

ONLINE GATEKEEPERS TO COMMERCE AND CULTURE



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I. INTRODUCTION

In the 1990s, the typical path to the Internet was a subscription to America Online (“AOL”) using a dial up modem on a Microsoft Windows computer. AOL was, at the time, the dominant online presence and offered what was commonly referred to as a “walled garden” — providing email (who can forget the notification “You Got Mail”), messaging, and website access for an hourly and, later, monthly fee.² A walled garden is an online ecosystem where the provider exerts considerable control over the content including restricting access to non-approved content.³ The emergence of broadband internet access (such as, DSL and cable modems) and standalone web browsers, such as Netscape, began to change that paradigm, as users were no longer as reliant on AOL’s portal and proprietary content. They increasingly used bookmarks and search engines to directly navigate to content outside of AOL’s protective walls.⁴

Recognizing that this development threatened not only to circumvent online portals but also potentially to “commoditize” desktop operating systems, Microsoft imposed a series of practices aimed at limiting the distribution and access to Netscape on computers running Windows (“PCs”).⁵ The end result was a seminal antitrust case condemning Microsoft’s conduct as illegally maintaining a monopoly.⁶ Perhaps in an appropriate bookend to the 1990s, AOL acquired Netscape in 1999. The 1990s represented the dawn of the digital era and still informs our approach to online platforms and “gatekeepers” today.⁷

2 See, e.g. Paul S. Maxwell, *From Aol to Apps: The Return of the “Walled Garden,”* MEDIAVILLAGE.COM, Oct. 20, 2015, <https://www.mediavillage.com/article/from-aol-to-apps-the-return-of-the-walled-garden>.

3 See e.g. PC Mag Encyclopedia, *walled garden*, PCMAG.COM, <https://www.pcmag.com/encyclopedia/term/walled-garden> (“A network or service that either restricts or makes it difficult for users to obtain applications or content from external sources. Cable TV and satellite TV are walled gardens, offering a finite number of channels and programs to their subscribers. When AOL was king of the Internet providers, it did an excellent job of keeping users on AOL-affiliated sites.”).

4 See e.g. Wall Street Journal Opinion, *AOL’s ‘Walled Garden,’* WALL STREET J., Sept. 4, 2000, <https://www.wsj.com/articles/SB968104011203980910> (“...people began to hear rumors of the wider Internet vistas to be found outside the garden and they wanted a look. Of course, AOL, Prodigy and CompuServe thought their gardens were quite nice, and were reluctant to let their customers out. But consumers knew what they wanted, and when they didn’t get it, they didn’t stay, or they stopped coming.”).

5 See e.g. W. Joseph Campbell, *The ‘90s Startup That Terrified Microsoft and Got Americans to Go Online*, WIRED, Jan. 27, 2015, <https://www.wired.com/2015/01/90s-startup-terrified-microsoft-got-americans-go-online>.

6 The case involved, *inter alia*, Microsoft preferencing its Internet Explorer web browser (over Netscape) on PCs through various restrictive practices and settings. See *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

7 For instance, the recent U.S. Department of Justice (DOJ) complaint against Google’s agreements to distribute Google Search explicitly cites the *Microsoft* precedent as support for their allegation that Google violated U.S. antitrust laws. See *United States v. Google*, Complaint, Oct. 20, 2020, <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>.

Recently, the term “gatekeeper” and variants such as “gateway” and “bottleneck” have made a major comeback in policy discussions concerning successful digital platforms and, in particular, whether “big tech” needs to be regulated and whether antitrust laws need to be reformed to better protect consumers from their market power.⁸ Indicative of this resurgence, in the Department of Justice’s (DOJ’s) complaint against Google, the DOJ simply declares: “Google of today is a monopoly gatekeeper for the internet.”⁹ Given this declaration by a federal antitrust agency, the time has come to better understand the label “gatekeeper” and its intersection with antitrust law.

Is Google, as the DOJ asserted, a monopoly gatekeeper to access content on the internet? If so, what role do Amazon, Apple, and Facebook play? Are they monopoly gatekeepers over specific areas of the internet or are they collectively oligopoly gatekeepers over the entirety of the internet? Are the following proclamations true: “Apple controls our phones;” “Facebook controls our access to people;” “Google controls our access to information;” and “Amazon controls our access to goods and many software services”?¹⁰

Importantly, determining whether an online service is a “gatekeeper” depends on a precise definition and a factual inquiry as to whether an online service meets the criteria established. What should be avoided are *ex post* declarations that a service is a gatekeeper based on, for instance, a regulatory objective.¹¹ An *ex post* approach leaves no room for objective debate whether a service is actually a gatekeeper — given that the term is widely used in policy discussions.

Consequently, this Article begins by asking: what exactly is an online gatekeeper? Within that discussion, it also asks whether the term is useful within antitrust. Next, it discusses some general guidelines that should be considered when determining whether an online service qualifies as a gatekeeper. Put succinctly, determining who is a gatekeeper should be, like all antitrust inquiries, a fact-based one — after establishing objective criteria. Finally, it discusses potential concerns with gatekeepers that go beyond the standard litany of antitrust theories of harm — namely, information asymmetries and representations made to users and businesses. These concerns encompass more than just gatekeepers, however, and include all online services that make representations about how the service will be governed and potential deviations from those representations.

II. DEFINING ONLINE GATEKEEPERS

At a foundational level, gatekeepers must control access to *something*. Further, in order to be relevant for public policy, a gatekeeper must control access to something of significant value. For instance, when Apple introduced the App Store in 2008, the store became the exclusive pathway to iOS users for app developers. The online store remains the only pathway to iOS users today and is at the center of the dispute between Epic Games and Apple.¹² Does this qualify Apple as an online gatekeeper?

When discussing online gatekeepers, are we simply rebranding multi-sided platforms?¹³ To address this question, let us suppose that Apple was not a multi-sided platform. Specifically, suppose that Apple only allowed proprietary apps for its iOS and those apps were distributed through its proprietary App Store. Would we still consider Apple a gatekeeper? With complete vertical integration, we probably would not consider Apple to be a gatekeeper because there is no “gate” at all — *everything* is excluded. Similarly, suppose that Amazon only sold Amazon-made

8 These terms are used frequently in several influential antitrust studies and reports. See, e.g. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY (“House Report”), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf; DIG. COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (UK), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; STIGLER COMM. ON DIG. PLATFORMS, STIGLER CTR., FINAL REPORT (2019) (“Stigler Report”), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

9 DOJ Complaint, *supra* note 7, at 3.

10 Scott Rosenberg, *The Squabble between Apple, Facebook, and Google Shows How the 3 Have Become Gatekeepers with Enormous Power*, BUSINESS INSIDER, Feb. 1, 2019, <https://www.businessinsider.com/tech-giants-apple-google-and-facebook-are-the-new-gatekeepers-2019-2>.

11 This appears to be the approach of the European Commission (EC) in their proposed Digital Markets Act that would regulate “gatekeepers,” where qualification is based largely on whether a company is successful (that is, whether they have reached certain revenue and user threshold levels). See European Commission, *Digital Markets Act: Ensuring Fair and Open Digital Markets*, Press Release, Dec. 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349.

12 See *Epic Games v. Apple*, Complaint for Injunctive Relief, Aug. 13, 2020, <https://cdn2.unrealengine.com/apple-complaint-734589783.pdf>.

13 Multi-sided platforms are catalysts that bring together two or more groups to facilitate exchanges that otherwise would not take place or would take place at an inefficient level but for the platform. Platforms are also identified by the presence of indirect network effects, a.k.a., cross-group effects. See, e.g. David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325 (2003).

and branded items? Would we consider Amazon a gateway? Again, probably not. Given a platform's central role is to bring together two or more groups, being a gatekeeper seems integral to what a platform is. Yet, is being a platform integral to what a gatekeeper is?

Consider Walmart, book publishers, and Netflix. These are not platforms. Instead, all three are, in a sense, intermediaries. Walmart aggregates products from various manufacturers, while also mixing in private label products. Book publishers and Netflix aggregate the works of various authors and visual creators, respectively. After this selection and aggregation process, ultimately, all three distribute and sell a set of products to consumers. While they are not strictly platforms, their role as intermediaries controlling what is allowed in and what stays out sounds a lot like the role played by a gatekeeper.

Where does this leave us? To summarize, first, a gatekeeper must control access to something of significant value. Yet, access is two-sided. When we are in their "castle," gatekeepers control access to consumers (from the perspective of producers), but they also control access to various producers (from the perspective of consumers). This leads to the second element. A gatekeeper is an "intermediary" of some type, whether as a platform or an aggregator of products generated by other sellers or agents. Consequently, a gatekeeper controls what comes in (from sellers) and what goes out (to consumers). If everything is produced "in house," that is, if the firm is entirely vertically integrated, then there is no sense of controlling what is coming in from third parties. Thus, this second element is about dependency on the intermediary from a group other than consumers.

Finally, the third element is that a gatekeeper has substantial market power; otherwise, there is nothing to distinguish an ordinary intermediary from a gatekeeper. Additionally, with no significant market power in the hands of any one intermediary, there is no legitimate rationale for antitrust attention — absent collusion among competing intermediaries. Another way of stating this element is that a gatekeeper must control access to something of significant value and that the access it provides does not have close substitutes. For instance, is Yelp a gateway for local businesses? Yelp certainly controls access to something of value and is a multi-sided market. Yet, does Yelp have substantial market power? It might — particularly for certain business searches — but this determination is, ultimately an empirical question based on evidence of consumer substitution within a well-defined relevant market. If it turns out that there are other sufficiently good substitutes for the services Yelp provides, the label "gateway" would seem like hyperbole rather than adding something of value to antitrust policy discussions.

Who would qualify as a gatekeeper using these elements? Every platform and intermediary with significant market power would qualify. Given that antitrust determinations of market power are based on demand conditions facing the supplier, this approach to gatekeepers does not seem to add much other than, perhaps, recognizing that intermediaries beyond platforms could be gatekeepers.¹⁴ Nonetheless, there is certainly nothing wrong with the use of the word as a shorthand. For that matter, thinking of gatekeepers (or intermediaries) as "inputs which, if monopolized, would afford considerable market power" might be accurate for many purposes as well.

Yet, various digital reports and public policy discussions concerning big tech seem to be capturing something broader than simply controlling access to a commercial product, where that access does not have close substitutes. Indicative of this are pronouncements by European Commission officials discussing new initiatives aimed specifically at regulating online "gatekeepers" — namely, the Digital Services Act and the Digital Markets Act.¹⁵ The etymology of the word "keeper" also denotes someone with an office of responsibility and a decisionmaker.¹⁶

This broader idea is that powerful digital platforms, particularly Google, Facebook, Amazon, and Apple, are (1) controlling access to markets in the sense that businesses need to go through these companies in order to reach consumers¹⁷ and (2) controlling access to information,

14 Work by Professors Andrei Hagiu and Julian Wright recognizes this fluidity between platforms and businesses like Walmart. See Andrei Hagiu & Julian Wright, *Multi-Sided Platforms*, 43 INT'L J. INDUS. ORG. 162 (2015).

15 See European Commission, *Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms*, Press Release, Dec. 15, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347 ("Commissioner for Internal Market Thierry Breton said: 'Many online platforms have come to play a central role in the lives of our citizens and businesses, and even our society and democracy at large.'").

16 See e.g. WEBSTER'S DICTIONARY 1828, <http://webstersdictionary1828.com/Dictionary/keeper> ("In Great Britain, the keeper of the great seal, is a lord by his office, and one of the privy council. All royal grants, commissions and charters pass through his hands. He is constituted lord-keeper by the delivery of the great seal. The keeper of the privy seal is also a lord by his office, and a member of the privy council."). See also *Genesis* 4:9 (Douay-Rheims) ("And the Lord said to Cain: Where is thy brother Abel? And he answered, I know not: am I my brother's keeper?").

17 See e.g. House Report, *supra* note 8, at 39 ("As Amazon, Apple, Facebook, and Google have captured control over key channels of distribution, they have come to function as gatekeepers. A large swath of businesses across the U.S. economy now depend on these gatekeepers to access users and markets.").

including information that could significantly impact public policy discussions and influence political outcomes.¹⁸ In other words, big tech is collectively alleged to be a monopoly access point for both online commerce, political information, and, ultimately, culture. In turn, this gives big tech the power to potentially engage in anticompetitive conduct, but also to shape public policy.

This concern over control over dissemination of information and control over culture suggests yet a fourth element possessed by today's online gatekeepers. Consider the role of major Hollywood studios before the advent of streaming services like Netflix and Prime Video. These major studios, and certain powerful producers, had gatekeeper control over, not only actors, screenwriters, and directors, but also what consumers saw in terms of major Hollywood productions.¹⁹ Given that movies represent a powerful medium for telling stories, controlling what stories are told can have a profound influence on culture.²⁰ Similarly, "old school" gatekeepers such as national newspapers and major broadcast networks had a powerful ability to frame political, cultural, and public policy debates. These offline gatekeepers from an earlier age had significant control over certain types of information that reached households.²¹ Of course, this is working under the presumption that major studios, national newspapers, and major broadcast networks had substantial market power; otherwise, if they operated in competitive markets, then they would not be gatekeepers (other than in a collusive scheme).

Given this fourth element, the following is a proposed definition: *An online gatekeeper is an intermediary, not necessarily a platform, that controls access to certain groups (e.g., users, websites, developers, merchants), where alternative access points and pathways are sufficiently distant substitutes that this gives the intermediary substantial market power commercially and/or over information, including data, relevant to public policy debates.* In theory, one can have multiple gatekeepers, each with substantial market power, in a market or a single, dominant monopoly gatekeeper, which may or may not be an essential facility.²² The goal of this proposed definition is to fix ideas — given that, currently, the term gatekeeper (and its variants) suffers from a lack of clarity in antitrust discussions.

III. WHO ARE THE ONLINE GATEKEEPERS?

Determining who is a gatekeeper is, like almost all antitrust inquiries, a fact-based one that should involve quantification of the actual claims of control over access. For example, how important is social media to how U.S. households get their news, and does any firm plausibly have substantial market power in providing it? Allcott & Gentzkow report that "only 14 percent of American adults viewed social media as their 'most important' source of [2016] election news."²³ Given the continued growth of social media, this percentage most likely increased for the 2020 election; although, there is evidence that people consider the news they read on social media, and even with news in general, with a heavy dose of skepticism.²⁴ Consequently, if social media is not a critical intermediary for dissemination of news, then even market leaders like Facebook — which is only part of "social media" — may not qualify under a definition requiring control over access to news.

18 See e.g. Stigler Report, *supra* note 8, at 152 ("The influence of the digital platforms on the news media has been under increased scrutiny and focus since the last US presidential elections, yet much of the focus has been on fake news and the interference of foreign governments in elections through such platforms.").

19 See Ben Thompson, *Goodbye Gatekeepers*, STRATECHERY, Oct. 16, 2017, <https://stratechery.com/2017/goodbye-gatekeepers>. While the overall number of movies released each year has increased linearly since the 1990s, the number of major studio releases has remained largely constant, which means there is a fixed supply that major studios control.

20 This discussion holds aside the question of causality. Are studios influencing culture or culture influencing studios? The answer is almost certainly both.

21 See e.g. Kurt Lewin, *Frontiers in Group Dynamics: II. Channels of Group Life; Social Planning and Action Research*, 1 HUMAN RELATIONS 143, 145 (1947) (defines "gate keepers" as "an individual or group [that] is 'in power' for making the decision between 'in' or 'out.'").

22 For an overview of the essential facilities doctrine, see Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1211 (1999) ("Inherent in the concept of an 'essential facility' is the premise that the owner of that facility possesses monopoly power... First, some degree of uniqueness and market control is inherent in the term 'essential.' Second, the inquiry regarding the impracticability of duplication assures that the doctrine will apply only to facilities for which no feasible alternative exists, or which cannot be reproduced.").

23 Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 212 (2017).

24 See e.g. A.W. Geiger, *Key Finding About the Online News Landscape in America*, PEW RESEARCH CENTER, Sept. 11, 2019, <https://www.pewresearch.org/fact-tank/2019/09/11/key-findings-about-the-online-news-landscape-in-america/> ("Even as they regularly turn to social media for news, a majority of those who often get news on social media (57 percent) say they expect the news they see on these platforms to be largely inaccurate."); Megan Brennan, *Americans Remain Distrustful of Mass Media*, GALLUP, Sept. 30, 2020, <https://news.gallup.com/poll/321116/americans-remain-distrustful-mass-media.aspx> ("Americans' confidence in the media to report the news fairly, accurately and fully has been persistently low for over a decade and shows no signs of improving, as Republicans' and Democrats' trust moves in opposite directions.").

Similarly, how important is Google Search for website traffic? Undoubtedly, the answer will depend on the site and category of sites. Focusing on news sites, Allcott & Gentzkow find top U.S. news sites received 10.1 percent of their traffic from all social media sites and 30.6 percent from all search engines.²⁵ While these are significant percentages, they fall short of monopolistic gatekeeper proclamations — even combining all social media and search engine sites — let alone one specific site. As the digital age continues to mature, will these percentages increase for social media and search engines? Possibly. Although, innovation is hard to predict. Just ask AOL.

Even with the continued importance of social media and search engines for obtaining information, one should differentiate between a potentially anticompetitive exercise of legitimately obtained market power and outcome-based market success. For example, suppose it were established that Google Search is responsible for 70 percent of the traffic that a category of sites receives (e.g. local restaurant reviews). On its face, the welfare consequences of this are not clear. Is this high percentage because these sites specifically invested heavily in optimizing their presence on Google Search relative to other distribution channels — and they succeeded in that investment? Is it because Google has determined these sites are relevant to users and are efficiently matching users with content better than other sources? Or is it, at least in part, because Google has anticompetitively choked off access to other search and referral sources? In other words, is Google's success in being responsible for significant traffic to specific sites due, in part, to restricting access, hampering competition, and promoting misinformation or due to meritorious competition including higher quality services and providing useful information that users are seeking?

This leads to the point that the presence of gatekeepers — like market power elsewhere in our economy — should be considered a state of the market—perhaps simply a reward for skill, industry, or foresight — rather than an antitrust concern in and of itself. Gatekeepers have a procompetitive and efficiency-enhancing role, while also clearly having the potential to engage in anticompetitive conduct. Even advocates for more aggressive antitrust enforcement acknowledge that gatekeepers have played an important role in promoting gains from trade and spurring innovation and commerce.²⁶ Their substantial market power could be largely the result of procompetitive investments in innovation that consumers value, rather than conduct that simply diminishes the competitive constraint provided by others.²⁷

Users are attracted to gatekeepers, at least in part, because of the opportunity cost of obtaining information.²⁸ While the advent of the internet has significantly lowered these costs,²⁹ precisely *because* there is such vast information available at our fingertips — there can be substantial costs associated with finding the right information and having one's questions efficiently answered. These costs include a fixed amount of time and utilizing one's scarce supply of attention and mental capacity. With more websites, advertisements, emails, apps, and messages than ever, there is an ever increasing need to filter online content and distill the vast amount of information that is readily available.³⁰

In a sense, our attention is like a common resource — rivalrous but, to a degree, nonexcludable.³¹ In such a setting, the role of intermediaries can be critical.³² Of course, information scarcity, whether through asymmetric information, moral hazard, or adverse selection, are not

25 Allcott & Gentzkow, *supra* note 23, at 222 (Figure 3).

26 See e.g. DIRECTORATE-GENERAL FOR COMPETITION, EUR. COMM'N, COMPETITION POLICY FOR THE DIGITAL ERA (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> at 13 ("Users have limited time and need curators to help them navigate the long tail of websites to find what they are looking for.").

27 See e.g. Avinash Collis, *Consumer Welfare in the Digital Economy*, THE GAI REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg, eds., 2020), <https://gaidigitalreport.com/2020/08/25/digital-platforms-and-consumer-surplus>.

28 See George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1 (1969).

29 See e.g. Casey Coleman, *The Democratization of Knowledge*, AROUND THE CORNER INNOVATION IN THE BUSINESS OF GOVERNMENT: A GSA BLOG, Sept. 17, 2012, <https://gsablogs.gsa.gov/innovation/2012/09/17/the-democratization-of-knowledge> ("Technology allows access to more information for more people than ever before in history. Sounds like hyperbole, but it is actually true.").

30 See e.g. Simon P. Anderson & André de Palma, *Information Congestion*, 40 RAND J. ECON. 688, 690 (2009) ("Excess information is costly.").

31 See *id.* at 689 ("The economics of such unsolicited advertising (such as billboards and radio/television) are characterized by a clutter of messages and the subsequent congestion of the consumer's limited attention span. In response, the consumer rations attention by screening out information—and good goes out with the bad, like a spam filter that blocks out some worthwhile messages.").

32 See e.g. Eszter Hargittai, *Standing Before the Portals: Non-Profit Websites in an Age of Commercial Gatekeepers*, 2 J. POL'Y, REGULATION, & STRATEGY FOR TELECOMMUNICATIONS 543, 544 (2000) ("the problem of attracting and, more particularly, retaining the attention of Web users causes individual creators of content to rely on 'gatekeepers' to channel their material toward users.").

unique to the digital era. Information gatekeepers have always been highly valued.³³ Prior examples include yellow pages, TV guides, encyclopedias, and libraries. AOL's walled garden allowed it to steer consumers to specific content and promote certain products.³⁴ Yahoo Search, an early search engine leader, was known for organizing websites into categories that users could choose from. Curation is the *raison d'être* of search engines. Of course, *how* the results are exactly curated is a subject of not only popular debate, but also antitrust investigations and litigation.³⁵

Importantly, we can both recognize welfare-enhancing aspects of gatekeepers but also scrutinize potential antitrust violations. The DOJ's recently filed case against Google alleges that Google has anticompetitively restricted access and foreclosed market opportunities of rival search engines.³⁶ While there are legitimate questions regarding the soundness of the DOJ's evidence and particular theory of harm,³⁷ the allegations are of a type that address the defendant's conduct, rather than simply its considerable success in the marketplace. Similarly, the FTC's recent case against Facebook alleges that its acquisition of Instagram in 2012 (and its subsequent acquisition of WhatsApp, among other products) was welfare-reducing.³⁸ Again, holding aside the merits of the case, the acquisition of nascent competitive threats is a legitimate theory of harm that goes beyond the mere status of Facebook as a gatekeeper.³⁹

IV. NON-ANTITRUST CONCERNS REGARDING GATEKEEPERS

Given online gatekeepers' role in providing access to information, there are at least two categories of increasing concern that go beyond antitrust. First, there is a concern that gatekeepers are not neutral arbiters and moderators but are "political," infecting their owners' biases into the dissemination of content on their platforms. This, it should be noted, has been a concern ever since search engines began to emerge at the turn of the century.⁴⁰ The allegation is that big tech is engaging in discriminatory moderation favoring one political group and one side of the debate on controversial topics ranging from election fraud, to the efficacy of masks and lockdowns in dealing with the coronavirus, and to the safety of vaccines. These concerns have led to calls by both the Executive and Legislative Branches to rescind big tech's legal immunity from discriminatory moderation under Section 230(c) of the Communications Act of 1934.⁴¹ Debates about the merits of rescinding Section 230(c) and imposing regulatory controls on big tech are beyond the scope of this article.⁴²

33 In the Bible, Abraham tasks an elder servant to find a wife for his son Isaac (tradition holds the servant was Eliezer — see Genesis 15:2-3 & 24:2 (Douay-Rheims)). The "matchmaker" finds Rebecca at the well and knows that she is the right one because she not only gives the servant a drink but also offers water to his camels. This initiative signaled both her generosity to strangers and care for animals. See *Genesis* 24 (Douay-Rheims). The idea of village matchmakers spans across cultures. See, e.g. J.R. Thorpe, *7 Strange Facts About the History of Matchmaking*, BUSTLE, Aug. 31, 2016, <https://www.bustle.com/articles/181415-the-history-of-matchmaking-in-7-strange-facts>.

34 See e.g. Hargittai, *supra* note 32 at 546 ("According to one report, AOL users spend less than 20 percent of their online hours outside of AOL, which demonstrates the ability of AOL to target and focus users' online attention to its own content.").

35 In 2013, the FTC closed a multi-year investigation examining whether search bias, that is, whether Google preferencing its own content over rival content on its search results page, is an antitrust violation. See FED. TRADE COMM'N, FILE NO. 111-0163, STATEMENT REGARDING GOOGLE'S SEARCH PRACTICES, *IN THE MATTER OF GOOGLE INC.* (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtftcomm.pdf. See also, John M. Yun, *Understanding Google's Search Platform and the Implications for Antitrust Analyses*, 14 J. COMP. L. & ECON. 311 (2018). The EC subsequently reached a different conclusion, and dozens of states recently filed an antitrust lawsuit alleging, among other things, search bias on the part of Google.

36 DOJ Complaint, *supra* note 7.

37 See e.g. Joshua D. Wright & Alexander Krzepicki, *Rethinking Foreclosure Analysis in Antitrust Law: From Standard Stations to Google*, CONCURRENTIALISTE, Dec. 17, 2020, <https://leconcurrentialiste.com/wright-krzepicki-foreclosure/>.

38 *Federal Trade Commission v. Facebook*, Complaint, Dec. 9, 2020, <https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf>.

39 In fact, the FTC Complaint never uses the term gatekeeper or its variants. See *id.* For more on nascent competition and how it relates with the doctrine of potential competition, see John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQ. L. REV. (forthcoming, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3698210.

40 See e.g. Lucas Introna & Helen Nissenbaum, *Defining the Web: The Politics of Search Engines*, COMPUTER 54, 54 (Jan. 2000) ("Make no mistake: These are political issues. What those who seek information on the Web can find will determine what the Web consists of—for them. We fear that technological limitations and commercial interests may conspire to disenfranchise those outside the mainstream and those who lack the resources or knowledge to promote their Web presence. Deprived of its diversity and impoverished by a lack of choice, a diminished Web would affect us all, individuals and institutions alike.").

41 See e.g. James Walker, *Tulsi Gabbard Backs Trump in Section 230 Battle, Accuses Lawmakers of 'Kowtowing' to Big Tech*, NEWSWEEK, Dec. 4, 2020, <https://www.newsweek.com/tulsi-gabbard-donald-trump-section-230-battle-1552336>.

42 See e.g. Joshua D. Wright & Alexander Krzepicki, *What is an Independent Agency to do? The Trump Administration's Executive Order on Preventing Online Censorship and the Federal Trade Commission*, 6 ADMIN. L. REV. ACCORD 29 (2020).

Second, there is a concern regarding how one can be expected to effectively regulate behavior that one cannot objectively and unambiguously classify. If a gatekeeper represents that it is not actually engaging in discriminatory moderation, how do we really know whether this is true? If a gatekeeper represents to content creators and to the public that content will be subjected to a fair review based on publicly announced moderation policies, how can we really know whether or not this promise has been adhered to? Relatedly, there is a concern about “bait and switch” strategies which involve a change in moderation policies/enforcement after a platform reaches a certain level of market success — especially after some users and creators make significant gatekeeper-specific investments based on representations that may change over time. In sum, there are questions regarding information asymmetry and the representations of online services regarding their governance policies.

Under this second concern, the problem with political bias is not the bias *per se*, but rather a platform’s representation about its moderation policies and how it enforces those policies. Absent more, political bias, including the promotion/suppression of “fake news,” is not an antitrust issue.⁴³ First, identifying fake news is extremely difficult and potentially subject to abuse, with a possibly chilling effect on free speech. Additionally, focusing on policing fake news would turn antitrust away from its well-ground objective of protecting the competitive process.

If the above is true, what role, if any, can usefully be played by government agencies such as the FTC? Arguably, an appropriate role would be to investigate allegations that a gatekeeper has engaged in conduct inconsistent with its public representations; in effect, whether it has been engaged in misrepresentation or fraud.⁴⁴ This is a consumer protection issue rather than an antitrust one. Platforms that discriminate against certain viewpoints are arguably free to do so under the First Amendment, but that should be made clear to all users.

The value of transparency is that it preserves a platform’s freedom to govern its service in a manner that it sees fit rather than through some public, regulatory control over content. Transparency also helps give users clarity as to how their data is being used and how the platform’s content will be moderated. Systematic deviations from these representations, while admittedly hard to detect, could be met with sufficiently high punishments to create optimal deterrence.⁴⁵ While current gatekeepers (collectively, though in general not individually) might be responsible for a large share of news delivery within a country, with more transparent governance policies and multi-homing or limited switching costs, market mechanisms — including new entry — can be expected to deliver alternatives.

V. CONCLUSION

“Gatekeeper” is a term that is gaining currency in the current debate over big tech. Certainly, gatekeepers in the role of curators and matchmakers can promote gains from trade and can spur innovation and commerce. Yet, gatekeepers can also violate antitrust laws and harm consumers; although, these allegations must be grounded in specific conduct rather than their status as a gatekeeper. Gatekeepers also make representations regarding how they are curating and moderating their services. To the extent that these gatekeepers deviate from their public representations, this can create welfare-losses and should invoke consumer protection concerns.

43 See e.g. Seth B. Sacher & John M. Yun, *Fake News is Not an Antitrust Problem*, CPI ANTITRUST CHRON. (Dec. 2017).

44 This appears, somewhat, to be what the FTC is doing recently with its Section 6(b) study to determine how various online businesses collect and use the data from their users. See <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services>. The order for data and documentation has been sent to Amazon, TikTok, Facebook, WhatsApp (Facebook), Reddit, Twitter, Snap, and YouTube (Google).

45 See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

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