Copyright Law and/or/vs. a 'Brussels Effect' for the Digital Services Act

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Disclaimer

- Today's discussion represents only my own views. I am not speaking for the University of California, Berkeley, for the California Privacy Protection Agency ("CPPA"), or for the CPPA Board.
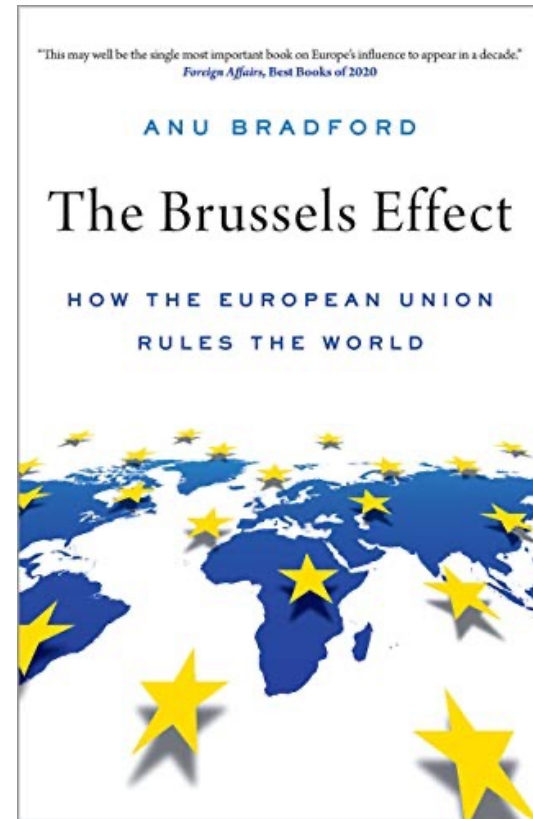
Question at hand:
Will the DSA achieve a 'Brussels Effect'?
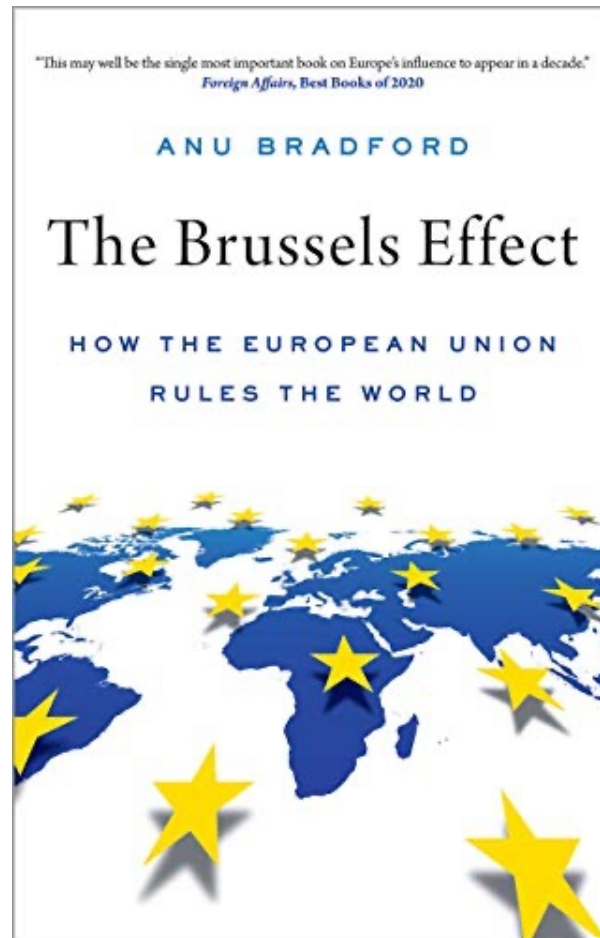
Anu Bradford, *The Brussels Effect: How the European Union Runs the World*, Oxford University Press (2020)

Criteria favoring a Brussels Effect

- Market size
- Regulatory capacity
- Stringent standards
- Inelastic targets
- Non-divisibility
  - Legal
  - Technical
  - Economic

Anu Bradford, *The Brussels Effect: How the European Union Runs the World*, Oxford University Press (2020)

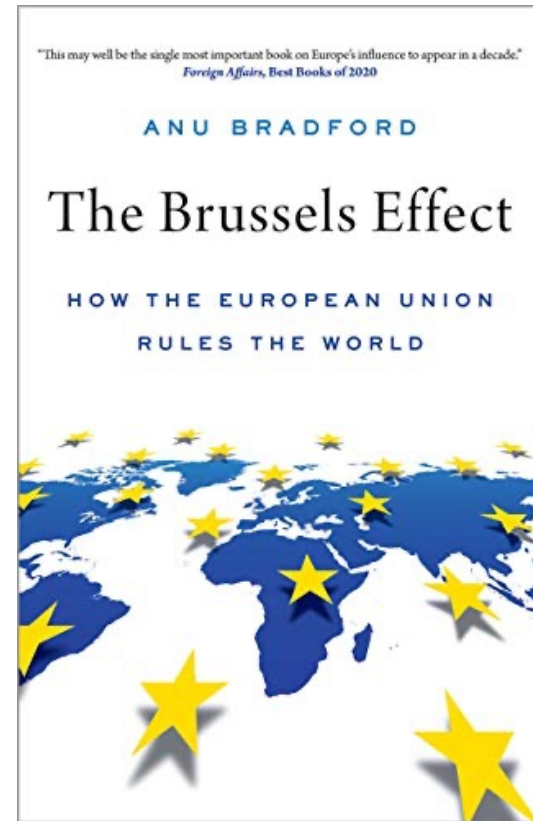# Criteria favoring a Brussels Effect: DSA → Copyright

- Market size
- Regulatory capacity
- **Stringent standards**
- Inelastic targets
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  - Legal
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Copyright is not like:

- Food/Chemicals
  - Physicality
  - Stringency easy to establish
    - More likely to be binary (allowed/disallowed)
    - Or to otherwise create clear stringency differential (level of chemical allowed is x, not y)
  - Observability/enforceability
  - First mover tends to be clear (though who it is can vary)

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Copyright is not quite like:

- Privacy
  - Lacks physicality
  - Complex, nuanced, balance-seeking, *but*
  - First mover is clear: EU competing against regimes that were comparatively much less developed
    - Comparative vacuum that could be filled
    - Strong first mover effect creates obvious stringency differential at time t0 even with nuance and balance-seeking
      - Theoretically, this could change at time t1 or t2.
      - Depends on stickiness of baseline regime

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"It's complicated" for copyright and:

- Competition policy
- Digital economy

- Copyright is a potentially an aspect of these
- DSA obviously implicates them

Comparing to copyright:

- Copyright lacks physicality

- Not binary

- Complex, nuanced, balance-seeking: what is "stringency" in this context?

- Highly developed, long-standing sectoral systems—put in place over hundreds of years
  - Traditionally has supported a highly segmented, explicitly *territorial* market approach by multinationals
  - Sticky
  - EU has been first mover on some things (Art. 17 of CSMD) not others (e.g., notice and takedown)

Will the DSA achieve a 'Brussels Effect'?

A service provider decides . . .

A service provider decides...

- To apply U.S. ©

- In the U.S.
- In the EU

- To apply EU DSA

- In the U.S.
- In the EU

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Potentially © infringing content provided by a user

A service provider decides...

What it *must* do

- To comply with U.S. ©
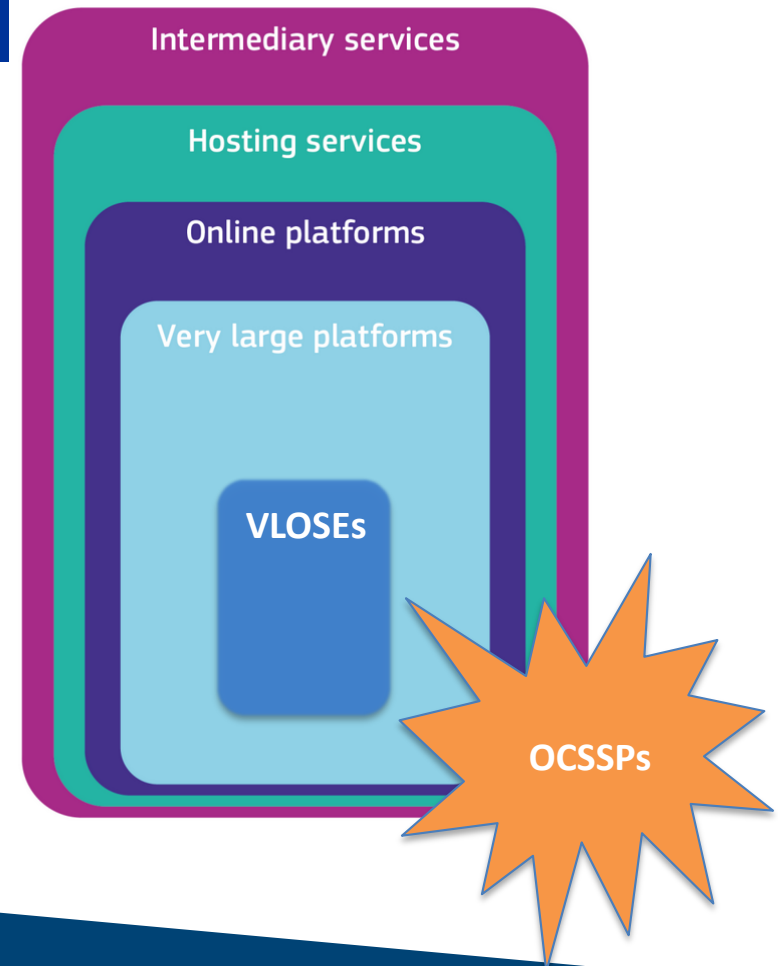

- In the U.S.

- To comply with EU DSA

- In the EU

A service provider decides...
What it *must* do

- DMCA 512(a) provider
- DMCA 512(b) provider
- DMCA 512(c) provider
- DMCA 512(d) provider

Intermediary services

Hosting services

Online platforms

Very large platforms

VLOSEs

OCSSPs

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A service provider decides...
What it *must* do

United States:
- Do not directly infringe
- Do not secondarily infringe

European Union:
- [Do not directly infringe]
- Obligations in DSA, e.g.
  - Art. 14 (T&Cs)
  - Art. 15 (transparency)
  - Art. 16 (N&A)–detailed
  - Art. 17 (statement of reasons
  - Art. 20 (complaint/appeal)
  - Art. 21 (ADR)
  - Art. 22 (trusted flaggers)
  - Art. 23 (against misuse)
  - Art. 24 (transparency reporting
  - Art. 25 (interface design)

A service provider decides...
What it *can* do

United States

- Comply with 512 and receive safe harbor from certain secondary copyright liability
- If so, follow detailed rules
- Decide details of implementation
- Make removal decision

European Union

- <Safe harbor>
- Decide how to set its terms of service
- Decide details of implementation
- Make removal decision

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A service provider decides...

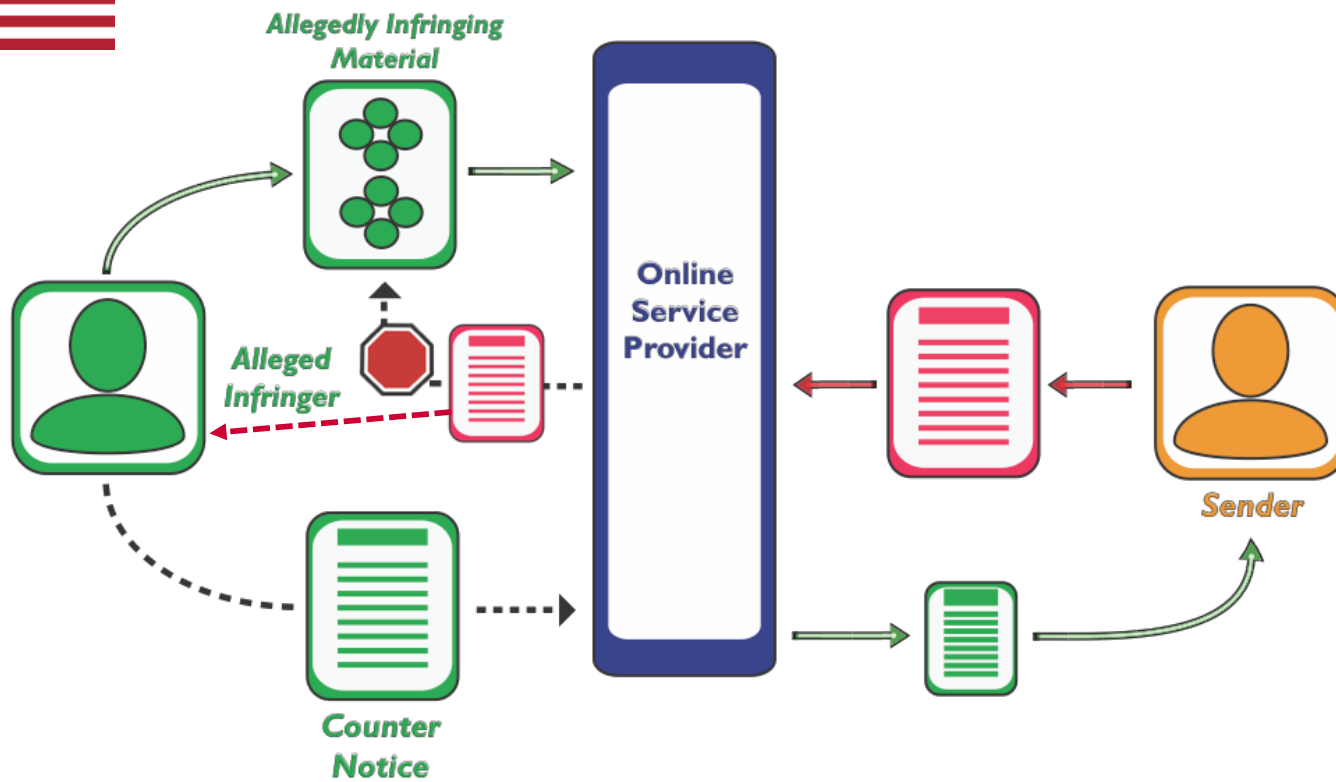## Which regime to *choose*
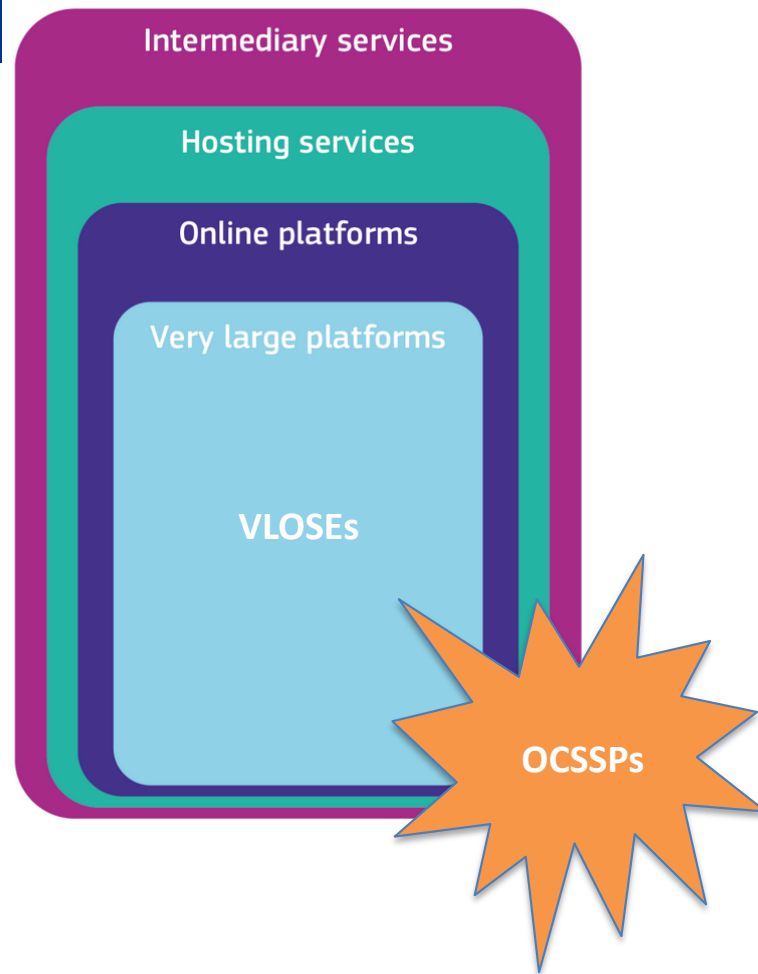

- Stringency
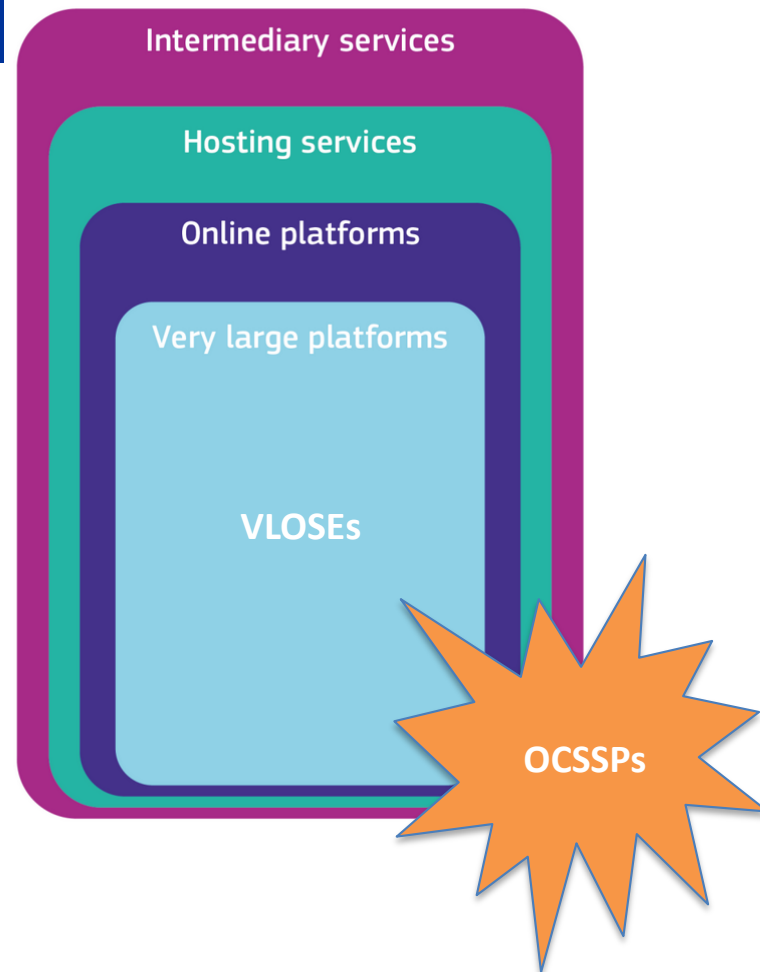- Non–divisibility

- Stringency
- Non–divisibility

DMCA 512: Notice and Takedown

DSA: Designer, Adjudicator, Rights Protector, Systemic Risk Avoider...

DSA: Takes into account many lessons from stakeholders

In sum:

- DSA has far more obligations
- Far more stringent to the benefit of users/public
- More stringent to the benefit of copyright holders in some important ways
- Much more stringent on service provides with regard to obligations
- Many of the big service providers do a lot of this anyway
- Could be seen to provide certainty—lots of detail, etc.

So...

Winner: DSA!

Or . . . .

Complications

Stringency . . .

- Against what/whom?
  - Infringement and infringers?
  - Inaccurate or abusive copyright claims/complainants
- Protecting/benefiting what/whom?
  - Copyrights and copyright holders?
  - Fair use/expression and fair users?
  - Incentives for new, copyright-protected expression?
  - Innovation and follow-on creativity? Fundamental rights and those who hold them?
- What is more stringent in a regime that seeks balance between and among private actors, economic rights and fundamental rights, etc.?
- Whose definition of "stringent" controls?

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Non-divisibility. . .

- Involves *voluntary adoption* of a second jurisdiction's rules
- When there is non-divisibility, *standardization* is attractive/incentivized
- *Incentive-based*

- (By extension: non-divisibility cannot exist in the face of an outright legal conflict: e.g. jx 1 requires A; jx 2 prohibits A)

Must consider the entire regime . . . in practice

- Downside risk
- Directionality of risk
  - Structural and practical bias toward takedown pursuant to section 512 remains
  - Downside risk disproportionately from one direction
  - Perceived downside risk for service providers of copyright infringement/secondary infringement is much greater than perceived downside of false or inaccurate takedowns/filters
- A form of stringency; affects incentives re non–divisibility

Why?

- The balance mechanisms in the intermediary liability provisions (counter notice; 512(f)) create weak incentives in comparison to risk of not taking down

- The balance mechanisms in the background law (subject matter limitations, fair use, etc.) also don't shift the directionality
  - Balance not achieved through affirmative obligations to public or users
  - Procedural structures in the law are are directional (e.g., fair use often treated procedurally as a defense)

- Magnitude of the downside risk
  - Statutory damages and injunctions

Non-divisibility. . .

- Have to take the entire regime of legal rights, limitations, defenses, etc. incentives into account
- Different actors' views of stringency matter
  - Downside risk matters

Stringency in copyright

- With copyright, there might not be clarity on stringency differential (or a direct legal conflict), but the background legal requirements can create strongly directional incentives for different actors

- Stringency can be *non-obvious*
- Stringency can be *contested* and *contestable*
- **Downside risk matters**

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So . . . Uncle Sam wins!

But maybe for the wrong reasons

Is this actually the answer to the question?

Many open questions

- DSA comingles copyright with moderation of other problematic/illegal content
- DSA explicitly takes into account different stakeholder interests
- . . .not least, fundamental rights
- Practical implementation
  - Practice experience (transparency!)
  - Shift to DSA for some specific practices that don't trigger (too much) copyright risk
- Interpretation in delegated acts, guidance, CJEU review
- Brussels Effect *de jure?* Copyright or "Section 230"?

Thank you!

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"Market size"

	Company	Digital Service	Type	Est. (cc)	Users (mil)	User-generated-content components
Search	Alphabet[11]	Google Search	VLOSE	IE	332+	Paid and unpaid search results
	Microsoft[12]	Bing	VLOSE	IE	107	Paid and unpaid search results
Social media	Alphabet	YouTube	VLOP	IE	401+	Videos, sound, photos & text
	Meta[13]	Facebook	VLOP	IE	255	Videos, sound, photos & text
	Meta	Instagram	VLOP	IE	250	Videos, sound, photos & text
	Bytedance[14]	TikTok	VLOP	IE	125	Videos, sound, photos & text
	Microsoft	LinkedIn	VLOP	IE	122	Videos, sound, photos & text
	Snap[15]	Snapchat	VLOP	?	96+	Videos, sound, photos & text
	Pinterest[16]	Pinterest	VLOP	?	n/a	Videos, sound, photos & text
	Twitter[17]	Twitter	VLOP	?	100+	Videos, sound, photos & text
App stores	Alphabet	Google App Store	VLOP	IE	274+	Mobile apps
	Apple[18]	Apple App Store	VLOP	IE	n/a	Mobile apps
Wiki	Wikimedia[19]	Wikipedia	VLOP	?	151+	Mostly text and photos
Markets	Amazon[20]	Amazon Marketplace	VLOP	LX	n/a	Sellers' offerings & users' reviews
	Alphabet	Google Shopping	VLOP	IE	74+	Sellers' offerings & users' reviews
	Alibaba[21]	AliExpress	VLOP	?	n/a	Sellers' offerings & users' reviews
	Booking.com[22]	Booking.com	VLOP	NL	n/a	Sellers' offerings & users' reviews
Maps	Alphabet	Google Maps	VLOP	IE	278+	Shop profiles, reviews, etc.

Martin Husovec, *The DSA's Scope Briefly Explained* (February 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365029.