Over a span of nearly 50 years Richard Posner’s ideas have loomed large over the subject of oligopoly pricing and antitrust. The span begins in 1969 with Posner’s publication of *Oligopoly and the Antitrust Laws: A Suggested Approach*,¹ which argues for more aggressive enforcement of Section 1 in cases involving circumstantial evidence of conspiracy. The span ends with Posner’s opinion in *In re Text Messaging Antitrust Litigation*² in 2015.

The two writings, the first an academic article published early in Posner’s career and the second a judicial opinion published near the end, suggest very different approaches to the enforcement of Section 1 in oligopoly pricing cases. The article counsels aggression while the opinion counsels timidity, with a closing paragraph that begins with the sentence, “We hope this opinion will help lawyers understand the risks of invoking ‘collusion’ without being precise about what they mean.”³

I will refer to the oligopoly pricing cases sometimes as “circumstantial-evidence conspiracy” cases because they typically involve a charge of conspiracy and an absence of direct evidence of agreement, such as a transcript or recording of messages proving the existence of an agreement to restrain trade in violation of Section 1. Almost always these are cases involving oligopoly pricing—though some circumstantial evidence cases have involved groups consisting of too many members to be considered an oligopoly.⁴ What makes these cases special, however, is the type of circumstantial evidence brought to court and the difficulty of determining whether the evidence justifies a finding of conspiracy.

Given the difficult problems of inference in oligopolistic pricing cases, it is easy to exaggerate the change in Posner’s outlook from 1969 to 2015. To fairly assess the change, one should keep in mind that inference is generally entwined with the specific set of facts at issue—alter the facts, alter the inference. Still, on a superficial level Posner’s reversal appears to be dramatic. He is skeptical in 2015 of the types of evidence he suggested would support a finding of conspiracy in 1969, and by 2015 he tells us that he no longer believes, as he did in 1969, that Sherman Act Section 1 prohibits tacit collusion. These changes alone would be of interest given Posner’s influence in antitrust law, but they are even more interesting in light of his impressive critique, in 1969, of the conservative enforcement approach advocated by former Antitrust Division chief Donald Turner and others. The journey changes the journeyer: the conservative approach that Posner criticizes in 1969 he embraces in 2015.

In this article, I first describe the text messaging litigation and the reasoning behind Posner’s virtual volte-face on oligopoly pricing. Then I discuss the beginning of Posner’s journey and the

² 782 F.3d 867 (7th Cir. 2015) [hereinafter Text Messaging 2015].
³ *Id.* at 879.
basis for his comparatively idealistic vision of the scope of Section 1. I conclude by considering the path forward—what courts are likely to do on the question of the scope of Section 1, and what courts should do.

The End of the Journey, 2015

Let’s start with the final stage of this odyssey, Posner’s 2015 In re Text Messaging opinion. We will have to consider both that opinion and his 2010 opinion affirming the denial of a motion to dismiss in the same case. The case arose from the consolidation in a multidistrict litigation of several class actions accusing major wireless network providers (T-Mobile USA Inc., Sprint Corp., AT&T Mobility LLC, and Verizon Wireless LLC) of fixing prices in the “pay per use” text messaging market (paying per message rather than a fixed fee for an unlimited number). The 2010 opinion examines the defendants’ interlocutory appeal of the trial court’s refusal of their motion to dismiss. The 2015 opinion examines the trial court’s decision to grant summary judgment in favor of the defendants. For simplicity, I will refer to the first opinion as Text Messaging 2010 and the second as Text Messaging 2015.

Text Messaging 2010 is mostly an application and explication of the standard of review for dismissal motions under Bell Atlantic Corp. v. Twombly. Quite helpfully, Posner describes Twombly as changing the standard for dismissal from a possibility standard to a plausibility standard. Under a possibility standard, a court should not dismiss a complaint if there is a potential scenario under which the allegations of the complaint would be valid. In other words, a court could not properly dismiss a complaint as long as it is possible that facts exist that would enable the plaintiff to prove the allegations in court. Thus, even a small or miniscule probability of being capable of proof would enable a complaint to survive a motion for dismissal under the possibility standard. By contrast, a plausibility standard requires the allegation of facts in a complaint that suggest a significant probability that the plaintiff will prove the allegations to the degree required by the prevailing proof standard. The plausibility standard does not require the allegation of facts that would enable a reasonable jury to conclude that the plaintiff is telling the truth with a probability greater than 50 percent. Such a standard would be equivalent to the preponderance standard for a verdict, and would clearly be too demanding at the complaint stage. But a plausibility standard, Posner explains, points to a probability that is greater than miniscule though less than 51 percent as the requirement for avoiding dismissal.

The defendants in Text Messaging 2010 argued that the plaintiff’s complaint did not satisfy the plausibility standard because it presented facts that established nothing more than parallel conduct equally consistent with unilateral action as with collusion. Posner concluded, however, that the complaint did meet the plausibility standard for a conspiracy claim. In addition to the observed parallel price increases, his analysis points to two important “plus factors” that are addressed by

---

5 Text Messaging 2015, 782 F.3d at 867.
6 In re Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010) [hereinafter Text Messaging 2010].
8 Text Messaging 2010, 630 F.3d at 629.
9 Twombly, 550 U.S. at 561.
10 Text Messaging 2010, 630 F.3d at 625.
11 Id. at 629 (“The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.”).
the facts asserted in the complaint. One plus factor is that of shared information. Posner noted that the defendants had met in trade associations and within other special groups with sufficient frequency to enable them to form and monitor an agreement on prices. Second, Posner argued that prices for “pay per use” text messaging service increased as costs were falling, which he treated as an anomalous feature suggesting the existence of a conspiracy. Third, he noted that the complex and nearly simultaneous changes in the pricing structure bolstered the plaintiff’s theory of conspiracy. Based on these plus factors, Posner held that the plaintiff’s complaint met the plausibility test of Twombly.

The defendants’ appeal having been denied by Posner, the case proceeded to discovery in the trial court, ending with a summary judgment in favor of the defendants. The plaintiffs appealed the summary judgment, leading to Text Messaging 2015, in which Posner upheld the judgment and took the further step of announcing that tacit collusion does not violate Section 1 of the Sherman Act.

Posner provides a careful and exhaustive assessment of the circumstantial evidence in Text Messaging 2015. His conclusion, however, boils down to the statement that the evidence produced by the plaintiffs was entirely consistent with individually rational conduct on the part of the defendants. The only new piece of evidence generated through discovery was an e-mail by an employee of T-Mobile criticizing the price increase for messaging services on the ground that it was not justified by an increase in costs and that it was just an attempt to gouge consumers. Posner dismisses the probative weight of the e-mail because it contained no language suggesting that there was an agreement among the firms to fix prices—if anything, the e-mail appears to adopt the premise that there was no agreement among the firms. In addition, the employee’s later attempt to delete all traces of the e-mail was consistent with an effort to avoid letting his own criticism of senior management get out, which would have risked retaliation from those managers, rather than with an effort to conceal the existence of a conspiracy.

Posner then turns to the subject of the scope of Section 1, holding that tacit collusion is not within its reach. As far as I am aware, this is the first appellate court opinion to state such a position so clearly. The Supreme Court, in Brooke Group, referred to tacit collusion as a practice “not

---

12 Id. at 628 (“Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings.”).
13 Id. (“The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices.”).
14 Id. (“The change in the industry’s pricing structure was so rapid, the complaint suggests, that it could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption.”).
15 Id. at 629.
16 Text Messaging 2015, 782 F.3d at 869.
17 Id. at 879.
18 Id. at 872. The manager also characterized the price increase as “colusive” (sic), which Posner suggested did not necessarily mean express collusion. Id.
19 Id. at 872–73.
20 Id. at 873 (“But that is consistent with his not wanting to be detected by his superiors criticizing their management of the company.”).
21 In an earlier opinion Posner equated “tacit collusion” with “oligopolistic interdependence,” and appeared to suggest that the practice does not violate the Sherman Act. JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 780 (7th Cir. 1999). However, Posner noted that a “number of cases treat the question as open.” Id. Moreover, Posner’s discussion focuses on the narrower question whether tacit collusion can violate Section 2. Id.
in itself unlawful.” 23 While the Court’s statement in *Brooke Group* is surely of value to antitrust defense lawyers, it was not necessary for the holding in that case, and the Court later backed away from the statement in *Twombly*. 24 The earlier Supreme Court case law on circumstantial-evidence conspiracies, including such decisions as *Interstate Circuit*25 and *Theatre Enterprises*,26 is also ambiguous on the question of whether Section 1 prohibits tacit collusion. Posner’s opinion appears to be the first, setting aside the *Brooke Group* dictum, to say unambiguously that Section 1 does not include tacit collusion within its prohibition.

Posner’s reasons for articulating a clear limit on the scope of Section 1 would be familiar to anyone who has followed the literature on this matter.27 First, there is the problem of notice:28 If a firm simply follows the price decisions of another firm, perhaps because it believes the other firm has superior information on market conditions, how is the firm to understand that such an act is a violation of Section 1? Or consider any other decision that appears to be based on considerations of interdependence, such as to increase spending on advertising in response to the same actions by a rival. Again, how is the firm to know when it has crossed the line into a violation of Section 1?

Second, there is the problem of remedy:29 If the Sherman Act prohibits tacit collusion, how can an order prevent the conduct from occurring again? Are firms to be instructed that they should not take the actions of rivals into account? How would they comply with such an injunction?

Posner notes also the problem of discouraging entry:30 If the Sherman Act prohibits tacit collusion, and courts infer tacit collusion from evidence that a firm acted in response to a move by a rival, then the threat of liability for such unspecified conduct would tend to deter new entrants from entering a market. Firms would fear that by entering a market, and adopting the same price level as incumbent firms, their actions might be taken as evidence of a Section 1 violation. Of course, as firms become aware of this danger, fewer will choose to enter new markets, leaving consumers even more vulnerable to anticompetitive pricing in oligopolistic markets.

Posner does not mention this, but there is also the problem of discouraging competition: If the Sherman Act prohibits tacit collusion, then if firms compete too vigorously, leading to losses, and then retreat by raising prices, enforcers and plaintiffs will bring Section 1 claims. Knowing that this

23 *Id.* at 227.

24 *Twombly*, 550 U.S. at 553–54, refers to “conscious parallelism,” not tacit collusion, as a practice “not in itself unlawful.” (quoting *Brooke Group Ltd.*, 509 U.S. at 227). Immediately before this reference the Court, quoting *Theatre Enterprises*, states that “[t]he crucial question” is whether the challenged anticompetitive conduct “stem[s] from independent decision or from an agreement, tacit or express,” *Id.* (quot- ing *Theatre Enters.*, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954) (internal quotation marks omitted)). One could reconcile the conflicting language by drawing a distinction between “tacit collusion” (the term used in *Brooke Group*) and “tacit agreement” (used in *Twombly*). See William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 *Antitrust L.J.* 593, 596 (2017). However, I would be reluctant to put so much weight on one word, especially since collusion is a synonym for conspiracy, and conspiracy surely implies agreement at some level. Moreover, if the position of the case law is that “tacit collusion” is lawful while “tacit agreement” is not, then plaintiffs need only resort to the “delete and replace” function of their word processors to transform a legally invalid theory to a valid one. The conclusion I draw is that the Supreme Court has been unclear about the legal status of tacit collusion.


26 See *Theatre Enterprises*, Inc., 346 U.S. at 537.

27 For a discussion and critique of the literature, see KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 75–89 (2003).

28 *Text Messaging 2015*, 782 F.3d at 874.

29 *Id.* (“It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete.”).

30 *Id.* (“And might not entry into concentrated markets be deterred because an entrant who, having successfully entered such a market, charged the prevailing market price would be a tacit colluder and could be prosecuted as such, if tacit collusion were deemed to violate the Sherman Act?”).
is the likely result of “overshooting” competition, firms will compete less aggressively. Again, the
effect of such a perception among firms is to leave consumers more vulnerable to oligopolistic sur-
charges, a result that contradicts the goals of the Sherman Act.

Posner notes in passing a recent book by Louis Kaplow that urges more aggressive enforce-
ment of Section 1 in circumstantial-evidence conspiracy cases, suggesting that Kaplow’s pro-
posals would be mostly unworkable and potentially harmful if implemented. The unusual feature
of Posner’s harsh critique is that Kaplow’s book largely pursues a thesis that Posner himself initiated. I will turn to that next.

The Beginning of the Journey, 1969
Posner’s arguments justifying a narrow scope for Section 1 in Text Messaging 2015 appear to
contradict a position that he had taken in his 1969 article. In Oligopoly and the Antitrust Laws, Posner called for more aggressive enforcement of Section 1 in circumstantial-evidence conspiracy cases. He criticized the tacit collusion model that had been described in an article by Donald Turner and at the same time rejected Turner’s relatively conservative approach to Section 1 enforcement. The Posner-Turner “conscious parallelism” debate includes several interesting arguments that I will not attempt to survey in detail here.

The conscious parallelism debate did not begin with Turner and Posner. Of course, discussion
tacit collusion, and its implications for antitrust, had been in the economics literature for a con-
siderable time before law professors began exploring the issue. In the law literature, James Rahl,
a Northwestern University law professor, had initiated the debate about Section 1 enforcement and
tacit collusion in his article Conspiracy and the Anti-Trust Laws. The interesting feature of Rahl’s
article is that he saw the close connection between the doctrine of intra-enterprise conspiracy and
the application of Section 1 to tacit collusion. In both cases, according to Rahl, enforcers were
seeking to apply Section 1 to conduct that did not involve a conspiracy. In the intra-enterprise
context, the necessary duality of conspiracy doctrine is missing, because a single enterprise
always agrees with itself. In the conscious parallelism case, the agreement component of con-
spiracy doctrine is missing.

Rahl’s article anticipates some of the arguments that would later appear in Donald Turner’s arti-
cle on tacit collusion and antitrust. Still, for the sake of conciseness I will not review Rahl’s article in detail. Rahl’s arguments for restraint in enforcing Section 1 overlap substantially with Turner’s. Interestingly, the first footnote in Turner’s article cites the Rahl article, but only as a source of “historical background” on Section 1 of the Sherman Act. Turner’s article includes no other citations to Rahl even though it is apparent that Turner was influenced by Rahl.

32 Text Messaging 2015, 782 F.3d at 874–76.
33 See generally Posner, supra note 1.
37 Id. at 754–62.
38 Id. at 762–68.
39 Id. at 755–62.
40 Turner, supra note 34, at 655.
Turner makes two core arguments. First, he contends that tacit collusion could in theory be viewed as a type of agreement (or an “agreement to agree”), even though it involves unilateral conduct. In other words, Turner refuses to say that Section 1 does not reach instances of tacit collusion. 41 Second, Turner argues that the practical difficulties of using Section 1 in cases of tacit collusion make it largely an ineffective and ill-advised enforcement weapon in these scenarios. 42 However, Turner does not claim that the practical difficulties imply that Section 1 can under no circumstances be applied to cases of tacit collusion, and indeed closes his article with examples of conscious parallelism where he thinks the application of Section 1 is appropriate. 43

Turner grounds his reasons for rejecting Section 1 as an enforcement tool against tacit collusion on the structure of the statute. First, there is a doctrinal problem. He argues that consciously parallel conduct is unilateral—that is, not based on a concrete agreement—then Section 1 does not provide a direct route to enforcement. 44 However, even if we assume that the conduct is unilateral, Section 2 provides a basis for enforcement, in Turner’s view, if the oligopoly power wielded by firms was acquired through unlawful means. Thus, the mere fact that the firms’ conduct is unilateral does not exempt it from the Sherman Act. As long as a factual basis could be generated that would demonstrate that the oligopoly power had been acquired by unlawful means, the Sherman Act can be used as an enforcement tool against tacit collusion in oligopolistic markets. Still, Turner’s concession that the statute was inapplicable in settings where oligopoly power had been lawfully acquired amounts to a significant reduction in the potential for Section 1 enforcement in the tacit collusion setting.

The second problem Turner finds is in the statute’s remedial structure. Turner says that he could not envision an injunction that would implement the statute’s goals in the tacit collusion setting. 45 If a firm is instructed not to follow the actions of its rivals, then what is the firm supposed to do? How can a firm in an oligopolistic market ignore the actions of its rivals? If such an order were issued by a court, the next question that would arise is precisely how to enforce the order. Turner says that in order to enforce such a capacious order, the court would have to transform itself into a regulatory agency. 46 He regards such a transformation as inconsistent with both the structure and the history of the Sherman Act.

I noted earlier that Turner appears to have been influenced by Rahl because of the similarities in their arguments. Rahl’s article argues (like Turner) that the statute itself—broadly including its associated common law and enforcement structure—is the most important obstacle to using Section 1 as an enforcement tool against tacit collusion. 47 The statute can be applied to oligopolistic pricing, according to Rahl, only if the evidence threshold necessary to prove conspiracy is lowered to the point where antitrust courts adopt a doctrine similar to res ipsa loquitur in tort law, where industry structure would provide the basis for inferring conspiracy. 48 Rahl also argues that

---

41 See id. at 663–73 (“And of course if there is agreement in the legal sense, the agreement seems inescapably an unlawful conspiracy in restraint of trade because a price-fixing agreement is unlawful per se.”).
42 Id. at 682.
43 Id. at 703–05.
44 Id. at 668.
45 Id. at 669–70.
46 Id. at 669.
48 Id. at 758.
the significant notice problems of using Section 1 would render the statutory enforcement scheme unworkable. The notice and remedial problems are so closely related that Rahl’s concern over notice mostly anticipates Turner’s later expressed doubt as to the existence of a viable remedy.

Posner enters the conscious parallelism debate as a critic of Turner. Posner begins by expressing skepticism of the theory that tacit collusion, in the absence of any system of monitoring and enforcement, could generate stable cartel prices. Posner specifically directs his criticism to the price leadership model described by Turner and implicitly warranted by the Court as a species of unlawful collusion in *American Tobacco*, where the major cigarette manufacturers were found guilty of violating Section 1 for participating in a scheme in which they followed the lead of R.J. Reynolds. Posner argues that price leadership, with nothing more assumed, provides an unpersuasive theory of collusion. If the follower firms simply mimic the price changes of the leading firm, then the leading firm could choose to undercut the cartel price whenever the opportunity arrives (in short time windows or in narrow markets) and quickly return to the cartel price to prevent a breakdown. Because of this vulnerability, Posner argues that successful collusion requires some system of monitoring and enforcement, even if or especially if there is no concrete agreement.

A pattern of price leadership without any accompanying evidence of monitoring and enforcement should be insufficient to support a Section 1 conspiracy finding, according to Posner. However, when evidence of enforcement and monitoring are added to the particular observations of parallel conduct, Section 1 enforcement is entirely appropriate.

In contrast to Turner (and Rahl), Posner does not suggest that Section 1 is a mostly ineffective or inappropriate enforcement tool with respect to tacit collusion. Posner argues that enforcement agencies should use Section 1 more aggressively in cases of circumstantial evidence, which necessarily implies cases of tacit collusion. In the absence of evidence of an agreement, Posner would have enforcers substitute evidence of monitoring and enforcement.

This is a reasonable position when viewed on an abstract plane. The Supreme Court’s case law has long supported the view that courts can infer conspiracy from circumstantial evidence. Radically, the Posner of 1969 suggests that the question of whether an agreement actually exists is a red herring. The essential question in his view is whether a conspiracy *should be inferred* because the evidence indicates that the observed arrangement has sufficient infrastructure, backed up by practice, to operate as a reasonably stable cartel. The infrastructure consists of shared information, monitoring, and enforcement. The practice consists of efforts to monitor and enforce the terms of a cartel, whether the parties have formally agreed to it or not.

On the question whether a court can find, in a manner consistent with the common law, that the parties have agreed, Posner argues that courts can infer the existence of a “unilateral contract.”

49 Id. at 762.
50 Posner, supra note 1, at 1569–75.
51 Id. at 1568, 1585–87.
52 Id. at 1570.
53 Id. at 1578–79.
54 Id. at 1567–87.
55 Id. at 1583–84.
56 *Interstate Circuit*, 306 U.S. at 221; *Theatre Enterprises*, 346 U.S. at 540; cf. *Twombly*, 550 U.S. at 556 n.4 (“The parties in this case agree that ‘complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason,’ would support a plausible inference of conspiracy.”) (citation omitted).
57 Posner, supra note 1, at 1576.
Such a contract exists, in the ordinary common law setting, when one party announces that he will offer something in exchange to anyone who carries out some specific actions. For example, a dog owner may post a sign saying that he will pay a reward to anyone who returns a dog bearing certain features; and under such conditions the person who complies with the terms of the offer thereby accepts and is entitled under the law to the reward. The promise followed by conduct meeting its conditions constitutes a unilateral contract. In the same sense, argues Posner, a firm that takes an action that is likely to be construed by other firms as an invitation to set the price at a high level effectively communicates the terms of a unilateral contract to those other firms. If they accept the contract by setting their prices at a high level, then under the law an agreement exists.\(^5^8\)

The difficult questions generated by Posner’s approach in 1969 appear in the details of application. What sort of suspicious phenomena justify an inference that collusion might be the explanation? Once a court observes such phenomena, what sort of evidence justifies an inference of collusion? Posner’s article discusses some of the phenomena, as do his opinions in the text messaging case. However, some of the oft-cited examples of suspicious phenomena have turned out to have low probative weight, as Posner concedes in *Text Messaging 2015*.\(^5^9\)

One classic example, noted by Posner in *Text Messaging 2010*, is the observation of price going up as costs fall.\(^6^0\) This was an important observation in the Court’s finding of conspiracy in *American Tobacco*.\(^6^1\) Posner refers to the phenomenon in his 1969 article as a potential piece of circumstantial evidence in Section 1 cases.\(^6^2\) In *American Tobacco*, the Supreme Court noted that cigarette prices had increased as costs fell during the Depression.\(^6^3\) The cigarette sellers had offered no justification sufficient to allay the suspicion of collusion. However, historical evidence indicates that demand for cigarettes increased markedly during the Depression.\(^6^4\) The observation that cigarette prices increased as costs fell during the Depression could suggest that the cigarette sellers were colluding. On the other hand, the observation could also suggest that prices increased with demand, as in any market. If demand increases and prices increase too, then clearly it would be inappropriate to infer conspiracy on the part of the sellers in the particular market under observation. Hence, the Supreme Court’s use of the evidence of a price increase at the same time as costs fall as a fact supporting a charge of conspiracy in *American Tobacco* is an example of improper inference. If, on the other hand, a case arises in which demand remains stable or falls, costs also fall, and price increases, then an inference of conspiracy among the sellers would be minimally plausible.

The same pattern with respect to prices and costs appears in the text messaging litigation. In *Text Messaging 2010*, Posner notes that prices for messaging services, in the “pay per use” market in which the plaintiffs allege the conspiracy occurred, had increased at a time when costs were

\(^{58}\) Id.  
\(^{59}\) *Text Messaging 2015*, 782 F.3d at 871.  
\(^{60}\) *Text Messaging 2010*, 630 F.3d at 628.  
\(^{62}\) See Posner, supra note 1, at 1585. However, Posner expresses some skepticism toward the price increase (with falling costs) observation, and especially criticizes Turner’s readiness to embrace the observation as evidence of conspiracy. Id.  
\(^{63}\) *American Tobacco*, 328 U.S. at 805.  
falling.\textsuperscript{65} However, in \textit{Text Messaging 2015}, Posner finds that the price increases could be attributed to a policy on the part of the defendants to shift consumers out of the more expensive “pay per use” text messaging service to cheaper bulk plans that permit the consumer to send a large (or unlimited) number of messages per month for a fixed price.\textsuperscript{66} Moreover, the customers who chose to remain in the pay-per-use market were those who used the messaging service quite infrequently and were relatively price inelastic.\textsuperscript{67} If, as the result of some market disruption or change, a multi-service firm finds that it has a group of consumers who are price inelastic in some particular market that it serves, then it will rationally raise price under the Ramsey-pricing model.\textsuperscript{68} There would be no need for a collusive agreement among the wireless network firms to see prices going up in the price-per-use messaging market. Although the text messaging case appears at first glance to be one where price increases as costs fall, raising the suspicion Posner notes in \textit{Text Messaging 2010}, a closer look at the market, as Posner undertakes in \textit{Text Messaging 2015}, indicates that a change in demand conditions (and to some degree cost conditions) could fully account for the price increase.\textsuperscript{69}

These observations undermine the probative weight of the simple observation that “price increases while costs fall” in a circumstantial-evidence conspiracy case. As a general matter, courts should not accord such an observation any inferential weight unless the plaintiff can also produce evidence indicating that demand conditions could not justify the price increase. Although \textit{Text Messaging 2010} cites the observation as one of several factors supporting the trial judge’s refusal to dismiss the complaint, one lesson suggested by \textit{Text Messaging 2015} is that courts should not cite the observation, standing alone with no evidence on demand conditions, without an accompanying admonition that it has zero probative value.

Recall that Posner’s 1969 article argues that courts should use evidence showing the existence of monitoring and enforcement mechanisms to support the inference of conspiracy. As with the case of “suspicious price increases,” the probative weight of evidence of such activities depends greatly on how one defines the activities and the specifics of every instance of application. The problem of definition is illustrated by one of the Court’s famous circumstantial-evidence Section 1 cases, \textit{American Column}\textsuperscript{70}. In \textit{American Column}, the Court found the enforcement mechanism in the reluctance of any member of the information-sharing plan to depart the plan and thereby forgo the benefits of being a member of the plan.\textsuperscript{71} This is perhaps the most troubling example of the use of circumstantial evidence in all of the Section 1 case law. Of course, every cartel member for-

\textsuperscript{65} \textit{Text Messaging 2010}, 630 F.3d at 628.
\textsuperscript{66} \textit{Text Messaging 2015}, 782 F.3d at 877.
\textsuperscript{67} Id. at 876–77.
\textsuperscript{69} The district court in \textit{Text Messaging} dismissed the first complaint (2009) using similar reasoning to Posner’s \textit{Text Messaging 2015}. \textit{In re Text Messaging Antitrust Litig.}, No. 08 C 7082, 2009 WL 5066652, at *11 (N.D. Ill. Dec. 10, 2009) (“In the wireless communications industry, price competition is fierce for voice calling, data services, and bundled plans. Most consumers purchase text messaging services on a bundled or unlimited basis. Defendants charge consumers steep penalties for early termination of service contracts. Given these factors, parallel pricing in this single, relatively narrow part of the field in which they compete does not support a reasonable inference of an agreement not to compete.”).
\textsuperscript{70} \textit{Am. Column \\& Lumber Co. v. United States}, 257 U.S. 377 (1921).
\textsuperscript{71} Id. at 401–12.
goes the benefits of being in a cartel if he chooses to cheat on the cartel. But basic cartel theory holds that the incentive to cheat is strong—often a dominant strategy—precisely because the benefits from cheating exceed the benefits from remaining in the cartel in any single period of consideration.72 As a general rule, evidence of an enforcement mechanism should refer to evidence of a punishment mechanism independent of the loss of the benefits of cartel membership. Such a definition should be part of the inference case law under Section 1.

One can raise similar questions about monitoring evidence. If the definition of monitoring includes self-reporting, as in American Column, then it is arguably too broad. A firm can report list prices without also reporting the actual transaction prices. An information-sharing plan that does not require the reporting of actual transaction prices leaves quite a lot of room for firms to discount list prices and thereby undercut a collusive pricing structure. This was one of the lessons of Du Pont (Ethyl),73 where the court found that the evidence of discounting below delivered prices weakened the FTC’s theory of tacit collusion.74

These questions of application and detail bedevil any serious effort to take the more aggressive approach to Section 1 enforcement urged by Posner in his 1969 article. Posner’s Text Messaging 2015, while not entirely rejecting the thesis of his 1969 article, is a sobering exploration of the problems of application. Probably because of these difficulties, Posner concluded that a clear statement that Section 1 does not prohibit tacit collusion would help guide courts toward a more rigorous treatment of the circumstantial evidence in conspiracy cases.75

The Journey that Remains: Where Do We Go from Here?

While Posner’s limitation of the scope of Section 1 provides guidance to other courts, the question remains whether other circuits will adopt his statement and whether the Supreme Court will endorse it at some point in the future. The limitation contradicts the Court’s most recent statements on the scope of Section 1 in Twombly.76

Even if the Supreme Court eventually endorses Posner’s limitation on the scope of Section 1, the larger question is whether it will have much of an impact on circumstantial-evidence conspiracy litigation. The circumstantial evidence cases have consisted of two types: one where the prosecution’s theory is that an actual agreement exists but that it is difficult to find evidence of the formal agreement, and the other where the prosecution’s theory is that only a tacit understanding or agreement exists. Posner’s limitation eliminates the second type of case—provided that it is brought under Section 1 and not by the FTC under Section 5. However, the two types of circumstantial evidence case are often factually indistinguishable, and many cases are, like Schrödinger’s cat, of both types at the same time. Longstanding doctrine enables plaintiffs to bring circumstantial evidence cases to court and to survive summary judgment on the basis of plus factors established in Interstate Circuit.77 Courts have not required evidence of the formal agreement, either in text or transcript form, among the conspirators. Posner’s limitation, if eventually accepted by the

72 Note that I am not considering a case where the whole cartel disintegrates in a punishment scheme (trigger strategy) against any particular deviator. I have in mind the case where one firm deviates while the remaining firms stay within the cartel.

73 E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

74 Id. at 132.

75 Text Messaging 2015, 782 F.3d at 879.

76 See Twombly, 550 U.S. at 564–70.

77 On plus factors and the Interstate Circuit doctrine, see HYLTON, supra note 27, at 134–43.
courts, will change the theories asserted by plaintiffs, but may not substantially change the sorts
of circumstantial-evidence conspiracy cases that enter the courts.

There are also questions having to do with the present state of Twombly and the definition of
agreement. Consider the Twombly question first. Posner’s Text Messaging opinions, viewed togeth-
er, take a relatively plaintiff-friendly approach to the dismissal question and a seemingly defendant-
friendly approach to the summary judgment question. The reason for describing Posner’s approach
as plaintiff-friendly at the dismissal stage is that he suggests that an undefinable list of facts can
serve as plus factors that enable a plaintiff to get beyond the dismissal stage.\textsuperscript{78} Such an approach
encourages plaintiffs to come into court with a long list of facts that can satisfy this burden. And,
as I noted earlier, some of the facts often used for this purpose, such as the observation that “price
increases while costs fall,” should be accorded zero probative weight standing alone. On the
other hand, in the summary judgment phase, Posner imposes a degree of rigor on the inference
process that goes beyond what is suggested in the Supreme Court’s foundational circumstantial-
evidence conspiracy cases.\textsuperscript{79} In this sense, Posner appears to favor defendants at the summary
judgment stage.

This is a troubling pattern under the theory of Twombly. One important reason for imposing a
plausibility standard, the Court argued in Twombly, is to save trial courts and defendants the
expense of going through discovery, which can be costly and time-consuming, when it is unlike-
ly that the plaintiffs will procure sufficient evidence to pass the summary judgment threshold.\textsuperscript{80}
A light touch at review of the dismissal stage followed by a heavy hand at summary judgment con-
tradicts this rationale for Twombly, and opens the gates to the sort of cases the Twombly doctrine
attempts to bar. In lending credibility to such cases, the light-touch review enables plaintiffs to
threaten to impose significant discovery costs on defendants. As discovery costs increase, such
threats become as powerful as threats to impose trial costs. Imposing such costs on defendants
then leads directly to the perverse incentive effects of tacit collusion prosecution that Posner wor-
rries about in Text Messaging 2015.

A counterargument is that it is not entirely clear what sort of antitrust case Twombly attempts
to bar. The general term “plausibility” does little to resolve this question. This problem of definition
is properly attributed to the Twombly opinion rather than Posner’s application of Twombly.
However, the solution to this problem is suggested in Text Messaging 2015 (and also by the trial
court’s opinion in Twombly). Posner’s decision rests largely on his assessment that the plaintiffs
had failed to produce objective evidence contradicting the conclusion that the defendants’ con-
duct was individually rational.\textsuperscript{81} If Posner had subjected the evidence brought into court at the dis-
missal stage to the same test, he probably would have fashioned a more demanding standard for
trial courts to apply than the multiple plus-factors approach that he adopts in Text Messaging
2010. It follows from this that Twombly itself, when applied to circumstantial-evidence conspiracy
cases, should be interpreted to require evidence inconsistent with individually rational conduct at
the dismissal stage. Under the individual rationality test, Posner could have conducted the same
rigorous analysis of the “price increase after costs fall” observation at the dismissal stage that he

\textsuperscript{78} Text Messaging 2015, 782 F.3d at 871–76; Text Messaging 2010, 630 F.3d at 627–29.

\textsuperscript{79} See Text Messaging 2015, 782 F.3d 867.

\textsuperscript{80} Twombly, 550 U.S. at 558–59.

\textsuperscript{81} Text Messaging 2015, 782 F.3d at 871–78.
applies at the summary judgment stage, and the result may have been a reversal of the trial court or a remand requiring the court to apply the individual rationality test.

The other question remaining after Posner’s Text Messaging 2015 has been at the heart of circumstantial-evidence conspiracy cases from the start, and that is the definition of tacit collusion. There is not enough space in this contribution to discuss this question in reasonable depth, but I will sketch some of obvious concerns here.

The Supreme Court, in its effort to retract the dictum of Brooke Group that tacit collusion is “not in itself unlawful,” states in Twombly that “conscious parallelism . . . is not in itself unlawful,” after quoting from an earlier opinion indicating that tacit collusion falls within the prohibition of Section 1. The question raised by this is what courts should regard as tacit collusion. The distinction between conscious parallelism and tacit collusion can be explained by reference to the two-firm Cournot oligopoly game. In the Cournot-Nash equilibrium, each firm chooses an output level taking the anticipated output choice of its rival as given and maximizing profit with respect to the residual market. In the collusion outcome, each firm adopts an output level that maximizes the joint profits of the two firms. The Cournot-Nash equilibrium, because it involves each firm considering the anticipated output of the other firm, could easily generate consciously parallel behavior. However, collusion requires more than conscious parallelism; it requires accommodation and adjustment so that each firm takes a complementary position along the set of output combinations that optimize joint profits. The question is whether the taking of such positions can occur in the absence of a formal agreement among the firms. Since conflict is likely, especially if the firms are not equally efficient, the firms would have to acquire a shared understanding of signals, and a method of enforcing the joint profit-maximizing allocation.

This suggests Posner was correct in 1969 to hold that tacit collusion of this sort should fall within the reach of the Sherman Act. However, it also points to a narrower definition of tacit collusion than what currently exists in the case law. Case law recognizes two types of tacit collusion: price leadership and focal point coordination. The price leadership model is exemplified by American Tobacco. The focal point model of tacit collusion has been suggested in cases like Maricopa, where the Court expressed the concern that physicians would use the maximum price-setting mechanism under the challenged insurance arrangement to collude in the fee-for-service market. Posner’s theory would imply that the basis for inferring conspiracy is weak in both types of case, unless plaintiffs can identify and prove the existence of an enforcement mechanism. The Supreme Court’s case law has not incorporated this important proviso from Posner. Moreover, the definition of an enforcement scheme is difficult to state, and American Column stands as a lasting reminder that such a definition can easily be botched. If the costs of erroneous convictions are substantial, Posner’s flat exclusion of tacit collusion from the reach of Section 1 could be prefer-

82 Brooke Group, 509 U.S. at 227.
83 Twombly, 550 U.S. at 553 (quoting Brooke Group, 509 U.S. at 227).
84 Id. (“[T]he crucial question is whether the challenged anticompetitive conduct ‘stem[s] from independent decision or from an agreement, tacit or express[.]’”) (second alteration in original) (quoting Theatre Enterprises, 346 U.S. at 540).
85 See, e.g., HYLTON, supra note 27, at 83–85.
86 American Tobacco, 328 U.S. 781.
88 For a recent 12(b)(6) decision that considers enforcement and monitoring mechanisms, see In re Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 60 (D.D.C. 2016).
able to the more theoretically appropriate rule.89 However, if, as is likely, the Supreme Court rejects Posner’s limitation of Section 1, a preferable path forward would entail the Court adopting a narrower definition of tacit collusion consistent with Posner’s argument.

Conclusion
Posner’s views on oligopoly pricing have enriched antitrust for nearly 50 years, and they have not been static. The general arc, however, has been from optimism for aggressive enforcement to a more conservative enforcement stance that worries about the costs of over-deterrence. More important than his suggested approach to enforcement are the clarity and richness of his arguments, which have guided courts not only in applying antitrust law but also in how to think about antitrust.

---