I'd like to propose a contest for the greatest intellectual embarrassment of antitrust. Let me name the first contestant—tying, which some of you know has been one of my favorite for years. Here's why. First, there is no persuasive theoretical or empirical evidence that tying is a business practice that is likely to harm consumers. (This is not the blog to deal with Professor Elhauge's provocative paper except to say that it does not alter this view.) There is work that says it could be, under stringent conditions, and one can point to cases where maybe the practice has been used in a harmful way. Yet the courts have put tying in the same antitrust category as price fixing when done by a firm with some market power. Second, the courts, lacking any analytical framework for detecting bad behavior, have developed a mechanical test for tying that doesn't have any connection whatsoever to any of the plausible theories of when and why tying might be bad. The test leads to false positives almost by design. Third, tying has led to one of the most ridiculous antitrust remedies of all time—namely the European Commission's insistence that Microsoft expend effort creating and offering a product–a version of Windows that didn't include Microsoft's media player technology—that no one wants. Now, I understand that others will have their own candidates. But to beat mine your challenge is you must show a complete lack of theoretical or empirical support; a really bad legal test; and a remedy that better demonstrates the bankruptcy of the law. The challenge is on.

Read the full piece here.