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Christopher R. Leslie

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TYING CONSPIRACIES

CHRISTOPHER R. LESLIE*

ABSTRACT

Antitrust law has long condemned tying arrangements when they are imposed by a single dominant firm. However, tying jurisprudence does not recognize that tie-ins can also occur as the result of a conspiracy among competitors. Consequently, antitrust doctrine fails to appreciate the unique anticompetitive dangers of concerted tying arrangements. After providing real-world examples of tying conspiracies, Professor Leslie explains how concerted tying arrangements present a far greater threat to competitive markets than traditional, unilaterally imposed tying arrangements. Because tying jurisprudence evolved without considering the existence or effects of concerted tie-ins, the current test for evaluating the legality of tying arrangements is inappropriately lenient to tying conspiracies. This is completely inconsistent with one fundamental principle of American antitrust law: concerted action should be treated more harshly than unilateral conduct. Finally, the Article advocates per se illegality for tying conspiracies and argues that greater appreciation of concerted tie-ins can inform the ongoing academic debate about tying arrangements more generally.

* Visiting Professor of Law, New York University School of Law; Professor of Law, Chicago-Kent College of Law. The author wishes to thank Michael Carrier, Herb Hovenkamp, Mark Lemley, and Tony Reese for comments on early drafts.

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INTRODUCTION

Tying arrangements, or tie-ins, exist when a firm refuses to sell a desired product (the tying product) unless the consumer agrees to purchase another product (the tied product) as well. The standard definition of a tie-in assumes that a single firm is unilaterally imposing the requirement on its customers. This is misleading.¹ While there is much confusion within individual antitrust doctrines, the broad contours of antitrust law are well-established. Concerted action is evaluated under section 1 of the Sherman Act, whereas section 2 focuses on unilateral conduct.² When confronted with an alleged antitrust violation, the first question that antitrust practitioners and judges will ask is whether the conduct is concerted or unilateral.³ This informs the observer whether to employ the apparatus of section 1 or section 2.⁴

Tying arrangements violate this most basic precept of antitrust law—the distinction between concerted and unilateral conduct. Most tying arrangements are unilaterally imposed, with no agreement among co-conspirators. Yet courts evaluate these tying arrangements under section 1 of the Sherman Act. Because tying law mischaracterizes unilaterally imposed tying arrangements as concerted action, antitrust law currently fails to recognize that tying arrangements can actually be the result of concerted action and that such tying conspiracies can create a greater anticompetitive threat than a traditional tying requirement imposed by a single dominant seller.

Although much ink has been spilled on the problems of tying arrangements jurisprudence generally, no scholarship has directly confronted the issue of tying conspiracies. A tying conspiracy exists

1. See Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1783 (1999) (discussing the presumption "that tie-ins are imposed by a single seller").

2. See Sherman Act, 15 U.S.C. §§ 1-7 (2000). The primary exception is section 2's prohibition on conspiracies to monopolize. *Id.* § 2. This provision is rarely used, with good reason. Such conspiracies are easier to prove under section 1's prohibition on conspiracies in restraint of trade.

3. See, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

4. Or both, if concerted action leads to monopoly. See Sherman Act §§ 1-2.

when a firm that sells both the tying and tied products agrees with a competing firm that sells the same products that each will impose a tying requirement on its customers. By entering into such agreements with these other firms, a tying seller can significantly increase the anticompetitive effects of a tying arrangement. This Article seeks to fill this gap in the antitrust literature and case law by explaining the anticompetitive risks of tying conspiracies and by advocating a true *per se* rule for such conspiracies.

Part I will lay out the current state of the law on tying arrangements. American tying jurisprudence requires no separate inquiry into whether the challenged tie-in is the result of concerted action among different firms. This is a significant oversight. Part I will explore the origins of the current legal test for evaluating tying arrangements and then explain the distinction between unilateral and concerted tying arrangements. Finally, Part I identifies the three varieties of concerted arrangements, which are analyzed more thoroughly in Parts II through IV.

Part II introduces the discussion of tying conspiracies. A tying conspiracy exists when two or more firms—who are competitors in both the tying and tied product markets—agree to impose tying arrangements on their respective customers. After giving real-world examples of such tying conspiracies, Part II will explain the anticompetitive effects of tying conspiracies on both competitors and consumers. Efficient competitors could be kept out of the market for the tying product, the tied product, or both. Consumers will face higher prices and reduced choice. Further, tying conspiracies could decrease firms' incentives to innovate.

Part III shows how current antitrust doctrine fails to appreciate the anticompetitive risks inherent in tying conspiracies. As a result, concerted tying arrangements are sometimes treated more leniently than unilateral tying arrangements—an outcome completely at odds with antitrust theory and jurisprudence.

Part IV advocates that courts treat tying conspiracies as *per se* illegal. After discussing the criteria that the Supreme Court has applied in determining whether a particular type of restraint falls in a *per se* category, Part IV explains how tying conspiracies satisfy all of the criteria for *per se* condemnation. Given the severity of *per se* condemnation, it is important to distinguish between a naked

tying conspiracy and an ancillary restraint that may only appear to be concerted tying; only the former deserves per se treatment. Next, Part IV discusses the defenses that courts have considered in traditional tying cases and explains why these arguments do not apply to tying conspiracies.

Finally, Part V lays out the elements that should be necessary to prove a tying conspiracy cause of action under section 1 of the Sherman Act. While a tying conspiracy plaintiff must demonstrate an agreement among competitors to link two products, there should be no need for the additional elements of market power, coercion, and anticompetitive effects that courts consider in traditional tying litigation.

I. THE EVOLUTION OF TYING DOCTRINE AND THE FAILURE TO RECOGNIZE TYING CONSPIRACIES

Antitrust law is premised on the fundamental distinction between unilateral conduct and concerted action. Under section 2 of the Sherman Act, "the conduct of a single firm [is] unlawful only when it actually monopolizes or dangerously threatens to do so."⁵ In contrast, section 1 of the Sherman Act condemns agreements in restraint of trade if they are unreasonable.⁶ This means that concerted action "is judged more sternly than unilateral activity."⁷ As a result, a firm can engage in anticompetitive acts unilaterally that it cannot do pursuant to an agreement with others. The Supreme Court bases this differential treatment on the fact that "[c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision making that competition assumes and demands."⁸ Because of this dichotomy, the first inquiry in almost all antitrust cases is whether the defendant engaged in the challenged conduct unilaterally or in

5. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

6. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

7. *Id.*; see *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1152 (9th Cir. 1988) ("[T]he Sherman Act treats concerted action more harshly than unilateral behavior"); *Shaw v. Rolex Watch, U.S.A., Inc.*, 673 F. Supp. 674, 677 (S.D.N.Y. 1987) ("This distinction [between unilateral and concerted activity] imposes a stricter standard on the conduct of concerted activity.").

8. *Copperweld*, 467 U.S. at 768-69.

concert with others. Not so in tying cases. Tying law developed on a separate track from nontying jurisprudence and, as a result, tying law does not embrace the fundamental unilateral-concerted distinction.

Though Congress enacted the Sherman Act in 1890, the origins of Sherman Act tying law lie in the Clayton Act of 1914.⁹ In the Supreme Court's first foray into tying requirements in 1912, the Court upheld the legality of tying arrangements under the Sherman Act.¹⁰ In response, Congress enacted section 3 of the Clayton Act, which proscribed those tying arrangements that "substantially lessen competition or tend to create a monopoly in any line of commerce."¹¹ Instead of treating tying arrangements as merely a Clayton Act violation, the Supreme Court took the congressional enactment as a directive to condemn tying agreements under section 1 of the Sherman Act as well.¹² Thus, tie-ins are condemned under section 1 of the Sherman Act *because* Congress condemned them under section 3 of the Clayton Act.

These awkward origins of the section 1 tying claim may help explain why tying jurisprudence developed along a separate path from other section 1 causes of action. Most section 1 claims grew organically from the common law on agreements in restraint of trade. But section 1 tying claims had a distinct origin. Tying claims matured in their adoptive home of section 1 of the Sherman Act but they never completely shed the influence of their birth parent, section 3 of the Clayton Act. And the structure of section 3 was quite different than that of section 1.

The language of section 3 of the Clayton Act describes a tie-in in which one firm imposes a tying requirement on its customers. The statute provides, in relevant part, that

9. 15 U.S.C. §§ 12-17 (2000).

10. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 29-32 (1912), *overruled in part* by *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 515-18 (1917).

11. 15 U.S.C. § 14; *see* Viktor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1016-23 (1985).

12. *See* Kramer, *supra* note 11, at 1024-30 (discussing the initial tying cases to reach the Supreme Court after the passage of section 3, including *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918), and *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U.S. 502 (1917)).

[i]t shall be unlawful for *any person* engaged in commerce ... to lease or make a sale or contract for sale of goods ... on the condition, agreement, or understanding that the lessee or purchaser ... shall not use or deal in the goods... of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.¹³

The language is in the singular. It makes it illegal for one firm to unilaterally impose a tying requirement. It should have been apparent that importing such a cause of action into section 1—a statute that deals exclusively with concerted action—would not be a seamless initiative.

After the Supreme Court brought tying arrangements within the ambit of section 1 of the Sherman Act, federal courts nevertheless continued to treat tying arrangements as a unilateral phenomenon. For example, the Supreme Court in *Northern Pacific Railway Co. v. United States* defined a tying arrangement “as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.”¹⁴ The definition does not contemplate tie-ins being the result of concerted action.

Focusing on unilateral tie-ins, federal courts have long condemned tying arrangements as anticompetitive. Early courts could see no good in tie-ins. The Supreme Court opined in *Standard Stations*, for example, that “[t]ying agreements serve hardly any purpose beyond the suppression of competition.”¹⁵ Courts and scholars have advanced several justifications for condemning tying arrangements. The primary fear is that a firm with monopoly power will be able to leverage its power from one product market to another.¹⁶ According to this theory, a firm that controls the market in the tying product can force its consumers to purchase the tied product in an effort to restrain competition in the tied product

13. 15 U.S.C. § 14 (emphasis added).

14. 356 U.S. 1, 5 (1958) (emphasis added); see Leslie, *supra* note 1, at 1793-95 (discussing how the singular language from *Northern Pacific* is deceptive).

15. *Standard Oil Co. v. United States* (*Standard Stations*), 337 U.S. 293, 305-06 (1949).

16. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14-15 (1984), *abrogated in part on other grounds* by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

market.¹⁷ Most tying law is designed to prevent the monopolist's expansion of empire.¹⁸

With the goal of preventing monopolists from leveraging monopoly power across product markets, tying jurisprudence eventually arrived at a basic four-prong test for determining whether a tying arrangement is per se illegal. The elements of this test are as follows: (1) there are two separate products or services; (2) the seller has exercised coercion or has conditioned the sale of one product or service on the purchase of another; (3) the seller must have sufficient market power over the tying product to force the buyer to purchase the tying product; and (4) a "not insubstantial" volume of interstate commerce in the tied product is affected.¹⁹ Some circuits require plaintiffs to show a fifth element, that the tying arrangement had actual anticompetitive effects in the market for the tied product.²⁰ Finally, although not enumerated as part of the baseline test for illegal tying, most courts also require the plaintiff to prove, when implicated, that the tying seller has a direct economic interest in the tied product market.²¹ All tying arrangements are evaluated under this test.²²

Because this test for tie-ins evolved to address unilaterally imposed tying arrangements, it does not specifically address the problem of concerted tying arrangements. At no point has the Supreme Court recognized the unique anticompetitive threats presented by concerted tying arrangements. The current legal test thus focuses exclusively on the situation of one seller with market

17. See *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 605 (1953).

18. For decades, scholars have debated whether a monopolist can employ tying arrangements to secure a second monopoly. See Christopher R. Leslie, *Cutting Through Tying Theory with Occam's Razor: A Simple Explanation of Tying Arrangements*, 78 TUL. L. REV. 727, 732-41 (2004) (discussing various competing schools and theories).

19. See *Fortner Enters., Inc. v. U.S. Steel Corp.* (*Fortner I*), 394 U.S. 495, 498-99 (1969) (discussing and quoting *Northern Pacific*); see also *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (quoting *Northern Pacific* and citing *Fortner I*).

20. See, e.g., *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000); *De Jesus v. Sears, Roebuck & Co.*, 93 Civ. 2605 (MBM), 1995 WL 122726, at *2 (S.D.N.Y. Mar. 22, 1995).

21. See *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 (11th Cir. 1984); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977); *Venzie Corp. v. U.S. Mineral Prods. Inc.*, 521 F.2d 1309, 1317 (3d Cir. 1975); *infra* Part III.

22. See *infra* Part III.

power coercing its customers to make unwanted purchases of a second product. Despite the fact that, as explained in Part II, concerted tying arrangements represent a greater threat to competition than traditional, unilaterally imposed tie-ins, antitrust jurisprudence does not yet recognize concerted tying arrangements as a distinct cause of action.²³ As Part III explains, this has led courts to treat concerted tying arrangements more leniently than unilaterally imposed tie-ins, in complete contravention of antitrust law's most basic dictate: concerted activity is to be judged more harshly than unilateral conduct.

II. THE INHERENT ANTICOMPETITIVE DANGER OF TYING CONSPIRACIES

A tying conspiracy exists when two or more competitors, each of whom is selling both the tying and tied products, agree with each other that they will each impose a tying arrangement. This Part will argue that tying conspiracies are particularly dangerous. Yet despite their anticompetitive potential, neither courts nor scholars have paid any meaningful attention to agreements among competitors to impose tying arrangements.²⁴

A. Examples of Tying Conspiracies

Seeing how competitors have entered into tying conspiracies in the past provides a useful foundation for understanding the anticompetitive consequences of such conspiracies. An examination of tying litigation reveals alleged conspiracies of varying size and complexity.

23. Some courts have attempted to justify why tying arrangements are analyzed under section 1 by reasoning that the illegal agreement lies between the tying seller and the buyer who agrees to purchase the tied bundle. See, e.g., *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1140-42 (10th Cir. 1997) (en banc). The presence of a buyer does not make a tying arrangement concerted for section 1 purposes, because the buyer neither instigates nor benefits from the antitrust effects of the tying arrangement. See Leslie, *supra* note 1, at 1802-17.

24. Professor Herbert Hovenkamp has a page on "tie-ins and collusion" in his hornbook. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 425 (3d ed. 2005).

First, tying conspiracies can arise in markets with only two major players.²⁵ One of the Supreme Court's earliest treatments of tying arrangements, *International Business Machines (IBM) Corp. v. United States*,²⁶ involved precisely such a scenario, though few courts or scholars realize it. IBM manufactured and leased tabulating machines that used tabulating cards.²⁷ IBM required its lessees to purchase only tabulating cards manufactured by IBM.²⁸ If a lessee used non-IBM cards, IBM could terminate the lease, a daunting prospect for any business dependent upon IBM's tabulating machines.²⁹ Both the district court and Supreme Court ruled that IBM's tying clause violated section 3 of the Clayton Act.³⁰

Although the Supreme Court's decision in the *IBM* case is a keystone tying case cited by antitrust scholars and practitioners, less well-known is the fact that the tying scheme began as a classic example of a tying conspiracy. IBM did not merely impose its tying requirement unilaterally. In the market for tabulating machines, IBM had one major competitor, Remington Rand.³¹ IBM and Remington Rand agreed with each other to simultaneously tie leases on tabulating machines to purchases of tabulating cards.³² The government had challenged both the agreement between Remington and IBM as a Sherman Act violation and the tying requirements of each individual company as a violation of the

25. In addition to the tying conspiracy between IBM and Remington discussed in the text, the tin can market during the interwar period until the mid-1940s represents another duopoly in which the two major firms, American Can and Continental Can, apparently engaged in a tying conspiracy. 2 SIMON N. WHITNEY, *ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 205 (1958) ("The Department of Justice charged in 1946 that identity of prices and terms between American and Continental in California markets was due to direct collusion 'at secret meetings held at irregular intervals' rather than to price leadership." (quoting *United States v. Am. Can Co.*, Cr. 30323-S (¶ 20) (N.D. Cal. 1946))).

26. 298 U.S. 131 (1936).

27. *Id.* at 133-34.

28. *Id.* at 134. The government was given a special dispensation whereby it could use tabulating cards that it made itself but had to pay a fifteen-percent-higher lease price for this privilege. *Id.*

29. *Id.*

30. *Id.* at 132, 137, 140.

31. *Id.* at 133.

32. The Court explained that the Government brought the suit against the competing manufacturers for entering into "a contract ... by which each agreed to use that type of lease, and not to solicit the lessees of machines of the others to purchase tabulating cards which it manufactures." *Id.* at 132.

Clayton Act.³³ However, the Court's opinion gave only passing reference to the agreement between IBM and Remington,³⁴ in large part because neither company attempted to defend their agreement.³⁵ Instead, the manufacturers had consented to canceling their agreement with each other, but not the tying arrangements themselves.³⁶ The Court's analysis thus focused on how IBM's tying policy violated section 3 of the Clayton Act.³⁷ Most notably, the Court rejected IBM's proffered justification for the tying requirement: that competing tabulating cards would be inferior and would therefore reduce the efficiency of IBM's machines.³⁸ The rejection of IBM's defense of its individual tie-in is the lasting legacy of the case, not the conspiracy between IBM and Remington Rand that each would impose the same tying requirement on its own customers.

Second, tying conspiracies can permeate markets comprised of many firms, unlike the duopoly in the *IBM* case. The cemetery industry presents numerous examples of regional markets plagued by horizontal tying conspiracies among multiple firms. Several antitrust suits have been brought against cemeteries and their trade associations for alleged tying conspiracies in which cemetery owners have tied plots to other goods or services.³⁹ For example, in

33. *United States v. IBM Corp.*, 13 F. Supp. 11, 12 (S.D.N.Y. 1935). The government originally initiated suit against four legal entities: IBM; Tabulating Machine Company, a wholly owned subsidiary of IBM; Remington Rand, Inc.; and Remington Rand Business Service, a subsidiary of Remington Rand. *Id.* By the time the litigation reached the Supreme Court, IBM had merged with Tabulating Machine Company and Remington Rand Business Service had dissolved, leaving only IBM and Remington Rand, Inc. as defendants. *Id.*; see *IBM*, 298 U.S. at 133.

34. See *IBM*, 298 U.S. at 135-36, 139.

35. Remington may also have appeared insignificant by the time the case reached the Supreme Court because Remington stipulated "that any decree entered against Remington should be identic with the decree which might be entered against [IBM]." *IBM*, 13 F. Supp. at 12. Consequently, a cursory reading of the Supreme Court's opinion does not inform the reader that Remington was a defendant.

36. *IBM*, 298 U.S. at 132-33.

37. See *id.* at 134-35, 137.

38. *Id.* at 138-39 ("The suggestion that without the tying clause an adequate supply of cards would not be forthcoming from competitive sources is not supported by the evidence.").

39. See, e.g., *Baxley-Delamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154, 1155 (8th Cir. 1988); *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1136 (8th Cir. 1981); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n*, 629 F. Supp. 1002, 1005 (D. Kan. 1986) (reviewing alleged horizontal tying arrangement between cemetery plots (tying product) and sale and installation of grave markers (the tied product and service)), *aff'd in part, rev'd in part*, 891 F.2d 1473 (10th Cir.

one case the tying arrangement required purchasers of cemetery plots to also purchase the foundation preparation work from the cemetery owner.⁴⁰ This was not an instance of one cemetery developing and implementing its own policy unilaterally. Instead, almost fifty individual cemeteries agreed that each cemetery would impose the same requirement on its customers.⁴¹ The agreement lasted for over two decades.⁴²

Finally, tying conspiracies can involve more unorthodox tying arrangements, beyond a simple purchase requirement. In a recent case, a group of retailers initiated a class action lawsuit against the two major credit card companies, which had allegedly agreed with each other to implement the same tying requirement on the merchants.⁴³ The class action named both Visa and MasterCard as defendants, accusing both of violating federal antitrust laws in myriad ways, including a tying conspiracy.⁴⁴ The tying arrangement that Visa and MasterCard agreed to impose was in the form of "an 'honor all cards' policy, which require[d] any merchant accepting any of their credit cards to accept all of their payment cards."⁴⁵ Accordingly, merchants who wanted to accept payment through credit cards—the tying product—were forced to accept payment through the lower-profit debit cards—the tied product—as well. Merchants made less profit from the latter transactions and would have preferred to not accept the debit cards at all. Despite their preferences, merchants were forced to accept the tied product, debit cards, as the price of receiving the tying product, being eligible to process traditional credit card transactions.⁴⁶ More than four million merchants formed a class that alleged the tying arrange-

1989); Fla. Monument Builders v. All Faiths Mem'l Gardens, 605 F. Supp. 1320, 1322 (S.D. Fla. 1984).

40. *Rosebrough*, 666 F.2d at 1136. Graves have either a one-piece marker or a two-piece monument comprised of a base and a die, which is the upright part of a tombstone. *See id.* at 1136 n.1. The tying arrangement allowed customers to purchase a marker or monument from outside sources, but required that the cemetery prepare the foundation for all memorials. *Id.* at 1136. Firms that prepared foundations for their markers and monuments were excluded from the apparently lucrative market for foundations. *Id.*

41. *Id.*

42. *Id.*

43. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 129-30 (2d Cir. 2001).

44. *Id.*

45. *Id.* at 131.

46. *Id.*

ment foreclosed competition in the debit card market.⁴⁷ The case settled on the eve of trial, so no rule of law emerged to condemn tying conspiracies.⁴⁸ The district court, however, found "evidence, direct and circumstantial, from which a jury could find a conspiracy."⁴⁹ And the seriousness of the accusation is supported by the amount of the settlement: approximately \$3.4 billion.⁵⁰ This represents the largest antitrust settlement in American legal history.⁵¹

While there are undoubtedly many more examples of tying conspiracies, antitrust law does not yet recognize concerted tying arrangements as a distinct cause of action. Court opinions, therefore, do not focus on the concerted nature of some tie-ins. As a result, the case law generally neglects to consider whether challenged tying arrangements are the consequence of agreements among competitors.⁵² This is a mistake, as the following section argues.

B. The Anticompetitive Effects of Tying Conspiracies

The anticompetitive consequences of tying conspiracies can be divided into two broad categories: exclusionary effects and anti-consumer effects. First, concerted tying agreements can have exclusionary effects, whereby a group of competitors jointly employs a tying strategy to erect barriers to entry or to drive other competitors from the market. Second, tying conspiracies can injure consumers' interests by limiting choice and by increasing the price of the tying product, the tied product, or both. The Supreme Court has long recognized that a unilaterally imposed tying arrangement can injure both competitors and consumers.⁵³ This section explains

47. *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238(JG), 2003 WL 1712568, at *1 (E.D.N.Y. Apr. 1, 2003). The complaint also alleged that the policies created a dangerous probability that either Visa, or Visa and MasterCard as a pair, would monopolize the market for debit cards. *Id.*

48. *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 508 (E.D.N.Y. 2003).

49. *Visa Check/MasterMoney*, 2003 WL 1712568 at *6.

50. *See Visa Check/Mastermoney*, 297 F. Supp. 2d at 509. The court estimated the value of the injunctive relief to be worth \$25 to \$87 billion. *See id.* at 522 n.25.

51. *Id.* at 508.

52. *See infra* notes 114-23 and accompanying text.

53. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7 (1984), *abrogated in part*

how tying conspiracies can significantly magnify the anticompetitive potential of tying requirements.

1. *Exclusionary Effects*

Competitors may conspire to impose tying arrangements because tie-ins can raise the cost of entry into the tied product market, the tying product market, or both. Tying arrangements can create barriers to entry into the tied product market. The Supreme Court has recognized that because the tying seller requires consumers to purchase the tied product from her, a tie-in “may destroy the free access of competing suppliers of the tied product to the consuming market.”⁵⁴ At a minimum, “the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market.”⁵⁵ It is harder for a competing seller of the tied product—even if he makes a better or less expensive good—to make sales when one’s customers are bound to purchase the product from someone else. Yet consumers are willing to forego purchasing the tied product in a competitive market if their demand for the tying product is sufficiently high. As a result, the tying arrangement injures competition in the market for the tied product as the “seller coerces the abdication of buyers’ independent judgment as to the ‘tied’ product’s merits and insulates it from the competitive stresses of the open market.”⁵⁶ The Supreme Court has acknowledged that tying arrangements may force a

on other grounds by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006) (“The exclusive contract had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services.”); *State v. Lawn King, Inc.*, 417 A.2d 1025, 1041 (N.J. 1980) (“Tying is said to have no other purpose or effect and thus offends antitrust values in two respects:(:) by foreclosing competitors of the seller from fair access to that part of the market for the tied product which is foreclosed by the tie, and by reducing the range of choice open to buyers of that product.” (quoting LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 156, at 445 (1977))).

54. *United States v. Loew’s Inc.*, 371 U.S. 38, 44-45 (1962), *abrogated in part on other grounds by Ill. Tool Works*, 126 S. Ct. at 1284; see *Jefferson Parish*, 466 U.S. at 14 (noting that tie-ins can “create barriers to entry of new competitors in the market for the tied product”) (citing *Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I)*, 394 U.S. 495, 495, 509 (1969)).

55. *Jefferson Parish*, 466 U.S. at 13 n.19 (quoting *Fortner I*, 394 U.S. at 512-14 (White, J., dissenting)).

56. *Id.* at 13 (quoting *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 605 (1953)).

new competitor in the tied product market to enter two markets simultaneously, which is exclusionary because "entry into both markets is significantly more expensive than simple entry into the tied market" and renders markets less competitive.⁵⁷

Tying conspiracies increase the probability that tie-ins will create successful barriers to entry into the tied product market. Concerted tying arrangements increase the likelihood of smaller firms aggregating their individually insignificant market power into a potent anticompetitive weapon. Indeed, tying conspiracies have the potential to destroy competition in the market for the tied product entirely. The IBM-Remington Rand tying conspiracy shows how rivals can join forces to eliminate competitors in the market for tabulating cards.⁵⁸ While IBM and Remington Rand sold both tabulating machines and cards, they faced competition from other firms only in the latter market. Both sought to increase their sales of cards, but were hampered by competition.⁵⁹ If IBM alone had required its machine customers to purchase their cards from it as well, consumers could have purchased their machines from Remington Rand and their cards from any of the other existing card suppliers. Remington Rand faced the same problem if it attempted a tie-in on its own. However, by agreeing to jointly impose the same tie-in, neither IBM nor Remington Rand customers could circumvent the tying requirement, and competing sellers of cards were locked out of the market altogether. As the district court in *IBM* noted,

it is obvious that even if there are no more than two competitors in a commerce ... and each is allowed to bind the lessees of its machines from purchasing the tabulating cards of the other for

57. *Id.* at 13 n.19 ("They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers." (quoting *Fortner I*, 394 U.S. at 512-14 (White, J., dissenting))); see also *Silkworth v. Cedar Hill Cemetery, Inc.*, No. 694, 1993 WL 122104, at *1 (Md. Ct. Spec. App. Feb. 11, 1993) (per curiam) ("Specifically, appellant alleged that in furtherance of a conspiracy, appellees ... sell cemetery lots and monuments as a package, a combination that a monument dealer like himself cannot offer").

58. See *United States v. IBM Corp.*, 13 F. Supp. 11 (S.D.N.Y. 1935).

59. See *id.* at 14-17.

use in its leased machines, the competition in tabulating cards would almost certainly be not only substantially lessened but practically extinguished.⁶⁰

By locking up a significant part of the market for the tied product, conspiring rivals can prevent other competitors from reaching the minimum efficient scale necessary to compete effectively.⁶¹ Consequently, a tying conspiracy could force a theoretically more efficient potential manufacturer of the tied product from the market. Once this competition is eliminated, the conspirators can exercise their power in the tied product market by raising price.

Critics of antitrust rules against tying assert that tie-ins cannot create monopolies in complementary product markets, and that even if they could the tying seller would not increase profits by doing so. First, they assert that tie-ins do not affect competition because tying sellers seldom possess monopoly power.⁶² This position heavily influenced Justice O'Connor, who opined that in the absence of market power over the tying product, "tying cannot conceivably have any adverse impact in the tied-product market."⁶³ Without market power, consumers can evade the tying requirement by purchasing the tying product from someone else who does not impose a tie-in. Tie-ins cannot create market power if none existed previously.⁶⁴ Furthermore, critics associated with the Chicago School asserted that even if the tying seller could force a tying requirement upon consumers, it would gain nothing by doing so because the monopolist can only extract a finite amount of monopoly profits.⁶⁵ Monopolizing a second, complementary market would not increase the monopolist's profits; it would merely collect those same profits in another market.

The Chicago School arguments do not consider the economic effects of concerted tying arrangements. Competitors can enter

60. *Id.* at 20.

61. See Leslie, *supra* note 1, at 1785-86.

62. See RICHARD A. POSNER, ANTITRUST LAW 198 (2d ed. 2001).

63. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 37 (1984) (O'Connor, J., concurring in the judgment), *abrogated in part on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 126 S. Ct. 1281, 1284 (2006).

64. See *id.* at 37-38 ("If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well.").

65. See POSNER, *supra* note 62, at 198.

conspiracies that increase their market power, allowing them to exclude competitors in a manner that could not happen in a free market or absent the illegal agreement. In her generally sympathetic position toward tying, even Justice O'Connor acknowledged that tying arrangements could "be economically harmful" when "power in the market for the tying product is used to create additional market power in the market for the tied product."⁶⁶ While she asserted this phenomenon was "rare,"⁶⁷ she did not consider the possibility of tying conspiracies. A tying conspiracy allows sellers to create market power in the tying product market and then to employ that power to injure competition in the tied product market.

A traditional tying arrangement can also be a barrier to entry into the market for the tying product. A firm wanting to enter a product market will have an easier go if consumers have easy access to complementary products and services. For example, it is easier to enter the market for selling some types of machinery when a market for servicing such machines already exists. If no service market existed, the new entrant would have to both make machinery and maintain a service force in order to assure would-be consumers that repair assistance is available. In general, if consumers do not have sufficient access to complementary products, then the new market entrant may have to sell these complementary goods as well in order to generate sufficient consumer demand for the new product. A dominant firm in the tying product may employ a tying arrangement in order to prevent the development of a competitive market in a complementary service. Thus, the United Shoe Machinery Corporation implemented a tying arrangement whereby firms leasing its machines received their service from United Shoe as well.⁶⁸ This arrangement prevented the formation of any independent repair organizations that could fix rival machines. As a result, any firm wanting to enter the market for shoe machinery equipment would have to create its own repair force as well. That increased the cost of market entry. In enacting section 3 of the Clayton Act, Congress cited United Shoe's conduct while condemning tying

66. *Jefferson Parish*, 466 U.S. at 36 (emphases omitted).

67. *Id.*

68. See Leslie, *supra* note 18, at 819 (discussing *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam)).

arrangements, in part because tie-ins strengthened monopolies in the tying product market.⁶⁹

A tying conspiracy can increase the risk that tie-ins will pose a significant barrier to entry into the tying product market. If a firm without a monopoly power⁷⁰ tried to implement a tie-in to prevent development of an independent market for a complementary product, and thus force any competitor to enter two markets simultaneously, the strategy would fail unless it had the cooperation of other suppliers of the tying product. Consumers could simply buy the purported tying product from that firm's competitors and then buy the complementary products from any available sellers, who could more easily enter these secondary markets alone as long as other firms are willing to sell the tying product without a tying requirement. However, if all major suppliers of the tying product conspired to impose a tying requirement and thus eliminated independent suppliers of the tied product, any new firm wishing to enter that market alone would be faced with the costly prospect of having to enter both product markets at the same time.⁷¹

In sum, the potential exclusionary effects of a tying conspiracy are greater than those of the run-of-the-mill tie-in discussed in Supreme Court tying jurisprudence. As with most antitrust issues, an agreement is more dangerous than similar unilateral action. When an agreement among competitors forces a more efficient producer

69. The 1914 House Report noted:

Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or "tying" contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains.

H.R. REP. NO. 63-627, at 12-13 (1914).

70. If the tying seller already possessed monopoly power over the tying product, it would not need to conspire with any remaining smaller sellers.

71. In theory, this firm could coordinate with a firm that wanted to enter only the market for the tying product. But this seems unlikely, and the costs of finding such a business partner and coordinating the joint market entry would themselves represent barriers to entry.

from the market, this is a result that antitrust law should unhesitatingly condemn.

2. Anticompetitive Consequences for Consumers

While tying conspirators' competitors suffer antitrust injury, the tying requirement itself is directly targeted at consumers. So it is not surprising that they too are injured by tying conspiracies. Consumers, however, are hurt differently than competitors.⁷² Consumers suffer at least three related harms from tying conspiracies: higher prices, reduced choice, and diminished innovation. Each will be discussed in turn.

a. Price Effects

Tying conspiracies raise the prices that consumers pay for a number of interrelated reasons. By eliminating competitors from the market, the tying conspirators are afforded greater collective power over pricing in the tied product market. With fewer competitors in the market, price may stabilize at a higher level even without an explicit subsequent agreement to fix price. This is demonstrated by the can industry—in which the two major players employed tying arrangements as barriers to entry⁷³—during the mid-twentieth century. The two largest producers netted consistent earnings during financially difficult times, in part due to “the duopoly structure of the industry which has weakened price competition in times of low sales.”⁷⁴

More importantly, in some markets, an agreement among competitors to impose tie-ins can represent a form of price-fixing. Some tying arrangements require consumers to purchase all future units of the tied product from the tying seller.⁷⁵ This is often called

72. See Joseph Gregory Sidak, Note, *Rethinking Antitrust Damages*, 33 STAN. L. REV. 329, 330 (1981) (“But the economic injury that a firm causes consumers by exploiting market power differs intrinsically from the injury it causes competitors by obtaining, maintaining, or expanding that market power.”).

73. See James W. McKie, *The Decline of Monopoly in the Metal Container Industry*, 45 AM. ECON. REV. 499, 500-03 (1955).

74. 2 SIMON N. WHITNEY, *ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 209 (1958).

75. The alternative is one-to-one bundling.

a requirements tying arrangement. Chicago School scholars defend this as an efficient method of price discrimination.⁷⁶ This price discrimination defense of tying arrangements starts from the assumption that a seller has monopoly power over the tying product. In the absence of a tie-in, the monopolist would charge the monopoly price for this product. This is suboptimal because output is reduced below the efficient equilibrium, thus creating deadweight loss. Price discrimination occurs when a seller charges higher prices to consumers willing to pay a higher price and lower prices to those consumers with lower reservation prices. Price discrimination can be efficient when it allows a monopolist to expand output, because it charges a lower price only to those consumers unwilling to pay the monopoly price. All monopolists would like to engage in price discrimination, but it is very difficult for sellers to correctly identify the high-value and low-value consumers.

A tie-in can facilitate price discrimination by pegging the price of a bundle of goods to the intensity of usage. In this scenario, the tying product is a relatively durable product (such as a copier, a stapler, or a printhead) and the tied product is a complementary product consumed in conjunction with the tying product (such as paper, staples, or ink). A person who uses the tying product more intensely will necessarily consume more of the tied product. So long as the high-intensity users are also the high-value consumers, a tie-in can help the monopolist differentiate between consumers with high reservation prices and those with lower ones. The monopolist reduces the price of the tying product below the monopoly price and then charges a supracompetitive price for every unit of the tied product. Over time, the higher-intensity users will pay a far greater amount above cost than will lower-intensity users. By allowing the monopolist to expand output—while still ultimately charging the monopoly price to high-value consumers—Chicago School scholars defend tying as efficient.⁷⁷

Ironically, the Chicago School defense of traditional unilateral tie-ins proves the harmful price effects of tying conspiracies. According to this price discrimination theory, the tying arrangement allows a monopolist to receive more for the bundle than she could by selling

76. See POSNER, *supra* note 62, at 198.

77. *Id.*

the tying and tied products separately. The theory assumes that the tying seller has market power over the tying product. In the absence of such power, if the tying seller tried to pursue this strategy she would fail.⁷⁸ Absent a tying conspiracy, a firm in a competitive market cannot engage in price discrimination through metering.⁷⁹ Consumers would not be willing to pay a supracompetitive price for the tied product, and would decline to enter a tying arrangement that required them to do so.⁸⁰ In short, absent coordination among competitors, each firm would charge the market price for its products and would not impose tie-ins that raise the price, lest its customers shop elsewhere. However, in the presence of collusion in which every seller of the tying product agreed to impose similar tie-ins, consumers could not evade the tie-in. The concerted effort provides the market power that makes the price discrimination possible, thus allowing the conspirators to charge more to those consumers with high reservation prices.⁸¹ Consumers will pay more for the bundle of goods than they would if there were competition in the tying and tied product markets, unrestrained by tying conspiracies. Furthermore, because the competitive price would be charged but for the conspiracy, the efficient quantity for both products would already be produced and sold. Price discrimination would not expand output; it would merely transfer revenue from consumers to colluders. Thus, assuming that the metering explanation of tying arrangements is correct, it follows that a tying conspiracy functions as a price-fixing agreement.

78. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 (7th Cir. 1985) ("It also may be possible to use tying arrangements to extract a higher profit through price discrimination. Both the extension of power and the practice of price discrimination are impossible unless the seller has substantial market power." (footnote omitted)).

79. A rational consumer aware of the long-term costs of the requirements contract would opt to purchase the tying product without the tying requirement and then purchase all units of the tied product on the open market. Consumers with high reservation prices prefer markets without price discrimination.

80. According to Chicago School theorists, a monopolist can overcome this consumer reluctance by reducing the monopoly price in order to convince its customers to accept the tying requirement. See Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 21 & n.8 (1957). The situation is different when a single tying seller does not possess monopoly power, and thus has no ability to charge the monopoly price in the first place.

81. For an analysis of the use of tying arrangements to create market power, see Kurt A. Strasser, *An Antitrust Policy for Tying Arrangements*, 34 EMORY L.J. 253, 266-73 (1985).

Additionally, a tying conspiracy can facilitate cartelization in several ways. First, a tying conspiracy can help conceal an underlying price-fixing agreement among competitors. The joint implementation of tying requirements may help conceal a cartel arrangement by obfuscating the prices of the individual tying and tied products.⁸² The Supreme Court has observed how tie-ins can result in consumer “inability to evaluate the true cost of either product when they are available only as a package.”⁸³ Further, because in many cases—especially requirements tie-ins—the tied product may be purchased in the distant future, it can be difficult for consumers to appreciate the total cost of the tie-in at the time that the tying arrangement is entered into.⁸⁴ All of this makes it harder for consumers to engage in price-comparison shopping and less likely that outsiders will suspect price collusion.⁸⁵

Also, tying conspirators need not fix price as traditional cartels do. Even if the conspirators do not agree on the prices each will charge for the tied product, the joint imposition of a requirements tie-in should serve to elevate the price levels in that market because each member of the conspiracy has a newfound power to engage in price discrimination through tying. As all firms simultaneously price discriminate, the real price for the bundle of the tying and tied products increases as each conspirator charges a supracompetitive price for the tied product, even without a separate specific agreement on price among the conspirators. This can decrease the opportunities for observing the cartel’s actions, which is important because frequent meetings among competitors—to set prices, change prices, and refine market share allocations in response to unforeseen circumstances—sometimes lead to cartel detection and conviction.⁸⁶ By eliminating the need for multiple meetings, a tying

82. See Leslie, *supra* note 1, at 1784-85 (“[A] tying arrangement can be used to obscure a traditional price-fixing scheme because the sellers can simultaneously impose tie-ins but charge different prices for the tying and tied product ... whereby the price for the bundle is the same.”).

83. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15 (1984), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

84. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 473 (1992).

85. See 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1712f, at 120 (2d ed. 2004) (explaining how a seller can employ a tying arrangement to “[d]eceptively understate price”).

86. See, e.g., CHRISTOPHER MASON, *THE ART OF THE STEAL: INSIDE THE SOTHEY’S-CHRISTIE’S AUCTION HOUSE SCANDAL* 352 (2004) (discussing how unexplained meetings with

conspiracy may reduce the probability of antitrust officials discovering and successfully prosecuting cartel activity.

A second, and perhaps more insidious, way in which tying conspiracies can facilitate horizontal price-fixing is that conspirators can use a concerted tying arrangement to stabilize a price-fixing cartel. Cartels are inherently unstable, as each member of the cartel can increase her profits by cheating on the cartel agreement (that is, reducing her price below the cartel's fixed level and selling more than her cartel allotment).⁸⁷ Cartels are much more stable if the members can find a way to detect and punish cheating.⁸⁸ Some tying requirements are structured so that the consumer must purchase the tied product from the tying seller unless the consumer can find the tied product at a lower price from another supplier.⁸⁹ In other words, the tying seller has a right of first refusal. Some scholars have argued that this form of tying arrangement can be a mechanism to detect cheating within a cartel.⁹⁰ Each firm charges the cartel price for the tied product and binds its customers to that cartel price unless the consumer can find a better deal. If the consumer finds someone charging a lower price for the tied product, she must report it to the tying seller in order to evade her obligation under the tying arrangement. The seller caught charging this lower price will then be subject to punishment by the cartel—such as fines or a retaliatory price war⁹¹—which are intended to erase the gains from cheating. By giving an incentive to consumers to police the cartel's agreement, this form of tying arrangement can help detect cheating and thus strengthen a cartel arrangement.

Finally, in addition to helping cartel members detect cheating, a tying conspiracy can stabilize a cartel in some instances by reducing the incentive to cheat. Once a customer has purchased its tying

a competitor were critical evidence in convicting an executive of price-fixing).

87. See Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 524-28 (2004).

88. See *id.* at 610-21.

89. See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958); *Int'l Salt Co., Inc. v. United States*, 332 U.S. 392, 396-97 (1947), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

90. See, e.g., F. Jay Cummings & Wayne E. Ruhter, *The Northern Pacific Case*, 22 J. L. & ECON. 329, 350 (1979) (noting that "Northern Pacific's traffic clauses aided in detecting whether other railroads were adhering to rate and service standards").

91. See Leslie, *supra* note 87, at 615-20.

product and has agreed to the tying requirement, each seller in the conspiracy has little incentive to cheat by lowering the price of the tied product because its customers are contractually obligated to buy the tied product from it. After the consumers are locked in, the tying seller can raise the price of the tied product and has little reason to monitor the prices of its putative competitors.

In sum, competitors can agree to impose tying arrangements in order to create, conceal, and stabilize illegal price-fixing cartels. Yet even in the absence of a separate price-fixing agreement, tying conspiracies have deleterious price effects by leading to more market concentration and facilitating a variety of price discrimination that does not expand market output.

b. Choice Effects

Antitrust also cares about preserving consumer choice. To the extent that antitrust exists to protect consumer welfare, it rightly should care about agreements that artificially reduce consumers' options. Choice serves consumers' interests in many ways:

All else being equal, consumers would prefer having a choice of suppliers or brands available to purchase. Even if differing brands are deemed equal in some overall price-quality assessment, individual buyers may prefer one brand's features over another. Large buyers often prefer to divide their purchases among available suppliers for reasons that may have nothing to do with quality or price differences. Over-reliance on a single supplier is perceived to raise business risks to the buyer. If a single source supplier has labor difficulties, imposes an abrupt price increase, has a fall-off in quality, or ... begins defaulting on critically timed deliveries, the buyer may face losses that could have been avoided had other suppliers been available and familiar with the buyer's needs.⁹²

Professor Robert Lande has persuasively argued that "choice-centered antitrust policy will support and lead to a more efficient market, the lowest prices, the best product quality and variety, the

92. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 15 (2d ed. 2006).

highest level of consumer surplus, and all the other benefits of a competitive economy.”⁹³ But choice is not praised merely by antitrust scholars; courts, too, have sometimes emphasized the critical role that choice plays in a free economy, and consequently in antitrust jurisprudence. For example, the Supreme Court has condemned horizontal “agreement[s] limit[ing] consumer choice by impeding the ‘ordinary give and take of the market place.’”⁹⁴ This concern is particularly visible in tying law.

Courts condemn tying arrangements in part because tie-ins reduce consumer choice. Once they agree to the tying requirement, consumers do not have the ability to choose freely among competing versions of the tied product. The Supreme Court has repeatedly condemned tying arrangements because of their effect on consumer sovereignty. In its 1953 *Times-Picayune* decision, the Court noted that, by imposing a tie-in, “a seller coerces the abdication of buyers’ independent judgment as to the ‘tied’ product’s merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the ‘tied’ product would convince freely choosing buyers to select it over others, anyway.”⁹⁵ Five years later, the Court condemned tying arrangements, in part, because “buyers are forced to *forego their free choice* between competing products.”⁹⁶ More recently, the *Jefferson Parish* Court reviewed its tying jurisprudence and noted that invalid tying arrangements had diminished consumer choice by “forc[ing] the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”⁹⁷

93. Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 504 (2001) (footnote omitted).

94. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)). Not surprisingly, sometimes Justices have failed to appreciate the importance of lost choice in antitrust. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 39-40 (1984) (O’Connor, J., concurring in the judgment) (“And in this unusual case, where flour is monopolized and sugar is useful only when used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.”), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

95. *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 605 (1953).

96. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958) (emphasis added).

97. *Jefferson Parish*, 466 U.S. at 12. More recently, the government emphasized the importance of diminishing choice through tie-ins in its brief in the *Microsoft* case. It argued that “Microsoft’s binding of [Internet Explorer] to Windows, in short, was pure bolting, which

While some may argue that choice is maintained because the consumer makes his decision about the tied product at the time he enters into the tying arrangement, the Supreme Court has explained that “from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product.”⁹⁸ By eliminating the consumers’ ability to choose, some consumers may be stuck with an inferior version of the tied product. The *Jefferson Parish* Court noted that when buying the tied product, consumers “are artificially forced to make a less than optimal choice” in that market.⁹⁹ Courts recognize this elimination of choice as an independent anticompetitive effect of tying arrangements.¹⁰⁰ Indeed, some judicial opinions have suggested that this reduction in choice is the *sine qua non* of tying illegality.¹⁰¹

Tying conspiracies increase the risk of diminished choice. When markets are competitive, a seller’s attempt at tying cannot diminish choice so long as consumers can purchase the tying product from an acceptable seller without the tying requirement, and thus be able to purchase the tied product from any supplier as well. However, a tying conspiracy makes it significantly harder for consumers to evade a tying requirement. If a lone seller imposes a tying arrangement, some consumers may accept the contractual term. But those individuals who wanted to purchase the tied product from another supplier, or those who would simply prefer not to be bound by a

caused the very harms targeted by tying law: substantial impairment of consumer choice on the merits between browsers, to the detriment of non-Microsoft browsers and the market as a whole.” Brief for Appellees-Plaintiffs at 44, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (Nos. 00-5212, 00-5213), available at <http://www.usdoj.gov/atr/cases/f7200/7230.htm>.

98. *Jefferson Parish*, 466 U.S. at 15.

99. *Id.* at 13 n.19 (1984) (quoting *Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I)*, 394 U.S. 495, 512-14 (White, J., dissenting)).

100. See, e.g., *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 684-85 (10th Cir. 1984) (“Tying also has an anticompetitive impact on buyers of the tied product, because their freedom of choice among products competing with the tied product is foreclosed.”).

101. See, e.g., *Jefferson Parish*, 466 U.S. at 27 (“Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.”); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1384 (5th Cir. 1994) (“[A] foreclosure of choice to an ultimate consumer appears to be the principal key to a tie that is illegal per se.” (quoting *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1297 (10th Cir. 1989))).

requirements tie-in, would have the option of purchasing the tying product from a competitor that did not impose a tie-in. Consumers would have a choice of whether to accept the tying condition and from whom they want to purchase the tied product. Consumer sovereignty in a competitive marketplace affords buyers the ability to select the most attractive deal and to not be bound on future purchases. In contrast, if that seller were to conspire with its competitors so that all sellers imposed similar tying requirements, consumer sovereignty would be nullified. At least one court has recognized that such a tying conspiracy "limits consumer choice and the free flow of commerce."¹⁰² Although antitrust "prevents business conduct that artificially limits the natural range of choices in the marketplace,"¹⁰³ this is precisely what competitors seek to do when they agree to simultaneously impose tying requirements. In sum, antitrust law should care about tying conspiracies, which necessarily reduce choice more than unilaterally imposed tie-ins do.

c. Reduced Innovation

Concerted tying arrangements also reduce conspirators' incentives to innovate in the tied product market. The incentives for improvement are highest when an innovator can lure a greater number of customers to buy the improved product. But tying requirements can interfere with the market rewards for innovating. A tying arrangement traditionally prevents consumers from buying an improved current version of the tied product from another seller.¹⁰⁴ The greater the number of consumers that are locked into their source for the tied product, the lower the potential rewards for creating a better version of the tied product. Once a sufficient percentage of consumers are locked into tying relationships, unable to shop among competing versions of the tied product, then makers of the tied product will have a marginally lower incentive to

102. *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1138 (8th Cir. 1981).

103. *Lande*, *supra* note 93, at 503-04.

104. *See Leslie*, *supra* note 18, at 788-91 (discussing tie-ins that allowed exit to superior versions of tied product).

innovate, because there are significantly fewer sales that they will be able to induce through a more attractive product.¹⁰⁵

A tying conspiracy amplifies any anti-innovation effect of a tie-in. Manufacturers have less incentive to improve their own versions of the tied products if a critical mass of customers is locked into purchasing from them regardless of quality. When a single seller in a relatively competitive market imposes a tying requirement, competing sellers of the tied product can still sell their wares to the majority of consumers who are not contractually obligated to buy the tied product from a tying seller. But as the number of sellers imposing tying requirements increases, the number of consumers able to purchase the tied product in the free market decreases. While an individual seller may be reticent to impose a tying requirement unilaterally—lest it lose its customers—the sellers as a group may feel emboldened to force their respective customers to accept the tie-in because the conspirators know that consumers desiring the tying product will have no meaningful choice and that this consumer acquiescence should also dry up the free market in the tied product. In short, this high level of consumer lock-in is more likely to be achieved when competitors jointly impose tying requirements. If new entrants are likely to be innovators and tying conspiracies create barriers to entry, then a side effect of the conspiracy may be reduced innovation in the tied product market. Not only does this deter new innovators from entering the market, but the agreement also provides another advantage to tying conspirators. If manufacturers know that their competitors have similarly reduced incentives to innovate, then all can enjoy one of the chief downsides of monopoly: sloth. Just as Judge Learned Hand wrote “that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy,”¹⁰⁶ the collective decision of competitors to erect barriers to entry, by colluding in imposing a tie-in, protects them from innovation both by potential new entrants and their colluding competitors, and thus discourages their own efforts at innovation.

105. See SULLIVAN & GRIMES, *supra* note 92, at 15-16 (“Preserving consumer choice is also important because it ensures a market structure conducive to innovation and technological improvement”).

106. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

3. *Conspiracies and the Probability of Tying*

In addition to magnifying the harms of tying arrangements, tying conspiracies also increase the probability that a firm will pursue a tying strategy. The fact that tie-ins can serve as barriers to entry provides a strong motive for competitors to form a tying conspiracy. Rivals in any given market share a common interest in excluding new competitors by creating barriers to entry. When existing firms agree to impose the same tying arrangement, this makes any barrier to entry even higher.¹⁰⁷ If a firm decides that it is going to insert tying clauses in its sales contracts, then it is better off if its rivals impose similar requirements. If the consumer objected to a lessor's tying arrangement, the consumer could not simply shift to another manufacturer, because the competing lessors imposed the same onerous condition. Consequently, a firm is more likely to attempt a tying arrangement if it has some assurances from its competitors that they will follow suit. Furthermore, because of the nature of group behavior, a firm that implements a tying arrangement pursuant to a conspiracy among competitors may be less likely to abandon the tying requirement.¹⁰⁸ To the extent that concerted tying arrangements disrupt markets with or without a corollary cartel agreement, antitrust law should discourage agreements among competitors to introduce tie-ins.

III. THE FAILURE TO APPRECIATE THE ANTICOMPETITIVE THREAT OF TYING CONSPIRACIES

Neither tying law nor antitrust scholarship currently recognizes the unique anticompetitive risks of tying conspiracies. But this was

107. See William B. Lockhart & Howard R. Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 922 (1952) ("Moreover, regardless of purpose, such arrangements may have that effect. Established firms may tie up so many of the better market outlets that a newcomer may find it difficult to break into the field." (footnote omitted)); see also *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 515 (E.D.N.Y. 2003) ("As part of their section 1 tying claim, plaintiffs argued that defendants' exclusionary rules created barriers to entry in the market for credit card services, thus solidifying defendants' power in that market and their ability to force merchants to accept their debit cards.").

108. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1315 (2003).

not always the case. The government's initial case against IBM and Remington Rand shows some early appreciation of the anti-competitive risks of concerted tying arrangements.¹⁰⁹ By the time the case reached the Supreme Court, however, the conspirators had agreed to terminate their agreement and, thus, the Court barely mentioned the concerted action between IBM and Remington. Although the Court notes that

[t]he agreed use of the "tying clause" by appellant and its only competitors, and the agreement by each of them to restrict its competition in the sale of cards to the lessees of the others, have operated to prevent competition and to create a monopoly in the production and sale of tabulating cards suitable for appellant's machines,¹¹⁰

it neither explicitly condemns the agreement as such, nor hints at why a concerted tying requirement imposed by both IBM and Remington Rand offended the antitrust laws more than individually implemented tie-ins.

In the post-*IBM* world, federal prosecutors do not appear as concerned about tying conspiracies. The credit card/debit card tying case shows how the government has mellowed. Although antitrust class action litigation often follows government prosecutions, in the case of the Visa and MasterCard tying policies the government's investigation and litigation followed on the private lawsuit.¹¹¹ But unlike the private plaintiffs, the government did not pursue the tying conspiracy cause of action. There appears to have been evidence to support such a claim.¹¹² The plaintiff's claim was strong

109. However, the Federal Trade Commission (FTC) had earlier declined to issue a complaint against the tying policies of IBM and Remington Rand, though whether the two firms had any actual agreement at the time is unclear. See *United States v. IBM Corp.*, 13 F. Supp. 11, 17-19 (S.D.N.Y. 1935). The application to the FTC to institute a proceeding was made in 1927. The district court mentioned an agreement between the two competitors made in 1931. If the 1931 agreement was their first agreement, then the FTC would not have had an allegation of concerted action. *Id.*

110. *IBM Corp. v. United States*, 298 U.S. 131, 135-36 (1936).

111. *Visa Check/Mastermoney*, 297 F. Supp. 2d at 524 n.31 ("[T]he government piggybacked on Class Counsel's efforts. Two years after [the private class] action was filed, the Federal Trade Commission began investigating the practices of defendants Based in part on this information, the Department of Justice filed its lawsuit against Visa and MasterCard based on their exclusionary practices.").

112. For example, class counsel alleged that there was "a 95 percent overlap between Visa's

enough to help lead to the largest antitrust settlement ever. Yet still the government did not argue a tying conspiracy claim against Visa and MasterCard.

Even when private plaintiffs do allege tying conspiracies, courts fail to recognize the distinction between concerted tying arrangements and unilateral tying arrangements. Courts evaluating tying conspiracies employ the traditional elements for determining the legality of unilaterally imposed tying arrangements.¹¹³ For example, courts have employed *Jefferson Parish* to dismiss or reject tying conspiracy claims without even acknowledging that the *Jefferson Parish* Court laid out a legal test for evaluating a tying requirement imposed by a single seller, not a conspiracy among competitors to use tying arrangements.¹¹⁴ Thus, when reversing district court dismissals of tying conspiracy claims, appellate courts in the cemetery cases generally failed to recognize or emphasize that the

and MasterCard's memberships, and virtually every retailer that accepts one of defendants' credit cards also accepts the other's credit cards. Additionally, as a result of the duality policy, Visa and MasterCard coordinate many of their policies." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 130 (2d Cir. 2001).

113. See, e.g., *In re Visa Check/MasterMoney Antitrust Litig.*, No. 96-CV-5238 (JG), 2003 WL 1712568, at *2 (E.D.N.Y. Apr. 1, 2003) ("The merchants claim that Visa and MasterCard, acting independently and jointly in a conspiracy, employ illegal tying arrangements that leverage their power in the credit card services market to force the merchants to accept their debit cards.... To show that such an arrangement is illegal under the per se test, the merchants must establish four elements: '(1) that the tying arrangement affects a substantial amount of interstate commerce; (2) the two products are distinct; (3) the defendant actually tied the sale of the two products; and (4) the seller has appreciable market power in the tying market.'" (quoting *In re Visa Check/MasterMoney*, 280 F.3d at 133 n.5)); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n*, 629 F. Supp. 1002, 1008 (D. Kan. 1986); see also *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n*, 891 F.2d 1473, 1482-83 (10th Cir. 1989) (discussing the elements).

114. See *Monument Builders*, 629 F. Supp. at 1008-09.

For example, in *Marian Bank v. Electronic Payment Services, Inc.*, No. Civ.A. 95-614-SLR, 1997 WL 811552 (D. Del. Dec. 30, 1997), the complaint alleged a "conspiracy to impose an illegal tying arrangement," yet the court applied the basic test for unilaterally imposed tying arrangements, requiring the plaintiff to "prove (1) that the tied and tying products are separate, distinct products/services; (2) the seller has 'appreciable economic power' in the tying product; and (3) the tying arrangement affects a substantial amount of commerce in the tied market." *Id.* at **20-21 (footnote omitted). Even though the tying arrangement alleged was concerted, not unilateral, the court continued to use the singular definition of a tying arrangement—"an agreement by a party to sell one [tying] product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at *21 (emphasis added) (alteration in original) (quoting *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992)).

agreement was the violation; instead, the courts simply held that the plaintiffs had sufficiently pled the elements of a traditional tying claim.¹¹⁵

This has meant that courts require plaintiffs in tying conspiracy cases to prove that the defendant possessed economic power over the tying product. In its most recent tying opinion, *Illinois Tool Works v. Independent Ink, Inc.*, the Court stated that plaintiffs challenging a tying arrangement imposed pursuant to “a market-wide conspiracy” must prove that the defendants had market power over the tying product, just as they would if the tie-in were imposed by a single firm.¹¹⁶ The Court’s dicta implies that concerted tying arrangements are to be treated the same as traditional tying arrangements. State courts, too, have required proof of market power in cases of tying conspiracies.¹¹⁷ In the end, many courts fail to understand that a tying conspiracy fundamentally changes the nature of the section 1 violation.¹¹⁸

Some courts fail to even conceive of the possibility of tying conspiracies. For example, the Seventh Circuit used language suggesting that tying cannot be the result of conspiracy when it opined that “[t]ying is not cooperation among competitors, the focus of § 1, it is aggressive conduct akin to monopolization under § 2 of the Sherman Act.”¹¹⁹ More shockingly, courts have suggested that only the agreement between the tying seller and its victim—the buyer—matters, not any agreement among competitors. In one case alleging a concerted tying arrangement, the court incorrectly asserted:

Whether or not such a conspiracy existed, the restraint of trade which must be proven in a tying case is an agreement, express or implied, between buyer and seller whereby the latter “sell[s]

115. See *Monument Builders*, 891 F.2d at 1484.

116. 126 S. Ct. 1281, 1291 (2006).

117. See, e.g., *Silkworth v. Cedar Hill Cemetery*, No. 694, 1993 WL 122104, at *3 (Md. Ct. Spec. App. Feb. 11, 1993) (per curiam) (“A plaintiff alleging a *per se* illegal tying arrangement must allege ... that the defendants possess significant market power in the ‘tying’ product”).

118. See, e.g., *Rental Car of N.H., Inc. v. Westinghouse Elec. Corp.*, 496 F. Supp. 373, 380 (D. Mass. 1980) (“Proof of conspiracy in a tying arrangement case would not relieve plaintiff of the burden of proving the illegality of the tie.”).

119. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669 (7th Cir. 1985).

one product but only on the condition that the buyer also purchases a different (or tied) product" Proof of a "conspiracy" as suggested by plaintiffs would not establish the requisite agreement between buyer and seller, the gravamen of this case.¹²⁰

The court misses the point of section 1 entirely. While the sales agreement between buyer and seller may be the traditional way of satisfying section 1's agreement element,¹²¹ collusion among competitors is worse than an agreement between buyer and seller. Indeed, anticompetitive collusion among competitors is precisely what section 1 was designed to punish and deter.

Such judicial misconceptions of tying conspiracies may make it harder to condemn a concerted tying arrangement than to invalidate a mere unilateral tie-in. In the case of the former, the plaintiff must prove the tying conspiracy and then all of the elements of a traditional tying claim. For example, when the Eighth Circuit evaluated the tie-ins imposed by cemeteries, the court applied the tying per se rule to the individual tie-ins and the traditional Rule of Reason analysis to the agreement among competing cemeteries to impose the tying requirements.¹²² As a result, the court did not require the plaintiff to prove an actual anticompetitive effect of the individual tying arrangements, but did require the plaintiff to prove the anticompetitive effects of the concerted tying arrangement. This is fundamentally inconsistent with the entire foundation of the Sherman Act, which condemns concerted action more readily than unilateral conduct.¹²³ Although the Eighth Circuit reached the correct result by condemning the tie-ins and the agreement,¹²⁴ under the court's reasoning it is easier to condemn a unilaterally imposed tying arrangement than a concerted tying arrangement.

The remedies pursued and imposed in tying conspiracy cases also indicate the prosecutors' and judiciary's failure to appreciate the

120. *Abercrombie v. Lum's Inc.*, 345 F. Supp. 387, 391 (S.D. Fla. 1972) (alteration in original) (emphasis omitted) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

121. See, e.g., *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1145 (10th Cir. 1997) (en banc).

122. *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1137 n.4 (8th Cir. 1981).

123. See *supra* notes 5-8 and accompanying text.

124. *Rosebrough Monument*, 666 F.2d at 1146.

anticompetitive effects wrought by concerted tying arrangements. The government did not seek damages against IBM and Remington Rand for conspiring to tie tabulating machines to tabulating cards. Instead, a simple consent decree was entered into. Even in *Rosebrough Monument*, a case in which the plaintiff prevailed on liability,¹²⁵ the Eighth Circuit ordered only nominal damages of \$1 trebled to \$3.¹²⁶ Instead, the plaintiff received injunctive relief.¹²⁷ But injunctive relief does not disgorge ill-gotten gains. The results in *IBM* and *Rosebrough Monument* make tying conspiracies appear cost-beneficial: constrain competition by colluding to tie and then stop when challenged. Neither of these cases demonstrates a serious approach to concerted tying arrangements.

A major problem in getting courts and scholars to take tying conspiracies more seriously has been the Chicago School-influenced assumptions about marketplace efficiency. Some courts conclude that if an industry is characterized by sellers imposing similar tying clauses, then the tying arrangement must be efficient. For example, some judges assume that the presence of multiple tying arrangements “implies strong net efficiencies.”¹²⁸ The assumption is that a firm would not adopt a particular marketing strategy unless it was efficient. Although an individual firm may make a miscalculation, multiple firms in an industry are unlikely to do so. So it follows that when most of the major players in a market are pursuing tying strategies, tie-ins must be efficient. Unfortunately, this line of reasoning makes a critical assumption: each firm unilaterally decided to impose a tying requirement.

Ubiquity can be evidence of either efficiency or collusion. Concerted tying arrangements can be profit-maximizing for each conspirator. The fact that many firms in an industry have imposed similar tying requirements is as consistent with cartel behavior as it is with the efficiency hypothesis. The presence of multiple tie-ins in a market may be evidence of concerted action in the same way

125. *Id.* at 1130.

126. *Id.* at 1147; see *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 736 F.2d 441, 443 (8th Cir. 1984).

127. *Rosebrough Monument*, 666 F.2d at 1147-48; see *Rosebrough Monument*, 736 F.2d at 443 (modifying the injunctive relief).

128. *United States v. Microsoft Corp.*, 253 F.3d 34, 88 (D.C. Cir. 2001) (*per curiam*) (“[B]undling by all competitive firms implies strong net efficiencies.”).

that uniform price hikes are ubiquitous in cartelized markets. The assumption that ubiquity proves efficiency is inconsistent with the entire purpose of section 1 of the Sherman Act: to condemn agreements among competitors to pursue anticompetitive policies in unison. Courts would not conclude that uniform, lock-step increases in price prove that price increases must be efficient. Instead, if such an action is done pursuant to an agreement, the firms have committed a felony and should be sentenced to up to ten years in prison.¹²⁹

Of course, the mere fact that competing firms have imposed similar tying requirements is insufficient to establish an agreement in restraint of trade. Even if each firm is aware that its competitors are imposing tie-ins, conscious parallelism alone does not prove an agreement in restraint of trade.¹³⁰ The plaintiff must also show the presence of "plus factors," factors that support the inference that firms adopted the same policies pursuant to an agreement.¹³¹ The same plus factors that are sufficient to establish an agreement to fix prices should be relevant to proving an agreement between competitors to impose tying arrangements. Indeed, one of the traditional plus factors may be present as a matter of course in tying cases: whether the parallel conduct represents a radical change in policy.¹³² In contrast to price fluctuations, which are inherent in all markets, the sudden imposition of tying clauses by market participants is a strong plus factor. But more than one plus factor is required: For example, did the competing firms impose or announce their tying policies at the same time? Was there evidence of communications between the alleged conspirators? Finally, most importantly, would the change in policy be irrational if adopted unilaterally, or does it only make sense in the context of a conspiracy among competitors?

129. Sherman Act, 15 U.S.C. § 1 (2000).

130. See, e.g., *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991).

131. *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)); *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995) (citing *Todorov*, 921 F.2d at 1456).

132. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 222 (1939).

IV. THE PROPER LEGAL TREATMENT OF TYING CONSPIRACIES

Antitrust jurisprudence should reflect the heightened anti-competitive threats posed by concerted tying arrangements by condemning them more swiftly than traditional unilaterally imposed tying arrangements. While the latter are nominally *per se* illegal, tying conspiracies should be truly *per se* illegal.

A. Per Se Principles

Courts generally employ one of three modes of analysis when determining whether a challenged agreement violates section 1 of the Sherman Act: the *per se* rule, the Rule of Reason, or the abbreviated Rule of Reason, also known as “quick look.” Once a court concludes that a challenged agreement falls in a *per se* category, it relieves the plaintiff of having to prove the actual anticompetitive effects of the defendant’s conduct. If an agreement is not *per se* illegal, it can still violate section 1 if the court—applying either the full-blown or abbreviated rule of reason—determines that the agreement’s anticompetitive effects outweigh any procompetitive redeeming virtues.

Although the Supreme Court has never laid down a clear rule of law for what conduct falls in the *per se* category, it has articulated several principles for when agreements are *per se* illegal. First, *per se* condemnation is reserved for concerted action “that would always or almost always tend to restrict competition and decrease output.”¹³³ In its most recent pronouncement on the subject, the Court noted that “[*per se* liability is reserved for only those agreements that are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’”¹³⁴

Second, the *per se* rule is supposed to be based on judicial experience. The Court has explained that “[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.”¹³⁵ The *per se*

133. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

134. *Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

135. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972); see *Broad. Music*,

rule is essentially a prediction about what would happen if the court applied a Rule of Reason to the type of restraint at issue.¹³⁶ As the Court explained in *Arizona v. Maricopa County Medical Society*, "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the Rule of Reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."¹³⁷ Conversely, the Court has reasoned that a lack of judicial experience can save an agreement from per se condemnation, leaving the restraint to be evaluated under the Rule of Reason.¹³⁸ The Court has also held that experience acquired after a type of agreement has earned the per se label can justify removing a particular restraint from the per se category.¹³⁹

Third, courts consider whether the category of restraint likely has countervailing procompetitive features that warrant closer examination. In describing those agreements subject to per se condemnation, the Justices have reasoned that "there are certain agreements or practices which because of their pernicious effect on competition and *lack of any redeeming virtue* are conclusively presumed to be

441 U.S. at 9 (quoting *Topco*).

136. *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 88 (5th Cir. 1978) ("The usual assumption is that a per se rule would grow out of a history of Rule of Reason cases all arriving at the same verdict.").

137. 457 U.S. 332, 344 (1982); see also *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (quoting *Maricopa County*); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (same); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) (same).

The abbreviated Rule of Reason is based on experience as well. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999) ("The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.").

138. See, e.g., *Broad. Music*, 441 U.S. at 10 ("[E]xperience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade."); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 377 (1933) ("Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership."); cf. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984) ("[W]e have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement").

139. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 48-49 (1977) (removing nonprice vertical restraints from per se condemnation, arguing that "[i]n our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance"); see *State Oil*, 522 U.S. at 13-14 (quoting *Continental T.V.* and invoking experience to remove vertical maximum price-fixing from per se category).

unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”¹⁴⁰ Stated another way, Justice O’Connor argued that the *per se* rule’s sweeping prohibition of a particular category of restraint is only appropriate “when there is very little loss to society from banning a restraint altogether.”¹⁴¹ The judicial experience often involves an understanding that the particular category of restraint empirically lacks a legitimate business justification unrelated to the suppression of competition.¹⁴²

Fourth, the characteristics of the challenged restraint are important in determining whether to impose *per se* liability. Courts are more willing to place a restraint in the *per se* category when the agreement is horizontal, that is, between competitors.¹⁴³ Vertical agreements are evaluated under the Rule of Reason,¹⁴⁴ with the exception of vertical minimum price-fixing.¹⁴⁵ Agreements on price are much more likely to be condemned under the *per se* rule than concerted action without price agreements.¹⁴⁶

Finally, the Court has on occasion exhibited a hesitance to expand *per se* rules. Most notably, the Court has repeatedly “expressed reluctance to adopt *per se* rules ... ‘where the economic impact of certain practices is not immediately obvious.’”¹⁴⁷ The shift of nonprice vertical restraints¹⁴⁸ and vertical maximum price-fixing¹⁴⁹ out of the *per se* rule and into Rule of Reason analysis also reflects

140. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (emphasis added).

141. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 33-34 (1984) (O’Connor, J., concurring in the judgment), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

142. *See White Motor Co. v. United States*, 372 U.S. 253, 265 (1963) (Brennan, J., concurring) (“Specifically, the *per se* rule of prohibition has been applied to price-fixing agreements, group boycotts, tying arrangements, and horizontal divisions of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition.”).

143. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

144. *See Cont’l T.V.*, 433 U.S. at 59.

145. *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).

146. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735-36 (1988).

147. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986)); *see Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279 (2006) (quoting *State Oil*).

148. *Cont’l T.V., Inc.*, 433 U.S. at 59.

149. *State Oil Co.*, 522 U.S. at 22.

a judicial ambivalence about per se condemnation when the anticompetitive effects of agreements are unclear.¹⁵⁰

B. The Case for Condemning Tying Conspiracies as Per Se Illegal

There is not an established rule in antitrust law that agreements among competitors to impose tie-ins are per se illegal.¹⁵¹ Without explanation, courts have applied Rule of Reason analysis to tying conspiracies, not explaining why they were not using per se analysis.¹⁵² This Section explains why antitrust jurisprudence and logic both counsel in favor of condemning tying conspiracies as per se illegal.

The failure to condemn tying conspiracies as per se illegal seems odd because they have all of the hallmarks of per se illegal conduct. First, tying conspiracies “always or almost always tend to restrict competition and decrease output” in the market for the tied product.¹⁵³ As explained in Part II, agreements among competitors to impose tying requirements have a pernicious effect on competition by erecting barriers to entry into both the tying and tied product markets.¹⁵⁴ Tying conspiracies subject consumers to

150. See *State v. Lawn King, Inc.*, 417 A.2d 1025, 1034 (N.J. 1980) (“The general thrust of the subsequent decisions interpreting *Sylvania* is that the Supreme Court’s ruling in that case ‘evinces judicial reluctance to extend *per se* rules under [the Sherman Act].’” (quoting *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir. 1979)) (alteration in original)).

151. Declaration of Professor Harry First, *In re Visa Check/MasterMoney Antitrust Litig.*, No. CV-96-5238 (E.D.N.Y. Aug. 13, 2003). In theory, the lack of a clear per se rule against tying conspiracies makes it more difficult for antitrust plaintiffs to initiate litigation with confidence, particularly in the context of class action lawsuits in which class counsel needs to represent a strong possibility of prevailing at trial in order to put more pressure on antitrust defendants to increase settlement offers. This does not appear to have been a significant problem in *In re Visa Check/MasterMoney Antitrust Litigation*, in which the class counsel negotiated a multibillion settlement when one of the claims included allegations of a concerted tying arrangement. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 129, 136 (2d Cir. 2001).

152. See *Rosebrough Monument Co. v. Mem’l Park Cemetery Ass’n*, 666 F.2d 1130, 1137 n.4 (8th Cir. 1981) (employing traditional Rule of Reason analysis).

153. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)).

154. In theory, there can be competition at the level of the bundled package. But competition among bundles does not solve the barriers to entry problem. First, the conspiracy excludes from the market those sellers who do not sell both products. Second, the bundle may not be the relevant level of competition because consumers may want to purchase the tying product from one supplier and the tied product from another (who has been eliminated from

unwanted contract terms that cannot be avoided since rival firms have conspired to impose the same onerous tying requirements. Such conspiracies often increase the total price that consumers pay for bundled goods, and they may stabilize and help conceal secret cartel agreements, which are themselves *per se* illegal.

Tying conspiracies resemble other *per se* illegal categories of conduct. For example, horizontal price-fixing agreements are *per se* illegal.¹⁵⁵ Tying conspiracies operate as a price-fixing mechanism. A higher price for the tied product is often being imposed on consumers pursuant to a horizontal agreement. Further, to the extent that a horizontal tying conspiracy operates as an agreement to jointly price discriminate,¹⁵⁶ it warrants *per se* condemnation as well.¹⁵⁷ Firms cannot agree to charge high prices to high-volume purchasers and lower prices to low-volume purchasers. The Supreme Court has recognized that *per se* illegal price-fixing can take a variety of forms beyond mere agreement among competitors to charge a specific price, including agreements not to extend credit¹⁵⁸ and agreements to remove surplus products from the market.¹⁵⁹ Tying conspiracies should be added to this list.

A tying conspiracy can also be analogous to customer division. Horizontal agreements to allocate customers are *per se* illegal.¹⁶⁰

the market by the conspiracy). Or, they may want to purchase only the tying product and not the tied product at all. Third, consumers are denied the ability to construct their own bundles. Antitrust law does not allow competitors to get together and decide what consumers should want; consumers do this through the marketplace. See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *Nat'l Soc'y of Prof'l Engr's v. United States*, 435 U.S. 679, 694-96 (1978).

155. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 400-02 (1927).

156. See *supra* notes 77-82 and accompanying text.

157. See *Zoslaw v. Columbia Broad. Sys., Inc.*, 533 F. Supp. 540, 553 (N.D. Cal. 1980) ("In the absence of a horizontal conspiracy to charge different prices or a vertical agreement to exclude competitors, price discrimination does not support a claim under section 1 of the Sherman Act."), *aff'd on this ground, rev'd in part on other grounds*, *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870 (9th Cir. 1982).

158. *Catalano*, 446 U.S. at 650 (condemning agreement to not extend credit as *per se* illegal price-fixing).

159. See *Socony-Vacuum*, 310 U.S. at 220-21.

160. See *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) ("Horizontal agreements to allocate markets among competitors are *per se* violations of § 1 of the Sherman Act." (citing *United States v. Topco Assocs.*, 405 U.S. 596 (1972))); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th

But with a tying conspiracy, customers are in fact divided along the following lines: each firm sells the tied product to customers that have purchased the tying product from it, and not to customers who have purchased the tying product from another member of the conspiracy. After the tying relationships are entered into, the tying sellers are not competing with each other for customers in the tied product market.¹⁶¹

Finally, in some ways a tying conspiracy resembles a per se illegal group boycott. In *FTC v. Superior Court Trial Lawyers Association (SCTLA)*, the Court characterized an agreement as a per se illegal group boycott when lawyers said, in effect, "we won't provide services unless you agree to our terms"—in that case a wage increase.¹⁶² Similarly, with tying conspiracies, the sellers are collectively saying "we won't provide tying products unless you agree to our terms"—that the buyer agree to purchase the tied product as well. A tying conspiracy involves a comparable instance of competitors agreeing to concentrate their economic power and target it against consumers, the precise type of agreement that the *SCTLA* Court held to be per se illegal.

These analogies suggest that treating tying conspiracies as unreasonable as a matter of law does not create a new category of per se illegality; it merely recognizes that this type of antitrust conspiracy falls within existing categories of per se condemnation. Indeed, concerted tying agreements arguably pose an even greater anticompetitive threat because they combine two separate antitrust violations—tie-ins and conspiracies—both of which individually raise serious antitrust concerns.

In short, to the extent that tying conspiracies increase price and reduce consumer choice, this type of conduct always or almost

Cir. 1994); see also *United States v. Goodman*, 850 F.2d 1473, 1477 (11th Cir. 1988) ("Undoubtedly, the government is correct that a customer allocation agreement is a *per se* violation of the Sherman Act, and therefore pricing is not relevant."); *Johnson v. Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 181 (E.D. Tenn. 1940) ("That an agreement not to sell to a particular person or class of persons is unlawful under the Sherman Act has long been established.... To fix customers in agreement with others is inherently as bad as to fix prices. Both stifle competition, and lead to monopolistic power.").

161. Customers desiring the tied product but not subject to a tying requirement would be fair game.

162. See 493 U.S. 411, 436 (1990) (finding the per se rule applicable).

always will negatively affect competition. That is sufficient to make such agreements *per se* illegal.

Second, tying conspiracies should satisfy the criterion of judicial experience. As an initial matter, having decided hundreds of tying cases, federal courts understand tying arrangements generally. Federal courts have had almost a century of experience examining hundreds and hundreds of cases of traditional tying arrangements.¹⁶³ Judges understand the concept of tying and how, in some cases, it can injure competition. Indeed, courts have had experience with tying conspiracies, even if they have not adopted a uniform nomenclature. In these cases, those courts that have examined the anticompetitive effects have recognized that these horizontal agreements do, in fact, unreasonably restrain competition.¹⁶⁴ Furthermore, a tying conspiracy is not so much a new type of restraint, as it is a combination of well-known types of restraints with which courts have significant experience: horizontal price-fixing and customer allocation. Federal courts have accumulated over a century of experience examining and condemning such horizontal restraints. Appreciating the anticompetitive effects of combining these two forms of anticompetitive conduct takes little effort. In sum, courts know enough about tying arrangements—and anticompetitive conspiracies in general—that they can easily understand the anticompetitive effects of tying conspiracies.

Third, agreements among competitors to impose tying arrangements would seem to lack any redeeming virtue. Although some may argue for the efficiency of tie-ins in general,¹⁶⁵ such arguments do not consider concerted tie-ins. Even if unilaterally imposed tying arrangements may be defensible, there is no need for competitors to agree with each other to implement tying policies. If tying arrangements were truly efficient, competitors would not need to agree to impose them.

Fourth, tying conspiracies bear the characteristics of those restraints that make up the bulk of *per se* illegal conduct. Whereas traditional tying arrangements are vertical, agreements among

163. See, e.g., *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936) (*per curiam*).

164. See, e.g., *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1140-41 (8th Cir. 1981).

165. See *infra* notes 195-206 and accompanying text.

competitors to impose tying arrangements are clearly horizontal, by definition. As such, they should be subject to more harsh treatment. Moreover, tying conspiracies are arguably price-related. Although tying conspiracies need not set the price for either the tying or tied product, they have the effect of increasing price.¹⁶⁶ Consumers are injured by—and the conspirators profit from—these price effects.

In addition to satisfying the stated criteria for per se illegality, a per se rule against tying conspiracies has several additional advantages. First, one virtue of the per se rule is certainty. As long as a per se category is well-defined, firms can reasonably predict whether their conduct will suffer swift condemnation. This clarity is good for both potential defendants and plaintiffs. Firms should know that entering such agreements will result in antitrust liability. With a per se rule in place, firms will be less likely to engage in tying conspiracies, making actual application of per se condemnation less necessary. The certainty of a per se rule should also encourage consumers to bring appropriate suits when they discover that they have been victimized by a tying conspiracy.

Second, per se illegality helps compensate for the difficulty in discovering tying conspiracies. Victims of antitrust conspiracies are often unaware of the underlying violation. For example, price-fixing is often effectively concealed from both antitrust prosecutors and consumers, because the colluders take great strides to hide their cartel activities, including having secret meetings and using code names.¹⁶⁷ Similarly, although unilaterally imposed tying requirements in the marketplace may be easy to spot, it takes considerably more effort to uncover tying conspiracies.

Finally, tying conspiracies should necessarily be treated more harshly than traditional tie-ins because concerted action is more dangerous than unilateral conduct. Fundamental to the entire structure of American antitrust law is the fact that concerted action is to be “judged more sternly than unilateral activity.”¹⁶⁸ The Supreme Court has long noted that an act that is harmless when performed by one dealer “may become a public wrong when done by

166. See *supra* notes 77-88 and accompanying text.

167. See, e.g., JOHN HERLING, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* 82-83 (1962).

168. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

many acting in concert.”¹⁶⁹ So it is with tying conspiracies: a concerted tying arrangement is inherently more dangerous than a unilaterally imposed tying arrangement because the conspiracy can create market power where none existed previously.¹⁷⁰ All of the potential anticompetitive risks of a tying arrangement are magnified when competitors agree to impose tying requirements. Firms that do not have sufficient market power to impose a tying arrangement unilaterally may have such power when they act in concert. Such collusion is particularly dangerous because, unlike illegal monopolization, which takes time, a tying conspiracy represents near-instantaneous acquisition and exercise of market power by the conspirators in the aggregate. Furthermore, tie-ins imposed pursuant to a conspiracy are less likely to be procompetitive or efficient. Otherwise, the firms would have implemented the tying requirements without the agreement. Most importantly, competitors’ joint implementation of tying requirements reduces and can even eliminate consumers’ ability to evade the tie-in by purchasing the tying product from another seller. This increases both the exclusionary and anticonsumer effects of tie-ins. Antitrust jurisprudence should reflect this asymmetry in anticompetitive risks by evaluating tying conspiracies more harshly than tie-ins imposed by a single seller.

All of these arguments should overcome the courts’ stated reluctance to expand *per se* categories. Although there may be a concern that a *per se* rule could condemn beneficial agreements, what are the beneficial effects of competitors agreeing to impose tying arrangements that would be lost under a *per se* rule against tying conspiracies? When tie-ins are net beneficial, individual firms acting independently can still employ them.

Proposing a stricter rule for concerted tying arrangements might seem unnecessary because tying arrangements are already subject to *per se* condemnation.¹⁷¹ But the so-called *per se* rule applied to

169. *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914) (quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440 (1910)).

170. See *Copperweld*, 467 U.S. at 769 (“In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.”).

171. See *Jefferson Parish Hosp. Dist. No. 2, v. Hyde*, 466 U.S. 2, 15-16 (1984), *abrogated in part on other grounds* by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284

traditional tying arrangements is not a *per se* rule at all.¹⁷² It requires proof of defendant's market power over the tying product, allows the defendant to argue that its tie-in was justified, and—in some circuits—requires the plaintiff to prove by a preponderance of the evidence that the tying arrangement had anticompetitive effects.¹⁷³ I propose a true *per se* rule for tying conspiracies, such that after the plaintiff has proven an agreement among competitors to impose tie-ins, the plaintiff need not prove market power or effects to establish liability.¹⁷⁴ Finally, the defendant should not be able to escape liability by arguing that it had a legitimate business justification for the tie-in, as the following section explains in greater detail.

C. Naked Tying Conspiracies Versus Ancillary Restraints

A word of caution is necessary about what constitutes a tying conspiracy, and, thus, when the *per se* rule is properly invoked. The tying conspiracies analyzed in Part II were naked conspiracies, agreements among independent competitors to impose onerous conditions on their customers. The issue becomes more complicated when the agreement to impose tying requirements occurs within the context of a legitimate joint venture comprised of otherwise competing firms. In determining whether to apply the *per se* rule, antitrust law distinguishes between naked and ancillary agreements.¹⁷⁵ Whereas naked restraints are condemned as *per se* illegal,

(2006).

172. See *id.* at 34 (O'Connor, J., concurring in the judgment) ("The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect.").

173. *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000) (stating five elements, including "anticompetitive effects in the tied market," required for a tying claim (quoting *Gonzalez v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1516-17 (2d Cir. 1989))); see also *Jefferson Parish*, 466 U.S. at 34 (1984) (O'Connor, J., concurring in the judgment) ("The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.").

174. Of course, the plaintiff would still have to prove causal antitrust injury and calculate damages. See *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 n.15 (6th Cir. 2003) ("Our conclusion that the Agreement was a *per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury.").

175. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 7-9 (2006).

a restraint that is ancillary to an overall procompetitive arrangement can evade both per se condemnation and, perhaps, antitrust liability altogether.¹⁷⁶ Even with horizontal price-fixing—the quintessential per se illegal violation—courts have distinguished between naked agreements and those restraints ancillary to legitimate procompetitive collaborations.¹⁷⁷

Some ancillary restraints may appear to be tying conspiracies, but are not. For example, local associations of realtors generally maintain policies that some might characterize as a form of concerted tying. Real estate agents often combine through realtor associations to create a multiple listing service (MLS), in which all of the available properties in a particular geographic area are listed in a centralized registry. Realtor associations commonly require membership in the National Association of Realtors or similar local boards as a prerequisite to allowing a real estate agent access to a multiple listing service. Some real estate agents have brought antitrust suits challenging the membership requirements as illegal tying arrangements, with access to the MLS as the tying product; and membership in the realtor association as the tied product: realtors are required to purchase membership (which some do not want) in order to acquire MLS access (which they do want). Although it might be tempting to characterize this as a tying conspiracy—because it is imposed by the otherwise competing members of a realtor association—such arrangements should not be condemned under the per se rule proposed in this Article, because the membership requirement is not a naked tying conspiracy. Such realtor associations are efficient joint ventures that “offer[] services to [their] members including training, technology services, computer classes, comparative data, legislative monitoring, and publications.”¹⁷⁸ Most importantly, this combination of realtors creates and maintains an important product, the MLS, that otherwise would not exist.¹⁷⁹ Further, federal courts have generally upheld realtor

176. *See id.*

177. *See id.* at 1281; *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (“The blanket license ... is not a ‘naked restrain[t] of trade with no purpose except stifling of competition’” (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)) (alteration in original)).

178. *Buyer’s Corner Realty, Inc. v. N. Ky. Ass’n of Realtors*, 410 F. Supp. 2d 574, 576 (E.D. Ky. 2006).

179. *See Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) (“The MLS

association rules that condition access to an MLS on membership in a particular realtors association as not indicative of an unlawful tying arrangement.¹⁸⁰ In most cases, there is no ill effect on competition in the alleged tied market—membership in a realtor association—because there are no competing associations.¹⁸¹ In applying the Rule of Reason in these cases, courts have employed the proper mode of analysis: because the alleged tie-in occurs in the context of a legitimate joint venture, courts must balance the procompetitive and anticompetitive potential of the arrangements.

In sum, concerted tying that is ancillary to a legitimate joint venture is fundamentally different from a naked tying conspiracy in which competing sellers agree to impose onerous terms on their customers solely to extract more money or to erect barriers to entry. Certainly, the concerted tying arrangements in the *IBM* and cemetery cases were naked. They were not pursued pursuant to a larger procompetitive scheme designed to increase consumer welfare. We should not be so eager to characterize an agreement as a tying conspiracy that we ignore the context in which the agreement happens. Such ancillary restraints should not be condemned under a per se rule against tying conspiracies.

This Article focuses only on naked tying conspiracies: agreements between competitors to impose tying requirements on their respective customers. These are the types of conspiracies documented in the *IBM* and cemetery tying cases. In some cases, it may be too difficult for a court to define the precise boundary between naked tying conspiracies and agreements that might appear to some

allows individuals with access to search and filter properties based upon detailed criteria including compensation offered to buyers' agents, detailed property information, neighborhood information, prior sales history, offers made on the property, days on the market, and the sale price of comparable homes. The features and information available through [the MLS] are not available through any other service.").

180. See, e.g., *id.* at 318; *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988); *Buyer's Corner Realty*, 410 F. Supp. 2d at 574; *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 116-17 (E.D.N.Y. 1988).

181. See *Buyer's Corner Realty*, 410 F. Supp. 2d at 583 ("[P]laintiffs have shown no foreclosure in the market for the tied product, and their tying claim should thus be dismissed.").

When the defendants' membership requirement forces real estate agents desiring access to MLS to abandon another competing realtor association, that requirement can create antitrust liability. See, e.g., *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1583 (11th Cir. 1991).

to be tying conspiracies but that were truly ancillary to legitimate joint ventures. In such instances, a Rule of Reason—either full or abbreviated, depending on the facts—is appropriate. But defendants should not be permitted to create ambiguity out of whole cloth: when competitors conspire outside of a legitimate joint venture to impose a tying requirement on their customers, courts should condemn the agreement as per se illegal.

D. Traditional Tying Defenses and the Absence of Legitimate Business Justifications for Tying Conspiracies

This Article advocates true per se illegality for tying conspiracies. If the plaintiff can establish a prima facie case of a tying conspiracy, then there should be no business justification defense for the agreement. This section reviews those business reasons that have been offered by tying defendants and antitrust commentators. Some have been successful in courts; others have not. However, none of them justify competitors agreeing to impose tying requirements on their customers.

Per se illegality is supposed to mean that the defendant cannot justify its conduct by asserting that it had a legitimate business reason unrelated to the suppression of competition. In nontying cases, the defendant is not generally afforded the opportunity to justify or defend its conduct if it falls in a per se category. Once the court determines that the challenged agreement is properly labeled as per se illegal, the antitrust liability inquiry is over.¹⁸²

Although courts refer to tie-ins as per se illegal, judges also sometimes permit tying defendants to assert the defense that the tying arrangement is justified because the tying seller had a legitimate business reason for imposing the tie-in unrelated to the suppression of competition.¹⁸³ Courts have entertained several defenses in traditional tying cases. First, some tying defendants

182. See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1058 (8th Cir. 2000); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 51 (1st Cir. 1998) (“Where a plaintiff proves conduct that falls within a per se category, nothing more is needed for liability; the defendants’ power, illicit purpose and anticompetitive effect are all said to be irrelevant.” (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940))).

183. See, e.g., *Rosebrough Monument Co. v. Mem’l Park Cemetery Ass’n*, 666 F.2d 1130, 1145 (8th Cir. 1981).

have argued that the tying requirement is necessary to ensure the proper operation of the tying product,¹⁸⁴ and thus protect the tying sellers' goodwill. Finding this explanation persuasive, some jurists have argued that tying arrangements "may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to malfunction."¹⁸⁵ Although the Supreme Court has "uniformly rejected similar 'goodwill' defenses for tying arrangements, finding that the use of contractual quality specifications are generally sufficient to protect quality without the use of a tying arrangement,"¹⁸⁶ some lower courts have been more receptive to this defense.¹⁸⁷ Second, the Supreme Court has "indicate[d] that tying may be permissible when necessary to enable a new business to break into the market."¹⁸⁸ This is a form of a goodwill defense, but is limited to infant industries. Third, some tying sellers try to justify their tie-ins as responding to consumer demand.¹⁸⁹ Finally, some believe that tie-ins may increase efficiency because "if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution."¹⁹⁰

None of these traditionally attempted defenses can justify a tying conspiracy. If the tying arrangement served an important goal, then each seller could impose the tie-in individually. For example, if a firm felt that other versions of the tied product were

184. See, e.g., *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 555-60 (E.D. Pa. 1960), *aff'd*, *Jerrold Elecs. Corp. v. United States*, 365 U.S. 567 (1961) (mem.) (per curiam); *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936) (per curiam).

185. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 41 (1984) (O'Connor, J., concurring in the judgment) (quoting *Fortner Enters., Inc. v. U.S. Steel Corp.* (*Fortner I*), 394 U.S. 495, 514 n.19 (1969) (White, J., dissenting)), *abrogated in part on other grounds* by *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

186. *Id.* at 26 n.42 (majority opinion) (citing *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949); *Int'l Salt Co. v. United States*, 332 U.S. 392, 397-98 (1947), *abrogated in part on other grounds* by *Ill. Tool Works*, 126 S. Ct. at 1284; *IBM Corp. v. United States*, 298 U.S. 131, 138-40 (1936); Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense*, 62 MICH. L. REV. 1413 (1964)).

187. See, e.g., *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342 (9th Cir. 1987).

188. *Jefferson Parish*, 466 U.S. at 24 n.39 (discussing *Jerrold*, 365 U.S. at 555-58).

189. *Id.* at 12 ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act.").

190. *Id.* at 41 (O'Connor, J., concurring in the judgment) (quoting *Fortner I*, 394 U.S. at 514 n.9 (White J., dissenting)).

not properly interoperable with the tying product and that the tying seller would be blamed for any malfunctions, it would impose the tying clause whether or not its competitors had a similar requirement.¹⁹¹ Similarly, if consumers truly demanded tie-ins—a hypothesis that seems weak on its face—firms would pursue this strategy without a conspiracy among competitors. Finally, with respect to the efficiency defense, if a tie-in created economies of scale or scope in a particular industry, then the firms would not need to agree to impose tying requirements. They would do it unilaterally and independently because it was efficient.¹⁹² If conduct is unilaterally efficient, firms do not need to do it pursuant to a conspiracy. In short, because concerted action is fundamentally different from unilateral conduct, the defenses that are allowed in cases of unilateral tying should not be permitted in tying conspiracies.

In addition to those tying defenses considered by courts, the Chicago School has attempted to justify tie-ins as mechanisms of efficient price discrimination.¹⁹³ Not only does the metering explanation fail to excuse concerted tying arrangements, it shows why tying conspiracies should be treated as *per se* illegal horizontal price-fixing. The metering story only makes sense as a defense of tying when the choice is between price discrimination and monopoly pricing.¹⁹⁴ When there is only one seller of the tying product, metering could possibly expand output more than monopoly pricing. But in the case of concerted tying, the alternative is not monopoly pricing; there are multiple sellers of the tying product—otherwise there could not be a horizontal agreement. In the absence of the tying conspiracy, there likely would not be monopoly pricing for the tying product, but rather competitive pricing. If the competing sellers are unable to jointly impose a tying arrangement, that

191. This same argument applies to the infant industry defense of tying arrangements. However, new markets also seem unlikely to be plagued by tying conspiracies to the extent that the infant industries scenario essentially assumes one new start-up testing a new product.

192. Indeed, if tying were efficient, rational competitors would prefer to be the only firm tying, as no firm wants to reduce its rivals' costs.

193. See *supra* notes 75-81 and accompanying text.

194. Also, the metering explanation only applies with requirements ties in which the tie-in is a metering device, and not so much with one-to-one bundling. Yet some of the tying conspiracies found in case law are one-to-one bundling.

particular marketplace is less likely to have tie-ins.¹⁹⁵ Although each seller possibly would attempt to impose the tying requirement—just as sellers may attempt to charge a higher than competitive price even absent a cartel agreement in the hopes that its competitors will follow suit—competition will just as likely result when consumers balk at the tie-in and one seller breaks rank to sell a greater quantity of the (formerly) tying product by removing the tying requirement. In short, absent the tying conspiracy, the tying sellers would have to compete against each other and would be more likely to bid the price of the tying product down to the efficient, competitive price. The premise of the Chicago School thesis—society must choose between price discrimination and monopoly pricing—does not hold in markets with tying conspiracies and thus should provide no defense to tying in these cases.

Courts have considered legitimate business justification defenses in some tying conspiracy cases.¹⁹⁶ Although courts have ultimately rejected the justifications because the asserted goal was achievable through a less restrictive alternative, the courts employed the legal tests used for traditional unilaterally imposed tie-ins. Courts naively recite that “[t]ying arrangements are valid if they can be shown to protect a legitimate antitrust interest.”¹⁹⁷ But courts developed this rule for unilateral tying arrangements, not horizontal tying conspiracies. If defendants were to offer a legitimate business rationale, it would have to justify their *agreement* to employ tying arrangements. Even if it makes sense for an individual firm to insert a tying clause in its contracts, that in no way justifies an agreement among competitors to simultaneously impose tying requirements.

In short, the main reason that these rationales for tying requirements fail to provide a defense to tying conspiracies is that they focus on the wrong act. Under a *per se* rule against tying conspiracies, the tying arrangement is not being condemned; the agreement is. Even if the individual tie-ins were somehow defensible, the conspiracy itself would not be. By analogy, although charging a particular price might be reasonable, agreeing with competitors to

195. See *supra* note 109 and accompanying text.

196. See, e.g., *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1139 n.5 (8th Cir. 1981).

197. *Id.* at 1145.

charge that price is not.¹⁹⁸ Just as a firm can unilaterally raise its price without creating antitrust liability but cannot raise its price pursuant to an agreement with competitors, a firm that may be justified in imposing a tying requirement on its own cannot do so in agreement with its competitors. Thus, defendants found to have entered into a tying conspiracy should not be allowed to argue that the tying arrangement is reasonable.

E. Aggregate Market Effects and the Need To Limit Safe Harbors in Tying Law

The current legal test for per se illegal tie-ins includes a safe harbor that applies when the defendant possesses a 30% (or less) market share over the tying product. The *Jefferson Parish* Court held that if the tying seller has less than 30% share in the market for tying product, then the tying arrangement is not per se illegal.¹⁹⁹ Instead, the tie-in is evaluated under the Rule of Reason.²⁰⁰ The court assumes that if the seller of the tying product had only 30% or less of the market for the tying product then it did not have the economic power to impose a tying arrangement because consumers wishing to purchase the tying product without the tied product could simply purchase the tying product from someone else.²⁰¹

The *Jefferson Parish* safe harbor for tying arrangements has not functioned as the Court announced. The safe harbor is supposed to remove a particular tying arrangement from the per se category so that it receives a full analysis under the Rule of Reason. However, the Rule of Reason applied to tying arrangements is so deferential as to be meaningless in most cases. Tying arrangements are simply not condemned under the Rule of Reason.²⁰² The 30% safe harbor

198. The Supreme Court has made clear that, in the context of horizontal price-fixing agreements, defendants may not argue that the fixed price was reasonable. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-99 (1927).

199. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984), *abrogated by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

200. If the defendant does not have high market share, then the Rule of Reason applies. *See id.* at 17-18.

201. *Id.* at 34 (O'Connor, J., concurring in the judgment) ("Without 'control or dominance over the tying product,' the seller could not use the tying product as 'an effectual weapon to pressure buyers into taking the tied item,' so that any restraint of trade would be 'insignificant.'" (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958))).

202. *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 210 (5th ed.

operates as effective absolution from antitrust liability in tying cases.²⁰³ Thus, what is supposed to be a mere escape from the per se rule operates as an effective immunity from antitrust liability for these tying arrangements altogether.

There are two possible approaches to the problem posed by the *Jefferson Parish* safe harbor in tying conspiracy cases: eliminate the safe harbor altogether or modify its application when a tying arrangement is the product of a horizontal agreement. On the one hand, it could be argued that safe harbors have no place in the law of horizontal tying conspiracies. The premise of the safe harbor is that if the defendant has a low market share in the tying product market, consumers can easily evade the tying requirement by purchasing the tying product from another source that does not impose a tie-in. But this assumes an absence of collusion among sellers. If the major competitors in a market agree to impose a tying arrangement, then this could have the same coercive effect of a tying arrangement imposed by a monopolist.²⁰⁴ Consumers would not be able to avoid the tying arrangement.²⁰⁵ Nevertheless, despite the fact that such a concerted tying arrangement would have similar effects to a traditional tying arrangement, each conspirator imposing the tying arrangement would technically fall within the

2002) ("Since the Supreme Court's decision in *Jefferson Parish*, plaintiffs' victories on Rule of Reason tying claims have been rare.").

203. See *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3d Cir. 1998) ("In fact, since *Jefferson Parish* no court has inferred substantial market power from a market share below 30 percent.").

204. For example, if there were ten firms of equal size in a market and each agreed that they would impose a tying arrangement, each firm would have a mere ten percent market share in the tying product market, and each could point to their market share as a defense. However, consumers would feel oppressed by this concerted tying arrangement the same as they would by a traditional tying arrangement imposed by a monopolist.

205. Consumers would be forced to buy a tied product even if they do not want the tied product. Also, consumers would be effectively precluded from buying the tied product from another source. Under a requirements tying contract, the consumers would be contractually forbidden from buying the tied product from another seller. But even without such an explicit prohibition, the effect is the same. For example, if a specialty store makes only the tied product and the consumer would rather purchase the tied product from that source, the consumer is less likely to be able to do so because she will be forced to buy the tied product from whomever she purchases the tying product. This also shows a tying conspiracy's anticompetitive effects on competitors in the tied product market. Even if the specialist makes a better version of the tied product at a lower price, consumers cannot buy the product if tying requirements bind them, and a tying conspiracy prevents consumers from avoiding tie-ins.

Jefferson Parish safe harbor as long as its individual market share was below 30%.

The above argument implicitly assumed that the combined market shares of the tying sellers was high. What if the opposite were true? If the combined market shares of the conspirators is low, competition seemingly is not injured because consumers can simply shop elsewhere. But this is true for all per se violations. If two relatively small sellers in a market agreed to fix prices, most consumers could avert anticompetitive injury by purchasing the product from a nonconspirator who charged a lower price. Despite this effect, horizontal price-fixing agreements are per se illegal and defendants are not allowed to point to their low market shares as a defense. This rule is sound for a couple of reasons.

First, some consumers may fail to appreciate price differentials and purchase from the conspirators. Similarly, some may fail to appreciate the implications of the tying clause and later regret being bound.²⁰⁶ Second, restraints in the per se category are dangerous and without redeeming virtues. Antitrust law does not permit competitors to enter these types of agreements because they are inherently anticompetitive. After all, given the lack of justification, competitors would have little reason to enter such arrangements unless they believed there would be an anticompetitive effect. Third, allowing the defendants to shift attention away from their agreement to their respective market shares would unnecessarily complicate and lengthen the litigation as the parties debated market definition and measurement. Defendants should not be able to delay the plaintiffs' recovery and to waste judicial resources when there is little reason to suspect that such an inquiry would increase the accuracy of litigation results.²⁰⁷ In short, this is the type of agreement that rivals should not be making. Antitrust law should have a bright-line rule that clearly forbids competitors from entering into such agreements.

206. This was the case in the *Illinois Tool Works* case, in which, according to the tying seller's own surveys, its customers were displeased to find themselves locked into a tying arrangement in which the tying seller charged an excessive price for the tied product. *Indep. Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1167 n.12 (C.D. Cal. 2002).

207. Even if the market shares of the two horizontal competitors do not add up to a combined market share of greater than 30%, *the agreement* between the competitors to simultaneously impose a tying arrangement should still constitute per se illegal conduct.

Furthermore, it bears noting that the *Jefferson Parish* Court announced the safe harbor for tie-ins in the context of unilaterally imposed tying arrangements.²⁰⁸ The Supreme Court has never considered the particular harms associated with concerted tying arrangements imposed by competitors where the result should be different. To the extent that the *Jefferson Parish* Court presumed an otherwise competitive market in the tying product, the presence of a conspiracy should eliminate the safe harbor.

On the other hand, if courts are reticent to ignore the 30% market share safe harbor altogether, then at a minimum courts should apply the safe harbor differently in the context of tying conspiracies. When evaluating this defense, some courts do not aggregate the market shares of the alleged tying conspirators, nor do judges consider the concerted nature of the tying arrangement.²⁰⁹ Indeed, courts have dismissed tying conspiracy cases while chastising the plaintiff for "refer[ring] only to the market share of [defendants] collectively, failing to make even the barest allegation that any [defendant] acting alone possesses a substantial market share."²¹⁰ This makes little sense. When the plaintiff alleges a tying conspiracy, and not merely a simple tie-in, the collective market shares of the conspirators informs the court about their ability to distort the competitive market. Individual market shares add little important information if the aggregate market share is known. The credit card antitrust litigation demonstrates the importance of combining the market shares of tying sellers who have conspired to impose tying

208. Although the tying arrangement in that case can be conceived as concerted action between the hospital and the anesthesiology firm, the Court did not perceive it that way. The Court in *Jefferson Parish* treated the tying arrangement as imposed by the hospital alone and concluded that because the hospital had only 30% market share, the tie-in could not be per se illegal. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

209. See *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1142-43 (8th Cir. 1981).

210. *Silkworth v. Cedar Hill Cemetery*, No. 694, 1993 WL 122104, at *3 (Md. Ct. Spec. App. Feb. 11, 1993) (per curiam) ("To withstand dismissal for failure to state a claim on the individual tying counts, appellant must allege that 'each defendant cemetery's share of the relevant market was sufficient to endow that defendant with enough market power to establish per se illegality.' As a result of appellant's failure to even allege that any appellee possessed sufficient market share individually, his individual tying claims must fail." (citation omitted) (quoting *Baxley-Delamar Monuments v. Am. Cemetery Ass'n*, 938 F.2d 846, 850 (8th Cir. 1991))).

requirements. The district court declined to find that MasterCard was ineligible for safe harbor protection because its market share—26-28% of the market—was below 30%.²¹¹ But the fact that Visa imposed an identical tying requirement dramatically increased the anticompetitive effects of MasterCard's tying arrangement. Courts should not look at the second firm's market share over the tying product in isolation. Context is critical. Even more clearly in the IBM tying case,²¹² IBM and Remington Rand were the only competitors in the relevant markets for tabulating machines and tabulating cards.²¹³ Although Remington Rand's market share was probably well below 30% of the market,²¹⁴ the existence of the agreement between it and IBM was sufficient to condemn both firms under the per se rule regardless of its market share over the tying product. However, even without proof of an explicit agreement between the two firms, Remington Rand should not have been able to take advantage of the *Jefferson Parish* safe harbor so long as IBM was imposing an identical tying requirement. Remington Rand's customers would have been unable to evade the tying requirement. This gave the company sufficient market power to force the tie-in onto unwilling customers. If the 30% market share safe harbor is maintained for such tie-ins, the market share of each conspirator should be aggregated.²¹⁵ If the combined market shares of the

211. *In re Visa Check/Mastermoney Antitrust Litig.*, 2003 WL 1712568, at *4 (E.D.N.Y. Apr. 1, 2003) ("MasterCard's share of the credit and charge card services market, however, has fluctuated from between 26 to 28 percent over the same period, and its share of the credit card market alone has varied from between 33 to 36 percent. At this stage in the proceedings, I cannot conclude as a matter of law that MasterCard has 'sufficient economic power' to warrant application of the per se rule." (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-7 (1958))).

212. *IBM Corp. v. United States*, 298 U.S. 131 (1936).

213. *See United States v. IBM Corp.*, 13 F. Supp. 11, 15 (S.D.N.Y. 1935) ("[IBM] and Remington are the only concerns now engaged in manufacturing and selling tabulating cards in the regular course of business in the United States").

214. The case does not provide Remington Rand's market share in the market for the tying product—tabulating machines—but notes that its share in the tied product market—tabulating cards—was 19%, compared to IBM's 81%. We may reasonably assume that their relative market shares in machines were roughly equivalent. *Id.* at 15.

215. *See* PHILLIP E. AREEDA ET AL., X ANTITRUST LAW ¶ 1734 (1996) ("Universal tying within a highly concentrated market cannot be so innocently explained and may therefore reflect tacitly coordinated 'shared market power' eliminating consumer choice, thus creating a potential for the detriments that might flow from tying. Of course, we should clearly cumulate the market shares of sellers who have conspired with each other to impose tying on their customers.").

conspirators exceed 30%, then no firm should be protected by the safe harbor, because the conspirators as a group "have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.'"²¹⁶

In sum, the *Jefferson Parish* safe harbor of 30% market share should not apply to concerted tying arrangements. Either all firms participating in a tying conspiracy should be deemed to have violated section 1 of the Sherman Act, or, at a minimum, their individual market shares should be aggregated to determine whether the safe harbor applies.

V. AN ANTITRUST CAUSE OF ACTION FOR TYING CONSPIRACIES

Tying conspiracies and tying arrangements are separate causes of action, each with each its own elements. This Part reviews what a plaintiff should have to prove in order to establish that the defendants have engaged in a per se illegal tying conspiracy. It will also explain why some of the per se elements applied in traditional tying cases are unnecessary to prove that a tying conspiracy violates section 1 of the Sherman Act. Because the two tying causes of action are not mutually exclusive, even without an agreement, a unilaterally imposed tying arrangement can still violate the antitrust laws under existing case law.²¹⁷

A. Elements for Per Se Illegal Tying Conspiracies

The basic elements for a section 1 violation are (1) an agreement or concerted action (2) that represents an unreasonable restraint of trade and (3) has an effect on interstate commerce.²¹⁸ The third element is easily satisfied and rarely an issue in section 1 litigation, so it will not be addressed here. The meat of any section 1 case lies in the first two elements.

216. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring in the judgment) (quoting *N. Pac. Ry. Co.*, 356 U.S. at 6), *abrogated in part on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

217. This Part does not address the elements of a traditional tying claim.

218. See *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 784 (9th Cir. 1996).

1. Agreement

The first element in a section 1 violation is proof of an agreement or concerted action.²¹⁹ The plaintiff would have to prove an agreement in order to show a tying conspiracy. But, as the following subsection explains, the nature of the agreement is different with a tying conspiracy as opposed to a traditional tying arrangement.

a. Agreement Among Competitors

In order for a tying conspiracy to qualify for per se condemnation, there must be an agreement among competitors to condition the sale of a tying product on the purchase of a specified tied product. In some cases, a tying seller may require its customers to purchase the tied product from a designated supplier, who may or may not provide a kickback to the tying seller.²²⁰ Although there is often an agreement between the tying seller and the designated supplier of the tied product, their relationship is not horizontal and does not constitute a tying conspiracy, as that phrase is being used here. The horizontal aspect of tying conspiracies is what results in the instant concentration of economic wealth in a manner that harms consumers.

Proving an agreement among competitors to impose tying requirements may be difficult. As with all conspiracies, the best evidence would be direct proof, such as a written agreement, a video or audio tape, or the testimony of eyewitnesses. Establishing a case through conscious parallelism could prove difficult because circumstantial evidence of agreement may be ambiguous, as we often see multiple firms unilaterally impose similar tying arrangements. For example, sometimes the tied product is a warranty; yet it would not be surprising if every firm in a particular market had such a tie-in. This is the sort of policy that we would expect firms to impose unilaterally so we should not readily infer agreement from the fact that all firms have the same policy in this area. This should not

219. *Id.*

220. *See, e.g., Ky. Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 378-80 (5th Cir. 1977).

prove to be a problem, as courts will not hesitate to dismiss tying conspiracy cases based on mere "similarity of business practices."²²¹

Finally, there should be no need to prove any explicit agreement on price among the tying conspirators. In the cemetery cases, district courts had found no conspiracy because the competing firms did not fix prices for the tied product foundation preparation work.²²² This is wrong. Although tying conspiracies are particularly deleterious when used to stabilize a price-fixing cartel,²²³ concerted tying arrangements injure competition even without a corollary agreement on price. They allow each firm to reduce consumer choice, to create barriers to entry, and to impose a burdensome term on its customers, which they could not do in a free market.

b. Agreement with Buyer Unnecessary

One of the oddities with tying law is that courts condemn traditional tie-ins under section 1 of the Sherman Act. However, a traditional tying arrangement is not the result of concerted action. An illegal tie-in occurs when a single firm with market power imposes the tying requirement on its customers. Unlike other section 1 violations, there are not multiple wrongdoers. Although the vast majority of courts simply ignore section 1's agreement requirement in tying cases, those judges that have addressed the issue have asserted that the illegal agreement is the contract between the seller and the buyer.²²⁴ This makes little analytic sense given that the buyer is the victim and that section 1 is concerned about the concentration of economic power resulting from the illegal agreement.²²⁵ Further, this means that there is no antitrust violation unless the consumer actually accepts the tying requirement.²²⁶

221. *E.g.*, *Silkworth v. Cedar Hill Cemetery, Inc.*, No. 694, 1993 WL 122104, at *4 (Md. Ct. Spec. App. Feb. 11, 1993) (per curiam) ("Appellant's complaint is devoid of factual allegations pointing to an actual agreement among appellees. Instead, appellant infers such an agreement from the similarity of business practices engaged in by all appellees and their common membership in a statewide trade association.").

222. *See Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 505 F. Supp. 525, 530-31 (E.D. Mo. 1980), *aff'd in part, rev'd in part*, 666 F.2d 1130 (8th Cir. 1981).

223. *See supra* notes 82-91 and accompanying text.

224. *See, e.g.*, *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1145 (10th Cir. 1997).

225. *Leslie, supra* note 1, at 1817-19 & n.191.

226. *Warner Mgmt. Consultants, Inc. v. Data Gen. Corp.*, 545 F. Supp. 956, 964 n.8 (N.D.

Tying conspiracies eliminate the need for the twisted logic of pretending that the victim is part of the conspiracy. There is no need to have the consumer agree in order to establish a section 1 violation. The agreement between the competitors alone triggers liability, just as in the case of horizontal price-fixing. This means that the consumer need not actually submit in order for there to be an antitrust violation. The agreement among competitors is the violation. The consumers' response will determine damages but is not necessary for liability.

2. Two Products

Under the traditional tying test, the plaintiff must prove that the tying and tied products are two separate products.²²⁷ Much time is invested into discussing whether two products are truly separate.²²⁸ This element is designed to determine whether a single seller is leveraging (legitimate) market power in one product market in order to (illegitimately) restrain competition in a separate product market. But the misdeed in tying conspiracies is the collusion among competitors; the creation of market power by collusion—and not merely the leveraging across markets—is what represents the core of the antitrust violation here. If a tying plaintiff can prove that competitors agreed to link two products, that is sufficient to show a tying conspiracy. The two-product element applied in unilateral tying cases is a red herring in concerted tying litigation. Conspirators may attempt to focus judicial and jury attention on whether there are truly two separate products under the legal test developed for unilaterally imposed tying arrangements and away from the fact that competitors conspired to link two product markets to the detriment of consumers. The inquiry makes sense for unilateral tie-ins because if two separate product markets are not present, then the seller is not leveraging their legitimate market

Ill. 1982) ("In the usual case where a distributor refuses to purchase goods under a tying arrangement, there will be no cause of action on the merits. The unsuccessful attempt to impose a tie will usually be merely unilateral action and there will be no 'contract, combination or conspiracy' within the meaning of the Sherman Act, and no 'contract' within the meaning of the Clayton Act.").

227. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

228. See, e.g., *id.* at 18-25 (discussing the two products requirement).

power in one market into a second market. Without the two-product element, the possession and exercise of legitimate market power could be sanctioned. However, with tying conspiracies, there is no risk of condemning legitimate market power because the power over the tying product is created by an illegitimate agreement among competitors. Furthermore, courts do not generally require market definition for per se violations, such as per se illegal price fixing.²²⁹ So should it be with tying conspiracies, which should be analyzed under a true per se rule.

B. Elements the Plaintiff in a Tying Conspiracy Case Need Not Prove

True per se treatment of concerted tying arrangements would fundamentally change the antitrust analysis of these tie-ins by eliminating the need for the plaintiff to prove many of the elements required in the current test designed to condemn unilaterally imposed tying arrangements. Namely, courts should not require the plaintiff to establish the defendants' market power or that coercion was applied by the tying sellers. The agreement among competitors is the antitrust violation. Further, those circuits that require the plaintiff to show anticompetitive effect would not need to do so if they applied a true per se rule against tying conspiracies, as they should.

1. Market Power

If tying conspiracies are treated as per se illegal, then there should be no need to show the market power of the conspirators. As with per se illegal price-fixing agreements, the conspirators would likely not have conspired unless they believed that they had a reasonable chance of injuring competition. The conspirators' own prediction should suffice. The process of engaging in lengthy market definition analysis is unnecessary when competitors conspire to disrupt the market, however it is defined.

229. See, e.g., *TV Signal Co. of Aberdeen v. AT&T*, 617 F.2d 1302, 1309 n.8 (8th Cir. 1980) ("No proof of relevant market is required under section 1 where a per se violation is established.").

This would represent an appropriate shift from the way some courts have approached tying conspiracies. Though ultimately reaching the correct result, appellate courts have required plaintiffs to prove that defendants who have conspired to impose horizontal tying arrangements possessed sufficient economic power over the tying product.²³⁰ Although often reversed, district courts have dismissed allegations of concerted tying arrangements for failure to state a claim when the complaint did not establish the defendants' market power over the tying product.²³¹ Indeed, in some cases, district courts have found that defendants' collective market share of over half the market was insufficient to establish a claim.²³² Most recently, although the main thrust of *Illinois Tool Works, Inc. v. Independent Ink, Inc.* was to eliminate the presumption that a seller's patent over the tying product confers market power, the Court suggested in dicta that all tying plaintiffs—including those alleging a tying conspiracy—must prove that the defendant(s) possessed market power over the tying product.²³³

Regardless of how wise such a rule is in traditional unilateral tying cases, the market power element is ill-suited for the unique harms imposed by concerted tie-ins. There should be no need to prove market power when tying arrangements are implemented pursuant to a conspiracy among competitors. This type of agreement is so dangerous that it should be condemned categorically. There should be no need for the plaintiff to prove market power; it is an unnecessary inquiry. Alternatively, if courts do insist on examining

230. *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n.*, 891 F.2d 1473, 1482-83 (10th Cir. 1989); *Baxley-Delamar Monuments, Inc. v. Am. Cemetery Ass'n.*, 843 F.2d 1154, 1156-57 (8th Cir. 1988); *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n.*, 666 F.2d 1130, 1142-43 (8th Cir. 1981); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1215-16 (9th Cir. 1977).

231. See, e.g., *Baxley-Delamar*, 843 F.2d at 1155; see also *Silkworth v. Cedar Hill Cemetery*, No. 694, 1993 WL 122104, at *1 (Md. Ct. Spec. App. Feb. 11, 1993) (per curiam) ("The [trial] court noted that appellant had failed to describe any specific relevant market or to show appellees' market power in any such market.").

232. See, e.g., *Baxley-Delamar*, 843 F.2d at 1155-56 (reversing district court's dismissal of claim in which tying defendants controlled 57% of market in the tying product); *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n.*, 629 F. Supp. 1002, 1008 (D. Kan. 1986), *aff'd in part, rev'd in part*, 891 F.2d 1473 (10th Cir. 1989) (dismissing claim of horizontal tying conspiracy in which defendants controlled 70-75% of market in the tying product).

233. *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1291 (2006).

market power, they should focus on aggregate market shares, not individual ones.²³⁴

Finally, if even market definition and power are not a formal element, market power still remains salient in tying conspiracy litigation. A private plaintiff seeking a monetary remedy would still have to prove damages. If the conspirators lack market power, their agreement is unlikely to inflict antitrust injury. Thus, market power will continue to play a role in suits challenging tying conspiracies. But that role differs dramatically from the role that market power plays in traditional tying cases. The most important difference is that, in proving the damages suffered as a result of the tying conspiracy, neither the plaintiff nor the court need go through the process of market definition, which is generally required to prove market power in unilateral tying litigation but unnecessary in the context of proving damages caused by a tying conspiracy. While plaintiffs seeking merely to enjoin a tying conspiracy would not have to prove market power in any instance, absent market power, there is little likelihood of tying conspirators without market power being sued or held accountable for antitrust damages.

2. Coercion

Although the present legal test for tying arrangement requires coercion,²³⁵ it is unnecessary when the cause of action is concerted tying. Coercion is an important element when analyzing unilaterally imposed tie-ins in order to distinguish between beneficial and anticompetitive tying arrangements. Coercion is less important when what is being challenged is the agreement among competitors that distorted the options that should have been available in a free market absent the tying conspiracy. The agreement supplants the need for a separate coercion element.²³⁶ The fact that competitors have agreed to impose a burdensome term—whether price or tying

234. See *supra* Part IV.E (discussing aggregation of market shares for purposes of applying the *Jefferson Parish* safe harbor).

235. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated in part on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1284 (2006).

236. The inquiry into coercion is satisfied by the plaintiff's burden of proving that the defendants agreed to condition their sales of the tying product on buyers agreeing to purchase the tied product as well. See HOVENKAMP, *supra* note 24, at 410 (3d ed. 2005) (noting that conditioning can satisfy the coercion requirement).

—suffices to show illegality. Indeed, for the purposes of liability, there is no need to show that the conspirators actually made sales subject to a tying requirement because it is the agreement that is the antitrust violation.²³⁷ Whether and how the tie-in was imposed is relevant to individual damages, but not necessary for liability.

The element of coercion has proven particularly powerful in class action litigation challenging tying arrangements. Class certification is sometimes denied because each member of the class must prove that he was individually coerced to accept the tying requirement. However, if there is a tying conspiracy, then class members should not have to prove coercion as such.²³⁸ Just as class action suits challenging horizontal price-fixing do not have to prove coercion, neither should class members arguing that sellers have engaged in a tying conspiracy.

3. Anticompetitive Effects

Finally, some jurisdictions require that the plaintiffs demonstrate that a challenged tying arrangement had anticompetitive effects.²³⁹ Besides the fact that this requirement is inconsistent with the functioning of a true *per se* rule in which anticompetitive effects are presumed as a matter of law, it is unnecessary in cases of tying conspiracies. The potential anticompetitive effects of traditional tying arrangements are significantly magnified when multiple firms agree to impose tying requirements. Competitors would have no reason to conspire unless there was a significant likelihood of anticompetitive effects. Thus, the proof of an agreement among tying conspirators should also be sufficient to relieve the plaintiff—whether it be the government or a private plaintiff—from any obligation to prove anticompetitive effects.²⁴⁰

237. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 n.13 (3d Cir. 1977) (“If plaintiffs had direct evidence of conspiracy, it would be unnecessary to prove that each defendant actually imposed the tie-in upon its lessees, only that each agreed to do so.”).

238. *Jennings Oil Co. v. Mobil Oil Corp.*, 80 F.R.D. 124, 129 n.8 (S.D.N.Y. 1978) (“Moreover, plaintiffs have alleged, in addition to the existence of a tie-in, a *Conspiracy* to impose a tie-in, which raises questions common to the entire putative class.” (emphasis added)).

239. See, e.g., *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000).

240. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (noting that “because the essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it—proper analysis focuses not on actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful”); *Multiflex, Inc.*

CONCLUSION

Antitrust jurisprudence is built upon a fundamental distinction between unilateral and concerted action. Tying law stands out as an anomaly for failing to engage in this critical antitrust inquiry. The law recognizes no formal distinction between unilateral and concerted tying arrangements. Yet, tying conspiracies are fundamentally different than unilateral tying arrangements. Tying conspiracies represent a far greater potential threat to competition than do conventional unilateral tying arrangements. Whereas competition provides for lower prices, higher quality, and better services, tying conspiracies eliminate aspects of competition and stifle the market's ability to achieve these ends. Tying conspiracies can prevent new entrants from breaking into the market, allow the firms to police an existing price-fixing cartel or simply raise market prices through more tacit collusion, and reduce consumer choice in a manner inconsistent with antitrust principles. Despite this, in some ways current law gives greater latitude to concerted tying arrangements than unilaterally imposed tying arrangements. As a result, antitrust law may simultaneously condemn innocuous tie-ins while permitting some tying conspiracies that pose serious anticompetitive threats.

Although courts and scholars debate whether and when defendants can advance a legitimate business justification defense for unilaterally imposed tying arrangements, such defenses have no place when plaintiffs challenge a horizontal tying conspiracy. Concerted tying arrangements have no redeeming virtues. Even if a particular firm has a legitimate business rationale for unilaterally imposing a tie-in, it has no legitimate reason to agree with its competitor to impose such a tie-in. Like other per se illegal conduct, it is this *agreement* that is the violation. It is appropriate for antitrust jurisprudence to recognize tying conspiracies as inherently anticompetitive and worthy of per se condemnation.

v. Samuel Moore & Co., 709 F.2d 980, 986 (5th Cir. 1983) ("Under the Sherman Act, conspiring in restraint of trade is illegal, even if the conspiracy does not in fact lead to an actual restraint of trade.... [A] conspiracy violates the Sherman Act even without proof of injury because of the surreptitious, pernicious effect a conspiracy ultimately can have upon a free market." (citation omitted)).