



**Amazon's Antitrust Paradox
Interview with Lina Khan**

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KENNEALLY: At the end of the 19th century, many local railroads in the United States became consolidated into giant iron networks. The anticompetitive practices that resulted soon made these trusts, also called monopolies, a hot political issue. More than a century later, a new rebellion is gathering strength against domineering players on the digital network – the digital network that is our new railroad for e-commerce and much more.

Welcome to Copyright Clearance Center's podcast series. I'm Christopher Kenneally for Beyond the Book. In 1890, the Sherman Antitrust Act made it illegal under federal law to restrain trade or to form a monopoly. Many celebrated legal cases since then have threatened, and sometimes succeeded, to break up such legendary American companies as Standard Oil, US Steel Corporation, International Harvester, and Microsoft.

In 2019, the so-called hipster antitrust cohort now have Amazon in their sights. A leader in that effort is Lina Khan, an academic fellow at Columbia Law School and senior fellow at the Open Markets Institute. Her piece, *Amazon's Antitrust Paradox*, published in January 2017 in the *Yale Law Journal*, was awarded the 2018 Antitrust Writing Award for best academic unilateral conduct article from *Conurrences Review* and the George Washington University Law School Competition Law Center. In the article, Khan argues that the e-commerce giant has amassed a level of market control that is damaging not only to its competitors, but also to society. Lina Khan was recently named to the Politico 50, a list of thinkers whose ideas are driving politics. Lina Khan, welcome to Beyond the Book.

KHAN: Great to be here.

KENNEALLY: We're looking forward to chatting with you about the Amazon antitrust paradox, Lina Khan. There has been a number of rubrics put to use since this very important article appeared nearly two years ago. You've been called antitrust hipsters as well as the new Brandeis school – that Brandeis school named for the progressive lawyer and later Supreme Court Justice Louis Brandeis, who famously wrote about the curse of bigness. I suppose that's a good place to start. In brief,



tell us what your argument is. What is the curse of bigness when it comes to Amazon?

KHAN: So my argument is that in many regards, Amazon has become a form of infrastructure for 21st century commerce. So if you're an independent merchant, an independent producer, and you want to reach consumers in the 21st century digital markets, you have to ride Amazon's rails. Amazon now captures \$1 of every \$2 spent online, and that share is growing significantly. Over 50% of all American households are Prime consumers, are Prime members, and around 99% of Prime customers stop engaging in any real price comparison. So Amazon's capture of online commerce and of the infrastructure of online commerce is quite significant, and it's able to use that dominance in ways that I argue are bad for competition.

In the piece, I really review how our approach to antitrust enforcement, which used to really focus on competition broadly and the process of competition and used to look at how markets are structured and whether there are certain conflicts of interest baked into certain businesses' business models, that approach has now instead given way to an approach where antitrust enforcers really focus on what they call consumer welfare. Consumer welfare ends up in practice meaning are prices high or are prices low? And in the piece, I argue that viewing Amazon through the prism of price exclusively really misses the structural dominance and the structural market power that the company is amassing. That's really the argument I advance in the piece.

KENNEALLY: And it's interesting – you point, of course, to the new direction or relatively new direction that antitrust law has gone. That began back in the 1970s, led in fact by another very famous legal name, Robert Bork, who at the time was a Yale Law School professor, I understand. Has there been any effort to try to reverse this emphasis on price and what is best for consumers in the past, or is this really something that is very revolutionary thinking, at least in legal circles?

KHAN: At the time when Robert Bork was advancing his ideas, and the broader Chicago school was advancing this alternative approach to doing antitrust, there was a pushback. There were legal scholars and lawyers at the time that anticipated that this would narrow antitrust and really enfeeble antitrust and allow dominant companies to abuse their market power across our economy without any real legal checks.

So it's not like this wasn't predicted and that there wasn't pushback at the time. There were just certain background trends that meant that the Chicago school ended up triumphant, and especially with the election of President Reagan, the Chicago school was able to hold policy positions and policy roles in the administration that



really let them stamp these theories, these ideas, into actual policy. And for the most part, both Republican and Democratic administrations since then have really followed that approach. So I think at the time, there was some debate. But for 30, almost 40 years now, there really hasn't been too much debate on this question.

KENNEALLY: Right. And that Chicago school, as you call it, is another way to name the emphasis on the free market and the very light hand that government has taken over the last several generations since Reagan's administration. In your piece, you say that that approach has meant – to sort of pick up on your title, Lina, Amazon's Antitrust Paradox – a paradoxical result, which is that antitrust law is promoting concentration in businesses and not opposing it. You're concerned that the short-term interest in price is overlooking these other long-term interests for businesses and society.

KHAN: That's exactly right. I think there are tradeoffs, but it's important to remember that if the goal of the antitrust laws is to promote competition, then you need to be thinking about that not just in the short term, but also in the long term. So if you're enabling consolidation, if you're enabling concentrations in ways that allow a single company to control 60%, 70%, 80% of the book market – of the ebook market – that will have hazards down the line. So it's important for antitrust to be thinking about the long term as well as some of the short-term effects.

KENNEALLY: Indeed, you reference the book market, a market that we are particularly interested in here on our program. You will be speaking at the annual PubWest conference in Santa Fe, New Mexico, on this topic to an audience, I think, that might welcome this argument. What has been the pushback, though, from the legal community when it comes to your point that Amazon is the new railroad? This really means rethinking things. And there has been some backlash to it, I believe.

KHAN: There has been some backlash. There's the obvious point that as consumers, individuals tend to really love Amazon services, right? It's built this business strategy and rhetoric around serving consumers. So there's a certain degree to which if you're making your list of monopolies to tackle, Amazon's not going to be high on the list, given that from a consumer perspective, oftentimes telecom companies or airline companies are other markets where we see a lot of concentration, where consumers actually see degraded service and higher prices. So that's one argument.

There's also a broader argument around consumer welfare. Supporters of consumer welfare say it might not be perfect, it might not always get us to the right result, but at least it provides enforcers with some stability, with some



predictability. So if we abandon consumer welfare, we'll just be at sea and not really know what kind of factors to consider.

I think what's really interesting about the current moment is that we've seen a whole set of empirical studies over the last couple of years that actually have shown that prices have increased after mergers, that markups are 300% higher today than they were 30 years ago. So there are all these signs that even if what you care about is consumer welfare, the consumer welfare framework has not actually even delivered within its own framework. So there's a broader debate happening about whether consumer welfare is a good proxy for competition, or if instead we need to think more about the competitive process and the structure of competition and rely more on certain forms of presumptions when thinking about things like merger enforcement.

So that's where the state of the debate is right now. I think in addition to thinking about consumers, we all should be thinking about producers. Producers are the ones that are bringing goods and services to market. And if they're faced with a marketplace where they're not really able to compete on the merits of that good, that's not going to be good for consumers in the long run.

One dynamic that we see with Amazon is that it runs a marketplace for third-party merchants, for third-party sellers, but it also sells Amazon goods and products under a private label. What ends up happening is that it uses the marketplace as a petri dish to identify what goods and services are doing well and then uses that information to then roll out a direct replica product and then demotes the third party on the search listings. That's a dynamic where if you're a third party, you're not really competing with Amazon on the merits, right? Amazon's both running the marketplace and is competing on the marketplace simultaneously. That's not good for competition.

KENNEALLY: That's a scenario that book publishers will recognize clearly. I was thinking as I was listening to you describe the changes over time and the perhaps debatable argument regarding pricing – the other thing that has changed over the last 30, 40 years, the same time as antitrust law has sort of moved into this one particular corner, is we have seen a labor environment changing as well – stagnant wages, declining worker power. Is there a way of seeing those changes as related to this lax approach to the monopolies or the potential monopolies?

KHAN: Absolutely. There's research showing that labor markets across the United States are also highly concentrated, and research shows that as you move from moderately to much more highly concentrated labor markets, you actually see a correlated decline in wages. So the fact that wages have been stagnant over the



very time period where labor markets have become more concentrated suggests that these trends are also connected.

And just at a practical level, you can see why these things would be connected, right? If you're, say, an auto mechanic, and your town goes from having five potential auto mechanic shops to having one auto mechanic shop, there's only one place where you can really now sell your labor. That totally changes the bargaining conditions – the kind of bargaining power you have – and employers are able to use that bargaining power to keep wages low.

In some instances, there have also been lawsuits alleging that employers are basically colluding. So they're calling one another up and saying, hey, let's just not hire one another's workers. That's another way in which big employers, employers that don't face much competition, are further engaging in schemes to make sure that workers are not really able to compete or kind of place the companies in competition to try and get better wages, to try and get better working conditions.

So I think growing concentration, growing consolidation, is related to stagnant wages. It's also related to the fact that companies are sitting on a lot of cash, and instead of investing it – last year, they bought back a trillion dollars' worth of stock buybacks. These are not the kinds of things that you'd be seeing in competitive market. I think there's also reason to think that growing consolidation is exacerbating geographic inequality. So this is a real systemic issue that has a lot of consequences beyond just whether consumers are paying higher prices.

KENNEALLY: Who's going to take this fight to Amazon, though? We have a government that's perhaps reluctant to do so. Is this going to require a lawsuit on the behalf of certain parties? How would you see that running its course through the legal system?

KHAN: I think I wouldn't rule the government out so quickly. The Justice Department did sue to block the AT&T-Time Warner merger, which was pretty significant, because it was the kind of the merger that the government hadn't sued to block in court for around 40 years. I think we are seeing some renewed activity and interest among both the Justice Department and potentially the Federal Trade Commission.

I think the chances of seeing a private lawsuit are slim, in part because at least when it comes to marketplace sellers, all of them sign a contract with Amazon that requires them to bring any dispute in arbitration. So they're basically signing away their right to bring cases in court. I think that partially explains why we really don't see as much litigation as you might otherwise expect given the kinds of terms and the kinds of treatment that we see from Amazon towards sellers.



KENNEALLY: Finally, Lina Khan, what consequences would you envision would come to pass if there was an attempt to break up Amazon or to limit its control over the marketplace?

KHAN: I think much would depend on what that would look like. You can imagine different approaches to breaking Amazon up. One approach would basically say you have to separate your marketplace from your private label. Another approach could say you have to spin off AWS, so you're not able to use the AWS profits to finance entry into all these other markets and engage in things like predatory pricing. So I think a lot of it would depend on how you structured the breakup. But that said, I think competition is good for innovation. It's good for consumers. It's good for producers. So any move towards greater competition in the online marketplace I think would have a lot of benefits.

KENNEALLY: Well, we appreciate you speaking with us today. We have been speaking with Lina Khan, who is the author of Amazon's Antitrust Paradox. She will be speaking at the PubWest conference in Santa Fe, New Mexico, in February. She is an academic fellow at Columbia Law School and a senior fellow at the Open Markets Institute. Lina Khan, thank you for joining me today on Beyond the Book.

KHAN: Thanks for having me.

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