

Response to Ramsi Woodcock's *The Hidden Rules of a Modern Antitrust*

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In *The Hidden Rules of a Modern Antitrust*, 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.

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, and the rule of reason's role in decreasing this uncertainty. It takes time and experience for courts to form an opinion about the value of certain forms of business conduct, and rule of reason litigation increases the accuracy of all subsequent litigation—and the ability of both economic actors and antitrust enforcers to predict judicial outcomes and adjust their practices accordingly. This stands in stark contrast to Woodcock's model, which assumes that 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).

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" 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.

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