Facilitating practices and concerted action under Section 1 of the Sherman Act

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I. Introduction

Collusion, tacit or express, is the ‘joint determination of outputs and prices by ostensibly independent firms’. Successful collusion requires that rivals reach consensus on the key terms and deploy some means of detecting and penalizing cheaters, usually by tracking rivals’ transaction prices. ‘Facilitating practices’ are mechanisms that enhance rival firms’ ability to police such an arrangement. Examples include price reporting systems, preannouncements of price changes, most favored customer clauses, meeting competition clauses, delivered or basing-point pricing and industry-wide resale price maintenance. Whatever else they may do, facilitating practices make list or transaction pricing more transparent and thus make it easier for firms to check whether their rivals are adhering to a tacit or explicit understanding to maintain a price level. Antitrust lawyers and economists often use the term (or a variant of it) to refer to the theory underlying a famous public enforcement campaign that began in the late 1970s. But the kinds of market phenomena that the term describes were matters of antitrust concern long before then and remain relevant subjects of study in both antitrust law and industrial organization economics.

Facilitating practices are a species of oligopoly behavior, and therefore relevant to the analysis of a variety of practices under the antitrust laws. The enforcement agencies’ 1992 Merger Guidelines, for example, observe that ‘reaching terms of coordination may be facilitated . . . by existing practices among firms, practices not necessarily themselves antitrust violations, such as standardization of pricing or product variables on which firms could compete’. The presence of facilitating practices thus might increase the chances that a horizontal merger would be found anticompetitive under Section 7 of the Clayton Act on the grounds that it would increase the probability of ‘coordinated interaction that harms consumers’. This role of facilitating practices is examined in Chapter 10. In this chapter, I will consider the role of facilitating practices in the analysis of collusion under Section 1 of the Sherman Act.

Section 1 prohibits every ‘contract, combination . . . , or conspiracy’ in
restraint of trade. Although these three words have different meanings in other contexts, in antitrust law they mean the same thing: an agreement. As the Supreme Court has emphasized, the agreement element of Section 1 is designed to limit the category restraints of trade to those that are more likely to be harmful:

Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision-making 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.

The framers of the Act evidently believed that, in cases other than monopolization, firms could ordinarily reduce competition only by engaging in some sort of agreement. The prototypical agreement in restraint of trade is the cartel. The early cases that condemned cartels under Section 1 involved express, usually written agreements that the statutory language obviously encompassed. No one contested the applicability of the agreement requirement to these arrangements; any problems of interpretation in these cases lay in other areas, such as whether Section 1 prohibited all restraints of trade or only unreasonable ones.

The interpretive conundrum concerning the meaning of agreement arises when informal patterns of conduct in oligopoly mimic the effects of an express cartel. At least since the 1930s, economists have shown that firms in an oligopoly can, in certain conditions, achieve noncompetitive prices and outputs without a formal agreement by making choices that anticipate each others’ likely responses – what courts have called oligopolistic interdependence, conscious parallelism, or tacit collusion. In game theory, behavior like this can allow firms to achieve noncompetitive prices. The pristine case often hypothesized involves rival gas stations at the same street corner in a remote town: by publicly posting a price increase, one station might invite similar actions by rivals, who may comply if they see that they will all profit if they all follow the first firm’s price and stick to it, rather than keep prices down in order to increase output temporarily.

It was not always clear whether this sort of conduct violates Section 1. The language of the statute is not decisive, because one might characterize the initial price increase as an ‘offer’ that the rivals then ‘accept’ by following suit. Donald Turner argued decades ago, however, that conscious parallelism, without more, cannot be an agreement, or at least an illegal
agreement under Section 1, because the rivals are only acting rationally based on available information, like competitive firms. Moreover, Turner argued, it would be vain to try to prevent this sort of conduct, because the remedy would require firms to act irrationally or to submit to direct price regulation. Richard Posner famously responded (and still responds) that, because tacit collusion requires conscious choices, it should be viewed as ‘a form of concerted action’ that the law could remedy without ‘telling oligopolists to behave irrationally’. To make a very long story short, courts have sided with Turner in this dispute. The Supreme Court has recently observed that parallel conduct is ‘consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market’. Thus, modern courts would certainly hold that the firms in the gas station scenario have not done anything culpable or at least not anything the courts could sensibly penalize or enjoin without doing more harm than good.

The presence of facilitating practices complicates the Section 1 treatment of parallel conduct. The simple gas station scenario rarely occurs in real-world markets, because firms are typically not able to coordinate their actions simply by publicly posting prices. Successful coordination, as I have already noted, requires detection and punishment of deviators. In many markets, firms’ list prices may be difficult for their rivals to discover from public information. The list prices may also differ from transaction prices, because firms offer selective, secret discounts. Heterogeneous products and power buyers can multiply the problems of coordination. In these circumstances, cheating might quickly undermine the tacitly arranged price. Thus, firms may adopt a facilitating practice to keep tabs on each other’s prices.

As I will show in Part III below, if firms expressly agree to adopt one of these facilitating practices, for example as a trade association rule, and the effect of the practice is to reduce competition, then that agreement may be independently illegal under Section 1. Moreover, the Sherman Act may preempt a state law that requires rivals to use a facilitating practice. A more difficult question arises, however, where the firms each adopt the same facilitating practice without any express agreement: does parallel pricing together with parallel adoption of facilitating practices allow a court to infer the requisite agreement? Both Turner and Posner believed that, unlike simple parallel pricing, the parallel adoption of a facilitating practice that permits noncompetitive pricing should be unlawful, because the problem of remedy is mitigated. Where the market is behaving noncompetitively and facilitating practices make that possible, so the argument goes, courts may characterize the circumstances as a Section 1 agreement and enjoin the use of the practices.
But conduct is not evidence of an agreement simply because it can be enjoined; it must also have no benign, independent justification. Facilitating practices may do more than simply facilitate rivals' efforts to achieve an inefficient oligopoly price. They also may provide certain immediate benefits to consumers by, among other things, reducing search or transaction costs (for example, by disseminating price information to consumers). In these circumstances, the firms’ adoption of the practice might well be for the benign rather than the malign, collusive reason. The lesson of the public enforcement campaign against facilitating practices is that courts will not easily infer an agreement from the parallel adoption of facilitating practices where the practices have beneficial functions apart from facilitating price coordination. Courts evaluate facilitating practices as one type of circumstantial evidence that may but usually does not warrant an inference of a Section 1 agreement.

Unfortunately, the stated legal standards of agreement under which courts evaluate circumstantial evidence, including facilitating practices, are inadequate. In the next Part, I review the deficiencies of the present law governing the definition and proof of agreement under Section 1 and propose that the law should recognize that communication among rivals is necessary for concerted action. In Part III, I examine cases involving facilitating practices in a variety of Section 1 contexts, and suggest that the courts have come to recognize the importance of communications among rivals in evaluating whether the evidence warrants an inference of agreement.

II. The definition and proof of agreement
Courts have traditionally evaluated price-fixing claims under two legal standards: a definition of agreement, and a standard of sufficiency of the evidence to raise a jury question. The first of these standards, which jurors are expected to apply if the issue of agreement reaches them, is deficient, because the terms used to define agreement are too ambiguous to make the essential distinctions. The Supreme Court has said that a Sherman Act agreement need not be ‘explicit’,35 ‘express’,36 or ‘formal’,37 so long as the firms have ‘a unity of purpose, a common design and understanding, or a meeting of the minds’38 or ‘a conscious commitment to a common scheme’.39 The Court repeated the ‘meeting of the minds’ shibboleth in its recent Twombly decision.40 Interpreted charitably, these phrases seem to suggest that rivals agree if they act in the same way, thinking they share a common goal. But those conditions are met by consciously parallel pricing, which we now know is lawful.41 Thus, the law’s definition of agreement offers no basis for making the most difficult distinction courts and juries must make under Section 1.
Nor has antitrust law borrowed a useful definition of agreement from ordinary usage, the law of contracts, or economics. The courts recognize that agreement under the Sherman Act is a ‘term of art’ whose meaning differs from its usage in ‘ordinary parlance’. An agreement under the Sherman Act also cannot be the same as an enforceable agreement in the law of contracts, because Sherman Act agreements, if they restrain trade, are necessarily illegal and unenforceable. Finally, agreement has no technical meaning in economics. Economists distinguish between competitive and noncompetitive outcomes, but they do not formally distinguish between noncompetitive outcomes achieved by consciously parallel action and those achieved by an informal agreement. Thus, economists are typically not permitted to testify whether circumstantial evidence raises an inference of an agreement, because that issue lies outside of their expertise. Consequently, if a case alleging horizontal agreement goes to trial, the jurors that decide the case will not be permitted to apply their common understanding of agreement, yet they will not be given a meaningful definition of agreement by the court or by the expert witnesses.

Most cases based on circumstantial evidence do not go to trial, however, because of the second standard, which defines the sufficiency of evidence to raise a jury question. Under Matsushita, ‘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’. Alternatively, courts require evidence that ‘tend[s] to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism’. Another way courts express this standard is by requiring the plaintiff to produce evidence amounting to a ‘plus factor’. Although this latter term has a long history and has been used in a variety of ways, courts now use it almost exclusively as a label to characterize evidence that tends to exclude the possibility of independent action, and thus creates a jury issue of agreement. Several pieces of evidence viewed as whole may raise the necessary inference. The Supreme Court’s recent decision in Twombly on pleading standards for conspiracy cases is a logical outgrowth of this rule: it is not enough for the plaintiff to allege parallel conduct; it must also allege some plausible ground for thinking the parallel conduct is the result of a conspiracy.

This criterion is significant, because it prohibits an inference of agreement in cases in which each defendant’s actions are in its individual self-interest, regardless of whether the other defendants act in the same way. In such circumstances, the evidence is fully consistent with independent action; it is certainly not consistent only with collusion. For example, in the classic Theatre Enterprises case, the defendant film distributors refused
to license first-run films to a suburban theater.\textsuperscript{54} Although the actions were parallel and uniform, each firm had an independent justification for the action, because downtown theaters offered more profitable venues.

Although consciously parallel conduct does not raise an inference that the firms in the market have agreed, it remains unclear what sort of evidence does. Courts often suggest that evidence of actions contrary to the defendants’ individual self-interest can amount to a plus factor.\textsuperscript{55} But this observation must be qualified: it does not mean that parallel conduct is evidence of agreement if the conduct is profitable only if all firms act in the same way. In such a case, each firm may be acting against its short-run self-interest, because it could profit immediately by breaking with the group and increasing sales. But the firms may be acting in their long-run self-interest by, for example, maintaining the higher price by conscious parallelism. Because courts have recognized that simple conscious parallelism is lawful, ‘individual self-interest’ must also include the interest in gaining the benefits of consciously parallel action.\textsuperscript{56} It is, in other words, legitimately in the self-interest of a firm to anticipate the actions of one’s rivals and to act accordingly, even if it means sacrificing short-run profits in hopes of long-term noncompetitive pricing. Thus, if a customer were to sue our hypothetical rural gas stations who coordinated a price increase by interdependent actions, the customer would suffer summary judgment. Even if the first station might have lost $100 in profit to the others had they chosen to abjure the price increase and to sell more gasoline (at the first station’s expense) at a lower price, the stations do not act against their self-interest by matching the price increase and selling less, if they split $200 in profit by doing so.\textsuperscript{57} Consequently, the plaintiff must produce something more than evidence that the defendants have acted against their short-run self-interest.

The uncertainty about what sort of evidence amounts to a plus factor is attributable mainly to the vacuity of the Supreme Court’s definitions of agreement and the absence of a coherent economic definition that might fill the void. If we knew better what a Section 1 agreement was, we could be more certain about what sort of evidence makes it reasonable to infer the agreement, and what role facilitating practices might play in that inference. We would also be more certain what sorts of allegations raise a plausible inference of conspiracy under \textit{Twombly}’s pleading standard.

I have argued elsewhere,\textsuperscript{58} building on the work of Oliver Black,\textsuperscript{59} that US law should frankly acknowledge that communication is an element of agreement. According to Black, parties’ parallel actions can be arranged along a spectrum of degrees of ‘correlation’.\textsuperscript{60} In the most highly correlated conduct that US law would call conscious parallelism, the firms act in reliance of their belief that their rivals will act in a certain way; the firms have
Facilitating practices and concerted action

the same goal; and all have knowledge that these conditions have been met. The firms’ actions become concerted if the conditions of conscious parallelism are met in part because the firms have communicated their reliance and goals to each other. Notice that, in this formulation, concerted action does not require the sort of exchange of promises or assurances that would be necessary for a completed verbal agreement, because the parallel action itself supplies an element of the offense.

Although Black formulates this conception of agreement using the tools of analytical philosophy, his account bears a close resemblance to economists’ stated beliefs, if not their formal theories, about the role of communication in cartels. As we have seen, economic theory does not recognize informal agreement as a category distinct from conscious parallelism. It also has not conclusively shown the role of communication of various sorts, especially ‘cheap’ or nonbinding talk, in achieving noncompetitive outcomes. Nevertheless, many economists, including those with extensive experience in antitrust litigation, believe that communication is necessary to coordinate pricing in complex markets, even if it may not be in desert-island hypotheticals like our gas station example. Studies of the functioning of real-world cartels invariably show extensive communications to coordinate ‘price, volume allocation, production quotas, and, in the case of bid-rigging, who wins any given bid and what that winning bid will be’.

Not all communications among rivals are suspicious. Carlton, Gertner, and Rosenfield suggest that communications are most likely to be anticompetitive if they are private rather than public, if they relate to current and future prices rather than historical prices, and if they are repeated rather than isolated. Although these authors do not propose these categories of communications as a definition of agreement, the categories are consistent with Black’s definition, which requires that the communications convey the firms’ intended actions and their mutual reliance. More important, as I have argued elsewhere, US courts, although still citing the decades-old meaningless definitions, have implicitly adopted a definition of concerted action that requires communication of intent and reliance. This understanding of the nature of concerted action has important implications for the evaluation of facilitating practices.

III. Facilitating practices

Facilitating practices raise issues under Section 1 in two primary contexts: where rivals adopt the practices by express agreement (or, analogously, pursuant to a state mandate), and where they adopt the practices by parallel action. Both contexts require analysis of the effects of the practice on the rivals’ ability to coordinate prices. In the first context, however, the
fact that rivals have found it necessary to agree to adopt the practice (or the state has found it necessary to compel it) simplifies the analysis, not only satisfying the agreement element, but by eliminating many of the possible independent and beneficial explanations for the practices. As we see in the next section, the legality of practices in this first category may hinge on whether the facilitating practice consists of an agreement to adhere to particular terms of dealing or an agreement to share information. Both types of agreement may facilitate price coordination, but courts view the agreements on terms of dealing with greater suspicion.

The more difficult cases are those in the second category: parallel adoption of the facilitating practices, which I address in the final section of this Part. These cases raise the issue of whether the practice permits inference of an agreement. Some have argued that the presence of facilitating practices makes oligopoly pricing illegal. As I noted in the introduction, both Posner and Turner agreed that the existence of facilitating practices would justify a finding of Section 1 liability for consciously parallel action, because that would avoid the problem of remedy: enjoining the practice would eliminate the noncompetitive pricing. But the presence of facilitating practices does not avoid the antecedent problem of inferring an agreement. Applying the *Matsushita* standard, courts have recognized that “‘facilitating devices’ are not necessarily sufficient under the law to constitute a ‘plus factor’”.67 The same principles that prevent courts from inferring an agreement based on parallel pricing, also often prevent them from inferring an agreement from parallel pricing accompanied by facilitating practices. I suggest below that cases involving facilitating practices are best understood if they are evaluated under a definition of agreement that requires communication of reliance and intent. Since facilitating practices may themselves involve communications, they can meet the clarified definition, particularly if other evidence supports the necessary inferences concerning the nature and content of the communications.

A. Agreements on (or state mandates of) terms of dealing that increase pricing transparency

Agreements that facilitate price coordination by fixing rivals’ terms of dealing are likely to be held illegal per se.68 In *Catalano*,69 for example, the Court condemned an agreement among beer distributors not to offer short-term credit. The agreement eliminated a common type of discount equal to the time value of the money owed. Although the agreement made transaction prices more transparent, it did so by limiting the rivals’ ‘action with respect to the published prices’.70 Indeed, the arrangement was a facilitating practice primarily because it inhibited firms from engaging in secret discounting, which might have undermined any understanding on
prices. The express agreement in *Catalano* was crucial to the result. Had the evidence shown only that the defendants individually declined to offer short-term credit, there would have been no inference of an agreement under *Matsushita*, because each firm could offer independent reasons for its actions. The fact that the firms found it necessary to agree on the practice, however, shows that any independent reasons for adopting it were not the decisive ones.

Earlier cases reached similar results. In *Sugar Institute*, the Court held unlawful an agreement among rivals to adhere to publicly announced prices. Again, the agreement to abide by particular terms of dealing was the decisive factor. An industry-wide practice of announcing list prices and adhering to them would have been no more than conscious parallelism. An agreement to announce list prices, without the agreement to adhere to them, would place the practice in the more benign category of data dissemination. But an agreement by each firm to adhere to list prices, like the agreement in *Catalano*, amounted to an agreement to eliminate secret discounting. Similar reasoning would apply to agreements to adopt other practices, like resale price maintenance or basing-point or delivered pricing, that enhance price transparency by restricting terms of dealing.

An analogous line of decisions extends the reasoning of these cases to invalidate state-mandated facilitating practices. Federal antitrust law preempts state economic legislation that mandates or authorizes private conduct that violates the antitrust laws, unless the regulatory scheme meets the requirements of state-action immunity, particularly ‘clear articulation’ of the policy and ‘active supervision’ by state regulators. The Supreme Court has invalidated state laws that authorized private firms to restrain trade in ways that closely resemble antitrust violations, even where the restraints did not technically involve a private agreement. Thus, the Supreme Court has struck down state laws that authorized a manufacturer or wholesaler to dictate the prices at which its products could be resold by downstream firms. The Court reasoned that the restraints amounted to state-mandated resale price maintenance, even though the state law did not require a vertical agreement, only compliance with terms laid down by the upstream firm. One of the grounds the Court offered for these results was that this sort of resale price maintenance is a facilitating practice:

We have noted that industrywide resale price maintenance also may facilitate cartelization. Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition. The New York statute specifically forbids retailers to reduce the minimum prices set by wholesalers.
On similar grounds, lower courts have condemned ‘post and hold’ statutes, which require liquor distributors to announce price lists and to charge only those prices for as long as the list is in effect. The Fourth Circuit characterized the statute as ‘a hybrid restraint that amounts to a per se violation of § 1’. The arrangement differs from a purely private cartel, because nothing in the statute requires distributors to agree with each other. Nevertheless, the statute mandates a facilitating practice, and thus is closely analogous to cases, like *Sugar Institute*, in which firms agree to adopt a facilitating practice that limits their ability to discount. In effect, the statutory mandate serves the function of the trade association rule. The restraint is hybrid, and, because there is no active supervision of the private actors, it does not qualify for state action immunity.

B. Agreements to exchange information

Horizontal agreements to exchange information, like those at issue in the trade association cases of the 1920s and in *Container*, are also facilitating practices, because they make it easier for rivals to coordinate prices. Unlike the restraints in *Catalano* and *Sugar Institute*, however, the terms of an information-exchange agreement do not control how the information will affect the rivals’ terms of dealing. In some instances, they can benefit consumers by spreading information in the market. Thus, courts must weigh the likely anticompetitive and procompetitive effects. The legality of these sorts of agreements thus depends on the nature of the information exchanged and the likely (and actual) effects of the practice, given the characteristics of the market. The cases suggest that exchanges of information are more likely to be unlawful if they include present and future prices, relate to specific transactions, and rely upon a central authority which interprets the data and makes recommendations. These criteria closely resemble those proposed by Carlton, et al., for identification of anticompetitive communications.

An information exchange may be unlawful if it is found to have an unreasonable effect on prices, or if it is found to be a plus factor permitting an inference of a per se illegal agreement to fix prices. Interestingly, the inquiries for these issues are similar. The existence of an agreement in cases alleging price fixing is the dividing line between lawful and unlawful behavior, and thus involves policy choices about the legitimacy of various types of interactions among rivals. Thus, inference of a per se illegal agreement to fix prices requires a balancing of procompetitive and anticompetitive effects that resembles a rule of reason analysis of the express agreement to exchange information.

*Eastern States Retail Lumber Dealers’ Association v. United States* illustrates this point, although it involved an agreement to exclude
Facilitating practices and concerted action

competition rather than to fix prices. The retailers’ association had gathered and evaluated complaints from members about wholesalers that sold directly to the retailers’ customers. The association distributed a ‘blacklist’ of the direct-selling wholesalers to its members, who then generally refused to deal with those on the list. The Supreme Court held that the evident purpose and ‘natural consequence’ of the ‘concerted action’ of circulating the list was to induce the refusals to deal. \(^90\) The arrangement ‘tend[ed] to prevent other retailers who [had] no personal grievance against’ the wholesaler from trading with it ‘solely because of the influence of the report circulated among the members of the associations’. \(^91\) The Court might have condemned the agreement to distribute the list because of its effects, but instead relied on the same evidence to infer the existence of a per se illegal boycott. The agreement’s tendency to induce refusals to deal by retailers unaffected by direct selling suggested that those refusals had no independent justification, and thus justified an inference of an agreement.

The key element in this inference was communication through the mechanism of data collection and dissemination. Retailers refused to deal because of the blacklist, which was assembled from their rivals’ reports and presumably in reliance on their rivals doing the same. The case is thus distinguishable from *Cement Manufacturers*, in which an association circulated a list of firms engaged in fraud, \(^92\) because that was information a retailer would find sufficient as a reason to refuse to deal regardless of the actions of its rivals.

C. Parallel adoption of facilitating practices

Finally, we are in a position to consider the legality of parallel pricing accompanied by parallel use of facilitating practices. It now seems clear that rivals’ parallel use of a facilitating practice does not, by itself, raise an inference of agreement. One court stated, for example, that “‘facilitating devices’ are not necessarily sufficient under the law to constitute a ‘plus factor’”. \(^93\) There is often an independent justification for a firm to adopt a practice that might facilitate price coordination. For example, in *Ethyl*, the court refused to condemn industry-wide use of advance notification of price changes, price protection clauses, and delivered pricing, even though they facilitated price uniformity, because the practices had been adopted when there was only a single seller in the market and thus evidently served non-collusive purposes that consumers wanted. \(^94\) Thus, under the *Matsushita* standard, the parallel adoption of a facilitating practice typically cannot exclude the possibility that the rivals were acting independently.

The Supreme Court’s recent *Leegin* decision, \(^95\) which abandoned the per se illegality of resale price maintenance, provides another useful
Illustration of the issues. That case held that resale price maintenance was not invariably anticompetitive, and so should be judged under the rule of reason. Manufacturers might use the practice in various ways to induce retailers to provide point-of-sale services and thus enhance interbrand competition. On the other hand, the practice would be anticompetitive if manufacturers used it to police a cartel by ‘identifying price-cutting manufacturers’. Such a cartel would be per se illegal and any ‘vertical agreement setting minimum resale prices’ that the members adopted to ‘facilitate’ the cartel would be ‘unlawful under the rule of reason’. This passage states the uncontroversial point that any resale price maintenance scheme that cartel members adopted to enable more effective enforcement of the cartel’s price terms would be illegal along with the horizontal price fixing agreement itself. Indeed, it would be illegal, under Catalano, for rivals to agree to adopt resale price maintenance, even if they did not agree on prices.

But what if there were no express, horizontal agreement? Turner, writing in 1962, concluded that it was ‘an unlawful agreement for oligopolists to make interdependent decisions to adopt fair trade, regardless of the means employed’. Leegin, however, states only that resale price maintenance agreement might be ‘useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel’ and ‘should be subject to more careful scrutiny . . . if many competing manufacturers adopt the practice’. This language strongly implies that industry-wide resale price maintenance alone would not constitute a plus factor. ‘Additional scrutiny’ would be necessary, first, to determine whether the vertical agreements were anticompetitive. If the vertical agreements benefited consumers by inducing retailers to provide point-of-sale services, the agreements would each be lawful, and the parallel adoption of them would not permit the inference of a horizontal agreement under Matsushita, because each manufacturer would have legitimate reason for adopting the practice. If the vertical agreements were anticompetitive because they facilitated noncompetitive oligopolistic behavior without inducing retailers to provide beneficial services, then they might be illegal under the rule of reason. Even in that case, however, the industry-wide adoption of the practice alone would likely not justify an inference of a horizontal agreement, because the pattern would be consistent with lawful oligopolistic interdependence.

Of course, the widespread adoption of resale price maintenance, or any other facilitating practice, combined with other evidence might justify inference of a horizontal agreement. In Part III.C, I suggested that, while courts continue to quote the Supreme Court’s vague definitions, they have in recent years begun to apply a more specific definition of concerted action, one that closely resembles the communication model I have
advanced here. Under that model, concerted action under Section 1 of the
Sherman Act requires, beyond evidence of parallel conduct, evidence that
rivals have communicated their intentions to act in a certain way and their
reliance on each other to follow suit. To convey the requisite information,
the communications must ordinarily be private and repeated, and must
relate to present or future prices. These considerations apply in the case of
facilitating practices as well.

In the hypothetical rural gas station, for example, coordination of prices
would be more difficult if the stations did not post their prices on signs as
well as at the pump. Thus, public price posting is literally a facilitating
practice that involves price communication. But courts would certainly not
find that posting prices on signs amounted to a plus factor, because it also
has the legitimate purpose of informing consumers of rivals’ prices. Public
‘signaling’ and ‘monitoring’ of prices are too ambiguous in their effects to
amount to plus factors, because they cannot convey the necessary intent
and reliance.103 If the information communicated is private, however, a
court might infer that the communication conveyed the necessary message
of intent to act in a particular way in reliance of the expectation that
others would do the same. In Container, for example, the Supreme Court
reasoned:

Here all that was present was a request by each defendant of its competitor for
information as to the most recent price charged or quoted, whenever it needed
such information and whenever it was not available from another source. Each
defendant on receiving that request usually furnished the data with the expecta-
tion that it would be furnished reciprocal information when it wanted it. That
concerted action is of course sufficient to establish the combination or conspiracy,
the initial ingredient of a violation of Section 1 of the Sherman Act.104

The Court thus inferred the agreement to exchange current price inform-
ation from the private, repeated practice of providing current pricing
information when requested. The Court emphasized that this conduct was
‘obviously quite different from the parallel business behavior condoned in’ Theatre Enterprises.105 In this case, the inference was that the parties
had agreed to exchange information, but similar evidence, in different
circumstances, might imply an agreement to fix prices.

Petroleum Products, which appeared to condemn a kind of public price
signaling, is not to the contrary. There, the court suggested in dicta106 that
firms’ announcements of increases in wholesale prices and withdrawals of
dealer discounts would support an inference of conspiracy, because the
actions made it easier for firms to coordinate price increases.107 The court
pointed out, however, that because the defendants sold through franchised
dealers, publishing wholesale prices would not give consumers useable
information; the evidence indicated that the publication of wholesale prices was intended to inform rivals. In a footnote, the court emphasized that its ‘conclusion would necessarily be different were the appellants’ inference of a price-fixing conspiracy based on the dissemination or advertising of retail prices; permitting an inference of conspiracy from such evidence would make it more difficult for retail consumers to get the information they need to make efficient market decisions’. In some circumstances, the court may infer that the requisite communications have occurred even without direct proof of the communications themselves. In Cement Institute, for example, the Court affirmed the FTC’s inference of an agreement to engage in basing-point pricing. Like an agreement to adhere to announced prices, an agreement among rivals to calculate freight from basing points greatly reduces the complexity of coordinating prices. Because basing-point pricing might provide benefits, however, parallel adoption of the practice would not alone justify the inference of an agreement to adopt it. In Cement Institute, however, the FTC inferred an agreement from evidence that the defendants not only quoted delivered prices from standard basing points, but also coordinated efforts to punish deviators from the practice. These methods included the imposition of punitive basing points at the locations of cement dealers that did not follow the system. These and other practices made it reasonable for the FTC to infer the agreement, even in the absence of testimony about specific communications.

IV. Conclusion
Facilitating practices are of continuing interest to antitrust courts and scholars because they may enable noncompetitive pricing. This characteristic of the practices is especially relevant to the characterization and proof of agreements under Section 1 of the Sherman Act. Express agreements among rivals (for example by adoption of a trade association rule) to adopt facilitating practices that limit terms of dealing in ways that make it easier to detect secret discounting are generally illegal per se. Analogously, when a state enacts a statute that requires rivals in an industry to adopt a facilitating practice, the courts usually hold the arrangement an invalid hybrid restraint. Where rivals adopt facilitating practices without an express agreement, however, the conduct is lawful, absent additional evidence that the adoption and maintenance of the practice was made possible by communication.

Notes
Facilitating practices and concerted action


2. *Id.* at 42–3.


14. For terms of formal cartel agreements, see United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 292–7 (1897); United States v. Addyston Pipe & Steel Co., 85 F. 271, 273–5 (6th Cir. 1898), aff’d 175 U.S. 211 (1899). For discussion of an early price-fixing
Antitrust law and economics


15. Compare Trans-Missouri, supra note 14, at 341 (condemning all agreements which are a restraint of trade with Id. at 371 (White, J., dissenting) (arguing only unreasonable restraints should be unlawful).


18. JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 780 (7th Cir. 1999).


22. There are, of course, many other outcomes of this scenario.


24. In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002) (Posner, J.) (‘If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm’s behavior can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices.’). Judge Posner recognized, however, that courts have not accepted this reasoning. Id. See also Devlin, A., Note, A Proposed Solution to the Problem of Parallel Pricing in Oligopolistic Markets, 59 STAN. L. REV. 1111, 1121–2 (2007).


26. See id. at 669–70; see also JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 780 (7th Cir. 1999) (reasoning that it would be impractical to frame relief for tacit collusion); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (same).

27. Posner, supra note 8, at 94. Posner acknowledges that ‘most other economically minded students of antitrust policy’ disagree. Id.

28. Id. at 97–8.

29. Some still argue that tacit collusion should be unlawful. See, e.g., Devlin, supra note 24; Piraino, supra note 16.


31. See, e.g., 1992 Merger Guidelines, supra note 11, at § 2.11 (‘[R]eaching terms of coordination may be limited or impeded by product heterogeneity or by firms having substantially incomplete information about the conditions and prospects of their rivals’ businesses, perhaps because of important differences among their current business operations.’).


34. Posner, supra note 8, at 98–9; Turner, supra note 25, at 675–6.


36. United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948) (noting that ‘[i]t is enough that a concert of action is contemplated and that the defendants conformed to the arrangement’).
Facilitating practices and concerted action

37. Am. Tobacco Co. v. United States, 328 U.S. 781, 809–10 (1946) (adding that evidence of a violation ‘may be found in a course of dealings or other circumstances as well as in any exchange of words’). The Supreme Court has also stated that an agreement need not involve ‘letters, agreements, or other testimonial[s] to a conspiracy’. Norfolk Monument Co. v. Woodlawn Mem’l Gardens, Inc., 394 U.S. 700, 703–4 (1969).

38. Am. Tobacco, supra note 37, at 810.


43. Carlton et al., supra note 23, at 424.

44. M.D. Whinston, LECTURES ON ANTITRUST ECONOMICS 20 (Cambridge; MIT Press 2006); Stigler, G.J., What Does an Economist Know?, 33 J. LEGAL EDUC. 311, 311–12 (1983). Economists do distinguish between cooperative and noncooperative equilibria. But cooperation, in this sense, means that the parties have formed an enforceable contract: D.M. Kreps, GAME THEORY AND ECONOMIC MODELING 9 (1990). Since the sort of agreements prohibited by the Sherman Act are unenforceable, they would all be considered noncooperative.


48. See, e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saska., 203 F.3d 1028, 1032–4 (8th Cir. 2000) (holding that the plaintiff ‘has the burden to present evidence of consciously paralleled pricing supplemented with one or more plus factors’).

49. See, e.g., Kovacic, supra note 41, 35 (observing that courts rarely rank plus factors or ‘specify the minimum critical mass of plus factors that must be established to sustain an inference of collusion’. Kovacic identifies as plus factors in this broader sense a motive for collective action; the absence of an independent motive; actions that are inexplicable unless collective; a history of collusion; meetings and communications among the defendants; facilitating practices; and industry structure and performance consistent with collusion. Id. at 37–55. See also Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001) (describing ‘defendant’s use of facilitating practices’ as a plus factor in this more general sense).

50. City of Tuscaloosa supra note 47, at 571 n.35, 572 (holding plaintiff must produce plus factors ‘tending to exclude the possibility of lawful action’). See also In re Baby Food Antitrust Litig., 166 F.3d 112, 122 (3d Cir. 1999) (‘The simple term “plus factors” refers to “the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy”’). (citation omitted)); cf. Blomkest, supra note 48, (dissenting opinion) (‘[I]t is useful to distinguish between “plus factors” that establish a background making conspiracy likely and “plus factors” that tend to exclude the possibility that the defendants acted without agreement.’).

51. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (courts should not ‘compartmentaliz[e] the various factual components [of the plaintiffs case] and wip[e] the slate clean of scrutiny of each’).


53. Id. at 1966 (holding that allegations must ‘be placed in a context that raises a
Antitrust law and economics

suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action’.


55. Kovacic, supra note 41, at 38–42; Piraino, supra note 16, at 37.

56. City of Tuscaloosa, supra note 47, at 570 n. 33 (describing an act is against the defendants’ self-interest if ‘each defendant would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action’) (citation omitted).

57. In real cases, pricing involves uncertainties that make a choice to follow the price increase more ambiguous. Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1311 (11th Cir. 2003) (observing that not matching a rival’s price increase ‘likely would have resulted in little if any market share gain [and] would have minimized profits, given that lower prices generate smaller revenues’).

58. Page, supra note 23.

59. BLACK, O., CONCEPTUAL FOUNDATIONS OF ANTITRUST (New York; Cambridge University Press, 2005).

60. Id. at 185–7.

61. Id. at 187, Cf. Hay, G.H., The Meaning of ‘Agreement’ under the Sherman Act: Thoughts from the ‘Facilitating Practices’ Experience, 16 REV. INDUS. ORG. 113, 128 (2000) (‘[I]f there is to be a category of unlawful tacit collusion which is to be distinguished from classic oligopoly, the difference must lie, not in the state of mind of the competitors, but on the specific elements of behavior that brought about the state of mind.’).


64. See also Leslie, supra note 4, at 580. Leslie adds that communication is also necessary to ‘build trust’ in the representations cartel members make to each other. Id. He also summarizes the results of economic experiments that tend to show that communication is necessary for effective cooperation. Id. at 538–9.


70. Id. at 649–50.


73. FTC v. Cement Institute, 333 U.S. 683, 690–93 (1948). In Catalano, supra note 69, the Court confirmed that the agreement condemned in Cement Institute under Section 5 of the FTC Act conduct ‘would also violate § 1 of the Sherman Act’. 44 U.S. at 648 n.10. See also Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484–5 (1st Cir. 1988).

74. Leslie, supra note 4, at 577–8.

Facilitating practices and concerted action


78. Id. at 342.


81. The Ninth Circuit in *Maleng* correctly struck down Washington’s post-and-hold statute as a hybrid restraint, accepting the argument that it closely resembled an agreement to adhere to posted prices. *Costco Wholesale Corp. v. Maleng*, 2008 WL 223121, at 12–15. The court, again correctly, noted that an ‘adherence requirement effectively removes a market uncertainty by making pricing behavior transparent and discouraging variance’. Id. at 14. But the court went on to uphold Washington’s ‘volume discount ban, the delivered pricing ban, and the ban on credit sales’ on the grounds that, apart from the post-and-hold requirement, they are ‘unilateral restraints imposed by the State, with no degree of discretion delegated to private individuals’. Id. at 16. The court reasoned that:

any anticompetitive effect arising out of these restraints is the result not of private discretion, but of the sovereign’s command. There is no ‘meeting of the minds’ to determine how much discounts will be, whether territorial variations in price will be allowed, or whether credit may be extended over a certain period of time. The State of Washington commands that no discounts be given, no credit be extended, and no transportation allowances be factored in; that the wholesalers comply with these commands is not enough to deem the restraints hybrid.

*Id.* This reasoning fails to recognize that each of the challenged restraints is as much a facilitating practice as the post-and-hold requirement. None involves an agreement or a ‘meeting of the minds’ among retailers in the usual Section 1 sense. Yet all involve state mandates to use a term of dealing that prevents secret discounting, while preserving individual discretion to establish prices. Thus all of the mandated practices should be preempted for facilitating noncompetitive price coordination by means closely analogous to a trade association rule imposing the same requirements.


85. Pearlstein, D.J. et al., 1 ABA Section of Antitrust Law, Antitrust Law Developments 95 (5th. ed. 2002) (exchanges are lawful if ‘a legitimate business reason for the exchange offsets any likely anticompetitive effect’).

86. Id. at 98.


88. *Cf. Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (distinguishing between information exchange as plus factor in establishing per se illegal price fixing agreement and independent violation under rule of reason).

89. 234 U.S. 600 (1914).

90. *Id.* at 612.

91. *Id.*


Antitrust law and economics

Ga.), aff’d sub nom. Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287 (11th Cir. 2003).

94. E.I. du Pont de Nemours & Co. v. FTC (Ethyl), 729 F.2d 128, 133–4, 140–42 (2d Cir. 1984). Although the claim in Ethyl was under Section 5 of the Federal Trade Commission Act, which does not facially require proof of agreement, the court imposed requirements evidently drawn from Section 1 of the Sherman Act. The court’s analyses under the two statutes would likely be identical.


96. Id. at 2715.
97. Id. at 2716.
98. Id. at 2717.

100. Leegin, supra note 95, at 2717.
101. Id. at 2719.

103. Holiday Wholesale Grocery, supra note 93, at 1275–96. See also In re Flat Glass Antitrust Litig., 385 F.3d 350, 360, 369–70 (3rd Cir. 2004) (holding no inference of conspiracy where an independent entity collected truckload prices for replacement glass, selected one as a benchmark to calculate a suggested retail price, and where glass manufacturers each matched the selected, implicit truckload price).

105. Id. at 335 n. 2.
106. The case also included direct evidence of agreement. In re Citric Acid Litig., 191 F.3d 1090, 1096 (9th Cir. 1999).

108. Id. at 448 (stating that ‘the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination’).
109. Id. at 448 n.14.
110. See, e.g., FTC v. Cement Institute, 333 U.S. 683, 714 (1948) (citing evidence of boycotts against ‘dealers who persisted in selling foreign cement’ and efforts by Institute officials to ‘secure pledges by producers not to permit sales f.o.b. mill to purchasers who furnished their own trucks, a practice regarded as seriously disruptive of the entire delivered price structure of the industry’. The Court also pointed to unexplained, precisely identical bids by numerous rivals. Id. at 713, n.15.

111. Id. at 714.

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Facilitating practices and concerted action


Antitrust law and economics


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Statute