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Extraterritorial Lawmaking

Dorm Rooms, Boardrooms, and Back Room Deals

In 1996, Stanford graduate students Sergey Brin and Larry Page developed an innovative search engine for navigating the Internet. Two years later, they dropped out of school, filed articles of incorporation, and moved their fledgling business from their dorm rooms to a friend's garage in Menlo Park, California. Public demand for their search engine soon exploded. By 2022, it received 8.5 billion search requests daily, accounting for nearly 90 percent of all searches in the United States and 70 percent worldwide. So great was its global popularity that the company's name – Google – became synonymous with searching the Internet.

Google leveraged its success as a search platform to become an advertising powerhouse. As the Internet drew consumers away from print media and television, global online advertising surged from approximately USD 6 billion in 2000 to USD 360 billion in 2020.[1] Much of this revenue went to Google, which enjoyed significant advantages over its competitors due to its dominant position in the search market and its ability to leverage user data for targeted advertising. But Google was not content to rest on these competitive advantages alone. It worked to cement its market dominance by buying up would-be competitors and expanding into adjacent markets, such as operating systems, mobile phone apps, and hardware for phones and tablet computers. These moves grew the Google family of companies – now consolidated under the holding company Alphabet – into a trillion-dollar corporate behemoth.[2]

[1] William L. Hosch, 'Google', Brittanica, www.britannica.com/topic/Google-Inc.
[2] Nick Statt, 'The Rise, Disappearance, and Retirement of Google Co-Founders Larry Page and Sergei Brin', The Verge, 4 December 2019.

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As Google's empire expanded, its activities attracted regulatory scrutiny. The US Department of Justice (DOJ) filed multiple lawsuits against Google, arguing that the company has engaged in anticompetitive behaviors that violate American antitrust law. Antitrust law is concerned with prescribing terms of fair competition to protect consumers from exploitation by dominant firms. The law seeks to achieve this goal by prohibiting mergers and acquisitions that lead to monopolies, prohibiting anticompetitive tactics to achieve or sustain monopolization (e.g., abuse of a dominant position), and banning collusion between competitors to restrain trade (e.g., price-fixing). Because the international community has not developed binding general rules for antitrust, the regulations that national authorities apply arise from domestic or regional sources, not international law.

In the case of Google, the DOJ alleges that the firm has contracted with mobile device manufacturers, wireless carriers, and browser developers to become the default search engine for their smartphones and other devices.[3] Combined with Google's Android mobile platform and Chrome browser, these agreements have made Google the default search engine for over 80 percent of all devices in the United States, further entrenching its dominant market position.[4] US regulators also accuse Google of other anticompetitive practices, such as blocking or downranking search results from competitors and driving up advertising prices by representing both buyers and sellers for its advertising services. If these allegations were not troubling enough, regulators claim that Google has conspired with Meta, the parent company of Facebook, to give the latter preferential treatment in its advertising auctions in exchange for Meta's agreement not to compete with Google's advertising business. Collectively, these accusations paint an unsettling picture of the global tech titan exploiting its dominant position as the "gatekeeper of the internet" to deliberately stifle competition, suppress innovation, and inflate the prices it charges for its services.[5] Based on these concerns,

[3] Gilad Edelman, 'Google's Antitrust Cases: A Guide for the Perplexed', Wired, 10 December 2020; 'The Google Antitrust Lawsuit: Initial Observations', Cong. Res. Serv., 23 October 2020.

[4] Mark Sullivan, 'How Google Will Fight Off the DOJ's Claims of Monopoly in Search', Fast Company, 21 October 2020.

[5] Brian Fung, 'The Antitrust Lawsuits Against Google Just Keep Coming', CNN, 17 December 2020, (quoting New York State Attorney General Leticia James). Whether US regulators will succeed in these lawsuits is by no means clear. See Sullivan, 'How Google Will Fight' (reviewing the case against Google's antitrust liability).

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a federal district court held in August 2024 that Google's anticompetitive practices violated American antitrust law.[6]

Google's controversial tactics have also drawn fire from European regulators. In June 2017, the European Commission fined Google €2.4 billion under EU competition law for using its search algorithm to funnel users toward its comparison shopping service, "Google Shopping," to the detriment of competitor sites.[7] The following year, Google incurred an additional €4.3 billion fine for illegally requiring Android manufacturers and network operators to preinstall its search app on mobile devices.[8] In March 2022, authorities in the European Union and the United Kingdom launched parallel investigations into the alleged conspiracy between Google and Meta to carve up the online advertising market.[9] Thus, European authorities have not shied away from enforcing their competition laws against Google, a corporation headquartered across the Atlantic.

This chapter uses antitrust law as a case study to explain why and how mandatory cooperation should apply to settings where states have concurrent regulatory jurisdiction under international law. Within the past century, the United States and the European Union have extended their domestic antitrust laws to foreign actors operating abroad.[10] Rising powers, such as Brazil, China, and India, have also asserted jurisdiction to regulate the anticompetitive behavior of foreign firms.[11] Supporters of these

[6] United States v. Google L.L.C., Memorandum Opinion, Case No. 20-cv-3010, at 276 (D.C.D.C. Aug. 5, 2024).

[7] European Commission, 'Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service', European Commission, 27 June 2017; see also Jack Denton, 'Google Just Lost a Major EU Antitrust Appeal. It's Bigger Than the $2.8 Billion Fine in a Major Win for Regulators', Barron's, 10 November 2021.

[8] European Commission, 'Antitrust: Commission fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine', European Commission, 18 July 2018.

[9] Pietro Lombardi, 'EU, UK Open Antitrust Probes Into Google, Meta Ad-Services Agreement', Politico, 11 March 2022.

[10] See United States v. Aluminum Company of America (Alcoa), 148 F 2d 416 (2d Cir. 1945); Joanne Scott, 'Extraterritoriality and Territorial Extension in E.U. Law' (2014) 62 *Am. J. Compar. L.* 87, 88.

[11] See Austen Parrish and Cedrick Ryngaert (eds.), *Research Handbook on Extraterritoriality in International Law* (Cheltenham: Edward Elgar Publishing, 2023), chs. 9–12 (discussing extraterritoriality in Africa, Asia, Australia, Latin America, New Zealand, and the United Kingdom); Angela Huyue Zhang, *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* (Oxford: Oxford University Press, 2021), pp. 34–35, 217–221 (noting the rise of Chinese extraterritorial antitrust regulation).

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practices argue that extraterritorial regulation is necessary to enable states to protect their people from foreign-sourced harm and generate public goods that benefit the entire international community.[12] Left unchecked, however, extraterritorial lawmaking can also undermine sovereign equality by subjecting a state to unilateral foreign governance.[13] Both extraterritorial regulation and its absence can enable neo-imperialism: the former by subjecting people to foreign rule and the latter by removing legal obstacles to exploitation by multinational corporations.[14] In this chapter, we argue that the equitable model of sovereignty requires a different approach: states must resolve disputes over their concurrent regulatory jurisdiction through mandatory cooperation.

Does Equal Sovereignty Require Exclusive Jurisdiction?

Prior to the twentieth century, the principle of sovereign equality was generally understood to impose limits on a state's prescriptive jurisdiction.[15] As early as the fourteenth century, Bartolus declared that "it is not for one city to make the law upon another, for an equal has no power over an equal."[16] In 1825, the US Supreme Court reiterated this view in *The Antelope*: "No principle of general law is more universally acknowledged, than the perfect equality of nations . . . It

[12] See, e.g., Cedric Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford: Oxford University Press 2020), pp. 7–8 (arguing that extraterritorial prescriptive jurisdiction can be deployed to promote cosmopolitan norms); Roger O'Keefe, 'Cooperative National Regulation to Secure Transnational Public Goods: A Reply to Nico Krisch' (2002) 33 EJIL 515, 524 (arguing that extraterritoriality advances states' "respective and collective regulatory interests in the effective securing of public goods, including transnational ones").

[13] One of us has argued that extraterritorial lawmaking in some settings also violates a people's international right to self-determination. See Evan J. Criddle, 'Extraterritoriality's Empire: How Self-Determination Limits Extraterritorial Lawmaking' (2024) 118 AJIL 607. In this chapter, we table that objection to focus on sovereign equality and the associated requirements of mandatory cooperation.

[14] See Jenny S. Martinez, 'The New Territorialism and Old Territorialism' (2014) 99 *Cornell L. Rev.* 1387, 1400 (observing that "anti-imperialist rhetoric in [US] courts" and the absence of extraterritorial US regulation "helped create the so-called 'banana republics' in Latin America").

[15] International lawyers use the term "prescriptive jurisdiction" to describe a state's legal competence to legislate and apply its law to particular people, property, and conduct. Prescriptive jurisdiction is distinguished from a state's authority to adjudicate disputes ("adjudicatory jurisdiction") or enforce legal norms ("enforcement jurisdiction").

[16] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), p. 433 (translating Bartolus).

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results from this equality, that no one can rightfully impose a rule on another."[17] Justice Joseph Story derived two general maxims of prescriptive jurisdiction from sovereign equality: first, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory," and second, "that no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein" except perhaps its own subjects.[18] Giving municipal laws extraterritorial effect would be unthinkable, Story asserted, because it "would at once annihilate the sovereignty and equality of every nation, which should be called upon to recognize and enforce them."[19] Max Huber endorsed this assessment in the *Island of Palmas* arbitration: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[20] Thus, for centuries, international lawyers tended to accept that the concept of sovereignty and the principle of sovereign equality required that states must be free to govern their respective territories without interference from foreign law.[21]

The Permanent Court of International Justice (PCIJ) dealt a significant blow to this idea in *The Lotus* when it concluded by the narrowest of margins that international law did not forbid Turkey from applying its criminal law to foreign nationals aboard a vessel flying the French flag (and therefore under French sovereignty). The Court recognized that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[22] However, the Court rejected the idea that states exercise "power"

[17] The Antelope, 23 US (10 Wheat) 66, 122 (1825).

[18] Joseph Story, *Commentary on the Conflict of Laws* (Boston: Hilliard, Gray & Co., 1834), §§ 18, 20–21.

[19] Ibid. § 32; see also The Schooner Exchange v. McFaddon, 11 US 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

[20] Island of Palmas Case (Neth./US), 2 RIAA 829, 838 (4 April 1928); see also Joseph H. Beale, 'The Jurisdiction of a Sovereign State' (1923) 36 HLR 241, 241 (reasoning that a state's prescriptive jurisdiction is limited to the extent that it "infringes the rights of other sovereigns").

[21] The principle was subject to some notable exceptions, including for pirates and slave traders, who were considered "enemies of all mankind" (*hostis humani generis*). John H. Knox, 'A Presumption Against Extrajurisdictionality' (2010) 104 AJIL 351, 367 (discussing traditional exceptions to the strict territoriality rule).

[22] The Case of the S.S. Lotus (Fr./Turk.), 1927 PCIJ (ser. A) No. 10 (7 September), p. 18, para. 45.

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if they merely "extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory" without enforcing those laws extraterritorially.[23] By distinguishing lawmaking from enforcement in this manner, the Court suggested that states were free under international law to exercise unlimited prescriptive jurisdiction. *The Lotus* thus gave states *carte blanche* to use their national laws to regulate the rest of the world.

The Lotus arrived at the apex of the colonial era, a moment in history when there were relatively few recognized states and the voluntarist model of sovereign equality was ascendant. As discussed in Chapter 1, legal scholars often cite the "Lotus principle" that "whatever is not explicitly prohibited by international law is permitted"[24] as the high-water mark for voluntarist approaches to international law.[25] In contrast, international lawyers today generally take the PCIJ's sweeping pronouncements on extraterritorial prescriptive jurisdiction with a grain of salt. Most legal scholars prefer to read *The Lotus* as standing for the narrower proposition that states may exercise prescriptive jurisdiction over conduct that causes substantial harm within their borders. This narrower reading accords with subsequent developments at the national level, where legislation authorizing effects-based jurisdiction has become increasingly common.

The 1945 *Alcoa* judgment of the US Court of Appeals for the Second Circuit marked a turning point in the rise of effects-based jurisdiction.[26] At issue in the case was an international price-fixing conspiracy between Alcoa, an American company, its Canadian sister company, and several foreign aluminum producers.[27] The central legal question before the court was whether American antitrust law applied to the extraterritorial conduct of foreign corporations.[28] The court concluded, as a matter of

[23] Ibid. p. 19, para. 46.
[24] Prosper Weil, '"The Court Cannot Conclude Definitively" . . . Non Liquet Revisited' (1998) 36 CJTL 109, 112.
[25] See, e.g., Arrest Warrant of 11 April 2000, 2002 ICJ Rep. 63, p. 78 para. 51 (14 Feb.) (joint separate opinion of Higgins, Kooijmans & Buergenthal, JJ.) (suggesting that the Lotus "dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies"); Mehrdad Payandeh, 'The Concept of Law in the Jurisprudence of H.L.A. Hart' (2010) 21 EJIL 967, 971 (observing that the "voluntarist approach to international law found its expression in the famous *Lotus* decision").
[26] United States v. Aluminum Co. of America (Alcoa), 148 F 2d 416 (2d Cir. 1945).
[27] Ibid. pp. 421–422.
[28] Ibid. p. 443.

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statutory interpretation, that foreign corporations were subject to antitrust liability under the Sherman Act if their actions "were intended to affect imports [into the United States] and did affect them."[29] *Alcoa* thus established the precedent that transboundary harm could support extraterritorial prescriptive jurisdiction under American antitrust law.

European regulators eventually embraced a similar effects-based approach to prescriptive jurisdiction. In 1964, the European Commission held that European Economic Community (EEC) rules apply to "all agreements which are apt to affect commerce between Member States and which have as their object or result to prevent, restrict or distort competition within the Common Market."[30] Two decades later, the European Court of Justice (ECJ) adopted a modified effects-based approach to prescriptive jurisdiction in *Wood Pulp*.[31] The ECJ concluded that although the defendants – numerous wood pulp producers and two associations of producers – were headquartered outside the EEC, their price-fixing agreement was subject to EEC competition law to the extent that the parties implemented the agreement through prices charged to EEC customers.[32] The ECJ thus accepted that at least two states could exercise prescriptive jurisdiction over a price-fixing conspiracy: the state where the parties organized their conspiracy and the state where the parties implemented their agreement.

By the end of the twentieth century, conventional wisdom held that international law permitted a state to exercise extraterritorial prescriptive jurisdiction in various contexts where "there is a genuine connection between the subject of the regulation and the state seeking to regulate."[33] Not only could a state regulate the activities of its nationals wherever they might be located (*nationality jurisdiction*),[34] but, more controversially, a state could also extend its law extraterritorially to protect its expatriate

[29] Ibid. p. 444.

[30] European Economic Community: Commission Decision in Grosfillex Case (Cartels and Dominant Positions; First Decision Under Regulation No. 17), 3 ILM (1964), 418, 419–420 (translating Grosfillex-Fillistorf, 1964 J.O. (58) 915, 3 CMLR 237, 238–339 (1964)).

[31] Åhlström v. Commission (Wood Pulp), 1985 O.J. (L 85) 1, 14–15, 54 CMLR 474, 499–500 (1985), aff'd in part, void in part 1988 ECR 5193.

[32] Wood Pulp, p. 5243.

[33] *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018) § 402(1) n. 2 [hereinafter *Fourth Restatement*]; see also James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), p. 441 ("If there is a cardinal principle emerging, it is that of genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question.").

[34] *Fourth Restatement*, § 410; Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 BYBIL 187, 196.

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nationals from harm (*passive personality jurisdiction*), safeguard essential sovereign interests from foreign-sourced threats (*protective principle jurisdiction*), and enforce peremptory norms of general international law (*universal jurisdiction*).[35] This expansion of states' prescriptive jurisdiction has divided international lawyers. Critics argue that extraterritorial prescriptive jurisdiction undermines national sovereignty and self-determination by subjecting states to foreign imperialism.[36] Supporters counter that a strict territorial approach would also have sovereignty costs because it would make states dependent on foreign powers to suppress extraterritorial activities that inflict transboundary harm.[37]

What makes this debate so intractable is that there is merit on both sides. Alone, neither strict territoriality (the classical approach) nor concurrent regulatory jurisdiction (the modern approach) can explain and honor sovereign equality as the organizing idea of international law that impedes powerful states and their firms from dictating terms to others. Strict territoriality prevents states from regulating foreign-sourced harm, placing them at the mercy of states where the harm originates. However, concurrent regulatory jurisdiction also fails to curb domination: allowing a state to regulate people and conduct outside its borders, at its sole discretion, would subject other states and their people to alien control. Both the classical and modern approaches to extraterritorial jurisdiction, without more, invite unilateralism and subvert a constitutional understanding of sovereign equality that takes seriously the "equal rights and self-determination of peoples."[38] Extraterritorial regulation therefore raises concerns like those that arise in other settings, such as transboundary rivers and border-straddling fisheries, where states' overlapping rights or powers trigger mandatory cooperation.[39]

[35] *Fourth Restatement*, §§ 411–413.

[36] See, e.g., Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010), pp. 20, 28 (arguing that sovereignty entails a claim to juridical independence and that states therefore "hold a prima facie immunity against extraterritorial authorities dictating criminal legal rules which are binding on their territory"); Criddle, 'Extraterritoriality's Empire', pp. 633–634, 636–648 (arguing that some bases for extraterritorial prescriptive jurisdiction violate the right to self-determination).

[37] Roger P. Alford, 'The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33 VJIL 1, 1–2, 10–11 (discussing the positions).

[38] UN Charter, art. 1(2).

[39] See Chapters 2–3.

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The difficulty in this context parallels the controversy discussed in Chapter 5 with respect to the authority of target states to use force against hostile groups from another state (the "host state") whose actions cannot be imputed to that state. The ICJ avers that the UN Charter does not authorize target states to use force against nonstate hostiles within the territory of the host state without the host state's consent, while some commentators claim that international law permits target states to use force without the host state's consent if the host state is unwilling or unable to address the threat. The ICJ treats the host state's territorial sovereignty as an absolute at the expense of the target state's territorial integrity, while the "unwilling or unable" approach would subject the host state's territorial sovereignty to the target state's unilateral view of its security needs. Both approaches undermine sovereign equality because both subject one state to the discretion of the other. The way forward, we argued, is to take seriously international law's demand that target states and host states cooperate to negotiate equitable solutions that forgo treating territorial sovereignty and territorial integrity as legal absolutes.

The classical and modern approaches to prescriptive jurisdiction also treat as absolutes strict territoriality, on the one hand, and an entitlement to extraterritorial prescriptive jurisdiction, on the other (whether delimited by an effects-based criterion or not). Here too, the way forward is good faith cooperation between the state asserting extraterritorial regulation and the host state from which transboundary harm originates. Generally, the territorial claim of the host state must yield to equitable interests of the state that suffers transboundary harm. The state that seeks to exercise prescriptive jurisdiction must also demonstrate due regard for the host state's sovereignty and its people's right to self-determination. Under the now-familiar norms of mandatory cooperation, the process called for is one of good faith information sharing, consultation, negotiation, mediation, conciliation, and if necessary third-party arbitration or adjudication. With equitable principles supervening on sovereign rights and with a process that treats the parties as legal equals throughout, mandatory cooperation coordinates the parties' contending sovereignties so they may fit together commodiously as part of a unified legal order, rather than subjugate one sovereignty to the other. Mandatory cooperation thereby offers the promise of interstate relations that live up to the demands of sovereign equality understood as a constitutional ideal that privileges the "equal rights and self-determination of peoples."

The remainder of this chapter discloses that international legal practice only partially subscribes to the framework of mandatory cooperation,

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and that global competition law as such is largely soft law and so, strictly speaking, not binding and mandatory. Nonetheless, to the extent that international law is committed to a constitutional understanding of sovereign equality, mandatory cooperation offers a laudable institutional framework through which sovereign equality can unfold into constitutional form in the context of extraterritorial regulation.

Tempering Extraterritoriality Through Adjudication

Recognizing the tensions between extraterritorial regulation and sovereign equality, American courts have used canons of statutory construction to rein in the geographic reach of domestic laws. The US Supreme Court has established a strong presumption that federal legislation does not apply to people and activities outside the United States.[40] Even when statutes reach outside the United States, courts have resisted applying them when the resulting imposition on another state's territorial sovereignty would be "unreasonable."[41] Lower courts have assessed whether extraterritoriality is unreasonable based on various considerations, including the links between the regulated activity and the regulating state, the character of the activity to be regulated, the importance of the regulation to the regulating state, and the likelihood of conflict with foreign law.[42] In the landmark 2004 decision, *F. Hoffman-La Roche Ltd. v. Empagran*, the Supreme Court held that extraterritorial regulation is unreasonable if foreign conduct lacks a genuine connection to the United States.[43]

Empagran is especially notable because the Supreme Court linked its interpretive canons to international law. The Court asserted that the presumption against extraterritoriality and the canon against unreasonable extraterritoriality are both based on "prescriptive comity" – that is, states' responsibility to "take account of the legitimate interests of other

[40] See Morrison v. Nat'l Australia Bank Ltd., 561 US 247, 255–261 (2010); Kiobel v. Royal Dutch Petroleum Co., 569 US 108, 115–117 (2013); Nestlé USA, Inc v. Doe, 141 S Ct. 1931, 1936 (2021).

[41] F. Hoffman-La Roche Ltd. v. Empagran, 542 US 155, 164 (2004) (citing *Restatement (Third) of Foreign Relations Law of the United States* §§ 403(1), 403(2) (1986) [hereinafter *Third Restatement*]).

[42] Timberlane Lumber Co. v. Bank of America, 549 F 2d 597, 614–15 (9th Cir. 1976); Mannington Mills, Inc. v. Congoleum Corp., 595 F 2d 1287, 1297–98 (3d Cir. 1979); *Third Restatement*, § 403(2).

[43] 542 US 155, 164–165 (2004).

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nations when they write [domestic] laws."[44] The canon against unreasonable extraterritoriality, in particular, "reflects customary international law – law that (we must assume) Congress ordinarily seeks to follow."[45] Narrowing the extraterritorial scope of domestic legislation in deference to foreign interests "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world."[46]

Some legal scholars have challenged the Supreme Court's view that prescriptive comity reflects customary international law.[47] For example, Bill Dodge argues that *Empagran* erroneously conflates international comity and international law.[48] Whereas international law establishes binding obligations, international comity is "a matter for each nation's discretion" and "does *not* bind the United States on the international plane or give rise to international responsibility."[49] According to Dodge, the presumption against extraterritoriality and the presumption against unreasonable extraterritoriality are comity-based canons rather than reflecting international legal obligations.[50] The influential *Restatement of the Law (Fourth)—Foreign Relations of the United States* (*Restatement*) concurs that the presumption against extraterritoriality is not designed "to avoid violations of international law" but instead to prevent "unintended clashes between our laws and those of other nations which could result in international discord."[51] The *Restatement* acknowledges that "prescriptive comity . . . accounts for the legitimate sovereign interests of other nations and helps the potentially conflicting laws of different nations work in harmony," but it stops short of characterizing

[44] Ibid. p. 164.

[45] Ibid. (citing, *inter alia*, *Third Restatement*, §§ 403(1)–(2)); see also Hartford Fire Ins. Co. v. California, 509 US 764, 800, 815 (1993) (Scalia, J., dissenting) (arguing that prescriptive comity rests on principles of "customary international law" that impose "limitations on a nation's exercise of its jurisdiction to prescribe").

[46] Ibid. pp. 164–165.

[47] See, e.g., William S. Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 HILJ 101, 137 n. 224 (arguing that the rule-of-reason "balancing approach is not required by international law"); Michael D. Ramsey, 'Escaping "International Comity"' (1998) 83 *Iowa L. Rev.* 893, 925 ("[D]escribing the inquiry as one of 'comity' disconnects it from international law.").

[48] William S. Dodge, 'International Comity in American Law' (2015) 115 *Colum. L. Rev.* 2071, 2120.

[49] Ibid. p. 2121 (emphasis in original).

[50] Ibid. pp. 2122, 2128.

[51] *Fourth Restatement*, § 404, rptr. n. 2 (quoting E.E.O.C. v. Arabian American Oil Co., 499 US 244, 248 (1991)). The *Restatement* also suggests that the presumption "reflects the assumption that Congress is primarily concerned with domestic conditions." Ibid.

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prescriptive comity as reflecting international law.[52] This approach accords with the jurisprudence of most European courts, which do not recognize reasonableness as limiting a state's prescriptive jurisdiction.[53] Thus, international lawyers tend to agree that international law does not require states to consider foreign interests when determining the extraterritorial reach of their domestic law.

The conventional wisdom that international law does not require states to exercise prescriptive comity makes sense only if we accept the waning voluntarist view of sovereign equality. Under the voluntarist view, a state may exercise prescriptive jurisdiction however it pleases as long as it does not violate a prohibitive rule of international law.[54] In contrast, the ascending constitutional view of sovereign equality requires a state to pay due regard to foreign rights and interests whenever it holds prescriptive jurisdiction concurrently with another state. This equitable obligation is a legal requirement emanating from the principle of sovereign equality; it is not committed to a state's unilateral discretion.

The constitutional view of sovereign equality explains the Supreme Court's oft-cited dictum that prescriptive comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[55] States are not absolutely obligated to abstain from applying their domestic law extraterritorially, but that does not mean they may disregard foreign interests entirely. To respect the principle of sovereign equality, each state must find a way to reconcile its rights and powers with other states' rights and powers in accordance with equitable principles. Insofar as the presumption against extraterritoriality and the canon against unreasonable extraterritoriality respond to these concerns, they answer to the demands of the constitutional view of sovereign equality expressed through customary international law. In this sense, the Supreme Court was correct to reason that "principles of international law" impose binding "limitations on a nation's exercise of its [prescriptive] jurisdiction."[56]

[52] Ibid. § 204, cmt. A.
[53] Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford: Oxford University Press, 2015), pp. 171–180 (summarizing the practice of European courts).
[54] See Chapter 1 (discussing the "Lotus principle").
[55] Hilton v. Guyot, 159 US 113, 163–164 (1895).
[56] Hartford Fire Ins. Co. v. California, 509 US 764, 800, 815 (1993) (Scalia, J., dissenting).

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Where Adjudication Falls Short

Nonetheless, judicial canons of statutory interpretation are poor vehicles for resolving international regulatory conflicts. Mandatory cooperation's substantive and procedural requirements are addressed primarily to diplomats and regulators, not judges. To satisfy international law, national authorities must consult with one another, share information about their national interests and policy preferences, pay due regard to foreign interests and preferences, and pursue an equitable solution that manifests due regard for their respective national interests. Courts are ill-equipped to perform these sensitive political functions.[57] The most national courts can do, consistent with their institutional role, is nudge lawmakers toward international cooperation. Courts can give lawmakers the benefit of the doubt by presuming that they would not have extended domestic law unilaterally to settings where international law requires international cooperation. When domestic law does extend extraterritorially, courts can apply the "rule of reason" canon to curb manifestly inequitable interference with another state's territorial sovereignty.[58] Yet, these judicial stopgaps, however beneficial, are no substitute for international regulatory cooperation.

The problem with relying on domestic courts to reconcile extraterritorial regulation with sovereign equality is that evaluating whether extraterritorial regulation is reasonable is, to some extent, in the eye of the beholder, and domestic judges struggle to conduct this inquiry impartially. In antitrust cases, for example, American judges rarely decide that applying domestic antitrust law to extraterritorial activities would be unreasonable. Plaintiffs therefore enjoy a clear home-field advantage when they ask US courts to enforce the Sherman Act against foreign defendants based on extraterritorial activities that cause domestic injury.

A notable illustration of this problem is the *Uranium Antitrust Litigation*.[59] In 1976, confidential documents leaked from an Australian uranium company found their way to the California Energy Commission,

[57] Brainerd Currie, 'Notes on Methods and Objectives in the Conflict of Laws' (1959) 2 *Duke L.J.* 171, 176 (arguing that "assessment of the respective values of the competing legitimate interests of two sovereign states is a political function of the highest order" outside the competence of courts).

[58] See *Fourth Restatement*, § 405, cmt. a (observing that the rule of reason canon "accounts for the legitimate sovereign interests of other nations and helps the potentially conflicting laws of different nations work in harmony").

[59] In re Uranium Antitrust Litigation, 617 F 2d 1248, 1253–1256 (7th Cir. 1980); In re Uranium Antitrust Litigation, 473 F Supp. 382 (N.D. Ill. 1979).

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which shared them with the world. The documents confirmed the existence of an international cartel composed of uranium producers from Australia, Canada, France, South Africa, and the United Kingdom.[60] When an American firm filed an antitrust lawsuit against cartel members, the international reaction was heated. Foreign governments complained that American regulators had been suppressing the price of uranium for years by prohibiting nuclear power reactors in the United States from using foreign uranium. Without international cooperation to maintain uranium prices at levels comparable to those in the United States, the uranium industry outside the United States would "bleed to death for sure."[61] Critics of the United States also noted that the companies' home governments firmly supported the uranium cartel. Enforcing the Sherman Act thus imperiled the uranium industry outside the United States and manifested flagrant disregard for the considered policy judgments of foreign governments. Despite these concerns, the trial court entered a default judgment against the cartel members,[62] and the Court of Appeals affirmed, concluding, over the objections of foreign governments, that applying the Sherman Act to the international uranium cartel was not an abuse of discretion under a "jurisdictional rule of reason" analysis.[63]

In fairness to the judges who presided over the *Uranium Antitrust Litigation*, they were saddled with an impossible task. There was no way they could craft a judgment that would reconcile the contending states' exercise of their equal sovereign powers when the national interests and regulatory policies of the United States and other uranium-producing countries were diametrically opposed.[64] The judges could not simply rewrite the Sherman Act to fashion a compromise between the states' conflicting policies. The limited tools of statutory construction at their disposal – the presumption against extraterritoriality and the canon against unreasonable extraterritoriality – offered only two options: (1) apply domestic law or (2) don't apply domestic law. The first option would subordinate foreign regulators' policy judgments to the demands

[60] Earle Gray, *The Great Uranium Cartel* (Toronto: McClelland & Stewart, 1982), pp. 95, 105–106.

[61] Ibid. pp. 103–104.

[62] In re Uranium Antitrust Litigation, 473 F Supp. at 392.

[63] In re Uranium Antitrust Litigation, 617 F 2d at 1253–1256.

[64] In parallel uranium cartel litigation before the UK House of Lords, Lord Wilberforce observed that "[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what is the policy of another state to attack." In re Westinghouse Elec. Corp. Uranium Contract Litig. [1978] AC 547, 617 (H.L.).

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of US antitrust law, while the second would put domestic uranium markets at the mercy of a foreign cartel. Neither option would reconcile the competing interests of the states concerned in a manner congenial to sovereign equality.

The Promise of Regulatory Cooperation

A better pathway for reconciling antitrust regulation with sovereign equality runs through international cooperation. When states cooperate to resolve antitrust disputes based on equitable principles, they can develop solutions responsive to their national interests without subordinating other states to their unilateral will.

After the *Uranium Antitrust Litigation*, the United States worked to patch things up by establishing bilateral cooperation agreements with Australia and Canada.[65] The Australia-US agreement acknowledged the parties' past conflicts over antitrust policy and affirmed "the need for such conflicts to be resolved with mutual respect for each other's sovereignty and with due regard for considerations of comity."[66] Australia agreed to notify and consult with the United States when it adopted a policy that "may have antitrust implications for the United States," and the United States committed to provide notice and consult with Australia when it undertook antitrust investigations impacting Australian interests.[67] Both sides resolved to "seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity."[68] Two years later, Canada and the United States concluded a memorandum of understanding with similar provisions, emphasizing the need for notice, consultation, good faith consideration of the other party's interests, and the cooperative pursuit of conflict avoidance, accommodation, and compromise.[69] Today, the

[65] See Agreement Relating to Cooperation on Antitrust Matters (US-Austl.), 29 June 1982, 34 UST 388 [hereinafter US-Austl. Agreement]; Canada-United States: Memorandum of Understanding as to Notification, Consultation and Cooperation with Respect to the Application of National Antitrust Laws, 9 March 1984, 23 ILM 275 (1984) [hereinafter Can.-US Agreement).

[66] US-Austl. Agreement, pmbl.

[67] Ibid. paras. 1–4.

[68] Ibid. para. 5.

[69] Can.-US Agreement, paras. 2–7. The 1984 memorandum of understanding between Canada and the United States has since been replaced by the more detailed and legally

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United States has cooperation agreements with dozens of other states.[70]

The most important international competition agreement to date is the bilateral 1991 Competition Laws Cooperation Agreement between the European Communities and the United States (EC-US Agreement).[71] The EC-US Agreement outlines requirements of notification, consultation, exchange of information, and cooperation and coordination in enforcement activities.[72] It also requires each party to consider the other's interests when deciding whether to enforce its laws extraterritorially. Factors relevant to this inquiry include whether parties engaged in anticompetitive activities are intended "to affect consumers, suppliers, or competitors within the enforcing Party's territory" and "the relative significance of the effects of the anticompetitive activities on the enforcing Party's interests as compared to the effects on the other Party's interests."[73] The agreement also adopts a procedure now known as "positive comity": "If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, [it] may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities [at the other Party's discretion]."[74] By encouraging intergovernmental cooperation in this manner, the EC-US Agreement reduces the parties' reliance on extraterritorial antitrust regulation.

Efforts to establish global standards for competition law have yet to bear fruit. Beginning in the mid-1990s, the World Trade Organization (WTO) hosted negotiations to develop treaty-based rules against cartels, the abuse of market dominance, and other anticompetitive activities impacting international trade. This initiative encountered a tepid reception outside Europe. Developing states feared global competition rules would impose onerous regulatory burdens while entrenching global inequality. The United States worried that a multilateral convention would water down antitrust enforcement by ensconcing suboptimal

binding Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (US-Can.), 3 August 1995.

[70] Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge: Cambridge University Press, 2010), pp. 494–509.

[71] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 23 September 1991, *reprinted in* 30 ILM 1487 (1991).

[72] Ibid. arts. II–IV.

[73] Ibid. art. VII.

[74] Ibid. art. V(2), (4); see also US-European Commission Enhanced Positive Comity Agreement, 4 June 1998 (fleshing out the requirements of positive comity).

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competition norms and institutions. As a result, the WTO abandoned the effort in 2003.[75]

With hopes fading for a global competition treaty, the international community has attempted to fill the gap with nonbinding "soft law" standards. For example, the Organisation for Economic Co-operation and Development (OECD) has recommended measures to suppress hard-core cartels and strengthen international cooperation for corporate merger reviews.[76] It has also collaborated with the International Competition Network, an association of public and private competition experts, to study state practices, identify opportunities for enhancing cooperation, and promote regulatory harmonization.[77] These initiatives have reduced the urgency for concluding a multilateral competition treaty. Still, more robust international cooperation will be needed in the years to come to reduce powerful states' reliance on extraterritoriality and protect weaker states from foreign domination.[78]

Thus far, the international community has yet to recognize international cooperation as a mandatory feature of global competition law. When states weigh options for international regulatory cooperation in this domain, they assume they are free to opt out and proceed unilaterally, if they choose. Yet, without international cooperation, competition laws imposed unilaterally by a state or regional organization (or the absence of national regulation) would subject other states to domination. To respect sovereign equality in accordance with equitable principles, states must accord due regard for other states' rights and powers when establishing competition rules. Accordingly, states must consult with one another, share relevant information, and negotiate mutually acceptable regulatory standards that are responsive to their respective interests.

If these requirements have been slow to take root in global competition law, as compared to other fields like the international law of the sea, this

[75] Anu Bradford, 'International Antitrust Negotiations and the False Hope of the WTO' (2007) 48 HILJ 383, 406–408; Eleanor M. Fox, 'Antitrust Without Borders: From Codes to Networks', in Andrew T. Guzman (ed.), *Cooperation, Comity, and Competition Policy* (Oxford: Oxford University Press, 2011), pp. 265, 272.

[76] 'Recommendation of the Council Concerning Effective Action Against Hard Core Cartels', OECD, 1 July 2019; 'Recommendation of the Council on Merger Review', OECD, 22 March 2005.

[77] See, e.g., OECD and International Competition Network, 'OECD/ICN Report on International Co-operation in Competition Enforcement', Report (2021).

[78] See Anu Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford: Oxford University Press, 2023) (explaining how China, the EU, and the United States are vying for regulatory control over the digital economy).

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may be attributable, in part, to the fact that international courts and tribunals lack jurisdiction over disputes involving national competition rules. Until international courts and tribunals assume jurisdiction to resolve these disputes, there will be no landmark cases comparable to the *Fisheries Jurisdiction Cases* or the *North Sea Continental Shelf Case* to affirm that states must cooperate to establish shared regulatory frameworks for global economic competition. Meanwhile, without judicial guidance, the pathways for mandatory cooperation to become entrenched in global competition law are limited. States could conclude a multilateral treaty codifying obligations to cooperate in managing regulatory conflicts, as they have done in many other fields of international law. Alternatively, mandatory cooperation could become a generally accepted feature of customary international law through the gradual accretion of state practice and *opinio juris*, as states consult and negotiate with one another as good neighbors to harmonize their national regulations in accordance with equitable principles.

Of course, even if mandatory cooperation were to become firmly embedded in international competition law, it could not completely level the playing field between states. Great powers will continue to wield disproportionate influence over the global economy regardless of whether international law considers regulatory cooperation optional or mandatory.[79] Nonetheless, mandatory cooperation is preferable to the current laissez-faire approach to extraterritorial regulation because it would give weaker states legal protections that they could use to counter great power domination. Mandatory cooperation would bring the interests of weaker states to the fore as legitimate considerations that powerful states must formally recognize and address (not simply ignore) in international negotiations. Although weaker states would lack the right to veto powerful states' preferred solutions, the other side of the coin is that powerful states could not lawfully impose their preferred solutions on weaker states unilaterally. Hence, if weaker states hold out for a more equitable deal, powerful states would have three choices under

[79] See Ryngaert, 'Jurisdiction in International Law', p. 204 ("Harmonization is not achieved nor does cooperation take place in a power-free environment."). Critics have accused the European Union and the United States of coercing less developed states to adopt national competition laws modeled on their own. See Dabbah, *International and Comparative Competition Law*, p. 3 (lamenting that "rules, practices and theories that are developed in certain parts of the world – mostly in the European Union (EU) and the USA – have come to be *forced down the throat* of countries in developing parts of the world, often with the aid of international organizations" (emphasis in original)).

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international law: (1) they could offer to sweeten the deal; (2) they could declare a stalemate and impose (impermanent and reversible) provisional measures while continuing to pursue international dialogue; or (3) they could submit the dispute to a third-party. This limited menu of options would give weaker states leverage to counteract, however imperfectly, powerful states' asymmetrical bargaining position. Outside mandatory cooperation's domain, weaker states have no such protections. Thus, mandatory cooperation would likely enhance weaker states' capacity to protect their national interests, at least relative to the status quo.

Global Cooperation in the Digital Era

Mandatory cooperation faces significant headwinds in the digital era. The dominant market power of some global technology companies has prompted states to defend their "digital sovereignty."[80] For example, the European Union's Digital Markets Act (DMA) imposes strict requirements on large web platforms like Amazon, Facebook, and Google, which function as "gatekeepers" for the global electronic marketplace.[81] Former US Trade Representative Charlene Barshefsky has excoriated the DMA as a "rigged competition law" because it "seems designed to impose blanket prohibitions on the business models and conduct of US companies."[82] However, European leaders have rallied behind the Act, seeking to rein in Silicon Valley tech titans while grooming homegrown alternatives. "The battle we're fighting is one of sovereignty," French President Emmanuel Macron has proclaimed.[83]

Amidst this transatlantic tug-of-war over the digital economy, multinational technology companies have pleaded for greater regulatory cooperation. In April 2021, Google Vice President Karan Bhatia lamented that "the technology trade relationship between the US and Europe – once one of the closest in the world – is

[80] Frances G. Burwell and Kenneth Propp, 'The European Union and the Search for Digital Sovereignty: Building "Fortress Europe" or Preparing for a New World', Atlantic Council, June 2020.

[81] See Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 2020 OJ (COM 2020) 842.

[82] Charlene Barshefsky, 'EU Digital Protectionism Risks Damaging Ties with the US', Financial Times, 2 August 2020. On April 23, 2022, the European Parliament announced that it had reached agreement with EU member states on the Digital Services Act.

[83] Ibid.; see also Anu Bradford, 'The Brussels Effect' (2012) 107 *Nw. U. L. Rev.* 1, 22 ("The EU is expected to defend its right to regulate its own market whenever competition in that market is affected.").

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fraying."[84] Bhatia urged the White House to accept the European Union's invitation to participate in a new EU-US Trade and Technology Council (TTC):

> An expedited high-level trade dialogue on technology issues is critical to avoid unilateral approaches on pressing issues like data flows that are essential to commerce, regulation of digital platforms that we all use every day, and other essential components of a modern economy. A TTC could also prevent divergence on emerging areas like artificial intelligence and other advanced technologies and promote cooperation on third-country technology challenges.
>
> Of course, a TTC needs to be set up for success. When entering trade negotiations, each side typically avoids preemptive or unilateral actions that might foreclose meaningful alignment. In entering a TTC, both sides should commit to meaningful consultation before taking any further actions harming transatlantic tech trade. The US should not enact new privacy or technology trade control regulations without consulting with the EU; the EU should pursue bilateral consultation to ensure technology initiatives like the Digital Markets Act reflect the EU-US values-based alliance. Quickly forming a TTC can help drive a consistent and non-discriminatory approach on these challenging new areas of technology regulation.[85]

Bhatia's vision for an effective transatlantic partnership aligns closely-with the requirements of mandatory cooperation. According to Bhatia's proposal, American and European regulators would renounce "unilateral approaches" that undermine the other's sovereign authority. Instead, they would jointly pursue cooperation through procedures that reflect due regard for their equal sovereignty. These procedures would include giving notice of potential investigations, exchanging relevant information, consulting regularly, treating foreign interests without discrimination, avoiding preemptive actions that could frustrate alignment, and pursuing international consensus in good faith. Robust cooperation between the European Union and the United States would benefit technology companies like Google by enabling them to organize their business around a more consistent and predictable set of regulatory ground rules.

There are some encouraging signs that regulators in Europe and the United States might be ready to embrace tighter regulatory cooperation for the digital economy. Two months after Bhatia's plea for transatlantic cooperation, the European Union and the United States formally

[84] Karan Bhatia, 'The U.S. and Europe Should Launch a Trade and Technology Council', Google: The Keyword, 9 April 2021.
[85] Ibid.

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announced the establishment of a high-level TTC. Among the initiative's major objectives was the aspiration "to facilitate regulatory policy and enforcement cooperation and, where possible, convergence, . . . without prejudice to the regulatory autonomy of the United States and the European Union."[86] The parties also formed a US-EU Joint Technology Competition Policy Dialogue to "focus on approaches to competition policy and enforcement, and increased cooperation in the tech sector."[87] US regulators raised detailed objections to the DMA in private correspondence. They also negotiated face-to-face with their European counterparts, seeking amendments barring the DMA from discriminating unfairly against American companies.[88]

Time will tell whether these efforts will produce a tighter transatlantic consensus about how best to safeguard competition in the digital marketplace. Enhanced cooperation between the EU and the United States would only be a first step, of course. Taking mandatory cooperation seriously would also require deeper engagement with other states and regional organizations, including developing nations that have criticized the EU and the United States for engaging in "digital colonialism" through multinational corporations like Google.[89] For the time being, however, recent efforts to bridge the transatlantic divide between the EU and the United States offer grounds for cautious optimism that even states and regional organizations with divergent interests might be able to find common ground as they replace unilateralism with cooperation.

[86] US-EU Summit Statement, White House Briefing Room, 15 June 2021, para. 17.

[87] Ibid., para. 19; see also EU-US Joint Technology Competition Policy Dialogue, Inaugural Joint Statement Between the European Comm'n, the US Dep't of Justice Antitrust Division, and the US Fed. Trade Comm'n, 7 December 2021 (reaffirming the sides' intention and "mutual interest in cooperating on competition policy and enforcement overall and especially in technology sectors" through "coordination and knowledge and information exchange, . . . potentially contributing to greater alignment").

[88] Samuel Stolton, 'US Pushes to Change EU's Digital Gatekeeper Rules', Politico, 31 January 2022.

[89] See Nick Couldry and Ulises A. Meijas, *The Costs of Connection: How Data Is Colonizing Human Life and Appropriating It for Capitalism* (Redwood City: Stanford University Press, 2019), pp. 6–18 (arguing that data colonialism parallels traditional colonialism by involving the appropriation of resources (data) and the establishment of relations premised on foreign domination); Michael Kwet, 'Digital Colonialism: US Empire and the New Imperialism in the Global South' (2019) 60 *Race & Class* 3, 4 (describing digital colonialism as a "structural form of domination exercised through the centralized ownership and control of the three pillars of the digital ecosystem: software, hardware, and network connectivity").

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