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Lillian Garcia
Portland State University

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Authored by: Lillian Garcia

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Abstract: This inquiry seeks to establish that Lina Khan's work brings to light the importance of reforming institutions in order to address the challenges of internet technology. As the dominance of a small number of technology giants has increased to unforeseen proportions, legal mind Lina Khan has emerged as a leading voice in the call for an updated legal framework, as well as a revision of current economic understanding, to address the new forms of monopoly power these firms practice. The first part of this inquiry examines Chicago School dominance over economic thought and its effect on antitrust enforcement over the past 40 years. The second part looks at the particular challenges that internet technology presents to today's antitrust policymakers. The third and final part considers Lina Khan's call for a revival of a structural understanding of market dynamics, which she terms "economic structuralism".

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This inquiry seeks to establish that Lina Khan's work helps to us to understand the importance of reforming institutions in order to address an array of challenges related to internet technology. As the dominance of a small number of technology giants has increased to unforeseen proportions, legal mind Lina Khan has emerged as a leading voice in the call for an updated legal framework to address the new forms of monopoly power these firms practice. Khan comes to the conclusion that firms have been able to acquire market dominance due to a combination of two main factors. The first is the rise of Chicago School ideological dominance, which stripped away the structural understanding of the economy previously embodied in antitrust law enforcement. The second is the technology of the internet, which allows for new forms of market control. In response to these challenges, Khan proposes a revival of a structural understanding of the economy, updated to today's technological and economic realities.

The Chicago School's Dominance

In order to address the current challenges faced by antitrust policymakers, Khan emphasizes the importance of recognizing the impact of Chicago School ideological dominance in weakening enforcement. The title of Khan's most significant scholarly work, "Amazon's Antitrust Paradox" (2017), is a direct response to the 1978 book *The Antitrust Paradox* by highly influential Chicago

School proponent Robert Bork. Bork, who became Solicitor General under President Richard Nixon in 1973. Bork outlined a stance favorable to big business and worked successfully to narrow grounds of antitrust enforcement. Under his influence, antitrust enforcement and interpretation changed dramatically, allowing for big business to thrive. Khan (2017, 727) notes that the paradigm of antitrust enforcement initiated by Bork has only developed further since the 1970's. The dominance of the Chicago School (named for the University of Chicago, from which its foremost scholars hailed) has been so complete, Khan (2017, 742) points out, that it extends to politically liberal thinkers as well. In an article for the online publication Quartz, Khan (2014) noted that writers for liberal media outlets such as *New York Magazine*, Vox, and *The New York Times*, under this influence, made arguments that Amazon was not a monopoly. The nearly universal acceptance of the propositions of Bork and the Chicago School has helped to render antitrust enforcement powerless, with deleterious effects to markets.

The alleged "paradox" in Bork's *The Antitrust Paradox* was that large size in companies did not promote the abuses of monopoly power; instead, large size provided efficiencies that benefited consumers. Such a pro-big business stance was echoed at large by the Chicago School. Khan (2017, 719) points out that Chicago School conclusions rest on the presumption that structural features of markets are a reflection of the most efficient modes of production, rather than a determining factor of how agents behave. Quoting author Marc Allen Eisner, who wrote a book about how anti-regulation policy makers (mis)invoked Chicago School economics to further their agenda, Khan (2017, 719) summarizes the Chicago School view as: "what exists is ultimately the best guide as to what should exist." In other words, this world is, inherently, the best of all possible worlds.

Bork's view, Khan (2017, 730) writes, narrowed the grounds on which antitrust was to be judged from a broad range of factors to the lone standard of consumer welfare. Bork put forth the argument that predatory pricing aimed at securing monopoly power almost never occurred. Furthermore, largeness in companies, rather than being a cause for alarm, was reinterpreted in his analysis as a boon to efficiency due to economies of scale and the smoothing effect of replacing market transactions with administrative decisions. Finally, Khan (2017, 733-4) notes that the Chicago School developed the "single monopoly profit theorem." The theorem held that each market had a finite amount of surplus available to extract, and this amount could not be increased through entering into vertically related markets. Armed with this analysis, Bork and the Chicago School argued that vertical integration was attractive not because of increased market power but because of increased efficiency. Mergers and acquisitions that resulted in vertical integration would, with Bork's view as a guide, no longer be a target of antitrust enforcement.

It was not only the content of its proposals—in favor of bigness, skeptical of intervention— that defined the Chicago School, but also its methodology. Khan (2017, 744) notes that Chicago School analysis shifted focus from process to outcome. Rather than examining how market power affected the structure of markets, the analysis shrunk to one question: whether prices were unreasonably higher. This was taken to answer the only relevant question of antitrust, the question of consumer welfare. Khan (2017, 728-9) explains that court cases established this as the basis of judgment in the form of something called recoupment analysis. The seminal case *Matsushita v. Zenith Co* (1986) invoked Bork's arguments to strike down a claim of predatory pricing. In 1993, *Brook Group Ltd. v. Brown & Williamson Tobacco Corp* followed up on *Matsushita*, solidifying its precedent with the introduction of the "recoupment test" to be used as the basis of judgment. Under this test the burden of antitrust prosecution was to show that aggressive pricing would eventually lead to prices high enough to compensate for earlier losses, including, following Chicago School analytical methodology, the "time value" of the money forgone during the predatory phase. Khan (2017, 730) notes that with the introduction of the recoupment test, predatory pricing became extremely difficult to prove, and antitrust enforcement effectively took a huge blow.

Challenges Associated with Technology

Bork's *The Antitrust Paradox* came out in 1978. Just a year earlier, Apple had come out with its Apple II computer, which over the next sixteen years reached millions of consumers; meanwhile, the development of the technological foundations of the internet were well underway—wide-area networks were established in the 1960's, and the first commercial domain would be registered in 1985. The reigning of the Bork regime of antitrust enforcement, in other words, came just as the technology of personal computers and the closely tied technology of the internet were beginning to develop. Over the next forty years, a new terrain of media and commerce opened up, with the path for ambitious entrepreneurs all the wider due to the Chicago School's business-friendly blessing.

The massive transformation to the way business is conducted instigated by the internet is still in process. The declaration of bankruptcy in October 2018 by Sears, "the original everything store," as an article by Tiffany Hsu (2018) in *The New York Times* called it, seemed to mark a definitive transition to the new "everything store," Amazon. A 2018 *Times* article by Michael Corkery makes a direct comparison of the two as stars of their respective gilded ages. All companies, at this point, are obligated to incorporate internet or computer technology into all aspects of their business. However, companies that operate as major platforms—in particular, Apple, Google, Facebook, and Amazon—have central positions in the consumer experience of the internet; as such, any company that needs to reach consumers must utilize these platforms. This centrality of position equates to an enormous amount of power.

In her essay, “Sources of Tech Platform Power” (2018), Khan examines how these companies make use of their position to expand and entrench their power. Khan (2018, 326) identifies three main tactics: gatekeeping; leveraging; and the exploitation of data. Khan notes that these platforms are peculiar beasts, in that they function at once as multi-sided platforms, advertising firms, media outlets, and lastly, as manufacturers, publishers, and sellers of their own products. The conflicts of interests that result are rampant, and, as Khan (2018, 326) notes, they can effectively use their position to set the terms of business for producers, retailers, advertisers, app developers, and publishers.

The first tactic, gatekeeping, refers to the ability of large tech companies to use their position as necessary vehicles for sales as a powerful bargaining tool in contract negotiation. Khan (2018, 326) notes the extent of these companies’ centrality: two operating systems, Apple and Google’s Android, run 99% of smartphones; nearly half of online sales, and over half of product searches, occur on Amazon; digital advertising sales, finally, overwhelmingly go through Facebook and Google. Khan points out that doing business with these companies is obligatory to have access to markets. In “Amazon’s Antitrust Paradox,” Khan discusses the significant blow Amazon has been able to effect on publishers as it has solidified its dominance in the online book and e-book sales markets. While negotiating with the Hachette publishing company, for instance, Khan (2017, 715) points out that Amazon took Hachette's books off its site, effectively crippling the bargaining position of the publisher. Hachette, however, has fared better than many. Khan (2017, 766), supported by testimony from publishers, makes the argument that the pressures exerted by Amazon—in extracting fees, pressing for lower retail prices, and in dominating the main avenue of sales—have led to consolidation and lessening of diversity within the publishing industry.

The second source of platform power, leveraging, results from the simultaneous position of these companies as platforms for other sellers and as sellers themselves. Khan (2018, 328) points out that these companies enter into direct competition with users of their platform. Because their algorithms control the order of search results, they can push their own products into prominence. Khan (2018, 328) notes that the European Commission, which is significantly more aggressive than the U.S. in antitrust enforcement, assessed Google a $2.7 billion fine for guiding traffic towards its shopping platform rather than those of competitors. Additionally, Khan (2018, 328) notes research indicating that Amazon promotes its own apparel over competitors' in product searches.

The last, and most daunting, source of platform power is data exploitation. This is the most powerful and, as Khan (2018, 333) points out, the most difficult to address instrument of power, because of its complexity, wide reach, and lack of precedence. For one, this form of power acts to buttress the other two. When companies use platform services, they provide a bounty of information regarding sales and strategy, helping platform businesses identify the most successful products and swoop in on promising markets. Google and Amazon also extract information through their cloud services, which companies use for content streaming, conducting online transactions, and websites hosting. On the other side of the platform, these companies extract a dystopian level of detail on consumers. Khan (2018, 329) notes that even the amount of time a customer moves their mouse over a "buy" button can be tracked. Khan (2018, 330) also points out the discriminatory way in which companies apply this information to their advertising businesses, targeting by race, age, and other characteristics, as well as to their product pricing, gauging personalized price points and selectively offering discounts. As revelations of Facebook's practices concerning data sales and exploitation continue to emerge, we are still learning the extent of the consequences of data exploitation.

Lina Khan and Economic Structuralism

In the face of these challenges, Khan calls for an overturn of the Chicago School regime. Khan makes the argument that the Chicago School analytical method, which focuses on prices, misses a number of serious problems that today's companies pose. The "paradox" of Khan's "antitrust paradox" is that despite the apparent boon to consumers, in fact large tech companies such as Amazon actually threaten consumer welfare, meaning they fail to meet the standard set by Bork and the Chicago School; but their negative impact goes far beyond that. As a *Seattle Times* article (2018) quoted Khan: "As consumers, as users, we love these tech companies. But as citizens, as workers and as entrepreneurs, we recognize that their power is troubling." Khan's solution is to recover and build on the precedents set before the rise of the Chicago School, employing what she refers to as "economic structuralism." It is necessary, according to Khan (2017, 717), to look at the structure of a business and its "structural role" in relevant markets in order fully to understand its impact. The goal should be to ensure the functioning of a healthy competitive process. Importantly, at stake is not just the economy but the foundations of democracy.

Lina Khan is far from the only legal scholar attempting to confront the new challenges presented by this age of technology; however, two distinct approaches exist. In one, the propositions of the Chicago School and mainstream economic theory as it stands are more or less accepted; in the other, we find a call for an overturn at the level of approach. In her scholarly work, "The Ideological Roots of America's Market Power Problem" (2018), Khan responds to a collection put out by the *Yale Law Journal* in which a number of legal scholars addressed the question of how to confront today's monopoly issues. Khan's criticism of the Yale Collection is that the authors fail to appreciate the fundamental way in which Chicago School ideas create obstacles to effective antitrust enforcement.

Khan identifies her own approach as belonging to the "New Brandeisian School." Her article, "The New Brandeis Movement: America's Antimonopoly Debate" (2018), something of a manifesto, expounds five tenets of the School: The first is that "antimonopoly," her word to encapsulate the New Brandeisian stance, is a critical instrument and philosophical foundation for structuring a truly democratic society. The second is that antimonopoly extends beyond antitrust: a multitude of approaches is necessary to protect competition. The third is that antimonopoly does not equate to a universal attack on bigness; natural monopolies exist and should be regulated rather than broken up. The fourth is that processes and structures, rather than outcomes, should be the central focus. The fifth is to deny the power of market "forces." This final tenet stands in explicit opposition to the Chicago School. Khan argues that the economy does not stand on its own; rather law and policy determine the shape of a fundamentally *political* economy.

In "Amazon's Antitrust Paradox," Khan (2017, 718) notes that a structural understanding of the economy was in operation until the 1970's. Prior to the Chicago School's takeover, antitrust law developed out of a desire to rein in the power that size and market centrality conferred upon large businesses. Khan (2017, 723) points to the 1890 Sherman Antitrust Act, which was further strengthened by the 1914 Clayton Act; the Robinson-Patman Act of 1936, which barred price discrimination in transactions between retailers and producers, further expanded the terms of antitrust, newly invoking criminal, rather than just civil, law. John Hughes and Louis P. Cain's *American Economic History* (2007, 370 and 401) point to the catalyzing factors of the growth of big business, on the one hand, and the political influence of the Populist Party, on the other, in the building of this antitrust framework. Furthermore, Hughes and Cain (2007, 374) point out (and Khan (2017, 798) notes the connection as well) that the Sherman Act built on earlier precedent set by the 1877 *Munn v. Illinois* case, which asserted the right to regulate private concerns if they had to do with "public interest."

Khan (2017, 737) addresses the Chicago School's primary concern, the consumer, arguing that on the basis of consumer welfare alone, large tech companies have wielded power with significant negative consequences. Just looking at the Chicago School's narrow grounds of price, Khan (2017, 738-9) argues, the consumer may be losing out. However, Khan emphasizes that the components of consumer welfare go beyond just “low prices.” Consumers place value on the quality, diversity, and inventiveness of products. As seen in the case of the publishing industry, the effects of excess power can mean less consumer choice in markets vital to the cultural health of society. Khan (2017, 739) points to a recent decline in new businesses as a sign of increasing staleness in markets.

Consumer welfare, however, cannot fully describe the harms caused by the new monopolists. Citing the intent of the creators and supporters of the 1890 Sherman Antitrust Act and the early 20th Century Supreme Court Justice Louis Brandeis, Khan (2017, 741-2) makes the argument that the goals of antitrust measures are far more complex. First, lawmakers were concerned with the effects of dominant firm power not only on consumers but also on producers. Hughes and Cain (2007, 374), for instance, note that it was farmers threatened by railroad price fixing who helped bring the *Munn* trial to its conclusion. Furthermore, concentration of economic power is a sure conduit to outsize political power and, as such, a threat to democracy., As an article by Robinson Meyer (2018) in *The Atlantic* pointed out, this point was brought home when Lina Khan’s former employer, Open Markets, an antimonopoly research and advocacy group, was defunded by Google after issuing a criticism of the company.

Finally, Khan emphasizes the importance of maintaining open markets. Again, Khan points to the views of Justice Brandeis, who believed in the necessity of "industrial liberty." The people at large, rather than a small elite, should be empowered to determine the direction of the economy. Economic concentration, on the other hand, allows dominant firms to control markets and determine the paths of market development. Khan (2017, 768-771) describes an instance of this power over path development in detailing the ruthless tactics Amazon used to drive a competitor, Quidsi, into insolvency, after it refused to be bought. Amazon, characteristically of the new monopolists, had at its disposal an unprecedentedly large stream of capital to execute predatory pricing and forgo profit. Part of the Amazon "paradox" has been that until the last few years, while Amazon's stock price continued to soar, Amazon made no profit at all.

Khan's solution is to look at a variety of factors when determining whether firms pose a threat to the health of markets. Khan (2017, 746) lists five components that should be key focuses of the investigative process: barriers to entry; conflicts of interest; gatekeeping; control of information; and the bargaining power balance. She suggests that breaking companies up or, in the face of efficiencies of scale which should not be ignored, regulating behavior to counterbalance any available tools for abuse. This multifaceted approach would address the critical importance of a structurally sound and democratic political economy.

Conclusion

This inquiry has sought to establish that Lina Khan's work illuminates the importance of reworking institutions to deal with the technology of the internet. Khan is a leading voice in the growing call for regulation to tackle the forms of monopoly power exerted by technology companies. Her work represents an attempt to overturn Chicago School ideological dominance in favor of a more multifaceted analysis of market dynamics. The growing body of discourse calling for an ideological shift is, at least so far, just that. This new perspective has not infiltrated at the level of federal policy. Big firms still reign; technology firms still escape the understanding of policy makers. There are, however, signs that things may change. Even the University of Chicago, as *The Economist* (2017) noted, has recognized a need to recalibrate its analytical framework.

If a new perspective is going to translate into effective policy, it will need to answer the Chicago School's main contention: that policies aiming to make the world more equal and to disperse economic power ultimately reduce aggregate income enough that most people end up comparatively worse off. The Chicago School also claims on its side the instruments of rigorous mathematical economic analysis. A robust reply to the Chicago tradition would likewise wield a rigorous analysis in policy formulation, an analysis which should, if the new perspective is correct, reflect the contention that welfare—a concept correlated with aggregate income but not the same—is served by pro-competitive policies. Additionally, the technical aspects of these firms must be understood in order for institutions to address the market appropriately. Khan (2018, 973) has noted that “heightened economic expertise” in judicial matters is, in this age, a necessity; technological expertise is as well. Policy makers and influencers will have to decide the extent to which any new perspective they embrace accommodates certain contentions and analytical instruments of the Chicago School or whether to reject its form of analysis altogether.

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