view of conspiracy, even the express contract provision stating *M*'s policy would not be sufficient. Nor would there be any agreement on price. Put another way, the *Colgate/Monsanto* defense is grounded in some sort of distinction

³⁰ This term has proved mischievous in the horizontal agreement setting. See KAPLOW, *supra* note 2, at 47–49; Kaplow, *supra* note 2, at 702–04.

³¹ See, e.g., sources cited *supra* note 17.

³² One could assert in the latter case (as courts implicitly do, see *infra* Section II.B) that *R*'s compliance with *M*'s threat is an independent (free, autonomous) decision (that is not looking to another for guidance) because, at the end of the day, *R* can do as it wishes, even though this may be commercial suicide. Of course, this is likewise true if *R* is contractually bound (particularly in a regime, like that in the United States, that does not ordinarily allow enforcement through specific performance). Further, my action in handing over my wallet to a mugger who is pointing a gun at my head, demanding “your money or your life,” is independent since I am literally free to keep my cash (whereas if the mugger instead clubbed me over the head, rendering me unconscious, and then took my wallet, we would not say that the transfer of the wallet from me to the assailant was an independent action performed by me).

³³ In this setting, it is understood that the requisite agreement must be one to commit an unlawful act. As explained in note 26, this further specification does not alter the present analysis.

³⁴ 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 266 n.11 (2d ed. 2003) (quoting MODEL PENAL CODE § 5.03 cmt. at 419 (1985)).

³⁵ *Id.* at 266.

between sufficiently expressed understandings and ones that, even if entirely clear and acquiesced in by one or more *Rs*, are stated less formally. Traditional conspiracy law rejects such a distinction.

D. ACQUIESCENCE COMMUNICATED AND SOUGHT

This Section's heading brings to mind contract law's basic requirement of offer and acceptance in forming a binding contract. It is expressed somewhat differently to match oft-quoted language in *Monsanto*, as will be elaborated in Subsection II.B.2. Of course, as stated in Section B, above, there is the problem—that is, if this requirement is not deemed always satisfied in the present context—that we ordinarily have an explicit contract, whether it be a signed document or an offer to supply on stated terms that is accepted by the buyer's submission of a purchase order. Presumably, to have any force, the additional demand that acquiescence be sought and communicated must refer to *M*'s policy, say, involving RPM. Section B explained that this twist does not seem to help, but let us set that difficulty aside in order to explore the matter further.

Confronting this requirement head on, example 2 (written contract and response by *R*) and example 3 (*M*'s public announcement of its policy to *Rs*) in Section A pose an immediate obstacle because they suggest that, in the ordinary course of interaction between *M* and an *R* or multiple *Rs*, the demand will often be satisfied by slight, routine reactions. Moreover, the difference between cases in which such are present and absent seems trivial and almost imperceptible.

One can illustrate this point in a number of ways. Allow one sample dialogue to suffice. It is a variant of example 2, where *M* is executing a supply contract with a particular *R*. After *M*'s mention of its unilateral policy, the discussion proceeds as follows:

R: I agree.

M: No, no!!! Don't agree! Take it back!

R: What do you mean? So, I don't have to adhere to the policy?

M: No. Of course, you must.

R: So what's the problem?

M: [*M* offers a legal explanation, invoking the firm's lawyer.] So, take it back.

R: OK, but I still agree to do it.

M: No, take that back too!

R: So I don't have to agree to do it?

M: Yes and no: You cannot *agree* to do it, but you must in fact *do* it.

R: What's the difference?

M: You're a pain in the neck. Just say No. I mean Yes. No, I mean Yes and No. Or was it No and Yes?

R: I'm confused.

M: Me too. Let's try this. Repeat after me: "I solemnly swear . . . That we have no agreement that you will follow my policy. But that you know I'm insisting that you follow my policy. And you understand that I will terminate you if you don't.

[*R:* repeats each in turn.]

M: Great!

R: Am I done? Can I go now?

M: Absolutely.

R: Great! Good-bye. I'm looking forward to a long, productive business relationship. And, on that policy thing, don't worry, you can be assured you'll be happy! Have a good day.

M: Oh no! You have to take that back now. My lawyers had told me that to "assure" is to "agree," and you can't agree!

R: I only assured you that you'd be happy, not that I agreed to do anything. So what's the problem?

M: Someone might think that, since I explained how angry I'd be if you didn't adhere, and you assured me I'd be happy, that you in essence have assured me you'd adhere.

R: But isn't that what you want?

M: Of course. Wait, I mean of course not! Let's try it again. But this time, when you're done repeating after me, please just SHUT UP!

R: Can I agree to that?

Each reader can form his or her own judgment about whether this is more or less absurd than Abbott and Costello's "Who's on First?" routine.

Perhaps *M* can be safe in this scenario and many others like it as long as the law requires

that *R*'s acquiescence not only be communicated to *M* but that it also be sought by *M*.³⁶ Nevertheless, *M*'s announcement of its policy, *M*'s communication of it to *R*, and *M*'s explicit statement of its intention to terminate if *R* does not follow the policy can be interpreted as seeking (demanding) *R*'s acquiescence, the very meaning of which is to do tacitly what another wishes.³⁷ One could require that *M* seek not merely acquiescence (tacit submission) but an open, declared promise to adhere. A rule requiring something akin to the utterance of magic words is intelligible although not intelligent.³⁸ Because it is so readily circumvented (by using slightly different words), it is hardly surprising that such an interpretation has not caught on with courts.³⁹

³⁶ See, e.g., AREEDA & HOVENKAMP, *supra* note 7, at 24 (“A communicated assurance does not create an agreement unless it is sought.”).

³⁷ See, e.g., sources cited *supra* note 17. Consider also a variation on the dialogue in the text. Specifically, suppose that *M* states: “It’s OK that you have agreed with me, even good; but, just to be clear, I didn’t request this! If you think I did, you misunderstood, and I take it back.” An alternative would be for *M* to state: “I’m requesting you to acquiesce, and I want you to acquiesce, and I will cut you off if you don’t acquiesce and it’s not entirely clear to me that you have, by your actions, acquiesced. But, do not, under any circumstances, *communicate* to me that you indeed acquiesce. Got it? If you do, I will instead terminate you for trying to get me into legal trouble. That is, I’ll terminate you for communicating this, and will do so even if you do charge my insisted-upon price.” All of these variations appear to be attacking a straw man, and a fairly silly one at that. The only thing is, the formulation under attack is the closest we have to an explicit statement of the operative legal rule in the United States. An interesting contrast is that, in the European Union, it appears more broadly accepted that acquiescence by action—that is, by actually complying with the demand, even when such intent to comply is not itself communicated—is sufficient. See *infra* Section II.E (including in particular the quotations in the footnotes).

³⁸ Cf. Levi, *supra* note 9, at 326 (“[I]t is a matter of concern also that in an area involving important commercial practice the law should have developed so as to appear to put a premium on the avoidance of words which describe what the parties clearly intend.”).

³⁹ It is not obvious how a court can avoid such a result while being faithful to *Monsanto*'s requirement that acquiescence be communicated and sought. Consider Judge Posner's discussion of the interactions in *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163–64 (7th Cir. 1987), a case that has been noted by commentators and is cited (alongside *Monsanto*, quoting the requirement that “the distributor communicated its acquiescence or agreement and that this was sought by the manufacturer”) in support of the Model Jury Instruction (see *infra* Section II.D) on “Plaintiff’s Agreement.” ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST ACTIONS, 2005 EDITION, B-81 (2005) [hereinafter MODEL JURY INSTRUCTIONS].

Vermont Castings reads [*Monsanto*'s statement on communicating and seeking assurances] literally, to mean that unless Isaksen said to it, “I agree to adhere to your suggested retail prices,” there was no agreement for purposes of section 1. If footnote 9 is interpreted in this way, however, a more explicit agreement would be required to establish concerted action under the Sherman Act than to establish a contract enforceable under the Uniform Commercial Code.

825 F.2d at 1164. Recall from Section B, however, that, in many settings, what the *Colgate/Monsanto* doctrine deems to be unilateral may well constitute a binding contractual obligation. The court continues:

Nor can a dealer be allowed to manufacture an agreement by saying “I agree to abide by your suggested prices,” when he has not been asked to agree. But we do not think the [*Monsanto*] Court intended to go so far as to rule that if a supplier telephones a dealer and tells him, “Raise your prices by next Thursday, or I’ll ship you defective goods,” and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer’s resale price. If it were not, there would be very little left of the rule against vertical price-fixing.

Id. Recalling example 2 in Section A, we now learn that, not only are magic words unnecessary, but a mere grunt—accompanied by acquiescence, which without the grunt is explicitly protected by the doctrine—is sufficient. With the bar that low, it is hard to see what is left of the defense. The court’s discussion concludes:

Any agreement came later, when Vermont Castings told Isaksen, “Raise your prices or else,” and Isaksen raised his prices only because he feared that otherwise Vermont Castings would wreck his business by mixing up his orders. It is as if Vermont Castings had told Isaksen that it would reduce its

Echoing the discussion of the examples in Section A, we can ask what exactly is the distinction contained in this version of vertical agreement doctrine. Perhaps just as important, if the trigger does depend on the particulars of any dialogue between *M* and its *R*s, we need to know how a factfinder is to determine—without the benefit of recordings of all interactions—on which side of the boundary a particular case falls. We also have seen that whether a particular case involves a contract, as examined in Section B, or falls within various of the terms examined in Section C, does not depend on precisely how *M* and *R*'s dialogue is conducted. Notably, the legal usage of conspiracy does not require that any words be spoken at all, much less does it hinge on slight differences in phrasings when the parties' meaning (understanding, meeting of the minds, and so forth) is the same.

E. UNILATERAL ACTION + MAKEWEIGHT(S) = VERTICAL AGREEMENT

In the decades after *Colgate* but before *Monsanto*, many believed that the *Colgate* defense had largely been eviscerated. It did not seem to take much beyond *M*'s unilateral policy for a court to deem the overall set of actions to constitute a vertical agreement.⁴⁰ *Monsanto*'s holding is understood to have breathed new life into the unilateral action defense, but perhaps not much: as will be discussed in Subsection II.B.2, *Monsanto* also found the fairly limited set of facts before it to be sufficient for the case to reach the jury, which had already found a vertical agreement to be present. Courts and commentators have subsequently paid as much attention to what *Monsanto* actually did as to the rule it articulated, so the state of the caselaw may have shifted somewhat, but it does not seem that there was a radical change.

In light of the difficulties revealed in Sections A–D of this Part, as well as actual court decisions, perhaps one can do no better than to characterize existing law as deeming unilateral action alone insufficient to constitute agreement, but declaring an agreement to be present as long as some additional factors are present—just about any factors (and perhaps only one), and with little regard to their practical significance. This formulation may be inelegant but might still constitute as accurate a statement as can be offered. It is similar in spirit to some leading commentators' suggestion that *M*'s plan will constitute an agreement when any “complexity” is involved in carrying it out,⁴¹ and it finds support in the Supreme Court's 1960 opinion in *Parke*,

wholesale price to him if he raised his resale price, and Isaksen had accepted the offer by raising his price.

Id. In this final restatement of the minimum, we no longer require the grunt: the *act* of acquiescence, which the doctrine seems to deem insufficient, is held to be enough on the ground that the unilateral demand has been accepted by action. This interpretation corresponds to the theory favored by Areeda and Hovenkamp, but which they believe to have been rejected by *Monsanto*. See *supra* note 27.

⁴⁰ See, e.g., Turner, *supra* note 9, at 695 (writing before *Monsanto*, stating that courts found agreements “in courses of conduct that showed any substantial element, such as complex detection and policing arrangements, beyond simple refusal to deal,” and describing the *Colgate* right as “almost entirely illusory”). This development, which began almost immediately after *Colgate*, is in a sense surprising because, as will be discussed in Subsection II.B.1, *Colgate*'s facts involved so much action by *M* that a broad defense was implied.

⁴¹ See, e.g., AREEDA & HOVENKAMP, *supra* note 7, at 15 (“If the *Colgate* privilege to choose one's suppliers or customers for reasons sufficient to oneself is not absolute, one might read the Court merely to permit a ‘simple’ implementation of one's announced condition on future dealing.”); *id.* at 15–16 (stating, “*Monsanto* might be read to draw a gross distinction between simple and complex refusals to deal. . . . Such an interpretation is consistent with the results of *Monsanto*, though not necessarily with its methodology.”); Turner, *supra* note 9, at 685 (referring to “complex detection and policing arrangements, beyond simple refusal to deal”). Areeda and Hovenkamp's treatise develops this

Davis.⁴²

This statement is even more unsatisfactory than it appears. Most fundamentally, if the rule is that the baseline must be exceeded, if only by a small amount, we will need to know fairly clearly what that baseline is. *M* is permitted to have and announce, say, an RPM policy, without there being an agreement, but what constitutes a *mere* announcement? May it be loud? Can a copy be attached to the underlying supply contract? Can it ever be transmitted to *R* after the supply contract is entered? By mail? Email? Can it be on the home page of *M*'s website? Reaffirmed at an event? That is, just looking at the announcement itself, which actions are understood as part of the baseline and thus protected, and which are supplemental actions that cross the line?

Similar questions can be asked about termination. Termination for violating *M*'s policy is permissible. May the reason be given? Or might that be seen as an invitation to *R* to mend its ways, which action would communicate its acquiescence, which was sought? Or must *M* refuse to state a reason? Or, since such a refusal might be a nonstandard commercial practice—especially when the longstanding *R* inquires and is met with “no comment”—might the failure to state the reason be a factor that crosses the line? What if *R* guesses the reason, and says “is that it?” And, after termination, is *M* ever allowed to sell to that *R* again?⁴³

Related, even if the baseline is known, we also must specify the minimal weight of the additional factors and along what dimensions they lie.⁴⁴ Presumably, whether the policy is announced on a particular day of the week or is printed in a particular font is wholly irrelevant. But various cases have deemed all manner of interactions—between *M* and *R* and between *M* and third parties—to be enough to cross the line. It is easy to assert that something is enough.⁴⁵

complexity theory over the course of much of their 200-page treatment of the subject. See AREEDA & HOVENKAMP, *supra* note 7, ch. 14D. Although there is undoubtedly some overlap in other commentators' assessments, there is surprisingly little engagement. For example, Glen Robinson, *supra* note 7, does not cite (the then-existing edition of) this treatise in the pertinent half of his article, *id.* at 583–601, although he once cites the next chapter in the other half, *id.* at 606 n.107. Likewise for Warren Grimes, *supra* note 9, at 487–91. Similarly, the latest edition of Areeda and Hovenkamp's treatise volume (2010) does not engage others' views of the subject.

⁴² See *infra* Section III.B (quoting *Parke, Davis*).

⁴³ For an interesting (pre-*Leegin*) discussion of practical advice to suppliers seeking the cover of *Colgate*, see Brian R. Henry & Eugene F. Zelek, Jr., *Establishing and Maintaining an Effective Minimum Resale Price Policy: A Colgate How-To*, ANTITRUST, Summer 2003, at 8 (advising, *inter alia*, that suppliers engage in no discussions of any kind when policies are promulgated, when complaints are received, or at termination, and that terminations be prompt and without second chances).

⁴⁴ There is yet another fundamental problem with this construct: even if a dimension is relevant, why is it that more rather than less is indicative of agreement? When one acts on one's own, rather than in coordination with others, the path is often more complex and convoluted, not less. (Consider attempting to get a sofa up three flights of stairs.) In the context of vertical restraints, if there is “really” a solid agreement, *M* may not need to engage in as much collateral activity to make sure its *R*s are in line, whereas if it must fully rely on itself to make the *R*s acquiesce (but, of course, not agree), more actions, of greater complexity and subtlety, may be needed. Hence, why it is that these additional factors make one more rather than less likely to deem an agreement to be present is more difficult to rationalize than is generally appreciated.

⁴⁵ For example, Areeda and Hovenkamp, in elaborating their notion that agreements are found “where announced conditions are enforced in a ‘complex’ manner,” acknowledge that “[d]efining ‘complex’ enforcement is difficult.” AREEDA & HOVENKAMP, *supra* note 7, at 17–18. They state: “The category [of complex enforcement] should not include announced conditions, terminations, or the use of third parties to gather information or to effect a termination. It should include control of third-party resales and, more arguably, individualized negotiations with dealers falling short of traditional agreement, and perhaps even exhortation meetings.” *Id.* at 18. Their use of “should” in this statement is mysterious, for it presumes some purpose or objective (which is not stated) and that the demarcation offered best

For example, “*M* did not just have a unilateral policy; it also issued warnings to noncompliant *Rs* before termination.” Or, “*M* did not just receive complaints from compliant *Rs*, it communicated them to noncompliant *Rs*.” But enough *what?* And *why?*⁴⁶

The difficulty of answering these sorts of questions is, on reflection, really a symptom of the underlying problems analyzed previously, beginning with the question of why these unilateral contractual provisions—which in that respect are like any other contractual provisions—are said not to be parts of contracts for purposes of Sherman Act Section 1 and similar provisions in other jurisdictions. If, at bottom, we do not know what the distinction is about, it is difficult to state it in an administrable fashion. Much less to apply it to actual facts, which may be disputed and which may need to be inferred from circumstantial evidence.

Foreshadowing Part III’s discussion of the relationship, if any, between various versions of the agreement requirement and the effectuation of competition policy, it is also natural to inquire into the consequences of defining the rule in this way. If, for example, an *M* cannot warn its *Rs* before terminating them for noncompliance with its policy—because this is a sufficient makeweight to cross the line, or because (echoing Section D) this would be seeking acquiescence which subsequent compliance might communicate—will there be more or fewer terminations?⁴⁷ And, either way, will there be more or less compliance with *M*’s policy (which we are assuming *arguendo* to have anticompetitive effects)? What is perhaps most interesting, and disturbing, is that these sorts of questions do not seem to be guiding the law’s development.

II. THE LAW OF VERTICAL AGREEMENT

To appreciate how the law of vertical agreement actually works, it is necessary to triangulate. The most obvious and conventional sources of law are the statute itself and authoritative interpretations thereof, which are the subjects of Sections A and B, respectively, for vertical agreement law in the United States, and Section E for the law in the European Union. In addition, implementation of a formal rule depends on the sorts of evidence that are available and admissible, considered in Section C, and on how that evidence is processed by the factfinder, which in the United States is typically a jury, whose instructions (the *de facto* law) are examined in Section D.⁴⁸

advances it (but no reason is given, which would be difficult since the goal is unknown). Their classification is subsequently elaborated, *see id.* ¶ 1449, where it appears that the objective relates to fidelity to the Supreme Court’s varied and conflicting opinions, although it is not clear how their final pronouncement, *see id.* ¶ 1449(f), is derived therefrom.

⁴⁶ This problem is illustrated by *Isaksen v. Vermont Castings, Inc.*, discussed in note 39.

⁴⁷ Perhaps more because now noncompliance leads to termination rather than a second chance, which would often be capitalized on by *Rs*. Perhaps less because *M* would be unwilling to actually terminate, or perhaps less because *M* would certainly terminate, the prospect of which will induce high *ex ante* compliance, which ultimately will result in fewer terminations than would a soft policy, where renegotiations and second chances often would fail to rectify the problem.

⁴⁸ There is a highly significant omission from the topics analyzed here (and from nearly all treatments of the subject): What messages filter down to firms (whether *Ms* or *Rs*), who, after all, are the real targets of the law. In many settings, the room for slippage is great. One might suppose that, given the subtleties and apparent contradictions in the law of vertical agreement, the gap could be large. Awareness of this point, however, does little to help us know what lawyers routinely tell their clients or what myriad firms, and their many particular agents—most of whom have not benefited from focused legal advice—take as the operative norms on a daily basis.

A. SHERMAN ACT SECTION 1⁴⁹

Sherman Act Section 1 prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy[] in restraint of trade or commerce.”⁵⁰ Although contract, combination, and conspiracy are often collectively referred to as “agreement”—as in stating, with regard to vertical restraints, that Section 1 requires the presence of a “vertical agreement”—it is useful to keep in mind that this is a mere shorthand, albeit one that, to some extent, may have taken on a life of its own.

As explored in Sections I.B and I.C, the provisions regarding contracts and conspiracies are obviously relevant in this context.⁵¹ Virtually all of the supply arrangements challenged under Section 1 are undoubtedly contracts, the terms regarding *M*’s policy that is under challenge are often most plausibly viewed as part of those contracts, and even when they are not, they are naturally understood to be covered since it has never been insisted that the narrow and literal contract (or other agreement) itself directly and sufficiently cause any and all pertinent anticompetitive effects. And, when *M*s have clear policies that are understood and complied with by one or more *R*s, the relationship between an *M* and its *R*s is readily encompassed by lay and legal notions of conspiracy as well as near synonyms such as agreement, understanding, concerted action, and a meeting of the minds. Hence, as a purely formal matter, it is easy to interpret Section 1 as covering the set of situations (however broad or narrow it is taken to be) that are sometimes described as unilateral policies, exempt under the *Colgate/Monsanto* doctrine. Indeed, it is the imputation of such a defense that arguably requires stretching the

⁴⁹ Following convention, this Section confines attention to Section 1 of the Sherman Act. Vertical restraints might also be reached, however, under other provisions. Section 2’s prohibition of monopolization (including attempts) is discussed in Section IV.A. Clayton Act Section 3 reaches some vertical restraints, such as tying and exclusive dealing. It too, in essence, has an agreement requirement: It requires that there be a “lease or . . . a sale or contract,” where there exists a “condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller.” 15 U.S.C. § 14. Areeda and Hovenkamp argue that “[t]his ‘agreement’ language has the same meaning as the language ‘contract, combination, and conspiracy’ in Sherman Act § 1.” AREEDA & HOVENKAMP, *supra* note 7, at 25. In contrast, others suggest that the agreement requirement in tying and exclusive dealing cases is more lenient. *See, e.g.*, LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 382 (2d ed. 2006). Nevertheless, the only support that Sullivan and Grimes offer, *see id.* at 382 n.49, is the *Kodak* case, but there, according to the lower court, “Kodak entered into agreements with its equipment owners, expressly set out in its ‘Terms of Sale,’ that it will sell parts only to users ‘who service only their own Kodak equipment.’” *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990). Robinson, without specific support, also suggests that “the unilateral action defense in intrabrand vertical restraint cases is all the more remarkable given that the defense has often gone unnoticed in interbrand restraint cases—tying and exclusive dealing—governed by Section 1 (and by Section 3 of the Clayton Act, which also presupposes the existence of a contract).” Robinson, *supra* note 7, at 590 (footnote omitted). Finally, Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition” without imposing anything akin to an agreement requirement, 15 U.S.C. § 45, but the FTC’s actions and court decisions have not, for the most part, extended its reach beyond that of the other antitrust statutes. *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 7, at 25–26, 196–98.

⁵⁰ 15 U.S.C. § 1.

⁵¹ There is also the potentially significant point that the whole may be greater than the sum of its parts. Specifically, in referring to contracts, combinations (themselves in any form whatever), and conspiracies, a natural reading is that Section 1’s language is meant to be all-encompassing, at a minimum favoring broad rather than narrow interpretations of each constituent term.

statutory language.⁵²

It is, of course, possible, although unlikely, that Congress used these terms in an artificial manner, divorced from common language and longstanding legal usage, the latter of which was highly developed with regard to both contract and conspiracy. If one is to insist on any defense of the sort contemplated, it is more plausible to attempt to ground it in competition policy. Ever since its 1911 decision in *Standard Oil* holding that Section 1 applies only to unreasonable restraints (equivalently, that a reasonable restriction is deemed not to be a restraint),⁵³ the U.S. Supreme Court has tended to interpret the antitrust laws in a purposive manner. Two related points should be noted in this regard.

First, importing defenses into Section 1's agreement requirement is, at best, redundant in the present setting. Because under *Standard Oil*'s rule of reason test, as subsequently elaborated,⁵⁴ a substantive inquiry is already demanded, it is not clear what purpose is served by loading additional requirements into a separate agreement element. Simply put, if some vertical restraints are not unreasonable—they promote, or at least do not suppress, competition—they are legal in any event.⁵⁵

Second, as explored in Part III, there is a serious problem of nexus between articulations of the vertical agreement requirement and competition policy. As an approximation, we might say that the two are largely unrelated. In that event, imposing a supplemental vertical agreement requirement exempts an essentially random subset of cases, the size and shape of which depends on the contours given to the *Colgate/Monsanto* defense. Although analysis of this point will be deferred, it should be fairly apparent from the examples and discussion in Part I that various attempts to carve out various *M* policies that are implemented in ever-so-slightly different ways do not, on their face, appear related to whether *M*'s specific policy or its particular means of deployment is more procompetitive than those that are covered by the statute. If this were so, it would probably be a stroke of luck, for development of the vertical agreement doctrine over the past century has proceeded with virtually no reference to the substance of competition policy.

B. SUPREME COURT DECISIONS

This Section will not recount all the U.S. Supreme Court decisions on the vertical agreement question, which are familiar.⁵⁶ It will instead focus on *Colgate*, the origin of the unilateral action defense, and *Monsanto*, the only direct elaboration thereof in the last half century, because of their centrality and certain important features that sometimes go unnoticed.⁵⁷

⁵² See, for example, the quotations from Robinson that appear in note 21. This view, although not stated in so many words, also seems to be a central thrust in the seminal article by Donald Turner, *supra* note 9.

⁵³ *Standard Oil Co. v. United States*, 221 U.S. 1, 49–68 (1911).

⁵⁴ See *supra* note 1.

⁵⁵ For elaboration, see Section III.A.

⁵⁶ See sources cited *supra* note 7.

⁵⁷ As will become clear, the central thrust of *Colgate* is rather different from what many take it to be. Perhaps more surprising, *Monsanto* often receives much less attention than one would expect in light of its being the only authoritative modern elaboration of the law on vertical agreement. See, e.g., AREEDA & HOVENKAMP, *supra* note 7, ch. 14D (offering an extensive analysis, much of which—even in the current, third edition, in 2010, more than 25 years after *Monsanto*—presents theories and recounts cases from the pre-*Monsanto* era, often tacking on toward the end comments to the effect that much does not survive *Monsanto*); Grimes, *supra* note 9, at 490–91 (devoting a few sentences to *Monsanto* near the end of a four-plus page treatment of the subject); Robinson, *supra* note 7, at 599–600 (discussing

1. Colgate

The Supreme Court's 1919 decision in *United States v. Colgate & Co.*⁵⁸ is remarkable in a number of respects, particularly in light of subsequent developments in the doctrine and in the Court's approach to the antitrust laws as a whole. Although the so-called *Colgate* doctrine or defense is now understood (even after *Monsanto*) to protect only a narrow range of behavior, the actual facts in the case were much more expansive.⁵⁹

Following this [allegation in the indictment] is a summary of things done to carry out the purposes of the combination: Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists;' *requests to offending dealers for assurances and promises of future adherence to prices, which were often given*; uniform refusals to sell to any who failed to give the same; sales to those who did; *similar assurances and promises required of, and given by, other dealers followed by sales to them*; unrestricted sales to dealers with established accounts who had observed specified prices, etc.⁶⁰

Even if the vertical agreement element is deemed to require acquiescence communicated and sought, explicit assurances, actual promises, or instead various indicia of intricacy in carrying out an otherwise-unilateral scheme, all were taken to be present in *Colgate*. Put simply, the breadth of vertical agreement in subsequent cases (including *Monsanto*, as we will see in a moment) and in articulations of the law by some commentators⁶¹ seems to contradict the scope of permission granted in *Colgate*.

In light of this rendition of the facts, it is necessary to proceed further to understand the nature of the defense carved out by *Colgate*. The core of the Court's pronouncement centered on goods that had already passed from *M* to *R* before termination. To be a vertical agreement under Section 1, the contractual arrangement had to control these goods as well.

No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further

Monsanto only briefly, and at the end, of an extensive analysis of vertical agreement law).

⁵⁸ 250 U.S. 300 (1919).

⁵⁹ There is some question of what the Court believed to be the actual facts in contrast to those alleged in the indictment. In that regard, the Court stated, "'We must accept [the lower] court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision.'" *Id.* at 301-02 (quoting *United States v. Miller*, 223 U. S. 599, 602 (1912)).

⁶⁰ 250 U.S. at 303 (emphasis added).

⁶¹ Areeda and Hovenkamp explicitly acknowledge the actual reach of *Colgate* itself. See AREEDA & HOVENKAMP, *supra* note 7, at 67-68.

sales to him, as he had the undoubted right to do.⁶²

One way to understand this distinction, which seems central to the Court in *Colgate* but ignored in modern cases and writings, is that it is a corollary of the underpinning of *Dr. Miles*⁶³ itself: that the question at hand was not the likely effects of the parties' arrangements or whether those were anticompetitive in any modern sense, but rather whether they offended the common law's traditional hostility to restraints on alienation.⁶⁴

It is only after the *Colgate* Court reaches its legal conclusion that it opines on the underlying justification, penning the words that are most often quoted from *Colgate*, as if they constituted the legal rule rather than the explanation for the rule stated earlier in the opinion:⁶⁵

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.⁶⁶

To further drive the point home, the Court concludes this paragraph and the opinion as a whole with the statement: “In [*Dr. Miles*], the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.”⁶⁷ In short, this passage from *Colgate* does indicate that the opinion is about contractual freedom, but in context this freedom is understood in terms of an *R*'s formal right, once it has purchased the goods from an *M*, to dispose of the goods literally as *R* chooses. As we can see from the earlier statement of the facts, this was not understood as inconsistent with *M*'s procuring explicit promises from *R* to adhere to *M*'s policy, specifically with regard to resale prices.⁶⁸

2. Monsanto

Although different in many respects, the Supreme Court's 1984 decision in *Monsanto*

⁶² 250 U.S. at 305–06 (emphasis added). The Court subsequently repeats mostly the same words, which were in the indictment itself. *See id.* at 306.

⁶³ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 404–05 (1911).

⁶⁴ *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 7, at 68; Turner, *supra* note 9, at 687 (“If only the first ground had been stated, the absence of a contract stressed in *Colgate* might have warranted the distinction there drawn, because in the absence of a binding contract there is technically no restraint on alienation.”); Grimes, *supra* note 9, at 488 (“Like *Dr. Miles*, *Colgate* was premised less on careful economic analysis and more on venerable principles of property law.”); *cf.* Robinson, *supra* note 7, at 590–91 (“To this point, I have treated the unilateral action defense as a matter of statutory semantics, but the Court's opinion in *Colgate* does not rest on the statutory language; indeed, it takes no note of it.”).

⁶⁵ *See, e.g.*, 2 EARL W. KINTNER, JOSEPH P. BAUER, WILLIAM H. PAGE & JOHN E. LOPATKA, FEDERAL ANTITRUST LAW § 14.6 (3d ed. 2013).

⁶⁶ 250 U.S. at 307 (emphasis added).

⁶⁷ *Id.* at 307–08.

⁶⁸ This understanding of *Colgate* will be revisited in Section III.B in discussing the modern Court's hostility to such formalities as the basis for antitrust rules.

Co. v. Spray-Rite Service Corp.,⁶⁹ resuscitating the *Colgate* doctrine, shares with *Colgate* a substantial inattention to competition policy, a trait that is more surprising in modern antitrust jurisprudence, as will be discussed in Section III.B. Instead, the Court largely confined itself to stating the rule and applying it to the facts before it. The rule is primarily embodied in two key statements.

First, after stating that an *M*'s otherwise unilateral policy was not transformed into a vertical agreement by some *Rs* complaining to *M* about noncompliance by other *Rs*, the Court offered a general outline, one that is widely quoted and has played a central role in subsequent cases on horizontal agreements as well.⁷⁰

Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others “had a conscious commitment to a common scheme designed to achieve an unlawful objective.”⁷¹

The language contrasting independent action to a conscious commitment to a common scheme is reminiscent of that discussed in Section I.C on conspiracy,⁷² where it was suggested that the sort of vertical arrangement that *Monsanto* suggests is exempt is actually covered by Section 1. Likewise, this passage is followed immediately by further citations, including comparison to another of the Court's well-known pronouncements on the meaning of conspiracy: “*American Tobacco Co. v. United States* . . . (Circumstances must reveal ‘a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement’).”⁷³

If these statements are taken as the necessary and sufficient conditions for a vertical agreement under Section 1, it is difficult to see *Monsanto* as enabling a significant—indeed any—unilateral action defense. However, the passage and citations are, in turn, accompanied by a footnote (number 9), which has become the other regularly quoted passage from *Monsanto*:⁷⁴

⁶⁹ 465 U.S. 752 (1984).

⁷⁰ Notably, the most-quoted language in *Matsushita*, on both the summary judgment standard in general and the definition of agreement (horizontal and vertical) under Sherman Act Section 1, draws heavily on this passage. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)) (“Respondents correctly note that ‘[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.’ . . . But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto* . . . , we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently. [*Id.*] Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.”)

⁷¹ 465 U.S. at 764 (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).

⁷² The term “conspiracy” (and other language from Section 1 itself) does not appear in this key passage or in most of the Court's discussion, but it is the key term in the applicable jury instruction, see 465 U.S. at 758 n.2, which formulation the Court implicitly endorsed in affirming the decision below. See *infra* Section II.D.

⁷³ *Id.* at 764 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

⁷⁴ Given that the footnote is seen by many as *the* rule announced in *Monsanto*, and that it arguably cuts significantly into the prominent passage in the text, which on its face seems to embody the legal standard, it is surprising that this language was relegated to a footnote. This feature combined with the Court's application of the standard to the

The concept of “a meeting of the minds” or “a common scheme” in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.⁷⁵

This passage, of course, is the source of the formulation examined in Section I.D, one that achieved prominence post-*Monsanto*, and one that we have seen does not obviously generate a robust unilateral action defense. This may be particularly so in practice when the requisite demonstration may be made by circumstantial evidence, as the *Monsanto* text pronouncement, quoted just above, explicitly reminds. The language from *American Tobacco*, which was similarly endorsed, when quoted more fully, reinforces this idea:

It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. . . . No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. . . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.⁷⁶

This statement focuses on substance over form—specifically, ends over means—which we have already seen are indistinguishable as between unilateral policies and vertical agreements in most instances. Additionally, we are told that, in showing agreement, there need not be any exchange of words; actions and indications by surrounding circumstances are sufficient. To restate the point, although footnote 9 directs an inquiry into whether acquiescence⁷⁷ or agreement was communicated or sought, *Monsanto*’s text indicates that such may be inferred from behavior and context.

In interpreting *Monsanto*, it is appropriate to examine not only the Court’s general statements of legal principles but also the manner in which it applied them to the case at hand.⁷⁸

facts (discussed next in the text here), which is arguably inconsistent with the footnote, supports the interpretation that the footnote does not well represent *Monsanto*’s rule as the Court saw it. In any event, the footnote is often quoted in subsequent cases although, like in *Monsanto* itself, it is often unclear whether it is given much weight.

⁷⁵ 465 U.S. at 764 n.9.

⁷⁶ 328 U.S. 781, 809–10 (1946).

⁷⁷ It may also be significant that what *M* must seek and *R* must communicate is not a promise or assurance but acquiescence, which, as was noted in Section I.D, is to do tacitly what another wishes. In this light, it is entirely natural to infer acquiescence from acts in conformity, and even *M*’s mere announcement of its policy on its face seeks acquiescence, all of which suggests that, on examination, footnote 9 requires very little. This conclusion, of course, can be taken to indicate that the proffered interpretations could not have been what the *Monsanto* Court meant. That is, it used words, to explicate other words, which refer to yet other words in the statute, and none of these sets of words are really to be understood in their ordinary (or, where applicable, legal) senses. Nevertheless, the key requirement is relegated to a footnote and arguably not adhered to in applying the Court’s test to the facts of the case. *See supra* note 74.

⁷⁸ Partially overlapping criticisms of the gap between *Monsanto*’s pronouncement and its analysis of the facts appear in other commentary. *See, e.g.,* Terry Calvani & Andrew G. Berg, *Resale Price Fixing After Monsanto: A Doctrine Still at War with Itself*, 1984 DUKE L.J. 1163, 1195–97.

In the trial court, the case had been sent to the jury,⁷⁹ which had found that there was a vertical agreement. On appeal, the question before the Court was whether the plaintiff's evidence was sufficient to support this conclusion (formally, to justify sending the case to the jury rather than entering a judgment for the defendant).

The Court held that it was. It described the strongest evidence of vertical agreement as follows:⁸⁰

In fact there was substantial *direct* evidence of agreements to maintain prices. There was testimony from a Monsanto district manager, for example, that Monsanto on at least two occasions in early 1969, about five months after Spray-Rite was terminated, approached price-cutting distributors and advised that if they did not maintain the suggested resale price, they would not receive adequate supplies of Monsanto's new corn herbicide. *Tr.* 1929-1934. When one of the distributors did not assent, this information was referred to the Monsanto regional office, and it complained to the distributor's parent company. There was evidence that the parent instructed its subsidiary to comply, and the distributor informed Monsanto that it would charge the suggested price. *Id.* at 1933-1934. Evidence of this kind plainly is relevant and persuasive as to a meeting of minds.⁸¹

As a preface, we have been told earlier in the opinion that unilateral policies are permitted and that complaints from other *Rs* do not transform a unilateral policy into an agreement. The first part of this subsequent passage informs us, however, that reminding noncompliant *Rs* of one's policy (which one was freely permitted to announce in the first place) is powerful evidence of agreement. In light of such pronouncements, one can see how some regard the heading of Section I.E ("Unilateral Action + Makeweight(s) = Vertical Agreement") to state the law. The second part of the foregoing excerpt from *Monsanto* does go further, but by less than meets the eye. It hardly seems inconsistent with the notion of a unilateral policy that one holds near and dear that one would complain if one's will were not reflected in others' actions. The differences between stating one's policy initially to an *R* not in compliance (permitted), reminding the *R* (condemned under to the first part of this passage), and complaining to the *R* (condemned under

⁷⁹ A critical question for present purposes is how that jury was instructed, a point to which we will return in Section D.

⁸⁰ Similarly, in further showing that there was sufficient basis for the jury to find that *R*'s termination was pursuant to the vertical agreement, the Court states:

In addition, there was reliable testimony that Monsanto never discussed with Spray-Rite prior to the termination the distributorship criteria that were the alleged basis for the action. . . . By contrast, a former Monsanto salesman for Spray-Rite's area testified that Monsanto representatives on several occasions in 1965-1966 approached Spray-Rite, informed the distributor of complaints from other distributors—including one major and influential one . . .—and requested that prices be maintained. . . . Later that same year, Spray-Rite's president testified, Monsanto officials made explicit threats to terminate Spray-Rite unless it raised its prices.

465 U.S. at 767-68. This suggests that receiving complaints is not sufficient to transform a unilateral policy into vertical agreement, but letting an *R* know what you have learned does, and that having a unilateral policy that threatens termination is not an agreement, but making threats pursuant to it is.

⁸¹ *Id.* at 765.

the second), are rather small.⁸² Consider also the significance of the complaint being directed to the parent company or, say, to the recalcitrant's boss. Is a policy less unilateral or does it involve more of a meeting of the minds when directed further up in the hierarchy of the target firm? That is, is *M*'s policy unilateral only if announcements of it are shared exclusively with underlings? Finally, and perhaps more strongly, we have *R* ultimately informing *M* that it will follow the policy. If *M* had said "shut up; just do it!" would there have been no agreement? Recall Section I.D. Or what if *R* simply complied, knowing that *M* would see its price conformity immediately?

From *Monsanto*, we know that these pieces of evidence, collectively and perhaps individually, are sufficient, whatever the rule might actually mean. But we know more. After this passage, in another footnote, the Court observed:

In addition, there was circumstantial evidence that Monsanto sought agreement from the distributor to conform to the resale price. The threat to cut off the distributor's supply came during Monsanto's "shipping season" when herbicide was in short supply. The jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance.⁸³

This suggestion is quite remarkable: A unilateral policy backed by stated threats, which in turn are carried out, is not a vertical agreement. But if the threats are deployed at a time when they are likely to be effective, an agreement can be inferred. The implication is that only ineffective threats are permitted, which would render the entire defense moot in terms of practical consequences.

The Court cited additional evidence in support of sending the question of vertical agreement to the factfinder:

An arguably more ambiguous example is a newsletter from one of the distributors to his dealer-customers. The newsletter is dated October 1, 1968, just four weeks before Spray-Rite was terminated. It was written after a meeting between the author and several Monsanto officials . . . , and discusses Monsanto's efforts to "ge[t] the 'market place in order.'" . . . The newsletter reviews some of Monsanto's incentive and shipping policies, and then states that in addition "every effort will be made to maintain a minimum market price level." . . . It is reasonable to interpret this newsletter as referring to an agreement or understanding that distributors and retailers would maintain prices, and Monsanto would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors; these were "the rules of the game."⁸⁴

In other words, a newsletter written by an *R* about *M*'s otherwise unilateral policy, suggesting that *M* is indeed serious about it, can be interpreted by the factfinder as showing that *M*'s policy was not unilateral but involved an agreement. (So much for *Monsanto*'s most-quoted language

⁸² One might say that a reminder to someone not complying with your will is a complaint. How much of a difference is there between reminding a teenager to do her homework when she has been refusing and complaining to her about her refusal?

⁸³ 465 U.S. at 765 n.10.

⁸⁴ *Id.* at 765–66.

that evidence must affirmatively tend to exclude the possibility of independent action.⁸⁵) As discussed throughout Part I, such reading between the lines is entirely plausible in this setting, but here we are told that the presence of an independent newsletter—which, on its face, purports merely to restate *M*'s policy—somehow authorizes this interpretation when the same inference is impermissible when reading between the lines of the policy itself.⁸⁶

C. CIRCUMSTANTIAL EVIDENCE

The law in action depends very much on the evidence that is available and admissible in applying the legal rule to the case at hand. With regard to the vertical agreement requirement, circumstantial evidence is particularly important for a number of reasons. One is that more direct evidence may be limited or entirely unavailable, a possibility rendered more likely by the fact that firms, here *M*s in particular, may have an incentive to hide certain actions. In addition, direct evidence may be unreliable: *R* may assert that it communicated its requested acquiescence to *M* in person (which, if believed, means that a vertical agreement is established under the *Monsanto* formulation), whereas *M* may assert that *R* is lying in order to establish liability. Circumstantial evidence may be more reliable than direct evidence, and at a minimum may put such evidence in context. Finally, when circumstantial evidence is allowed and deemed to be sufficient as a general matter, there is substantial room for a factfinder to conclude as it wishes on the vertical agreement question, which is evident from the discussion in Part I as well as that in the preceding Subsection discussing the facts in *Monsanto*.

Accordingly, it is significant that circumstantial evidence is indeed admissible and, as a matter of law, may alone constitute a basis for finding a vertical agreement. This point was clearly stated in *Monsanto*, both in the first-quoted general statement of the rule and in its discussion of some of the particulars.⁸⁷ Nor are these statements aberrations. It is widely accepted in U.S. antitrust law that conspiracies under Sherman Act Section 1 may be proved by

⁸⁵ The Court further explains that

The newsletter also is subject to the interpretation that the distributor was merely describing the likely reaction to unilateral Monsanto pronouncements. But Monsanto itself appears to have construed the flyer as reporting a price-fixing understanding. Six weeks after the newsletter was written, a Monsanto official wrote its author a letter urging him to “correct immediately any misconceptions about Monsanto's marketing policies.” App. A-98. The letter disavowed any intent to enter into an agreement on resale prices. The interpretation of these documents and the testimony surrounding them properly was left to the jury.

Id. at 766 n.11. This passage suggests a catch-22 (reminiscent of the hypothetical exchange described in Section I.D). First, the Court tells us that a third-party restatement of *M*'s otherwise unilateral policy is sufficient basis for a jury to find that it is in fact a vertical agreement. Then, the Court states that, should *M* find this characterization inaccurate and attempt to clarify the record, that clarification can be interpreted by the jury to mean the opposite, that *M*'s policy really was not unilateral, for *M* doth protest too much. Query whether if *M*, instead, had made clear in its original policy statement that its policy was entirely unilateral, it likewise may be interpreted by a factfinder as a coy way of indicating that it really is not. This situation presents quite a predicament for a lawyer trying to counsel an *M* on what it can and cannot say for its policy to be deemed unilateral. Also, as one reflects on the matter, there is an infinite regress, the equilibrium of which (if any common interpretation is possible) could readily involve either version understood as unilateral, with the other as vertical agreement—supposing throughout that there is a difference between the two.

⁸⁶ It is possible that the newsletter stated *M*'s policy in a different manner, which affects the plausibility of competing interpretations. But the Court makes no reference to how, if at all, and in what direction, the newsletter's depiction differed from *M*'s.

⁸⁷ See *supra* Subsection B.2 (including *Monsanto*'s invocation of *American Tobacco*).

circumstantial evidence.⁸⁸ This permission, in turn, reflects the blackletter law of conspiracy more broadly.⁸⁹

This basic observation is powerful in the present setting, as already suggested. It is quite unclear what is the boundary between unilateral action and vertical agreement. Perhaps it relates in some manner to subtle distinctions about the nature of contracts, or to some aspect of the concept of a meeting of the minds, or to the senses in which various actions and nuances of context (in addition to words) might constitute the seeking or communication of acquiescence, or perhaps no more can be said but that there are various clusters of bits that convert unilateral policies into agreements. For any of these formulations, as fuzzy as they seem to be, contemplate how much more murkiness is added when we are permitted to and often must determine on which side of the boundary a case lies based on circumstantial evidence. We must read between the lines not only of sentences and words, but also of actions of all sorts in various contexts.

A basic challenge in interpreting any body of evidence, much less circumstantial evidence, is that we need to be clear on just what it is that the factfinder is supposed to infer. When we combine tremendous uncertainty regarding the target with significant ambiguity about much of the evidence, the degree to which the decision process is fraught is immense.

D. JURY INSTRUCTIONS

Juries do not read statutes, Supreme Court decisions, or commentary. Nor do trial judges recite these to juries. Instead, the judge issues instructions, and the jury is supposed to adhere to them in determining the outcome of the case based on the evidence presented. Supposing that juries pay some attention to these instructions, it is appropriate to consider them directly—really not just in addition to, but instead of other sources of the law, of which juries are unaware.⁹⁰

To begin, examine the ABA Antitrust Section’s Model Jury Instructions.⁹¹ A substantial segment is devoted to vertical agreements and, in particular, to the *Colgate* doctrine and related issues. The pertinent instruction (stated for a case involving RPM) reads, in relevant part:

Announcing such a policy, and then terminating distributors that do not follow the

⁸⁸ See, e.g., ANTITRUST LAW DEVELOPMENTS, *supra* note 9, at 6–7 (“As courts have recognized, . . . [o]nly rarely will there be direct evidence of an express agreement’ in conspiracy cases. Circumstantial evidence of agreement is admissible and relevant . . .”) (quoting *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 720 (1965) (Goldberg, J., concurring), and for the latter proposition, citing, *inter alia*, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765–66 (1984)); 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 4 (3d ed. 2010) (“Often, we can infer the agreement only from [firms’] behavior.”).

⁸⁹ See, e.g., LAFAVE, *supra* note 34, at 267 (“[I]t is thus well established that the prosecution may ‘rely on inferences drawn from the course of conduct of the alleged conspirators.’”) (quoting *Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939)).

⁹⁰ More standard sources of law remain important for a number of reasons. Most relevant for present purposes, jury instructions are supposed to be formulated to implement governing law. However, when the actual instructions differ—and, moreover, are not closely scrutinized on appeal—existing instructions, for the time they are in use, constitute the de facto law in this domain. Also, as in *Monsanto* itself (on which more will be said later in this Section), the legal rule was used to determine whether the facts were sufficient to reach the jury. However, if that threshold is set fairly low, which was arguably done in *Monsanto*, we again have the jury instructions playing a significant role. Of course, if juries do not give much weight to the instructions, they are accordingly less important, but this possibility does not make statutes and caselaw more important in guiding juries’ deliberations.

⁹¹ MODEL JURY INSTRUCTIONS, *supra* note 39.

suggested prices, does not by itself constitute a resale price-fixing agreement. This is so because simply announcing and enforcing such a policy does not constitute an agreement between the supplier and anyone else. . . . To establish resale price-fixing in such a situation, the plaintiff must show that the distributor reached an agreement on price with the supplier, rather than merely followed the supplier's suggestion.⁹²

In short, a jury is told that everything turns on the presence or absence of an "agreement." With regard to complaints by *Rs* to their *M*, the scenario giving rise to *Monsanto*, the applicable instruction states,

An agreement between the defendant and another of its distributors may be proved either by explicit evidence of an agreement or from circumstantial evidence that tends to show that the defendant and another distributor were not acting independently. . . . Plaintiff must show something more [than distributor complaints]. Plaintiff must present evidence that tends to show that the defendant reached an agreement with its distributor⁹³

In addition to reemphasizing the focus on "agreement," this instruction invites the use of circumstantial evidence and uses the language of independence.

In these Model Jury Instructions, therefore, most of the weight is borne by the term "agreement." This term is defined in a couple of ways. The instruction that opens the section on vertical agreements instructs the judge to begin by inserting the relevant instructions on conspiracy that are earlier in the volume and pertain to all Sherman Act Section 1 cases.

To establish the existence of a conspiracy, the evidence need not show that its members entered into any formal or written agreement; that they met together; or that they directly stated what their object or purpose was, or the details of it, or the means by which they would accomplish their purpose. The agreement itself may have been entirely unspoken. What the evidence must show to prove that a conspiracy existed is that the alleged members of the conspiracy in some way came to an agreement to accomplish a common purpose. . . . The agreement may be shown if the proof establishes that the parties knowingly worked together to accomplish a common purpose. . . . Direct proof of an agreement may not be available. A conspiracy may be disclosed by the circumstances or by the acts of the members. Therefore, you may infer the existence of an agreement from what you find the alleged members actually did, as well as from the words they used.⁹⁴

This statement mixes the terms agreement and conspiracy and, with regard to what is required and how it may be proved, largely reflects common and legal interpretations of those terms, as discussed in Section I.C. The Instruction reinforces some of the prior exposition, including that in Section C of this Part on the use of circumstantial evidence. Whatever is the agreement that the previously quoted instructions require, this statement makes clear that pretty much everything can be read between the lines and, in particular, inferred from actions, even if there are no words or they are unknown.

⁹² *Id.* at B-74. The instruction contains optional supplemental language for cases involving a refusal to deal or termination that is to similar effect in focusing on the presence of an "agreement," which it contrasts with conduct that is "unilateral." *Id.* at B-74 to B-75.

⁹³ *Id.* at B-79 to B-80.

⁹⁴ *Id.* at B-2 to B-3.

There is another instruction on the agreement concept that appears toward the end of the set of instructions specifically on vertical agreements:

Plaintiff must prove by a preponderance of the evidence that defendant entered into an agreement with a distributor fixing resale prices. One way plaintiff may prove this is to show that the plaintiff itself entered into an agreement with defendant. Proof that the plaintiff distributor's resale price conformed to the suggested price is not enough. Rather, plaintiff must prove that defendant sought an agreement from plaintiff with respect to the resale prices it would charge and that plaintiff communicated its agreement to defendant.⁹⁵

The final sentences clearly echo *Monsanto*'s footnote 9.⁹⁶ It is unclear the extent to which this should be viewed as a clarification of the "agreement" that the previously quoted Instruction says may be inferred entirely from actions—indicating what it is that must be inferred—or instead as a toughening of (or contradiction to) the preceding statement.⁹⁷

It is also instructive to examine the jury instructions involved in *Monsanto* itself. Specifically, as explained before, the Supreme Court, in holding that the facts were sufficient to present the case to the jury, upheld its finding of a vertical agreement. In another footnote, the Court quoted the pertinent jury instruction, without offering any further comment thereon: "Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?"⁹⁸ That is, the jury was indeed required to find that the action causing the plaintiff's injury was the product of a "conspiracy or combination," but as far as we can tell from the Supreme Court's opinion, the jury was not told that complaints from other *Rs* were insufficient to establish a conspiracy (which is notable in light of the fact that the appellate court thought they were, which conclusion was reversed by the Supreme Court). Nor do the instructions incorporate any other aspects of the Court's articulation of the legal rule (such as footnote 9's mention of acquiescence being communicated and sought) or the Court's explanations of how various sets of fact may, but need not, be understood as demonstrating agreement in the relevant sense.

The Supreme Court did not mention whether there were further jury instructions that may have refined the notion of conspiracy or otherwise borne on the matter, perhaps in ways that would have been consistent with its dictates and perhaps in ways that would have contradicted them.⁹⁹ That is, for all the discussion and refinement of the law of vertical agreement and of how

⁹⁵ *Id.* at B-81.

⁹⁶ This *Monsanto* footnote is quoted in the Model Instruction's accompanying note, which also includes citations to a few circuit court cases, including *Isaksen*, discussed in note 39.

⁹⁷ Consider also the immediately following instruction on the subject of "coercion," which specifically states that "if distributors respond to a supplier's coercion or persuasion by agreeing with the supplier to charge its suggested prices, rather than just by charging those prices, that satisfies the agreement element of the resale price fixing offense." MODEL JURY INSTRUCTIONS, *supra* note 39, at B-82. It appears that certain actions by an *M* to induce compliance by an *R* are deemed to constitute its seeking acquiescence, fulfilling half of *Monsanto*'s footnote 9 formulation. Query whether stating a policy firmly and, in the statement, including aggressive termination threats—generally understood to be unilateral—constitute coercion or mere persuasion.

⁹⁸ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 758 n.2 (1984).

⁹⁹ The circuit court, in contrast, said a good deal more. It remarked that the trial court's instructions had defined "conspiracy," *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982), but it did not say how, except to the extent that it was referring to the instructions it subsequently discussed (which to this reader does not appear

various facts might support a finding of conspiracy, but only if viewed in the right way and only if certain inferences are made by the factfinder, the Court in *Monsanto* appeared to be entirely indifferent to whether any of this was appreciated by the jury whose verdict it was upholding. For all the attention given to the question of when a case can reach the jury—predicated on a view that there are sufficient facts that, if believed and interpreted in appropriate ways, would warrant a finding of vertical agreement—the question of what juries are told to do with these facts seems to be largely ignored.¹⁰⁰ This silence makes it all the more difficult to understand what the law in action regarding vertical agreements actually is.

E. TFEU ARTICLE 101

Under the competition law of the European Union, Article 101(1) (formerly 81(1)) covers “all agreements between undertakings, decisions by associations of undertakings and concerted practices . . . which have as their object or effect the prevention, restriction or distortion of competition,” including “in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions.”¹⁰¹ Similarities with Sherman Act Section 1 are apparent. Here, the term “agreement” appears in the rule itself, suggesting that related interpretive questions would arise. One commentary on the meaning of agreement under Article 101(1) states that “[a]ll that seems to be required . . . is some form of consensus between two or more undertakings—also referred to as a ‘meeting between minds’ or a ‘concurrence of wills,’”¹⁰² a statement that is close to ordinary and U.S. legal definitions of agreement as well as of conspiracy, which in turn, as noted in Section I.C, also connect with the notion of concerted action, linking to the third category identified in Article 101(1).

As with Section 1 of the Sherman Act, application of this provision in the vertical restraints context has been viewed as raising the need to distinguish unilateral action from vertical agreement. A synopsis of the state of the law is offered by Richard Whish and David Bailey:

In a number of vertical cases the Commission has held that conduct which at first sight appeared to be unilateral fell within Article 101(1) as an agreement or a concerted practice Several of these decisions were upheld on appeal by the EU Courts; however in a number of cases, beginning with *Bayer AG/Adalat* in

to be the case). Notably, one instruction stated, “It is also unlawful for a manufacturer to terminate or threaten to terminate one of its distributors for the reason that the distributor objected to, or departed from either the manufacturer's price-fixing or stabilization plan or any customer or territorial restraints which are part of that plan.” *Id.* at 1235 n.3. This instruction appears to suggest that termination of an *R* for departure from *M*'s stated plan is, in itself, unlawful. If this was the basis for the jury's finding of liability, it would indeed contradict the Court's pronouncements in *Monsanto*. The trial court also gave an instruction on conspiracy and independent action, including that an agreement may be inferred from actions rather than words, that was similar to the material in the Model Jury Instructions quoted in the text. *See id.*

¹⁰⁰ One possibility is that lawyers and courts view jury instructions to be largely irrelevant to jury decision making, at least in the present context, in which case there is little point in scrutinizing them closely. Another is that *Monsanto*'s lawyers were quite pleased with the instructions themselves and thus their only opportunity to overturn the verdict involved a challenge to the evidence as less than minimally sufficient. It may also be that the litigants or the judges (despite litigants' efforts) were simply inattentive to this aspect of the case.

¹⁰¹ Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 47.

¹⁰² MAHER M. DABBAH, EC AND UK COMPETITION LAW 59 (2004) (citing Case T-208/01, Volkswagen AG v. Comm'n, 2003 E.C.R. II-05141).

1996, findings of the Commission that there were agreements between a supplier and its distributors have been annulled on appeal.¹⁰³

For example, one of the earlier cases took the view that an *M*'s sending out a circular stating its policy, followed by *Rs*' compliance, constituted offer and acceptance and hence agreement.¹⁰⁴

The degree to which subsequent cases have expanded the sphere deemed to be unilateral action is unclear. In *Bayer*, the Commission's 1996 decision finding an agreement was overturned by the Court of First Instance (CFI), which reversal was upheld by the European Court of Justice (ECJ) in 2004.¹⁰⁵ The CFI's notion of agreement seemed fairly encompassing, including the case of mere tacit acquiescence in another's policies, but it did not find this to have occurred in the case at hand. The CFI's factual findings to this effect were, in turn, deferred to by the ECJ.¹⁰⁶ Had the decision been otherwise, Whish and Bailey suggest that "the notion that an agreement for the purpose of Article 101(1) requires consensus between the parties would have been virtually eliminated."¹⁰⁷ Some other Commission losses also seem to have involved weak facts, even if the unilateral action defense is viewed narrowly,¹⁰⁸ whereas in a recent case on stronger facts, the Commission prevailed.¹⁰⁹ In any event, some recent statements of the scope of vertical agreement under Article 101(1) are quite expansive.¹¹⁰

¹⁰³ RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* 105 (7th ed. 2012) (footnotes omitted).

¹⁰⁴ *See id.* at 107 (discussing Case IV/31.503-Konica UK Ltd., Comm'n Decision, 1988 O.J. (L 78) 34, 4 C.M.L.R. 848 (1988)).

¹⁰⁵ Judgment of the Court of 6 January 2004, Joined Cases C-2/01 P & C-3/01 P, *Bundesverband der Arzneimittel-Importeure v. Bayer*, 2004 E.C.R. I-00023.

¹⁰⁶ For example, the ECJ distinguished a prior case as follows: "In *Sandoz*, the manufacturer had sent invoices to its suppliers carrying the express words 'export prohibited', which had been tacitly accepted by the suppliers (see paragraph 23 of this judgment). The Court could therefore hold that there was an agreement prohibited by Article [101](1), without being required to seek proof of that in the existence of a system of subsequent monitoring." *Bayer*, at I-100. Furthermore, the Court stated that "it is true that the existence of an agreement within the meaning of that provision can be deduced from the conduct of the parties concerned," *id.*, but it went on to explain that "such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others." *Id.* at I-101. The Court, following the CFI, viewed Bayer's policy as one of merely reducing the quantity it would sell to wholesalers.

¹⁰⁷ WHISH & BAILEY, *supra* note 103, at 109.

¹⁰⁸ *See, e.g., id.* at 110 ("In *General Motors* [CFI 2004] the Commission lost on the point about Opel's export policy because it had failed to show that the policy had been communicated to its distributors or that they had reacted to a policy known to them: if one reverses the facts—suppose that Opel had communicated the policy and the distributors had changed their behaviour accordingly—there would have been an agreement.").

¹⁰⁹ *See* Case T-450/05, *Automobiles Peugeot SA & Peugeot Nederland NV v. Comm'n*, 2009 E.C.R. II-2533 (finding it sufficient to establish an agreement that dealers acquiesced in the system and the pressures on them created by it, which acceptance was manifested by their continuing to place orders).

¹¹⁰ *See* LENNART RITTER, W. DAVID BRAUN, & FRANCIS RAWLINSON, *EC COMPETITION LAW: A PRACTITIONER'S GUIDE* 90 (2d ed. 2000) ("Typically the parties have entered into a long-term supply, distribution or sales agreement which is supplemented by informal anticompetitive arrangements extending beyond the text of the agreement to certain other market conduct of the purchaser (e.g., not to export, or to maintain resale prices), and it is obvious to the purchaser that observance of those arrangements is an unwritten condition for obtaining supplies."); *id.* at 91 ("If a firm receives complaints from a competitor about competition from its products and adapts its conduct accordingly, the conduct is likely to amount to a concerted practice."); *id.* at 92; Astrid Ablasser-Neuhuber & Heinrich Kühnert, *Section 2: EU Substantive Areas; Vertical Agreements: Vertical Agreements and EU Competition Law*, *GLOBAL COMPETITION REVIEW*, *THE EUROPEAN ANTITRUST REVIEW* (2013), globalcompetitionreview.com/reviews/47/sections/162/chapters/1822/vertical-agreements/ ("The term 'agreement' is interpreted widely so that any expression of a concurrence of wills of the undertakings operating on different trade levels is deemed to constitute an agreement. The mere conduct of parties may also constitute an agreement; for example, the

III. COMPETITION POLICY NEXUS

Part I's elaboration of the problem and Part II's exposition of the law of vertical agreement were conducted in a competition policy vacuum. As should be apparent from the foregoing examples and the hairsplitting involved in applying formulations that purport to distinguish unilateral policies from vertical agreements, the real-world effects, competitive or otherwise, of the two types of arrangements will often be the same. Indeed, in many of the settings examined, it was supposed that we know exactly what happened with regard to actual behavior of any consequence, and the only challenge was the need to sift through subtleties of how it came about—or, even less, how to characterize them once they have been brought into focus. It is therefore not surprising that commentators have long criticized the distinction and suggested that unilateral policies be subject to the same treatment under antitrust law as vertical agreements (although there is disagreement on what that treatment should be).¹¹¹

tacit acquiescence of dealers in a selective distribution system.”); Eric Gippini-Fournier, *The Notion of Agreement in a Vertical Context: Pieces of a Sliding Puzzle*, in REVIEWING VERTICAL RESTRAINTS IN EUROPE: REFORM, KEY ISSUES AND NATIONAL ENFORCEMENT 125 (Jean-François Bellis & José Maria Beneyto, eds. 2012) (describing a fairly narrow unilateral action exclusion post-*Bayer* under which tacit acceptance by a dealer is sufficient for an agreement but that schemes that can be implemented solely by the supplier are not); European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 98 [hereinafter EC Guidelines on 81(3)] (“Co-ordination . . . can also be tacit[, which requires] an invitation from an undertaking to another undertaking, whether express or implied, to fulfil a goal jointly. In certain circumstances an agreement may be inferred from and imputed to an ongoing commercial relationship between the parties.” (footnotes omitted)); European Commission, Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1, 10 (“Secondly, in the absence of such an explicit acquiescence, the Commission can show the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice.” (citing the CFI’s opinion in *Bayer*)); *id.* at 11 (“For instance, a system of monitoring and penalties, set up by a supplier to penalise those distributors that do not comply with its unilateral policy, points to tacit acquiescence with the supplier’s unilateral policy if this system allows the supplier to implement in practice its policy.”); *id.* at 17 (“However, RPM can also be achieved through indirect means. Examples of the latter are . . . threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level.”).

¹¹¹ Most commentators who have examined the vertical agreement requirement have remarked on the fact that economic outcomes tend to be similar or identical when *M*'s policies are unilateral and have advocated that the *Colgate/Monsanto* defense be eliminated. This refrain begins at least as early as Turner's seminal paper over a half century ago: “I find it impossible to think of an example of vertical arrangements in which it would make sense to try to draw a distinction between tacit agreement on the one hand and acquiescence induced by threats of refusal to deal on the other, even assuming, contrary to fact, that the distinction is capable of being drawn.” Turner, *supra* note 9, at 692; *see also id.* at 705–06 (“Whether induced by a threat of refusal to deal or not, acquiescence in a seller’s policy as to resale (or in a buyer’s policy as to dealings with the buyer’s competitors) should be enough to establish vertical agreement between the buyer and seller . . .”). Areeda and Hovenkamp suggest that there may be some differences, but usually they are insignificant. *See AREEDA & HOVENKAMP, supra* note 7, at 13, 47–48; *id.* at 75 (“There is no good reason for agreement theory or antitrust policy to save from Sherman Act §1 scrutiny the simple enforcement of announced conditions on future dealing. If complex enforcement can fit within the agreement concept, so can simple enforcement. If similarity of effects to express vertical agreements is the motivating policy concern, simply enforced announced conditions can have that effect . . .”); *see also* SULLIVAN & GRIMES, *supra* note 49, at 376, 382; Burns, *supra* note 26, at 31; Fajer, *supra* note 26, at 17; Grimes, *supra* note 9, at 491; *id.* at 495 (“[I]t is now widely acknowledged that the unilateral conduct defense—which from the outset covered conduct that was not genuinely unilateral—cannot be justified by economic analysis. It is time to eliminate a defense that invites subterfuge, requires awkward and expensive machinations to implement, and can protect genuinely anticompetitive conduct.”); Jayma M. Meyer, *Relaxation of the Per Se Mantra in the Vertical Price Fixing Arena*, 68 SO. CAL. L. REV. 73, 79–80 (1994); Robinson, *supra* note 7, at 581, 586, 591–601,

This Part examines the vertical agreement requirement's nexus, or lack thereof, with competition policy. Section A considers explicitly whether there are possible linkages (correlations) between the two in some settings, including whether the vertical agreement requirement may serve a screening function, whether for agency investigations or at preliminary stages in court. Section B turns to the relationship between competition policy and U.S. Supreme Court precedent, in particular whether current doctrine on the agreement requirement is consistent with the Court's antiformalism, which has been increasingly evident in recent decades.

A. POSSIBLE LINKAGES

The conceptual relationship between a vertical agreement requirement—specifically, allowing a unilateral action defense—and competition policy is straightforward. From the perspective of Sherman Act Section 1's rule of reason, the requirement presupposes that the presence of a vertical agreement (appropriately defined) as a matter of a priori theory or empirical regularity makes it more likely that the scheme that *M* is imposing on its *Rs* suppresses rather than promotes competition.¹¹²

Even if taken as a necessary condition, Section II.A explained how it is not sufficient because, even if this is true, any difference in competitive effects would be reflected in the outcome under the rule of reason in any event. Moreover, imposing an independent vertical agreement requirement would be detrimental unless cases lacking the vertical agreement element virtually never involved net anticompetitive effects, and even then it would be redundant.¹¹³ The explanation is that all restraints that were procompetitive would be exonerated in any event under the rule of reason, so the additional hurdle would be outcome determinative only when an anticompetitive restraint never reached the second stage of the analysis. As will be discussed shortly, even the most optimistic view of the sorting properties of the vertical agreement requirement do not come close to establishing this sort of differentiation.

There is an important qualification of sorts, which pertains not to the relative diagnosticity of the agreement requirement but to the absolute level of concern about the type of restraint under examination. If a type of restraint is almost never anticompetitive (or never, for

621.

¹¹² Throughout, the analysis proceeds on the assumption that the policy concern is with competitive effects. From this perspective (that is, setting aside any formal doctrinal requirements, the subject of Part II and of Section B, below, in this Part), it does not make sense to think of competition law's proscription as involving two logically independent elements, vertical agreement and anticompetitive effects. On one hand, it is true that, if there is a vertical agreement but no anticompetitive effects (suppose in particular that the net impact is procompetitive), then there should not on this view be a violation. In this scenario, the anticompetitive effects requirement is alone sufficient to generate the result. On the other hand, consider the case in which the vertical agreement requirement is not met but the vertical restraint nevertheless does cause anticompetitive effects. In such a case, it does not make policy sense to exonerate the behavior. To summarize, as elaborated in the text, in this setting the so-called element of vertical agreement, if it makes sense at all, does so because it is part of the overall set of evidence bearing on the single question of competitive effects.

¹¹³ Cf. Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1129–35 (2013) (arguing that, when there is a risk that a rule might too often target benign or beneficial behavior, it tends to be better to raise the burden of proof on the core element than to impose an additional element, which, unless its absence is perfectly indicative of desirable behavior, worsens the tradeoff between positive and negative effects of a prohibition).

that matter), then it would tend to be desirable to exonerate the *M* in all cases.¹¹⁴ This condition is essentially that which justifies a rule of per se legality, which renders the vertical agreement question moot.

More broadly, we can relax various implicit assumptions underlying this idealized account to consider more nuanced possibilities. Specifically, we may wish to examine when it may make sense to employ a vertical agreement requirement as a screen, perhaps to guide competition agencies' allocation of investigative and analytical resources, and perhaps to use in adjudication in order to remove some cases from the system at an early stage.¹¹⁵ In many instances, the rule of reason analysis of whether a particular restraint promotes or suppresses competition is costly and subject to error. Accordingly, it would be useful to remove weak cases from the system even if there is a nontrivial likelihood that they involve anticompetitive activity. Hence, it may appear sufficient to justify a vertical agreement requirement that most cases in which it is not met involve procompetitive effects.

Even this view, however, is importantly overstated. First, the validity of the prerequisites may vary greatly across restraints. That is, this argument might hold for some restraints but not others. Second, there remains the question of diagnosticity. It may be true for some types of restraints that most are benign when the agreement requirement is not met, but this may be so precisely because most are benign generally. Again, we may have a rationale for a rule of per se legality (here, not necessarily because almost all acts are benign, but because a sufficiently high portion are and the costs of identifying those that are malignant exceed the benefits). Hence, it must be supposed that the absence of a vertical agreement indicates not only a sufficiently low absolute likelihood of competitive harm but also a likelihood that is relatively low for the type of restraint at hand.

This condition, in turn, gives rise to a third reservation: If the absence of vertical agreement is diagnostic in this fashion, why not employ that very fact in applying the rule of reason itself? The central answer would have to involve costs. This rationale supposes (in addition to the diagnosticity assumption) that it is relatively cheap to determine whether there is a vertical agreement but comparatively expensive to undertake the analysis of other factors bearing on competitive effects. Whether this is plausibly so, even for some vertical restraints, will be assessed momentarily.

In this regard, it is natural to inquire whether the existence of a vertical agreement is unique or even distinctive in this respect. That is, are there other features—the nature of the restraint itself, the market power of *M* (individually, or combined with others supplying the same or similar products) or of *R*s, the nature of the product, and so forth—that are as or more diagnostic of anticompetitive effects? If so, for various restraints, we might imagine employing a hierarchy of threshold conditions, starting with those that are best with regard to diagnosticity and cost and then proceeding to the others.¹¹⁶

In addition, it is worth reflecting on the cost and accuracy of preliminary inquiries into the existence of a vertical agreement in light of the analysis in Parts I and II. Suppose, perhaps heroically, that we can fix on some administrable definition of vertical agreement—and one that

¹¹⁴ This point supposes that there are nontrivial costs in performing the necessary assessment and that in the rare cases in which the restraint is anticompetitive the social costs are not terribly large.

¹¹⁵ See generally Kaplow, *supra* note 113 (analyzing how optimally to make termination decisions at preliminary and intermediate stages of adjudication, and relating the analysis to procedural rules in U.S. civil litigation).

¹¹⁶ See *id.* at 1221–29 (analyzing the optimal staging of adjudication).

fails to be satisfied in a nontrivial fraction of cases (otherwise, what's the point?). Will it usually be easy to determine that no agreement has been entered? The more that the answer depends on subtleties of interactions between *M* and various of its *Rs*, occurring over extended periods of time, and regarding both words exchanged (in contracts, policy statements, and emails, as well as orally) and actions performed, the less plausible is the presumed characterization. Moreover, for a vertical agreement requirement to make sense as an independent hurdle, it must be possible to make this assessment independently of other inquiries bearing on pro- versus anticompetitive effects. Put conversely, if one must assess most or all of the relevant evidence in any event in order to reach a judgment on the vertical agreement question, the desired savings will not be obtained. Then, even if the presence of vertical agreement were highly diagnostic, it would tend to be better to combine information on it with that on other aspects of the restraint and reach an overall judgment on its competitive effects.

Having examined with some care how vertical agreement may be relevant in principle to inquiries into vertical restraints' competitive effects, it remains to consider what, if any, nexus exists in fact. Within the range of where the distinction between unilateral action and vertical agreement currently seems to be drawn,¹¹⁷ the prior discussion of examples and cases indicates that there is little, if any, difference on average in competitive effects between the masses of cases on each side of the line.¹¹⁸ Put another way, the correlation between agreement (or its negation, unilateral action) and competitive effects is almost certainly close to zero. Accordingly, the foregoing discussion seems almost entirely academic since a vertical agreement requirement presupposes a significant correlation, and one operating in the right direction.

Nevertheless, let us consider some possible relationships. The one most mentioned is that more powerful *Ms* may be able to effectuate their policies unilaterally, whereas those that are weaker may need to cajole their *Rs*, obtain assurances, or rely on courts' enforcement of contractual provisions to have their way.¹¹⁹ To the extent that this is true, vertical agreement is symptomatic of less *M* power and, under some theories, less risk of anticompetitive effects. That is, agreement is diagnostic, but in the wrong direction.¹²⁰ When *M* is able to impose its policy

¹¹⁷ In light of the analysis in Parts I and II, this statement is intentionally blurry.

¹¹⁸ See, e.g., AREEDA & HOVENKAMP, *supra* note 7, at 13 ("This similarity of results is far more powerful than the differences of form."); Robinson, *supra* note 7, at 597–98 ("The standard benign account of vertical restraints describes them as means for promoting interbrand competition. The standard malign account of vertical restraints describes them as means for enforcing either a cartel among dealers or a cartel among manufacturers. But whichever account one accepts, the *form* of the vertical arrangements between manufacturer and dealer is irrelevant. The existence of a vertical agreement has no evidentiary significance on whether to accept the benign or malign account because it is entirely consistent with either.") (footnotes omitted).

¹¹⁹ See, e.g., Robinson, *supra* note 7, at 598 ("Market power is not created by the agreement between supplier and dealer. If there is a relationship between power and agreement, it runs the other way: it is the supplier's market power that enables it to impose the condition (force an 'agreement') on the dealer."); Turner, *supra* note 9, at 692 ("Moreover, refusal to deal in some situations may reflect greater coercive power in that the seller may be so powerful that he does not need the assurance that formal contract protection affords." In any event, Turner views this possibility as "an evidentiary point."). Note that one focus of the vertical agreement requirement—whether the contract is merely at will, with a separately stated policy, rather than that policy appearing in the contract—should be immaterial in this regard. Because a contract terminable at will (including for violation of the separately stated policy) and a contract specifically terminable (but at *M*'s option) for failure to adhere to the policy each give *M*, regardless of its power, the same legal rights, nothing seems to turn on that difference.

¹²⁰ Cf. KAPLOW, *supra* note 2, pt. III (arguing that aspects of the horizontal agreement requirement, as many would interpret it, are negatively correlated with the welfare consequences of the prohibition on price fixing); Louis Kaplow, *Direct Versus Communications-Based Prohibitions on Price Fixing*, 3 J. LEGAL ANALYSIS 449 (2011) (same).

unilaterally, liability should be more likely, not less.

This view, on its terms, is overstated. First, the power revealed (to the extent that it is) by an *M*'s ability to impose a restraint unilaterally is not market power as that term is generally used in competition law but a more focused ability to implement the restraint itself. One could imagine, on one hand, an *M* that was a monopolist but had great difficulties keeping its many *Rs* in line. Perhaps *M*'s monopoly concerns a product that is one of thousands sold by its large number of *Rs*, so that it is relatively costly to observe *Rs*' behavior and *Rs* do not feel terribly threatened by termination; they may have difficulty noticing or remembering *M*'s restrictions, even if they are formally part of their supply contract. On the other hand, an *M* may be one of many producers of branded goods that are fairly close substitutes but nevertheless have little difficulty inducing its *Rs* to comply. For example, some *Rs* (such as automobile dealers) specialize in a single *M*'s product line, in which event a slight chance of termination might constitute a sufficient threat to induce compliance.

Second, *M*'s power to impose a restraint, even if correlated with market power in general or with anticompetitive effects in particular, may also be correlated with procompetitive effects. For example, if *M*'s restraint is justified by efficiently inducing *Rs* to provide useful services, more powerful *Ms* may be more likely to succeed, and with less collateral costs that may offset some of those efficiencies. Therefore, indicia of *M* possessing greater power are not necessarily diagnostic of the relative likelihood of pro- and anticompetitive explanations for *M*'s restraint. Of course, this may still be so in fact, perhaps because greater power (in the sense indicated by *M*'s ability to succeed unilaterally) is required for anticompetitive effects than for procompetitive ones. Or perhaps there is another category—including failed attempts and mistakes—that are not worth adjudicating—and greater power tends to rule them out even if it does not much distinguish types of competitive effects.

Third, recognizing that sometimes we may be concerned not (only) with *M*'s power in some sense, but with *M*'s ability to implement its policy, the presence of a vertical agreement may, after all, be positively correlated with this capacity. Although it is true that an *M*'s ability to implement its policy unilaterally may indicate greater, not lesser, power, it can also be true that, holding *M*'s power fixed, its policy may be carried out more effectively when a vertical agreement is present.¹²¹ Indeed, the point is arguably a truism. Why would an *M* bother with additional efforts unless it thought that they were likely to help? This reasoning is all the more powerful if such efforts raise the prospect that *M*'s actions may subject itself to liability, for an *M* should on that account be presumed to expect a larger benefit from its choice to employ a vertical agreement.¹²² Therefore, it may be true both that *Ms* that choose to implement their

¹²¹ See Turner, *supra* note 9, at 692 (suggesting that the presence of a formal contract may indicate a stronger restraint, but remarking that “this is simply an evidentiary point” and, in the example under consideration, stating that “the evidentiary significance is not great”).

¹²² That is, the very fact that the law may make sanctions more likely when a vertical agreement is present might contribute to the diagnosticity of vertical agreement. Of course, it could contribute in a number of ways, some of which run in the opposite direction. If a vertical agreement is a necessary condition for liability, then *Ms* whose policies are indeed anticompetitive will tend to rely on unilateral action and those whose policies are procompetitive will be more willing to employ what the law deems to be vertical agreements. While this fact greatly complicates the inference process, it is actually a positive feature of the system in that, if unilateral action is, *ceteris paribus*, less effective, some deterrence will have been achieved. *Cf.* KAPLOW, *supra* note 2, at 232–39 (offering related observations with regard to horizontal agreements to raise prices); Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 362–66 (2011) (same); see generally Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738 (2012) (analyzing the

policies unilaterally tend to be more able to have their way than *Ms* that use vertical agreements and that the latter—which have whatever power they have—are more able to have their way when they use such agreements rather than when they confine themselves to unilateral action.

Combining the preceding points, it appears that there might be some correlation between the presence of vertical agreements and competitive effects via a channel relating to an *M*'s power, but the correlation is probably quite small, it might on balance cut in the wrong direction, and it is of questionable relevance in any event. As a whole, it seems that we are far short of the nexus that would be necessary to justify placing significant weight on vertical agreements, much less to make their presence a prerequisite for liability.

Another way that the use of vertical agreements rather than reliance on unilateral action could be relevant to competition policy is that their presence tells us something about *Rs*, rather than or in addition to *Ms*. In examining the definitions and distinctions ordinarily discussed and how they often arise in litigated cases, it seems that vertical agreements might be employed in order better to protect *Rs* from exploitation (intended or incidental) by their *Ms* and, relatedly, due to *Ms*' desires to preserve relationship-specific investments of their own or by their *Rs*. Although aspects of this explanation may seem backward at first glance, this type of situation is fairly common in contractual settings.

When *R* provides *M* with nongeneric services—unlike, say, shelf space that can be reallocated at a moment's notice—there will ordinarily be various types of investments, part of the payoff of which extends into the future, after the costs have been sunk. These might include becoming familiar with the product, advertising, or otherwise cultivating a steady clientele. Once those investments are made, *R* is subject to the classic hold-up problem by *M* and therefore will seek protection *ex ante*. Similarly, *Ms* may make their own investments in dealing with various of their *Rs*, will want to induce their *Rs* to make relationship-specific investments, and will not wish to destroy such investments that already have been made, part of the return on which accrues to *M*.

Consider how different aspects of the supply relationship that are related to the vertical agreement question may bear on this. Many cases, including *Monsanto*, involve an *M* interacting with its *Rs* after the supply relationship has been established: to determine whether there have been misunderstandings, negotiate, and otherwise seek to continue to deal rather than to terminate. If neither side had undertaken any specific investments, it may be a simple matter for *M* to terminate *R*. Hence these activities, sometimes viewed as indicative of or constituting a vertical agreement, may signal that relationship-specific investment is involved.

Contractual provisions may also be relevant. Many of the examples in Section I.A and the analysis in Section I.B presupposed that *M*'s contract permitted *M* to terminate whenever it wished. In the circumstances just described, *Rs* may be reluctant to deal on such terms, or, if they are willing, they will be inclined to invest less in the relationship. If so, it will be in *M* and an *R*'s mutual interest *ex ante* for the contract not to be terminable at will by *M*. In that event, since *M* will nevertheless want to be able to terminate *R* for some reasons, they may need to be enumerated.¹²³ This point applies to any policy of *M* involving restraints it seeks to impose on *R*.

interaction between the burden of proof, underlying behavior, and the mix of cases that come before tribunals).

¹²³ The converse is also conceivable, which would nullify the argument in the text. That is, a contract may state that *M* may terminate *R* for any reason except an enumerated set. There are two difficulties with this approach. First, *R* may be worried that *M* will nevertheless terminate it for enumerated, impermissible reasons if it is left too free. Second, it will sometimes (perhaps often) be difficult to enumerate all of the impermissible reasons, particularly if *R* is concerned

That is, if *M* wants *R* to comply with its policy, at the risk of termination, *M* may need to include a specific provision in the contract authorizing termination of *R* for noncompliance with that policy (perhaps along with other specific termination provisions, such as for repeated nonpayment).

We can see, therefore, that many factors associated with a finding of vertical agreement rather than unilateral action are indicative of the presence and importance of relationship-specific investments. A basic question, from the previous analysis, is whether this should even matter, for one could always inquire directly into the presence of such investments if they are relevant (on which, more in a moment). Perhaps vertical agreements inform that inference when direct evidence is hard to come by, raising the now-familiar questions about why, in that event, agreements should not merely be given evidentiary value rather than seen as an independent element.

Additionally, it is not obvious how this channel of relevance bears on whether a vertical restraint is pro- or anticompetitive. That is, if, aside from the restraint itself, we conclude that we are likely confronting a supply arrangement that involves relationship-specific investments, does this indicate that the vertical restraint has different competitive effects than otherwise? First, the very presence of such investments, as explained, suggests that the contract contributes more value. Second, focusing on *M*'s restraint policy in particular, perhaps when a contractual relationship as a whole is characterized by important relationship-specific investment, it is more likely that any vertical restraint connected with it has been included for the same sort of reason.¹²⁴ If so, the presence of a vertical agreement rather than unilateral action indicates that the restraint is more likely to be procompetitive.

The use of vertical agreements may be informative about *Rs* in other respects as well. It is sometimes suggested that they reflect greater power by a dominant *R* or a group of *Rs* that are acting as a cartel and in effect are enlisting *M* as an enforcer.¹²⁵ As usual, we have our standard set of questions about why, even if some such relationship exists, vertical agreements would not be viewed as one factor bearing on our ultimate question of anticompetitive effects rather than requiring their presence as an independent element. In addition, the linkage seems somewhat attenuated. Our dominant *R* or group of *Rs* may want *M* to actively enforce, say, an RPM policy, but this does not in itself explain why they would not be satisfied with *M* acting unilaterally to do so, as that concept is understood under the law. Insisting that *M* include an explicit clause in various contracts with *Rs* in no way forces or even incentivizes *M* to enforce such a clause.¹²⁶ Likewise, it is not clear that powerful *Rs* would prefer that *M* cajole noncompliant *Rs*, giving

with *M*'s opportunism. The use of arbitration clauses and the naming of specialized, trusted tribunals may mitigate some of the challenges. Note that such tribunals might also be used to help enforce vertical restraints, even ones that are legally deemed to be unilateral.

¹²⁴ One can imagine the opposite case, in which relationship-specific investments are well handled by other contractual provisions, making it less likely that a vertical restraint that might sometimes serve such ends is used for that purpose in the case at hand. This possibility is raised only in a footnote because it seems less plausible, but ultimately the matter presents an empirical question.

¹²⁵ Another variation is that an *M*, through RPM, may be sharing profits with *Rs* for the very purpose of giving the *Rs* an incentive not to aid potential rivals of *M*. See John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AM. ECON. REV. 672 (2014).

¹²⁶ Relatedly, if we see that an *M* repeatedly interacts with noncompliant *Rs* and undertakes additional complex, even extraordinary efforts to ensure that its vertical restraint policy is followed, does this make it more likely that *M* is acting on behalf of one or more *Rs* than on its own behalf?

them second chances, rather than simply terminate them promptly when they cut prices. To be sure, there are various reasons that giving *M* extra flexibility may enhance its ability or willingness to enforce the policy, but the frequency and degree to which this is so is not obvious.

In all, a number of reasons can be adduced to explain why some *Ms* implement their vertical restraints through unilateral policies and others enter into vertical agreements. The answers may differ depending on how the law defines these terms, and, as will be discussed in Section C, this in turn bears on how these categories should be specified in the first place, if some distinction is to be maintained. Viewed as a whole, it seems that sometimes the use of vertical agreements will be related in some fashion to other aspects concerning the use of vertical restraints and thereby may sometimes aid in illuminating their consequences, competitive or otherwise. These linkages, however, are not always present, are often indirect and subtle, and as best we can tell may as or more often operate backward, which is to say that the use of vertical agreements may indicate that anticompetitive effects are less likely. Moreover, whatever connections do exist are likely to vary greatly across types of vertical restraints—RPM versus territorial restrictions versus tying versus exclusive dealing—and across contexts, making it difficult to construct a one-size-fits-all rule that makes sense, aside from one indicating that the presence of vertical agreements should be considered for its evidentiary value, if any, in a given case.¹²⁷

Before concluding the present discussion, it should be noted that sometimes the presence of a vertical agreement rather than mere unilateral action will bear on whether *M* has a policy (such as RPM) in the first place and what its content happens to be, wholly independent of the effects of such a policy, assuming that it exists. This point is particularly important because many vertical restraints cases arise out of contractual disputes in which an *R* may find it advantageous to assert that its *M* employed a vertical restraint that violates antitrust law, thus subjecting *M* to treble damages and payment of attorneys' fees and other costs.¹²⁸ In such cases, a threshold question concerns what policy of *M*, if any, exists.

It is obvious that some aspects of vertical agreement inquiries bear on this question, but not nearly all and (again) not all in the same direction.¹²⁹ For example, if *M*'s policy is explicitly articulated in the contract itself, and in contracts with other *Rs*, it is likely that the policy is present (likely, but not certain, because many contractual provisions and other policy statements are largely ignored in practice). Of course, the same is true in many of the situations posed throughout Part I, notably, when *M* has a clearly announced policy, but one that it claims is

¹²⁷ Regarding probative value, other evidence pertaining to vertical restraints, independent of how it bears on agreement, may illuminate competitive effects. For example, it is often noted that whether an RPM policy has its origin from an *M* versus one or more *Rs* may help us determine whether the restraint predominantly fosters the provision of services by *Rs* or boosts a dominant *R*'s or a cartel of *Rs*' profits. *See, e.g.,* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 897–98 (2007); AREEDA & HOVENKAMP, *supra* note 7, at 23, ¶ 1457; Robinson, *supra* note 7, at 616–17 & n.143; *see also id.* at 620 (concluding that “these alignments are adventitious; they do not rest on any principled alignment between the virtues or vices of vertical restraints on the one hand and the soundness of the unilateral action defense on the other”). Note, however, that *Rs* might sometimes bring free-rider problems to *Ms*' attention in the first place, and *Ms* might be the first to spot opportunities to organize cartels of *Rs*, some of the profits from which might accrue to the *Ms*.

¹²⁸ Such an allegation may be part of *R*'s complaint against *M* for breach of contract, or it may be offered as a defense or counterclaim in an action by *M* against *R* for breach.

¹²⁹ In contrast, some aspects of the law of vertical agreement in the European Union seem more concerned with whether *M* is implementing the posited policy in the first place. *See supra* Section II.E (especially the quotations in the footnotes).

unilateral and in fact is accompanied by swift terminations but no associated negotiations, second chances, cajoling, and the like. Furthermore, when there is neither an explicit contract nor a clearly articulated policy, current law permits a vertical agreement to be inferred from all manner of ambiguous circumstances. In summary, in order to assess whether a vertical restraint is pro- or anticompetitive, it is necessary to ascertain whether it is present and what it actually consists of, and these matters will sometimes be hotly disputed; however, such an inquiry is entirely distinct from that into competitive effects, which is the focus of this Section and of most prior treatments of the vertical agreement requirement.

B. SUPREME COURT ANTIFORMALISM

The law on vertical agreement and, in particular, the *Colgate/Monsanto* unilateral action defense, has a peculiar status in U.S. antitrust law in light of the Supreme Court's strongly antiformalist decisions and pronouncements in recent decades. Specifically, the Court has decried basing doctrine on legal form rather than economic substance, particularly with regard to vertical restraints, so much so that it has reversed both fairly new and longstanding precedents as a result. Moreover, the *Monsanto* decision itself—seen as breathing new life into the unilateral action defense associated with *Colgate*, which at that point, in the views of many, had been almost distinguished out of existence—falls amidst this series of modern cases, is subsequently cited by the Court as part of its antiformalist body of precedent on vertical restraints, and yet states a rule that, in the case itself and subsequently, the Court has described as imposing a legal distinction where no economic difference exists.

To begin, let us recall the Supreme Court's antiformalist pronouncements, particularly in vertical restraints cases.¹³⁰ This series of decisions begins with *Sylvania's*¹³¹ reversal of *Schwinn*.¹³² “The Court's [*Schwinn*] opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction.”¹³³ The Court further observed that “even the leading critic of vertical restrictions concedes that *Schwinn's* distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact.”¹³⁴ Of particular relevance here, the *Sylvania* Court insisted that, if Sherman Act Section 1's agreement requirement was to be the ground for a difference in legal treatment, that difference needed to be justified in terms of the contrasting economic effects of the practices under consideration.

In addition, the Court's *Matsushita* decision (which centrally drew on *Monsanto* for its formulation of the legal rule¹³⁵) is also highly probative because, although it is not a vertical restraints case, it nevertheless is a leading modern statement of Section 1's agreement requirement. The Court was specifically concerned about allegations that made no “economic

¹³⁰ An earlier statement that results, not form, are to govern interpretations of Sherman Act Section 1's agreement requirement appears in *American Tobacco*, quoted in Subsection II.B.2.

¹³¹ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹³² *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967).

¹³³ *Sylvania*, 433 U.S. at 53.

¹³⁴ *Id.* at 56.

¹³⁵ *See supra* note 70.

sense.”¹³⁶ Even more recently, *Leegin*’s reversal of *Dr. Miles*¹³⁷ was defended on the ground that the earlier “Court justified its decision based on ‘formalistic’ legal doctrine rather than ‘demonstrable economic effect’” (quoting *Sylvania*).¹³⁸

Next, consider further the specific connection between the pronouncements in these cases and the *Colgate/Monsanto* unilateral action defense. To begin, the *Colgate* case drew heavily on *Dr. Miles*’s rationale concerning restraints on alienation, as explained in Subsection II.B.1, but this is precisely the rationale that *Leegin* rejected in overturning *Dr. Miles*.

The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property from the stream of commerce for generations. The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that “the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today.”¹³⁹

Also, *Leegin* made much of commentators’ harsh criticism of *Dr. Miles*. Commentary has similarly been critical of *Colgate* and, more recently, *Monsanto*.¹⁴⁰

Monsanto, as mentioned, is even more puzzling from this perspective. Weaving together the vertical agreement question and the matter of what restraints should be deemed to be per se unlawful, the Court stated:

While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its “market impact.” . . . But the economic effect of all of the conduct described above—unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical.¹⁴¹

In other words, having held that this lack of difference in economic consequences justified reversing *Schwinn* in its subsequent *Sylvania* decision, the Court proceeded to resurrect the importance of the distinction between unilateral action and vertical agreement, which it purported to view in the same way. Even more, the Court’s perspective regarding the latter is not new; it cited *Parke, Davis* (immediately after the passage just quoted), a 1960 decision on the vertical agreement question, in further support of the proposition. The cited portion of *Parke,*

¹³⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

¹³⁷ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

¹³⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887–88 (2007). The *Leegin* Court further emphasized that antitrust principles on vertical restraints were to be formulated by reference to “differences in economic effect” so that “it is necessary to examine . . . the economic effects of vertical agreements to fix minimum resale prices” to determine what legal rule should apply. *Id.* at 888–89; see *id.* at 902 (“The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints.”).

¹³⁹ *Id.* at 888 (quoting *Sylvania*, 433 U.S. at 53 n.21 (internal quotation marks omitted)); see *id.* (“The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints.”); see also Grimes, *supra* note 9, at 488 (remarking on the *Leegin* passage quoted in the text).

¹⁴⁰ See, e.g., sources cited *supra* notes 9 & 111.

¹⁴¹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984).

Davis states:

True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal." . . . When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.¹⁴²

Thus, for more than half a century, the Supreme Court has consistently viewed the vertical agreement requirement as a formalism not grounded in economic substance, one to be given as little decisive weight as possible. Yet in *Monsanto*, even after *Sylvania*, the Court bolstered rather than obliterated the requirement (although, as discussed in Subsection II.B.2, one can view *Monsanto* as preserving the defense only in a most limited manner in light of its assessment of the facts in that case).

A further irony is presented by the Supreme Court's decision in *Business Electronics*,¹⁴³ just four years after *Monsanto*. That opinion strongly rests on its reading of *Sylvania*, particularly the point that "departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing."¹⁴⁴ More interestingly, *Business Electronics* repeatedly invokes *Sylvania* and *Monsanto* as a unit, in support of the proposition that, in vertical restraints cases, economic substance trumps legal form—a pairing that would be more natural had *Monsanto* reversed *Colgate* rather than rejuvenated it. For example, *Business Electronics* states:

Our approach to the question presented in the present case is guided by the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions¹⁴⁵

That is, even though *Business Electronics*, like *Sylvania* (and *Leegin* to follow¹⁴⁶) involved

¹⁴² *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). The reader will appreciate how some commentators see this passage as supporting the interpretation of vertical agreement law explicated in Section I.E.

¹⁴³ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

¹⁴⁴ *Id.* at 724 (quoting *Sylvania*, 433 U.S. at 58–59).

¹⁴⁵ *Id.* at 726; *see also id.* at 729, 731 (containing passages that treat *Sylvania* and *Monsanto* as a unit).

¹⁴⁶ Indeed, *Leegin* specifically recalls *Monsanto*'s pronouncement regarding the lack of economic distinction between unilateral action and vertical agreement: "A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. . . . The economic effects of unilateral and concerted price setting are in general the same. *See, e.g., Monsanto . . .*" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902–03 (2007). Immediately following this statement, the *Leegin* court proceeds to link *Monsanto* and *Business Electronics* (again, a pair of cases on opposite sides of the legal form / economic substance divide), and it discusses *Monsanto* in this context as erecting a "stringent standard[]" that plaintiffs must overcome. *Id.* at 903.

whether a restraint was to be governed by the per se rule or a rule of reason, its rationale (favoring the latter), based on effects rather than legal niceties, is one that it claims is supported by *Monsanto* even though that case's rule took the opposite side (according to *Monsanto*'s own characterization that the unilateral action defense lacked economic substance).¹⁴⁷

In sum, *Colgate* and *Monsanto*'s unilateral action defense seems precarious in the context of the past few decades of Supreme Court decision making. *Monsanto* seems surprising on its own terms, and subsequent Supreme Court cases cite it in ways that would make more sense if it had reversed *Colgate*.

There is a final reason to wonder whether the *Colgate/Monsanto* doctrine has much of a future, namely, the very fact of *Dr. Miles*'s reversal in *Leegin*. Specifically, some have conjectured that carving unilateral action out of Section 1's reach served to protect a range of behavior that is often efficient from misguided per se rules applicable to various vertical restraints.¹⁴⁸ As a matter of history, this explanation has some notable shortcomings. The *Colgate* defense was created in 1919, not long after *Dr. Miles* and decades before that rule came under attack. Additionally, once created, the Court began almost immediately to limit its reach,¹⁴⁹ which seems hard to explain if the defense was meant to serve as a bulwark against application of the rule in *Dr. Miles*. Also, it was not that long after the Court's 1960 decision in *Parke, Davis*—perhaps the most notable case limiting the defense—that the Court created a new per se rule in *Schwinn*. This view does, however, help to understand why *Monsanto* would resurrect the *Colgate* defense (despite the need to elevate form over economic substance) and why, for that very reason, *Monsanto* has been subsequently viewed by the Court as in the spirit of *Sylvania*. But at the same time, it is difficult to understand why *Monsanto* itself placed its most defendant-friendly language in a footnote and proceeded to uphold a jury verdict for the plaintiff, justifying its result mostly on evidence that was rather weak, sending the message to lower courts that the defense is not very robust.

In any event, because all vertical restraints are now subject to the rule of reason, the Supreme Court may for that reason, in addition to those adduced earlier in this Section, be inclined to reverse *Colgate* and *Monsanto*.¹⁵⁰ If and when that happens, Part IV's examination of the structure of competition law will become more important, although given the stinginess with which unilateral action has been interpreted, the resulting shift may be rather modest.

C. SUMMARY

Section A explores the possible linkages between the unilateral action / vertical agreement distinction, on one hand, and the competitive effects of a vertical restraint, on the other hand. Although a number of possible connections can be identified, they are rather attenuated, are highly contingent on the type of restraint and the context, and often operate in the wrong direction. The analysis there also suggests that, even if the linkage were more substantial,

¹⁴⁷ See also *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010) (“we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate”).

¹⁴⁸ See, e.g., AREEDA & HOVENKAMP, *supra* note 7, at 9–10, 19.

¹⁴⁹ See sources cited *supra* note 7.

¹⁵⁰ Due to the elimination of per se rules in vertical restraints cases, combined with plaintiffs' lack of success under the rule of reason, the opportunities and felt need to revisit the question are notably reduced.

it would not follow that vertical agreement should constitute an independent element, separate from the inquiry into whether a given restraint promotes or suppresses competition.

A wrinkle on these points, further motivated by the discussion in Section B of the Supreme Court's antiformalism, is that, if vertical agreement is to play any significant role in delimiting Section 1 of the Sherman Act, it would make sense to start with competition policy and use it to generate the law of vertical agreement.¹⁵¹ The rule of reason, which has governed the substantive determination of what restraints are reasonable for over a century, is stated in terms of competitive effects. As the more modern cases make clear, any subsidiary doctrines are to be erected only if they aid in the effort to attack arrangements that suppress competition (as the per se rule against price fixing is widely believed to do) and to exonerate those that promote competition, to avoid chilling procompetitive behavior (which concern lies behind most of those Supreme Court opinions).¹⁵² There is essentially no indication that past Supreme Court decisions on the vertical agreement requirement have been guided in this manner, except perhaps for *Parke, Davis's* candid statement that, to be blunt, the unilateral action defense should be construed narrowly because it makes no sense. If one were to undertake this constructive task, then analysis along the lines of that in Section A should guide the way. That analysis, in turn, does not suggest that a plausible, meaningful, independent vertical agreement requirement—which in essence is to say, a unilateral action defense—can be devised.

IV. ON THE STRUCTURE OF COMPETITION LAW

The analysis to this point compares particular vertical arrangements, such as RPM, when implemented in ways that differ little if at all. This part turns to a larger question, concerning the fundamental distinction in competition law between the regulation of the unilateral behavior of dominant firms and of various agreements that may be entered between any firms. The main purpose of this Part is to elaborate the consequences of a narrow or nonexistent unilateral action defense—equivalently, a thin vertical agreement requirement—for the structure of competition law.

A. COMPETITION LAW LANDSCAPE

Competition regimes primarily focus on three areas: agreements between firms, mergers of different firms, and the actions of individual, dominant firms. The present subject concerns the distinction between the first and third categories: agreements and dominant firm behavior.

Rules governing horizontal agreements involve a qualitatively different prohibition than

¹⁵¹ Compare AREEDA & HOVENKAMP, *supra* note 7, at 5 (“There is, of course, an element of artificiality in discussing the existence of an agreement independently of the competitive policies and substantive rules governing resale price maintenance, restricted distribution, tying, and exclusive dealing.”), *with id.* (“Nevertheless, it is not analytically convenient to consider all topics simultaneously, and the agreement question is commonly considered separately in actual litigation.”).

¹⁵² The statements in the text are not intended to advocate any particular outcome, but rather to endorse a purposive approach.

those applicable to the conduct of dominant firms.¹⁵³ Specifically, the law often prohibits competitors from combining forces (and thus enhancing their power) to behave in ways that may be permissible for a dominant firm. Notably, competitors may not fix prices whereas a dominant firm may generally set its own prices. Merger law, as it applies to horizontal mergers (the focus of most modern merger enforcement), is related: it limits the ability of competitors to become a single firm with concomitantly greater power.¹⁵⁴ For the remainder of this Part, horizontal agreements and horizontal mergers are set to the side—although, as will be noted, many discussions by agencies, courts, and commentators ignore this familiar distinction when expounding the fundamental difference between competition law’s regulation of agreements versus acts of dominant firms, which may be partially responsible for the existing incomplete state of understanding.

Against this background, it is generally supposed that vertical agreements are treated qualitatively differently from dominant firm behavior. As a start, they are typically governed by distinct legal provisions. In the United States, Sherman Act Section 1 applies to agreements (including vertical agreements), and Section 2 governs monopolization (including attempted monopolization).¹⁵⁵ In the European Union, Article 101 applies to agreements (including vertical agreements), and Article 102 addresses abuses by dominant firms.¹⁵⁶ For convenience, most of this Part will refer to Sections 1 and 2 of the Sherman Act, although the distinction is similar in many jurisdictions.

Moreover, the distinct legal provisions are understood to involve different levels of scrutiny. Exclusionary or abusive acts of dominant firms (in the United States, monopolists or firms attempting to become monopolists) are not policed as heavily as agreements are. Although, as will be discussed, the degree of differentiation is unclear, competition agencies, courts, and commentators generally believe there to be an important difference between the level of scrutiny accorded to vertical agreements between firms and that applied to the unilateral acts of dominant firms. More important, this difference—regularly replicated as modern competition law has spread throughout the world—is regarded to be a central design feature, neither a mistake nor merely a secondary detail in the architecture of competition regimes.¹⁵⁷

Competition law renders it more difficult to challenge single-firm activity in two ways. First, unilateral acts of dominant firms are questioned only in the presence of substantial market

¹⁵³ Nevertheless, Jonathan Baker endorses what he sees as a growing trend in U.S. caselaw to the effect that, contrary to the consensus view, collusion and exclusion are to be scrutinized with a similar level of strictness, rather than taking a more cautious approach in condemning exclusion (versus collusion). See Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527 (2013).

¹⁵⁴ The regulation of horizontal mergers can be seen as a gatekeeper between two realms: because merged entities may undertake important decisions jointly going forward (notably, fixing prices), a one-time decision is made whether the shift in governing regimes—from strict scrutiny to light or no scrutiny—is justified.

¹⁵⁵ Section 2 also covers conspiracies to monopolize, but that additional scope is generally taken to be moot because any such conspiracy would be reached by Section 1 in any event.

¹⁵⁶ Sherman Act Section 2 also covers conspiracies to monopolize, and Article 102 also covers collective dominance, but these provisions have not proved to be central and will not be considered further here.

¹⁵⁷ See, e.g., Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1223 (2008) (“Perhaps the most fundamental distinction in antitrust law is between unilateral and concerted restraints. This distinction is one of the few that has a statutory basis; section 1 of the Sherman Act governs only ‘contracts, combinations or conspiracies’ in restraint of trade, while unilateral actions are given more favorable treatment under section 2.”).

power, more market power than is taken to be required when assessing agreements. In the United States, this demand in monopolization cases is referred to as monopoly power, and, as the U.S. Supreme Court states, “[m]onopoly power under § 2 requires, of course, something greater than market power under § 1.”¹⁵⁸ In the European Union, dominance must be established, and, as the European Commission reminds us: “The degree of market power normally required for the finding of an infringement under Article [101(1)] in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article [102].”¹⁵⁹ Most pronouncements signal a notable difference in the market power requirements for the two categories of activity, although the magnitude is nevertheless unclear because of the obscure manner in which market power requirements for all types of practices are expressed.¹⁶⁰

Second, the substantive examination of exclusionary practices by single, powerful firms is more cautious than that applicable to agreements. The nature and degree of this difference is also mysterious, here because there does not exist a consensus on the tests under different provisions, crisp statements of the difference between the two standards are infrequent (in contrast to routine mention of an overall difference or a difference specifically with respect to

¹⁵⁸ *Eastman Kodak Co. v. Image Technical Servs, Inc.*, 504 U.S. 451, 481 (1992); 1 ANTITRUST ADVISOR 1-65 (Irving Scher ed., 4th ed. 2007) (“However, a major distinction between the two sections is the degree of proof required to establish the anticompetitive practices which each addresses. Because the presence of actual or potential monopoly power is a requisite element of the offenses of actual and attempted monopolization, the courts have recognized that the degree of proof required under § 2 is greater than that required by § 1.”). This requirement also is featured in competition agencies’ pronouncements regarding monopolization or abuse of dominance by single firms. *See, e.g.*, U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 1 (2008) (“Unlike section 1 of the Sherman Act or section 7 of the Clayton Act, section 2 specifically targets single-firm conduct by firms with monopoly power or a dangerous probability of attaining such power.”); *id.* at 9 (“This core requirement’s importance as a basic building block of section 2 application to unilateral conduct should not be overlooked. Among other things, this requirement ensures that conduct within the statute’s scope poses some realistic threat to the competitive process, and it also provides certainty to firms that lack monopoly power (or any realistic likelihood of attaining it) that they need not constrain their vigorous and creative unilateral-business strategies out of fear of section 2 liability.”); *id.* at 19 (“This monopoly-power requirement serves as an important screen for evaluating single-firm liability. It significantly reduces the possibility of discouraging ‘the competitive enthusiasm that the antitrust laws seek to promote’ [quoting *Copperweld*], assures the vast majority of competitors that their unilateral actions do not violate section 2, and reduces enforcement costs by keeping many meritless cases out of court and allowing others to be resolved without a trial. Accordingly, it is important to determine when monopoly power exists within the meaning of section 2.”). Interestingly, this 2008 Justice Department Antitrust Division report was not joined by the Federal Trade Commission, which had participated jointly in the hearings and other work leading up to the report, and the DOJ report was withdrawn a year later when the administration changed. *See* Press Release, Fed. Trade Comm’n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), www.ftc.gov/news-events/press-releases/2008/09/ftc-commissioners-react-department-justice-report-competition-and; Press Release, Dep’t of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), www.justice.gov/atr/public/press_releases/2009/245710.htm). It appears that most of the disagreement concerned the report’s statement of substantive rules governing single-firm conduct that others regarded to be too lenient. Note that this debate is largely moot in light of the analysis in Section B to the effect that most of the practices in question appear to be subject to Sherman Act Section 1’s tougher rules (and absence of an elevated market power requirement) in any event.

¹⁵⁹ EC Guidelines on 81(3), *supra* note 110, at 101.

¹⁶⁰ It proves to be baffling to try to figure out the degree of market power actually required, even from the supposedly clearest statements on the subject, which are denominated as market share requirements. *See* Louis Kaplow, *Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments*, 7 J. COMPETITION L. & ECON. 243 (2011). For a broader exploration of the proper role of market power in competition law inquiries, see Louis Kaplow, *Market Definition, Market Power*, 43 INT’L J. INDUS. ORG. 148 (2015); Louis Kaplow, *On the Relevance of Market Power* (Nov. 9, 2015) (on file with author).

market power demands), and rules are sometimes fashioned for particular practices, which makes overall comparison difficult. However, inspection and reflection suggest that notable divergences exist. For example, most discussion of the test for predatory pricing under Section 2 places great weight on the concern for chilling aggressive but legitimate single-firm behavior, erring on the side of moderation. Section 1’s rule of reason, which governs challenges to agreements, calls for an even balancing of pro- and anticompetitive effects,¹⁶¹ whereas it is hard to imagine that essentially every act of each dominant firm might be assessed and potentially judged illegal on that basis,¹⁶² despite some formal statements that suggest otherwise.¹⁶³ Additionally, in many jurisdictions (and, until recently, in the United States), some types of vertical agreements are judged harshly.

There are widely accepted justifications for this bifurcation of legal provisions and development of distinctive doctrine under them. At a fundamental level, competition law is understood to be concerned with two substantially different settings that pose quite different dangers and rewards from attempts at regulation. The simple, central point of departure is that firms engage in all manner of activity on a daily basis. Although one can imagine economies in which every decision is dictated by the government, competition law is an adjunct to other legal rules that channel the operation of market economies, a defining feature of which is

¹⁶¹ See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Nat’l Soc’y of Prof’l Eng’g v. United States*, 435 U.S. 679, 690–91, 693–96 (1978).

¹⁶² A high monopoly power requirement, which shelters most firms in the economy from Section 2 scrutiny of their unilateral acts, offers no such protection to those firms having such power. And even if this limitation leaves only a modest number of firms (limiting our attention to major sectors and focusing on the national economy), those firms are extremely important ones and engage in countless acts.

¹⁶³ Most notably, consider the rule of reason itself. Its announcement in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), was explicitly directed at interpreting Sherman Act § 1, but the Court indicated that the inquiry is the same under § 2. See *id.* at 61–62; see also, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (suggesting a “similar balancing approach” under the two sections and citing *Standard Oil*). Nevertheless, much of the development of the rule of reason, under that phrasing, as a formal test, is under Section 1, growing out of *Chicago Board*. The development of the law of monopolization, interpreting Section 2, also post-dates *Standard Oil*. The passage quoted in the text to follow from *Copperweld* contrasts with *Standard Oil*’s suggestion that the two sections essentially prohibit the same thing. Likewise, courts examining particular practices under Section 2 tend not to mention the rule of reason as such or its equipoised balancing rubric. See, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (not mentioning rule of reason in its decision on predatory pricing); *United States v. Dentsply Intl., Inc.*, 399 F.3d 181 (3d Cir. 2005) (same, for exclusive dealing, in an opinion examining the practice under Section 2). Typical statements of the test under Section 2 also do not tend to be evenly balanced, as under the typical articulation of the rule of reason under Section 1. See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015) (“To prevail, the FTC must establish that McWane ‘has engaged in anti-competitive conduct that reasonably appears to be a *significant contribution* to maintaining monopoly power.’ *Dentsply*, 399 F.3d at 187; *accord Microsoft*, 253 F.3d at 79 (quoting III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650c, at 69 (1996)).” (emphasis added)) (the relevant language in *Microsoft* from Areeda and Hovenkamp contains its own emphasis on the phrase “contributed significantly”). *McWane* does make reference to the rule of reason, in two ways. First, it described the familiar burden-shifting technique as “a structured, ‘rule of reason’-style approach.” *Id.* at 833 (emphasis added). Second, it explained that exclusive dealing has long been assessed on the basis of its reasonableness rather than under a per se rule. See *id.* at 835–36. (Interestingly, with regard to the central question in this article, in a case under FTC Act Section 5 the *McWane* court accepted that the exclusive dealing arrangement was “unilaterally imposed” but nevertheless stated: “We are disposed to follow the Supreme Court’s instruction that we consider ‘market realities’ rather than ‘formalistic distinctions’ in rejecting McWane’s argument that the specific form of its exclusivity mandate insulated it from antitrust scrutiny.” *Id.* at 835.)

decentralized decision making.¹⁶⁴ The notion that each and every decision of each and every firm might be subject to second-guessing by a government regulator¹⁶⁵ or readily expose the firm to a private lawsuit is anathema. Not only is micromanagement of firms' behavior infeasible and likely to be seriously costly in itself, but it is also regarded to be important to allow enterprises to reap the fruits of their successful initiatives. Therefore, although competition law has important work to do, it must be careful lest it overburden the very economic activity it is designed to facilitate.

Competition law recognizes that it would be absurd to subject the myriad everyday acts of all firms to external inquiries, which is the rationale for limiting the scrutiny of unilateral acts to dominant firms and for using a light touch in this domain. The idea is that most firms have little to fear as long as they keep to themselves and behave as competitors.¹⁶⁶ On the other hand, it is supposed that competition law can afford to be more aggressive once groups of firms move beyond independent action and enter into agreements with each other.

Consider the U.S. Supreme Court's manifesto on this subject in *Copperweld*,¹⁶⁷ a decision that eliminated the intraenterprise conspiracy doctrine—under which a parent and its wholly-owned subsidiary could be deemed conspirators under Section 1—on the ground that it undermined this statutory scheme.¹⁶⁸

The Sherman Act contains a “basic distinction between concerted and independent action.” *Monsanto* The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. . . . In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur. Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a

¹⁶⁴ See also Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1181–82 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“At the heart of a market economy is the principle that firms have free rein to compete aggressively to win business and earn profits, possibly vanquishing their rivals in the process. If one firm does gain a dominant position, that is the firm’s just reward for best serving the interests of consumers. Imposing liability on companies that compete most effectively, perhaps to the point of driving their rivals out of business, would contravene the fundamental workings of a market economy.”).

¹⁶⁵ Regulated utilities are a notable exception. The point here is that detailed regulation of a firm or an industry by an expert agency assigned to the task is understood to be a qualitatively different legal strategy from relying primarily on marketplace interactions that are, however, kept in check by rules of the road, namely, competition law.

¹⁶⁶ Mergers, as noted, and also significant joint ventures with competitors receive higher scrutiny.

¹⁶⁷ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). It is interesting that *Copperweld* and *Monsanto* were argued the same day and decided only three months apart. Given *Copperweld*'s strong statements on the critical importance of sheltering individual firms' policies from Section 1, one might have expected an extremely aggressive and broad unilateral action defense in *Monsanto* rather than the anemic one discussed in Section II.B.2. Another irony is that *Copperweld* is strongly antiformalist, in line with the other modern cases discussed in Section III.B, whereas *Monsanto* (cited as support in *Copperweld*) involved partial resurrection of a formalist doctrine. As Section B will explain, the Court's bind is that what it sees as a core substantive principle of antitrust law is, on reflection, grounded in formalism after all.

¹⁶⁸ See *id.* at 776 (“For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority.”).

“contract, combination ... or conspiracy” between *separate* entities. It does not reach conduct that is “wholly unilateral.” . . . Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. . . . Whatever form the inquiry takes, . . . it is not necessary to prove that concerted activity threatens monopolization.¹⁶⁹

The Court embraced the resulting gap in the Sherman Act resulting from more lenient treatment of unilateral conduct:

Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm’s anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability. We have already noted that Congress left this “gap” for eminently sound reasons. Subjecting a single firm’s every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.¹⁷⁰

A similar endorsement is offered in *Spectrum Sports*: “It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which ‘inherently is fraught with anticompetitive risk.’ *Copperweld* For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. *Id.*”¹⁷¹ This theme is also emphasized in *American Needle*: “[B]ecause concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm’s necessary conduct[, and] courts need only examine discrete agreements”¹⁷²

B. COLLAPSE OF SECTION 2 INTO SECTION 1

Readers should at this point appreciate that the conventional account has a gaping hole. Firms, however large or small, do not operate in a vacuum: modern economies, including emerging ones, do not consist of a single firm, on a remote island, operating autarkically, selling only to final consumers. Quite the opposite. Contracts of all sorts, formal and informal, are ubiquitous. Firms contract for employees and other supplies, buy or lease land and buildings for

¹⁶⁹ *Id.* at 767–68.

¹⁷⁰ *Id.* at 775; see Robinson, *supra* note 7, at 593 (“It is a gap the courts have refused to close with expansive interpretations of either Section 1 or 2, however. Far from treating this gap as some inadvertent omission, to be narrowed as far as possible, the courts have regarded it as an important principle of antitrust policy.”). Subsequently, it has been argued that the *Copperweld*-emphasized gap has been vanishing. See Andrew I. Gavil, *Copperweld 2000: The Vanishing Gap Between Sections 1 and 2 of the Sherman Act*, 68 ANTITRUST L.J. 87 (2000). That article, however, gives more support for the narrowing of the gap rather than for its elimination, and the article’s projection at that time, see *id.* at 88 & n. 10, that *Aspen Skiing Co. v. Highlands Skiing Corp.*, 472 U.S. 585 (1985), indicates significantly greater receptiveness to monopolization claims does not seem to have been borne out. See, e.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409 (2004) (“*Aspen Skiing* is at or near the outer boundary of § 2 liability.”). (Gavil’s footnote 10 also mentions *Kodak*, which is quoted earlier in this Section for the proposition that the market power requirement is indeed higher under Section 2—a point that Gavil later acknowledges in passing, on page 101.)

¹⁷¹ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458–59 (1993).

¹⁷² *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 190 (2010).

their operations, arrange financing, and so forth. In addition, firms in large portions of the economy sell their goods and services to other firms. But, as we know from Parts I and II, pretty much all of these activities involve agreements. This point holds to a substantial extent even in the presence of a unilateral action defense under Section 1 or Article 101 because operative provisions are often stated in the contracts themselves, and it is surely true without such a defense.

The problem in a nutshell is that a central tenet of the conventional view of the structure of competition law is that “unilateral action \Rightarrow lax; contracts \Rightarrow tough,” whereas the simple fact of the matter is that nearly all of the relevant unilateral action is implemented through contracts. Even granting *Copperweld*’s immunity for activities within firms (which involve contracts as well, notably, for employment) there remains a wide swath of activity taken to be governed by Section 2—and only by Section 2—that actually falls as well within Section 1. It readily characterizes such practices as Alcoa’s covenants with suppliers of electricity not to serve other aluminum companies¹⁷³ and the leases attacked in *United Shoe*.¹⁷⁴ Likewise, practices not conventionally viewed in contractual terms, such as predatory pricing, are implemented through contracts; after all, a predatory price requires a sale, which constitutes a contract, and an allegedly predatory price is part of these contracts of sale, making such contracts ones in restraint of trade if indeed the prices contained therein have anticompetitive consequences. Perhaps the only significant exception is a general refusal to deal, which in and of itself involves no contract with third parties.¹⁷⁵ It follows, therefore, that virtually anything an individual firm might do—so-called unilateral action that is protected from challenge under Section 2 or Article 102, whether because market power is insufficient or the conduct does not violate the circumscribed substantive prohibition—must be implemented via vertical agreements that can be attacked under the easier-to-meet standards of Section 1 or Article 101.

Before continuing, let us reflect briefly on the relationship between this transparent yet usually overlooked observation and the analysis in Parts I and II in this article. On one hand, that analysis is unnecessary to suggest a significant problem with the conventional account of competition law’s structure because, even if a robust unilateral action defense existed and was internally coherent (whether good policy or not), it remains true that much of the activity just listed that is taken to fall (only) under Section 2 or Article 102 undoubtedly involves explicit contractual arrangements that do not thereby escape Section 1 or Article 101. On the other hand, recognition of the incoherence of the unilateral action defense makes the collapse of Section 2 into Section 1 harder to miss.¹⁷⁶

To proceed, it seems apparent that what courts, competition agencies, and commentators widely regard to be a central feature of the law and crucial to sound operation of the system is approximately nonexistent or at most applicable in only a modest portion of the domain. If this

¹⁷³ See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 422 (1945) (describing Alcoa’s prior practices that had been subject to a 1912 consent decree).

¹⁷⁴ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff’d per curiam*, 347 U.S. 521 (1954).

¹⁷⁵ A refusal to continue prior dealings does involve a prior contract, although if the anticompetitive effect is from the refusal rather than attributable to the prior dealing, the contract would not itself be the source of an impermissible restraint.

¹⁷⁶ Borrowing from cinematic parlance, one might say that this Part of the article is “inspired by” rather than “based on” the preceding Parts.

distinction were thought to be a historical, path-dependent accident of the language chosen by the Sherman Act's drafters in 1890, with early, formalistic precedents freezing the structure into place, this collapse would be less surprising and unproblematic.¹⁷⁷ In fact, however, interpretation of the Sherman Act has a very different history, starting with the creation of the rule of reason in 1911,¹⁷⁸ followed by the erosion of per se rules in recent decades and the gradual movement away from highly formulaic approaches to horizontal mergers over that same period of time, and, as surveyed in Section III.B, the across-the-board rejection of formalism standing in the way of economic substance. Moreover, this rule structure has been transplanted across the globe in more recent times in jurisdictions unconstrained by any American peculiarities. (Indeed, the distinction is more important in many other jurisdictions because vertical agreements are treated more harshly.) Finally, as noted in Section A, the scheme has consensus endorsement as a prescriptive matter.

One explanation for the state of discourse is that the justification most have in mind for the harsher treatment of agreements between firms than of the unilateral actions of individual firms concerns horizontal, not vertical agreements.¹⁷⁹ Price fixing among competitors—by

¹⁷⁷ This view is suggested by the dissenting opinion in *Copperweld*: “Since at least [*Colgate*], § 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 789 (1984) (Stevens, J., dissenting).

¹⁷⁸ *Standard Oil Co. v. United States*, 221 U.S. 1, 49–68 (1911). It is worth recalling that the rule of reason replaced what was at least nominally a rule that prohibited all contracts in restraint of trade, whether reasonable or not. Since, as Justice White famously argued, all contracts restrain, some such relaxation was necessary. The parallel point made in this article is that all contracts are contracts, so the vertical agreement requirement really does not help either.

¹⁷⁹ For example, revisit *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984), which offers the following elaboration:

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

This exposition does not literally refer to horizontal competitors rather than vertical contractors; for example, chaotic buyers and sellers move in diverse directions, whereas when they pair up and the seller supplies what the buyer needs, there is an increase in power moving in a particular direction. However, the Court's statement seems to imagine concerted activity between competitors. A sharper pronouncement appears in 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* (4th ed. 2015): “The principal difference between § 1 and § 2 is that the existence of an agreement *among competitors* shifts the scale against the defendants. As a result, in close cases it is proper to condemn the arrangement by resolving uncertainties against the defendant. By contrast, when the challenged conduct is unilateral, the court must be somewhat more cautious.” *Id.* at 124–25 (emphasis added). It seems remarkable that the leading treatise, in presenting and defending the structure of U.S. antitrust law, would talk of Section 1 as if it applied only to horizontal agreements. *See also* Lemley & Leslie, *supra* note 157, at 1243–44 (“The fundamental distinction between unilateral and concerted conduct makes a good deal of sense as a matter of antitrust policy. Unilateral acts have the potential to create productive efficiencies that are generally lacking in agreements between competitors. They are also much harder to police, since companies have to make pricing and output decisions, while they don't have to agree with competitors. For both reasons, the administrative and error costs are much greater when policing unilateral acts than when policing agreements. Accordingly, the law treats agreements, especially among competitors, much more harshly than unilateral conduct.”). The point that horizontal agreements differ from vertical agreements and hence need to be kept separate in our minds when examining the latter is, however, noted in some of the literature on the vertical agreement

contrast, say, with a single firm dictating maximum or minimum resale prices to its buyers—needs to be subject to tough rules and steep sanctions. Related, collaborations among competitors that might facilitate price fixing or be little more than a cover for price fixing need to be scrutinized carefully. It is widely recognized that, whatever may be the optimal treatment of various sorts of vertical agreements, they do not, as a class, pose the same competitive dangers as horizontal agreements.¹⁸⁰ This point is strongly reinforced by the foregoing observation that, on reflection, many of the myriad unilateral acts of individual firms are implemented through contracts, vertical contracts; hence, aggressive treatment of all contracts, horizontal or not, entails aggressive treatment of much unilateral action.

Most everyone appreciates that vertical and horizontal agreements differ, and modern law tends to treat vertical agreements more generously (in many respects, much more generously) than the manner in which horizontal agreements are treated. That is, not all agreements are created equal; nor are they dealt with as such. It remains true, however, that explication of competition law's structure and application does not regard Section 1 and Article 101 to be inapplicable to vertical agreements or, equivalently, to subject them to the more lenient standards of Section 2 and Article 102.

It is difficult to make sense of the present rule structure that subjects the same behavior to different levels of scrutiny as a function of which of two available provisions is invoked. It also makes it hard to understand why those challenging firms' practices often choose the tougher route when an easier path is available. For competition agencies (as distinguished from private plaintiffs), such choices may reflect self-restraint: agencies may invoke the more demanding rules whenever they believe that such standards are more appropriate. And, of course, they always have the option of not bringing a challenge in the first place.

Once all manner of vertical arrangements are taken to be contracts, hence agreements, thereby reaching most unilateral action, it is difficult to maintain the existing structure of competition law that draws a sharp distinction. Perhaps the matter is moot because, as just mentioned, anyone seeking to challenge any practice subject to both provisions may simply choose the easier (more aggressive) one. If that is so, this phenomenon should be acknowledged, and all the effort devoted to debating and refining the proper treatment of arguably exclusionary practices under Section 2 and Article 102 should be abandoned. Another possibility—or a possible reform—would be to deem Section 1 and Article 101 applicable only to horizontal agreements. (Equivalently, one could raise the standards in vertical restraints cases under Section 1 and Article 101 to the level employed under Section 2 and Article 102.) In that event, we can continue the effort to determine the best rules under Section 2 and Article 102 and instead abandon such efforts regarding vertical agreements under Section 1 and Article 101. Or, for some practices, the best rule may lie somewhere in between the existing treatments of vertical agreements and of unilateral action. All of this can be summarized by stating that the many practices that fall under both the tougher and laxer rules should receive some treatment, that there is a single answer to the question, and that the continuing engagement in simultaneous, parallel, sometimes disconnected discourses cannot be the best way forward.

requirement. *See, e.g.*, Robinson, *supra* note 7, at 597 (“However, what is plainly true of agreements between competitors is plainly not true of agreements between suppliers and dealers. Such agreements are intrinsic to product distribution by nonintegrated firms and are neither inherently nor usually suspicious.”).

¹⁸⁰ This banal point does not deny that some vertical agreements are anticompetitive and that many horizontal agreements are not.

Although it is not the purpose of this investigation to offer concrete answers regarding the best treatment of various practices, one lesson bearing on these inquiries does emerge: it is misleading to continue the pretense that we can place in a safe harbor or at least regulate with a gentle touch most unilateral practices while at the same time more intensively scrutinizing all agreements, for such is a contradiction in terms. It is controversial the extent to which competition regulation can effectively be rule-like, generating important benefits, including reductions in the chilling of beneficial conduct and avoiding significant costs of providing powerful firms with recipes for anticompetitive exclusion. The present suggestion is that, in exploring candidate rules or other formulations, testing for the existence of a contract or other form of agreement is not very helpful in many domains in which it is now taken to be central.¹⁸¹

V. CONCLUSION

The law on vertical agreements has long been viewed with skepticism. This article suggests a harsher view. Part I explains how the underlying concept of vertical agreement, as distinguished from unilateral action, is incoherent on a number of levels. Basic illustrations of standard settings undermine the belief that an underlying distinction really exists. The notion that a requirement of a contract should not be regarded as part of the contract when the obligated party wishes it were otherwise is absurd. (By this account, the obligation to pay the contract price is not part of the agreement.) Conspiracy, a key operative legal term, includes the so-called unilateral action under examination here. A demand that acquiescence be communicated and sought does not, on reflection, materially limit the category of vertical agreements. And a requirement that there be something more than unilateral action founders on the inability to define mere unilateral action, to offer cogent bases for identifying the dimensions on which something more might be demonstrated, and to quantify how much more is required.

Part II demonstrates that in many respects the law itself provides less foundation for even a meek vertical agreement requirement than is generally appreciated. Statutory language, if the core terms are given ordinary or standard legal meanings, does not embrace the contemplated restriction. The Supreme Court, on one hand, in *Colgate*, carved out a much larger space for unilateral action than courts and commentators in the subsequent century have acknowledged, but, on the other hand, in *Monsanto*'s more recent and purported resurrection of the *Colgate* defense (which had in the interim been rendered nearly defunct), proffered quite narrow legal formulations of the defense and assessed the case's facts in perhaps an even less demanding fashion. Moreover, factfinders are permitted to infer whatever little may be required from murky circumstantial evidence (some of which might cut either way), and standard jury instructions articulate a sufficiently undemanding view of the requirement so as to permit a finding of vertical agreement in any case of a restriction arising from allegedly unilateral action.

Part III turns to the question of how the vertical agreement requirement relates to

¹⁸¹ See *supra* Section III.A. As noted throughout, horizontal agreements are qualitatively different. On another front, complete refusals to deal, wherein there is no contract or agreement even when viewed broadly, do pose enforcement challenges, particularly if remedies will require dealing, because the terms will then need to be set and monitored. Note, however, that scrutinizing existing contract terms—whether they involve prices or other conditions—often is not easy, and remedial orders (when sanctions are not limited to fines or damages) likewise may require setting terms and monitoring compliance.

competition policy. Possible linkages are examined, and the analysis indicates the lack of even a prima facie case for a separate vertical agreement element, in contrast to considering any pertinent evidence as part of the rule of reason inquiry. Regarding any actual correlation between competitive effects and the factors bearing on the purported distinction between unilateral action and vertical agreement, it appears that usually there will be little if any connection, and, when there is, the relationship may well be negative: that is, unilateral action may be more associated with anti- than procompetitive effects. Subsequent discussion reveals that the sharp disjunction between the highly formalistic vertical agreement requirement and its relationship to (or lack thereof with) economic substance clashes sharply with recent decades of Supreme Court precedent, especially with regard to the substantive rules applicable to vertical agreements themselves.

Part IV closes by offering some preliminary thoughts about a central question of competition law and policy that is brought into relief by the foregoing: the supposedly contrasting treatment of agreements, subject to (relatively) harsher scrutiny, and allegedly abusive actions of dominant firms, treated with pronounced caution. Although this difference is viewed as one of the defining features of modern competition regimes and is thought to have powerful policy justifications, its existence is rendered problematic once one appreciates that vertical agreements are ubiquitous. Specifically, most alleged exclusionary acts involve vertical agreements, so it is difficult to see how one can simultaneously apply substantially different legal assessments to the two—or to maintain the view that such differentiation is essential to the successful operation of the system. In sum, clearing our minds of vertical agreement vestiges brings into focus an important substantive challenge regarding the basic formulation of modern competition policy.