

Dear Antitrusters: Bias Is Ubiquitous. Stick to the Merits.

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A recent [tweet](#) by Lina Khan, discussing yesterday's *American Express* decision, exemplifies an unfortunate trend in contemporary antitrust discourse. Khan wrote:

The economists cited by the Second Circuit (whose opinion SCOTUS affirms) for the analysis of 'two-sided' [markets] all had financial links to the credit card sector, as we point out in FN 4 [[link to amicus brief](#)].

Her implicit point—made more explicitly in the linked brief, which referred to the economists' studies as "industry-funded"—was that economic analysis should be discounted if the author has ever received compensation from a firm that might benefit from the proffered analysis.

There are two problems with this reasoning. First, it's fallacious. An *ad hominem* argument, one addressed "to the person" rather than to the substance of the person's claims, is a fallacy of irrelevance, sometimes known as a genetic fallacy. Biased people may make truthful claims, just as unbiased people may get things wrong. An idea's "genetics" are irrelevant. One should assess the substance of the actual idea, not the identity of its proponent.

Second, the reasoning ignores that virtually everyone is biased in some way. In the antitrust world, those claiming that we should discount the findings and theories of industry-connected experts urging antitrust modesty often stand to gain from having a "bigger" antitrust.

In the common ownership debate about which Mike Sykuta and I have recently been [blogging](#), proponents of common ownership restrictions have routinely written off contrary studies by suggesting bias on the part of the studies' authors. All the while, they have ignored their own biases: If their proposed policies are implemented, their expertise becomes exceedingly valuable to plaintiff lawyers and to industry participants seeking to traverse a new legal minefield.

At the end of our recent paper, [The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms](#), Mike and I wrote, "Such regulatory modesty will prove disappointing to those with a personal interest in having highly complex antitrust doctrines that are aggressively enforced." I had initially included a

snarky footnote, but Mike, who is far nicer than I, convinced me to remove it.

I'll reproduce it here in the hopes of reducing the incidence of antitrust *ad hominem*.

Professor Elhauge has repeatedly discounted criticisms of the common ownership studies by suggesting that critics are biased. *See, e.g.*, Elhauge, *supra* note 26, at 1 (observing that “objections to my analysis have been raised in various articles, some funded by institutional investors with large horizontal shareholdings”); *id.* at 3 (“My analysis of executive compensation has been critiqued in a paper by economic consultants O’Brien and Waehrer that was funded by the Investment Company Institute, which represents institutional investors and was headed for the last three years by the CEO of Vanguard.”); Elhauge, *supra* note 124, at 3 (observing that airline and banking studies “have been critiqued in other articles, some funded by the sort of institutional investors that have large horizontal shareholdings”); *id.* at 17 (“The Investment Company Institute, an association of institutional investors that for the preceding three years was headed by the CEO of Vanguard, has funded a couple of papers to critique the empirical study showing an adverse link between horizontal shareholding and airline prices.”); *id.* (observing that co-authors of critique “both have significant experience in the airline industry because they consulted either for the airlines or the DOJ on airline mergers that were approved notwithstanding high levels of horizontal shareholding”); *id.* at 19 (“The Investment Company Institute has responded by funding a second critique of the airline study.”); *id.* at 23-24 (“Even to the extent that such studies are not directly funded by industry, when an industry has been viewed as benign for a long time, confirmation bias is a powerful force that will incline many to interpret any data to find no adverse effects.”). He fails, however, to acknowledge his own bias. As a professor of antitrust law at one of the nation’s most prestigious law schools, he has an interest in having antitrust be as big and complicated as possible: The more complex the doctrine, and the broader its reach, the more valuable a preeminent antitrust professor’s expertise becomes. This is not to suggest that one should discount the assertions of Professor Elhauge or other proponents of restrictions on common ownership. It is simply to observe that bias is unavoidable and that the best approach is therefore to evaluate claims according to their substance, not according to who is asserting them.

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