SMU | Dedman School of Law

SMU Law Review

Volume 62 | Issue 2 Article 7

January 2009

The Gary Dinners and the Meaning of Concerted Action

William H. Page

Recommended Citation
William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. Rev. 597 (2009)
https://scholar.smu.edu/smulr/vol62/iss2/7

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

THE GARY DINNERS AND THE MEANING OF CONCERTED ACTION

*William H. Page**

I. INTRODUCTION

BETWEEN 1907 and 1911, executives of American steel manufacturers gathered in a series of social events and meetings that became known as the Gary dinners.[1] Their founder, Judge Elbert H. Gary, chairman of the board of the United States Steel Corporation (U.S. Steel), believed the dinners were a lawful way to stabilize steel prices by enabling manufacturers to tell each other "frankly and freely what they were doing, how much business they were doing, what prices they were charging, how much wages they were paying their men, and . . . all information concerning their business."[2] The government agreed that the dinners stabilized prices, but took a different view of their legality. It brought suit in 1911, pointing to the dinners as one of the reasons why the court should dissolve U.S. Steel as an illegal monopoly.[3] Nine years later, the Supreme Court held that the dinners amounted to price fixing.[4] The Court went on to hold, however, that U.S. Steel's resort to the dinners only proved that it lacked the power to control steel prices on its own and, therefore, could not have unilaterally monopolized the industry.[5]

Commentators have long questioned the Court's result on the issue of monopolization.[6] In this essay, however, I will focus on the Court's intermediate conclusion that the dinners were concerted action, a result that was by no means obvious in antitrust's formative period, when the case

---

* Marshall M. Criser Eminent Scholar and Senior Associate Dean for Academic Affairs, University of Florida Levin College of Law. I would like to thank Herbert Hovenkamp and Christopher Leslie for their comments.

1. For early accounts of the episode, see MILTON NELS NELSON, OPEN PRICE ASSOCIATIONS 33-44 (1923) and see generally Maurice H. Robinson, *The Gary Dinner System: An Experiment in Cooperative Price Stabilization*, 7 SW. POL. & SOC. SCI. Q. 137 (1926). *See also* GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY 35-37 (1963).

2. Transcript of Record, Defendants' Testimony vol. 12, at 4889, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) (Testimony of Elbert H. Gary).

3. United States v. U.S. Steel Corp., 223 F. 55, 60, 81 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920).

4. United States v. U.S. Steel Corp., 251 U.S. 417, 440-42 (1920).

5. *Id.* at 444-45.

6. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 29 (1976); GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY 108-12 (1968); Donald O. Parsons & Edward John Ray, *The United States Steel Consolidation: The Creation of Market Control*, 18 J.L. & ECON. 181 (1975).

was decided. I argue that the reasoning that led to this conclusion, especially by the trial judges in the case, can still shed light on the agreement element of section 1 of the Sherman Act. In the next Part, I briefly describe the legal and historical circumstances in which the dinners occurred. In Part III, I describe what happened at the dinners and at the related committee meetings. In doing so, I have been aided by the voluminous records and briefs in the case (the government brief alone ran to over 1,000 pages) and by the remarkable volubility of the witnesses, who were the leading steel executives of the era. After describing the dinners, I will examine the courts' analyses of them and extract some lessons that might help modern courts clarify the boundaries of the Sherman Act's agreement requirement.

II. THE LEGAL AND HISTORICAL CONTEXT

On April 1, 1901, the United States Steel Corporation came into being.[7] It was a holding company that controlled Carnegie Steel, Federal Steel (itself the recent product of a merger of several producers), and ten other operating companies,[8] and had an initial capitalization of $1.4 billion, an amount equal to about one fourth of the U.S. gross national product.[9] Called simply "the Corporation" in its early years, U.S. Steel "was far and away the nation's biggest steel company and the largest industrial organization of any kind worldwide."[10] Charles M. Schwab, who had proposed the creation of U.S. Steel in a famous dinner address the year before,[11] became its first president; Elbert Gary became chairman of its board and of its executive committee.[12] After a brief power struggle between the two men,[13] Gary gained unquestioned control, which he maintained until his death in 1927.[14]

Unlike the chief executives of some of the corporations that U.S. Steel subsumed, particularly Andrew Carnegie, Gary believed that "'competition was unprofitable'" and rejected the "'old method of going out into the market and slashing prices in order to get business.'"[15] Under Gary's leadership, "collaborative action and . . . stable, open price structures helped preserve existing centers of production yet at the same time provided shelter under which new producers could not only compete but also earn higher than average profits."[16] Gary designed this passive and cooperative strategy as much for legal reasons as for business ones. At its

7. KENNETH WARREN, BIG STEEL: THE FIRST CENTURY OF THE UNITED STATES STEEL CORPORATION, 1901–2001, at 7 (2001).
8. Parsons & Ray, *supra* note 6, at 182.
9. *Id.* at 182-83.
10. WARREN, *supra* note 7, at 7, 73, 265.
11. *Id.* at 18.
12. *Id.* at 27.
13. *Id.* at 27-28. Schwab resigned in 1903 and later became president Bethlehem Steel. *Id.* at 28.
14. *Id.* at 27, 32, 128.
15. *Id.* at 26-27 (quoting James Gayley, the first vice president of U.S. Steel).
16. *Id.* at 32.

formation, U.S. Steel controlled sixty-six percent of American production, but Gary took steps to reduce that figure in order to placate both rivals and antitrust authorities.[17] He admitted to his biographer that he aimed for a fifty percent share in most markets because William Jennings Bryan had promoted that figure as a statutory cap.[18] When U.S. Steel acquired a major rival in 1907, ostensibly as part of a plan he developed with J.P. Morgan to calm financial markets during a panic, Gary sought and received President Roosevelt's approval of the transaction as a way of insulating it from antitrust liability.[19]

Gary also tried to comply with antitrust laws in shaping his policy of cooperation with rivals. For three years after U.S. Steel was formed, some of its subsidiaries continued to participate in longstanding pools, in which members submitted detailed monthly reports of their operations to a commissioner who collected the reports and distributed a compilation to the members.[20] The members also posted bonds that were subject to forfeiture if a member violated its assigned production quotas and prices.[21] In 1904, however, Judge Gary ordered U.S. Steel's subsidiaries to withdraw from the pools in compliance with established antitrust law.[22] In some of the product lines, the pools were replaced until 1906 by so-called statistical associations that retained the detailed reporting requirements and a central administrator, but eliminated the explicit fixing of prices and assignment of production quotas.[23]

---

17. Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901–1938*, 49 J. ECON. HIST. 593, 610-13 (1989).

18. IDA M. TARBELL, THE LIFE OF ELBERT H. GARY: THE STORY OF STEEL 257-58 (1925).

19. *See* Marc Winerman, *Antitrust and the Crisis of '07*, ANTITRUST SOURCE, Dec. 2008, at 3, http://www.abanet.org/antitrust/at-source/08/12/Dec08-Winerman12-22f.pdf. Winerman quotes Roosevelt's letter to his Attorney General explaining the reasons for the acquisition and reporting that he told Gary that he "felt it no public duty of mind" to object. *Id.* at 3-4.

20. Transcript of Record, Plaintiff's Testimony vol. 2, at 816-21, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) (Testimony of John C. Langan) (identifying the Steel Shafting Association, the Structural Steel Association, and the Steel Plate Association).

21. *Id.* at 819-20, 824.

22. Brief of Appellees at 206-07, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481); MELVIN L. UROFSKY, BIG STEEL AND THE WILSON ADMINISTRATION: A STUDY IN BUSINESS-GOVERNMENT RELATIONS 2-3 (1969); *see also* JOSEPH E. DAVIES, UNITED STATES BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION 15 (1916) (observing that, because "[l]egal difficulties had at an earlier date . . . discouraged the use of written price and pooling agreements as means of combination," firms adopted the form of the "gentlemen's agreement," which aimed to "procure substantial harmony in policy among competitors regarding volume of output and prices, without specific written or oral agreements, but rather by tacit understandings and the communication of information regarding the production and prices of the various cooperating interests in order to insure good faith").

23. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 15, at 6036-37, 6048 (Testimony of William Chase Temple). A participant in the pools and the statistical associations characterized the latter as involving a gentlemen's agreement, in which the participants, "after discussing conditions agree among themselves, without any penalty or anything else but a moral obligation, that they will charge so much for their product."

What followed were the Gary dinners. Some commentators have suggested that, by "inaugurat[ing] the famous (if short lived) Gary dinners, at which prices were openly discussed,"[24] Gary uncharacteristically flouted antitrust law.[25] But Gary designed the dinners to achieve the goals of non-expansion and cooperation while avoiding antitrust liability.[26] Gary believed, as he asserted in speeches again and again, that an illegal agreement required an exchange of promises to adhere to the same price.[27] Three months after the first dinner, he assured the Attorney General that the steel producers were:

> perfectly satisfied to limit the amount of our business to our proportion of capacity and to do everything possible we can to promote the interests of our competitors; and by frequent meetings and the interchange of opinions [they had] thus far been able to accomplish this result *without making any agreements of any kind.*[28]

As I show in Part IV, Gary's fellow steel producers were well schooled in his antitrust compliance program and shaped their conduct and statements at the dinners and committee meetings accordingly.[29]

The dinners were an important part of the government's suit to dissolve U.S. Steel in 1911. A panel of four judges of the Third Circuit heard the case as a trial court in the District of New Jersey under the Expediting Act of 1903.[30] In 1915, the court issued two opinions that held, for reasons that I describe in Part IV, that the Gary dinners constituted an unlawful combination when they occurred.[31] Nevertheless, both opinions concluded that U.S. Steel had not monopolized the steel industry.[32] Judges Buffington and McPherson saw the formation of U.S. Steel through mergers in 1901 as a legitimate effort to achieve productive efficiencies through specialization, integration, and economies of scale.[33] The Gary dinners, although unlawful, were "exceptional" and unlikely to recur.[34] Judges Woolley and Hunt, by contrast, saw the merger as an ef-

---

Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2435 (Testimony of Willis L. King).

24. McCraw & Reinhardt, *supra* note 17, at 612.

25. *Id.* at 611-12.

26. *Id.*

27. *See, e.g.*, United States v. U.S. Steel Corp., 223 F. 55, 158-59 (D.N.J. 1915) (Buffington, J., concurring), *aff'd*, 251 U.S. 417 (1920).

28. Letter from Judge Elbert H. Gary, Chairman of the Bd., U.S. Steel Corp. to Charles Bonaparte, Attorney General of the United States (Feb. 11, 1908), *quoted in* KOLKO, *supra* note 1, at 36 (emphasis added).

29. *See, e.g.*, Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2104 (Testimony of Willis L. King).

30. Expediting Act of Feb. 11, 1903, § 1, 32 Stat. 823, *amended* June 25, 1910, 36 Stat. 854; *U.S. Steel Corp.*, 223 F. at 57. The Act provided for trial of cases of "general public importance" by "not less than three of the circuit court judges of said circuit." Expediting Act § 1. This part of the Act was eliminated by the Antitrust Procedures and Penalties Act of 1974, § 4, 88 Stat. 1706, 1708 (1974).

31. *See* United States v. U.S. Steel Corp., 223 F. 55, 159-61 (D.N.J. 1915) (Buffington, J., concurring), *aff'd*, 251 U.S. 417 (1920); *id.* at 176 (Woolley, J., concurring).

32. *Id.* at 57, 110 (Buffington, J., concurring).

33. *Id.* at 139.

34. *Id.* at 154, 160-61.

fort to monopolize the industry, but one that had failed because of unexpectedly fierce competition from independents.[35] The Gary dinner episode[36] proved that, with fifty percent of the market, U.S. Steel could not unilaterally "dominate the industry by compelling the trade to sell at prices it desired"; it could only restrain trade by pools and dinners, in which it was no more culpable than any other participating manufacturer.[37] The producers of the other forty percent of steel output that cooperated in the dinners "did so voluntarily" and "cheerfully."[38] Thus, both opinions agreed that dissolution was unnecessary to prevent recurrence of this kind of collaboration.[39]

On direct review under the Expediting Act, the Supreme Court affirmed the district court,[40] with Justice McKenna's majority opinion largely endorsing Judge Woolley's analysis:[41] U.S. Steel's organizers had tried to gain monopoly power, but failed because "opposing conditions were underestimated."[42] U.S. Steel had engaged in no "brutalities or tyrannies" aimed at its rivals like freight rebates and predatory pricing.[43] U.S. Steel could exercise monopoly power only by "persuad[ing]" its rivals to participate in "pools, associations, trade meetings, and . . . the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect."[44] The dinners occurred intermittently until 1911, the Court observed, "but, after instances of success and failure, were abandoned nine months before this suit was brought," and there was no "evidence of an intention to resume them."[45] Apart from these concerted efforts, U.S. Steel was unable to maintain noncompetitive prices: "[t]he suggestion that lurks in the government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power was, in view of the testimony of the competitors, untenable."[46]

U.S. Steel marked the end of the first era of large-scale public monopolization cases.[47] Its reasoning was dubious on several grounds. Modern studies suggest, for example, that even after it ceded market share to smaller rivals, U.S. Steel retained a substantial part of the monopoly

35. *Id.* at 170-71 (Woolley, J., concurring).

36. *Id.* at 178 (finding that the episode "ended with the dinner of January 11, 1911" and the filing of the government's case).

37. *Id.* at 175-76.

38. *Id.* at 176. Judge Woolley pointedly identified, for each subcommittee, the U.S. Steel subsidiary and its independent competitors. *Id.* at 177 n.4.

39. *Id.* at 161, 178 (Buffington, J., concurring); *id.* at 176 (Woolley, J., concurring).

40. United States v. U.S. Steel Corp., 251 U.S. 417, 417 (1920).

41. *Id.* at 442.

42. *Id.* at 444.

43. *Id.* at 440-41.

44. *Id.* at 444-45.

45. *Id.* at 445.

46. *Id.* at 449-50.

47. William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1115-16 (1989).

power it acquired in the 1901 merger.[48] Its participation in efforts like the Gary dinners to maintain prices with its rivals was in no way inconsistent with this conclusion, because a dominant firm has every incentive to persuade fringe firms to maintain prices and limit expansion.[49] For present purposes, however, I will set this critique to one side and focus on an issue that the courts in the *U.S. Steel* litigation analyzed correctly: whether the Gary dinners amounted to unlawful concerted action.

III. THE DINNERS AND THE STEEL MARKET

The Gary dinners occurred in two phases. The first series of dinners, which Judge Gary personally convoked, began in late 1907 and ended in early 1909, with Gary's declaration of an "open market." The second series of dinners and meetings, held under different auspices but still dominated by Gary's personality and vision, began later that year and continued until mid-1911, just before the government filed its monopolization case.

A. PHASE ONE: FROM THE FIRST DINNER TO THE OPEN MARKET

The first Gary dinner took place at New York's Waldorf Astoria Hotel on November 20, 1907, in the midst of an economic panic.[50] At Gary's invitation, executives representing ninety percent of domestic iron and steel production attended.[51] Judge Gary later testified that, by preaching calm and providing a forum for manufacturers to share information, he hoped:

> to prevent the demoralization of business, to maintain so far as practicable the stability of business and to prevent, if [he] could—*not by agreement, but by exhortation*—the wide and sudden fluctuation of prices which would be injurious to everyone interested in the business of the iron and steel manufacturers.[52]

He "made it perfectly plain" to those present "that under no circumstances would [he] do or say anything that did not leave [their] company free to go out and do exactly as it pleased with respect to prices and

48. *See, e.g.*, Hideki Yamawaki, *Dominant Firm Pricing and Fringe Expansion: The Case of the U.S. Iron and Steel Industry, 1907-1930*, 67 REV. ECON. & STAT. 429, 437 (1985) (presenting statistical evidence that U.S. Steel acted as dominant firm).

49. Naomi R. Lamoreaux, *Entrepreneurship, Business Organization, and Economic Concentration*, *in* 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES: THE LONG NINETEENTH CENTURY 403, 430 (Stanley L. Engerman & Robert E. Gallman eds., 2000) (arguing that the Gary Dinners were more effective than formal pools because of the threat of price cutting by a dominant firm to punish cheating); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 43-44 (2d ed. 2006) (arguing that the Gary Dinners were an effort to bolster U.S. Steel's role as a price leader).

50. ROBERT F. BRUNER & SEAN D. CARR, THE PANIC OF 1907: LESSONS LEARNED FROM THE MARKET'S PERFECT STORM 2 (2007); Robinson, *supra* note 1, at 138.

51. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2092-93 (Testimony of Willis L. King).

52. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 12, at 4889 (Testimony of Elbert H. Gary) (emphasis added).

everything else."[53] After he spoke, the guests "expressed opinions . . . in regard to the market and what ought to be done . . . . Nothing was said . . . about maintaining a price of a certain commodity at so much; but there were opinions expressed as to whether or not prices were fair and reasonable . . . ."[54] Some of the guests testified that Judge Gary urged them to keep their heads and not to try to seek out new business and thus drive down prices.[55] Other dinners occurred the following year, with a similar format.[56]

At the initial dinner, the representatives voted to create a general committee of five members, chaired by Judge Gary, to form subcommittees for each of their product lines.[57] Ultimately, there were subcommittees for ore and pig iron, pipes and tubular goods, wire products, rails and billets (steel ingots), structural material, plates, steel bars, and sheets and tin plates.[58] According to participants, the frequency of the meetings varied depending upon the products covered, but all involved a discussion of conditions followed by statements from the representatives of the prices they intended to charge,[59] which were usually the same prices.[60] The witnesses insisted that they made no promises or agreements,[61] but that they left the meetings with a "general understanding" that each firm would adhere to its announced prices unless circumstances warranted a change, in which case they would inform the other members.[62]

---

53. *Id.* at 4890.

54. *Id.* at 4889.

55. Transcript of Record, Plaintiff's Testimony, *supra* note 20, at 2091; *id.* vol. 11, at 4195 (Testimony of Charles M. Schwab); *id.* vol. 14, at 5682 (Testimony of James H. Reed).

56. Judge Gary recalled subsequent events occurring on January 30, 1908, April 2, 1908, May 21, 1908, and December 10, 1908. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 12, at 4895-96, 4900 (Testimony of Elbert H. Gary).

57. Robinson, *supra* note 1, at 140.

58. Brief of Appellant at 931 n.1, United States v. U.S. Steel Corp., 251 U.S. 417 (1920). Judge Gary told the appointees to the subcommittees that "[w]hile it is advisable that no agreements contrary to law be entered into, there is no objection to frequent consultations for the purpose of receiving full information and for the frank interchange of opinions concerning the business interests of all." *Id.* at 933 n.1.

59. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 20, at 8037 (Testimony of John L. Haines); Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1778 (Testimony of Edwin B. Crawford); *id.* vol. 8, at 3072 (Testimony of William E. Corey); *id.* vol. 5, at 1836 (Testimony of James Anson Campbell); *id.*, vol. 6, at 2493 (Testimony of Samuel A. Benner); Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 19, at 7806 (Testimony of William W. Lukens).

60. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5 at 1810-11 (Testimony of B.G. Follansbee) ("When we left the meeting we practically had come to exactly the same conclusion all around that whatever price was made, whether it was lowering or advancing, we would sell on those figures."); *id.* vol. 19, at 7806 (Testimony of William W. Lukens).

61. *Id.* vol. 11, at 4195 (Testimony of Charles M. Schwab).

62. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2104 (Testimony of Willis L. King) (stating that he "would undoubtedly have felt that I should notify [rivals] if I cut the price," but only out of common decency, and not because of an agreement); *id.* vol. 5 at 1777 (Testimony of Edwin B. Crawford); *id.* vol. 5 at 1836-37 (Testimony of James Anson Campbell) (stating that, as chairman, he would "always [make] the statement . . . that there could be no agreements among [them]" but that he "called on each [member] to state what their policy would be in the future with reference to the sale of their products and with reference to price"; there would usually, though not always, be a

As an illustration of the proceedings at committee meetings, the district court in the monopolization case quoted the testimony of Samuel Benner of Carnegie Co., a subsidiary of U.S. Steel.[63] Benner insisted that the meetings entailed no "formal undertaking" or "absolute promise made by anybody" concerning prices, but only statements of intent.[64] He conceded, however, that the manufacturers left the meetings "with the general understanding, each relying upon the other, that the prices announced would be maintained."[65] This exchange, not quoted by the court, followed:

> By Mr. Lindabury [for the defendant]
> Q. That [reliance] was faith and hope, though, rather than promise and contract, was it not?
> A. Yes.
> By Mr. Dickinson [for the government]:
> Q. Was a good deal of it faith?
> A. Mostly hope.
> Q. Did you expect to observe your announcement?
> A. Yes.
> Q. Did you observe it?
> A. Yes sir.
> Q. Did others observe it?
> A. The larger concerns, the stronger concerns, yes.[66]

The court also quoted the testimony of Edwin Crawford, president of McKeesport Tin Plate Co., that "[t]here would be a general understanding that we would do what we would say we would do—quote a certain figure until . . . we found reason to change it," in which case "we would notify our competitors" and "another meeting would be held."[67] Crawford and some other witnesses also claimed to have felt a "moral obligation," albeit a conditional one, to adhere to their stated prices.[68] Others

---

"general understanding; that is, [they] had the statement of the different representatives that their policy would be to market their product at the then prevailing price until they notified their competitors that they wanted to change their price").

63. United States v. U.S. Steel, 223 F. 55, 159 (D.N.J. 1915) (Buffington, J., concurring).

64. *Id.*

65. *Id.* Later, he conceded that the participants left the meeting "each relying upon the other that [the announced] price would be observed by them, and that the announcement of the price was made to the trade." *Id.* at 160. The full text of these passages appears at Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2506-09 (Testimony of Samuel A. Brenner).

66. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 6, at 2509 (Testimony of Samuel A. Brenner).

67. *U.S. Steel*, 223 F. at 160. The complete passage is in Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1777 (Testimony of Edwin R. Crawford).

68. *U.S. Steel*, 223 F. at 160; Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1793 (Testimony of Edwin R. Crawford); *see also* Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 19, at 7889, 7891, 7893 (Testimony of Harry D. Westfal); Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1780, 1781 (Testimony of Edwin R. Crawford); *id.* vol. 5, at 1812, 1813 (Testimony of B. G. Follansbee); *id.* vol. 5,

described adhering to their announced prices as "common decency."[69] Some said they acted in reliance on the statements of those in attendance,[70] and that most, though not all, did as they had announced.[71] They also understood that rivals would discover any deviations from stated prices and would bring them up for discussion at a later meeting.[72]

The meetings evidently succeeded in maintaining prices to some degree on several fabricated steel product lines during the first half of 1908, even as the prices of ore and pig iron declined.[73] By mid-1908, pressures from price-cutters and secondary producers forced the major manufacturers to lower their own prices.[74] After a meeting of the "'leading steel manufacturing companies,'" Judge Gary announced that it was "'understood that the price of iron ore has been or will soon be reduced 50 cents per ton base. Each one of the steel manufacturers expressed the opinion that there should be a readjustment in the prices of the respective commodities'" in specified amounts.[75] Although price cutting continued, U.S. Steel maintained these prices until February of 1909, when the company's finance committee decided that the policy of restraint was not working.[76]

---

at 1855 (Testimony of James Anson Campbell); *id.* vol. 2, at 741 (Testimony of John A. Topping).

69. *Id.* vol. 2, at 741 (Testimony of John A. Topping). Topping explained that the obligation was a matter of "common decency." He conceded that it was not always common decency, but only when rivals were "[e]xchanging business information and trying to help one another in [their] general operations." *Id.* He added that he expected the same obligation of some but not all of his rivals. *Id.* at 746. Judge Gary also used this phrase in a speech at the dinner of January 11, 1911, in which he reminded the assembled representatives of their "high moral obligation . . . towards [their] neighbor." Transcript of Record, Government's Exhibits vol. 4, at 1389, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) (Exhibit No. 140: Remarks of E.H. Gary, Made at a Dinner Given at Waldorf Astoria Hotel, January 11, 1911).

70. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1811 (Testimony of B.G. Follansbee) (agreeing that he "le[ft] with reliance" he and others would adhere to announced prices); *id.* vol. 5, at 1839 (Testimony of James Anson Campbell) (agreeing that when he announced a price he "expect[ed] the others to rely upon the announcement that [he] would observe it" and had the same reliance in others' announcements); *id.* at 1841 (observing that the events in meetings of the tube subcommittee, billet and sheet bar subcommittee, and the tin and sheet steel subcommittee were "[p]ractically the same"); Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 19, at 7806 (Testimony of William W. Lukens) (agreeing that he made statements of policy in good faith and with the expectation or hope that others would view them in that way, and that he accepted at least some of the statements of others).

71. *Id.* vol. 20, at 8037 (Testimony of John L. Haines) (agreeing that "the prices were fairly well maintained by the manufacturers that made . . . announcements" of the prices they expected to charge).

72. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, at 1838-39 (Testimony of James Anson Campbell); *id.* vol. 6, at 2506 (Testimony of Samuel A. Benner) (stating that prices would be maintained until "one competitor [took] business away from another competitor," in which case the parties would meet again).

73. Robinson, *supra* note 1, at 146-47.

74. Kolko claims that "the Gary agreement was nominal rather than real" after June 1908 and was "formally terminated" in 1909 because of cheating and widespread pressure to cut prices. KOLKO, *supra* note 1, at 36.

75. Robinson, *supra* note 1, at 150 n. 52 (quoting IRON TRADE REV., June 11, 1908).

76. *Id.* at 151.

At a meeting of manufacturers called on February 18, 1909,[77] Judge Gary announced that U.S. Steel would no longer "cooperate in the sense we had been cooperating" by meeting to share information about its business.[78] He insisted that he had never shared information pursuant to an agreement that required his rivals would act in a certain way.[79] Nevertheless, "there is a fair way of doing business . . . and an unfair way."[80] It had become apparent that "there was a disposition on the part of many of the small manufacturers to keep their mills running full regardless of the price [and] that we were the only ones who were really selling at the prices at which we advertised we were selling."[81] Consequently, he announced that U.S. Steel would "withdraw from any meeting at which I am expected to tell you anything about our business, and we will go alone."[82] The president of U.S. Steel then instructed a key subsidiary "that he was at liberty to meet any competitive conditions that he found."[83] Prices fell and output increased substantially during this "open market,"[84] with most of the new sales going to U.S. Steel.[85]

B. Phase Two: From the Loving Cup Dinner to the Filing of the Government Case

Suitably chastened, the steel manufacturers held another dinner at the Waldorf on October 15, 1909, not at Gary's invitation, but ostensibly to present him with a "loving cup" and to praise him for his heroic efforts to save the steel industry during the panic of 1907.[86] Gary had, one speaker said, supplanted the "old order" of instability with a "new" order in which the Judge "gave us good advice, which has made us a great deal of money."[87] Evidently, the subcommittee meetings resumed.[88] The gov-

77. According to Gary, the meeting was "called by . . . some one other than [himself]" and "was nominally held under the auspices of the [nascent] American Iron and Steel Institute." Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 12, at 4901 (Testimony of Elbert H. Gary).

78. *Id.* at 4902.

79. *Id.* at 4902-03.

80. *Id.* at 4903.

81. *Id.*

82. *Id.*

83. Brief of Appellees, *supra* note 22, at 255.

84. Robinson, *supra* note 1, at 151-52.

85. Transcript of Record, Government's Exhibits, *supra* note 69, vol. 2, at 539 (Minutes of the Board of Directors of Carnegie Steel Co., March 22, 1909, Report of Henry P. Bope) ("In general, the business that has been placed has largely come to us. The other mills seem to think that the pace we are setting is a little too fast for them . . . .").

86. Robinson, *supra* note 1, at 153 ("[I]t was evident to all parties that the call for a general meeting of the steel manufacturers would be received with better grace if it were cloaked under a summons less obvious than an invitation to another Gary dinner.").

87. Transcript of Record, Defendants' Exhibits vol. 3, at 348, 349-50, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) (Exhibit No. 82: Address of Mr. Willis L. King, October 15, 1909).

88. Several witnesses indicated that committee meetings occurred until 1910. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 3, at 1346 (Testimony of W.P. Worth) (describing the Tin Plate subcommittee); *id.*, vol. 5, at 1780 (Testimony of Edwin R. Crawford) (describing the Tin Plate subcommittee); *id.*, vol. 5, at 1804 (Testimony of B.G. Follansbee) (describing the Sheet and Tin Plate subcommittees); Transcript of Record, De-

ernment offered evidence that, the month after the meeting, U.S. Steel's finance committee recommended price increases and its largest subsidiary "advanced the prices of structural shapes, plates, and bars until they reached about the level that had prevailed prior to the break in prices on February 19, 1909."[89] Summarizing this sequence of events on oral argument before the Supreme Court, the government asserted that "the Corporation decided to give its competitors a taste of competition . . . so that they would know better than to break away so far next time, they came together and gave Gary a loving cup, meetings were resumed, and prices advanced."[90]

During this period, Gary also sponsored the creation of the American Iron and Steel Institute, a more permanent forum for steel producers to exchange information. At its first official meeting on October 14, 1910,[91] Gary described the institute as a way "to afford means of communication between members of the iron and steel trades upon matters bearing upon their business affairs," including matters of "ethic[s]."[92] Ethics, in this context, included adhering to announced prices and avoiding secret discounting. The first matter of concern for the institute was "maintenance of stable conditions," especially "reasonable prices."[93] Supply and demand should depend upon "mutual consideration and decision" by buyers and sellers.[94] Stability should be maintained by "[f]rank and friendly intercourse; full disclosure of his business by each to the others; recognition by all of the rights of each."[95] Gary insisted once again that no "agreement, express or implied" is necessary to achieve stability.[96] He quoted the Attorney General's argument in the pending appeal in the *Standard Oil Co. of New Jersey v. United States*[97] case that "the law does not compel competition; it only prohibits an agreement not to compete."[98] Thus,

> [i]f competitors are in frequent communication and make full disclosures to each other in regard to their business, notifying one another

---

fendants' Testimony, *supra* note 2, vol. 20, 8036-37 (Testimony of John L. Haines) (describing the Structural Steel subcommittee). At least one witness suggested that the meetings continued into 1911. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 5, 1842 (Testimony of James Anson Campbell).

89. Brief of Appellant, *supra* note 58, at 965.

90. Transcript of Oral Argument at 129, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 6).

91. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 12, at 4907 (Testimony of Elbert H. Gary) (stating that the institute was organized in May 1909 and had its first annual meeting on October, 10 1910).

92. Transcript of Record, Defendants' Exhibits, *supra* note 87, vol. 2, at 248 (Exhibit No. 61: Address of Mr. E. H. Gary at a meeting of the American Iron and Steel Institute at Waldorf-Astoria, New York, Oct. 14, 1910).

93. *Id.* at 249-51.

94. *Id.* at 251.

95. *Id.* at 252.

96. *Id.*

97. 221 U.S. 1 (1911).

98. Transcript of Record, Defendants' Exhibits, *supra* note 87, vol. 2, at 252 (Exhibit No. 61: Address of President E.H. Gary, June 3, 1913).

> of what they are doing, it will follow as a natural result that no one will take advantage of the information he thus receives to act unjustly or dishonorably towards his neighbor.[99]

On January 11, 1911, at another dinner at the Waldorf, Judge Gary said demand had fallen to fifty percent of the industry's capacity and that "there [was] no possible way of protecting one another and thereby protecting oneself except to submit [themselves] to the conditions as they exist and take and be satisfied with our fair proportion of the business which is offered."[100] He cautioned that the law prohibited agreements to suppress competition, but asserted:

> [W]e have something better to guide and control us in our business methods than a contract which depends upon written or verbal promises with a penalty attached. We as men, as gentlemen, as friends, as neighbors, having been in close communication and contact during the last few years, have reached a point where we entertain for one another respect and affectionate regard. We have reached a position so high in our lines of activity that we are bound to protect one another; and when a man reaches a position where his honor is at stake, where even more than life itself is concerned, where he cannot act or fail to act except with a distinct and clear understanding that his honor is involved, then he has reached a position that is more binding on him than any written or verbal contract (Applause).[101]

Gary stressed "that every one of us should have a keen and abiding sense of the personal obligation which he has towards all others and to make no mistake of running the risk of trespassing within the domain of the rights of his neighbor."[102]

He rejected "insinuations" in the press that U.S. Steel "carried a big stick" and called the independents together to "lectur[e]" or "threaten[ ]" them to maintain prices.[103] He told the guests: "[i]f any of you desire to lower prices . . . and will make the fact known to me, you will find that I am a follower and not a stubborn opposer."[104] However, he did take the opportunity to "express my opinions in regard to what I think are fair prices."[105] And "my opinion is that it would be a mistake to reduce prices at this time."[106] He also rejected assertions in the press that steel manufacturers were fixing prices, insisting that:

> [W]e are independent [and] can go out of this room and do exactly as we please, without violating any agreement or understanding,

---

99. *Id.* at 252-53.
100. Transcript of Record, Government's Exhibits, *supra* note 69, vol. 4, at 1386 (Exhibit No. 140: Remarks of E.H. Gary, Made at a Dinner Given at Waldorf Astoria Hotel, January 11, 1911).
101. *Id.* at 1387.
102. *Id.* at 1389.
103. *Id.* at 1390.
104. *Id.*
105. *Id.*
106. *Id.* at 1391.

> and . . . all must depend upon the belief that, as honorable men we are desirous of conducting ourselves and our business in such a way as not to injure our neighbors . . . and there will be no secrecy in what we do.[107]

Other speakers at the meeting also stated their opposition to cutting prices as a way to stimulate demand,[108] and emphasized the importance of keeping one another informed in order to resist efforts by customers to negotiate lower prices.[109]

On May 15, 1911, the Supreme Court affirmed the dissolution of the Standard Oil Trust.[110] Nine days later, at a meeting of the Iron and Steel Institute, the president of Republic Steel announced a significant reduction in the price of steel bars. He informed his rivals of the cut, he said, out of "moral[ ] obligat[ion]" and "courtesy,"[111] stating that he would have "expected the same" of at least some of his rivals, including U.S. Steel.[112] Judge Gary called a luncheon of steel manufacturers at the Metropolitan Club on May 29, during which he expressed his support for the President and Congress in whatever regulation they might choose to impose on the steel industry.[113] He referred to Republic's recent price cut and expressed good will toward all who gave "frank expression" of what they chose to do, insisting that he would never agree on prices, but urging the guests "so far as you can, so far as you have the lawful right, to stand together or at least to come together in friendly intercourse, not reserving to yourselves any question of information or knowledge you have."[114] He claimed that "[t]here is only a certain amount of business[, and] . . . you cannot change it" by taking away rivals' business temporarily.[115] He reminded them of what a "splendid thing" it was that they had cooperated over the past four years, because they had been able to thwart buyers' efforts to negotiate lower prices by lying about what producers were charging.[116] He closed by advocating "stability of prices" in the interests of all.[117] On June 1, *Iron Age* published an article quoting Judge Gary at the Metropolitan Club meeting: "[I]t was the unanimous opinion that co-

---

107. *Id.* at 1392-93.

108. *Id.* at 1402-03 (Remarks of E.C. Felton); *id.* at 1418-19 (Remarks of A.F. Huston).

109. *Id.* at 1407-08 (Remarks of William M. Grace); *id.* at 1405 (Remarks of E.A.S. Clarke). The government argued that the records of the dinner showed that "Gary called upon practically all of the leading manufacturers, and they almost without exception, expressed themselves as opposed to any reduction in prices." Brief of Appellant, *supra* note 58, at 999. Moreover, those prices were "common prices that were then definitely known to each of them." *Id.* at 1000.

110. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 81-82 (1911).

111. Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 2, at 740 (Testimony of John A. Topping).

112. *Id.* at 745.

113. Transcript of Record, Defendants' Exhibits, *supra* note 87, vol. 3, at 296, 298-99 (Exhibit No. 66: Remarks by Mr. E. H. Gary at a luncheon, given to certain iron and steel manufacturers at the Metropolitan Club, New York on May 29, 1911).

114. *Id.* at 302-03.

115. *Id.* at 304.

116. *Id.* at 304, 306.

117. *Id.* at 307.

operation, as heretofore fully explained, should be continued."[118] Moreover, Judge Gary reported that U.S. Steel's subsidiaries had "decided to make adjustments" of price in response to Republic's price cuts "effective June 1, and it [was] believed that these [would] be generally followed."[119] A list of prices followed.

This action was to be the last, at least in public, of the Gary dinners episode. A committee of the House Representatives chaired by Augustus Stanley began hearings on U.S. Steel in May 1911.[120] On July 1, 1911 the Commerce Department's Bureau of Corporations, a predecessor of the Federal Trade Commission, issued the first of its massive reports on the steel industry.[121] Although this initial report did not discuss the Gary dinners, the Commissioner did state in his letter of submittal that price competition between U.S. Steel and the independents "has been modified by the policy of 'cooperation.'"[122] The Attorney General filed his petition for injunction and dissolution of U.S. Steel in the United States District Court in Trenton, New Jersey on October 26, 1911.[123]

IV. THE GARY DINNERS AS CONCERTED ACTION

On June 3, 1915, after a lengthy trial, the district court, through two concurring opinions, decided that U.S. Steel had not monopolized the steel industry.[124] In the course of reaching that conclusion, however, both of the court's opinions found, and the Supreme Court later agreed, that the Gary dinners and the committee meetings constituted an unlawful combination.[125] This determination was an important step in the interpretation of section 1 of the Sherman Act for reasons that may not be fully appreciated today. Judge Gary and the other participants, including many who acted on the advice of counsel, were convinced that the dinners and committee meetings were lawful because the participants had

118. Transcript of Record, Defendants' Testimony, *supra* note 2, vol. 14, at 5450 (Testimony of Elbert H. Gary).

119. *Id.*

120. United States Steel Corporation: Hearings Before the H. Comm. on Investigation of Unites States Steel Corporation, 62d Cong. (1911). See also the committee's report, HOUSE COMM. ON BANKING AND CURRENCY, INVESTIGATION OF UNITED STATES STEEL CORP., H.R. REP. NO. 1127 (2d Sess. 1912), which concluded that the dinners fixed prices and limited output "just as certainly, just as effectively, and just as unlawfully as had been done under the discarded pooling agreements of former years." *Id.* at 126. The minority report cautioned that "the question raised by these dinners is a somewhat difficult and delicate one," and that "it would require a far more careful scrutiny into the facts and the methods of the men who met at the Gary dinners than was given to them . . . by the committee" to determine if they were unlawful. *Id.* at 324-25.

121. DEP'T OF COMMERCE AND LABOR, BUREAU OF CORPORATIONS, REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE STEEL INDUSTRY pt. 1, at i (1911).

122. *Id.* at xxiii.

123. United States v. U.S. Steel Corp., 223 F. 55, 60 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920).

124. United States v. U.S. Steel Corp., 251 U.S. 417, 437 (1920), *aff'g* 223 F. 55 (D.N.J. 1951). The case was heard in district court by four circuit judges who "agreed that the bill should be dismissed[, but] disagreed as to the reasons for it." *Id.*

125. *Id.* at 442.

scrupulously avoided making any promises about their future pricing behavior. The district court judges absolved the participants of any intent to violate the law as they had (mistakenly) understood it.[126] Most strikingly, neither of the district court opinions cited a single case as authority for their reasoning on the legality of the dinners, apparently conceding that they were breaking new ground.[127] In part because the judges were aware of the novelty of the issue, their analyses shed light on aspects of the law of section 1 that remain troublesome to courts in the twenty-first century. Interestingly, the court's reasoning anticipates an important modern theory of concerted action.

A. The Trial Court's Analysis

In addition to its challenge to the Gary dinners, the government pointed to a remarkable instance of consciously parallel pricing as evidence that U.S. Steel was colluding with its rivals. It claimed "the fact that standard Bessemer steel rails have for . . . the whole life of the Steel Corporation, been sold at the uniform price of $28 per ton . . . evidences the existence of a combination among all rail mills, including the Steel Corporation, to control the price."[128] Judge Buffington held, however, that even such prolonged identical pricing was not evidence of collusion, because "rail manufacturers simply followed that basic price to prevent the ruinous rail wars of the past."[129] He accepted the explanation of Charles M. Schwab, a former president of U.S. Steel:

> [I]f I were to vary that price of $28 for rails, which seems to have been recognized by all rail manufacturers as a fair price and giving a fair profit, if I were to vary that 10 cents a ton, I would precipitate a steel war . . . that would result in ruining my works without any profit. *Everybody by tacit and mutual understanding felt the same about that.* . . . I would not vary the price of my rails under any circumstances, not if I knew it was to get 100,000 tons in order, for

126. *U.S. Steel*, 223 F. at 161 (Buffington, J., concurring); *id.* at 174 (Wolley, J., concurring).

127. The court might have cited *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), decided the previous year. In that case, the Supreme Court condemned the defendant's program of circulating a blacklist of lumber wholesalers who sold directly to consumers in competition with the association's members. *Id.* at 606. Most members refused to deal with blacklisted wholesalers as a "natural consequence" of the "concerted action" of circulating the list. *Id.* at 612. Consequently, the Court inferred a boycott agreement from the dissemination of information and subsequent actions in restraint of trade, even though the association's members did not formally agree to boycott the disfavored wholesalers. *Id.* at 608-09.

128. *U.S. Steel*, 223 F. at 150 (Buffington, J., concurring). One executive testified that the steel rails sold for a "standard price" that he never discussed with rivals. Transcript of Record, Plaintiff's testimony, *supra* note 20, vol. 14, at 5715-16 (Testimony of James H. Reed); *see also* Warren, *supra* note 7, at 35-36 (stating that the price of steel rails, established at the first meeting of U.S. Steel's executive committee, remained at $28 per ton for fifteen years); Transcript of Record, Plaintiff's Testimony, *supra* note 20, vol. 4, at 1722 (Testimony of Powell Stackhouse) (explaining why Cambria Steel could not charge more than U.S. Steel's Pittsburgh-plus price for rails).

129. *U.S. Steel*, 223 F. at 154 (Buffington, J., concurring).

> the reason that my competitor next door would put the price down $1 a ton, or $.50 a ton even, and we would be in a position where we would be running without any profit at all.[130]

In accepting this account as exculpatory, Judge Buffington excluded conscious parallelism from the definition of a Sherman Act agreement.[131]

The Gary dinners were a different matter. Judge Buffington agreed with the government's concession in the complaint that "merely assembling and mutually exchanging information and declaration of purpose,"[132] even a purpose "to charge such and such prices"[133] was not, by itself, an unlawful agreement in restraint of trade. Judge Buffington recognized that "every large business has its societies and associations, and these meet periodically to exchange information of all kinds" and that "if each individual should choose to announce at such a meeting the specific price he intends to charge for his wares, we are aware of no law that forbids him so to do" so long as each individual was "acting for himself" and not "pursuing a common object" with the others.[134] When, on the other hand, rivals "make distinct contracts with each other, either in the form of pools or other agreements" to fix prices, their actions are clearly unlawful, regardless of whether the agreement involves a penalty: "[i]n a gentlemen's agreement the sanction is the sense of honor, the moral obligation, the indefinite, but real, force that in some instances compel persons to keep their promises simply because they have promised."[135]

The Gary dinners fell in a gray area between a simple declaration of purpose and an express agreement without penalties. In a case where competitors "refrain from making a definite formal agreement, and limit themselves to an understating, a declaration of purpose—an announcement of intention," a court can only determine if they have engaged in illegal concerted action by determining "what the participants were really doing."[136] The dinners, Judge Buffington suggested, began innocently enough. Judge Gary and other guests at the inaugural dinner testified that the steel trade was "demoralized" during the panic of 1907 because all of the actors in the chain of distribution had large stocks on hand that would have been devalued by a precipitous fall in steel prices.[137] Such an event would drive them out of business and limit the market for new steel production. In these conditions, Gary urged, producers should remain

---

130. *Id.* at 154 (quoting Schwab's testimony at a tariff hearing in 1908, which was read into the record of the monopolization case) (emphasis added)).

131. *Id.*

132. Transcript of Record, Pleadings, Orders, Etc. vol. A, at 52, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 481) (Petition: United States v. U.S. Steel Corp. (D.N.J. filed Oct. 26, 1911)).

133. *U.S. Steel,* 223 F. at 155 (Buffington, J., concurring).

134. *Id.* at 154-55.

135. *Id.*; *see also* United States v. Socony-Vacuum Oil Co., 320 U.S. 150, 179 (1940) (characterizing an arrangement in which major refiners would buy up independents' excess supplies as a "gentlemen's agreement").

136. *U.S. Steel,* 223 F. at 155 (Buffington, J., concurring).

137. *Id.* at 156.

calm and show both restraint in price policy and mutual respect. Judge Buffington thought that, had the "loose" association of manufacturers ended after this dinner, the government would not have complained.[138]

The subsequent dinners and meetings, however, amounted to "a period of cooperation, or *action with a common object*" between U.S. Steel and most of its rivals "marked by an understanding concerning the maintenance of price" that was "equivalent to an agreement."[139] In the passages from the record quoted in the last Part, participants testified that they "understood . . . they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting" at least "until they saw good reason to do otherwise, and . . . even then until they had signified to their associates their intention to make a change."[140] The "final test" was that "the object and effect were to maintain prices, at least to a considerable degree."[141] Such an "understanding or moral obligation"[142] was illegal even though the participants assumed "no positive and expressed obligation"[143] and "did not intend to act illegally" or with "trickiness or attempted evasion."[144] Nor did it matter that some participants no doubt "silently dissented"[145] or that "a large section of the trade paid little attention, if any, to this effort at co-operation."[146]

Like Judge Buffington, Judge Woolley thought the first Gary dinner was innocuous, the "urgent request of a strong man that in the stress of panic all should keep their heads and avoid the consequences of reckless cutting of prices."[147] Later, however, the dinners provided a mechanism not for "averting disaster, but [for] creating greater profits, by raising and maintaining prices in periods of industrial calm."[148] At the dinners, participants discussed the "general business of the industry," while at the subcommittees, the members discussed "the business of a particular branch of the trade."[149]

> *At neither were agreements made concerning prices at which the participants would sell their products.* In fact, it was asserted and reasserted that such agreements were impossible, because illegal; but in lieu of agreements, the parties, both at the dinners and at the committee meetings, severally made what they chose to call 'declarations of purpose'—that is, declarations of the prices at which they respectively proposed to sell their products, to which prices it is testified all adhered until some one chose to deviate therefrom, in which event

138. *Id.* at 159.
139. *Id.* at 159-60 (emphasis added).
140. *Id.*
141. *U.S. Steel*, 223 F. at 160-61 (Buffington, J., concurring).
142. *Id.* at 160.
143. *Id.*
144. *Id.* at 161.
145. *Id.* at 160.
146. *Id.* at 161.
147. *U.S. Steel*, 223 F. at 174 (Wolley, J., concurring).
148. *Id.*
149. *Id.*

> he was 'in decency' bound to notify his dinner associates or the members of his committee.[150]

The dinners, Judge Woolley concluded, were "in effect pools, with the right reserved to each participant to withdraw upon notice to the others" without penalty other than by the "force of a moral understanding."[151] They "did not make it fatal for a competitor of the corporation to stay out, but made it attractive for him to stay in."[152] The pools of 1901–1904, the statistical associations of 1904–1906, and the dinners of 1907–1911 were equally effective in maintaining prices.[153] During the "open market" in 1909, Judge Woolley observed, prices fell and output increased, thus proving that "the policy of co-operation as to prices, based upon mutual understandings and enforced by moral obligations, [had until then] operated effectually and unduly to restrain trade."[154] He asked sarcastically, "Is it not strange that a breach of an understanding as to the one matter of prices should have caused a discontinuance of the dinners, with the consequent loss of their primary benefits?"[155] Confirming the point, prices increased after the resumption of the dinners in October 1909.

B. The Trial Court's Analysis in Modern Perspective

The trial court's treatment of the Gary dinners can still help define the reach of section 1's agreement requirement. The modern controversy over the meaning of concerted action has centered mainly on the problem of conscious parallelism. Firms' actions are consciously parallel if they coordinate a noncompetitive result—a price increase, for example—simply by anticipating and taking account of each others' likely responses to their actions. Although commentators continue to debate the issue, courts have concluded that simple conscious parallelism is lawful.[156] As we saw in the last section, the courts in *U.S. Steel* anticipated this modern consensus, holding consciously parallel pricing of steel rails lawful, even though competitors had maintained identical prices for over a decade.

The twin opinions' analyses of the Gary dinners are also consistent with the modern law of agreement under section 1, but they are especially illuminating because of the procedural and historical setting in which they arose. Modern cases have been preoccupied with whether a plaintiff has either pleaded enough detail to avoid dismissal or discovered enough evidence to avoid summary judgment. To raise an issue of agreement, a

150. *Id.* (emphasis added).
151. *Id.*
152. *Id.*
153. *Id.* at 175-76.
154. *Id.* at 175.
155. *Id.*
156. Conscious parallelism or tacit collusion is the process "not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

plaintiff must plead facts[157] and produce evidence[158] that distinguishes the defendants' conduct from simple consciously parallel action. But the law has never clarified the definition of a Sherman Act agreement sufficiently to distinguish concerted action from lawful conscious parallelism. The Supreme Court has suggested that "[n]o formal agreement is necessary to constitute an unlawful conspiracy"[159] so long as the participants had "a unity of purpose or a common design and understanding, or a meeting of minds."[160] These phrases suggest that concerted action may be achieved by "means other than a direct exchange of assurances,"[161] but they are so vague that they could easily encompass consciously parallel action, which the Court has held to be lawful.

The district court's opinions in *U.S. Steel* shed light on the nature of unlawful concerted action, in part because they were the product of a bench trial in which the court had the benefit of extraordinarily detailed testimony. The court had direct evidence of both what the participants said in meetings and how they understood others' statements.[162] Consequently, the court was able to identify clearly the conduct and communications that distinguished the actions of the steel manufacturers from simple conscious parallelism. But the opinions are also revealing because of the moment in antitrust history in which they were written. As he said repeatedly in his speeches, Judge Gary believed, based on his reading of antitrust law in 1907, that a program of cooperation would be lawful if the participants avoided what he saw as the key element of agreement: an exchange of promises. The participants seem to have followed this principle scrupulously. Judge Woolley found that the participants never entered into "agreements . . . concerning prices at which [they] would sell their products."[163] Judge Buffington likewise recognized that the participants had "refrain[ed] from making a definite, formal agreement."[164] Consequently, both judges had to decide whether conduct that went beyond conscious parallelism yet fell short of an exchange of promises could still be concerted.

The district court agreed with the government's concession in its complaint that "merely assembling and mutually exchanging information and declaration of purpose" concerning prices, as the participants in the din-

157. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). *See generally*, William H. Page, Twombly *and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, J. COMPETITION L. & ECON. (forthcoming).

158. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

159. Am. Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

160. *Id.* at 810.

161. William E. Kovacic, *Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 LOY. CONSUMER L. REV. 97, 100 (1997).

162. *Cf. In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 662 (7th Cir. 2002) (holding that direct evidence of conspiracy "is evidence tantamount to an acknowledgment of guilt" and that circumstantial evidence "is everything else *including* ambiguous statements" that require an inference to determine their meaning).

163. United States v. U.S. Steel Corp., 223 F. 55, 174 (D.N.J. 1915) (Wolley, J., concurring).

164. *Id.* at 155 (Buffington, J., concurring).

ners certainly did, was insufficient by itself.[165] But declarations of purpose could become concerted if made with a "common object" and not individually.[166] This phrasing of the issue required the court to determine the mental states of the speakers. It was able to do so, in part by interpreting the substance of the communications and their relationship to steel prices but also by examining the participants' testimony about their understanding of the meaning of their words.

Although the participants assumed "no positive and expressed obligation" to adhere to announced prices, some conceded that their statements created a "moral obligation" to do so, at least "until they saw good reason to do otherwise, and . . . even then until they had signified to their associates their intention to make a change."[167] This sort of "an understanding about prices . . . was equivalent to an agreement."[168] The "final test" for Judge Buffington was that "the object and effect were to maintain prices, at least to a considerable degree."[169] Judge Woolley similarly reasoned that the participants achieved the same purpose and effect as an agreement by "declarations of the prices at which they respectively proposed to sell their products, to which prices . . . all adhered until some one chose to deviate therefrom, in which event he was 'in decency' bound to notify his dinner associates or the members of his committee."[170]

The court's analysis of the Gary dinners is remarkably consistent with Oliver Black's philosophical theory of concerted action,[171] which I have argued provides a useful framework for understanding the requirements of U.S. antitrust law.[172] Black identifies a hierarchy of six levels of increasing "correlation" among rivals' actions: (1) independent action, in which each party acts independently of all others; (2) mutual belief, in which firms act in the belief that others are acting in a certain way; (3) mutual reliance, in which firms act both believing the others will act in a certain way and relying on them to do so; (4) mutual reliance with a com-

---

165. *Id.* at 154.
166. *Id.* at 155.
167. *Id.* at 160.
168. *Id.*
169. *Id.* at 160-61. This analysis anticipates the famous hypothetical in *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965):

> Let us suppose five competitors meet on several occasions, discuss their problems, and one finally states—"I won't fix prices with any of you, but here is what I am going to do—put the price of my gidget at X dollars; now you all do what you want." He then leaves the meeting. Competitor number two says- "I don't care whether number one does what he says he's going to do or not; nor do I care what the rest of you do, but I am going to price my gidget at X dollars." Number three makes a similar statement—"My price is X dollars." Number four says not one word. All leave and fix "their" prices at "X" dollars.

Like the court in *U.S. Steel*, the court in *Esco* reasoned that statements of intention must be interpreted in light of "evidence as to what these competitors had done before such meeting, and what actions they took thereafter, or what actions they did not take." *Id.*
170. *U.S. Steel*, 223 F. at 174 (Woolley, J., concurring).
171. *See generally* OLIVER BLACK, CONCEPTUAL FOUNDATIONS OF ANTITRUST (2005).
172. William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 406 (2007).

mon goal, in which firms act both believing the others will act in a certain way and relying on them to do so, and in doing so the firms have the same goal; (5) mutual reliance with a common goal and with knowledge, in which firms act knowing that fourth condition is satisfied.[173] At this level of correlation, the rivals' actions amount to conscious parallelism. For example, as Charles Schwab testified in *U.S. Steel*, the uniform pricing of steel rails required a "tacit understanding" not to deviate from that price,[174] because of shared knowledge that doing so would precipitate a price war. What distinguishes this sort of conduct from unlawful concerted action, the sixth level of correlation, is communication: in concerted action, firms act with mutual reliance, a common goal, and knowledge gained, in part, by communication.[175] The firms are able, in other words, to engage in consciously parallel conduct in part because they communicated their reliance and their goals to each other. Communications are far more likely to meet these conditions if they involve future prices and are repeated.[176]

The court in *U.S. Steel* understood concerted action in a similar way. The tacit, mutual perception of self-interest that maintained the price of steel rails was not collusive in the court's view, even though the producers had reached the common purpose of avoiding the price wars of the past. The Gary dinners crossed the line because they involved communications that helped produce the reliance, belief, and knowledge necessary to maintain prices.[177] The communications in the committee meetings expressed the speakers' intention to charge a specific price and were addressed to rivals in the markets in which the speakers competed. Although the court did not condemn all statements of intention about future prices, it recognized their centrality in a system of concerted action. The court observed that many participants had conceded that that they left the committee meetings "*with the general understanding, each relying upon the other, that the prices announced would be maintained.*"[178] This reliance, and the understanding that others would rely, even if not expressed in so many words at the meeting itself, was the product of Gary's insistent promotion at the dinners of the norm that business honor and decency required steel manufacturers to disclose to their rivals any departures from their announced prices.[179]

---

173. BLACK, *supra* note 171, at 185-87. He uses the term correlation consciously in order to avoid terms that imply a legal characterization.

174. *U.S. Steel*, 223 F. at 154 (Buffington, J., concurring).

175. BLACK, *supra* note 171, at 187.

176. Page, *supra* note 172, at 431 (discussing Dennis W. Carlton, Robert H. Gertner, & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423, 435-36 (1997)). For a discussion of communication of past prices, see *id.* at 446 (discussing Blomkest Fertilizer, Inc. v. Potash Corp. of Sask., 203 F.3d 1028, 1033 (8th Cir. 2000)).

177. BLACK, *supra* note 171, at 186-87.

178. *U.S. Steel*, 223 F. at 159 (Buffington, J., concurring) (emphasis added).

179. David Sally, *Two Economic Applications of Sympathy*, 18 J.L. ECON. & ORG. 455, 465 (2002) (citing the Gary dinners as an effort to promote sympathy among rivals as a means of facilitating concerted action on prices). For further discussion of the role of trust

Also like Black,[180] the district court distinguished a completed verbal agreement from concerted action. Judge Buffington observed that "distinct contracts . . . in the form of pools or other agreements" were unlawful, and that this prohibition extended to a "gentlemen's agreement" in which the only "sanction is the sense of honor" that "compel[s] persons to keep their promises simply because they have promised."[181] This sort of verbal agreement is complete if one party makes a conditional promise and another party makes a promise in response, even if the parties undertake no act in furtherance of the agreement.[182] But both opinions also condemned arrangements like the Gary dinners, in which the participants took pains not to make promises[183] and instead only announced their intentions. That sort of arrangement constituted concerted action where the parties acted consistently with their statements, felt a "moral obligation" to do so, and relied on other participants to do the same.[184] The arrangement had "the object and effect [of] maintain[ing] prices, at least to a considerable degree."[185] Although modern courts will never have the volume or clarity of testimony about communications that the courts in *U.S. Steel* had, they can benefit from their predecessors' analyses.

---

in cartel maintenance, see generally Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004).

180. BLACK, *supra* note 171, at 164-66. Black interprets Article 81 of the European Treaty, which prohibits both agreements and "concerted practices." *Id.* at 166. Section 1 of the Sherman Act does not explicitly make this distinction.

181. *U.S. Steel*, 223 F. at 155.

182. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("[A] conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity.").

183. *U.S. Steel*, 223 F. at 160 (recognizing that "there was no positive and expressed obligation; no formal words of contract were used").

184. BLACK, *supra* note 171, at 159-60 (criticizing a European case that suggested that communication of intentions can be concerted practice even if "the parties do not act in mutual reliance"); Oliver Black, *Communication, Concerted Practices, and the Oligopoly Problem*, 1 EUR. COMPETITION J. 341, 342-46 (2005) (arguing that, in concerted action, the participants' act must cause the rival to believe the firm is acting in reliance on the rival's corresponding act); *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948) (holding an arrangement may be unlawful if "a concert of action is contemplated and . . . defendants conformed to that arrangement"); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939) ("It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."); Esco Corp. v. United States, 340 F.2d 1000, 1007-08 (9th Cir. 1965) (holding that an inference of "mutual consent" did not require "an exchange of assurances to take or refrain from a given course of conduct"; it would be sufficient that one firm proposed to act in a certain way "in the presence of other competitors" and then did so "generally and customarily—and continuously for all practical purposes, even though there be slight variations").

185. *U.S. Steel*, 223 F. at 161. The court also observed that "in actual effect prices were more or less maintained," even though "a large section of the trade paid little attention, if any, to this effort at co-operation." *Id.*

V. CONCLUSION

The record in *U.S. Steel* is a window onto the mechanisms of the Gary dinners. The testimony and exhibits reveal what steel executives said and thought at the meetings and how the steel market responded. The district court's decision reviewing this evidence and condemning the dinners was an important step in the evolution of antitrust. It broadened the prevailing understanding of the nature of a Sherman Act agreement in the context of concerted action and influenced the design of later information exchange arrangements, particularly the open price systems[186] and similar information exchange arrangements that were the subject of important Supreme Court decisions during the 1920s.[187] Its focus on communication of intent and reliance and competitive effects can still teach us important lessons about the nature of concerted action.

186. Milton N. Nelson, *The Effect of Open Price Association Activities on Competition and Prices*, 13 AM. ECON. REV. 258, 259 (1923) (observing that Arthur Eddy had "taken note of Mr. Gary's experience in attempting to stabilize the iron and steel industry by building up among competitors a spirit of coöperation through the instrumentality of the so-called Gary Dinners" and realized that "understandings in violation of law inevitably followed upon the heels of discussions devoted to a consideration of future prices, production policy and the like, but that exchange of information dealing only with past transactions could never be construed as being in the nature of understandings in contravention of law."). Eddy first advanced his ideas in ARTHUR J. EDDY, THE NEW COMPETITION: AN EXAMINATION OF THE CONDITIONS UNDERLYING THE RADICAL CHANGE THAT IS TAKING PLACE IN THE COMMERCIAL AND INDUSTRIAL WORLD—THE CHANGE FROM A COMPETITIVE TO A COÖPERATIVE BASIS (1913).

187. *See, e.g.*, Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925); Maple Flooring Mfg. Ass'n v. United States, 268 U.S. 563 (1925); United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923); Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921).