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Tying – Still a Competitive Evil

Peter C. Carstensen
University of Wisconsin Law School

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TYING - STILL A COMPETITIVE EVIL

*Peter C. Carstensen**

ABSTRACT:
This article examines the unavoidable adverse effects on consumer choice, consumer prices, and competition in the market for the tied (as well as the tying good) that necessarily result from unjustified tying by any firm with any appreciable capacity to affect competition in the markets for either good. My thesis is not that all tying is or should be absolutely illegal, but rather it ought to remain presumptively illegal and should be condemned after only a "quick look" unless the defendant can plead and prove a legitimate justification, i.e., one that does not involve primarily exploiting customers or excluding competitors.

I. INTRODUCTION

Congress in 1914 expressly prohibited any restriction by a seller on the buyer's freedom to buy goods from other sellers when such conduct "may . . . substantially lessen competition or tend to create a monopoly in any line of commerce."[1] The condemnation speaks to situations in which either there is a cognizable potential effect on competition or a tendency to create a monopoly "in any line of commerce." This action reflected a profound Congressional concern with the ways in which dominant firms can distort competition by the use of such restrictive terms to the detriment of consumers, and exclude equally efficient rivals from markets. Tying was one type of conduct that Congress targeted with this provision in direct response to the Supreme Court's *A. B. Dick* decision that allowed patent tying practices.[2]

Today economists and lawyer apologists for large enterprises have come up with a number of "justifications" for tying that, in some economic sense, advance aggregate welfare.[3] However, as the Chief Justice observed in the recent health care decision, legislators and constitutional

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* Peter Carstensen is Professor at the University of Wisconsin Law School where his scholarship and teaching have focused on antitrust law and competition policy issues. He has published a number of articles in the field, including a number analyzing aspects of the relationship of antitrust law and regulation.

1 15 U.S.C. §14 (Clayton Act §3).

2 *See*, Motion Picture Patents Co.v Universal Film Mfg. Co., 243 U.S. 502, 517 (1917) overruling Henry v. Dick Company, 224 U. S. 1 (1912).

3 *See*, e.g., Herbert Hovenkamp, *Federal Antitrust Policy The Law of Competition and Its Practice* 474 (4th Ed. 2005) ("Tying is not even arguably in the category of highly suspicious restraints for which the per se rule is reserved.")

Merely exploiting consumers and/ or excluding competitors were, until recently, not deemed to be a legitimate justification for tying.

draftsmen are not engaged in the metaphysics of economics.[4] They are engaged in the practical management of the nation and its economy. In that management, if the goal is to protect the competitive process from undue interference, and if particular practices on balance are likely to have adverse effects on that process, then creating a presumption that such practices are illegal is a rational policy judgment by "practical statesmen" even if the "metaphysical philosophers" of economics want to justify that which Congress forbad.

The prohibition on tying, as manifest in Clayton 3, is one of presumptive illegality whenever there is a discernable potential or actual effect on the market. Mislabeled as a *per se* rule,[5] tying doctrine, in fact, allowed ties when there was a legitimate, non-exploitive, non-exclusionary justification and no reasonable alternative.[6] However, merely exploiting consumers and/ or excluding competitors were, until recently,[7] not deemed to be a legitimate justification for tying. By transforming the issue from a concern for the competitive process to one focused on the metaphysical abstractions of economic theory, modern tying doctrine has diminished the impact of the law and, in doing so, has harmed the long-run efficiency of the market process.

In what follows, the argument examines the unavoidable adverse effects on consumer choice, consumer prices, and competition in the market for the tied good (as well as the tying good) that necessarily result from unjustified tying by any firm with any appreciable capac-

[4] In justifying the rejection of the "free rider" argument for imposing a health insurance requirement on all adults, the Chief Justice proclaimed: "To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers." Nat. Fed. Ind. Bus. v. Sebalius, __U.S. __, 132 S.Ct. 2566, 2589 (2012).

[5] *See*, Hovenkamp, *supra* note 3, at 473 (noting requirement of competitive effect–"market power" and the fact that affirmative defenses are permitted).

[6] The case law refers to the prohibition as a "*per se*" rule but this reflects the poverty of legal doctrinal labels in antitrust law.

[7] In *Independent Ink*, the Court implicitly sustained a tie-in whose only apparent function was to "meter" the value of the tying product by excluding competition in the tied product thereby both exploiting buyers and harming competition. *See* Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006).

ity to affect competition in the markets for either good.[8] My thesis is not that all tying is or should be absolutely illegal, but rather it ought to remain presumptively illegal and should be condemned after only a "quick look" unless the defendant can plead and prove a legitimate justification, i.e., one that does not involve primarily exploiting customers or excluding competitors.[9]

Implicit in the foregoing is a perspective on the goals of antitrust law that is at odds with the views of many commentators. The goal of antitrust is to facilitate, protect, and enhance the competitive process. As Mike Scherer observed many years ago: "the political arguments . . . and not the economist's abstruse models . . . have tipped the balance of social consensus toward competition [because] . . . competition decentralizes and disperses power [, limits] the conscious exercise of power held in private . . . or government hands [, and advances] freedom of opportunity."[10]

And besides political arguments, there are powerful economic reasons as well to take as the basic goal of competition law and policy the process itself and not some economic manifestation of its operation. Such a perspective advances the longer run interest in market dynamics by preserving and protecting the ability to enter and compete. Economic models, especially those resting on static comparisons, fail to take account of the overall interest in retaining a dynamic and flexible economy with as few restraints on participation as feasible.

II. THE TRADITIONAL STANDARDS AND LEADING CASES - STUDIES IN EXPLOITATION

The doctrinal analysis of tying has suffered from the limited vocabulary of antitrust law. Given a choice between describing the law governing tying as an application of a "rule of reason" which implied an open-ended inquiry into the merits of a particular restraint and a *per se* rule, the Supreme Court opted for the *per se* label. This label reflected the unfortunate doctrinal fact

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[8] Even Hovenkamp, a tying apologist, recognized seven ways in which tying might be explained; six involve harms to competition while only one arguable advances legitimate interests in either economic efficiency or the competitive process, Herbert Hovenkamp, *Federal Antitrust Policy The Law Of Competition And Its Practice*, 3rd Ed 398 (2005). Yet he advocates an open-ended rule of reason in which the victim must bear all the risks of rejection. Id. at 432-433.

[9] A central procedural implication of this framework is that justification for any tying is a matter of affirmative defense with all relevant burdens on the party engaging in such tying.

[10] F. M. Scherer & David Ross, *Industrial Market Structure And Economic Performance* 18-19 (3rd Ed. 1990).

that the Court had cabined itself into a binary categorization for the analysis of restraints. The poverty of doctrinal language, however, cannot totally obscure the analysis leading up to the conclusionary label.

A conventional tying case requires a challenger to establish four elements:[11] 1) that two or more distinct goods or services are involved, 2) that they are tied, 3) that the "tying" good has some distinctiveness or market power such 4) that there is an appreciable effect on the marketplace. But even when those elements existed, the defendant can escape liability based on a legitimate business justification.

The two products or services criterion is often problematic and contentious. Whether the issue is newspaper advertising[12] or the use of anesthesiologist in connection with surgery,[13] the issue can be complex and its resolution should turn in substantial part on the goals of competition law. Does the putative tie actually foreclose access to the market for the "tied" service or product?

The issue of whether there is a "tie" is also one that is debatable. In some cases the tie is overt and clear - the buyer can get the desired product if, and only if, the buyer takes the tied product. But in other cases there is a price difference, i.e., the package has a price that is substantially more favorable than buying the elements separately,[14] or the buyer can opt out of the tie if it can get a lower price or equal quality goods.[15] Again the analysis, viewed realistically,

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[11] Hovenkamp, *supra* note 3, at 435, advances a five step analysis that distinguishes between "tying" and "coercion" while Sullivan & Grimes identify a three-step analysis that is essentially similar. Lawrence A. Sullivan, Warren S. Grimes, *The Law Of Antitrust: An Integrated Handbook* 383 (2000).

[12] *See*, Times-Picayune v. United States, 345 U.S. 594 (1953) (combined sale of advertising in two commonly owned newspapers did not involve two products); but *see* Associated Press v. Taft-Ingalls, 323 F2d 114 (6th Cir.1963) (requiring purchase of additional news services from a press service involved two or more products).

[13] I remain a skeptic about the characterization of anesthesia as a separate product from the components of surgery despite the Supreme Court's contrary view. Jefferson Parish Hosp. Dist. No. 2 v Hyde, 466 U.S. 2 (1984). My observation is that there is little demand for anesthesia as a separate service but that almost everyone undergoing major surgery does use it. Moreover, it is used in fixed ratio with the overall service being provided, i.e., surgery. Hence, it is a component, separately produced and provided, that is an element in surgery. But just as one would not regard a car maker's choice of engine components - all essential to the car's operation - as unlawful tying, so it has always seemed a stretch to call anesthesia a distinct product. This implies that the hospital offers a surgical service or that the surgeon is the "manufacturer" of the service and, in either case, the customer is buying the full service and not its components. *See*, *id*. at 43-45 (O'Connor J., concurring). Hence, Justice O'Connor's view that the *Hyde* case should be examined as an exclusive dealing case makes sense as the appropriate analytic framework to consider its competitive effects. *Id*. 45-46 (O'Connor concurring).

[14] *See*, e.g., Cascade Health Solutions v. PeaceHealth, 542 F.3d 668 (9th Cir. 2008).

[15] International Salt Co. v. United States, 332 U.S. 392 (1947).

focuses on when the combination interferes with the functioning of either the tied or tying market and there is no legitimate explanation for that combination.[16]

The third element, market power, is one that has changed most notably. In the older cases, it was a marginal consideration since the fact of a tie, affecting commerce in some appreciable degree, sufficed to show its adverse effect on the market. This analysis was particularly relevant to applications of the Clayton Act with its unidirectional focus on adverse effects while the Sherman Act, because of its more general interpretation, more readily accommodated a requirement of some market power.[17] What is striking when one looks at the older cases such as *Northern Pacific*[18] or *International Salt*[19] is how little market power is evident. But when the elements of the bundle can be obtained separately elsewhere in the market, then there is no adverse tying effect.[20]

The final step is to show that the tie has some effect on a market. Here again, the older cases were willing to find risks of harm based on modest absolute sales or dollar values.[21] One can read these decisions as reflecting again a policy of presumptive illegality. If the tie had some demonstrable or even credible potential adverse effect on competition, it was presumptively illegal because tying itself was in fundamental conflict with the ideal of competition on the merits. An effective tie - whether of packages of motion pictures for use on television,[22] land and rail services in Montana,[23] or salt injecting machines and salt[24] - had the effect of foreclosing some level of competition.

The primary focus was on the market for the tied product where the effect of the tie was to foreclose those sellers who lacked access to the tying product from access to customers who needed the tying product. Thus the test was whether competition was foreclosed in any degree. If it was, the conduct necessarily had an adverse effect on the market. That effect might be mi-

[16] Although legitimate business justification is primarily an affirmative defense, it also enters here if the business can show that it experiences cost savings by selling the package. This justification is different from a claim that the buyer experiences lower search costs that the seller captures - that does not provide an excuse for denying buyers other options.

[17] *See* generally, Times-Picayune v. United States, 345 U.S. 594 (1953).

[18] International Salt Co. v. United States, 332 U.S. 392 (1947).

[19] Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[20] *See*, U.S. Steel Corp. v. Fortner Enterprises, Inc. 429 U.S. 610 (1977) (the tying product, 100 percent financing for a housing development, was available in the market from other sources).

[21] International Salt Co. v. United States, 332 U.S. 392 (1947); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958); United States v. Loew's, Inc., 371 U.S. 38 (1962).

[22] United States v. Loew's, Inc., 371 U.S. 38 (1962).

[23] Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

[24] International Salt Co. v. United States, 332 U.S. 392 (1947).

What is striking when one looks at the older cases is how little market power is evident.

nor or major, but to make that determination would invite courts to "set sail on the sea of doubt"[25] and determine how much foreclosure, unjustified except as means of exploitation or exclusion, would be lawful.

But proof of these four elements did not necessarily result in absolute (true *per se*) illegality. The defendant could justify its tying practice based on some legitimate, non-exploitive, business explanation for its action. In addition, the defendant had to demonstrate there was no reasonably acceptable alternative way to achieve its legitimate goal. Hence, if the quality of an input was at issue, the general response was that quality standards communicated to buyers should suffice. But the tie was excused where there were greater risks of passing off products that would affect the manufacturer's goodwill,[26] or where some technical constraint required the linking of the components (in essence an argument that there was functionally a single product),[27] The paucity of such cases tells us that, in fact, the need to tie two products or services was, and is, relatively rare in order to achieve legitimate business needs.

If one reviews the cases where the *per se* label is invoked, the economic analysis of the facts as seen by the Supreme Court[28] consistently shows it rejected tying practices where its analysis showed that the tie either had an exploitive or exclusionary explanation or lacked any legitimate business justification. In contrast, another group of cases running through the history of tying show that the Court has allowed ties that (i) protected trademark goodwill,[29] (ii) involved repair part reputation,[30] and (iii) were needed to ensure successful entry into a new market.[31]

The *Jerrold* decision is perhaps the most significant because the Supreme Court upheld a tie in a period when it was considered to be at its most extreme phase of antitrust rigidity. The significant fact in *Jerrold* was that it was a new entrant into a business (providing cable televi-

[25] *See*, United States v. Addyston Pipe, 85 Fed. 271, 284 (6th Cir. 1898).

[26] Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (per cur. 1936); F.T.C. v. Sinclair Refining Co., 261 U.S. 463 (1923).

[27] Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1963).

[28] One of the persistent challenges for outside observers and commentators is to take seriously the facts as the Court sets them forth. Using extra-record facts or hypothetical facts, one can come up with plausible counter stories, but that does a disservice to the analysis being investigated if the focus of the argument is whether or not the Court's analysis made sense in the context of the factual assumptions it made.

[29] FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).

[30] Pick Manufacturing Co. v. General Motors Corp., 299 U.S. 3 (per cur.1936).

[31] United States v. Jerrold Electronics Corporation, 187 F. Supp. 545 (ED Pa 1960) aff'd per cur. 365 U.S. 567 (1961).

sion systems) needed to ensure its viability at that entry stage, and so controlling the engineering element for the installation of its systems was therefore vital to accomplishing entry.

The central observation is that tying does, in fact, distort the market process and affects adversely both buyers and competitors, actual and potential, of the firm employing the tying device.

This argument speaks directly to the dynamics of competition and the competitive process. *Jerrold*'s defense makes sense if the goal of antitrust law is to protect and promote competition, but it makes no sense in the metaphysical world of economics where everything is known and hence buyers of cable system equipment are both perfectly able to select their own engineering services and they can tell, if there is problem with the system, whose fault it was. Hence, the *per curiam affirmence* of the trial court in this case demonstrates that the Supreme Court understood the presumption against tying to be in service of the market process and not some economic abstractions. Moreover, the trial court also condemned continuation of the tie-in because *Jerrold* had, by the time of trial, established market credibility for its products. Continuation of the tie would have foreclosure effects on providers of engineering services and thus deny customers the benefits of competition on the merits in that market.[32]

The lower courts invoked these precedents to uphold other tying agreements when they saw the non-exploitation, legitimate business justification as valid. For example, the *A.O. Smith* case affirmed a tie between a special type of silo and a specific loading machine because the manufacturer established that it was necessary to link the two to avoid serious product failure problems.[33] In the *Mercedes repair parts* litigation, two different courts reached opposite conclusions about whether the tying had a legitimate business justification.[34] The two decisions reflect differing interpretations of the facts and the options available to the original equipment manufacturer of competing components.

Thus, a better historic statement of the law of tying is that it created a presumption of illegality whenever there was evidence of market power or a cognizable actual or potential impact on the market measured in dollar terms. The defendant then had the burden of proof to justify its conduct, not by arguing *de minimus* effect, but by providing a legitimate non-exploitive

[32] *See*, 187 F. Supp. at 557.

[33] Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (1st Cir. 1963).

[34] *Compare* Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033 (4th Cir.1987) (upholding tying claims involving auto repair parts) *with* Mozart Co. v. Mercedes-Benz of North America, Inc., 833 F.2d 1342 (9th Cir. 1987) (finding no violation because the car maker lacked "market power" in the tying product market defined as car dealerships in a particular brand of vehicle).

explanation for the conduct that demonstrated it was reasonably necessary to accomplish the legitimate purpose.[35]

The next two parts of this article examine in more detail why the courts adopted this perspective. The central observation is that tying does, in fact, distort the market process and affects adversely both buyers and competitors, actual and potential, of the firm employing the tying device. Given a policy goal of promoting and protecting competition on the merits, especially in light of the specific commands of Section 3 of the Clayton Act, the presence of these effects as the inherent consequence of tying explains the traditional presumption of illegality. Moreover, that presumption is entirely consistent with a broader view of the competitive process and the concern for both static and dynamic efficiency.

III. HARM TO BUYERS FROM TYING

A core objection to tying is that it denies buyers the opportunity to make unfettered choices in the tied product or service market. This directly impairs competition on the merits in which the market process provides the choices for consumers and registers their preferences accurately. Choice is important in a fully understood market process. Variety allows individual buyers to express their preferences among a range of options. Averitt & Lande have argued that choice is, in fact, as important an element of the competitive process as is price itself.[36]

Second, tying allows a firm with some market power to exploit its customers by discriminating among buyers. The classic example is the metering of demand, with those buyers gaining greater utility from the product forced to pay a higher price. Indeed, in the extreme case, the tying good is sold below cost so that the high demand buyers wind up subsidizing the lower demand users. This distorts the preference system of buying and results in a misallocation of resources.

In addition, tying allows for more invidious discrimination. High-volume buyers are often

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[35] This analytic framework is similar to that adopted by the DC Circuit in the Microsoft case, United States v. Microsoft, 253 F.3d 34, 58-59 (D.C. Cir. per cur. 2000) and the Second Circuit in the Visa and Mastercard cases. United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2nd Cir.2003).

[36] Neil W. Averitt & Robert H. Lande, *Using the 'Consumer Choice' Approach to Antitrust Law*, 74 Antitrust L. J. 175 (2007); *see* also, Neil Averitt, Robert Lande, & Paul Nihoul, *"Consumer Choice" Is Where We are All Going - So let's Go Together*, 2-2011 Review Concurrences 1(arguing that both American and European competition law have as a primary objective the preservation and protection of consumer choice).

able to negotiate around the tie while low-volume buyers are forced to accept the tie-in and pay above-market prices for the tied good or service. For example, in the *Image Technologies* case, the facts showed that Kodak sold parts to its large volume buyers who then were able to establish their own in-house repair and maintenance services. This would presumably be a lower cost and more reliable system than Kodak's service. Smaller buyers and entities without the ability or skill to demand such advantages were compelled to take Kodak's more expensive and less desirable services after Kodak excluded the independent service providers.[37] Another example involves computer printers where the ink is expensive when purchased from the original equipment maker. Here again, a large volume buyer will get either deep discounts on its ink cartridges or else will be given the technology to refill the cartridges.

As a matter of economic theory, the discrimination demand curve is always inside the non-discrimination demand curve except in the rare case where a buyer's "income effect" would not result in any increase in purchases of the good whose demand curve is being modeled. The logic of this observation is quite simple. A buyer that values one unit of a good or service highly, but who pays a price well below the price (value) the buyer would have paid, has an "income"effect in that they do not pay as much as they might have. Some of that income will be spent elsewhere, but usually some or all buyers will now take more units because the price is lower.

Therefore, a uniform price demand curve reflects the increased volume that results from buyers with high valuation of the good taking more units. In a perfect price discrimination situation, the price is set for each buyer exactly at the level that equals their valuation of the good. This eliminates the income effect altogether, and so reduces the total quantity taken at lower prices, since the only buyers will be those who start with lower valuation of the good. Hence, despite claims that perfect price discrimination will result in the same output as perfect competition, the models properly analyzed show that such an outcome can occur only under one extreme condition.

The *Loews* case presented yet another type of exploitation.[38] The economic theory was that, if the sellers priced movies separately, they would be compelled to use lower prices than

[37] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992).
[38] U.S. v. Loew's, Inc., 371 U.S. 38 (1962).

If the goal of competition policy is consumer welfare, then the use of tying in this circumstance results in higher costs to consumers than would have existed absent the tie.

if they bundled the movies because different buyers with different valuations of individual movies were forced to take the bundle to get the films they really desired.[39] This is a pure exploitation explanation for tying. It directly affects the ability of buyers to make unfettered choices at prices reflecting competitive valuation among a range of options. Moreover, the buyer, having spent its budget, will now be unable to buy other goods or services. Hence, part of the effective exploitation of the buyer with respect to its most preferred good is to deny the income effect (more value for less price) that would have allowed increased purchases from other producers.[40] So long as competition on the merits is the goal of policy this kind of exploitation is presumptively bad.

Another justification for tying is that it can reduce customer search costs for some substantial segment of buyers. Again, this meets with the initial objection that it reduces search costs for favored buyers by imposing the cost of loss of choice on other buyers who would have preferred another option. Second, while the favored customers are the ones with the initial gain from the search cost savings resulting from packaging the two products together, by refusing to sell the units individually, the seller can and will raise the price of the package (by denying the customer the option of buying individual items the seller forecloses either a customer or third-party packaging the elements to compete with its own bundle), thereby appropriating some or all of the gain the favored buyer got from the packaging. This kind of wealth transfer is sometimes said to involve no competitive harm, but if the goal of competition policy is consumer welfare, then the use of tying in this circumstance results in higher costs to consumers than would have existed absent the tie. Moreover, once again, the customers who did not want the tied product or service are subsidizing those who wanted that combination.

Legalizing tying, or even making it presumptively lawful, encourages this kind of exploitation of buyers and the development of bundles and packages that do not allow the customer to make choices. Thus, such a legal system creates an incentive structure that encourages and

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[39] *See*, George Stigler, *United States v. Loew's Inc: A Note on Block-Booking*, 1963 Sup. Ct. Rev. 152. If A will pay $100 for movie X and $50 for movie Y, while B's preferences are the reverse, the seller will price both movies at $50 in order to make two sales and will collect a total of $200. But if it ties the two movies into a package, it can price the package at $150 (the combined value of the package for each buyer) and sell to both buyers with a resulting revenue of $300.

[40] To return to the hypothetical in note 39, *supra*, but for the tie, each buyer would have had $50 to spend on other purchases whether on programs or some totally unrelated good or service.

rewards exploitation and the development of multi-product lines of business. That, in turn, further weakens the access to choices that is the cornerstone of a workably competitive market.

IV. HARM TO PRODUCERS FROM TYING

Just as the buyers' freedom of choice is impaired by tying, the producer of the excluded goods finds its market constrained by the exclusionary effect of a tie-in. The prototypical example is the producer in the tied product market that has lost access to potential customers. It cannot compete on the merits of the specific product with the firm engaged in the tying. Regardless of how competitive the market for the tied good might otherwise be, or how large the aggregate volume, the effect is necessarily to diminish the scope of the market open to the excluded seller. Thus, tying always has an adverse effect on competition in the tied product market.

Recent scholarship has identified other potential adverse effects. The tie may be employed to exclude potential competition in the tying good market. Microsoft may well have used its tied internet browser as means of eliminating what it saw as a potential competitor in the operating system market. By driving Netscape from the market, it sought to entrench its dominance in the related market.[41] The effect of that exclusionary conduct was also to retard and diminish the innovation and dynamics of the browser technology. The evidence is that when the browsers were untied and competition re-emerged, the effect was to increase innovation and improve quality of the product.[42] These are the usual results of competition.

The impact of exclusion extends beyond the immediate loss of opportunity for the excluded seller. Potential entrants into the tying product market may need to expand into the tied market as well in order to offer a competitive product line. For example, beyond the metering exploitation evident in the IBM punch-card case, another competitive element in that case was that there was little or no production of the high quality cards needed to make tabulating machines work well because IBM and its major competitor had controlled access to that market. Hence, a potential tabulating machine manufacturer would also have to find or develop a source for the punch cards.[43] This type of requirement, therefore, raises the barriers to entry into the tied market. That sometimes the increase in the barriers will not be substantial does

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41 Dennis Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 *Rand J. Econ*. 194 (2002).

42 For current market share data *see*, e.g., http://gs.statcounter.com/, which shows that three major browsers have around 30 percent of the market.

43 International Business Machines Corp. v. United States, 298 U.S. 131, 136 (1936).

Tying will inherently affect adversely the capacity of excluded firms to compete.

not detract from the consistent fact that the effect will be a recurring one. Only its degree of impact will vary.

The use of tying can also obscure the value of the tying product that may be priced at a low nominal price because the tied component carries the excess price. This is the standard metering concept. But this approach can make it much less attractive to enter and compete in the tying product market. Unless the competitor can also engage in a parallel tie, it faces the problem that the price of the tying good by itself is low. Hence, competition in the sale of that good will be unprofitable. So the would-be entrant has to find a way to obtain and tie the tying good, which it can then offer at a "discount" from the dominant firm. These combined effects mean that tying can be a significant deterrent to entry and competition in the tying good market.

The central point is that there is a predictable adverse effect on competition and particularly on the dynamics of competition in both the tied and tying good markets. This is a cost and detriment to the competitive process. Hence, the traditional tying law would not excuse harm based on any *de minimus* claim, but rather would require that there be a proven affirmative justification for the adverse effect on competition.

Another adverse implication for the competitive process of tying is that it creates incentives for firms to integrate or consolidate to provide multiple related products where the only reason for doing so is to match the "package" of another firm. This has a potential efficiency cost as the consolidated enterprise must now manage production and distribution challenges in two or more product lines when it could be more efficient to specialize. Second, potential entrants into any one line will find that they face a more complex and less attractive entry condition. The specialist entrant may well have to package its good with one or more other goods if bundling or tying is pervasive. If it is not, the specialist still faces the challenge of getting access to the full range of potential customers since it cannot easily deal with those customers whose purchases are tied. The loss of that potential element of the market reduces the value of the individual specialist and makes its sale to the integrated, tying firm a more likely outcome. The result here is that there is a tendency to increase concentration; reduce incentives for individualized, specialized innovation; and reinforce the dominance of the existing market leaders.

In sum, tying will inherently affect adversely the capacity of excluded firms to compete. It can also make competition in the tying product market more difficult and thus reduce the incentives to enter and compete in that market. Again, the argument is that these effects inhere in tying. The degree of effect will probably vary depending on the market context. Given

that there is a cost or burden to the competitive process by allowing tying, and given a goal of protecting and advancing competition, the fact of harm should demand that the party causing the harm have a convincing justification.

V. THE GAINS TO STATIC EFFICIENCY AND DYNAMIC COMPETITION FROM A RETURN TO TRADITIONAL TYING RULES

The inherent effect of tying is to foreclose options for both buyers and sellers. Thus, over time, there is an unavoidable impact on market dynamics as well as on the short-run range of options available to both the buying and selling side of the affected markets. Cast in conventional economic terms there are costs to the competitive process from any tying where there is any effect on consumer choice or seller access to consumers. For this reason, economic logic would seem to dictate that no tying should be permitted unless there is an offsetting gain to the competitive process.

Again, by definition, that goal involves furthering the competitive process and not the interests of particular competitors or even particular customers. It is for this reason that traditional tying law recognized an affirmative defense where the tie advanced a legitimate, non-exploitive, non-exclusionary goal. To avoid the risks of false negatives, moreover, the law put the burdens of pleading, evidence, and persuasion on the proponent of the tie-in. In the absence of clear justification, the presumption was that the harm to competition outweighed any ambiguous benefits. The rationality behind this presumption, as illustrated in the case law reviewed earlier, is (in part) that rarely is tying the only, let alone the best, solution to any specific legitimate need of a seller. Thus, from an efficiency perspective, the traditional rules are more efficient than an open-ended, rule of reason in which the victim must bear the risks of harm if the evidence is ambiguous.[44]

From the perspective of longer run market dynamics, the argument against tying is even stronger. Competition on the merits should, in general, require that each product or service stand on its own and not rely on its having a compulsory relationship with some other good or service. For the reasons canvassed in Part III, the tying can cause serious distortions with respect to both entry and effective competition in both the tied and tying markets. A presumption against tying serves the public interest in maximizing the dynamic potential of the markets. Only when there is a strong case to justify the tie as an essential step in some legitimate non-ex-

[44] *See*, W. David Slawson, *A Stronger, Simpler Tie-In Doctrine*, 25 Antitrust Bull. 671 (1980).

From the perspective of a policy goal of favoring competition and the competitive process, the resulting strong presumption against tying is an apt, rational, and efficient response.

clusionary, non-exploitative interest of the party imposing the tie is there any justification for imposing a dynamic economic cost on the economy. Again, then, this analysis points toward the model governing tying that was built by experience: a strong presumption of illegality tempered by the right of the party to defend its conduct by proof that it has a legitimate justification.

VI. CONCLUSION

In 1980, David Slawson wrote: "Experience has shown that economic theory tends to be vague and abstruse and that economic data tend to be voluminous and ambiguous."[45] Turning his attention to tying law in particular, Professor Slawson observed: "The foreclosure which any tie-in effects in the markets for both the tying and the tied products is in itself a lessening of competition, without more. . . . Competition is reduced when buyers' alternatives are reduced because competition is buyers' alternatives."[46] His conclusion, similar to the one advanced in this analysis, is that tying should be broadly illegal with a clear recognition of an affirmative defense for legitimate packaging of goods. In the more than 30 years since Professor Slawson wrote, the law has moved in the opposite direction, denying the self-evident harms to competition that tying causes and developing any number of economic theories that might explain and so excuse such harms.

It is possible (but not probable) that the Supreme Court, or at least the Chief Justice, has had an epiphany:[47] Economic metaphysics is a limited guide to the solution of economic policy issues. Practical statesmen and legislators have made choices based on insights drawn from the real world of experience. The law of tying, with its clear root in Section 3 of the Clayton Act, is such a practical statement of a conclusion about the social and economic value of tying. The traditional case law and resulting rules carried out that policy. Moreover, from the perspective of a policy goal of favoring competition and the competitive process, the resulting strong presumption against tying is an apt, rational, and efficient response.

[45] *Id* at 671

[46] *Id* at 676 (emphasis in the original).

[47] *See* note 4, *supra*