

The Commerce Requirement in Tying Law

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I. INTRODUCTION

Courts condemn tying arrangements based on the assumption that firms are leveraging their market power in one market (the “tying product market”) in order to monopolize a second market (the “tied product market”).¹ A tying arrangement exists when a seller refuses to sell one product (the “tying product”) unless the buyer also agrees to purchase another separate product (the “tied product”). Tying arrangements may potentially injure competition in numerous ways.² For example, a tying seller may employ a tie-in to suppress competition in the market for the tied product.³ Tying arrangements may also create a barrier to entry into the tying product market.⁴ Absent proof of a legitimate purpose for the tying arrangement that cannot be achieved through less restrictive means, scholars have long argued that “it is a reasonable assumption that the *purpose* of the seller in using a tie-in is to restrain competition in the tied product.”⁵ The Supreme Court famously asserted in *Standard Stations* that “[t]ying agreements serve hardly any purpose beyond the suppression of competition.”⁶ Historically, the fear that tying arrangements were almost inherently anticompetitive led courts to condemn some tying arrangements as per se illegal.⁷

Despite decades of scholarship and hundreds of published opinions, tying law remains a confusing and controversial area of antitrust jurisprudence.⁸ This Essay focuses on the least controversial element: that a

1. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14–15 (1984); Christopher R. Leslie, *Cutting Through Tying Theory with Occam’s Razor: A Simple Explanation of Tying Arrangements*, 78 TUL. L. REV. 727, 732–36 (2004).

2. See Christopher R. Leslie, *Tying Conspiracies*, 48 WM. & MARY L. REV. 2247, 2260–76 (2007).

3. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 11 (1958) (“[T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another . . .”); Kurt A. Strasser, *An Antitrust Policy for Tying Arrangements*, 34 EMORY L.J. 253, 267 (1985).

4. See Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 ANTITRUST L.J. 811, 843–44 (2011).

5. Donald F. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50, 62 (1958).

6. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–06 (1949).

7. See *Int’l Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

8. See generally Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015); Roger D. Blair & Christine Piette Durrance, *Licensing Health Care Professionals, State Action and Antitrust Policy*, 100 IOWA L. REV. 1943 (2015); Roger D. Blair & D. Daniel Sokol, *Quality-Enhancing Merger Efficiencies*, 100 IOWA L. REV. 1969 (2015); John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015); Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025 (2015); Keith N. Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 IOWA L. REV. 2069 (2015); William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115

substantial volume of commerce in the tied product market be affected by the tie-in. An examination of this element demonstrates a flaw in current tying law. Depending on how the commerce element is articulated, it serves either a substantive or a jurisdictional function, or both. However, courts are neither particularly clear nor consistent in how they are using the element. This ambiguity makes the element difficult to understand and apply. By exposing the awkward evolution of the commerce element and its current duality, this Essay attempts to make this relatively non-controversial element more controversial.

II. THE ORIGINAL FUNCTION OF THE COMMERCE ELEMENT IN TYING LAW

A. THE LEGAL TEST FOR IDENTIFYING WHICH TYING ARRANGEMENTS ARE ANTICOMPETITIVE

Not all tying arrangements necessarily injure competition. Scholars associated with the Chicago School have argued that firms may use tying arrangements to effect price discrimination in a manner that expands output of the tying product.⁹ Other scholars and judges have reasoned that some sellers have imposed tying requirements to protect an infant industry,¹⁰ to protect goodwill by insuring that only high-quality complementary goods are used with the seller's tying product,¹¹ or simply to increase their sales of the tied product at competitive prices.¹² No universal explanation can describe all tying arrangements, their purposes and effects.¹³

The objective of tying law should be to distinguish those tying arrangements that injure competition from those that do not. When evaluating alleged restraints of trade, courts generally employ one of two tests: the per se rule or the Rule of Reason.¹⁴ Under the per se rule, courts presume

(2015); Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161 (2015); Barak Orbach, *The Durability of Formalism in Antitrust*, 100 IOWA L. REV. 2197 (2015); Spencer Weber Waller & Matthew Sag, *Promoting Innovation*, 100 IOWA L. REV. 2223 (2015).

9. See, e.g., M.L. Burstein, *A Theory of Full-Line Forcing*, 55 NW. U. L. REV. 62, 64 & n.6 (1960); Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 26-28 (1997).

10. See, e.g., *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 557 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

11. See *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348-50 (9th Cir. 1987); see also Richard S. Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 TEX. L. REV. 1363, 1382-83, 1436 (1980).

12. See Leslie, *supra* note 1, at 759-62.

13. *Id.* at 749; see also Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 539 (1985).

14. "Quick look" analysis—also called "abbreviated" or "truncated" Rule of Reason—provides a third mode of analysis. *Cal. Dental Ass'n v. Fed. Trade Comm'n*, 526 U.S. 756, 763 (1999). Because courts have not yet applied the "quick look" approach in tying cases, this Essay will not discuss the abbreviated Rule of Reason.

anticompetitive effects. In general, antitrust law's per se rule relieves the plaintiff from having to prove anticompetitive effects.¹⁵ The Supreme Court has long noted that a tying plaintiff does not have to prove actual anticompetitive effects.¹⁶ For example, the Supreme Court has twice cited *International Salt* for the proposition that it is "deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition."¹⁷ Once the elements of a tying claim are established, "tying arrangements are illegal in and of themselves, without any requirement that the plaintiff make a showing of unreasonable competitive effect."¹⁸ Courts do "not consider whether competition was in fact unreasonably restrained."¹⁹ After the elements are shown, the "*anticompetitive effects will be presumed.*"²⁰

In contrast, under the Rule of Reason, the plaintiff must use evidence to prove anticompetitive effects. Although the Supreme Court has opined that tying arrangements are per se illegal, it has not articulated a single, clear legal test for this per se illegality. Instead, in its tying opinions, the Court has discussed several necessary components of antitrust liability for imposing a tie-in.

Circuit courts have converted the Supreme Court's tying jurisprudence into a traditional element-driven test. Many, but not most, federal courts articulate the per se test for tying arrangements as follows:

There are essentially four elements to a *per se* tying claim: (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with

15. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 199 n.1259 (7th ed. 2012).

16. See *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305 (1949) ("[I]t was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.").

17. *Id.*; see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 9 (1958) (quoting *Standard Oil Co.*, 337 U.S. at 305).

18. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 540 (9th Cir. 1983) (citing *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498 (1969)). This has affected how state courts treat tying arrangements. See, e.g., *State v. Lawn King, Inc.*, 417 A.2d 1025, 1042 (N.J. 1980) ("[T]ying arrangements are generally illegal *per se* and . . . such a designation means that a plaintiff need not demonstrate that the actual effects of the tie are unreasonable." (citing *Ky. Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 374 (5th Cir. 1977))).

19. *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1338 (9th Cir. 1984); see also *Rosebrough Monument Co. v. Mem'l Park Cemetery Ass'n*, 666 F.2d 1130, 1140 (8th Cir. 1981) ("Tying arrangements are presumptively illegal if three elements exist, and once those are demonstrated no specific showing of unreasonable anticompetitive effect is needed.").

20. 1 HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY & CHRISTOPHER R. LESLIE, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 21.5d, at 21-163 (2d ed. 2015) (emphasis added).

respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.²¹

If the plaintiff can establish these four elements, the courts in most jurisdictions will conclude that the defendant has violated antitrust law.²² If the plaintiff fails to prove these elements, then a court can still—at least in theory—condemn a tie-in under the Rule of Reason.²³

Because different tying arrangements have different competitive effects,²⁴ every element of the legal test should help distinguish between conduct that is benign (or procompetitive) and conduct that is harmful and thus should be condemned (assuming that the other elements of the cause of action are established).²⁵ The first three elements of the per se test for tying arrangements provide indicia of whether the challenged tie-in actually harms competition. For example, because tying arrangements are condemned for harming competition by leveraging market power across markets, the first element—two separate products—ensures that market power in one market (the tying product market) is being used to distort competition in another separate market (the tied product market). If two separate products are not being linked, then the defendant is not leveraging its economic power in one market to injure competition in another market.

Courts have articulated the second element in various ways—conditioning, coercion, and forcing, for example. However styled, the second element requires the defendant to have improperly manipulated consumers, as opposed to responding to consumer demand for particular product bundles. Almost half a century ago, the Supreme Court opined that “[b]y conditioning his sale of one commodity on the purchase of another, 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

21. *Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo Inc.*, 96 F.3d 10, 17 (1st Cir. 1996) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1178–79 (1st Cir. 1994)); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461–62 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12–18 (1984)) (articulating a similar test).

22. See *supra* note 21.

23. See *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 29–31; *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482–83 (3d Cir. 1992) (stating that absent proof of market power, tie-ins are analyzed under the Rule of Reason).

24. Leslie, *supra* note 1, at 748 (“The purpose and competitive effects of a tying arrangement are often a function of several variables: the form of the tie-in (e.g., one-to-one bundling or a requirements contract), the seller’s market share in the tying product market, the seller’s market share in the tied product market, the number of customers subject to the tying arrangement, and the competitive conditions in the tied product market.”).

25. See Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1764–65 (2013) (“Every element in any antitrust legal test should serve a purpose. . . . Elements that increase the plaintiff’s burden without helping to distinguish between exclusionary and efficient behavior simply make it harder to establish liability and, thus, may protect anticompetitive conduct.”).

market.”²⁶ The *Jefferson Parish* Court opined that “[p]er se condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences.”²⁷ However, the Court’s requirement of a “probability of anticompetitive consequences” does not require the plaintiff to prove that the challenged tie-in actually injured competition.²⁸

The third element—that the defendant possesses economic power in the tying product market—is in some ways related to the second, in that the tying seller must have economic power in order to be able to force its customers to acquiesce to the tying arrangement.²⁹ The Supreme Court has expressed the economic-power element as “sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.”³⁰ If the defendant does not possess economic power, it is unlikely to be injuring competition.

Thus, each of these first three elements of a tying claim helps distinguish conduct that injures competition and consumers from conduct that is either benign or procompetitive.

B. THE COMMERCE REQUIREMENT AND DISTINGUISHING ANTICOMPETITIVE TYING ARRANGEMENTS

That leaves the fourth element of a *per se* illegal tying arrangement: a substantial volume of commerce is affected by the tying arrangement. This element, unlike the first three, does not seem to be effective in helping courts determine whether a challenged tie-in is anticompetitive.

Different courts articulate the fourth element differently.³¹ Yet courts agree on one aspect of this element: “The amount of commerce affected in the tied product is measured in terms of dollar volume.”³² The required dollar

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

27. *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 15–16 (citation omitted).

28. *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 322 (7th Cir. 2006) (Wood, J., concurring in the judgment) (quoting *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16). More importantly, some courts have held that this probability can be shown through proof that the tie-in affected a substantial dollar volume of commerce. *See id.*

29. *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 976 (5th Cir. 1977) (noting the requirement that “the seller has sufficient economic power over the tying product, e.g., monopoly, market dominance, etc., to induce his customer, through economic leverage, to purchase the tied product along with the tying product”).

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

31. *See infra* text accompanying notes 78–95.

32. *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 684 (10th Cir. 1984); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 12-ML-2048-C, 2014 WL 104964, at *11 (W.D. Okla. Jan. 9, 2014) (“Plaintiff must show that a substantial amount of commerce in the tied product is involved, which is evaluated in terms of dollar volume, not market percentage.”); *see also* 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1721b1, at 285 (3d ed. 2011) (“In *Loew’s*,

volume is exceedingly small, as the Supreme Court has held that “normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie.”³³ So what is the purpose of requiring that more than a *de minimis* dollar volume of commerce be affected before condemning a tying arrangement as illegal?

Most courts seem to employ the “not insubstantial dollar volume” element as a proxy for anticompetitive effects.³⁴ Early on, the Supreme Court implied a relationship between dollar volume and anticompetitive effects. In *International Salt*, the Supreme Court condemned a tying arrangement between salt-processing machines and salt.³⁵ The *International Salt* opinion essentially equated dollar volume—\$500,000—and unreasonable market foreclosure, without mentioning market share.³⁶ Instead, “the Supreme Court inferred a sufficient effect on competition from the mere fact that ‘the volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.’”³⁷ The opinion implied that dollar volume demonstrates “competitive impact.”³⁸ Recent opinions by some courts

the Court did not define the test but held that the text was satisfied on the basis of dollar volume.” (citing *United States v. Loew’s, Inc.*, 371 U.S. 38, 49 (1962)).

33. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969); *see also* *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1425 (9th Cir. 1995) (“The ‘not insubstantial’ requirement can be satisfied by the foreclosure of a single purchaser, so long as the purchaser represents a ‘not insubstantial’ dollar-volume of sales.”).

The requirement that a ‘not insubstantial’ amount of interstate commerce be affected in the tied market is a *de minimis* requirement. The relevant inquiry is the absolute dollar amount of the goods affected in the tied product market, as opposed to the proportion of the entire product market that the affected goods comprise.

Telerate Sys., Inc. v. Caro, 689 F. Supp. 221, 234 (S.D.N.Y. 1988).

34. *9 AREEDA & HOVENKAMP*, *supra* note 32, ¶ 1722a, at 301 (“Both before and after *Jefferson Parish*, a number of lower courts listed ‘anticompetitive effects’ as a requirement for per se illegality. To some extent, those words refer merely to a nontrivial dollar volume of trade in the tied product.”).

35. *Int’l Salt Co. v. United States*, 332 U.S. 392, 395–96 (1947).

36. William B. Lockhart & Howard R. Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangement Violates Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 916 (1952) (noting that the Supreme Court in *International Salt* sustained a summary judgment against the company even though it had no information as to the company’s market share).

37. JOEL B. DIRLAM & ALFRED E. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 75 (1954) (quoting *Int’l Salt Co.*, 332 U.S. at 396); *see also id.* at 100.

38. Lockhart & Sacks, *supra* note 36, at 916 (noting that the *International Salt* opinion “reasoned that the ‘volume of business affected by these contracts’ was not ‘insignificant or insubstantial’ and that this was sufficient to satisfy the competitive impact clause [of the Clayton Act]” (quoting *Int’l Salt Co.*, 332 U.S. at 396)).

continue to view a plaintiff's satisfaction of the commerce element as "some indication of 'anti-competitive effects in the market for the tied product.'"³⁹

C. *PROBLEMS WITH USING DOLLAR VOLUME AS A PROXY FOR ANTICOMPETITIVE EFFECTS*

Using dollar volume affected as a proxy for anticompetitive effects creates problems within antitrust jurisprudence. This Subpart notes three of them. The commerce element examines dollar volume instead of market share.⁴⁰ The Supreme Court has held that "[t]he requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie."⁴¹ This is misguided if the element is directed at uncovering anticompetitive effects, because dollar volume is an inappropriate measure for determining such effects. It rarely tells us anything meaningful about the competitive consequences of a tying arrangement.⁴² A tying arrangement can involve a large dollar volume of commerce without affecting the competitive conditions of the market. For example, a tie-in can foreclose \$50 million of trade in the tied product market, but if the overall size of the tied product market is \$5 billion, then the anticompetitive effects of the tie-in are probably negligible.⁴³ Scholars have condemned courts' failure to consider the share of the market foreclosed by the tie-in.⁴⁴ In short, when measuring anticompetitive effects, antitrust law should care about market share, not dollar volume.⁴⁵

39. *BookLocker.com, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89, 105 (D. Me. 2009) (quoting *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988)).

40. 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721a, at 284 ("[T]he volume in question is merely the dollar value of tied sales rather than the share of any defined market."); *see supra* notes 34–39 and accompanying text.

41. *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969).

42. 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721c1, at 294 ("Nevertheless, the dollar-volume test has almost nothing to do with actual threats to competition.")

43. *Id.* ¶ 1721b2, at 286 ("A large volume of tied sales can be too small a share of the tied market to move a competitively structured market toward oligopoly or monopoly, or to threaten to do so, or to worsen the performance of a preexisting oligopoly. Dollar volume does not even indicate the likelihood that anyone subject to the tie will pay more than it would in the absence of the tie."); *see also* Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust's Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1826–28 (1999).

44. *See* 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721b2, at 286 ("[T]he dollar volume of tied sales does not measure a threat to competition."); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 420 (2009) ("The fact that the quasi-per se rule bases liability on tying market power rather than requiring a substantial tied foreclosure share has been roundly condemned, even by some Harvard School scholars who accept the existence of foreclosure share effects and thus reject the single monopoly profit theory." (citing 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1701d, at 31–32, ¶ 1703d3, at 45)).

45. *L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1997) ("A dollar yardstick never measured *market power* . . ."). The *Fortner* Court allowed for market-share analysis to condemn tying arrangements that affected "an apparently small dollar-volume of business," but

If courts use the commerce element as a proxy for anticompetitive effects, this creates a risk of benign tie-ins being condemned.⁴⁶ This probability of false positives is magnified by the fact that the commerce element is so easy for plaintiffs to satisfy. In the 1960s, the Supreme Court held that a dollar volume of only \$60,800 was not insubstantial for the purposes of tying law's per se rule,⁴⁷ and in the 1980s, lower courts held that amounts as low as \$10,091.07 and \$6000 met the requirement.⁴⁸ In the decade after *Fortner*, one district court noted that “[u]nder most of the post-*Fortner* decisions, any amount of commerce restrained by an illegal tie-in agreement constitutes a not insubstantial amount of interstate commerce.”⁴⁹ In a previous edition of the *Antitrust Law* treatise, Professors Phillip Areeda, Einer Elhauge, and Herbert Hovenkamp noted that “the ‘not insubstantial’ test approaches triviality.”⁵⁰ Although the element can still be dispositive if the plaintiff fails to adequately plead or provide evidence that a minimal dollar amount is affected,⁵¹ courts are described as “somewhat reluctant to dismiss cases for inadequately pleading the requisite effect on interstate commerce.”⁵² In any case, using dollar volume as a proxy—instead of examining evidence of actual or probable anticompetitive effects—invites errors.

The Supreme Court has acknowledged that dollar volume is an unacceptable proxy for anticompetitive effects in other areas of antitrust law. This makes tying jurisprudence inconsistent with the overall body of antitrust

not to exonerate tying arrangements that affected a not insubstantial dollar volume in a substantially larger market. *Fortner Enters., Inc.*, 394 U.S. at 501; *see also* 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721b1, at 285–86 (discussing *Fortner*).

46. *See* 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1720c, at 277 (“Nevertheless, since *International Salt*, the courts have regularly condemned ties that did not foreclose a significant share of the market for the tied product, even when it seemed obvious that any foreclosure share would be very small indeed.”); *see also* Leslie, *supra* note 43, at 1860–61.

47. *United States v. Loew's, Inc.*, 371 U.S. 38, 49 (1962).

48. *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1419–20 (11th Cir. 1987) (concluding \$10,091.07 is not insubstantial); *Ringtown Wilbert Vault Works v. Schuylkill Mem'l Park, Inc.*, 650 F. Supp. 823, 826–27 (E.D. Pa. 1986) (finding annual sales of \$6000 sufficiently substantial for long-term tying arrangement).

49. *Falls Church Bratwursthau, Inc. v. Bratwursthau Mgmt. Corp.*, 354 F. Supp. 1237, 1240 (E.D. Va. 1973).

50. 10 PHILLIP E. AREEDA, EINER ELHAUGE & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1734a, at 39 n.3 (1996) (noting that the test “is significant in a few situations”).

51. *See, e.g.*, *Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.*, No. 09-5815 CW, 2010 WL 3619884, at *7 (N.D. Cal. Sept. 10, 2010); *Compliance Mktg., Inc. v. Drugtest, Inc.*, No. 09-CV-01241-JLK, 2010 WL 1416823, at *10–11 (D. Colo. Apr. 7, 2010); *T-Mobile USA, Inc. v. Wireless Exclusive USA, LLC*, No. 3:08-CV-0340-G, 2008 WL 2600016, at *3 (N.D. Tex. July 1, 2008); *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc.*, 677 F. Supp. 1477, 1489 (D. Or. 1987); *see also* *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009) (“Here, there is no evidence that any purchaser was affected or that any competition was foreclosed.”); 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1723a, at 312 (“When there are no rival sellers of the tied product, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone.”).

52. ABA SECTION OF ANTITRUST LAW, *supra* note 15, at 50.

law. In non-tying contexts, the Supreme Court has held that dollar volume is not the proper inquiry for evaluating the likelihood of anticompetitive effects. For example, the Court in *United States v. Columbia Steel Co.* explained:

In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, . . . the probable development of the industry, consumer demands, and other characteristics of the market.⁵³

Most notably, exclusive dealing jurisprudence provides strong evidence that the dollar-volume inquiry does not establish anticompetitive effects. In *Standard Oil Co. of California v. United States*, the Court held that “the qualifying clause of [section] 3 is satisfied by proof that competition has been foreclosed in a substantial *share* of the line of commerce affected.”⁵⁴ Driving the point more forcefully in *Tampa Electric Co. v. Nashville Coal Co.*, the Court concluded that when evaluating the legality of exclusive dealing arrangements, “a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.”⁵⁵ Instead, the Court instructed lower courts to consider, among other things, “the *proportionate volume* of commerce involved in relation to the total volume of commerce in the relevant market area,”⁵⁶ which is a measurement of market share.

The use of dollar volume to evaluate anticompetitive effects for tying arrangements, but not for exclusive dealing arrangements, is odd, because both arrangements are condemned under the same language from section 3 of the Clayton Act.⁵⁷ It is simply inconsistent that the exact same phrase used only once in a statute can mean two different things.⁵⁸ In sum, as applied, the commerce element of tying law is inconsistent with the remainder of antitrust law.

III. THE EVOLUTION OF THE COMMERCE ELEMENT

The commerce element has changed over the decades. As discussed in Part II, the commerce element began as an ill-conceived proxy for anticompetitive effects. Perhaps in implicit recognition that the proxy is not a good one, several courts have refashioned the commerce element to read

53. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948).

54. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949) (emphasis added).

55. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961).

56. *Id.* (emphasis added).

57. 15 U.S.C. § 14 (2012).

58. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (“We adhere to ‘the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.’” (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990))).

more like a jurisdictional inquiry.⁵⁹ This Part explains that the commerce element did not initially serve a jurisdictional function, but eventually courts wove jurisdictional language into the element. This transformation from substantive to jurisdictional element has, however, been haphazard and inconsistent, resulting in a commerce element whose structure and function is unclear.

A. THE JURISDICTIONAL INQUIRY IN TYING CLAIMS

Because proving an effect on interstate commerce is a traditional mechanism for establishing federal jurisdiction over economic misconduct,⁶⁰ it might be tempting to think that the commerce element was initially intended to serve a jurisdictional function. In other words, the plaintiff needed to show that the tie-in affected a substantial dollar volume of interstate commerce in order for federal judges to have authority to hear the tying claim. The theory is facially attractive but inconsistent with the case law.

The commerce element did not begin as a jurisdictional element. The earliest Supreme Court tying cases addressed the question of jurisdiction broadly, noting that the defendants traded in interstate commerce.⁶¹ For example, the 1947 *International Salt* opinion's second paragraph began by noting that: "It was established by pleadings or admissions that the International Salt Company is engaged in interstate commerce in salt, of which it is the country's largest producer for industrial uses."⁶² Beyond this initial recognition of jurisdiction, the *International Salt* Court never intimated

59. Jurisdictional concerns have historically been an important part of antitrust jurisprudence. In the early years of federal antitrust law, there was much debate over the reach of the Sherman Act and the Clayton Act. The 1890 Congress worried that the Constitution did not grant Congress the authority to adopt a federal antitrust law. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937, at 80 (1991). Much of the congressional debate over the Sherman Act focused on the federal legislature's authority to enact national law to restrict monopolies and cartel activities. Congress ultimately enacted the Sherman Act pursuant to its authority under the Commerce Clause of the Constitution. 2 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES: PART I, THE ANTITRUST LAWS 1022 (Earl W. Kintner ed., 1978). Congress solved the constitutional problem by limiting the reach of the Sherman Act to agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This wording recognized that Congress could only prohibit anticompetitive conduct that had an effect on *interstate* commerce.

60. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) ("To establish a federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved."); *United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982) ("A de minimis effect on interstate commerce is sufficient for federal jurisdiction . . .").

61. See *United States v. United Shoe Mach. Co. of N.J.*, 247 U.S. 32, 36 (1918); see also *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 460–61 (1922). In *IBM v. United States*, the Court did not mention interstate commerce or the source of its jurisdiction, beyond citations to the Clayton Act. *IBM Corp. v. United States*, 298 U.S. 131, 132 (1936).

62. *Int'l Salt Co. v. United States*, 332 U.S. 392, 394 (1947).

that the commerce element—which the Court used as a proxy for anticompetitive effects⁶³—was relevant to providing the Court jurisdiction to hear and decide the case. Similarly, in 1953’s *Times-Picayune* opinion, the Court explained in a footnote that “[i]n the light of this Court’s broad interpretations of those relevant concepts, it is now beyond dispute that the activities challenged in this case are sufficiently ‘trade or commerce’ relating to the interstate economy to fall under the wide sweep of the Sherman Act.”⁶⁴ In neither *International Salt* nor *Times-Picayune* was the commerce element jurisdictional; the commerce element did not have to mention interstate commerce because the Court established its jurisdiction elsewhere in the opinions.

In 1958’s *Northern Pacific Railway* opinion, however, the Court seemingly wove the jurisdictional inquiry into the commerce element when it held that tying arrangements “are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a ‘not insubstantial’ amount of *interstate* commerce is affected.”⁶⁵ For the first time, the Court required the commerce in the commerce element to be interstate in nature. Unlike *International Salt* and *Times-Picayune*, the *Northern Pacific Railway* opinion contained no other references to interstate commerce, suggesting that the Court satisfied itself as to its jurisdiction through the interstate commerce language that it moved into the commerce element. This apparent insertion of jurisdictional language into the commerce element began a trend among many lower courts to structure the commerce element as more jurisdictional in form.

B. THE COMMERCE ELEMENT BECOMES JURISDICTIONAL

In the aftermath of *Northern Pacific Railway*, some federal courts embraced the notion that the commerce element was a jurisdictional element, as opposed to a substantive one. There are several reasons for thinking that courts have attempted to repurpose the commerce element as a jurisdictional element. First, the addition of the word “interstate” suggests that the element is jurisdictional, not substantive. If the courts intended the commerce element to only address the anticompetitive effects of the tie-in—and not the jurisdictional element of antitrust claims—then they would not have specified that the commerce be interstate. In determining whether a tie-in is anticompetitive, the Court does not limit the inquiry to interstate commerce. To provide the court with jurisdiction, however, the dollar volume of commerce at issue must be interstate in nature. After this jurisdictional

63. See *supra* note 17 and accompanying text.

64. *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 602 n.11 (1953) (citing seven U.S. Supreme Court cases).

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

element is satisfied, the anticompetitive effect element can be evaluated with respect to all commerce, not merely interstate commerce.⁶⁶ This suggests that adding the word “interstate” to the commerce requirement gave the element a jurisdictional function,⁶⁷ one having little to do with predicting anticompetitive effects in the market.

Second, the Court measures the volume of commerce in dollars. This never made sense as a substantive element but made perfect sense as a jurisdictional requirement, because dollars are the currency of jurisdiction. This is true in antitrust law,⁶⁸ as well as other areas of federal law.⁶⁹ Some federal statutes explicitly make district court jurisdiction a function of a specific dollar amount.⁷⁰ Most notably, federal diversity jurisdiction exists only “where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.”⁷¹ Similarly, the fact that antitrust law requires that a tying arrangement affect a not insubstantial dollar volume of commerce makes this element seem like it is focused—at least in part—on jurisdiction.

Third, courts often express the commerce element by referring to a “not insubstantial” dollar volume of commerce. This language of “not insubstantial” dollar volume mimics the language of jurisdictional elements in other antitrust claims.⁷² In tying cases, modern antitrust courts split on their

66. The *anticompetitive* effects do not have to be on interstate commerce in order for federal courts to have jurisdiction; so long as the conduct has some effect on interstate commerce, federal courts have jurisdiction.

67. See *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1083 (5th Cir. 1978) (“The requirement that a restraint on interstate commerce be present acts as a jurisdictional limitation on the power of Congress, pursuant to the interstate commerce clause of the Constitution, to condemn such an arrangement as that alleged here.”).

68. *Otto Milk Co. v. United Dairy Farmers Coop. Ass’n*, 261 F. Supp. 381, 384 (W.D. Pa. 1966), *aff’d*, 388 F.2d 789 (3d Cir. 1967) (“Otto also purchases from other states materials which it uses in its business. The volume of these purchases is well over one million dollars per year. It is obvious that a decline in Otto’s business would have an effect on interstate commerce that is ‘not insubstantial.’”).

69. *Gilmour v. Wood, Wire & Metal Lathers Int’l Union, Local No. 74*, 223 F. Supp. 236, 241 (N.D. Ill. 1963) (“[I]n several cases Federal courts have held that the dollar volume of purchases in interstate commerce of the total members of the employers association, rather than of only one individual employer, is to be considered when testing Federal jurisdiction.”).

70. *Goodin v. Clinchfield R.R. Co.*, 125 F. Supp. 441, 443 (E.D. Tenn. 1954), *aff’d*, 229 F.2d 578 (6th Cir. 1956) (“Jurisdiction of this court was based on the Railway Labor Act, which gives the district courts jurisdiction when the matter exceeds three thousand dollars and arises under the constitution, laws or treaties of the United States, and Title 28 U.S.C. § 1337, which gives district courts jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce.” (citation omitted)); see also 28 U.S.C. § 1337(a) (2012) (“That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds \$10,000, exclusive of interest and costs.”).

71. 28 U.S.C. § 1332(a).

72. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (“To establish federal jurisdiction in this case, there remains only the requirement that respondents’ activities . . . have a not insubstantial effect on the interstate commerce involved.”); *Hamilton*

usage of “substantial” and “not insubstantial,” with several using the former and several the latter formulation.⁷³ Substantively, there is no difference in current case law.⁷⁴ But the frequent use of the “not insubstantial” language is more consistent with a jurisdictional element.

Fourth, some courts have changed the verb used in the commerce element from those signaling substantive antitrust law to those reflecting jurisdictional concerns. Courts use many different words to describe the relevant commerce in the tied product market, including “‘affected,’ ‘effected,’ ‘involved,’ ‘restrained,’ or ‘foreclosed.’”⁷⁵ These words potentially carry different significance in antitrust law. The terms “restraint” and “foreclosure” are substantive. Restraint is the foundation of antitrust liability; foreclosure is an anticompetitive effect. In contrast, the terms “affect” and “effect” are the language of jurisdiction. The Supreme Court has long held that an antitrust defendant’s activity need only “affect” interstate commerce in order to satisfy the jurisdictional requirement.⁷⁶

Finally, it is easy to understand why lower courts would treat the commerce element as serving a jurisdictional function, because the location of tying law’s commerce element is similar to the jurisdictional element of the Sherman Act section 1 test. For non-tying claims, courts generally evaluate section 1 claims under a common three-prong test: 1) a contract, conspiracy, or combination, also referred to as an agreement or concerted action; 2) that unreasonably restrains trade; and 3) that affects interstate commerce.⁷⁷ Both

Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 67 (2d Cir. 1997) (“[T]he inquiry is whether the aspects of the defendant’s business that are infected by the allegedly unlawful conduct can reasonably be expected, as a matter of practical economics, to have a not insubstantial effect on interstate commerce.”); Furlong v. Long Island Coll. Hosp., 710 F.2d 922, 926 (2d Cir. 1983) (“We therefore conclude that a plaintiff must allege [that] sufficient facts concerning the alleged violation and its likely effect on interstate commerce . . . either have had or can reasonably be expected to have a not insubstantial effect on commerce.”).

73. Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 780 (7th Cir. 1994) (“It is true that many cases, such as *McLain v. Real Estate Board* and *Hospital Building Co. v. Trustees of Rex Hospital* say that the Sherman Act requires proof of a *substantial*, or at least a *not insubstantial*, effect on interstate commerce, either by the antitrust violation itself, or by the activities affected by the antitrust violation.” (citations omitted)).

74. *Id.* (“So there is a deep tension in the cases between the go-to-the-constitutional-limit position and the must-prove-substantial-effect position, as well as a variety of uninformative and possibly inconsistent verbal tests (are ‘substantial’ and ‘not insubstantial’ the same or different?). Simplification is indeed overdue.”).

75. 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721d1, at 296 (“The volume of tied sales on which the courts focus is described variously as the amount of commerce ‘affected,’ ‘effected,’ ‘involved,’ ‘restrained,’ or ‘foreclosed.’”).

76. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236–37 (1948); see also *McLain*, 444 U.S. at 246. As the Court whimsically put it in 1949, “[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.” *United States v. Women’s Sportswear Mfrs.*, 336 U.S. 460, 464 (1949).

77. See, e.g., *Kendrick v. City Council*, 516 F. Supp. 1134, 1140 (S.D. Ga. 1981) (“As a general matter, in order to prevail on a section one claim, plaintiff must show (1) concerted

the standard test for section 1 liability and the specialized test for illegal tying place the “interstate commerce” requirement after the core substantive elements of the antitrust offense.

In short, there are several ways that federal judges have seemed to treat the commerce element as a jurisdictional one. Without explanation, courts have changed their statement of the commerce element in ways that are both subtle and significant: the addition of the word “interstate”; the use of dollars as the measurement device; the language of “de minimus” and “not insubstantial”; the use of weak jurisdictional verbs; and the placement of the interstate commerce requirement at the end of the test. All of these aspects of courts’ phrasing of the commerce element are consistent with the element being jurisdictional in nature.

C. ONE ELEMENT, SEVERAL VARIATIONS

The commerce element currently exists in several different variations, each with its own problems. First, in the modern era, every circuit has articulated the commerce element in its quasi-jurisdictional form, requiring that “a not insubstantial amount of interstate commerce in the tied product is affected.”⁷⁸ In this articulation, the element no longer seems to function as

action, (2) an unreasonable restraint of trade, and (3) a sufficient effect upon interstate commerce in order to establish federal jurisdiction.”).

78. *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 886 (10th Cir. 1997); *see, e.g., DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1337 (Fed. Cir. 2014) (“[A] not insubstantial amount of interstate commerce was affected.”); *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 31 (2d Cir. 2006) (requiring, in addition, a separate element for “anticompetitive effects”); *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317–18 (7th Cir. 2006); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 214 (3d Cir. 2005) (“[A] substantial amount of interstate commerce is affected.”); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 134 n.5 (2d Cir. 2001) (referring to this as the first “substantive element[] of plaintiffs’ illegal per se tying claim”); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1499 (8th Cir. 1992) (“[T]he amount of interstate commerce in the tied product’s market [is] not insubstantial.” (second alteration in original) (quoting *Rosebrough Monument Co. v. Mem’l Park Cemetery Ass’n*, 666 F.2d 1130, 1141 (8th Cir. 1981))); *Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 683 (4th Cir. 1992) (noting “a not insubstantial impact on interstate commerce.”); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992) (“[A] substantial amount of interstate commerce is affected”); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985) (noting “involvement of a ‘not insubstantial’ amount of interstate commerce in the tied product market.” (quoting *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 57 (2d Cir. 1980)) (internal quotation marks omitted)); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 45 (5th Cir. 1976) (“involving a not insubstantial amount of interstate commerce”); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 844 (5th Cir. 1975) (noting “[i]nvolvement of a not insubstantial amount of interstate commerce in the tied market”); *see also Cablevision Sys. Corp. v. Viacom Int’l Inc.*, No. 13 Civ. 1278 (LTS) (JLC), 2014 WL 2805256, at *2 (S.D.N.Y. June 20, 2014) (noting “the involvement of a ‘not insubstantial’ amount of interstate commerce in the tied market.”); *Rocha v. FedEx Corp.*, 15 F. Supp. 3d 796, 810 (E.D. Ill. 2014) (“[T]he tie ‘affects a not-insubstantial amount of interstate commerce’ of the tied product or service” (quoting *Reifert*, 450 F.3d at 317)); *Clark Mem’ls of Ala. Inc. v. SCI Ala. Funeral Servs. LLC*, 991 F. Supp. 2d 1151, 1160 (N.D. Ala. 2014) (quoting *Sulmeyer*, 515 F.2d at 844); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 12-ML-2048-C, 2014 WL 104964, at *7 (W.D.

a proxy for anticompetitive effects and, instead, seems to suggest a jurisdictional purpose. However, most courts that have repurposed the commerce element as a jurisdictional element have failed to replace the bad proxy for anticompetitive effects with an appropriate proxy. With neither a proxy for—nor direct proof of—anticompetitive effects, this version of the tying test retains the risk of condemning benign or beneficial tying arrangements.⁷⁹ While the tying arrangement may affect interstate commerce—and thus provide federal judges with the authority to hear a claim that the tie-in is illegal—the tie-in might not injure competition. The jurisdictional interpretation of the commerce element, thus, fails to guard against false positives.

Second, some courts treat the commerce prong as not jurisdictional, as shown by their omission of any reference to the commerce being interstate.⁸⁰ These courts often present the commerce element as substantive in nature, concerned about whether the tie-in restrains or forecloses commerce, instead of merely affecting it.⁸¹ For example, district courts in the Third Circuit ask whether “a substantial volume of commerce in the tied product is restrained.”⁸² Similarly, circuit courts often require that “the tie forecloses a substantial amount of commerce in the market for the tied product.”⁸³ These constructions of the commerce element—with their references to commerce

Okla. Jan. 9, 2014) (“[A] not insubstantial amount of interstate commerce in the tied product is affected.”); *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013) (quoting *Town Sound & Custom Tops, Inc.*, 959 F.2d at 477); *Bodet v. Charter Commc’ns Inc.*, No. 09-3068, 2010 WL 5094214, at *5 (E.D. La. July 26, 2010) (requiring “involvement of a not insubstantial amount of interstate commerce in the tied market.” (quoting *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir. 1981))); *Mediacom Commc’ns Corp. v. Sinclair Broad. Grp., Inc.*, 460 F. Supp. 2d 1012, 1025 (S.D. Iowa 2006) (“[T]he amount of interstate commerce in the tied product’s market was not insubstantial.” (quoting *Amerinet*, 972 F.2d at 1499)).

79. The apparent exceptions include the Second and Fifth Circuits, which require plaintiffs to prove a separate element—that the tie-in had anticompetitive effects. This additional element, however, is often applied in a manner that replicates the problems of the original commerce element. See *infra* notes 113–14 and accompanying text.

80. Removing the word “interstate” effectively precludes the element from serving a jurisdictional function, because if the commerce need not be interstate, meeting the commerce element itself does not confer federal judges with the authority to hear the tying claim.

81. See, e.g., *Heattransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964, 976 (5th Cir. 1977) (requiring that “a not insubstantial amount of commerce in the tied product is restrained” by the tie-in); *Am. Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1490–91 (D. Minn. 1991).

82. *Schuykill Health Sys. v. Cardinal Health 200, LLC*, No. 12-7065, 2014 WL 3746817, at *5 n.8 (E.D. Pa. July 30, 2014).

83. *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001) (“[T]he tying arrangement forecloses a substantial volume of commerce.”); *Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo Inc.*, 96 F.3d 10, 17 (1st Cir. 1996) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1178–79 (1st Cir. 1994)); *Fox Motors, Inc. v. Mazda Distribs. (Gulf), Inc.*, 806 F.2d 953, 957 (10th Cir. 1986) (“[A] tying arrangement must foreclose to competitors of the tied product a ‘not insubstantial’ volume of commerce.”); see also *AVX Corp. v. Cabot Corp.*, 600 F. Supp. 2d 286, 289 (D. Mass. 2009) (quoting *Data Gen. Corp.*, 36 F.3d at 1178–79).

being restrained or foreclosed—read like proxies for anticompetitive effects with all the problems that that poses, as discussed in Part II.

Third, some courts seem to take a hybrid approach that is neither jurisdictional nor particularly substantive. Many circuit court opinions omit any reference to commerce being interstate and also only require that commerce be merely “affected,” not “restrained” or “foreclosed,” by the tie-in. For example, the Ninth Circuit requires the tying plaintiff to prove that “the tying arrangement affects a ‘not insubstantial volume of commerce’ in the tied product market.”⁸⁴ Under this formulation, the commerce element does not serve a jurisdictional function, because there is no reference to interstate commerce, and it is an even worse proxy for anticompetitive effects because commerce need not be restrained or foreclosed, but only affected.

Fourth, some courts treat the commerce element as both substantive and jurisdictional. For example, one district court in Pennsylvania explicitly stated that the commerce element is both “an element of the substantive offense, as well as of the jurisdictional standard under the Sherman Act.”⁸⁵ Other courts reach a similar result, but in a more roundabout fashion. For example, the Seventh Circuit has held that a tie-in is per se illegal “only if ‘a substantial volume of commerce is foreclosed’ because of the tie.”⁸⁶ While this could read like one garden-variety version of the commerce element, the Seventh Circuit has further reasoned this element has two separate components: “(1) Is there at least one competitor in the tied product market other than the favored seller; and (2) Is the quantity of interstate commerce affected not-

84. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 913 (9th Cir. 2008); *Jerrold Elecs. Corp. v. Wescoast Broad. Co.*, 341 F.2d 653, 661 (9th Cir. 1965); *Pioneer Family Invs., LLC v. Lorusso*, No. CV 14-00594-PHX-PGR, 2014 WL 2883058, at *5 (D. Ariz. June 25, 2014) (“[T]he tying arrangement affected a not insubstantial volume of commerce in the tied product market.” (internal quotation marks omitted)); *see also Palmyra Park Hosp., Inc. v. Phoebe Putney Mem’l Hosp.*, 604 F.3d 1291, 1296 n.4 (11th Cir. 2010) (“[T]he tying arrangement affects a substantial volume of commerce in the tied product market.”); *Virtual Maint., Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 664 n.6 (6th Cir. 1993) (“[T]he amount of commerce affected must be not insubstantial.” (internal quotation marks omitted)); *Brown Shoe Co. v. Fed. Trade Comm’n*, 339 F.2d 45, 53 (8th Cir. 1964), *rev’d on other grounds*, 384 U.S. 316 (1966); *Susser v. Carvel Corp.*, 332 F.2d 505, 518 (2d Cir. 1964) (Friendly, J., concurring) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)); *Preformed Line Prods. Co. v. Fanner Mfg. Co.*, 328 F.2d 265, 277 (6th Cir. 1964); *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832, 838 (4th Cir. 1960); *Evening News Publ’g. Co. v. Allied Newspaper Carriers of N.J.*, 263 F.2d 715, 719 (3d Cir. 1959); *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, No. 10-cv-02516-WJM-KLM, 2014 WL 4412529, at *3 (D. Colo. Sept. 8, 2014) (“[A] substantial volume of commerce affected in the tied product market.”); *Shamrock Mktg., Inc. v. Bridgestone Bandag, LLC*, 775 F. Supp. 2d 972, 979 (W.D. Ky. 2011) (requiring “a not insubstantial effect on commerce”).

85. *Ringtown Wilbert Vault Works v. Schuylkill Mem’l Park, Inc.*, 650 F. Supp. 823, 826 (E.D. Pa. 1986). Some non-tying Sherman Act section 1 cases have noted that the “requirement of interstate commerce has been construed as an element of both the jurisdictional standard and the substantive offense under the Sherman Act.” *Cardio-Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 71 (3d Cir. 1983).

86. *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317–18 (7th Cir. 2006) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)).

insubstantial?”⁸⁷ The first inquiry goes to substance—the potential of the tie-in to injure competition. The second inquiry seems more geared toward jurisdictional concerns—whether a not insubstantial volume of interstate commerce is affected. While more transparent than other approaches, this formulation also fails to require either proof of anticompetitive effects or satisfaction of an appropriate proxy.

Finally, some courts are inconsistent on whether the element includes any reference to interstate commerce. For example, one Colorado district court opinion cited *Fortner* for the proposition that “a substantial volume of commerce [was] affected in the tied product market,”⁸⁸ despite the fact that *Fortner* actually required that “a ‘not insubstantial’ amount of interstate commerce is affected.”⁸⁹ Sometimes inconsistencies on whether the element requires interstate commerce can exist within a single opinion. For example, the district court in *Suture Express, Inc. v. Cardinal Health 200, LLC* quoted one Tenth Circuit opinion for the proposition that the commerce element required proof that “a not insubstantial amount of interstate commerce in the tied product is affected,”⁹⁰ and then sentences later the district court quoted another Tenth Circuit opinion requiring tying plaintiffs to show that “the arrangement affects a substantial volume of commerce in the tied product market.”⁹¹ The *Suture* opinion reflects the fact that the Tenth Circuit adds and deletes the word “interstate” from its statement of the commerce element without recognizing that this can have legal significance. This illustrates the problem of courts’ failure to clearly establish the purpose—and, consequently, the wording—of the commerce element.⁹²

In many cases, the omission of “interstate commerce” appears to be careless, not an explicit effort to decide whether the commerce element is jurisdictional or substantive, or both, or neither. For example, in *Kodak*, the Supreme Court required that “the arrangement affects a substantial volume

87. *Id.* at 318.

88. *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1066 (D. Colo. 2012) (citing *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 498–99 (1969)).

89. *Fortner Enters., Inc.*, 394 U.S. at 499 (emphasis added) (quoting *N. Pac. Ry. Co.*, 356 U.S. at 6).

90. *Suture Express, Inc. v. Cardinal Health 200, LLC*, 963 F. Supp. 2d 1212, 1219 (D. Kan. 2013) (quoting *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 886 (10th Cir. 1997)) (internal quotation marks omitted).

91. *Id.* (quoting *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995)) (internal quotation marks omitted).

92. Additional evidence that courts do not appreciate the significance of the word “interstate” can be found in the fact that state courts sometimes include the reference to interstate commerce when applying their state analogs to the Sherman Act. For example, a Texas appellate court stated that the element is that “the seller’s activity in the tied product must involve a substantial amount of interstate commerce.” *RTLAC AG Prods., Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 830 (Tex. Ct. App. 2006). This is odd because the Texas statute did not require an effect on interstate commerce either to provide the court jurisdiction or to prove the necessary anticompetitive effect. TEX. BUS. & COM. CODE ANN. § 15.05(a) (West 2010).

of commerce in the tied market.”⁹³ This formulation is not jurisdictional, because it omits any reference to interstate commerce; it also makes the proxy for anticompetitive effects lower by requiring that the tie-in “affects”—as opposed to “restrains”—commerce. In the next sentence, however, the Court noted that “Kodak did not dispute that its arrangement affects a substantial volume of *interstate* commerce.”⁹⁴ In other words, the statement of the legal test for this element did not refer to interstate commerce, but the application of that element did.⁹⁵

D. THE IMPLICATIONS OF—AND THE ARGUMENT AGAINST—A JURISDICTIONAL INTERPRETATION OF THE COMMERCE ELEMENT

Treating the commerce element as serving a jurisdictional function creates problems for antitrust jurisprudence. First, the intermingling of the jurisdictional concept of interstate commerce with a substantive element for liability can distort state antitrust jurisprudence. When deciding antitrust cases under state law, state courts often adopt the substantive legal tests developed by federal courts.⁹⁶ In general, this is an efficient process because state courts do not decide many antitrust cases, and, thus, the body of state antitrust common law is less developed than federal antitrust common law. A state court’s borrowing from federal case law is problematic, however, in the context of tying arrangements when federal courts weave jurisdictional concepts into the substantive legal test. Applying the federal tying test to state law tying claims, state courts have required plaintiffs bringing state law claims to show “that a ‘not insubstantial’ amount of interstate commerce is affected.”⁹⁷ Citing federal precedent, state courts from Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, Nebraska, New Jersey, Oregon, and Texas have all articulated the tying test under their *state* antitrust laws as requiring that *interstate* commerce be affected.⁹⁸ This is a mistake

93. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462 (1992). This is similar to *International Salt*.

94. *Id.* (emphasis added). This is the only reference to interstate in the whole opinion.

95. One problem with the *Kodak* Court’s approach is that subsequent courts rely on the legal test as articulated, not as applied. Many subsequent federal courts have quoted *Kodak* for the element that “the arrangement affects a substantial volume of commerce in the tied market,” *Kodak*, 504 U.S. at 462, but never mention interstate commerce in their opinion. *See, e.g.*, *Batson v. Live Nation Entm’t, Inc.*, 746 F.3d 827, 832 (7th Cir. 2014) (quoting *Kodak* without ever mentioning interstate commerce in the opinion); *Mich. Div.-Monument Builders of N. Am. v. Mich. Cemetery Ass’n*, 524 F.3d 726, 732 (6th Cir. 2008) (same); *CTUnify, Inc. v. Nortel Networks, Inc.*, 115 F. App’x 831, 834 (6th Cir. 2004) (same); *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 818 (6th Cir. 1997) (same); *Oracle Am., Inc. v. CedarCrestone, Inc.*, 938 F. Supp. 2d 895, 901 (N.D. Cal. 2013) (same).

96. *See, e.g.*, *Greenbelt Homes, Inc. v. Nyman Realty, Inc.*, 426 A.2d 394, 398 (Md. Ct. Spec. App. 1981).

97. *Golden W. Insulation, Inc. v. Stardust Inv. Corp.*, 615 P.2d 1048, 1052 (Or. Ct. App. 1980).

98. *People ex rel. Woodard v. Colo. Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1065 (Colo. 1984); *Conn. State Med. Soc’y v. Conn. Med. Serv., Inc.*, 293 A.2d 794, 797 (Conn. Super. Ct.

because state antitrust law does not require interstate effects for either liability or jurisdiction. Some scholars might argue that the fact that state antitrust law should not require an effect on interstate commerce in order to establish jurisdiction proves that the “interstate commerce” language does not serve a jurisdictional function in either federal or state antitrust jurisprudence. It is true that it makes no sense for state courts to import a jurisdictional element from federal courts.⁹⁹ But it is similarly true that violations of state antitrust law should not require an effect on interstate commerce as a substantive element either; an effect on intrastate commerce should suffice to establish liability.

Second, even within federal law, evaluating jurisdictional issues in the context of a substantive element may obfuscate the asymmetrical reaches of the Sherman Act and section 3 of the Clayton Act. Both statutes condemn anticompetitive tying arrangements.¹⁰⁰ In the mid-20th century, the Supreme Court in *Times-Picayune* held that the two statutes imposed different legal tests for tying liability.¹⁰¹ Although *Times-Picayune* has not been explicitly reversed, courts now hold that the legal tests under section 1 of the Sherman Act and section 3 of the Clayton Act are the same¹⁰²—with the main exception being that section 3 is limited by its text to tying arrangements between goods, while section 1 can condemn tying arrangements involving services.¹⁰³ Even if the substantive legal tests are now identical, importing the jurisdictional inquiry into the substantive test invites confusion because the jurisdictional reach of section 1 and section 3 are different.¹⁰⁴

1971); *Luster v. Jones*, 388 N.E.2d 1029, 1041–42 (Ill. App. Ct. 1979); *Greenbelt Homes, Inc.*, 426 A.2d at 398; *Bigos v. Nationwide Mobile Home Parks, Inc.*, 306 N.W.2d 373, 377–78 (Mich. Ct. App. 1981); *Curran V. Nielsen Co. v. Structural Wood Corp.*, No. CX-90-587, 1990 WL 132651, at *2 (Minn. Ct. App. Sept. 18, 1990); *Heath Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596, 603 (Neb. 1995); *State v. Lawn King, Inc.*, 417 A.2d 1025, 1042 (N.J. 1980); *RILC AG Products, Inc. v. Treatment Equip. Co.*, 195 S.W.3d 824, 830 (Tex. Ct. App. 2006). Some state courts have recognized the folly of this approach. For example, one Florida court, after quoting the federal test that requires “involvement of a not insubstantial amount of interstate commerce in the tied product market,” explicitly noted that because the plaintiff’s “antitrust claim is brought under the Florida Antitrust Act of 1980, [so] the federal requirement (Sherman Antitrust Act, 15 U.S.C.A. § 1 et seq.) that interstate commerce be involved need not be met.” *Day v. Le-Jo Enters., Inc.*, 521 So. 2d 175, 177–78 (Fla. Dist. Ct. App. 1988) (quoting *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985)).

99. Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. LAW REV. 29, 58–60 (explaining how state courts are courts of general jurisdiction).

100. See Leslie, *supra* note 2, at 732–33 & n.6, 739 n.53, 824.

101. *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 608–09 (1953).

102. *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 592 (7th Cir. 2008).

103. *Paul E. Volpp Tractor Parts, Inc. v. Caterpillar, Inc.*, 917 F. Supp. 1208, 1226 (W.D. Tenn. 1995) (“Tying claims may violate [s]ection 3 of the Clayton Act pursuant to the same test as the Sherman Act if the tie-in involves goods, wares, merchandise or other commodities.”).

104. 1B AREEDA & HOVENKAMP, *supra* note 32, ¶ 267a, at 239–40. This would be easily remedied if courts treated jurisdiction as a separate issue.

The fact that infusing the commerce element with jurisdictional significance creates problems like these could support the argument that the commerce element must be nonjurisdictional. The leading antitrust treatise concludes that the commerce element of tying law does not serve a jurisdictional purpose.¹⁰⁵ The basis of this deduction is that a jurisdictional interpretation would be inconsistent with non-tying law. The treatise argues that “the jurisdictional issue should be left separate, without complicating the substantive standard for illegality.”¹⁰⁶

This Essay shares the same premise as the Areeda and Hovenkamp treatise: combining jurisdiction and substance in a single element is wrong. I argue that—despite the incorrectness of this approach—this seems to be what some courts are doing. This Essay does not argue that the commerce element *should* serve a jurisdictional function. Rather, it argues that many courts have repurposed the commerce element into a quasi-jurisdictional element. Further, these courts may not appreciate the legal implications of weaving jurisdictional functions into a (previously) purely substantive element, albeit one that did a poor job as a proxy for anticompetitive effects. Prior to *Northern Pacific Railway*, courts in tying cases used to establish their jurisdiction by—early in their opinions—noting that the challenged conduct had an effect on interstate commerce. When discussing substantive antitrust law, these courts would then separately require the plaintiff to show that the challenged tie-in affected commerce, without any reference to the commerce being interstate in nature. Beginning with *Northern Pacific Railway*, many courts no longer separately inquired about interstate commerce, but instead required that the tie-in affect interstate commerce as part of the substantive commerce element. Given that the effect on interstate commerce is what provides federal courts the authority to hear an antitrust claim, it is hard to read this change as anything other than judges moving the interstate commerce jurisdictional inquiry into the commerce element of the substantive legal test for determining whether a tying arrangement violates antitrust law. Most importantly, however, is the fact that some courts have explicitly stated that the commerce element of tying law is simultaneously substantive and jurisdictional.¹⁰⁷ The leading treatise argues that such cases are wrong.¹⁰⁸ I

105. 9 *Id.* ¶ 1721b2, at 286–87.

106. *Id.* ¶ 1721b3, at 288.

107. See *Ringtown Wilbert Vault Works v. Schuylkill Mem’l Park, Inc.*, 650 F. Supp. 823, 827 (E.D. Pa. 1986); *Detroit City Dairy, Inc. v. Kowalski Sausage Co.*, 393 F. Supp. 453, 472–73 (E.D. Mich. 1975). For a similar non-tying case, see *United States v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993) (“For there to be a Sherman Act violation, the defendant’s business activities must be ‘in restraint of trade or commerce among the several States.’ This requisite relationship to interstate trade or commerce is not only an element of the alleged antitrust offense, but also a necessary jurisdictional requirement.” (citation omitted)).

108. See 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721b3, at 288 (“The judge apparently thought that the substantive requirement for a per se violation of a ‘not insubstantial’ volume of tied sales reflected the jurisdictional requirement of some interstate commerce.”).

agree, but many courts are nevertheless presenting the commerce element as if it were a jurisdictional element.

Part of the problem lies in the fact that federal courts invoke the concept of “jurisdiction” imprecisely in antitrust cases.¹⁰⁹ Generally, in non-tying law, there is sometimes disagreement between the jurisdictional and the substantive nature of proving an effect on interstate commerce.¹¹⁰ This confusion can have consequences.¹¹¹ Bringing clarity to the different jurisdictional tests applied to different antitrust statutes is beyond the scope of this Essay. My goal is far more modest: to show that some courts are using the commerce element of tying law to serve a jurisdictional function, that courts should not do so, and that clarifying the elements of illegal tying could remedy the problem, as the following Part argues.

IV. FIXING THE COMMERCE ELEMENT

Tying law has two problems associated with the current treatment of the commerce element. First, the element fails to work as a jurisdictional element when courts remove the reference to the commerce being interstate. Second, when the element operates as a proxy for anticompetitive effects, it fails to perform that function effectively in its current form. No matter how one looks at it, the commerce element of tying law is a mess. As originally constructed, and as often still used, the element is a bad proxy for anticompetitive effects. As re-envisioned as a jurisdictional element, it is inconsistently stated and applied. For these reasons, tying law is in need of change. This Part proposes changes.

A. EXAMINE COMPETITIVE EFFECTS DIRECTLY

Because some tie-ins injure competition while others do not, plaintiffs in tying cases should have to prove anticompetitive effects caused by the tying arrangement. This requires the addition of a separate element. The anticompetitive effects can be in either the tying product market or the tied product market. Either way, courts should not assume such injury from the dollar amount of commerce in the tied product market.

109. See Stephen Calkins, *The 1990–91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L.J. 603, 633 (1991) (“[S]ome courts clearly err, seemingly using the term accurately and yet treating interstate commerce issues as normally jurisdictional.”).

110. See Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 659 (2005) (“Commentators are similarly divided on whether the requirement of an interstate commerce nexus is or should be jurisdictional or substantive.”).

111. *Id.* at 662 (“Confusing whether a fact issue goes to jurisdiction or merits produces uncertainty as to when the issue should be resolved, by whom, and under what standard, along with confusion as to the meaning of that resolution.”).

Several courts claim to require tying plaintiffs to prove “anticompetitive effects in the tied market.”¹¹² Even those jurisdictions that require the tying plaintiff to show anticompetitive effects—most notably, the Second and Fifth Circuits—have retained the requirement that the plaintiffs show that the tying arrangement affected a substantial dollar volume of commerce.¹¹³ This is odd because, in this context, the dollar-volume requirement serves no purpose. It is not needed to show any anticompetitive effects because the additional element addresses this directly. Nor is it related to jurisdiction, as it does not refer to interstate commerce.

More importantly, courts that list anticompetitive effects as a separate element do not actually interpret and apply the element with any vigor.¹¹⁴ Professors Areeda and Hovenkamp have explained:

Consistent with *Jefferson Parish* and *Northern Pacific*, foreclosure shares were not measured and assessed by the lower courts that purported to require “anticompetitive effects” in addition to a not insubstantial commerce volume. Instead, the courts either ignored that additional requirement or employed it very circumspectly to eliminate a specified class of relatively harmless tie-ins from per se condemnation.¹¹⁵

Courts could address this problem by using a more meaningful element of “anticompetitive effects.” Indeed, when examining anticompetitive effects, courts should examine more than mere dollar volume.¹¹⁶

112. See, e.g., *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 86 (2d Cir. 2000); *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321, 323 (5th Cir. 1974); see also 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1722c, at 307 (noting that “[t]he express requirement of an ‘anticompetitive effect’ appears to have originated in” *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286, 1289 (2d Cir. 1974)).

113. The fact that some courts are using the volume-of-commerce element as a substantive element—instead of as a jurisdictional one—is perhaps best illustrated by courts that require a tying plaintiff to prove both that “the tying arrangement has foreclosed a substantial volume of commerce in the market for the tied product” and “the seller’s activities affected interstate commerce.” *Am. Computer Trust Leasing v. Jack Farrell Implement Co.*, 763 F. Supp. 1473, 1490 (D. Minn. 1991) (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 (1984)). Given the presence of the latter element, the former element is only a proxy for anticompetitive effects. But it is a bad proxy if the volume of commerce is measured in dollars, which is the current jurisdictional interpretation. See *supra* Part II.C.

114. 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1722c, at 307 (noting cases that “have listed ‘anticompetitive effects’ as a separate element without giving it any content or applying it”).

115. *Id.* ¶ 1722c, at 306–07.

116. See *id.* ¶ 1721c1, at 294 (“[I]f antitrust tribunals begin weighing the share of the tied market that is foreclosed, it would make more sense to replace the dollar-volume test entirely with a share test.”).

B. ELIMINATE THE PER SE LABEL

It would be easier to solve the problem of the commerce element being misused as a proxy for anticompetitive effects if courts stopped claiming that tying arrangements are per se illegal. They are not.

The legal test for tying arrangements is not truly per se for several reasons. First, the test requires the plaintiff to prove that the defendant has market power over the tying product.¹¹⁷ Market power is not required under the traditional per se rule. Second, the test requires the plaintiff to demonstrate that a “not insubstantial” dollar volume of commerce in the tied product market is affected.¹¹⁸ If this were interpreted only as a jurisdictional requirement, then the element would not be inconsistent with the per se rule, which still requires that federal judges have constitutional authority to hear the claim. But when courts use the volume of commerce as a measure for anticompetitive effects, this conflicts with the per se rule’s premise that anticompetitive effects are presumed and need not be proven.¹¹⁹ A true per se rule would not require the use of a commerce element to serve as a proxy for anticompetitive effects. The Supreme Court has stated that in cases involving price fixing, group boycotts, and patent tying, “the amount of commerce involved is immaterial because such restraints are illegal per se.”¹²⁰ Third, under the current tying test, courts allow defendants to argue that they have a legitimate business justification for imposing a tie-in.¹²¹ The per se rule generally prohibits defendants from justifying their conduct if it falls in a per se category. Because of these elements and defenses, tying arrangements are—at most—only nominally per se illegal.¹²²

Despite the fact that the so-called per se rule against tying is quite porous, it retains the harshest aspect of per se rules in antitrust: it allows an inference of anticompetitive effects without actual evidence that the challenged tie-in

117. See *United States v. Loew’s, Inc.*, 371 U.S. 38, 47–48 (1962); see also *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 17–18 (suggesting that Rule of Reason should be applied when “the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product”).

118. See *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969).

119. If the Court truly believed that tying arrangements were per se illegal, then the volume-of-commerce language would not be a proxy for anticompetitive effect, because the whole point of per se analysis is that the anticompetitive effect is presumed as a matter of law.

120. *United States v. Columbia Steel Co.*, 334 U.S. 495, 522–523 (1948).

121. See, e.g., *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F.2d 641, 644 (7th Cir. 1935), *aff’d per curiam*, 299 U.S. 3 (1936); *United States v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 555–60 (E.D. Pa. 1960), *aff’d per curiam*, 365 U.S. 567 (1961).

122. See *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 34 (O’Connor, J., concurring in judgment) (“The ‘per se’ doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.”); *id.* at 34 n.1; *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 477 (3d Cir. 1992) (“The rule in tying cases is not, however, like other, truly per se rules in antitrust law.”); 9 AREEDA & HOVENKAMP, *supra* note 32, ¶ 1721a, at 284 (“[T]ying is unlawful under a special ‘per se rule’ that requires both power over the tying product and coverage of a ‘not insubstantial’ volume of commerce in the tied product.”).

has, in fact, injured competition.¹²³ By using the dollar volume of commerce affected by the tie-in as a proxy for these anticompetitive effects, courts perform a half-hearted and ill-conceived analysis somewhere in between the per se rule and the Rule of Reason. Courts employ a (poor) proxy for anticompetitive effects (which the per se rule does not require), but they do not look for actual anticompetitive effects (as the Rule of Reason requires).

Because some tying arrangements may be beneficial or benign, per se treatment is inappropriate.¹²⁴ Courts have lamented this fact when condemning, under the per se rule, tying arrangements that would survive Rule of Reason analysis.¹²⁵ Over three decades ago, in her concurrence in *Jefferson Parish*, Justice O'Connor observed that "[t]he time has therefore come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."¹²⁶ The majority, however, pronounced it "far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'"¹²⁷

Appreciating how courts have misapplied the volume-of-commerce element provides another reason to jettison the per se rule against tying arrangements. Tying law already has a Rule of Reason, though it is generally conflated with the tying law's per se test. Professor Hovenkamp has proposed the following components of a Rule of Reason for tying arrangements:

A rule of reason inquiry in tying cases would simply consider (1) whether the firm imposing the tie had sufficient power to force an anticompetitive arrangement, (2) whether the tie foreclosed a sufficiently large part of the tied market to force competitor exit or significantly increased costs, and (3) whether the arrangement was unnecessarily harmful to rivals in light of any proffered justifications. This modification in antitrust doctrine would save many millions of dollars annually in legal fees and administrative costs.¹²⁸

As the next Subpart explains, we should add an interstate commerce jurisdictional requirement to this list.

123. See *supra* notes 27–28.

124. *Data Gen. Corp. v. Digidyne Corp.*, 473 U.S. 908, 908 (1985) (White, J., dissenting) ("As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis."), *denying cert. to* 734 F.2d 1336 (9th Cir. 1984).

125. See, e.g., *Gonzales v. St. Margaret's House Hous. Dev. Fund Corp.*, 880 F.2d 1514, 1519 (2d Cir. 1989).

126. *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 35.

127. *Id.* at 9 (majority opinion).

128. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 123 (2005).

C. INTERSTATE COMMERCE AS A SEPARATE ELEMENT

The volume-of-commerce element should not be eliminated wholesale; it should be fixed. The standard Sherman Act section one test—under either the per se rule or the Rule of Reason approach, which requires the plaintiff to prove anticompetitive effects—does not eliminate the need for an interstate commerce element. Antitrust plaintiffs still must prove “an effect on interstate commerce.”¹²⁹ The element does no damage to antitrust jurisprudence—except when it is misapplied as a proxy for the anticompetitive effects of a challenged tie-in. It can still serve a jurisdictional purpose, so long as it correctly includes the word “interstate.” The interstate commerce requirement for tying claims could mirror the interstate commerce element of section 1 jurisprudence. As with non-tying claims, this element will be easy to meet, but it still must be pled and satisfied. There is no reason why the jurisdictional requirement in tying cases should differ from the general test applied to other section 1 causes of action.¹³⁰

V. CONCLUSION

The fact that the rationale for the commerce element has shifted from a substantive element to a jurisdictional element leads to several insights. At least some courts seem to tacitly recognize that dollar volume of commerce is a bad proxy for anticompetitive effects. Building on that recognition, courts should make tying law consistent within and across jurisdictions. Abandoning the per se label, requiring genuine proof of actual or likely anticompetitive effects, and creating a separate jurisdictional element—clearly labeled as such—would go a long way toward bringing more clarity to tying law jurisprudence.

129. See, e.g., *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 37 n.5 (O'Connor, J., concurring in judgment) (“Wholly apart from market characteristics, a prerequisite to application of the Sherman Act is an effect on interstate commerce.”).

130. The jurisdictional element may be differently phrased for section 3 of the Clayton Act and section 1 of the Sherman Act. See *supra* notes 100–01.