Response

The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock's *Hidden Rules of a Modest Antitrust*

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INTRODUCTION

In *The Hidden Rules of a Modern Antitrust*,[1] Ramsi Woodcock argues that courts' systematic use of the rule of reason, which underpins most of contemporary antitrust law, effectively amounts to an unwarranted blanket exemption from liability for potentially egregious practices. According to Woodcock, this is due to the interaction between the exorbitant cost of prosecuting cases under this standard (compared to the cost of enforcing per se rules), the courts' increasing application of the rule of reason, and the shrinking budgets of antitrust enforcement agencies.[2] The rule of reason in the face of enforcement budget constraints, in other words, is like a Ferrari in a world with no fuel; it is inherently flawed. And the result has been a "state of affairs [that] is untenable."[3]

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1. Ramsi Woodcock, *The Hidden Rules of a Modern Antitrust*, 105 MINN. L. REV. 2095 (2021).

2. *Id.* at 2103 ("The Court's conversion of many per se rules of illegality to rules of reason starting in the 1970s has therefore driven up the costs of enforcing the antitrust laws at a time when the enforcement budget constraint has been tightening.").

3. *Id.* at 2104 ("The Court today presides over an antitrust regime that purports to subject all suspect conduct to meticulous, tailored examination for harm, but in practice looks more like desuetude, the Court all the while seemingly ignorant of the striking divergence it has created between the law on the books and the law in action.").

A proper concern with errors costs—one that considers not only the cost of erroneous outcomes from overly broad rules, but that also considers the costs of enforcing more accurate rules—would decry this outcome. Accordingly, Woodcock contends that courts should reject the rule of reason in favor of bright-line rules, such as per se (il)legality.[4]

In its broad outline, Woodcock's analysis is undeniably correct. An increase in the use of rules that demand extensive discovery and expert analysis without a commensurate increase in enforcement budgets (or productivity under the same budgets) will, all else equal, surely result in fewer (and/or less effective) enforcement actions. But this truism is insufficient to condemn the existing antitrust regime or, more to the point, to support the corrective action by the courts proposed by Woodcock.

As this Response discusses, Woodcock's bold claims ignore or misconstrue several critical aspects of the modern antitrust apparatus. Chief among these is the uncertainty that underpins antitrust enforcement. It is often the case that decision-makers simply do not know whether a given type of conduct is more likely than not to injure competition, especially given the near-infinite circumstances in which such conduct could conceivably take place. Even if the challenged conduct *clearly* results in anticompetitive harm in the particular dispute before the court (which, itself, is virtually never the case), devising accurate, generalizable rules is often impossible. Where it is possible, of course, courts do tend to assign per se rules. But the "leftover" realm of conduct in which outcomes are uncertain will still remain—and it may not even be possible to offer educated guesses about the marginal *tendency* of ambiguous conduct to cause harm. Under these circumstances, the imposition of per se exemptions or prohibitions is undesirable.

Part I of this Response contends that the entire antitrust apparatus is built around this uncertainty. It likely explains why Congress tasked decentralized courts to determine what constitutes a restraint of trade rather than defining it itself in detail.[5] Because courts are

4. *Id.* at 2119 ("*If the Court believes ambiguous conduct to be mostly good—in the sense of mostly beneficial to consumers—then the Court should make per se legal any conduct that enforcers cannot afford to subject to the rule of reason, and if the Court believes ambiguous conduct to be mostly bad—in the sense of mostly harmful to consumers—then the Court should make per se illegal any conduct that enforcers cannot afford to subject to the rule of reason*.") (emphasis in original).

5. As Senator Sherman, the primary author of the first federal antitrust legislation noted in the debates leading up to that Act's passage: "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations.

obligated to adjudicate only individual cases—thus avoiding the need to form definitive opinions about broad categories of conduct—they face lower informational constraints than Congress. Over time and after repeated consideration in diverse circumstances, the resulting body of decisions may reveal which categories of conduct are more or less likely to harm consumers.

Part II explains how Woodcock misstates some of the Chicago School's positions on the arc of antitrust law and enforcement, and why, contrary to his assertions, the imposition of a per se rule is appropriate only after repeated determinations under the rule of reason.[6] Per se rules are proper only when courts have learned from experience that a category of conduct is almost systematically harmful (or beneficial) to consumers. This process of discovery is key, if imperfect: Woodcock is right that, other things being equal, the rule of reason is the more costly method of adjudication, and that it leaves parties with less legal certainty. Yet the alternative is almost certainly worse. Categorically proscribing swaths of ambiguous and poorly understood conduct because plaintiffs currently struggle to prove they are harmful is the height of faith-based policymaking.

Part III proposes that Woodcock fails to acknowledge certain key facts in arguing that the rule of reason effectively amounts to (unintentional) per se legality. For a start, it is not self-evident that enforcers facing budget constraints will focus all or most of their resources on the most winnable cases (and thus fail to generate case law pertaining to novel forms of conduct). Recent enforcement activity in the digital sector suggests otherwise.[7] Likewise, the perception that "too few" cases are successfully prosecuted under the rule of reason is not necessarily inconsistent with optimal enforcement: put simply, we do not know whether the number of cases is low because the most harmful conduct is being deterred or whether it is going unchallenged. Nor is it clear that declines in antitrust enforcement represent a departure

This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries." 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman).

6. As Justice Marshall wrote, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972).

7. *See* Complaint, United States v. Google LLC, No. 1:20-CV-03010 (D.D.C. Oct. 20, 2020); *see also* Complaint, Colorado v. Google LLC, 1:20-CV-03715 (D.D.C. Dec. 17, 2020); Complaint for Injunctive Relief, FTC v. Facebook, Inc., 1:20-cv-03590 (D.D.C. Jan. 13, 2021); Complaint, New York v. Facebook, Inc., 1:20-cv-03589 (D.D.C. Dec. 9, 2020).

from the optimal enforcement baseline, rather than courts achieving a better overall balance. And, finally, the distinction between per se rules and the rule of reason is itself overstated, as all legal regimes exist on a spectrum somewhere between perfect "rules" and looser "standards."

I. ANTITRUST AND THE RULE OF REASON

Debates over the proper intensity of antitrust enforcement efforts are almost as old as the antitrust laws themselves. There is debate, as well, over the content of the antitrust laws (both statutory laws as well as judicial decisions) and procedural rules governing the litigation process. But the question of enforcement has always loomed large in antitrust. This reflects a few peculiarities of antitrust law. To begin with, antitrust legislation is in the nature of a standard, rather than a rule. Stripped of non-essential verbiage, the operative provisions of Section 1 and Section 2 of the Sherman Antitrust Act are some 14 and 23 words long, respectively: "Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal"[8]; "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize . . . trade . . . shall be deemed guilty of a felony."[9] Other statutes have been passed since, and this is not the sum total of antitrust law—but it is not far off, and certainly the vast majority of federal non-merger antitrust enforcement is brought under the authority of these 37 words.[10]

Obviously, the Sherman Act doesn't provide much guidance, and taken literally it would outlaw virtually all business activity. From the earliest cases interpreting the Act, the courts have provided the necessary specificity for the law—and enforcers have had substantial discretion to bring cases to the courts. For instance, early Supreme Court cases debated whether all restraints of trade were prohibited or whether the prohibition laid out in the Sherman Act should be assessed in light of the rule of reason.[11] The Supreme Court found that Congress had chosen the latter option. And while it can largely be said

8. 15 U.S.C. § 1.

9. 15 U.S.C. § 2.

10. Section 7 of the Clayton Act, the primary source of merger enforcement authority, is not much more detailed. Its operative language amounts to about 48 words: "No person engaged in commerce . . . shall acquire, directly or indirectly, the whole or any part of the stock . . . [or] the whole or any part of the assets of another person . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

11. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

that the antitrust statutes provide a standard to guide the development of the law, it is the courts that promulgate the actual antitrust rules, under authority delegated to them by the statutes, mediated by the enforcement decisions of government and private antitrust plaintiffs. In this way, the antitrust statutes themselves reflect a legislative choice for judicial, over legislative, rulemaking.[12] "Thus an appraisal of the efficiency of a legislative decision to enact a standard requires consideration of the differences in costs and benefits between legislative rules and judge-made rules (precedents)."[13] Importantly, one of the characteristics of judge-made rules (as compared to legislative) is that they evolve relatively slowly and at significant cost.

It is not my task here to assess the desirability of Congress' decision to leave the bulk of antitrust rulemaking to the courts. Rather, my aim is to put the discussion of the desirability of any given level of enforcement intensity into necessary perspective: whether optimal or not, Congress has decided to delegate antitrust rulemaking to the courts, moderated by an accompanying delegation of enforcement discretion to the antitrust agencies. With that comes an implicit preference for a relatively slow and costly evolution of rules.[14] Confronted with that reality, courts are likely to prefer rules of relatively less specificity, which can more readily accommodate heterogenous actors, fact-dependent consequences, and changes in technology, societal preferences, and other dynamic attributes. "In general, the more detailed a rule is, the more often it will have to be changed. The greater detailedness of a very precise rule is thus also a source of additional costs, the costs of changing rules."[15]

12. *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 261 (1974) ("The legislature's choice whether to enact a standard or a set of precise rules is implicitly also a choice between legislative and judicial rulemaking. A general legislative standard creates a demand for specification. This demand is brought to bear on the courts through the litigation process and they respond by creating rules particularizing the legislative standard.").

13. *Id.*; *see also id.* at 267–68 ("[A]s the amount and complexity of social activity increase over time, we can expect to find that legislatures, rather than expanding, will delegate more and more of the legislative function to bodies that do not produce rules through negotiation among a large number of people—*i.e.*, to executive and administrative agencies and to courts—as has in fact happened.").

14. *Id.* at 279 ("Judicial processes are ill suited to the rapid alteration of rules. The delays of the judicial process, coupled with its dependence on a sequential sampling process (described earlier) for the formulation of rules, produce significant lags in judicial response to changing conditions. These lags, more serious in a rapidly changing than in a slowly changing society, may not infect legislative (or nonjudicialized executive or administrative) processes to the same degree.").

15. *Id.* at 278.

In the antitrust context, the judicial rule of "relatively less specificity" is the rule of reason; the rule of greater specificity is the per se rule. While, of course, the decision in any given case under either of these frameworks is typically perfectly specific (liability is either imposed on the defendant or not), the implications of the holding as an ongoing legal rule are not. Cases decided under the rule of reason provide guidance for future conduct in general terms, and with the expectation that enforcement of the rule will be more expensive in any given case (although less difficult to change over time) and less determinate (but also more accurate). Per se rules are less costly to enforce, more difficult to change, and their enforcement more precise. They thus provide more certainty for economic actors (and enforcers, and courts), but they are also more likely to be erroneous:

> The inherent ambiguity of language and the limitations of human foresight and knowledge limit the practical ability of the rulemaker to catalog accurately and exhaustively the circumstances that should activate the general standard. Hence the reduction of a standard to a set of rules must in practice create both overinclusion and underinclusion.[16]

The point of this discussion is to establish that judging the social desirability of the process of antitrust rulemaking requires recognition that the process is both one selected by the legislature and one that, whatever its defects, may be on net preferable to more precise and explicit legislative rulemaking. And even within the context of judicial decision-making itself, greater precision in rulemaking may or may not be socially preferable.

In short, Congress chose to outsource the determination of what constitutes a restraint of trade to the courts. This is a clear endorsement of judicial rulemaking, which entails the slow emergence of rules and a heavy reliance on loose standards that accommodate heterogeneous fact patterns. In other words, whatever one thinks about the current state of antitrust enforcement, it is important to recognize that it results from a deliberate decision by Congress.

II. MISCHARACTERIZING THE ERROR-COST AND CHICAGO POSITIONS

Woodcock's critique also misrepresents the working of the error-cost framework and, more broadly, some of the key challenges that antitrust enforcers face. Two points are particularly salient in that respect. First, Woodcock seemingly views any rule that restricts enforcement as suboptimal. Second, Woodcock's argument that ambiguous conduct should increasingly be subjected to per se rules wrongly

16. *Id.* at 268.

assumes that courts could readily determine whether broad categories of conduct are more likely than not to harm consumers.

A. THE ERROR-COST FRAMEWORK *DELIBERATELY* MAKES SOME ENFORCEMENT HARDER

Like others, Woodcock identifies a possible connection between the current state of antitrust enforcement and "increased market concentration across the economy and . . . recent declines in the share of GDP going to labor."[17] Leaving aside the veracity of this assertion,[18] the reason it matters is that Woodcock claims that this state of affairs is "bound up with the concept of error costs."[19] The "untenableness" of antitrust today is a function of the dominance of the "Chicago School's" skeptical approach to antitrust law—leading to a shift to rules of less precision—that has made cases so complex that they cannot be won by antitrust enforcers (at least not with their current budgets).[20]

For Woodcock the problem is not so much that the Chicago School revolution in antitrust has convinced enforcers to become less vigorous in their efforts, but that the rule of reason simply makes bringing cases too costly. As Woodcock puts it:

17. *See* Woodcock, *supra* note 1, at 2096 n.1. For Woodcock there is only "some evidence" of the causal relationship between the current level of antitrust enforcement and these macroeconomic effects. Others, however, are less circumspect. *See, e.g.*, Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1852–53 (2020) ("[T]he United States well overshot the mark in reducing antitrust enforcement . . . . [T]he evidence demonstrates that eliminating antitrust enforcement likely results in monopoly prices and monopoly levels of innovation in many markets . . . . Four decades of underenforcement has contributed to rising inequality . . . .").

18. Despite repeated claims that lax antitrust enforcement has led to dismal economic outcomes, neither the characterization of those outcomes, the characterization of the laxity of enforcement, nor the connection between the two is particularly well demonstrated in the literature. *See, e.g.*, Geoffrey A. Manne, *Invited Statement on Antitrust in Digital Markets* 11–21, *submitted to* the U.S. House Judiciary Committee Antitrust Investigation of the Rise and Use of Market Power Online and the Adequacy of Existing Antitrust Laws and Current Enforcement Levels (2020), *available at* https://judiciary.house.gov/UploadedFiles/Submission_from_Geoffrey_Manne.pdf [https://perma.cc/8SGF-YQPQ]; Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: the Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 297 (2019).

19. Woodcock, *supra* note 1, at 2096.

20. *See id.* at 2101 ("[E]mbrace of the rule of reason has paradoxically led to the policy of reduced enforcement advocated by Chicago, however, rather than to the compromise in favor of greater accuracy in adjudication that the Court seems to have intended, because case-by-case adjudication is too expensive for enforcers fully to apply.").

> Thus every time the Court considers some practice that would normally violate the antitrust laws in itself, and decrees that henceforth the effect of the practice on consumers must be considered in every case before liability can attach, the Court has not improved the accuracy of adjudication but rather effectively repealed the rule of illegality for that practice. For enforcers lack the resources to investigate effects in each individual case and so they respond to the imposition of rules of reason by bringing fewer cases.[21]

There may be some descriptive truth to the claim that the increased complexity (and thus cost) of antitrust enforcement under the rule of reason leads to fewer cases, all else equal. But the diagnosis and assessment of this dynamic are a bit off the mark.

To begin, Woodcock appears to misunderstand Judge Easterbrook, the *pater familias* of Chicago's error-cost framework, when he quotes him for the notion that the inherent uncertainty of the antitrust enterprise merits a detailed, complex investigation: "We cannot condemn so quickly anymore. What we do not condemn, we must study. The approved method of study is the Rule of Reason."[22] But contrary to the impression Woodcock leaves in his piece, Judge Easterbrook is no cheerleader for the rule of reason.

The approval referenced in Judge Easterbrook's quote is not his own; it is that of the antitrust community. Here Judge Easterbrook is merely comparing the rule of reason to its alternative and explaining (not advocating) that the commonly accepted, more-studious alternative to the *per se* standard is the rule of reason. Consider what Judge Easterbrook says immediately following: "A court could try to conduct a full inquiry into the economic costs and benefits of a particular business practice . . . [b]ut it is fantastic to suppose that judges and juries could make such an evaluation. The welfare implications of most forms of business conduct are beyond our ken."[23] This is not a defense of the rule of reason, but a vehement *critique* of it. Referring to the Supreme Court's characterization of the assessments required by the rule in *Chicago Board of Trade*,[24] Judge Easterbrook pointedly derides them as "empty" and criticizes their tractability: "Judges and justices rightly protest that courts cannot make these judgments."[25] In short,

21. *Id.* Of course, the word "normally" is doing a lot of work in that claim. "Normally" here means only "consistent with the approach the Court happened to take previously." It does not connote anything about the adequacy or appropriateness of the previous approach.

22. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984). This passage is also quoted in Woodcock, *supra* note 1, at 2100 n.11.

23. Easterbrook, *supra* note 22, at 11.

24. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

25. Easterbrook, *supra* note 22, at 12. Judge Easterbrook continues, quoting *United States v. Topco Assocs.*, 405 U.S. 596, 609, 612 (1972) ("Courts are of limited

Easterbrook is no proponent of the rule of reason, and indeed, essentially made *the very case* that Woodcock is trying to advance.[26]

Similarly, Woodcock quotes Joshua Wright and Geoffrey Manne as characterizing the move to the rule of reason in complex cases as "all to the good."[27] But that is not what we said. Rather, we said that the move *away* from per se illegality was "all to the good," but immediately noted that the default alternative to the per se standard—the rule of reason—was also problematic. Indeed, we acknowledged "a number of reasons, [that] the mere rejection of per se rules does not go far enough to protect consumers" and further noted that "the case for enhanced judicial accuracy with the rule of reason is overstated."[28] In any case, the upshot for Woodcock of the widespread adoption of the rule of reason, as noted, has been reduced enforcement without realization of the promise of greater accuracy. Of course, Manne and Wright called the rule of reason's promise of accuracy into question a decade ago—and we were not the first to do so.[29]

But Woodcock's implication is very different than ours, and in this sense the spirit of Woodcock's claim—that we would support a move toward the rule of reason if its primary effect were less enforcement—is correct. The only real point of disagreement is that he sees this as leading to too little enforcement and too many unwinnable cases, and we see it as doing too little to stem *over*-enforcement and *not enough* to make cases unwinnable. So while we can all agree that the Chicago School is significantly responsible for the shift in antitrust toward rules of reason, it is an open question whether it deserves *blame* or *credit*.

Woodcock is correct that the error-cost approach pioneered by Judge Easterbrook tends, all else equal, to welcome impediments to enforcement on the assumption that the costs of erroneous

utility in examining difficult economic problems . . . . [They are] ill-equipped and ill-suited for such decision-making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions.").

26. *See id.* at 13 ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.").

27. Woodcock, *supra* note 1, at 2100 n.11 (quoting Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 195 (2010)).

28. Manne & Wright, *supra* note 27.

29. *See* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 81 ("Each of the price-theoretic assumptions animating the current structure of Rule of Reason analysis is inconsistent with recent advances in economic theory, in particular, transaction cost economics.").

enforcement outweigh its benefits[30] (and what better way to improve costly, erroneous enforcement than to curtail it?) But pointing to the fact of curtailed enforcement is insufficient to demonstrate that the assumption is incorrect and that the costs of less enforcement actually outweigh the benefits.

It is important to note that, like virtually all scholarship on the error-cost framework in antitrust, Woodcock's ultimately collapses into a question of belief: Does the author believe that type I or type II errors are more likely and more costly? Woodcock would like for his project to transcend this fundamental question, but he cannot escape it. Indeed, in his final analysis, Woodcock is aware that one's priors determine the choice between per se exemptions and per se bans.[31]

In the appendix to his paper Woodcock presents his formal model, in which, under Assumption 5, the rule of reason is always applied neutrally, such that it "precludes a share of good conduct that equals the share of bad conduct that the rule allows to occur."[32] In other words, the likelihood that a court erroneously condemns beneficial conduct under any rule of reason analysis is the same as the likelihood that it erroneously excuses harmful conduct.[33] This means that error costs in Woodcock's model are entirely a function of the magnitude of the effects of each error (that is, how costly it is to forego beneficial conduct versus how costly it is to endure anticompetitive conduct). But his model makes no assumptions about magnitude. Thus, in

30. Easterbrook, *supra* note 22, at 2 ("If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time.").

31. *See, e.g.*, Woodcock, *supra* note 1, at 2122 ("If the Court was to believe conduct to be not just mostly bad, but very bad (though the Court need not believe conduct to be completely bad), then it might even be appropriate for the Court to forego the rule of reason entirely, even when enforcers can afford to apply it to some conduct, and instead to make all ambiguous conduct per se illegal.") *See also id.* at 2170 Figure 2 (purporting to demonstrate the implications of his model, but showing only the special case where assumptions of harm (the dotted grey lines) correspond to false negatives being more costly than false positives).

32. *Id.* at 2162.

33. There is little evidence to suggest that this is a reasonable assumption. Particularly with respect to vertical restraints (where the Chicago School has been especially influential in convincing courts to adopt rules of reason), "it is pretty safe to conclude vertical conduct is predominantly procompetitive or competitively neutral." Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 YALE L.J. FORUM 622, 631 (2021). This renders a neutrality assumption suspect. "So too with . . . predation; while possible, it is also very rare . . . . [T]he data on modern horizontal mergers tell the same story." *Id.* at 631–32.

his "Graphical Exposition of the Model" he happens to choose to illustrate his analysis with relative magnitudes that yield the result he seems to prefer.[34] But different assumptions would yield completely different results.[35]

At one point, Woodcock actually sums up this inevitable bottom line quite nicely—incidentally, in the process, outlining the approach taken by Judge Easterbrook (although Woodcock does not cite him for this point):

> The careful decision theorist, by contrast, recognizes that searching scrutiny of ambiguous conduct is costly, and budget constraints may sometimes force use of a per se rule of illegality, or a per se rule of legality, as a low-cost alternative to a rule of reason. The use of per se rules in such a situation may, despite the rules' imprecision, still result in lower error costs than would the other alternative of searching rule of reason review of the conduct for actual harm.[36]

Indeed, compare Woodcock's description of what a "careful" approach would look like with Easterbrook's own assessment:

> Courts should use the economists' way out. They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution.
>
> If presumptions let some socially undesirable practices escape, the cost is bearable. The per se rule condemns whole categories of practices even though some practices in these categories are beneficial. The Court permits such overbreadth because all rules are imprecise. One cannot have the savings of decision by rule without accepting the costs of mistakes. We accept these mistakes because almost all of the practices covered by per se rules are anticompetitive, and an approach favoring case-by-case adjudication (to prevent condemnation of beneficial practices subsumed by the categories) would permit too many deleterious practices to escape condemnation. The same arguments lead to the conclusion that the Rule of Reason should be replaced by more substantial guides for decision.[37]

It would be hard to find closer agreement on the proper method for assessing the optimality of rules of reason versus per se rules. What ultimately separates the two is the fundamental belief in the relative cost of type I and type II errors.

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34. These are represented by the dotted grey lines in Appendix Figure 2. *See* Woodcock, *supra* note 1, at 2170.

35. Thus, for example, in Appendix Figure 2, "[a]s the magnitude of the harm inflicted by bad conduct increases, these lines become steeper. The slope pictured here is large enough to support a no-per-se-rules-of-legality optimum . . . ." *Id.* at 2173–74. But if the relative magnitudes were reversed (and, as noted, nothing in the model precludes this) the outcome would be reversed, as well.

36. *Id.* at 2109.

37. Easterbrook, *supra* note 22, at 14–15.

B. THE RULE OF REASON AS A DISCOVERY PROCEDURE

In any field of law, the cases that make it to court are the relatively novel ones. And especially for antitrust, that often means novel business conduct. If you present the court with novel conduct or a novel setting, virtually by definition, it will not meet the standard for per se review. Even under the most stringent per se standard, a court will still be forced to determine in the first instance whether to apply the per se rule.[38] In any case where that was clear, the parties either would have settled or wouldn't have undertaken the conduct in the first place. As a result, "per se" is far from a blanket ban, nor should it be. That also means that the move toward rule of reason has not obviously harmed enforcement agencies' relatively stagnant budgets, because it is not clear they could escape a rule of reason analysis in virtually any cases.

Because the Sherman Act does not (and, without destroying the economy, could not) outlaw all agreements that in any way reduce rivalry between firms, the law itself—whether enforced by a per se rule or a rule of reason—outlaws only *undue* restraints of trade. "Undue" is not inherently a bright line. To determine whether a practice should be condemned per se, it must first be determined that it is the sort of conduct that courts know always or almost always unduly constrains competition. Barring the vanishingly rare case where both the conduct at issue and the economic circumstances surrounding it are the same as those of conduct previously condemned by courts, this is not an automatic, costless, and certain assessment.

But it is not undertaken in a state of complete ignorance, either. As noted, Woodcock's conclusion is dependent on one's priors regarding the relative likelihood and cost of harmful and beneficial conduct when that assessment is uncertain, as often it will be. But Woodcock's model assumes a much more radical ignorance: it assumes a static world in which there is no opportunity for courts, enforcers, or economic actors to learn from prior rule of reason cases. For courts this means that no matter how many times the rule of reason is applied to various forms of, say, exclusionary conduct, it confronts each subsequent instance of challenged exclusion with complete ignorance about its likely anticompetitive effects. For enforcers this means that they have no ability to pick rule of reason cases that are more or less likely to be successful because no matter what conduct they challenge, "the

38. *See* Meese, *supra* note 29, at 93 (discussing the *Standard Oil* test, in which the "first step—per se analysis—requires characterization and then classification of a restraint. Here courts inquire into the nature of the agreement and decide whether it is unlawful per se or instead subject to further scrutiny.").

Court perceives all conduct to be uniform in harmfulness."[39] And for economic actors it means that prior decisions have no deterrent effect and do not inform the specific conduct they choose to undertake.

In reality, of course, courts, enforcers, and economic actors do learn over time, and this affects the types of conduct in the economy, the cases chosen by enforcers, and the accuracy of decisions by judges. Even within categories of conduct (agreements between competitors, say, or exclusionary conduct), the value of a rule informed by past judicial experience (and empirical and economic analysis, of course) is not, as Woodcock's model assumes, "divided between good and bad conduct in fixed proportions equal to the overall shares of good and bad conduct in the universe of conduct."[40] Rather, courts are able to adjust their rules and how they are enforced to reflect degrees of ambiguity, and economic actors adjust their conduct in response to the courts.

The rule of reason is key to this discovery procedure. The Supreme Court has repeatedly acknowledged that antitrust law emerges through iterative decision-making. Consider the Court's words in *Topco*: "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."[41] The message is simple: it takes time and experience for courts to form an opinion about the value of certain forms of business conduct.

This stands in stark contrast to Woodcock's worldview, where courts are unable to differentiate between forms of ambiguous conduct (and yet simultaneously well informed enough about enforcers' budget constraints to know whether they can "afford" to litigate under the rule of reason).[42] Granted, Woodcock is right that, faced with ambiguous forms of conduct, courts have only two options: either impose

39. Woodcock, *supra* note 1, at 2160.

40. *Id*.

41. United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972). Justice Marshall's reasoning in *Topco* was repeated in both the *Broadcast Music* and *Leegin* majority opinions. Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 2 (1979); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). Note that European competition law also relies upon this learning process. *See, e.g.*, Dirk Auer & Nicolas Petit, *CK Telecoms v Commission: The Maturation of the Economic Approach in Competition Case Law*, 11 J. EUR. COMPETITION L. & PRACTICE 225 (2020).

42. Woodcock, *supra* note 1, at 2119 ("If the Court believes ambiguous conduct to be mostly good—in the sense of mostly beneficial for consumers—then the Court should make per se legal any conduct that enforcers cannot afford to subject to the rule of reason, and, if the Courts believe ambiguous conduct to be mostly bad—in the sense of mostly harmful to consumers—then the Courts should make per se illegal any conduct that enforcers cannot afford to subject to the rule of reason.").

a bright-line rule, or rely on a standard that requires parties to show that the conduct is harmful (or not). Woodcock would like courts to favor the first option. But his conclusion ignores a key part of the equation. Of these two alternatives, only one is naturally self-correcting. Per se prohibitions deter conduct, while the rule of reason encourages firms to self-assess their behavior and proceed if they think it is not harmful. Plaintiffs and courts are then free to challenge this assessment.

Woodcock would surely retort that this feedback loop is merely hypothetical because, in practice, anticompetitive harm is nearly impossible to prove.[43] But if anything, this claim avers in favor of the rule of reason. Should we really expect courts to outlaw entire categories of conduct, despite plaintiffs being unable to show that such conduct is harmful in individual cases? Put differently, Woodcock wrongly assumes that identifying the effects of business conduct becomes easier when moving to a more aggregated scale. This seems impossible to support.

All of this is not to say that per se rules can never accommodate some uncertainty regarding a practice's underlying effects. Rather, it posits that per se rules are the exception, best reserved for situations where there is a clear potential for consumer harm. In those cases, per se analysis is both simpler and less costly than rule of reason analysis:

> [A]ny determination of whether a restraint falls into the per se category . . . requires an assessment of any justifications proffered by the proponents of a restraint. That is to say, once a plaintiff has shown that a restraint limits competition, i.e., rivalry between the parties, the tribunal must determine whether any justification proffered by the defendants is cognizable, that is, constitutes the sort of virtue that the Sherman Act recognizes as redeeming or legitimate. Such an analysis does not entail any assessment of the factual basis of the purported justification. Instead, the step consists of a sort of relevance inquiry, that is, a determination whether, if proved, the justification offered by the defendants would tend to enhance the welfare of consumers, thus rebutting any presumption that the restriction on competition is undue.[44]

The rule of reason has another key strength as far as this discovery procedure is concerned: it is more susceptible to change than is the per se rule. By adopting less precise rules of reason, the courts render the relative changeability of the rule less difficult. This has important implications for the overall accuracy and optimality of the legal regime. Unless you assume infallibility on the part of enforcers and courts, the ease with which rules can change may be the most significant aspect of the antitrust regime. Because of defendant

43. *Id.*

44. Meese, *supra* note 29, at 97.

heterogeneity, evolving economic understandings, and the inherent competitive ambiguity of novel conduct or novel circumstances, the optimal rule is likely not a single rule, but a dynamic one that continually (but not drastically) evolves over time. The error-cost framework suggests that rules that enable correction are generally preferable to rules less susceptible to change (this enables courts to fine tune their approach and reduce both false positives and false negatives).

Even if you believe that improperly stringent rules are no more or less likely than improperly permissive ones, there is still reason to favor improperly permissive ones because correcting them is easier than correcting overly stringent rules. In other words, the likelihood of an improperly stringent rule being subsequently overturned is in part a function of its clarity. Leaving aside obvious outliers (rules that are so clearly wrong that a firm may violate them just to get the chance to overturn them in court), the more certain the rule, the less likely firms would, whether intentionally or accidentally, engage in conduct that violates it.[45] But this also means that there would be fewer opportunities to challenge enforcement of the rule and potentially overturn it.

The same cannot be said of an improperly permissive rule: In that case, firms would regularly engage in the conduct (in the limit case because it has been deemed per se legal), and enforcers would have innumerable opportunities to challenge the conduct in the hope of overturning the (improperly permissive) rule. This is not an argument that doing so is, once a case is brought, any easier for permissive than for stringent rules; it is simply an argument that the likelihood of overturning an erroneous rule is a function of both the likelihood of convincing a court to do so, *and* the likelihood of a suitable case coming before a court in the first place.

> [A]nticompetitive conduct that is erroneously excused may be subsequently corrected, either by another enforcer, a private litigant, or another jurisdiction. An anticompetitive merger that is not stopped, for example, may be later unwound, or the eventual anticompetitive conduct that is enabled by the merger may be enjoined . . . . By contrast, procompetitive conduct that does not occur because it is prohibited or deterred by legal action has no constituency and no visible evidence on which to base a case for revision.[46]

An unfortunate, further implication of this dynamic is that an erroneously stringent rule is more likely to be subsequently reversed

45. *See* Geoffrey A. Manne, *Error Costs in Digital Markets*, *in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 3, 64–65 (2020) ("A rule that clearly prohibits all mergers over a certain size, for example, would likely be extremely effective, and few if any such mergers would be attempted.").

46. *Id.* at 65.

the *less wrong* it is. In the extreme case, if the "correct" rule should be per se legality, say, the likelihood of overturning a prohibition and reaching that result is greater if the prohibition is less clear and less severe. For example, if all mergers should be permitted, such a result is more likely to come about (all else equal) if the current rule is one that permits some mergers under some circumstances than if the current rule is that no mergers are ever permitted. The unfortunate part is that, for the same reason, overturning such a rule would also yield commensurately less benefit, because the less stringent rule would *already* permit some (by hypothesis here, always procompetitive) mergers to occur. We'd get more bang for the buck if we could overturn a per se prohibition on all mergers—but that would never happen because no one would ever merge under that rule, and thus no opportunity to challenge it in court would ever arise. In other words, "[o]ver the plausible range of overly strict erroneous rules, the worst are less likely to be overturned, and the (relatively) best most likely to be reversed."[47]

And this feeds into what is perhaps the most important critique of an approach that puts per se prohibitions over accuracy: courts are supposed to try to get it right. Administrative cost considerations are important, but they could never justify wholesale application of rules of completely unknown effect just because they cost less. The per se rule is a rule of judicial economy, but it is one predicated on the notion that the outcome, if decided under the rule of reason, would always or virtually always end up in the same place. "[P]er se rules replicate the result that full blown analysis would produce while at the same time avoiding the administrative costs of such an inquiry."[48] Absent considerable experience adjudicating cases under the rule of reason (or perhaps derived from an extensive economic literature), the expectation that per se rules of illegality would replicate the result of a rule of reason analysis is unwarranted.[49] The relative difficulty of changing such

47. *Id.*

48. Meese, *supra* note 29, at 93 ("Per se rules are no exception to the approach articulated in *Standard Oil*. To the contrary, such rules simply implement the overarching Rule of Reason, just as a requirement that motorists "stop and look" before crossing any railroad tracks once implemented the more general requirement that tort victims act reasonably. A conclusion that a particular class of restraint is unlawful per se rests upon a determination that a thoroughgoing examination of the reasonableness of such restraints will always or almost always result in a conclusion that they exercise or create market power and thus restrain competition (rivalry) unduly.").

49. It should be noted that, while the same is arguably true of rules of per se legality, the disconnect is attenuated for the simple reason that, under a rule of per se legality, there will be real-world experience to draw from in assessing competitive effects. Under a rule of per se illegality, however, the conduct in question would be

rules, and the relative likelihood of changing only the least-bad among them, exacerbate this problem, effectively disabling the learning process by which courts can evolve toward greater accuracy.

III. THE RULE OF REASON IS NOT A PER SE RULE OF LEGALITY

Throughout his paper, Woodcock equates the rule of reason with a blanket exemption under the assumption that authorities currently have insufficient budgets to successfully pursue cases under this standard. His comparison overlooks key aspects of enforcement under the rule of reason, however.

The critical question is whether perceived low enforcement is *caused* by the rule of reason, or whether it is a function of the behavior that is currently prosecuted under this rule. In other words, it is plausible that rule of reason cases are rare and difficult to prove because the most egregious practices are either being deterred or policed under the per se rule. The marginal cases that face prosecution under the rule of reason might thus be those that are least likely to harm consumers. In other words, the litmus test is whether widely detrimental practices—such as cartels or mergers to monopoly—would be hard or impossible to bring under the rule of reason.

As the following sections explain, Woodcock's piece fails to elucidate this underlying point, and thus fails to establish that the rule of reason is *causing* what he perceives to be underenforcement.

A. THE RULE OF REASON AND AGENCY BUDGETS

What is perhaps most interesting about Woodcock's analysis is that, if true, it does demonstrate that criticism of the rule of reason by the likes of Judge Easterbrook, Manne, and Wright (among others) for introducing problematic complexity may indeed be overstated. What Woodcock points to is an unintended consequence of the interaction of the overall move toward the rule of reason with enforcement-agency budgetary constraints. The practical effect, in a roundabout fashion, is, according to Woodcock, the effective imposition of per se rules of legality—the greater use of which is exactly what scholars like Judge Easterbrook, Manne, and Wright would advocate.

Of course, there are some differences, and—again, if Woodcock is correct—the net effect is not exactly the same. For one, the mechanism Woodcock describes effectively entails bright-line filters being applied not by courts, but by enforcers. In essence, Woodcock's analysis

significantly or totally deterred, thus ensuring that there is no opportunity to learn the conduct's true effects.

argues that enforcers will limit their cases to the easiest to win. In general, this should fairly well coincide with the cases most likely to have net positive expected value—that is, most likely to be the cases whose enforcement would not be erroneous.

But note that this separating equilibrium requires that the rule of reason be imposed far more readily—the very thing that Woodcock laments. Determining that unfamiliar, challenged conduct unduly harms competition entails a full-blown analysis. And often it may not be until a defendant proffers a procompetitive justification in a particular context that it will be learned that the assumed logic underlying a per se approach is improper. Indeed, often this analysis should undermine not only per se illegality, but even the prima facie case and balancing of harms under a rule of reason analysis—suggesting, in other words, that the conduct should often be deemed per se *legal* under the relevant circumstances.[50]

Another difference is that the imposition of filters at the agency level may not perfectly track their hypothetical imposition at the judicial level. To be sure, if courts were consistently applying Judge Easterbrook's filters, enforcers would take those into account in making enforcement decisions, effectively transferring the locus of decision-making from the courts to the agencies. But that is not quite the situation we have now. Instead, enforcers do not make their decisions necessarily on the winnability of the case as determined by a court's expected imposition of a filter. Rather, most cases probably fall into an undifferentiated category of "maybe we could win this, even under the rule of reason, or maybe not, but it's going to be costly either way and we have to decide how to prioritize our scarce resources." The most important difference between these two approaches is that the latter is likely to turn substantially on considerations divorced from the merits of any given case relative to any other (because, from a binary win/loss perspective, they all face essentially the same odds), but instead to turn on political and, of course, budgetary considerations. For

50. As Meese argues, for contractual integration and many other forms of conduct, demonstration of *any* procompetitive effect undermines the rationale supporting even a prima facie case under the rule of reason, meaning demonstration of procompetitive effects could operate to immunize the conduct at an earlier stage of investigation. *See* Meese, *supra* note 29, at 161–62 ("Under current [rule of reason analysis], defendants must do more than show that a restraint produces significant benefits by, for instance, combating a market failure. Instead, defendants must also show that such benefits outweigh, counteract, or offset any anticompetitive harm .... [Modern economics] suggests that proof that contractual integration combats a market failure should ipso facto rebut any prima facie case, regardless whether such proof tends to show that prices are lower or output higher than before the restraint.").

instance, it is worth noting that federal enforcers have recently devoted vast resources to bring cases against Qualcomm, Facebook, and Google.[51] It is an open question whether antitrust authorities decided to allocate substantial budgets toward these cases because they were perceived to be easily winnable—and at least for the Qualcomm proceedings, this has already turned out not to be the case[52]—or because these cases fitted well within the agencies' broader political agendas.

Indeed, this last point should be a fairly important consequence of the regime Woodcock describes. In a world where budgetary constraints are the primary determinant of an agency's ability to win cases, and agency budgets are set by Congress, the calculus for which cases to bring must be significantly influenced by the agency's expectations regarding the effect of bringing any given case on its ability to convince Congress to increase its budget. It is by no means certain that such a calculus would result in the agency choosing only the most winnable cases; indeed, it seems quite plausible that an enforcement agency's ability to raise funds from Congress might be most improved by a *loss* in a case important to the relevant members of Congress and that may be claimed to have resulted from insufficient funding. This is an argument *against* a regime that encourages enforcers to bring more cases, not an argument in favor of it.

B. THE RULE OF REASON AND DETERRENCE

Another error is the implication that *all* conduct must be subject to rule of reason review for *any* bad conduct to be properly prohibited. But this is not how a precedential judicial system works. It is enough to act against a sufficient number of cases that bad conduct is deterred; it is not remotely necessary to scrutinize all conduct in court.[53]

51. *See* Fed. Trade Comm'n v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019). *See also, supra* note 7 and accompanying text.

52. The FTC ultimately lost its case before a panel of the Ninth Circuit, see *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020), and the full court declined to re-hear the case. The FTC declined to petition the Supreme Court for review. *See* Press Release, FTC, Statement by Acting Chairwoman Rebecca Kelly Slaughter on Agency's Decision not to Petition Supreme Court for Review of Qualcomm Case (March 29, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/statement-acting-chairwoman-rebecca-kelly-slaughter-agencys [https://perma.cc/TK89-D97Y].

53. *See* Paul L. Joskow, *Transaction Cost Economics, Antitrust Rules, and Remedies*, 18 J.L. ECON. & ORG. 95, 99–100, 104 (2002) ("[T]he test of a good legal rule is not primarily whether it leads to the correct decision in a particular case, but rather whether it does a good job deterring anticompetitive behavior throughout the economy given all of the relevant costs, benefits, and uncertainties associated with diagnosis and remedies.").

Of course Woodcock knows this. But he does not provide a basis for distinguishing between "enough" judicial review of potentially bad conduct and insufficient review. Much like competitive conduct itself, it can be difficult to tell the difference: The eventual number of cases both brought and won would be extremely low in both a system with under-enforcement as well as one with optimal enforcement.[54] Telling the difference between them is difficult, at best.

The assumption that counting cases or wins provides evidence that the current enforcement regime and legal standards that influence it are improper is unfounded. But it is endemic. For example, Woodcock purports to demonstrate that *Brooke Group*'s imposition of a rule of reason on predatory pricing was erroneous by pointing out that "[a]fter the Court imposed the recoupment requirement for predatory pricing . . . , enforcers all but stopped bringing cases."[55] In reality, this proves nothing because the cause of this result could be that none of the conduct was actually anticompetitive, rather than that it is too difficult to prove that anticompetitive conduct is, in fact, anticompetitive. Indeed, with a mature legal system and relatively clear rules, one should expect relatively few instances of marginal conduct giving rise to cases that present truly novel problems. It is entirely predictable that firms would, for the most part, be accurately guided in their affairs by the law and would largely avoid offending well-established competition principles.[56]

It is also unclear what simply counting investigations and enforcement actions across years demonstrates. Woodcock asserts that "[t]he effect of this budget constraint is written in the steep decline in enforcement since the 1970s,"[57] noting by way of example that the DOJ

54. The number of cases could be extremely low in a system with massive *over*-enforcement, too. Such a system would dramatically curtail *all* conduct, thus indirectly curtailing enforcement. Indeed, the argument that an optimal enforcement regime would tend toward little enforcement rests in part on this same dynamic, only in that case it is *harmful* conduct that is deterred, leading to decreased enforcement, while in the excessive-deterrence case it is all conduct that is deterred.

55. Woodcock, *supra* note 1, at 2101.

56. *See, e.g.*, Lawrence J. White, *Antitrust Activities During the Clinton Administration*, *in* HIGH STAKES ANTITRUST—THE LAST HURRAH? 11, 12–13 (Robert W. Hahn ed., 2003) ("For a given level of enforcement *effort*, the number of enforcement *actions* (and litigation generally) will be related to the extent of uncertainties and ambiguities about legal outcomes perceived by defendants . . . . If the number [of enforcement actions] is low, the reason could be lax enforcement or it could be clear legal standards and a reputation for vigorous enforcement . . . . Accordingly, in the absence of more information, counts of legal actions by themselves ought not to carry much weight.") (emphasis in original).

57. Woodcock, *supra* note 1, at 2101.

Antitrust Division "conducted twenty investigations for violations of section 2 of the Sherman Act and filed thirteen cases" in 1972, "whereas, in 1981, the agency conducted eight investigations and filed one case, and, in the five years ending in 2019, the agency conducted an average of two investigations per year and brought no cases over that period."[58] It is far from clear that budget constraints were the cause of this trend, however. In 1972 the Antitrust Division's total appropriated funding was $12,340,000 ($49,339,000 in 2009 dollars); in 1981 it was $44,862,000 ($92,107,000 in 2009 dollars); and in 2019 it was $165,000,000 ($139,630,000 in 2009 dollars).[59] Were these steadily increasing budgets nevertheless somehow the cause of the agency's decision to bring fewer cases in each period? At the very least it seems somewhat unlikely that the expected cost of enforcement increased *so much* between 1972 and 1981 that a virtual *doubling* of the agency's real budget nevertheless imposed a budget constraint on the agency sufficient to explain why it brought a single Section 2 enforcement action in 1981, down from 13 in 1972. Of course, there are many other variables relevant to an assessment of the relationship between an agency's budget, the expected cost of litigation, and the number and type of enforcement actions it brings in any given year.[60] But that is really the point: simply citing to a decline in the number of cases brought by an agency (particularly without also citing to the agency's budget) is woefully insufficient to demonstrate that increased enforcement costs played any meaningful role in that decline.

Moreover, it is insufficient to judge the quality of an antitrust regime by considering only the direct effects of enforcement actions, rather than also considering their broader deterrent effect. As Douglas

58. *Id.* at 2101 n.17.

59. *See Appropriation Figures for the Antitrust Division Fiscal Years 1903-2021*, DEP'T OF JUST., https://www.justice.gov/atr/appropriation-figures-antitrust-division [https://perma.cc/RN44-RK5R] (last visited May 4, 2021) (2009 dollar values calculated using the U.S. Bureau of Economic Analysis GDP deflator).

60. Similarly, of course, the casual empiricism presented here is far from conclusive. These numbers include only the DOJ's antitrust budget and Section 2 enforcement actions, whereas a more accurate picture would account for budgets and enforcement activities for the FTC, state attorneys general, and private litigants, as well as changes in other agency activities, productivity, and producer prices (among many other things). Elsewhere in the article Woodcock does attempt to estimate the change in the agencies' budgets and offers an educated hypothesis suggesting real budgets have declined and that the budget constraint is real. *See* Woodcock, *supra* note 1, at 2112–17. He also presents a figure with his own calculations of the combined DOJ and FTC enforcement budgets, adjusted for inflation, GDP, and productivity growth. *See id.* at 2114 fig.1.

Melamed puts it, antitrust law's "principal value is found, not in the big litigated cases, but in the multitude of anticompetitive actions that do not occur because they are deterred by the antitrust laws, and in the multitude of efficiency-enhancing actions that are not deterred by an overbroad or ambiguous antitrust law."[61]

This is crucial because Woodcock's analysis completely overlooks the deterrent effect of antitrust enforcement actions.[62] Merger enforcement offers a fitting example. There are currently no per se rules in this area of antitrust law. Even a merger to monopoly would be assessed under a standard close to the rule of reason.[63] And yet, for this subset of mergers, the loose standard is effectively much closer to per se illegality than a blanket exemption.[64] Mergers to monopoly are almost completely deterred by existing antitrust rules. Of course, firms still attempt *some* mergers where large market shares are involved. And one might thus ask what differentiates attempted large share mergers from those not attempted? One conjecture is that deterrence depends on the extent to which each merger implicates specific concerns raised by courts (or enforcers) in prior mergers. This has important ramifications for Woodcock's claim about agencies' declining enforcement budgets. Indeed, in a world where firms know that a merger to monopoly *will* be blocked, agencies do not need to devote any resources to the prosecution of such cases. The perception that such mergers *would* be blocked is sufficient. When this is the case,

61. A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 285 (2010).

62. Indeed, as a superficial indication of the irrelevance of deterrence to Woodcock's analysis, the words "deterrence" and "deterrent" occur only four times in the article, in every instance in a quotation from another source and in each case incidentally to the point being supported by the citation.

63. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/4KV3-Z58H] ("Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

64. *See, e.g.*, Jan Rybnicek, *Recent Antitrust Proposals Could 'Throw Sand in the Gears' of Economic Recovery by Stalling M&A*, CNBC (Feb 12, 2021), https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html [https://perma.cc/D9UY-Y7DE] ("Reform advocates would have you believe that the FTC and DOJ show up in court on a wing and a prayer and rarely are able to convert the power and credibility of the federal government into merger litigation victories. But reality is far different. The government has no problem blocking mergers it believes are problematic. Over the last 20 years the DOJ and FTC have prevailed in nearly 85% of merger challenges.").

limited agency budgets could be a sign of adequate deterrence rather than systematic underenforcement.[65]

This deterrent effect is amplified by enforcers' ability to challenge practices that have the widest possible application, and thus, if they win, deter the broadest amount of conduct. In other words, when you appreciate that deterrence is the primary way the law operates, it is not only the cost of litigation that affects the cost of enforcement, but the choice of cases. If enforcers are being squeezed, perhaps it is because they are making inefficient choices. This would hardly be surprising—let's not forget they are political beings, responding to political incentives.

C. MOVING FROM PER SE RULES TO THE RULE OF REASON AND THE ROLE OF LEGISLATURES

There is also a historical determinist bent to Woodcock's article that undermines its argument. Consider that the bête noir for Woodcock is the courts' converting per se rules into rules of reason without making a corresponding change elsewhere in the system to maintain the same overall expected cost of litigation. It is unclear what time Woodcock takes as his optimal baseline, but, like all critics of the Chicago School, it seems to be somewhere around the late 1960s. But why should we have any reason to think that the level and cost of enforcement at that time was optimal? More importantly, there is no justification for defining it on the basis of its explicit rules of per se illegality.

What this fails to capture is the vast scope of conduct that is effectively per se legal because it is simply ignored by antitrust enforcers. But this novel conduct is regularly brought under antitrust scrutiny, effectively removing it from per se legality to, at the very least, rule of reason treatment:

> To say that the dynamic enforcement model provides a positive theory for the exploitation safe harbor in existing Section 2 case law is not to say that the law is optimal in its current state. The safe harbor is surrounded by soft edges rather than a hard shell, and the current trend in the enforcement agencies is to press in at the edges of the shell.[66]

65. *See id.* ("In fact, after the DOJ or FTC challenge a merger, companies more often than not abandon their deal before trial because the legal standard is so favorable to the government. This even includes successful challenges against deals involving the acquisition of a nascent firm that does not compete against the acquirer today but, in the government's view, could in the future, such as the DOJ's recent success in blocking Visa's purchase of fintech upstart Plaid.").

66. Keith N Hylton & Haizhen Lin, *Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions*, 77 ANTITRUST L.J. 261 (2010).

In a common law-like system, the only constant is change. And this comes slowly. This stands in stark contrast to Woodcock's article, which gives the impression that the courts reject per se rules on a whim virtually every day. Ironically, it is the slowness of judicial revision of incorrect rules that lends primary support to the presumption that type I errors are more costly than type II. A firm improperly deterred from procompetitive conduct has no standing to sue the government for erroneous antitrust enforcement nor any ability to appeal against a court's adoption of an improper standard. Judicial correction presupposes, at the very least, some firm engaging in conduct despite its illegality in the hope that its conduct will go unnoticed, or the prior rule may be misapplied or overturned if it is sued. But the primary effect of type I errors is the nonexistence of such conduct in the first place. Type I errors are thus harder (and slower) to overturn than type II.[67] This might explain why courts are often reluctant to turn rules of reason into per se prohibitions, and why the opposite has been more common of late.

The social costs emanating from type I errors are compounded in digital markets. This is predominantly a function of courts' and policymakers' historical inhospitality toward novel forms of business conduct.[68] Not only does this deter firms from adopting what may be efficient conduct, it may also reduce product and business model innovation by preventing firms from experimenting with novel business conduct (and thus earning positive returns on inventions).[69]

Another fundamental error is the implicit acceptance of the *ex ante* baseline and neglect of the ability of elected bodies, but not courts, to rectify budget constraints. The court is not a decision-maker in the same way enforcers and legislatures are. Legislatures decide which conduct to proscribe and how to do so. They thus set the parameters not only for substantive liability, but the overall "certainty" of the legal regime. Where, as with antitrust, the legislation operates in the nature of a standard, it is left to courts to decide the specific contours of legal rules (in this case, in accordance with economic learning):

67. For more on this topic, see Manne, *supra* note 45.

68. *See* Easterbrook, *supra* note 22, at 4 ("The tradition is that judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use.").

69. *See* Manne & Wright, *supra* note 27, at 163–77. *See also*, Elyse Dorsey, *Anything You Can Do, I Can Do Better—Except in Big Tech?: Antitrust's New Inhospitality Tradition*, 68 KANSAS L. REV. 975 (2019).

> The legislature's choice whether to enact a standard or a set of precise rules is implicitly also a choice between legislative and judicial rulemaking. A general legislative standard creates a demand for specification. This demand is brought to bear on the courts through the litigation process and they respond by creating rules particularizing the legislative standard.[70]

The application of decision theory to judicial decision-making originated with Ehrlich and Posner's 1974 article, *An Economic Analysis of Legal Rulemaking*:

> The model is based on a social loss function having, as its principal components, the social loss from activities that society wants to prevent, the social loss from the (undesired) deterrence of socially desirable activities, and the costs of producing and enforcing statutory and judge-made rules, including litigation costs. Efficiency is maximized by minimizing the social loss function with respect to two choice variables, the number of statutory rules and the number of judge-made rules.[71]

Because the choice over the number of statutory and judge-made rules rests with the legislature, the primary determinant of the efficiency (error-cost minimization) of legal rules is the legislature's: "a theory of the legal process according to which the desire to minimize costs is a dominant consideration in the choice between precision and generality in the formulation of legal rules and standards."[72]

Accordingly, it is impossible for any court, or for "the courts" even, to properly address the overall balance of expected harm and litigation costs. Enforcers (along with private plaintiffs), of course, decide which conduct to challenge, thus determining the scope of conduct to be considered by courts. There is no requirement for prosecutorial discretion to optimize social welfare, say by enforcing against conduct that is most likely to cause the greatest amount of harm to the greatest number of people. This is the scope of conduct at issue before the courts. Courts decide only how to rule in a particular case. Even the Supreme Court is rarely faced with a case or even a set of cases that encompasses the entirety of the relevant legal disputes, let alone of the challenged conduct.

The relevant question is not, really, whether a particular court gets it right in a particular case, but whether the emergent effect is as good as can be achieved, taking account of courts' repeated and evolving holdings, the changing evidentiary circumstances underlying those cases, the perception and conduct by business actors (and their legal advisors), and the perception and enforcement decisions of public enforcers (operating subject to budget constraints). Certainly, it is not within the purview of any given court to account for the *overall*

70. Ehrlich & Posner, *supra* note 12, at 261.
71. *Id.* at 272.
72. *Id.* at 280.

systemic error costs, including those arising out of enforcers' budget constraints. That may well be the province of the legislature (and, in particular, each enforcers' oversight committee in Congress), but it surely is not for the courts.

Similarly, Woodcock's framing assumes away the actual institutions that govern the judicial decision-making process. It would be extremely odd for a court to, for instance, determine that X conduct should continue to be judged under the rule of reason but that, because last week it decided that resale price maintenance should now be judged under a rule of reason, it will instead subject X conduct to a per se rule of illegality. Yet this is, in fact, what Woodcock seems to be advocating:

> [T]he Court should balance the enforcement budget for each new expensive rule of reason the Court adopts by substituting inexpensive per se rules of illegality for expensive rules of reason in other areas of antitrust. That is, if the Court believes that under-enforcement is worse than over-enforcement, then the Court should pay for any new rule of reason the Court imposes on one area of conduct by making per se illegal another area of conduct once subject to a rule of reason, rather than by allowing enforcers simply to stop enforcing the antitrust laws in other areas in order to set aside the funds needed to enforce the new rule of reason. If the Court wants to subject predatory pricing to a rule of reason, then the Court should, for example, ban reverse payment patent settlements. If the Courts wants to subject minimum resale price maintenance to rule of reason treatment, then the Court should, for example eliminate rule of reason treatment for horizontal mergers. If the Court wants to subject refusals to deal in essential facilities to rule of reason treatment, then the Court should, for example, ban exclusive dealing contracts. And so on.[73]

Maybe Woodcock is using a rhetorical device here, and he doesn't literally mean that "the Court" should randomly heighten the standard of review in another area to counterbalance the budgetary effects of its relaxation in the one under scrutiny. At the very least, however, his paper shows no signs that his intention is merely rhetorical. This has troubling implications. While some variation might be desirable within the judicial rulemaking system—judges may disagree on the interpretation of a rule, they might also reach different decisions despite facing similar, though not identical, fact patterns; this is the essence of common law approach—it is another matter entirely to suggest that courts should arbitrarily put their thumbs on the scale to maintain a semblance of financial balance. Indeed, these two approaches could not be further apart. The first uses "emergent" randomness to discover appropriate rules, while the latter imposes randomness to maintain arbitrary enforcement levels (potentially

73. Woodcock, *supra* note 1, at 2104.

discounting evidence that these levels may be inappropriate in the process). Moreover, the suggestion that the Court should adjust its decisions to manage enforcement budgets would assign to the Court—the least political branch—Congress' inherently political responsibility to set agency budgets.

In short, Woodcock's argument rests on a critical assumption regarding the optimal level of antitrust enforcement, and a belief that courts are well-situated to adjust the necessary levers to maintain these levels constant. At the very least, this seems to underplay the role that Congress plays in these matters. It also appears to run counter to the ethos underlying the common law approach that has shaped American antitrust law for decades (as was intended by the framers of antitrust law's key statutes).[74]

D. THE OVERSTATED DIFFERENCE BETWEEN RULE OF REASON AND PER SE

It is also inaccurate to frame per se rules as entailing no indeterminacy whatsoever. There will always be procedural, theoretical, and/or evidentiary predicates for legal liability. Per se rules are triggered by factors that can be subject to significant interpretation. And rules of reason may be designed to provide firms with safe harbors. Accordingly, the distinction between these standards is often overblown.

For example, a great deal of the enforcement activity characterized by Woodcock as movement toward a rule of reason could better be characterized as the creation of bright-line safe harbors for large swaths of conduct. There are—or were—a great number of antitrust safe harbors beginning in the 1980s and coinciding with a number of per se to rule of reason shifts. *Copperweld* established a safe harbor for within-firm conduct.[75] *Brooke Group* introduced a safe harbor in predatory pricing cases for above-cost pricing.[76] *Trinko* created a safe harbor for monopoly pricing (and a presumption of legality for unilateral refusals to deal).[77] The Court also adopted safe harbors for

74. *See, e.g.*, Michael A Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1298 ("[T]he Sherman Act framers intended that courts would draw the dividing line between reasonable and unreasonable restraints of trade by applying the common law.").

75. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767–68 (1984).

76. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–23 (1993).

77. Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409–10 (2004).

product innovation by dominant firms.[78] There are numerous other examples.[79]

Significantly, many of these shifts are described by Woodcock as moves toward the rule of reason from per se illegality—but they needn't be. Where Woodcock describes *Jefferson Parish* as having the net result that an exemption for "exclusive dealing that forecloses more than 30% of the market is subject to rule of reason treatment on the model of *Tampa Electric*"[80] Edwards and Wright describe it as "a bright line foreclosure safe harbor to analyze the reasonableness of exclusive dealing contracts."[81]

Woodcock goes on to interpret the rule set out in *Jefferson Parish* by noting that:

> Justice O'Connor's observation in her celebrated *Jefferson Parish* concurrence that exclusive dealing contracts "of narrow scope pose no threat of adverse economic consequences" and "may be substantially procompetitive" referred to the character of those contracts that foreclose up to 30% of the market and are effectively per se legal today. Of the ambiguous conduct that forecloses more than that amount, Justice O'Connor expressed no opinion regarding the likelihood of harm.[82]

The key language from Justice O'Connor is the following:

> Our prior opinions indicate that *the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact* in the tied-product market or that abet the harmful exercise of market power that the seller possesses in the tying product market. *Under the rule of reason tying arrangements should be disapproved only in such instances* . . . .
>
> In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question — the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. *Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal*.[83]

The presence of an indeterminate term like "significant fraction" does not render the rule inherently indeterminate (if that word is to have any meaning). And under this enunciated rule, exclusive dealing is unreasonable (illegal) only when it entails "significant" foreclosure. That

78. *See, e.g.*, Cal. Comput. Prod., Inc. v. Int'l Bus. Machs. Corp., 613 F.2d 727, 741–42 (9th Cir. 1979).

79. For an excellent, detailed discussion of the creation and decline of antitrust safe harbors, see Lindsey M. Edwards & Joshua D. Wright, *The Death of Antitrust Safe Harbors*, 23 GEO. MASON L. REV. 1205 (2016).

80. Woodcock, *supra* note 1, at 2130.

81. Edwards & Wright, *supra* note 79, at 1206.

82. Woodcock, *supra* note 1, at 2130.

83. Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 35, 45 (1984) (emphasis added) (O'Connor, J., concurring).

is a bright line, even if "significant" is indeterminate. Conduct that does not foreclose a significant fraction of buyers or sellers is per se legal. In this case, because the conduct in question foreclosed 30% of the market, a figure of 30% to 40% has been interpreted by numerous courts as the boundary of effective per se legality.[84]

This may seem like a semantic distinction—but that is somewhat the point. Whether a rule is a bright-line safe harbor embedded in a rule of reason or a rule of per se legality is in the eye of the beholder. Woodcock is aware of this, but unduly dismissive of it. The prior case law did not establish per se rules that were always appreciably distinct from rule of reason analysis; they simply imposed different safe harbors or spheres of per se liability, the boundaries of which inevitably require detailed analysis, at times little different than that entailed by the later rules.[85] By the same token, the rule of reason is not monolithic, either, and "[a]pplication of the rule of reason is not a rule of per se legality."[86] Indeed, while "[i]n some instances, rule of reason treatment approaches per se legality; in others, the rule amounts to a rule of presumptive condemnation."[87]

For this same reason, Woodcock's characterization of *Jefferson Parish* as bifurcating a prior per se rule is arguably incorrect: it did not create a safe harbor and a rule of reason out of a prior per se rule; it

84. *See, e.g.*, Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 124 (1st Cir. 2011) ("[F]oreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, low numbers make dismissal easy."). *See also* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 324 n.85 (2002) (collecting cases).

85. *See, e.g.,* Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 479 (2000) ("NCAA is to be applauded to the extent that it created an 'escape hatch,' allowing defendants to justify some restraints that would otherwise be per se unlawful.").

86. Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 27 (2004). *See also id.* ("Even without a monopoly . . . many manufacturers will find their non-price restraints subjected to significant judicial scrutiny if those restraints take the form of concerted action."); *id.* at 28–30 ("[T]he 'rule of reason' that courts and the enforcement agencies apply to analogous restraints is quite unforgiving to defendants. Often, mere proof that a restraint exists will cast the burden of production upon the defendant. Other courts require a little more to support a prima facie case, namely, proof that the restraint actually alters the price or output of the parties to it. As with the case of vertical restraints, demonstrating that the restraint produces procompetitive benefits does not always suffice to rebut this proof of a restraint and to demonstrate the agreement's reasonableness. Instead, the plaintiff will prevail if it can show that a less restrictive means will produce the same benefits. In the current legal environment, firms that adopt horizontal intrabrand restraints incur a significant legal risk.").

87. *Id.* at 83.

simply shifted the precise nature of the presumptions. It introduced a fairly clear rebuttal to the presumption of harm from substantial foreclosure. But it did not really insulate conduct below the threshold any more than prior cases made it truly per se illegal. One way we know that is that conduct was attempted, and cases litigated all the way to the Supreme Court. Had the rule been clear, it is unlikely the conduct would have been attempted in the first place and unlikely that any firm would incur the expense of repeatedly litigating an outcome that was a foregone conclusion.

Further, just as litigation efforts will shift to take advantage of the relative pressure points in any given case, potential defendants' conduct will shift, as well. This does not necessarily mean that there will be less problematic conduct; only that the character of the conduct will shift. In an efficiently functioning regime, this shift will entail a shift to conduct less likely to harm consumers. Certainly, per se rules are better at deterring the conduct proscribed by such rules. But as long as there remains any scope of indeterminacy and any possibility that conduct not clearly proscribed may be beneficial to the actor, there will be business conduct that may run afoul of the antitrust laws. And as long as this level of activity exceeds the budget constraint of the enforcement agencies, the budget constraint will always be a limiting factor.

This is not to say that more legal certainty cannot serve to improve the legal regime. But it does mean that we should be careful before pointing to the level of enforcement budgets as outcome determinative. Indeterminacy can come in many places. And while, at a high level of generality, it may be true that the general arc of cases has (or had) been from per se illegality to rule of reason treatment, when the concern is litigation costs, it is not a nominal per se rule or rule of reason but, rather, the law's overall indeterminacy that is relevant.

Again, this is not to say that the standard of review and the availability of evidentiary presumptions are irrelevant—far from it. But both are consistent with per se and rule of reason approaches. Litigants will apply pressure wherever there is indeterminacy. Woodcock's argument that courts should eschew the rule of reason, on account that it is too indeterminate, is thus off the mark.

CONCLUSION

Winston Churchill famously quipped that "it has been said that democracy is the worst form of Government except for all those other

forms that have been tried from time to time . . . ."[88] Much of the same could be said about the rule of reason. While it is certainly not perfect, policymakers have yet to find another standard that provides the same flexibility to accommodate ever-evolving forms of conduct with initially ambiguous effects on consumer welfare. Woodcock's paper underplays these important virtues, while his more pointed critiques often miss the mark.

This is particularly true of arguments that the rule of reason overstretches enforcement budgets, that it provides no deterrent effect, and that it ultimately amounts to a blanket exemption of conduct. Indeed, the case for relaxing enforcement standards to make litigation easier for enforcers given their budget constraint is tenuous, at best. The fact that, compared to antitrust's earlier inhospitality regime, the current regime entails larger direct costs is in no way decisive unless it can be demonstrated that the net effect of more nuanced rules and higher direct costs (leading to less enforcement) is a reduction in the optimality of enforcement. The assumption that the change from inhospitality to effects-based analysis, even if accompanied by higher direct costs, is a deterioration essentially just assumes that more enforcement is better. But that assumption is unsupported.

More broadly, it must also be considered that enforcement budgets do not exist in a vacuum, and, like everything else, their consumption entails opportunity costs. A relative increase in antitrust enforcement budgets means a commensurate decrease in funding for some other government activity or (perhaps more likely) an increase in tax revenues taken from taxpayers. An increase in antitrust enforcement budgets may be the right response to an increase in the difficulty of antitrust enforcement litigation, but only if taken subject to the determination that there isn't a still better use for those resources. That has not been demonstrated here, nor has an attempt to do so even been made.[89] When all is said and done, Woodcock's paper, while thought-

88. W.S. CHURCHILL & R.M. LANGWORTH, CHURCHILL BY HIMSELF: IN HIS OWN WORDS 574 (2013).

89. There is some literature attempting to assess the return to consumers from antitrust enforcement spending, but it consists primarily of speculation and back-of-the-envelope estimates. Even so, it is plausibly the case that the return on antitrust enforcement spending is positive and even substantial. What is entirely unknown, however, is the value of the *marginal* enforcement dollar, and thus the return to any additional enforcement spending. As the author of one of these studies claiming value for antitrust enforcement dollars puts it: "Do the benefits of antitrust enforcement exceed the costs? Almost surely, although any quantitative calculus is highly speculative." Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. ECON. PERSP. 27, 42 (2003).

provoking, thus fails to convincingly establish the point it sets out to make.