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American Law in the New Global Conflict

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AMERICAN LAW IN THE NEW GLOBAL CONFLICT

MARK JIA*

This Article surveys how a growing rivalry between the United States and China is changing the American legal system. It argues that U.S.-China conflict is reproducing, in attenuated form, the same politics of threat that has driven wartime legal development for much of our history. The result is that American law is reprising familiar patterns and pathologies. There has been a diminishment in rights among groups with imputed ties to a geopolitical adversary. But there has also been a modest expansion in rights where advocates have linked desired reforms with geopolitical goals. Institutionally, the new global conflict has at times fostered executive overreach, interbranch agreement, and interparty consensus. Legal-culturally, it has in places evinced a decline in legal rationality. Although these developments do not rival the excesses of America's wartime past, they evoke that past and may, over time, replay it. The Article provides a framework for understanding legal developments in this new era, contributes to our understanding of rights and structure in times of conflict, and reflects on what comes next in the new global conflict, and how best to shape it.

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INTRODUCTION

International conflict has profoundly influenced American law. From the Founding through the Cold War, competition with our putative adversaries has shaped the creation and evolution of our constitutional order,¹ structural changes in federal and executive power,² and shifts in our legal and political culture.³ The effects can be contingent and complex. Both canons and anticanons of our constitutional law were

¹ See J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 123 (1993) (“As a logical consequence of the Revolution, responsibility for American law passed into American hands.”); Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935 (2010) (“[A] core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states”); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 437–50 (1996) (describing how anti-Nazism and anti-Sovietism shaped constitutional jurisprudence); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1091 & n.24 (2014) (collecting sources on how “fear of foreign totalitarianism” led to a more “antitstatist, judicially enforced character” for civil liberties law).

² See Daniel R. Ernst & Victor Jew, *Introduction to TOTAL WAR AND THE LAW* 4–6 (Daniel R. Ernst & Victor Jew, eds., 2002) (describing the expansion of executive power during World War II); JAMES T. SPARROW, *WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT* 243 (2011) (arguing that by the end of World War II, “Americans had authorized a government far larger and more intrusive than the New Deal had ever been”); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1576 (2011) (arguing that each of four epochs in American approaches to national security “resulted in alterations to the domestic and foreign affairs structures of the federal government”); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 n.2 (2005) (collecting sources on “Executive Branch unilateralism” after September 11).

³ See Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. 335, 352–81 (2015) (expounding on the World War I origins of constitutional veneration).

drafted in the shadow of foreign threat and global competition. *Brown* on one end.⁴ *Korematsu* on another.⁵

We are in the midst today of what some believe to be a “new cold war.”⁶ The main competitor is no longer the Soviet Union, but China, a country whose swift ascent and authoritarian politics have set off alarm bells in Washington. Already, China’s rise has transformed our economic, technological, and military policies, as well as our partisan politics.⁷ And while there are important distinctions between the Cold War and today, most agree that we are entering a sustained period of global rivalry—one that may intensify before it resolves.⁸

Given China’s impact on our politics, and given foreign conflict’s historic impact on our legal system, one wonders what effect China’s rise will have on our law. Recent works have addressed American legal responses to China in fields as varied as criminal law,⁹ antitrust law,¹⁰ business and investment law,¹¹ transnational law and procedure,¹² and national security law.¹³ They show that China’s rise has begun to

⁴ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (stating that *Brown* “helped to provide immediate credibility to America’s struggle with Communist countries”); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988) (arguing that “*Brown* served U.S. foreign policy interests”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 27 (1994) (describing how “desegregation as a Cold War imperative became standard political fare” following World War II); Robert A. Burt, *Brown’s Reflection*, 103 YALE L.J. 1483, 1487 (1994) (suggesting that Justice Jackson’s Nuremberg experiences shaped his views on Jim Crow).

⁵ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 425 (2011) (rooting *Korematsu*’s reasoning in longstanding “deference to military judgments about the conduct of war”).

⁶ David Brooks, *The Cold War with China Is Changing Everything*, N.Y. TIMES (Mar. 23, 2023), <https://www.nytimes.com/2023/03/23/opinion/cold-war-china-chips.html> [https://perma.cc/M83D-Z5L9].

⁷ See *infra* Sections I.B, III.B.

⁸ See *infra* Section I.B.

⁹ See, e.g., Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145 (2021); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737, 745–50 (2021).

¹⁰ See, e.g., Angela Huyue Zhang, *Strategic Comity*, 44 YALE J. INT’L L. 281 (2019).

¹¹ See, e.g., Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023); Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT’L L. & BUS. 395 (2014); Timothy Webster, *Why Does the United States Oppose Asian Investment?*, 37 NW. J. INT’L L. & BUS. 213 (2017); Ji Li, *Superpower Legal Rivalry and the Global Compliance Dilemma*, 45 U. PA. J. INT’L L. (forthcoming 2024).

¹² See, e.g., Donald Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, U. PA. J. INT’L L. 455 (2023); William S. Dodge & Wenliang Zhang, *Reciprocity in China-US Judgments Recognition*, 53 VAND. J. TRANSNAT’L L. 1541 (2021); Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHI. L. REV. 157 (2022); Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685 (2020).

¹³ See, e.g., Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT’L L. 1145 (2022).

shape American law in concrete areas. But because few scholars have addressed this topic more generally, there has been little discussion of broader patterns and principles, of China's cross-cutting effect on American legal institutions as a whole.

This Article argues that U.S.-China conflict is starting to reproduce patterns and pathologies associated with global rivalry and American law. As in earlier conflicts, the politics of threat has had downstream effects on our law. It has diminished rights and liberties, especially among groups with imputed connections to a geopolitical adversary. But it has also led to a limited expansion in rights, especially where constituencies have linked desired reforms with geopolitical goals. More institutionally, the politics of threat has led to executive overreach and increased interbranch and political consensus. Lower courts have checked overreach in some areas, while in other areas, structural and partisan accountability has eroded. Finally, the new global conflict has at times evinced a decline in legal rationality. On notable occasions, legal or prosecutorial judgments appear to have been influenced by the politics and psychology of threat. Familiar ideological and nationalistic frames have returned to political-legal discourse.

At this likely early stage of conflict, few of these developments rival the excesses of our wartime past. There are no relocation centers, loyalty hearings, or military commissions. The conflict is not violent, and is far less "total" than earlier ones.¹⁴ Yet in its rhetoric, its politics, and its competitive dynamics, U.S.-China conflict is beginning to recall historic patterns.¹⁵ It has reproduced, in attenuated form, the same politics of threat that has driven wartime legal development historically. And it has reprised familiar normative frameworks that are beginning to structure our descriptive perceptions of reality. The results are legal changes that evoke our past, and that may, over time, replay it—if conflict deepens and vigilance wanes.

The Article advances scholarship in several ways. First, it provides a framework for understanding legal developments in this new global conflict. By assessing historical patterns in three transubstantive domains—rights, structure, and rationality—the Article shows how wartime patterns can illuminate legal-institutional dynamics today. Second, the Article reinvigorates debates on whether there is a "generally ameliorative trend" in civil liberties violations in wartime.¹⁶

¹⁴ Edward Corwin famously described the Second World War as a "total war." EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 1–4 (1947); *see also* Ernst & Jew, *supra* note 2, at 2.

¹⁵ *See infra* Section I.B.

¹⁶ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 221 (1998).

While it is too early to conclude how U.S.-China conflict will inform these debates, the Article points to areas of both progress and relapse, disagreeing with those who too loosely invoke history as well as those who too readily dismiss it. Finally, in looking to the road ahead, the Article extends and adapts scholarly proposals from previous conflicts, highlighting where earlier proposals address enduring concerns.

A few notes before proceeding. First, my focus is not China's impact on international or transnational law.¹⁷ I am interested in how China's rise is shaping America's domestic law, and in particular, the core institutions and values that aspirationally comprise our legal system. The aim is not to catalog all of China's legal effects across various sectors. Instead, I address how China's rise has affected our adherence to general constitutional and rule-of-law values: civil rights and civil liberties, structural accountability, and rationality in legal administration.

Second, my criticism of certain recent developments is not to deny that China's rise presents weighty challenges.¹⁸ In fact, a secondary contribution here is to show how Chinese governance uniquely exacerbates wartime pathologies in American law.¹⁹ For example, the Party-state's recruitment of its diaspora communities complicates efforts to reduce bias in law enforcement, heightening incentives to

¹⁷ This is the subject of a rich and growing literature. See, e.g., Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT'L L. 221 (2020); Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607 (2020); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016); Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China's Digital Silk Road as Transnational Data Governance*, 54 N.Y.U. J. INT'L L. & POL. 1 (2021); Jacques deLisle, Remarks by Jacques deLisle (Apr. 13, 2017), in PROCEEDINGS OF THE 116TH ANNUAL MEETING OF THE AM. SOC'Y INT'L L., 2018, at 69, 75–78; Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1 (2006). Of course, domestic legal developments caused by U.S.-China conflict can have recursive transnational and international legal effects, see Ji Li & Ruonan Tang, *Superpower Rivalry and the "Modernization" of Foreign Investment Risk Review*, 2023 U. ILL. L. REV. 461, 494–502 (showing how foreign investment risk review changed in China partly in response to legal developments in the United States), and can be conceptualized as part of broader process of transnational legal ordering, see TERENCE C. HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* 18–20 (2015) (describing transnational legal orders).

¹⁸ For a too brief account of some of these challenges, see *infra* Section I.B.

¹⁹ For a succinct account of why scholars of contemporary China often prefer the term "Party-state," see Ming Xia, *The Communist Party of China and the "Party-State"*, N.Y. TIMES, <https://archive.nytimes.com/www.nytimes.com/ref/college/coll-china-politics-002.html> [<https://perma.cc/Q655-TKAS>] (asserting that the Communist Party of China "commands, controls and integrates all other political organizations and institutions in China"). For a more thorough treatment of the Party's relationship with the state, see Margaret K. Lewis, *Seeking Truthful Names, in LAW AND THE PARTY IN CHINA: IDEOLOGY AND ORGANIZATION* 151–86 (Roger Creemers & Susan Trevaskes eds., 2021).

target groups instead of individuals.²⁰ Similarly, the opacity of Chinese firms' links to the Party-state, coupled with the Party-state's own encompassing national security concepts, can frustrate the accurate assessment of risks posed by Chinese firms.²¹ The aim is not to arrest a robust China policy, but to encourage a more informed discussion of how we can meet genuine challenges without sacrificing core values.

The remainder of the Article proceeds in five parts. Part I opens with an account of how China has shaped American law before the current moment. It then lays out salient features of U.S.-China conflict today. The next three parts assess how our legal system's responses to China's rise are following historical patterns associated with rivalry and law. Part II addresses rights. Part III addresses structure. Part IV addresses legal rationality. Part V closes with a discussion of conceptual and practical implications.

I

BACKGROUND

Part I sets the scene. It begins by explicating factors that have influenced China's historic impact on American law. These forces, which sound in politics, ideology, and race, continue to shape China's downstream effects on American law today. Part I then addresses salient features of U.S.-China competition. The new global conflict is less ideological, less decoupled, and far less violent than earlier conflicts. But in its politics, its rhetoric, and its competitive dynamics, it evokes earlier era-defining rivalries.

A. *China and American Law*

China has been an important presence in American legal development from the beginning. In the eighteenth-century, China's status as a vaunted trade destination shaped formative events on the path to independence. A major source of colonial dissatisfaction then was the East India Company's monopoly on trade with China, under

²⁰ See CHINA'S INFLUENCE & AMERICAN INTERESTS xiii (Larry Diamond & Orville Schell eds., 2019) (describing China's efforts to influence American citizens of Chinese ancestry).

²¹ See *The United States' Strategic Competition with China Before the S. Comm. on Armed Services*, 117th Cong. (2021) (prepared testimony of Dr. Sheena Chestnut Greitens) [hereinafter Greitens Testimony] (analyzing China's comprehensive national security policy and its impact on relations between China and the United States); Christopher Balding & Donald Clarke, *Who Owns Huawei?* (SSRN Draft, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669 [<https://perma.cc/9UY5-HW74>] (refuting the claim that Huawei, a Chinese company, is employee-owned).

which colonial merchants could serve only as middlemen.²² The 1773 Boston Tea Party, where forty-six tons of Chinese teas were dumped into Boston Harbor, “was incited by British attempts to remove colonial merchants altogether from the tea trade with China.”²³ Chinese trade was also a source of status in the international system. “Americans widely held the belief that intercourse with China was an important statement about the post-colony’s desire for parity with Europe in international law,” writes Jedidiah Kroncke, “and was one of the ways in which foreign relations helped form [a] common national identity.”²⁴

Several Founders shared an interest in Chinese philosophy and law.²⁵ In searching for alternatives to British governance, the founding generation looked extensively to foreign models.²⁶ China, depicted in many writings as an isolationist and agrarian meritocracy, had a natural appeal to some.²⁷ Thomas Jefferson was an “avid collector of books on China.”²⁸ James Madison sought similar texts and hung a picture of Confucius in his home.²⁹ Thomas Paine extolled Confucian moral teachings.³⁰ Benjamin Franklin described China as “the most ancient, and, from long [e]xperience, the wisest of Nations.”³¹ His letters in *The Pennsylvania Gazette*, “The Morals of Confucius,” lauded Chinese governance.³² One letter praised “the extraordinary Precautions which the [Chinese] Judges took before any Cause was brought before

²² JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT* 26 (2016).

²³ *Id.*; see also TEEMU RUSKOLA, *LEGAL ORIENTALISM* 120–21 (2013); BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS* 2–3 (2010).

²⁴ KRONCKE, *supra* note 22, at 26.

²⁵ See GORDON H. CHANG, *FATEFUL TIES* 23–25 (2015) (asserting that American elites in the mid-eighteenth century thought Chinese society could serve as a model for Americans); RUSKOLA, *supra* note 23, at 45 (“[M]any thinkers of the American Enlightenment admired the political wisdom of Confucianism . . .”); JOHN POMFRET, *THE BEAUTIFUL COUNTRY AND THE MIDDLE KINGDOM: AMERICA AND CHINA, 1776-PRESENT* 15 (2016) (“To America’s founders, China was a source of inspiration.”).

²⁶ See Michael H. Hoeflich, *Comparative Law in Antebellum America*, 4 WASH. U. GLO. STUD. REV. 535 (2005) (noting that America’s founding fathers looked to ancient Rome, Germany, France, and the Asian empire for inspiration); cf. NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON* 74–76 (2017) (describing James Madison’s study of ancient and foreign confederations).

²⁷ See RUSKOLA, *supra* note 23, at 44 (writing that the Confucian “vision of a peaceful, stable agrarian empire governed by a virtuous ruler and a bureaucracy composed of men of letters held great appeal for the young nation”). This was especially so for Jeffersonians. Cf. ROBERT W. TUCKER & DAVID C. HENDRICKSON, *EMPIRE OF LIBERTY* 246 (1990) (describing Thomas Jefferson speaking of the “desirability of ‘Chinese isolation’”).

²⁸ KRONCKE, *supra* note 22, at 24.

²⁹ *Id.* at 15, 24.

³⁰ *Id.* at 23.

³¹ Dave Wang, *The US Founders and China*, 16 EDUC. ABOUT ASIA, 2011, at 5–6.

³² RUSKOLA, *supra* note 23, at 44; see also PATRICK MENDIS, *PEACEFUL WAR* 50 (2013) (stating that Franklin “promoted Chinese moral philosophy” in his letters).

their Tribunal.”³³ When veterans of the Revolution proposed creating an order of hereditary knighthood, Franklin objected by invoking Confucian principles of meritocracy.³⁴

In the nineteenth century, a mix of social, economic, and demographic forces led thousands of Qing subjects to emigrate to the United States.³⁵ Drawn initially to the gold rush, Chinese émigrés spread throughout the country as railroad workers, storekeepers, laundrymen, gardeners, factory workers, and merchants.³⁶ By 1870, approximately 63,000 Chinese lived in the United States.³⁷ In time, economic insecurities and cultural xenophobia gave way to racial violence and calls to limit Chinese immigration.³⁸

The ensuing era of Chinese Exclusion was a milestone in American law. State laws discriminated against Chinese immigrants; federal laws banned Chinese from entry and citizenship.³⁹ The 1882 Chinese Exclusion Act and its successors produced several landmark cases in constitutional law. In *Chae Chan Ping v. United States*, the Supreme Court issued a broad declaration of federal plenary power over the exclusion of foreigners as “an incident of sovereignty.”⁴⁰ In *Fong Yue Ting v. United States*, the Court extended *Chae Chan Ping*’s federal-power proclamation from exclusion to deportation.⁴¹ Together, these decisions “gave Congress essentially a free hand with respect to noncitizens.”⁴² The Exclusion Era also shaped important cases in constitutional equal

³³ RUSKOLA, *supra* note 23, at 44 n.61.

³⁴ See Wang, *supra* note 31, at 6 (quoting Franklin’s explanation that if a man is meritocratically promoted to “the Rank of Mandarin,” ceremonial respect is bestowed to his parents for their education and example, but not to his descendants).

³⁵ See JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 208 (2d ed. 1999).

³⁶ *Id.* at 210–11; JÜRGEN OSTERHAMMEL, *THE TRANSFORMATION OF THE WORLD* 862–63 (C. H. Beck ed., Princeton Univ. Press trans. 2014) (2009).

³⁷ ERIKA LEE, *THE MAKING OF ASIAN AMERICA* 59 (2015).

³⁸ *Id.* at 89–95; SPENCE, *supra* note 35, at 212–14; JONATHAN D. SPENCE, *THE CHAN’S GREAT CONTINENT* 122–44 (1998).

³⁹ See *Chinese Immigration and the Chinese Exclusion Acts*, U.S. DEP’T OF STATE, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> [<https://perma.cc/P2WL-AL5L>].

⁴⁰ 130 U.S. 581, 609 (1889). A leading immigration law casebook describes *Chae Chan Ping* as “the granddaddy of all immigration cases.” STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 114 (7th ed. 2019).

⁴¹ 149 U.S. 698 (1893).

⁴² Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION LAW STORIES* 1, 30 (David Martin & Peter Schuck eds., 2005). For detailed discussion of the legal significance of these and related cases, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7–8, 124–49 (2002) (arguing that these cases helped give rise to doctrines of not only immigration plenary powers but also to foreign affairs inherent powers).

protection and due process. *Yick Wo v. Hopkins*,⁴³ a challenge to laundry ordinances that adversely impacted Chinese immigrants, stands for the rule that extreme unevenness in the enforcement of facially neutral laws can show discriminatory purpose.⁴⁴ Emily Prifogle argues that *Muller v. Oregon*,⁴⁵ the classic case involving regulation of women's work hours, "should be understood not only as a decision about protective labor legislation and women's rights, but also about anti-Chinese animus."⁴⁶ Lucy Salyer has shown how litigation brought by Chinese migrants during the Exclusion Era led "in significant and unexpected ways to the growth of administrative power."⁴⁷

If Founding Era admiration of China was rooted in domestic politics and ideology,⁴⁸ so too was Exclusion Era denigration of the Chinese people. Politicians exploited racial tensions through lawmaking. All but one of "eight anti-Chinese measures passed by Congress were passed on the eve of national elections and for avowed political purposes."⁴⁹ Justice Stephen Field, the *Chae Chan Ping* author, had earlier "written the plank of the Democratic national convention urging . . . the suppression of Chinese labor immigration . . . with an eye on the presidency."⁵⁰ Racist views soon bled into legal argument. The United States' brief in *Fong Yue Ting* urged that "the most insidious and dangerous enemies are . . . those alien races who are incapable of assimilation, and come among us to debase our labor and poison [U.S.] health and morals."⁵¹

In the early twentieth century, China not only influenced American law in the form of ongoing exclusion policies,⁵² it also became a literal

⁴³ 118 U.S. 356 (1886).

⁴⁴ KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 640–41 (18th ed. 2013). For debates on whether race mattered to *Yick Wo*'s outcome, see Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts about Yick Wo*, 2008 U. ILL. L. REV. 1359 (answering no); Thomas W. Joo, *Yick Wo Re-revisited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. ILL. L. REV. 1427 (answering yes).

⁴⁵ 208 U.S. 412 (1908).

⁴⁶ Emily A. Prifogle, *Law and Laundry: White Laundresses, Chinese Laundrymen, and the Origins of Muller v. Oregon* in STUDIES IN LAW, POLITICS, AND SOCIETY 24 (Austin Sarat ed., 2020) (arguing that legislation in *Muller* "was part of a larger labor struggle that tangled together women's rights advocacy, union activism, and anti-Chinese discrimination).

⁴⁷ LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW xiii (1995).

⁴⁸ See KRONCKE, *supra* note 22, at 25 (arguing that "early American engagement with the Chinese example . . . rested solely on what could be drawn from Chinese practice to best exemplify the new American ideal").

⁴⁹ MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946) (quoting M.R. COOLIDGE, CHINESE IMMIGRATION 233 (1909)).

⁵⁰ *Id.* at 10 n.29.

⁵¹ Brief for the Respondents at 55, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

⁵² See ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 82–83 (1999) (describing ongoing policies and conditions).

site of American jurisdiction. In 1906, Congress established the United States District Court for China, a federal district court headquartered in Shanghai with appeals to the Ninth Circuit.⁵³ The Court assumed powers previously exercised by U.S. consular officials in China over disputes involving Americans—part of the system of extraterritoriality extracted from China in nineteenth-century treaties.⁵⁴ Teemu Ruskola explains that “one of the court’s main tasks was to provide a model of rule-of-law for the Chinese—a classic *mission civilisatrice*.”⁵⁵ Just as perceptions of Chinese barbarism helped to justify Chinese exclusion, opinions about Chinese lawlessness helped vindicate an imperial project. Most ironic, writes Ruskola, was how “lawless” the U.S. Court for China was.⁵⁶ The Court applied such an eclectic mix of laws, from English common law predating American independence to the territorial code of Alaska even after its repeal, that basic legal principles—clarity, coherence, constancy—were likely violated.⁵⁷

Both Chinese exclusion and the American extraterritoriality in China ended in 1943. The repeal of exclusion “was a decision almost wholly grounded in the exigencies of World War II, as Japanese propaganda made repeated reference to Chinese exclusion . . . to weaken the ties between the United States and its ally.”⁵⁸ The United States relinquished its extraterritorial rights in China for similar reasons: to neutralize Japanese criticism of American imperialism and to shore up its Chinese partners.⁵⁹ Politically, these changes were made tenable by vastly improved perceptions of the Chinese.⁶⁰ During the War, *The San Francisco Chronicle* praised Chinatown residents as “American through and through” for their aid of the war effort.⁶¹ In 1942, gubernatorial candidate Earl Warren claimed that he had “cherished during [his]

⁵³ Milton J. Helmick, *United States Court for China*, FAR E. SURV., vol. 14, Sept. 1945, at 252. For a view that the court little resembled its Article III cousins, see Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923, 936 (2004).

⁵⁴ See Lee *supra* note 53, at 938–39.

⁵⁵ RUSKOLA, *supra* note 23, at 161; see also KRONCKE, *supra* note 22, at 64.

⁵⁶ RUSKOLA, *supra* note 23, at 162.

⁵⁷ *Id.* at 7; see LON FULLER, THE MORALITY OF LAW 39, 46–91 (1964) (articulating core tenets of legality generally).

⁵⁸ *Repeal of the Chinese Exclusion Act, 1943*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal> [<https://perma.cc/MTE8-YTN8>].

⁵⁹ See HERBERT FEIS, THE CHINA TANGLE 62 (1953); Treaty Between the United States of America and the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.-China, Jan. 11, 1943, 57 Stat. 767, T.S. 984.

⁶⁰ See CHANG, *supra* note 25, at 169–71 (describing the evolution of Americans’ perceptions of the Chinese).

⁶¹ K. SCOTT WONG, AMERICANS FIRST: CHINESE AMERICANS AND THE SECOND WORLD WAR 89 (2005).

entire life a warm and cordial feeling for the Chinese people. . . . [who] have long been in the forefront of the battle for freedom.”⁶² From a land of wisdom to barbarism to lawlessness, China had become part of the righteous fight for freedom.

All of this changed again, of course, when the Chinese Communist Party (CCP) assumed power in 1949, cementing China’s position opposite America in the nascent Cold War. Even as a junior antagonist, viewed by the American public “as an evil, oppressive Soviet puppet,”⁶³ China was pivotal in sustaining military disputes that gave rise to milestone developments in American law. Its intervention in the Korean War was a major factor underlying President Truman’s declaration of an “unlimited national emergency” and subsequent extra-legislative seizure of the nation’s steel mills.⁶⁴ That act led to the Supreme Court’s seminal opinion in *Youngstown* and to Justice Robert Jackson’s influential concurrence laying out a functionalist framework for the separation of powers.⁶⁵ Similarly, China’s military support for North Vietnam contributed substantially to the United States’ mirroring in that conflict.⁶⁶ For that reason, China cannot be written out of the major legal developments of that period, from the famed Pentagon papers case to congressional efforts to curb presidential war powers.⁶⁷ On the domestic rights front, Cold War relations with China led to both new challenges and new opportunities. On one end, fears of Communist infiltration led to heightened monitoring and persecution of Asian-Americans.⁶⁸ On the other end, Cold War politics highlighted racist quotas in the country’s immigration laws, leading ultimately to the enactment of more egalitarian immigration reforms in 1965.⁶⁹

⁶² *Id.* at 89.

⁶³ Matthew S. Hirshberg, *Consistency and Change in American Perceptions of China*, 15 POL. BEHAVIOR, 1993, at 247, 251.

⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 583 (1952).

⁶⁵ *Id.* at 634; see Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 ST. LOUIS U.L.J. 29, 31 (2008) (describing Jackson’s “separation-of-powers functionalism”).

⁶⁶ See John W. Garver, *Sino-Vietnamese Conflict and the Sino-American Rapprochement*, 98 POL. SCI. Q. 445, 448 (1981) (describing how Chinese troop deployments “placed serious constraints on the U.S. attack against the North”); see also Chen Jian, *China’s Involvement in the Vietnam War, 1964–69*, 142 CHINA Q. 356, 378 (1995).

⁶⁷ See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding that the government could not enjoin publication of a classified study on the “History of U.S. Decision-Making Process on Viet Nam Policy”); War Powers Resolution, 50 U.S.C. §§ 1541–48 (1973).

⁶⁸ See CINDY I-FEN CHENG, *CITIZENS OF ASIAN AMERICA*, 3–4, 117–47, 153–72 (2013) (discussing the experience of Asian Americans as shaped by global conflict between the United States and Asian countries).

⁶⁹ See *id.* at 19–20, 173–89 (outlining the connections between U.S. immigration policy and the nation’s turn toward internationalism); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*,

The preceding history is far from exhaustive, but it suffices to surface a few mutually constitutive themes. First, politics has been a prime determinant of China's downstream effects on American law. Domestic electoral ambitions shaped the worst of Exclusion era policies, just as international political needs supported the enactment of more egalitarian policies at home. Second, ideas about China have been filtered through a range of normative-ideological frameworks over time. They have ranged from notions of civilization, freedom, and democracy on the one hand to ideas about barbarism, despotism, and oppression on the other. Third, China's effect on American law has often been tied to racial politics and ideologies. While Chinese-Americans were sometimes cast as loyal Americans, they have often been linked to foreignness and threat.

B. *The New Global Conflict*

The foregoing shows that even in periods when China was weaker and more peripheral to our national attention, its effects on our legal system were considerable. The situation today is different. No longer a slumbering empire or a junior partner to the Soviet Union, China has emerged as a formidable global power, second only to the United States in economic size and military spending.⁷⁰ Its current leader, Party General Secretary Xi Jinping, has articulated a vision of “great rejuvenation” (*weida fuxing*) to return China to its “rightful place” near or at the center of world civilization.⁷¹ Domestically, the Party-state has turned more repressive, sharpening the contrast with archetypes of Western liberal democracy.⁷² Internationally, it has become more assertive, seeking to shape regional order through trade and infrastructure projects while aspiring to “lead the reform of the global

75 N.C. L. REV. 273, 298–302 (1996) (arguing that the Immigration and Nationality Act of 1965 was passed with with “foreign policy” and “racial egalitarian motivations”); DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 169 (2002) (similar).

⁷⁰ David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES (Aug. 15, 2010), <https://www.nytimes.com/2010/08/16/business/global/16yuan.html> [<https://perma.cc/T4BD-G5Q4>]; *China Expands Defense Budget 7.2%, Marking Slight Increase*, ASSOCIATED PRESS (Mar. 4, 2023), <https://apnews.com/article/china-defense-budget-aircraft-carriers-cdac45c8d36a47cfd6a68be99b7c9ee7> [<https://perma.cc/V8VD-FGTN>].

⁷¹ See Maria A. Carrai, *Chinese Political Nostalgia and Xi Jinping's Dream of Great Rejuvenation*, 18 INT'L J. ASIAN STUD. 7, 7–8 (2021) (analyzing Xi's treatment of historical memory in the rhetoric of rejuvenation).

⁷² See Susan L. Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, 29 J. DEMOCRACY 22, 23 (2018) (detailing Xi's return to strongman rule); ELIZABETH ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* 21–54 (2018) (similar); see Carl Minzner, *China After the Reform Era*, 26 J. DEMOCRACY 129, 130 (2015) (similar); Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, 26 J. CONT. CHINA, 68, 77–78 (2017) (similar).

governance system.”⁷³ Perceiving American decline, Xi speaks often of strategic opportunity, of “great changes unseen in a century.”⁷⁴

American leaders have responded to these developments with alarm. The Obama Administration articulated a “pivot to Asia” and proposed a regional trade deal to ensure that “the United States—and not countries like China—[would be] the one writing this century’s rules for the world economy.”⁷⁵ The Trump Administration scuttled that deal and launched a trade and tech “war” with China, seeking to induce changes in China’s economic practices and to shelter American industry.⁷⁶ The Biden Administration describes China as “the only country with the economic, diplomatic, military, and technological power to seriously challenge” the American-led order.⁷⁷ It has maintained most of the Trump Era tariffs,⁷⁸ legislated to enhance American competitiveness,⁷⁹ and acted to limit development of foundational technologies in China.⁸⁰

⁷³ Timothy R. Heath, *China Prepares for an International Order After U.S. Leadership*, LAWFARE (Aug. 1, 2018), <https://www.lawfareblog.com/china-prepares-international-order-after-us-leadership> [<https://perma.cc/WBC3-CEWU>]; see TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 245–85 (2021); RUSH DOSHI, THE LONG GAME: CHINA’S GRAND STRATEGY TO DISPLACE AMERICAN ORDER 261–98 (2021); JONATHAN HILLMAN, THE EMPEROR’S NEW ROAD: CHINA AND THE PROJECT OF THE CENTURY 3–15 (2020).

⁷⁴ Rush Doshi, *The Long Game: China’s Grand Strategy to Displace American Order*, BROOKINGS (Aug. 2, 2021), <https://www.brookings.edu/essay/the-long-game-chinas-grand-strategy-to-displace-american-order> [<https://perma.cc/LA3L-E3L3>].

⁷⁵ Janine Davidson, *The U.S. “Pivot to Asia”*, 21 AM. J. CHINESE STUD., 77, 77 (2014); James McBride, Andrew Chatzky & Anshu Siripurapu, *What’s Next for the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELS. (Sept. 20, 2021), <https://www.cfr.org/background/what-trans-pacific-partnership-tpp> [<https://perma.cc/7VP8-6D32>].

⁷⁶ See Ryan Haas & Abraham Denmark, *More Pain than Gain: How the US-China Trade War Hurt America*, BROOKINGS (Aug. 7, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america> [<https://perma.cc/PMQ3-SEDJ>].

⁷⁷ Antony J. Blinken, U.S. Sec’y of State, Remarks: A Foreign Policy for the American People (Mar. 3, 2021), <https://www.state.gov/a-foreign-policy-for-the-american-people> [<https://perma.cc/5W5Q-TMHZ>]. The Chinese Embassy in the United States disagreed point by point with Blinken’s address. See Press Release, Embassy of the People’s Republic of China in the U.S., China’s Comprehensive, Systematic and Elaborate Response to Sec’y Antony Blinken’s China Policy Speech – Reality Check: Falsehoods in U.S. Perceptions of China (June 19, 2022), http://us.china-embassy.gov.cn/eng/zmgx/zxxx/202206/t20220619_10706097.htm [<https://perma.cc/7GDG-K9K4>] (arguing inter alia that the “so-called international order” was a fig leaf for perpetuating American “hegemony”).

⁷⁸ Editorial Board, Opinion, *Call Them the Biden-Trump Tariffs Now*, WALL ST. J. (Oct. 26, 2022), <https://www.wsj.com/articles/call-them-the-biden-trump-tariffs-now-section-232-aluminum-steel-tariffs-beverage-manufacturers-11666721317> [<https://perma.cc/G9B9-6N55>].

⁷⁹ See Zolan Kanno-Youngs, *Biden Signs Industrial Policy Bill Aimed at Bolstering Competition with China*, N.Y. TIMES (Aug. 9, 2022), <https://www.nytimes.com/2022/08/09/us/politics/biden-semiconductor-chips-china.html> [<https://perma.cc/G9B9-6N55>].

⁸⁰ See Gavin Bade, *“A Sea Change”: Biden Reverses Decades of Chinese Trade Policy*, POLITICO (Dec. 26, 2022), <https://www.politico.com/news/2022/12/26/china-trade-tech-00072232> [<https://perma.cc/E8ZA-KGKP>].

Beneath these policy shifts has been mounting frustration with Chinese policies on an array of axes. American politicians have accused Chinese economic practices of hollowing out the American industrial base, decimating communities, and stealing American intellectual property and trade secrets;⁸¹ they have been troubled by the party's military build-up, its defiance of international norms in nearby waters, and its increasingly bellicose rhetoric towards both its neighbors and the United States;⁸² and they have been disturbed by worsening repression and persecution of dissidents and religious minorities.⁸³ Underlying these specific grievances is a more general sense of disillusionment, a realization that years of engagement with China—one predicated on mutual economic benefit and eventual Chinese liberalization—had seemingly failed.⁸⁴ And even more basic to the new dynamic, some have argued, is a sense that American hegemony may have peaked, with China posing the first serious challenge to the United States' global dominance since the fall of the Soviet Union.⁸⁵

⁸¹ See, e.g., Press Release, Sherrod Brown, Senator, Brown Statement on Industrial Policy with China (Mar. 24, 2009), <https://www.brown.senate.gov/newsroom/press/release/brown-statement-on-industrial-policy-with-china> [<https://perma.cc/TKT7-6LNG>]; JON BATEMAN, COUNTERING UNFAIR CHINESE ECONOMIC PRACTICES AND INTELLECTUAL PROPERTY THEFT 6, 97 (Carnegie Endowment for International Peace 2022). For academic work on similar issues, see David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2122 (2013).

⁸² See, e.g., John Grady, *China Upping Bullying Tactics Against Neighbors, Says Top State Department Diplomat*, USNI (July 3, 2023), <https://news.usni.org/2023/07/03/china-upping-bullying-tactics-against-neighbors-says-top-state-department-diplomat> [<https://perma.cc/WXD9-S654>] (describing Chinese intrusion into the Philippines' undisputed exclusive economy zone); Blinken, *supra* note 77 (noting China's willingness to sow doubts about American democracy).

⁸³ See, e.g., Matt Pottinger, Deputy Nat'l Sec. Advisor, Remarks to London-based Policy Exchange, (Oct. 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-deputy-national-security-advisor-matt-pottinger-london-based-policy-exchange> [<https://perma.cc/KAU6-ED5C>] (describing Beijing's intrusions on rule-of-law norms in Hong Kong); Blinken, *supra* note 77 (citing a need for the U.S. to stand up for human rights abuses in Xinjiang and anti-democratic suppression in Hong Kong).

⁸⁴ See Matthew Choi, *Pompeo: U.S. Engagement with China has Failed*, POLITICO (July 23, 2020), <https://www.politico.com/news/2020/07/23/pompeo-china-speech-nixon-380251> [<https://perma.cc/LPA5-2G86>]. *But see* Neil Thomas, *Matters of Record: Relitigating Engagement with China*, MACRO POLO (Sept. 3, 2019), <https://macropolo.org/analysis/china-us-engagement-policy> [<https://perma.cc/QWA6-SLMG>] (criticizing the "failure" viewpoint as one that insufficiently contemplates the broader history of U.S.-China relations). For a skeptical view of this strategy with respect to the development of an autonomous legal profession, see William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionals in the People's Republic of China*, in *EAST ASIAN LAW: UNIVERSAL NORMS AND LOCAL CULTURES* (Lucie Cheng, Arthur Rosett, Margaret Woo eds., 2002).

⁸⁵ See Graham Allison, *The Thucydides Trap: Are the U.S. and China Headed for War?*, THE ATLANTIC (Sept. 24, 2015), <https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756> [<https://perma.cc/34TF-A3SF>].

The new global conflict is distinct from previous contests in critical ways. First, it has entailed no military violence. Even the Cold War ran hot in proxy conflicts throughout Korea, Vietnam, Congo, Nicaragua, and Afghanistan.⁸⁶ Not so here—or at least, not yet.⁸⁷ Second, the new global conflict involves a still high level of economic and social integration between its principal competitors.⁸⁸ In 2022, U.S.–China trade volume hit a record 690 billion dollars.⁸⁹ Trade between the United States and the Soviet Union was “small,” even “inconsequential” throughout the Cold War.⁹⁰ Third, the new global conflict is built on looser ideological fault lines than the Cold War. China’s authoritarianism may have deepened, but it has not fully eschewed market principles at home, despite its distinctive approach to state capitalism,⁹¹ nor has it pushed to export its Leninist state organization abroad.⁹² The United States and China are more similar and interdependent today than the United States and the Soviet Union last century.

Yet Cold War analogies are not wholly inapposite. Consider first the rhetoric on China in Washington and many state capitals, now replete with familiar references pitting freedom against tyranny. In opening the first hearing of the House Select Committee on the Communist Party

⁸⁶ See Mark O. Yeisley, *Bipolarity, Proxy Wars, and the Rise of China*, STRATEGIC STUDS. Q. 75, 80–81 (2011).

⁸⁷ There is little evidence that the ongoing Russo-Ukrainian War was instigated by China as a proxy contest. Since Russia’s invasion, Beijing has offered cautious support for its ally without overt and substantial assistance. See Keith Bradsher, Anton Troianovski & Jane Perlez, *Challenges for Russia and China Test a “No Limits” Friendship*, N.Y. TIMES (Sep. 13, 2022), <https://www.nytimes.com/2022/09/13/world/asia/china-russia-xi-putin.html> [https://perma.cc/DQK2-C9CD].

⁸⁸ See NOAH FELDMAN, *COOL WAR: THE UNITED STATES, CHINA, AND THE FUTURE OF GLOBAL COMPETITION* (2015); Joseph S. Nye, Jr., *Opinion, With China, a “Cold War” Analogy is Lazy and Dangerous*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/11/02/opinion/biden-china-cold-war.html> [https://perma.cc/XDR8-3V4R].

⁸⁹ Doug Palmer, *What Cold War? U.S. Trade with China Hits New High*, POLITICO (Feb. 7, 2023), <https://www.politico.com/news/2023/02/07/trade-china-relations-economies-00081301> [https://perma.cc/2KBQ-4GSR].

⁹⁰ William R. McIntyre, *American-Soviet Trade*, CO RESEARCHER, 1959; Abraham S. Becker, *U.S.-Soviet Trade in the 1980s*, RAND PUBLICATION SERIES, 1987, <https://www.rand.org/content/dam/rand/pubs/notes/2009/N2682.pdf> [https://perma.cc/PVH5-JYY5].

⁹¹ See Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 748 (2013) (describing China’s state-owned enterprises and the influence of the U.S. “rights-based, shareholder-oriented approach” on China’s corporate governance).

⁹² See Nye, *supra* note 88 (“The United States and its allies are not threatened by the export of Communism in the same way they were in the days of Stalin or Mao”). Some argue that this is changing, however. See Bethany Allen-Ebrahimian, *In Tanzania, Beijing is Running a Training School for Authoritarianism*, AXIOS (Aug. 21, 2023), <https://www.axios.com/2023/08/21/chinese-communist-party-training-school-africa> [https://perma.cc/TM2P-XFBB] (arguing that China’s training school for African leaders in Tanzania serves as evidence that China is “exporting” its governance model).

of China, Chairman and Congressman Mike Gallagher (R-WI) made the stakes clear. “This is not a polite tennis match,” he said. “This is an existential struggle over what life will look like in the 21st century—and the most fundamental freedoms are at stake.”⁹³ Senator Tom Cotton’s (R-AR) 2021 China report references the “Cold War” a dozen times.⁹⁴ Like “Nazi Germany, Imperial Japan, and the Soviet Union,” he writes, “America confronts a powerful totalitarian adversary that seeks to dominate Eurasia and remake the world order.”⁹⁵ In a recent order banning the social media app from government-issued devices, Texas Governor Greg Abbott warned that the “Chinese government . . . wields TikTok to attack our way of life.”⁹⁶

Chinese political discourse has likewise begun to evoke Cold War themes. Encirclement frames, once dominant in Soviet and Chinese discourse, have returned.⁹⁷ In March 2023, Xi stated that, “Western countries—led by the U.S.—have implemented all-round containment, encirclement and suppression against us, bringing unprecedentedly severe challenges to our country’s development.”⁹⁸ Xi’s views echo a longstanding “encirclement complex” in Soviet thinking, *Einkreisung*, *kapitalisticheskoe okruzhenie*, “anxiety about one’s own nation being ringed in systematically, in the manner of a conspiracy planned and executed by foreign enemies.”⁹⁹ Charges of Western hypocrisy, also prevalent during the Cold War, have recently intensified. Chinese diplomats have responded to criticisms of Chinese rights violations with pointed critiques of their own; one diplomat called American police “inhumane”;¹⁰⁰ another decried the “slaughtering”

⁹³ Mike Gallagher, Chairman, H. Select Comm. on the Chinese Communist Party, Opening Remarks at First Hearing (Feb. 28, 2023), <https://selectcommitteeontheccp.house.gov/media/press-releases/chairman-gallaghers-opening-remarks> [<https://perma.cc/M56Q-N5GH>] [hereinafter Gallagher Remarks].

⁹⁴ See Report, Tom Cotton, Senator for Arkansas, *Beat China: Targeted Decoupling and the Economic Long War* (Feb. 2021), https://www.cotton.senate.gov/imo/media/doc/210216_1700_China%20Report_FINAL.pdf [<https://perma.cc/4AMZ-GWPB>].

⁹⁵ *Id.* at 6.

⁹⁶ Letter from Greg Abbott, Governor, State of Texas, to State Agency Heads (Dec. 7, 2022), https://gov.texas.gov/uploads/files/press/State_Agencies_Letter_1.pdf [<https://perma.cc/SCP4-SVM6>].

⁹⁷ See Alfred Vagts, *Capitalist Encirclement; A Russian Obsession—Genuine or Feigned?*, 18 J. POL. 499, 515 (1956) (quoting Chinese politburo statement criticizing “the encirclement of imperialism”).

⁹⁸ Chun Han Wong, Keith Zhai & James T. Aredy, *China’s Xi Jinping Takes Rare Direct Aim at U.S. in Speech*, WALL ST. J. (Mar. 6, 2023), <https://www.wsj.com/articles/chinas-xi-jinping-takes-rare-direct-aim-at-u-s-in-speech-5d8fde1a> [<https://perma.cc/6YHD-LHHR>].

⁹⁹ Vagts, *supra* note 97, at 499–500.

¹⁰⁰ PETER MARTIN, CHINA’S CIVILIAN ARMY: THE MAKING OF WOLF WARRIOR DIPLOMACY 3 (2021).

of African-Americans.¹⁰¹ The Soviet press routinely disseminated stories of American racial abuses to undercut U.S. government narratives.¹⁰²

The new global conflict also evokes the Cold War's competitive dynamics. First, there is a new science and technology race. Space was the most prominent field of competition last century, but not the only one. American analysts were concerned with Soviet advances in metallurgy, physical chemistry, geophysics, and electronics, as well as the number of Soviet engineers generally.¹⁰³ In the new conflict, focus has shifted towards frontier industries. Xi has said that "a new round of technological revolution and industrial change—artificial intelligence, big data, quantum information, and biotechnology" would bring about "earth-shaking changes."¹⁰⁴ The White House's explainer of the CHIPS and Science Act cites the mid-1960s "race to the moon" to justify the Act's investments in the American semiconductor industry—part of an effort, it says, to "[c]ounter China."¹⁰⁵

Second, both countries are making a sustained push towards strategic decoupling or derisking. In China, the drive for self-sufficiency is manifested in several initiatives: efforts to reduce dependence on the U.S. dollar, the Made in China 2025 Initiative to foster domestic enterprise, and its dual circulation strategy to boost domestic consumption and demand for Chinese products.¹⁰⁶ The United States

¹⁰¹ Humeyra Pamuk, David Brunnstrom & Michael Martina, *U.S. Tells China It Does Not Seek Conflict; But Will Stand Up for Principles, Friends*, REUTERS (Mar. 18, 2021, 6:05 PM), <https://www.reuters.com/world/us/us-tells-china-it-does-not-seek-conflict-will-stand-up-principles-friends-2021-03-18> [<https://perma.cc/3JKY-JHSR>].

¹⁰² See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* 37 (2000) (describing how "Soviet propaganda exploited U.S. racial problems, arguing that American professions of liberty and equality under democracy were a sham").

¹⁰³ Robert A. Kilmarx, *Soviet Competition in Science and Technology*, 43 *CURRENT HIST.* 201, 202, 204 (1962) (stating that "Soviets already have a total of over a million trained engineers").

¹⁰⁴ Rush Doshi, *The United States, China, and the Contest for the Fourth Industrial Revolution*, BROOKINGS (July 31, 2020), <https://www.brookings.edu/testimonies/the-united-states-china-and-the-contest-for-the-fourth-industrial-revolution> [<https://perma.cc/7C3Z-24T6>].

¹⁰⁵ *Fact Sheet: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, WHITE HOUSE (Aug. 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china> [<https://perma.cc/RMB9-NMVJ>].

¹⁰⁶ See John S. Van Oudenaren, *Xi Seeks to Accelerate China's Drive for Self-Sufficiency*, JAMESTOWN FOUND. (June 17, 2022), <https://jamestown.org/program/xi-seeks-to-accelerate-chinas-drive-for-self-sufficiency> [<https://perma.cc/4K3Z-Z253>] (describing Made in China 2025 Initiative as an effort to obviate reliance on foreign technology); Michael Pettis, *Will China's Common Prosperity Upgrade Dual Circulation?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 15, 2021), <https://carnegieendowment.org/chinafinancialmarkets/85571> [<https://perma.cc/8Z2S-5YUL>] (explaining China's dual circulation model).

has sought to cut China out of strategic global supply chains,¹⁰⁷ block inbound investments from Chinese firms,¹⁰⁸ and to limit certain forms of outbound investments to China.¹⁰⁹ While the two economies remain highly integrated, the move towards derisking threatens to reduce economic interdependence in high-value domains.

Third, competitive dynamics have intensified military planning. China's Party-state has pursued, among other policies, an "unprecedented . . . expansion and modernization" of its nuclear arsenal.¹¹⁰ Congress, think tanks, and defense researchers are increasingly focused on Chinese wargames, with attention to the South China Sea, where the Party-state has staked out aggressive territorial claims, and Taiwan, the return of which is of paramount importance in national narratives.¹¹¹ Congressman Seth Moulton (D-MA), a member of the Select Committee on China, recently suggested that the United States could deter a Taiwan invasion by threatening to blow up Taiwan Semiconductor Manufacturing (TSMC), the world's most important

¹⁰⁷ Orange Wang, *US Adds 36 Chinese Companies to Export Blacklist, Including Country's Top Flash Memory Chip Maker*, S. CHINA MORNING POST (Dec. 16, 2022), <https://www.scmp.com/news/china/article/3203494/us-adds-36-chinese-companies-export-blacklist-including-countrys-top-flash-memory-chip-maker> [<https://perma.cc/M85J-RZ33>].

¹⁰⁸ Eichensehr & Hwang, *supra* note 11, at 550–51.

¹⁰⁹ Gavin Bade, *White House Nears Unprecedented Action on U.S. Investment in China*, POLITICO (Apr. 18, 2023), <https://www.politico.com/news/2023/04/18/biden-china-trade-00092421> [<https://perma.cc/SDT9-K6WB>] (discussing the broad outlines of an executive order that would limit economic engagement with China); Emily Benson & Gregory C. Allen, *A New National Security Instrument: The Executive Order on Outbound Investment*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 10, 2023), <https://www.csis.org/analysis/new-national-security-instrument-executive-order-outbound-investment> [<https://perma.cc/2YMC-TT55>] (detailing limits on outbound investments, including targeted prohibitions and mandatory notifications for investments in quantum technology, artificial intelligence, and semiconductors).

¹¹⁰ David C. Logan & Phillip C. Saunders, *Discerning the Drivers of China's Nuclear Force Development: Models, Indicators, and Data*, INST. FOR NAT'L STRATEGIC STUD. 5 (July 26, 2023), <https://ndupress.ndu.edu/Media/News/Article/3471053/discerning-the-drivers-of-chinas-nuclear-force-development-models-indicators-an> [<https://perma.cc/EUP5-L98G>].

¹¹¹ See, e.g., Mark F. Cancian, Matthew Cancian & Eric Heginbotham, *The First Battle of the Next War: Wargaming a Chinese Invasion of Taiwan*, CTR. FOR STRATEGIC & INT'L STUD. 10 n.18, 22 (Jan. 9, 2023), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/230109_Cancian_FirstBattle_NextWar.pdf [<https://perma.cc/7HDB-F62K>] (noting role of South China Sea in military elements of U.S.-China Conflict, within broader wargame project); Sophia Cai, *House China Committee to War-game Taiwan Invasion Scenario*, AXIOS (Apr. 18, 2023), <https://www.axios.com/2023/04/19/house-china-committee-taiwan-war-game> [<https://perma.cc/QGF8-PTYU>] (describing the participation of members of the House panel on China in a wargame simulation). There are also concerns about China's possible military support of Russia in its war with Ukraine. See Oona A. Hathaway & Ryan Goodman, *Why China Giving Military Assistance to Russia Would Violate International Law*, JUST SECURITY (Mar. 17, 2022), <https://www.justsecurity.org/80709/why-china-giving-military-assistance-to-russia-would-violate-international-law> [<https://perma.cc/V7PE-7QHE>].

chipmaker.¹¹² Taiwan's defense minister retorted that his armed forces would not "tolerate" America wanting to "bomb this or that."¹¹³ Moulton's comment tapped into geopolitical insecurities in Taiwan about its fate amid great power competition.

A final parallel is that the politics on China are becoming increasingly bipartisan. This has led to productive legislative activity in important areas, but it has also produced bandwagoning and groupthink. Former Congresswoman Stephanie Murphy (D-FL) describes it, albeit hyperbolically, as a "second era of McCarthyism."¹¹⁴ "Basically, no politician, Republican or Democrat, can be seen as soft on China, and so that pushes us in the direction of not [discussing] smart policy, but politics."¹¹⁵ Bipartisan consensus characterized American politics during the Cold War, up until Vietnam.¹¹⁶ As later detailed, such consensus risks eroding important mechanisms of partisan and interbranch accountability.¹¹⁷

II

RIGHTS AND LIBERTIES

Part II is the first of three sections on how U.S.–China conflict is beginning to reproduce historic patterns associated with conflict and law. It begins by delineating some of the general conditions under which rights and liberties evolve in times of conflict. With some exceptions, today's conflict appears to involve circumstances associated with rights violation or contraction. Where there has been an actual or threatened diminishment in rights, we see a familiar story of politics-driven threat inflation, with disparate effects on groups with imputed ties to a geopolitical rival. Where there has been limited rights enlargement, we see groups framing desired reforms as geopolitically beneficial.

¹¹² Jason Willick, Opinion, *Blow up the Microchips? What a Taiwan Spat Says About U.S. Strategy*, WASH. POST (May 12, 2023), <https://www.washingtonpost.com/opinions/2023/05/12/microchips-us-taiwan-strategy> [<https://perma.cc/DH9D-6YCB>].

¹¹³ *Id.* (internal quotations omitted).

¹¹⁴ Bade, *supra* note 80 (internal quotations omitted).

¹¹⁵ *Id.* (alteration in original).

¹¹⁶ See Eugene R. Wittkopf & James M. McCormick, *The Cold War Consensus: Did It Exist?*, 22 POLITY 627, 628, 651–53 (1990) (finding empirical support for the existence of a "Cold War consensus"); Peter Trubowitz & Nicole Mellow, *Foreign Policy, Bipartisanship and the Paradox of Post-September 11 America*, 48 INT'L POL. 164, 166 (2011) (describing commonplace bipartisanship in foreign policy during the Cold War).

¹¹⁷ See *infra* Section III.B.

A. Historical Patterns

Foreign conflict is associated with both rights contraction and expansion. Though diametric, both effects are rooted in a particular kind of mobilizational politics. As national attention focuses on the struggle against foreign enemies, state and civil society actors have strong incentives to respond to and exploit foreign threats. Sometimes, the effect can be rights limiting for certain groups with imputed links to the enemy. Other times, the effect can be rights-enhancing where reforms are tied to wartime needs.

Conflict-driven rights contraction is perhaps the more intuitive of the two effects—well captured in Cicero’s epigram: “[s]ilent enim leges inter arma.”¹¹⁸ States have amassed power during emergencies for millennia; both autocrats and democrats continue to do so today.¹¹⁹ No exception to this trend, American history is replete with wartime rights derogations.¹²⁰ “During every serious war in our nation’s history,” Jack Goldsmith and Cass Sunstein write, “civil liberties have been curtailed.”¹²¹ Mark Graber lists several examples:

The first major federal restrictions on civil liberties, the Alien and Sedition Acts of 1798, were enacted while the federal government was dealing with . . . the undeclared naval war with France. President Abraham Lincoln during the Civil War unilaterally imposed martial law in the North and censored the Copperhead press. Left-wing dissidents and aliens who opposed military intervention were persecuted during the First World War. During the Second World War, martial law was imposed in Hawaii and Japanese-Americans were forcibly removed to internment camps. The cold war inspired McCarthyism. Massive detention without trial or aid of counsel [took] place during the . . . war against terrorism.¹²²

¹¹⁸ LYNN S. FOTHERINGHAM, PERSUASIVE LANGUAGE IN CICERO’S PRO MILONE 87 (2013) (“For in war, the laws are silent.”).

¹¹⁹ See OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS 17–85 (2006); YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS 210–11 (2020); Kim Lane Scheppele & David Pozen, *Executive Overreach and Underreach in the Pandemic*, in DEMOCRACY IN TIME OF PANDEMIC 38 (Miguel Poiaras Maduro & Paul W. Kahn eds., 2020).

¹²⁰ *But cf.* Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States’ Constitutional Approach to Rights During Wartime*, 2 INT’L J. CONST. L. 296, 297 (2004).

¹²¹ Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 284–85 (2002).

¹²² Mark A. Graber, *Counter-stories: Maintaining and Expanding Civil Liberties in Wartime*, in THE CONSTITUTION IN WARTIME 95, 95 (Mark Tushnet ed., 2005). For more on several of these examples, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 50–54 (1951) (describing the Alien Enemies Act and the unbridled power of the president over unauthorized immigrants); NOAH FELDMAN, THE BROKEN CONSTITUTION 187–223 (2021) (describing President Lincoln’s suspension of habeas corpus, and suppression of

American politics in the early Cold War years was dominated by fear of Communist infiltration. McCarthyism and the rise of the House Un-American Activities Committee were only its most prominent expressions.¹²³ Federal laws first mandated the registration of Communist Party members before outlawing the Party entirely.¹²⁴ Other acts with speech and associational consequences included “loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; . . . undercover informers to infiltrate dissident organizations,” “and direct prosecution of the leaders and members of the Communist Party.”¹²⁵

The state’s tendency to limit rights during wartime is rooted in the politics of threat. Executives, realizing they are institutionally best equipped to confront exigency and also most directly accountable for failures to win, tend to seek greater powers in times of conflict.¹²⁶ Some may subjectively believe rights restrictions to be necessary; others may claim greater authorities on pretext.¹²⁷ Either way, there are strong incentives for officials to “exaggerate the dangers . . . to persuade legislators and the public to grant them” more power.¹²⁸ Even where

free speech and free expression, during the Civil War); William M. Wiecek, *Sabotage, Treason, and Military Tribunals in World War II*, in *TOTAL WAR AND THE LAW*, *supra* note 2, at 45–69 (describing the Supreme Court’s confrontation with military justice in the treason trials of Nazi saboteurs in World War II); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 2 (2003) (describing the war on terrorism as part of an evolution of political repression).

¹²³ See RICHARD M. FRIED, *NIGHTMARE IN RED* (1990) 3–4 (providing a broader contextual analysis of McCarthyism beyond the person); ELLEN SCHRECKER, *MANY ARE THE CRIMES X* (1998) (describing McCarthyism as “the most widespread and longest lasting wave of political repression in American history”). Anti-communist hysteria long predated the Cold War. See BRAD SNYDER, *DEMOCRATIC JUSTICE* 313 (2022) (describing anti-communist sentiment at confirmation hearings of Justice Frankfurter).

¹²⁴ Geoffrey R. Stone, *Civil Liberties v. National Security in the Law’s Open Areas*, 86 *B.U. L. REV.* 1315, 1325–26 (2006); Communist Control Act of 1954, ch. 886, 68 Stat. 775 (codified as amended at 50 U.S.C. §§ 841–44 (2000)).

¹²⁵ Stone, *supra* note 124, at 1326; see also MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE* 35–115 (1977) (analyzing Smith Act prosecutions).

¹²⁶ See MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY* 107–10 (2019) (describing how post-Cold War global engagement facilitated the empowerment of the executive branch); Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 *U. CHI. L. REV.* 199, 203 (2016) (noting that proponents of the consolidation of national security responsibilities emphasize that consolidated power is more effective and accountable, and reduces points of drag).

¹²⁷ See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 *MINN. L. REV.* 1789, 1850 (2010) (describing dangers of the politics of emergency, including presidents misdescribing reality to achieve efficacy or obtain new powers from Congress).

¹²⁸ Stone, *supra* note 124, at 1328; see also Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 116 (1951) (“It is easy . . . to reduce our liberties

leaders may not want to restrict rights, they may nevertheless do so under pressure from others.¹²⁹ In a polity mobilizing to defeat a foreign foe, political space for reserve begins to shrink.

Rights erosion in this sense tends to more greatly impact groups with imputed ties to the enemy. Most emblematic: the forced relocation of Japanese and Japanese-Americans during the Second World War. At bottom, WWII internment was predicated on broad, racialized presumptions of disloyalty. The government argued then that “there was no way, short of evacuation, for the military commanders to determine which Japanese residents and citizens were loyal.”¹³⁰ Citing *Korematsu*, Bruce Ackerman warned in 2004 that the “war on terrorism is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions.”¹³¹ Shirin Sinnar recently urged an end to two decades of post-9/11 security policies deployed against these communities.¹³² Federal responses have included the mass detention of Muslim immigrants and the mass surveillance and over-policing of Muslim communities.¹³³

to a shadow, often in answer to exaggerated claims of security.”). Other branches that might otherwise check executive prerogative in crisis times are hampered by informational asymmetries as well as coordination and collective action problems. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 10 (2010).

¹²⁹ See Stone, *supra* note 124, at 1325, 1328. President Truman boasted of imposing stringent loyalty programs in the federal bureaucracy only after he was attacked for being insufficiently anti-Communist. *Id.*

¹³⁰ Issacharoff & Pildes, *supra* note 120, at 310–11.

¹³¹ Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1042–43, 1075 (2004). *But cf.* Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 *J. LEGAL EDUC.* 433, 436 (2011) (arguing that the War on Terror was not so much a “brief departure caused by a military crisis” as much as it was “part of a recurring process of intense stigmatization tied to periods of social upheaval, of which war and its accompanying repressions are simply representative . . . illustrations”).

¹³² *Hearing on Discrimination and the Civil Rights of the Muslim, Arab, and South Asian American Communities Before the Subcomm. on the Const., C.R. & C.L. of the H. Comm. on the Judiciary*, 117th Cong. 1–2 (2022) (written statement of Shirin Sinnar, Professor of Law and John A. Wilson Faculty Scholar, Stanford Law School).

¹³³ See, e.g., Cole, *supra* note 122, at 2 (documenting the detention of two thousand people “largely because of their ethnic identity” and discriminatory treatment of “Arab and Muslim noncitizens”); Shirin Sinnar, *The Lost Story of Iqbal*, 105 *GEO. L.J.* 379, 414 (2017) (describing the detentions at issue in *Iqbal*); Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 *COLUM. L. REV. ONLINE* 108, 116–19 (2016) (describing the post-9/11 expansion of electronic surveillance and extensive policing of Muslim communities as forms of structural Islamophobia); Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 *MICH. J. RACE & L.* 161, 186–93 (2006) (analyzing the FBI’s Pentagon/Twin Towers Bombing criminal investigation, which misidentified innocent Muslims, and the DOJ and INS’s National Security Entry and Exit Registry System, which tracked non-immigrants believed to pose increased national security risks); *Muslim Profiling*, *CTR. FOR CONST. RTS.*, <https://ccrjustice.org/home/what-we-do/issues/muslim-profiling> [<https://perma.cc/H4FT-9HFZ>] (summarizing litigation opposing experimental prison units, surveillance of Muslim communities, and attempts to coerce Muslims into spying on their communities);

Rights are not always violated in wartime, however. Sometimes they are left untouched.¹³⁴ Other times, they grow.¹³⁵ The Civil War is associated with both restrictions on liberties and the emancipation of slaves.¹³⁶ The First World War involved both sedition prosecutions and federal enactment of an eight-hour workday.¹³⁷ World War II entailed both the forced relocation of Japanese residents and increased workplace opportunities for Black Americans and women.¹³⁸ Cold War dynamics underlay both McCarthyism and doctrinal “revolutions” in speech and equal protection.¹³⁹

Like rights contraction, conflict-driven rights expansion is rooted in the politics of threat. As civil society actors mobilize to expand rights, many begin to link specific causes with wartime goals, needs, and ideas. During the early Cold War, American civil rights leaders routinely tied American racial progress with ongoing global struggles.¹⁴⁰

Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1042–43 (2013) (recounting harsh conditions of lengthy post-9/11 detentions of Muslim immigrants at Brooklyn’s Metropolitan Detention Center, including an initial communications blackout, lockdown for twenty-three hours a day, and physical abuse by guards).

¹³⁴ See, e.g., FLAHERTY, *supra* note 126, at 118–19 (discussing the World War II Court’s “judicial surrenders” as well as certain decisions checking executive power); Wiecek, *supra* note 122, at 45 (asserting that the World War II Court strove to preserve liberties and First Amendment protections, with the major exception of the internment of Japanese Americans).

¹³⁵ Wars are especially closely linked to expansions of the franchise. See Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 300–01 (2000) (describing Black (male) participation during the Reconstruction-era); Paula A. Monopoli, *Women, Democracy, and the Nineteenth Amendment*, 100 B.U. L. REV. 1727, 1728 (2020) (rooting Nineteenth Amendment in World War I dynamics); Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 670 (2017) (tracing lowering in voting age in part to the Vietnam War).

¹³⁶ Cf. JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 219 (2012) (describing the Emancipation Proclamation as a “morally momentous” “war measure based in military necessity”).

¹³⁷ Graber, *supra* note 122, at 106–08, 113.

¹³⁸ See PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 159–60 (1999) (summarizing history of Executive Order 8802 prohibiting discrimination in employment on the basis of race, creed, color, or national origin, and the creation of the Fair Employment Practices Committee).

¹³⁹ Primus, *supra* note 1, at 437–50. See generally DUDZIAK, *supra* note 102. There is disagreement on the extent to which Cold War dynamics mattered to this story. See Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, in *THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS* 141, 147 (Tatiana Borisova & William Simons eds., 2012).

¹⁴⁰ See Klarman, *supra* note 4, at 23, 26–28 (describing tactics employed by civil rights activists to connect domestic racial inequality with global narratives of oppression). *But cf.* Gregory Briker & Justin Driver, *Brown and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 464–500 (2022) (arguing that anticommunism also played a central role in segregationists’ opposition to desegregation and civil rights).

The NAACP's submissions in *Brown* stressed that the “[s]urvival of our country in the present international situation is inevitably tied to resolution of [the] domestic issue.”¹⁴¹ Frames such as these deliberately tapped into U.S. government alarm over the Soviet Union's criticism of American racial abuses.¹⁴²

At the elite level, conflict dynamics can lead state actors to see rights expansion as part of the war effort. Some may see exigency as the main reason for enlarging rights; others may sense new opportunities to enact policies already favored. President Woodrow Wilson urged Congress to enact the eight-hour workday in 1916 because “we cannot . . . suffer the nation to be hampered in the essential matter of national defense.”¹⁴³ Likewise, the Truman “Justice Department repeatedly invoked the Cold War imperative in its amicus briefs in the Supreme Court's race discrimination and segregation cases.”¹⁴⁴ Michael Klarman suggests that anticommunist frames help explain Chief Justice Fred Vinson's support for desegregation despite a “scant regard for most civil liberties claims.”¹⁴⁵ In subtler ways, conflict dynamics can help enlarge rights through ideational contrast with “negative models,” a phenomenon that Kim Lane Scheppele calls “aversive constitutionalism.”¹⁴⁶ *Barnette*, for example, the canonical case declaring unconstitutional a flag-salute requirement, was driven in part “by the [Supreme] Court's desire to distinguish America from wartime Germany.”¹⁴⁷ Richard Primus has argued that between 1940 and the 1960s, “reaction against Nazism and fear of Communism have helped make racial equality, personal privacy, free expression, and protection against police abuse into central commitments of constitutional law.”¹⁴⁸

¹⁴¹ Dudziak, *supra* note 4, at 111 n.287 (first alteration in original) (internal citation omitted).

¹⁴² Internal racial strife, from Little Rock to Birmingham, repeatedly pushed race onto the foreign policy agenda, creating a desire to “project a story of progress” to the world amid “Soviet manipulation of American racial problems.” DUDZIAK, *supra* note 102, at 12, 250.

¹⁴³ Graber, *supra* note 122, at 106–07 (citation omitted) (describing fear that labor unrest would cripple the war effort).

¹⁴⁴ Klarman, *supra* note 4, at 27.

¹⁴⁵ *Id.* at 28; cf. ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* 7–9 (2020) (finding that constitutional rights are better realized where there are vested and organized interests in protecting them).

¹⁴⁶ Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 2 INT'L J. CONST. L. 196, 300 (2003); cf. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 (2001) (defining “negative comparativism”).

¹⁴⁷ RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 198 (1999); see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943) (criticizing the “fast failing efforts of our present totalitarian enemies” to “coerce uniformity of sentiment”).

¹⁴⁸ Primus, *supra* note 1, at 456; see also Scheppele, *supra* note 146, at 314–19 (analyzing cases where the Supreme Court invoked the Soviet Union as a negative model).

As the following sections will show, the new global conflict is beginning to evoke the patterns identified above. While modern analogs are not as nationally consuming as McCarthyism or as monumental as the civil rights revolution, they each recall patterns from the historical scholarship.

B. *Rights Contraction*

Consider first three instances of attempted or actual rights contraction. The case studies that follow sound in both federal and state action, law-making and law-enforcement. Yet all reprise a familiar politics of threat, with uneven effects on groups with imputed links to a geopolitical rival.

1. *Espionage*

First, the new global conflict has brought about heightened fears of industrial spies. The Economic Espionage Act, which criminalizes trade secret theft to benefit foreign governments, was enacted in 1996,¹⁴⁹ but law enforcement did not systematically focus on Chinese economic spies until the mid-2010s.¹⁵⁰ A pivotal moment, observes Margaret Lewis,¹⁵¹ was the Chinese Party-state's 2015 launch of its "Made in China 2025" plan to upgrade Chinese industry in areas like information technology, robotics, and aerospace.¹⁵² American officials were alarmed not merely by the Party-state's aims, but also by its escalating use of intellectual property theft, forced technology transfers, and industrial spies to achieve them.¹⁵³ Of special concern were its talent recruitment plans, designed, in the words of a Senate report, "to exploit America's openness to advance [China's] own national interests."¹⁵⁴ The Thousand

¹⁴⁹ Economic Espionage Act, 18 U.S.C. § 1831 (2018).

¹⁵⁰ See Lewis, *supra* note 9, at 158–60; cf. Samuel J. Rascoff, *The Norm Against Economic Espionage for the Benefit of Private Firms: Some Theoretical Reflections*, 83 U. CHI. L. REV. 249, 265 (2016) (noting difficulty in assessing whether the norm against economic espionage was viable in places like China given increasing bilateral competition).

¹⁵¹ Lewis, *supra* note 9, at 160–61.

¹⁵² Scott Kennedy, *Made in China 2025*, CTR. FOR STRATEGIC & INT'L STUD. (June 1, 2015), <https://www.csis.org/analysis/made-china-2025> [<https://perma.cc/7QD2-79XF>].

¹⁵³ See Christopher Wray, Director of FBI, Remarks at the Hudson Institute: The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States (July 7, 2020), <https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states> [<https://perma.cc/3XTX-JWB8>] [hereinafter Wray Remarks].

¹⁵⁴ PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC. & GOV'T AFFS., 116TH CONG., THREATS TO THE U.S. RESEARCH ENTERPRISE: CHINA'S TALENT RECRUITMENT PLANS 1 (2019), <https://www.hsgac.senate.gov/wp-content/uploads/>

Talents Plan offered salaries, funds, and labs to encourage researchers to transmit knowledge to China.¹⁵⁵

The Justice Department's most systematic response to these challenges was its China Initiative, launched by former Attorney General Jeff Sessions in 2018.¹⁵⁶ The Initiative sought to focus resources on combatting Chinese economic espionage, led by a steering committee under the Department's National Security Division.¹⁵⁷ More than an organization chart revision, the Initiative's effect was to prioritize cases with a China nexus. FBI Director Christopher Wray reported in 2020 that China-linked economic espionage cases had grown by 1300 percent over the previous decade, covering all 56 field offices.¹⁵⁸ The following year, he reported that the FBI had over 2,000 China-related investigations, with a new investigation opening every ten hours.¹⁵⁹ Perhaps the most notable convict under the Initiative was Harvard chemistry professor Charles Lieber, who received \$50,000 a month under the Thousand Talents Plan to support research at Wuhan University.¹⁶⁰

Although the Justice Department had some genuine success in uncovering industrial theft, the China Initiative soon fell into disrepute. A number of abandoned or failed prosecutions, all involving scientists of Chinese descent, raised concerns over racial profiling and prosecutorial overreach. Some of these cases predated the Initiative, as spy fears escalated in the mid-2010s. For example, Dr. Xiaoxing Xi, then chairman of Temple University's physics department, was arrested in 2015 on suspicion of sending schematics of a secret "pocket heater" device with superconductor applications to Chinese agents.¹⁶¹ Dr. Xi, a naturalized American citizen, was placed on leave, lost his title, and was

imo/media/doc/2019-11-18%20PSI%20Staff%20Report%20-%20China's%20Talent%20Recruitment%20Plans%20Updated2.pdf [https://perma.cc/6QNT-Z3WK].

¹⁵⁵ *Id.*

¹⁵⁶ Jeff Sessions, U.S. Att'y Gen., Remarks on New Initiative to Combat Chinese Economic Espionage (Nov. 1, 2018), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage> [https://perma.cc/G9YR-A88R].

¹⁵⁷ *Id.* (establishing a committee composed of the head of the National Security Division, a senior FBI executive, five U.S. Attorneys, and other Justice Department officials).

¹⁵⁸ Wray Remarks, *supra* note 153.

¹⁵⁹ Mike Conte, Christian Sierra & Ben Wescott, *FBI Opens a New Investigation into China 'Every 10 Hours,' Bureau Director Says*, CNN (Apr. 14, 2021, 11:31 PM), <https://www.cnn.com/2021/04/14/politics/fbi-director-china-investigations-intl-hnk/index.html> [https://perma.cc/T85X-KRMK].

¹⁶⁰ Gina Kolata, *Ex-Harvard Professor Sentenced in China Ties Case*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/04/26/science/charles-lieber-sentence-china.html> [https://perma.cc/J8RN-7MRG].

¹⁶¹ Andrew Chongseh Kim, *Prosecuting Chinese "Spies": An Empirical Analysis of the Economic Espionage Act*, 40 CARDOZO L. REV. 749, 760–61 (2018).

banned from speaking with certain colleagues.¹⁶² It turned out, however, that the schematics were not for a pocket heater at all; in fact, they were “patented and publicly available to anyone.”¹⁶³ Prosecutors had no choice but to drop all charges.¹⁶⁴

The first researcher to go to trial under the China Initiative was Dr. Anming Hu.¹⁶⁵ A Chinese-Canadian, Dr. Hu was a laser physics professor at the University of Tennessee (Knoxville) when the FBI began investigating him in 2018.¹⁶⁶ The government surveilled Dr. Hu and his family for nearly two years before accusing him of concealing his ties with a Chinese university and defrauding the government of NASA funds.¹⁶⁷ Dr. Hu was fired from his university and kept under house arrest for over a year.¹⁶⁸ The trial ended in a hung jury: “It was the most ridiculous case,” one juror later said. “If this is who is protecting America, we’ve got problems.”¹⁶⁹ The judge later granted a motion of acquittal on a “no rational jury” standard.¹⁷⁰

Another failed China Initiative case involved an MIT engineering professor, Dr. Gang Chen. In 2021, Dr. Chen was arrested in front of his wife and daughter by a team of federal agents.¹⁷¹ A U.S. citizen, Dr. Chen was placed on leave by MIT, forbidden to enter campus or contact his colleagues.¹⁷² Prosecutors accused Dr. Chen of concealing Chinese affiliations when he applied for Department of Energy grants.¹⁷³ In 2022, however, prosecutors abandoned the case upon

¹⁶² *Id.*

¹⁶³ *Id.* at 761.

¹⁶⁴ *Id.*

¹⁶⁵ Jamie Satterfield, *Trump Administration’s First ‘China Initiative’ Prosecution Sputters as Jurors Deadlock*, KNOXVILLE NEWS SENTINEL (June 16, 2021, 10:00 PM), <https://www.knoxnews.com/story/news/crime/2021/06/17/anming-hu-case-jurors-trump-china-initiative-trial-deadlocked/7712463002> [<https://perma.cc/6G2B-UK8T>].

¹⁶⁶ Natasha Gilbert, *‘I Lost Two Years of My Life’: US Scientist Falsely Accused of Hiding Ties to China Speaks Out*, NATURE (Mar. 7, 2022), <https://www.nature.com/articles/d41586-022-00528-2> [<https://perma.cc/QC3S-WTEH>].

¹⁶⁷ Amy Qin, *As U.S. Hunts for Chinese Spies, University Scientists Warn of Backlash*, N.Y. TIMES (Nov. 28, 2021), <https://www.nytimes.com/2021/11/28/world/asia/china-university-spies.html> [<https://perma.cc/SJX2-QB6W>].

¹⁶⁸ *Id.*; Gilbert, *supra* note 166.

¹⁶⁹ Mara Hvistendahl, *“Ridiculous Case”: Juror Criticizes DOJ for Charging Scientist with Hiding Ties to China*, THE INTERCEPT (June 23, 2021, 5:42 PM), <https://theintercept.com/2021/06/23/anming-hu-trial-fbi-china> [<https://perma.cc/A2CX-GBQC>].

¹⁷⁰ See *United States v. Anming Hu*, No. 3:20-CR-21-TAV-DCP-1, at *52 (E.D. Tenn. Sept. 9, 2021) (describing how “no rational jury” could have concluded that Hu had a scheme to defraud NASA).

¹⁷¹ Ellen Barry, *‘In the End, You’re Treated Like a Spy,’ Says M.I.T. Scientist*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/science/gang-chen-mit-china.html> [<https://perma.cc/3W9B-DJ6B>].

¹⁷² *Id.*

¹⁷³ *Id.*

realizing, belatedly, that Dr. Chen never had to disclose those affiliations in the first place.¹⁷⁴

Voices in and out of government began raising concerns.¹⁷⁵ In 2021, ninety members of Congress asked the Attorney General to investigate “the repeated, wrongful targeting of individuals of Asian descent for alleged espionage.”¹⁷⁶ In another letter to the Attorney General, 177 members of the Stanford University faculty criticized the Initiative for biased enforcement, conflating disclosure violations with espionage, and harming America’s scientific competitiveness.¹⁷⁷ The ACLU and Asian-Americans Advancing Justice filed Freedom of Information Act requests for federal materials relating to these prosecutions.¹⁷⁸ The Asian American Scholars Forum began assembling resources to support researchers under investigation.¹⁷⁹

Among legal scholars, the most prominent critic of the China Initiative was Margaret Lewis. Her article, *Criminalizing China*, argued that the use of “China” as the “glue connecting cases under the Initiative’s umbrella create[d] an overinclusive conception of the threat and attache[d] a criminal taint to entities that possess ‘China-ness.’”¹⁸⁰ By “conflat[ing] ideas of government, party, nationality, national origin, and ethnicity and meld[ing] them into an amorphous threat,” she

¹⁷⁴ See Josh Gerstein, *Report Details Collapse of China Initiative Case*, POLITICO (Feb. 18, 2022, 6:00 PM), <https://www.politico.com/news/2022/02/18/china-initiative-case-00010281> [<https://perma.cc/476Z-FA59>] (describing how a top Energy Department official informed prosecutors that Chen’s omissions either did not need to be disclosed or would not have impacted decisions on his grants).

¹⁷⁵ See Michael German & Alex Liang, *End of Justice Department’s ‘China Initiative’ Brings Little Relief to U.S. Academics*, BRENNAN CTR. FOR JUST. (Mar. 25, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/end-justice-departments-china-initiative-brings-little-relief-us> [<https://perma.cc/7N4X-8P5U>] (describing how the China Initiative “quickly gained infamy for dubious investigations and abusive prosecutions” and noting criticism from prosecutors involved in the China Initiative).

¹⁷⁶ *Rep. Lieu and 90 Members of Congress Urge DOJ Probe into Alleged Racial Profiling of Asians*, CONGRESSMAN TED LIEU (July 20, 2021), <https://lieu.house.gov/media-center/press-releases/rep-lieu-and-90-members-congress-urge-doj-probe-alleged-racial-profiling> [<https://perma.cc/DM7V-79WZ>].

¹⁷⁷ Letter to the Honorable Merrick B. Garland, STANFORD UNIVERSITY (Sept. 8, 2021), <https://sites.google.com/view/winds-of-freedom> [<https://perma.cc/EW2W-JRLZ>]. The letter was later endorsed by several thousand professors at other universities. *Id.*

¹⁷⁸ Lewis, *supra* note 9, at 195 (describing how these organizations filed FOIA requests for records pertaining to government efforts to “scrutinize, investigate, and prosecute” scientists and researchers with perceived ties to China).

¹⁷⁹ See *AASF Webinar: Chinese American Scientists: What Do You Have to Pay Attention to Under the China Initiative?*, ASIAN-AMERICAN SCHOLAR FORUM (Feb. 6, 2021) <https://www.aasforum.org/2021/02/06/chinese-american-scientists-what-do-you-have-to-pay-attention-to-under-the-china-initiative> [<https://perma.cc/V68E-E7NN>] (noting plans to launch webinars to give insight into “common legal allegations” and “recommended best practices” for those pursuing academic endeavors).

¹⁸⁰ Lewis, *supra* note 9, at 171.

wrote, “the China Initiative has created threat by association.”¹⁸¹ Even in earlier economic espionage cases, according to one empirical study, “Asian-Americans [were] disproportionately charged . . . , receive[d] much longer sentences, and [were] significantly more likely to be innocent than defendants of other races.”¹⁸²

These events follow historic patterns.¹⁸³ As in previous red scares, new espionage fears have led to a rise in questionable spy investigations and prosecutions. The politics has reflected both well-founded concerns and inflated threats; President Trump stated in 2018 that “almost every student that comes over to this country [from China] is a spy.”¹⁸⁴ Politicians have mobilized extensive resources to meet a seemingly all-encompassing Chinese threat, incentivizing federal agents and prosecutors to over-enforce and over-target. One former U.S. Attorney criticized the China Initiative for creating “perverse incentives” through imposing “an arbitrary goal, often with an arbitrary deadline.”¹⁸⁵ She assessed that “the rising percentage of [exonerated] Chinese defendants . . . suggests that investigators and prosecutors, pressured to meet higher prosecution expectations, are stretching the facts and jumping to unwarranted conclusions.”¹⁸⁶

Prosecutorial overreach has had apparently greater effects on researchers of Chinese ancestry. Graber writes that “[c]ivil rights and liberties are likely to be restricted . . . whenever the beneficiaries of protective policies are ideologically or ethnically identified with

¹⁸¹ *Id.* at 152.

¹⁸² Kim, *supra* note 161, at 820. Cf. Rochelle Cooper Dreyfuss & Orly Lobel, *Economic Espionage as Reality or Rhetoric: Equating Trade Secrecy with National Security*, 20 LEWIS & CLARK L. REV. 419, 426 (2016) (noting that arguments for greater trade secrets protection “derive at least some of [their] power from xenophobia”). Elizabeth Rowe has problematized the very idea of academic economic espionage, arguing that “the proprietary culture that underpins corporate research is missing from academia and the system for prosecuting espionage relies on ownership, both legally and in practice.” Elizabeth A. Rowe, 65 WM. & MARY L. REV. 1, 9 (2023).

¹⁸³ The China Initiative is not a case of rights contraction flowing out of the enactment of new rights-restrictive legislation; after all, positive law did not change during this period. Rather, it illustrates a kind of functional rights contraction through heightened targeting of certain groups that enjoyed fairer treatment before new conflict dynamics materialized.

¹⁸⁴ Annie Karni, *Trump Rants Behind Closed Doors with CEOs*, POLITICO (Aug. 8, 2018, 9:36 PM), <https://www.politico.com/story/2018/08/08/trump-executive-dinner-bedminster-china-766609> [<https://perma.cc/MME4-XE68>].

¹⁸⁵ *Commentary by Carol Lam for the Committee of 100*, CMTE. OF 100, <https://www.committee100.org/our-work/commentaries> [<https://perma.cc/4LXK-Y922>].

¹⁸⁶ *Id.* Perverse bureaucratic incentives generated by rigid top-down quotas is, of course, a longstanding problem in Chinese governance as well. See, e.g., Carl F. Minzner, *Riots and Cover-ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT’L L. 53, 53–57 (2009) (describing how targets used in Chinese cadre responsibility systems impact behavior of local officials).

America's enemies."¹⁸⁷ In one trade theft case against a Chinese national, "[t]he atmosphere . . . became so explosive that the federal judge . . . barred unnecessary mention of [the defendant's] ethnicity."¹⁸⁸ Perceptions of racial profiling may have also led to over-deterrence among Chinese and Chinese-American researchers. Relative to the past, scientists of Chinese descent report feeling less free to associate with their Chinese friends and family, or to work on particular lines of research. Yiguang Ju, a Princeton engineering professor asked by NASA in 2010 to develop "a plan for the future of American rocketry," told journalists he would be too "scared" to accept that invitation today.¹⁸⁹ A 2021 survey of U.S.-based scientists of Chinese descent found that over half felt "considerable fear and/or anxiety that they [were] surveilled by the U.S. Government, compared to only 11.7% of non-Chinese scientists."¹⁹⁰

Complicating efforts to discern discrimination is that although China's Party-state has targeted scientists of multiple backgrounds, it has made a concerted effort to recruit scientists of Chinese ancestry.¹⁹¹ This follows the Party-state's broader policy of seeking aid from overseas Chinese communities to support its national strategies, in what Audrye Wong has termed "diaspora statecraft."¹⁹² Wong notes, however, that

¹⁸⁷ Graber, *supra* note 122, at 97.

¹⁸⁸ Mara Hvistendahl, *Surveillance Planes, Car Chases, and a FISA Warrant: How a Chinese Immigrant Became a Pawn in America's Technological Cold War with Beijing*, VANITY FAIR (Jan. 28, 2020), <https://www.vanityfair.com/news/2020/01/how-chinese-immigrant-became-pawn-in-us-technological-cold-war-with-beijing> [<https://perma.cc/3EPV-J5PB>].

¹⁸⁹ Qin, *supra* note 167.

¹⁹⁰ JENNY J. LEE, XIAOJIE LI, & STAFF AT COMMITTEE OF 100, RACIAL PROFILING AMONG SCIENTISTS OF CHINESE DESCENT AND CONSEQUENCES FOR THE U.S. SCIENTIFIC COMMUNITY 9 (2021), <https://www.committee100.org/wp-content/uploads/2021/10/C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf> [<https://perma.cc/SZT9-U5U4>]; *see also* Yu Xie, Xihong Lin, Ju Li, Qian He & Junming Huang, *Caught in the Crossfire: Fears of Chinese-American Scientists*, 120 PROC. NAT'L ACAD. SCIS., July 2023, at 3 (revealing that, among a sample of scientists of Chinese descent employed by American universities in tenured or tenure-track positions, 35% of respondents felt unwelcome in the United States, and 72% did not feel safe as an academic researcher).

¹⁹¹ *See* Kate O'Keefe & Aruna Viswanatha, *How China Targets Scientists via Global Network of Recruiting Stations*, WALL ST. J. (Aug. 20, 2020, 5:30 AM), <https://www.wsj.com/articles/how-china-targets-scientists-via-global-network-of-recruiting-stations-11597915803> [<https://perma.cc/N2CJ-JHUG>] (describing talent recruitment stations co-organized by the Party's United Front Work Department's Western Returned Scholars Association and Overseas Chinese Affairs Office).

¹⁹² *See* Audrye Wong, *The Diaspora and China's Foreign Influence Activities, in 2021–22 WILSON CHINA FELLOWSHIP: ESSAYS ON CHINA AND U.S. POLICY* 607, 623 (Lucas Myers ed., 2022), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Wong_The%20Diaspora%20and%20China%27s%20Foreign%20Influence%20Activities.pdf [<https://perma.cc/UX5G-7JP5>] ("[D]iaspora statecraft' involves a home state's attempt to shape the attitudes and behavior of diasporic individuals in ways that favor the homeland's strategic interests.").

“governments do not always have a good track record of identifying such incidents.”¹⁹³ A central law enforcement challenge then is how to find actual cases of espionage without unfairly targeting scientists on the basis of race or national origin. Beyond the immediate equity concerns, biased prosecutions can also further racial tensions here, playing into the Chinese Party-state’s own “narratives and messaging strategies” about the ills of American society.¹⁹⁴

The China Initiative was terminated in 2022.¹⁹⁵ The Assistant Attorney General for National Security explained that, “[b]y grouping cases under the China Initiative rubric, we helped give rise to a harmful perception that the department applies a lower standard to investigate and prosecute criminal conduct related to [China] or that we in some way view people with racial, ethnic or familial ties to China differently.”¹⁹⁶ Chinese spy cases would continue, he said, under a broader organizational framework.¹⁹⁷

2. *Property Bans*

The politics of threat has begun to impact subnational lawmaking as well. According to new research, “state legislatures proposed or adopted more than 100 pieces of anti-China legislation between 2020 and 2022, up fourfold from the 2017 to 2019 period.”¹⁹⁸ The change is even starker on a longer time horizon: between 2012 and 2016, there were 18 anti-China laws proposed in state legislatures; between 2017 and 2022, that number rose to 127.¹⁹⁹ Many such laws have taken the form of barring a

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 608.

¹⁹⁵ Josh Gerstein, *DOJ Shuts Down China-focused Anti-espionage Program*, POLITICO (Feb. 23, 2022, 3:21 PM), <https://www.politico.com/news/2022/02/23/doj-shuts-down-china-focused-anti-espionage-program-00011065> [<https://perma.cc/FQ8A-8PPC>] (noting how the Biden administration ended the China Initiative after stumbles in criminal cases and accusations of racial profiling). While the termination of the China Initiative may indicate a favorable trend, a number of Congressional Republicans are clamoring to reintroduce it. *See, e.g.*, Press Release, Office of Sen. Marco Rubio, Rubio, Scott, Colleagues Introduce Bill to Reestablish DOJ’s China Initiative (Mar. 31, 2022), <https://www.rubio.senate.gov/rubio-scott-colleagues-introduce-bill-to-reestablish-doj-s-china-initiative> [<https://perma.cc/2FJT-LDE2>]. And the termination of the program does not make whole those it has harmed.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Kyle A. Jaros & Sara A. Newland, Opinion, *Federal Anti-China Sentiment Is Increasingly Seeping into State Laws*, THE HILL (Apr. 28, 2023, 1:30 PM), <https://thehill.com/opinion/international/3975855-federal-anti-china-sentiment-is-increasingly-seeping-into-state-laws> [<https://perma.cc/9NDY-MPRK>]. The mere introduction of a bill tells us little about enactment likelihood. But the dramatic increase in introductions is doubtless a sign of China’s growing importance in domestic politics and of a growing trend in state legislatures.

¹⁹⁹ Kyle Jaros & Sara Newland, *Paradiplomacy in Hard Times: Cooperation and Confrontation in Subnational US-China Relations* (Apr. 10, 2023) (unpublished manuscript) (on file with author).

person or entity linked to China from engaging in certain transactions within the state or availing themselves of state-provided resources. For example, a bill in Texas would bar all Chinese citizens from enrolling in state public universities.²⁰⁰ These laws have been defended on several grounds, from protecting military bases to combating Party influence to guarding the American food supply.²⁰¹

Many of these bills have sought to ban Chinese citizens from buying property.²⁰² In Texas, the initial version of a proposed bill would have barred citizens of China (among other countries), including permanent residents, from purchasing any real property in the state.²⁰³ The bill's sponsor described the law as an effort to "address adversarial countries acquiring land" in Texas, and followed the state agricultural commissioner's call for such a bill to thwart property purchases by agents of "Communist China: America's greatest foe."²⁰⁴ After local communities protested, the bill was watered down and enacted by one house before meeting its end in the other.²⁰⁵ Likewise in Alabama, a proposed bill would have banned Chinese citizens from purchasing

²⁰⁰ Tori Otten, *Texas GOP Bill Would Ban Students from China and 3 Other Countries from All Public Universities*, NEW REPUBLIC (Mar. 17, 2023, 3:29 PM), <https://newrepublic.com/post/171238/texas-gop-bill-ban-students-china-3-countries-public-universities> [https://perma.cc/JH4M-YLPS].

²⁰¹ See David J. Lynch, *Heartland Lawmakers Push Bans on Chinese Purchases of American Farms*, WASH. POST (Apr. 4, 2023, 6:00 AM), <https://www.washingtonpost.com/us-policy/2023/04/04/china-farm-land-tensions> [https://perma.cc/SF6J-5XQA] (noting how lawmakers have justified proposals to restrict foreign acquisitions of farmland with concerns that the Chinese government could use land acquisitions to impact America's food supply); *Gov. DeSantis Signs Bills Targeting China Influence*, CBS NEWS MIA. (May 8, 2023, 4:00 PM), <https://www.cbsnews.com/miami/news/gov-desantis-signs-bills-targeting-china-influence> [https://perma.cc/V6AQ-JK2U].

²⁰² Matthew Erie has compiled a data set of 152 state bills and laws regulating property rights in view of threats posed by China. See generally Matthew S. Erie, *Property as National Security*, 2024 WIS. L. REV. (forthcoming).

²⁰³ See Act Relating to the Purchase of or Acquisition of Title to Real Property by Certain Liens or Foreign Entities, S.B. 147, 88th Leg., Reg. Sess. (Tex. 2023), <https://capitol.texas.gov/tlodocs/88R/billtext/html/SB00147I.htm> [https://perma.cc/A9VQ-8NHW].

²⁰⁴ Robert Downen, *Bill to Ban Chinese Citizens and Government from Buying Texas Land Gains Steam Among Republicans*, TEX. TRIB. (Jan. 20, 2023, 3:00 PM), <https://www.texastribune.org/2023/01/20/texas-legislature-china-land-ownership> [https://perma.cc/X75G-SA8K]; Sid Miller, *Opinion: Ban China from Buying Texas Land*, TEX. BORDER BUS. (Aug. 11, 2022), <https://texasborderbusiness.com/op-ed-ban-china-from-buying-texas-land-sid-miller> [https://perma.cc/U2BR-3HKL].

²⁰⁵ Jeremy Wallace, *Bill Banning Chinese Citizens from Buying Texas Land Dies in Legislature, with Help from Protesters*, HOUS. CHRON. (May 22, 2023, 6:45 PM), <https://www.houstonchronicle.com/politics/texas/article/bill-banning-chinese-citizens-buying-texas-land-18112969.php> [https://perma.cc/L495-QBX2].

real estate anywhere in the state.²⁰⁶ Local groups objected,²⁰⁷ and the enacted version bars only certain foreign governments or affiliates from buying farmland, forestland, or real property near sensitive sites.²⁰⁸

The successful moderation of such bills stands in contrast with Florida's recent enactment of S.B. 264.²⁰⁹ That law contains several prohibitions relevant to this discussion. First, it bans all persons domiciled in China, Russia, Iran, and several other countries from purchasing agricultural land and real property on or within ten miles of any military or critical infrastructure facility.²¹⁰ Second, the law bars Chinese citizens "domiciled" in China from purchasing real property anywhere in Florida.²¹¹ Chinese citizens who violate this latter provision will have committed a third-degree felony, punishable by up to five years' imprisonment.²¹² The law contains an exception whereby natural persons with a valid non-tourist visa or who have been granted political asylum may purchase a single residential property under two acres and not within five miles of a military installation.²¹³ S.B. 264 also requires those who had purchased such properties prior to the law's operative date to register with the state.²¹⁴

The ACLU and several other organizations have challenged these prohibitions. Their complaint, written on behalf of a group of plaintiffs, alleges that the law impermissibly classifies and invidiously targets individuals on the basis of race, ethnicity, color, alienage, and national

²⁰⁶ See H.B. 379, 2023 Reg. Sess. (Ala. 2023), <https://www.legislature.state.al.us/pdf/SearchableInstruments/2023RS/HB379-int.pdf> [<https://perma.cc/9DD8-Q76Z>].

²⁰⁷ See Patrick Darrington, *Chinese Citizens Speak Out Against Legislation Preventing Their Acquisition of Property*, ALA. POL. REP. (May 16, 2023), <https://www.alreporter.com/2023/05/16/chinese-citizens-speak-out-against-legislation-preventing-their-acquisition-of-property> [<https://perma.cc/7LCA-EQ5Q>].

²⁰⁸ See Alabama Property Protection Act, H.B. 379, 2023 Reg. Sess. (Ala. 2023) <https://www.legislature.state.al.us/pdf/SearchableInstruments/2023RS/HB379-enr.pdf> [<https://perma.cc/ZVJ9-SX26>] (codified as amended at Ala. Code § 35-1-1.1 (2023)).

²⁰⁹ See generally *Interests of Foreign Countries*, ch. 2023-33, §§ 3–8 2023 Fla. Laws 5–15, <https://www.flsenate.gov/Session/Bill/2023/264/BillText/er/PDF> [<https://perma.cc/W5CE-7EFK>] (codified at Fla. Stat. Ann. §§ 692.201–.205 (2023)).

²¹⁰ Fla. Stat. §§ 692.202–.203 (2023), <https://www.flsenate.gov/Session/Bill/2023/264/BillText/er/PDF> [<https://perma.cc/S9VM-CZNL>].

²¹¹ *Id.* § 692.204. The law does not define "domicile."

²¹² *Id.* § 692.204(8); *id.* §§ 775.082(3)(e), .083(1)(c). Sellers who violate this provision have committed a first-degree misdemeanor, *id.* § 692.204(9), punishable by up to a year of imprisonment and a maximum fine of \$1,000, *id.* §§ 775.082(4)(a), .083(1)(d).

²¹³ *Id.* §§ 692.203(4), .204(2).

²¹⁴ *Id.* §§ 692.202(3)(a), (b).

origin,²¹⁵ violates procedural due process on grounds of vagueness,²¹⁶ establishes discriminatory housing practices in violation of the Fair Housing Act,²¹⁷ and is preempted under the Supremacy Clause “by federal regimes governing foreign affairs, foreign investment, and national security.”²¹⁸ The complaint further alleges that S.B. 264 would lead sellers to discriminate against Asian buyers for fear of incurring criminal penalties, and would stigmatize people of Chinese and Asian descent.²¹⁹ A federal judge denied plaintiffs’ request for a preliminary injunction.²²⁰ In early 2024, however, the Eleventh Circuit temporarily blocked S.B. 264’s enforcement as to two plaintiffs in the suit.²²¹

S.B. 264 recalls several historical patterns. First, it is rooted in the politics of threat. The law was part of a trio of bills signed by Governor Ron DeSantis shortly before he announced his bid for president.²²² The other two laws, S.B. 846 and S.B. 258, limited state universities’ collaboration with educational institutions in countries like China and sought to address cybersecurity threats from similar places.²²³ DeSantis framed these bills in familiar terms: “Florida is taking action to stand against the United States’ greatest geopolitical threat—the Chinese Communist Party.”²²⁴ Governor DeSantis’s electoral ambitions help explain why Florida was the first to adopt restrictive property bans. Exclusion Era anti-Chinese laws were almost invariably enacted “on the eve of national elections.”²²⁵

In facially discriminating against groups with imputed adversary ties, S.B. 264 follows history in other ways. Most immediately, it evokes

²¹⁵ Complaint ¶¶ 1, 86, *Shen v. Simpson*, No. 4:23-cv-208 (N.D. Fla., May 22, 2023) (alleging that the Florida law stigmatizes Chinese and Chinese-American citizens, and “casts a cloud of suspicion” over people of Chinese descent seeking to purchase Florida property).

²¹⁶ *Id.* ¶ 95 (claiming that Florida’s New Alien Land violates the Due Process Clause because it is “impermissibly vague, indefinite and ambiguous”).

²¹⁷ *Id.* ¶ 103.

²¹⁸ *Id.* ¶ 114. For an analysis of related preemption issues, see Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT’L. SEC. J. 1 (2022).

²¹⁹ Complaint, *supra* note 215, ¶¶ 68, 69.

²²⁰ Niha Masih, *Florida Judge Refuses to Halt Law Restricting Chinese Land Ownership*, WASH. POST (Aug. 18, 2023, 3:57 AM), <https://www.washingtonpost.com/nation/2023/08/18/florida-chinese-property-law-desantis/> [<https://perma.cc/8ZYC-43PH>].

²²¹ Yifan Shen v. Comm’r, No. 23-12737, 2024 U.S. App. LEXIS 2346, at *4 (11th Cir. Feb. 1, 2024).

²²² See *Governor Ron DeSantis Cracks Down on Communist China*, RON DESANTIS, 46TH GOVERNOR OF FLA. (May 8, 2023), <https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/> [<https://perma.cc/HD26-6RJJ>]; see Domenico Montanaro, *Florida Gov. Ron DeSantis, Top Rival to Trump Jumps into the Race for President*, NPR (May 24, 2023), <https://www.npr.org/2023/05/24/1166796229/ron-desantis-president-election-2024> [<https://perma.cc/8R67-4YZQ>].

²²³ See DESANTIS, *supra* note 222.

²²⁴ *Id.*

²²⁵ KONVITZ, *supra* note 49, at 11.

early twentieth-century alien land laws that effectively banned Asians from acquiring property.²²⁶ Alien land laws sought both to protect American farm labor and to combat perceived threats from Japan, a rising power whose people were seen as a “fifth column . . . waiting to be activated at the emperor’s command.”²²⁷ California enacted its first alien land law in 1913, and was soon followed by over a dozen states, including Florida.²²⁸ S.B. 246 is especially poignant because Florida was the *last* state to remove constitutional language referencing alien land restrictions in 2018.²²⁹

Like its historic analogs, S.B. 264 sweeps more broadly than a fair notion of threat would permit. Its statutory logic presumes that a large heterogenous group variously connected to a foreign adversary is collectively untrustworthy.²³⁰ Consider several of the plaintiffs in the ACLU litigation. Yifan Shen, a registered dietician with no associations with the Chinese government or Communist Party, has been living in Florida for seven years on a skilled-worker visa.²³¹ Zhiming Xu, who fled China and likewise has no associations with its Party-state, has lived in Florida for four years with a pending application for asylum.²³² Xinxi Wang, who worships with a Miami-area Christian congregation, has lived in Florida for five years on a student visa to complete a PhD.²³³ All are presumably subject to the law’s prohibitions solely by reason of their link to China. Yet none, from known evidence, pose the threats Governor DeSantis described.

Similar laws have been considered in other legislatures.²³⁴ S.B. 91 forbids non-permanent resident Chinese citizens from not only owning, but even *leasing*, immovable property within fifty miles of certain military facilities or other sensitive installations in Louisiana.²³⁵

²²⁶ See Edgar Chen, *With New “Alien Land Laws” Asian Immigrants Are Once Again Targeted By Real Estate Bans*, JUST SEC. (May 26, 2023), <https://www.justsecurity.org/86722/with-new-alien-land-laws-asian-immigrants-are-once-again-targeted-by-real-estate-bans> [<https://perma.cc/43HC-K5Y7>].

²²⁷ *Id.* (quoting Professor Keith Aoki).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See Bruce Ritchie, *Chinese Citizens Seek to Block Florida’s Law Banning Them from Owning Property*, POLITICO (June 7, 2023, 3:17 PM), <https://www.politico.com/news/2023/06/07/chinese-citizens-ask-federal-court-to-delay-land-ownership-bill-00100809> [<https://perma.cc/3C46-24PF>].

²³¹ Complaint, *supra* note 215, ¶ 60. Shen purchased property within ten miles of a critical infrastructure facility. *Id.*

²³² *Id.* ¶ 61. Xu also purchased property near a critical infrastructure facility. *Id.*

²³³ *Id.* ¶ 62. Wang would be subject to the registration requirement because her property was also near a critical infrastructure facility. *Id.*

²³⁴ Chen, *supra* note 226.

²³⁵ S.B. 91, 2023 Reg. Sess. (La. 2023), <https://legis.la.gov/legis/ViewDocument.aspx?d=1317999> [<https://perma.cc/9GAN-XLFU>].

As a result, “lawfully admitted Chinese citizens present on student or employment visas studying or working at Louisiana State University would not be able to even *rent* an apartment in Baton Rouge, which houses an armed forces reserve center.”²³⁶ Such measures are not proportional to the articulated threat.

3. *Platform Bans*

Recent attempts to ban Chinese mobile applications (“apps”) have also raised civil liberties concerns. In August 2020, President Trump issued two executive orders that would have disabled two social media companies—TikTok and WeChat—from operating in the United States.²³⁷ One order alleged that TikTok, a video-sharing app owned by a Chinese parent, ByteDance,²³⁸ gave the Communist Party access to Americans’ personal data, enabled censorship, and fostered disinformation.²³⁹ The other order alleged that WeChat, a messaging, payment, and social media app developed by a Chinese company, Tencent,²⁴⁰ presented similar risks.²⁴¹ Implementing regulations made clear that these platforms would effectively be banned.²⁴²

Both executive orders were predicated on combatting a perceived China threat. “[T]he spread in the United States of mobile applications developed and owned by companies in . . . China . . . threaten[s] the national security, foreign policy, and economy of the United States,” they each said.²⁴³ For authority, the orders relied principally on the International Emergency Economic Powers Act (IEEPA), which confers on the President certain peacetime emergency powers.²⁴⁴

²³⁶ Chen, *supra* note 226.

²³⁷ Exec. Order No. 13942, 85 Fed. Reg. 48637, 48637–48638 (Aug. 6, 2020) (prohibiting “any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with ByteDance Ltd. [the parent company of TikTok] . . . or its subsidiaries”); Exec. Order No. 13943, 85 Fed. Reg. 48641, 48641–48642 (Aug. 6, 2020) (prohibiting “any transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States”).

²³⁸ *Marland v. Trump*, 498 F. Supp. 3d 624, 630 (E.D. Pa. 2020).

²³⁹ Exec. Order No. 13942, *supra* note 237.

²⁴⁰ *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 917 (N.D. Cal. 2020).

²⁴¹ Exec. Order No. 13943, *supra* note 237.

²⁴² See Identification of Prohibited Transactions to Implement Executive Order 13942, 85 Fed. Reg. 60061, 60062 (Sep. 21, 2020); DEP’T OF COM., IDENTIFICATION OF PROHIBITED TRANSACTIONS TO IMPLEMENT EXECUTIVE ORDER 13943 (2020), <https://www.commerce.gov/sites/default/files/2020-09/WeChat%20-%20FR%20-%20Identification%20of%20Prohibited%20Transactions%20-%20Updated%20Injunction.ogc%20%281%29.pdf> [<https://perma.cc/9U8Y-6TMX>].

²⁴³ Exec. Order No. 13942, *supra* note 237, at 48637; Exec. Order No. 13943, *supra* note 237, at 48641.

²⁴⁴ 50 U.S.C. §§ 1701–1706; Exec. Order No. 13942, *supra* note 237, at 48637; Exec. Order No. 13943, *supra* note 237, at 48641. The orders also relied on the National Emergencies

The President had earlier invoked a national emergency under IEEPA with respect to information and communications technology and services (ICTS) provided by “foreign adversaries.”²⁴⁵ The WeChat and TikTok orders were framed as “additional steps” needed to address the ICTS emergency declared in that order.²⁴⁶

The implementing regulations for each order were soon enjoined by federal district courts.²⁴⁷ A group of WeChat users won a preliminary injunction on First Amendment grounds,²⁴⁸ TikTok won two preliminary injunctions as to two different sets of prohibited transactions from Judge Carl Nichols, a Trump appointee, on statutory grounds, namely that IEEPA bars the president from regulating or prohibiting the import or export of “information or informational materials.”²⁴⁹ A group of TikTok influencers won a preliminary injunction in federal court on similar statutory grounds.²⁵⁰

The orders at issue were a familiar product of electoral politics. Issued three months before the election, they were likely motivated by President Trump’s desire to bolster his anti-China credentials, particularly following the outbreak of COVID-19, or what he termed the “China flu.”²⁵¹ Days later, Trump warned that “China will own the United States if this election is lost by Donald Trump.”²⁵² “You’re going to have to learn to speak Chinese, you want to know the truth.”²⁵³ TikTok, specifically, had also become a political nuisance for the President. It was one of the only major social media platforms not widely used by his supporters, and had at times become a site of resistance, even

Act, 40 U.S.C. §§ 1601–1651; Exec. Order No. 13942, *supra* note 237, at 48637; Exec. Order No. 13943, *supra* note 237, at 48641.

²⁴⁵ Exec. Order No. 13873, 84 Fed. Reg. 22689 (May 17, 2019).

²⁴⁶ Exec. Order No. 13942, *supra* note 237, at 48637; Exec. Order No. 13943, *supra* note 237, at 48641.

²⁴⁷ This saga is well chronicled in Chander, *supra* note 13, at 1156–61.

²⁴⁸ *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 926–28 (N.D. Cal. 2020). For more on the advocacy events and strategies that led to this outcome, see Judy Tzu-Chun Wu & Ji Li, *Chinese Immigrant Legal Mobilization in the United States: The 2020 Executive Ban on WeChat and Civil Rights in a Digital Age*, 30 *ASIAN AM. L.J.* 51 (2023).

²⁴⁹ *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 80–83 (D.D.C. 2020) (quoting 50 U.S.C. § 1702(b)(3)); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 102–12 (D.D.C. 2020) (quoting 50 U.S.C. § 1702(b)(3)).

²⁵⁰ See *Marland v. Trump*, 498 F. Supp. 3d 624, 636–41 (E.D. Pa. 2020).

²⁵¹ See Ana Swanson & David McCabe, *U.S. Judge Temporarily Halts Trump’s WeChat Ban*, *N.Y. TIMES* (Oct. 5, 2020), <https://www.nytimes.com/2020/09/20/business/economy/court-wechat-ban.html> [<https://perma.cc/8CTE-NPEY>].

²⁵² Kevin Liptak, *Trump Says Americans Will Have to Learn Chinese if Biden Wins but Offers Little Condemnation of Beijing*, *CNN* (Aug. 11, 2020), <https://www.cnn.com/2020/08/11/politics/trump-china-biden-learn-chinese/index.html> [<https://perma.cc/9RXZ-L6YE>].

²⁵³ *Id.*

embarrassment.²⁵⁴ Finally, the President may have been leveraging the ban to engineer the sale of TikTok to an American company. He had made clear that Oracle would be a suitable acquirer, and had sought *ex ante* to claim political credit for any such sale.²⁵⁵

Political incentives may have led the Administration to overstate the level of threat. All three judges in these lawsuits noted the thinness of the Administration's risk analysis. Judge Nichols wrote that while "the government has provided ample evidence that China presents a significant national security threat" generally, "the specific evidence of the threat posed by [TikTok] . . . remains less substantial."²⁵⁶ In the influencers' suit, the Court lamented that "the Government's own descriptions of the national security threat posed by the TikTok app are phrased in the hypothetical."²⁵⁷ In the WeChat suit, the judge stated that "while the general evidence about the threat to national security related to China . . . is considerable, the specific evidence about WeChat is modest."²⁵⁸

As in previous conflicts, an expansive state response threatened to limit civil liberties, especially among those with imputed "enemy" ties. Plaintiffs showed that the WeChat order posed significant speech burdens on Chinese-speaking communities. Their declarations asserted that over 19 million regular WeChat users based in the United States relied on the app as their "primary source of communication and commerce."²⁵⁹ In an affidavit, Erwin Chemerinsky added that the order was "the equivalent of a complete ban of a newspaper, a TV channel, or a website used by the tens of millions of U.S. citizens who regularly use the WeChat platform to communicate ideas and to conduct business every day in the United States."²⁶⁰ Judge Beeler agreed that the plaintiffs had "shown serious questions going to the merits of their First Amendment claim that . . . [the ban was] the equivalent of censorship of speech or a prior restraint on it."²⁶¹ Even if the regulation was content-neutral, she added, plaintiffs had shown "serious questions" whether

²⁵⁴ Chander, *supra* note 13, at 1149 (describing anti-Trump activities on TikTok).

²⁵⁵ *Id.* at 1150–52.

²⁵⁶ *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 85 (D.D.C. 2020); *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 114 (D.D.C. 2020).

²⁵⁷ *Marland v. Trump*, 498 F. Supp. 3d 624, 642 (E.D. Pa. 2020).

²⁵⁸ *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 929 (N.D. Cal. 2020).

²⁵⁹ *Id.* at 918 (internal quotation marks and citation omitted). One plaintiff explained how her mental health nonprofit effectively could not operate without WeChat which allowed it to communicate with its primarily non-English-speaking patients. *Id.* at 918–19.

²⁶⁰ Declaration of Erwin Chemerinsky in Support of Plaintiffs' Motion for Preliminary Injunction at 2, *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912 (N.D. Cal. 2020) (No. 3: 20-cv-05910-LB).

²⁶¹ *U.S. WeChat Users All.*, 488 F. Supp. 3d at 926.

it could withstand intermediate scrutiny.²⁶² The government had “put in scant little evidence that its effective ban of WeChat for all U.S. users addresses” national security concerns, and had ignored “obvious alternatives.”²⁶³

The TikTok order also raised First Amendment concerns. Although judges enjoined it on statutory grounds, one court hinted at constitutional problems. In the influencers’ suit, the judge cited House Conference Report language urging that IEEPA’s informational materials exception ought to be given a “broad scope” to facilitate information flows “protected under the First Amendment.”²⁶⁴ She further noted that the government misapplied precedent in its speech analysis.²⁶⁵ Had judges reached the constitutional question here, it seems likely they would have had sufficient basis to issue a preliminary injunction on that basis. Given the TikTok order’s explicit goal of countering Chinese propaganda, the government could not have plausibly argued that its regulations were a regulation of purely commercial conduct—a point that Judge Nichols made in his statutory analysis.²⁶⁶ Even if the ban was content-neutral, it likely would have “burden[ed] substantially more speech than . . . necessary” to further the state’s interests.²⁶⁷ As both judges noted, the government had provided only speculative evidence of national security harms.²⁶⁸ And it did not well address why tailored alternatives, such as better data security standards, would not have achieved the same goals.²⁶⁹

As later addressed, Chinese firms can present distinctive security challenges stemming from local laws that require intelligence sharing and the presence of Party-state institutions within ostensibly private firms.²⁷⁰ For example, TikTok’s parent ByteDance is a Beijing-headquartered firm with a Party Committee and has been accused of

²⁶² *Id.* at 927.

²⁶³ *Id.*

²⁶⁴ *Marland v. Trump*, 498 F. Supp. 3d 624, 630 (E.D. Pa. 2020).

²⁶⁵ *Id.* at 638 n.6.

²⁶⁶ *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 106 (D.D.C. 2020) (“At a minimum, then, the Secretary’s prohibitions indirectly regulate, rather than incidentally burden, TikTok communications that spread CCP propaganda and the data all U.S. users share on TikTok . . .”).

²⁶⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

²⁶⁸ *See supra* notes 256–58 and accompanying text.

²⁶⁹ *See U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 927 (N.D. Cal. 2020); *TikTok*, 507 F. Supp. 3d at 112 (noting that the government did not consider “having Oracle host all U.S. user data and secure associated computer systems to ensure that U.S. national security requirements are satisfied,” before banning TikTok (internal quotation marks and citations omitted)).

²⁷⁰ *See infra* Section III.B.

sharing dissident data with the Party-state.²⁷¹ WeChat has been accused of facilitating disinformation and interference with foreign elections.²⁷² Even so, recent attacks on these firms have often failed to comply with federal law or to adequately explain why expansive actions with serious rights implications, such as outright app bans, have been warranted in each case. This reflexive tendency towards overprescription is consistent with threat politics, but does not help address the actual risks posed by Chinese firms in a careful and targeted fashion.

C. Rights Expansion

The new global conflict has led to rights expansion in at least one instance.²⁷³ Until recently, the State Department enforced a policy of “assignment restrictions” that barred certain employees from specific country or country-desk assignments, based on their personal ties to those countries.²⁷⁴ According to the Department’s Foreign Affairs Manual, these restrictions served “to mitigate foreign influence” and to “prevent potential targeting and harassment by foreign intelligence

²⁷¹ See Yaqiu Wang, *Targeting TikTok’s Privacy Alone Misses a Larger Issue: Chinese State Control*, QUARTZ (Jan. 24, 2020), <https://qz.com/1788836/targeting-tiktoks-privacy-alone-misses-a-much-larger-point> [<https://perma.cc/D8VE-YEFV>]; Peter Hoskins, *TikTok: ByteDance Accused of Helping China Spy on Hong Kong Activists*, BBC (June 7, 2023), <https://www.bbc.com/news/business-65817608> [<https://perma.cc/D7SX-WXDE>].

²⁷² See Norimitsu Onishi, *Canadian Politicians Who Criticize China Become Its Targets*, N.Y. TIMES (July 15, 2023), <https://www.nytimes.com/2023/07/15/world/americas/canada-china-election-interference.html> [<https://perma.cc/5QBH-H78Z>].

²⁷³ Several other arguable instances of conflict-driven rights expansion bear mention. First, recent budgets in California have set aside tens of millions of dollars in support of “Asian and Pacific Islander (API) Equity.” *Governor Newsom Signs \$40 Million API Equity Budget into Law*, CAL. AAPILC (June 30, 2023), <https://aapilegcaucus.legislature.ca.gov/products/governor-newsom-signs-40-million-api-equity-budget-law> [<https://perma.cc/K8MB-XVNW>]. While such funding was mostly framed around “systemic racism . . . in the wake of the COVID-19 pandemic,” *id.*, the rise in anti-Asian discrimination has also been fueled by U.S.-China tensions, see National Committee on U.S.-China Relations, *Confronting Anti-Asian Racism: Anti-China Foreign Policy and Legislative Change*, YOUTUBE (Apr. 20, 2021), <https://youtu.be/xDgHrsQUZc> [<https://perma.cc/7SJW-SNOV>] (noting that anti-Asian hate incidents have been fueled by anti-China foreign policy and xenophobic political rhetoric). Second, the federal government has offered several rounds of Deferred Enforced Departure (DED) for Hong Kong residents residing in the United States, providing them with a “temporary safe haven in the United States” in the wake of Beijing’s imposition of a draconian National Security Law in Hong Kong. *Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2023), <https://www.uscis.gov/humanitarian/deferred-enforced-departure> [<https://perma.cc/A92R-4ADQ>]; Extending and Expanding Eligibility for Deferred Enforced Departure for Certain Hong Kong Residents, 88 Fed. Reg. 6143 (Jan. 26, 2023) (describing China’s actions in Hong Kong as “compelling foreign policy reasons” for the U.S. to extend DED to Hong Kong residents).

²⁷⁴ U.S. DEP’T OF STATE, 12 FOREIGN AFFAIRS MANUAL §§ 233.5(a)–(c), <https://fam.state.gov/FAM/12FAM/12FAM0230.html> [<https://perma.cc/K9WH-S5CX>].

services.”²⁷⁵ Though long criticized as discriminatory—limiting opportunities available to employees of certain backgrounds over concerns of potential disloyalty—assignment-restriction policies were not abandoned until 2023.²⁷⁶ Their abolition owes in part to the use and resonance of familiar geopolitical frames.

Assignment restrictions have long been a source of unhappiness within the State Department.²⁷⁷ Congressman Andy Kim (D-NJ), who started at the Department in 2009, recalls his disappointment upon learning he was barred from working on Korean affairs.²⁷⁸ Kim was born in America, did not speak much Korean, and “barely” knew his relatives in South Korea.²⁷⁹ “What confused me,” he said, was that “I didn’t even apply to work on Korea,” yet the Department “was proactively telling me they didn’t trust me.”²⁸⁰ An association representing Asian-American diplomats began raising concerns over assignment restrictions in 2009.²⁸¹ It won a modest victory in 2016 and 2017 in the form of greater procedural protections.²⁸²

Yet as concerns over China’s rise intensified in the late 2010s, procedural reforms did little to mitigate perceptions of discrimination. Greater numbers of employees received assignment restrictions, while anecdotal accounts of bias grew.²⁸³ The Asian-American Foreign Affairs Association’s (AAFAA’s) conducted a member survey in 2020, finding

²⁷⁵ *Id.* § 233.5(a).

²⁷⁶ Kylie Atwood, *US State Department Ends Assignment Restrictions that were Perceived as Discriminatory*, CNN (Mar. 22, 2023, 3:05 PM), <https://www.cnn.com/2023/03/22/politics/state-department-end-assignment-restrictions/index.html> [<https://perma.cc/48RB-6K8A>].

²⁷⁷ See Lydia DePillis, *At the State Department, Diversity Can Count Against You*, WASH. POST (Sept. 24, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/24/at-the-state-department-diversity-can-count-against-you> [<https://perma.cc/B5TG-5BE2>].

²⁷⁸ Ryan Heath, *Foreigners in Their Own Country: Asian Americans at State Department Confront Discrimination*, POLITICO (Mar. 18, 2021, 7:35 PM), <https://www.politico.com/news/2021/03/18/asian-americans-state-department-477106> [<https://perma.cc/5ZH3-2ACB>]; Kim, *Andy 1982–*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguide.congress.gov/search/bio/K000394> [<https://perma.cc/8E24-F7XL>].

²⁷⁹ Andy Kim (@AndyKimNJ), X (Mar. 20, 2021, 10:35 AM), <https://twitter.com/AndyKimNJ/status/1373282039609311238> [<https://perma.cc/4LVG-8DEU>].

²⁸⁰ *Id.*

²⁸¹ Christina T. Le & Thomas T. Wong, *Lack of Fairness and Transparency in the Assignment Restrictions Process Undercuts Both Employees and the State Department. Asian-American Employees Took It On*, FOREIGN SERV. J. (Sept. 2017), <https://afsa.org/pursuit-transparency-assignment-restriction-policies> [<https://perma.cc/Y6VR-53SD>].

²⁸² See *id.*; Heath, *supra* note 278 (describing language inserted into 2017 State Department Authorization Act that created “a formal appeals process”).

²⁸³ See Laura Kelly, *Asian American Lawmakers say State’s ‘Assignment Restrictions’ Discriminate*, THE HILL (May 11, 2021, 12:57 PM), <https://thehill.com/homenews/administration/552887-asian-american-lawmakers-say-states-assignment-restrictions> [<https://perma.cc/EV64-SKMU>] (noting that assignment-restriction recipients nearly doubled from 168 employees in 2016 to 307 employees in 2017).

that 70% of 132 respondents perceived bias in the assignment restriction process.²⁸⁴ Most respondents with a restriction reported that they did not receive a reasoned explanation; among those who did, half detected “outright factual errors,” including “incorrect assertions of immediate family members living in China, and restrictions imposed over parents who” fled China before the Communist takeover.²⁸⁵ Many felt, in the words of one congressman, that there was “literally no basis” for their restrictions other than “their last name or their ethnicity.”²⁸⁶

In March 2021, over a hundred Asian-American diplomats and national security officials issued a letter opposing discriminatory practices generally. The letter explains that “the xenophobia that is spreading as U.S. policy concentrates on great power competition has exacerbated suspicions, microaggressions, discrimination, and blatant accusations of disloyalty simply because of the way we look.”²⁸⁷ “Treating all Asian-Americans working in national security with a broad stroke of suspicion, rather than seeing us as valuable contributors, is counterproductive to the greater mission of securing the homeland,” the letter adds.²⁸⁸ “We must . . . learn from painful elements of American history, when hostilities abroad resulted in undue prejudice . . . [against] Japanese-Americans.”²⁸⁹

Concerns from within the foreign policy establishment struck a chord with several legislators. Like others, Congressman Ted Lieu (D-CA) leaned on historical comparisons: the “inability of our government . . . to distinguish between a foreign government and Americans of Asian descent” is what “caused the American government to intern over 120,000 Americans of Japanese descent”²⁹⁰ Congressman Kim spoke publicly about his experiences with assignment restrictions, describing them as bureaucratic jargon for a “fail[ed] loyalty test.”²⁹¹ In 2021, four congressmen introduced the *Accountability in Assignment Restrictions*

²⁸⁴ Heath, *supra* note 278.

²⁸⁵ *Id.*

²⁸⁶ Kelly, *supra* note 283 (internal quotation marks omitted).

²⁸⁷ *Asian-Americans and Pacific Islanders in National Security Statement on Anti-Hate and Discriminatory Practices*, <https://docs.google.com/forms/d/e/1FAIpQLSeiE69q4M8Jk8JcQuBFiW102zzoz2kOkYICTrY5g1x2L50fGA/viewform> [<https://perma.cc/P8ZJ-UTKZ>] [hereinafter National Security Professionals Letter].

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Heath, *supra* note 278 (internal quotation marks omitted).

²⁹¹ Andy Kim (@AndyKimNJ), X (Mar. 20, 2021, 10:35 AM), <https://twitter.com/AndyKimNJ/status/1373282038355259394> (internal quotation marks omitted) [<https://perma.cc/6NC8-KEBL>].

Act to establish an independent appeals process and to mandate the tracking of race and ethnicity data.²⁹²

As more policy elites began to speak out, many framed the problem around security. One thinktank leader described assignment-restrictions reform as a “national security imperative.”²⁹³ Harry Harris, formerly the Commander of United States Pacific Command, echoed the same, urging that “[i]n this hyper-competitive and dangerous global landscape . . . , we must ensure our best and most talented diplomats are representing our nation at the forward edge of diplomacy.”²⁹⁴ Others stressed the need to draw on employees’ “cultural and linguistic skills.”²⁹⁵ The prevalence of security frames owes in part to tactical choices made by reform advocates. In their 2021 letter, national security professionals urged that “Chinese-Americans are America’s greatest asset in promoting improved understanding and providing a unique bulwark to counter malign Chinese” policies.²⁹⁶ The AAFAA has said that assignments-restriction reform would improve our “national security readiness.”²⁹⁷

The Biden Administration came into power hoping to distinguish its China policy from its predecessor’s, despite substantive continuity in several areas.²⁹⁸ Contra Trump, Biden officials stressed the importance of promoting democratic and egalitarian values at home.²⁹⁹ In a major speech on China policy, Secretary of State Antony Blinken argued that American “democracy” was a “core source of national strength,” with

²⁹² Press Release, Ted Lieu, Member, House of Representatives, Rep Lieu Introduces Bill to Ensure Accountability in State Department Assignment Restrictions Process (Sept. 16, 2021), <https://lieu.house.gov/media-center/press-releases/rep-lieu-introduces-bill-ensure-accountability-state-department> (internal quotation marks omitted) [<https://perma.cc/56PX-FBLL>] [hereinafter Lieu Release].

²⁹³ *Id.* (internal quotation marks omitted).

²⁹⁴ *Id.* (internal quotation marks omitted).

²⁹⁵ *Id.* (internal quotation marks omitted).

²⁹⁶ National Security Professionals Letter, *supra* note 287.

²⁹⁷ Lieu Release, *supra* note 292. Interestingly, the argument here was that Asian-American diplomats could use their foreign understandings to enhance American security, not simply that Asian-Americans like Congressman Kim did not have the ties that were imputed to them.

²⁹⁸ Biden officials stressed that the new Administration’s China strategy “represented a departure from the approach favored by former U.S. President Donald Trump.” *Kurt Campbell: U.S. and China Can Co-Exist Peacefully*, ASIA Soc’y POL’Y INST. (July 6, 2021), <https://asiasociety.org/policy-institute/kurt-campbell-us-and-china-can-co-exist-peacefully> [<https://perma.cc/5RCE-8992>].

²⁹⁹ See Jacob M. Schlesinger, *What’s Biden’s New China Policy? It Looks a Lot Like Trump’s*, WALL ST. J. (Sept. 10, 2020), <https://www.wsj.com/articles/whats-bidens-china-policy-it-looks-a-lot-like-trumps-11599759286> [<https://perma.cc/NV9Z-VANA>] (describing “promoting democracy and human rights” as a key component of Biden’s China strategy).

the capacity to “unleash [the people’s] full potential.”³⁰⁰ In the same section, Blinken addressed racial discrimination.

We . . . know from our history that when we’re managing a challenging relationship with another government, people from that country or with that heritage can be made to feel that they don’t belong here – or that they’re our adversaries. Nothing could be further from the truth. . . . Mistreating someone of Chinese descent goes against everything we stand for as a country³⁰¹

Blinken and others at the Department were thus highly receptive to criticisms of assignment restrictions. At a 2021 hearing, Blinken told Congressman Lieu that he was “very concerned” about reports of bias in the assignment-restrictions process.³⁰² Half a year later, Blinken announced that the Department had lifted over half of all assignment restrictions, “opening up new possible assignments for hundreds of” employees.³⁰³ And in March 2023, Blinken announced that the Department would no longer issue assignment restrictions at all.³⁰⁴

U.S.-China competition shaped the course of these events in several ways. At the start, growing paranoia within the security establishment led to an apparent increase in questionable assignment restrictions, or at the very least, to perceptions of bias. This, in turn, prompted many affected and allied foreign policy professionals to sound the alarms, mobilizing organizations like the AFAA and legislators with oversight authority over the Department. Arguments to dismantle assignment restrictions were framed not merely in moralistic terms, but as instrumentally necessary to meet the China challenge. The coupling

³⁰⁰ Antony J. Blinken, U.S. Sec’y of State, Speech at The George Washington University: The Administration’s Approach to the People’s Republic of China (May 26, 2022) [hereinafter Blinken Speech], <https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china> [<https://perma.cc/K8AG-J3X7>].

³⁰¹ *Id.*

³⁰² Heath, *supra* note 278.

³⁰³ Antony J. Blinken, U.S. Sec’y of State, Remarks at the Foreign Service Institute, George P. Shultz National Foreign Affairs Training Center: Modernization of American Diplomacy (Oct. 27, 2021), <https://www.state.gov/secretary-antony-j-blinken-on-the-modernization-of-american-diplomacy> [<https://perma.cc/KBF5-NYZS>].

³⁰⁴ See Letter From Antony J. Blinken to Colleagues at U.S. Department of State (Mar. 2023) [hereinafter Blinken Letter], <https://www.politico.com/f/?id=00000187-0a39-d989-a7a7-afbd4d460000> [<https://perma.cc/D2ED-MXD9>]; Daniel Lippman, *State Department Ends ‘Assignment Restrictions’ Policy that Some Called Discriminatory*, POLITICO (Mar. 22, 2023, 2:03 PM), <https://www.politico.com/news/2023/03/22/state-ends-assignment-restrictions-policy-00088310> [<https://perma.cc/P4R9-K2ZE>]. Existing assignment restrictions would be subject to “a review and appeals process consistent with that of security clearance denials or revocations” and several other designations would be retained. Blinken Letter, *supra* note 304.

of diversity and security goals was especially appealing to Biden officials seeking to distinguish their more pro-democratic China policies from their predecessors.’

Understood in this way, the abolition of assignment restrictions evokes historic episodes of rights expansion. While the scale of reform is not comparable to the civil rights victories of the Cold War, both stories involve a conscious effort to link pro-democratic reforms at home to geopolitical struggles abroad. In demanding equal treatment, Asian-American national security professionals urged that they had “the linguistic and cultural intelligence to better understand the other side[]”³⁰⁵ Secretary Blinken framed his decision to end new assignment restrictions as an effort to “unlock the full potential of our workforce”³⁰⁶ In this light, expanding opportunities for Asian-American employees was not a concession with security risks; rather it stood to enhance the government’s ability to compete effectively. Graber observes that rights can expand when conflict requires “mobilization of the beneficiaries of a rights protective policy for success.”³⁰⁷

Still others have argued against assignment restrictions on grounds that even more closely recall Cold War narratives around race and democracy. One anti-assignment-restrictions advocate wrote in 2022 that such policies, along with a pandemic-related surge in anti-Asian rhetoric, “undermine[d] U.S. credibility on human rights issues abroad.”³⁰⁸ While it is hard to know whether such arguments resonated with Biden officials, it is not implausible to think they mattered. The Biden Administration has been keen to foster democratic and inclusion values, in explicit contrast with its predecessor, and has simultaneously been attuned to Chinese accusations of human rights hypocrisy.³⁰⁹ Assignment restrictions may not have been a major rights issue in the grand scheme of national policy, but lifting them was a fairly costless means of effectuating the Administration’s larger policy goals.

In sum, the new global conflict is beginning to produce, in attenuated form, a familiar politics of threat that has led to both rights contraction and expansion. Following next is a discussion of how a similar politics has begun to shape not only rights, but also the balance of constitutional powers.

³⁰⁵ National Security Professionals Letter, *supra* note 287.

³⁰⁶ Blinken Letter, *supra* note 304.

³⁰⁷ Graber, *supra* note 122, at 97 (brackets and internal quotations omitted).

³⁰⁸ Aimee Yan, *Asian American Representation is a National Security Imperative*, CTR. FOR STRATEGIC AND INT’L STUD. (Jan. 2022), https://defense360.csis.org/wp-content/uploads/2022/01/Yan_Represent.pdf [<https://perma.cc/Z8AH-G3G5>].

³⁰⁹ See *supra* Section I.B.

III STRUCTURE

Global rivalry is often associated with changes to structural and partisan accountability. The conventional story is one of accountability decline: presidential power expands, congress acquiesces, courts defer, and political parties rally around the flag. Yet on other occasions, mechanisms of structural accountability have limited state action, even amid foreign threat. Part III highlights how the new global conflict both conforms with and departs from the conventional story. The politics of threat has led to executive aggrandizement and increased interbranch and interparty collaboration. Yet on several occasions, lower courts have curbed instances of presidential overreach.

A. *Historical Patterns*

Foreign conflicts are often linked to a decrease in structural and partisan accountability. In the conventional story, executive power is the first to expand.³¹⁰ Clinton Rossiter stated as “an axiom of political science” that “national emergencies bring an increase in executive power and prestige, always at least temporarily, more often than not, permanently.”³¹¹ Part of the reason is structural.³¹² Alexander Hamilton predicted that the executive would enjoy inherent advantages in crisis: speed, decisiveness, and secrecy.³¹³ Other reasons sound more in politics.

³¹⁰ See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) (“Conflict abroad almost always enhances executive power at home.”); see generally FLAHERTY, *supra* note 126 (showing growth in executive power throughout American history).

³¹¹ Clinton Rossiter, *War, Depression, and the Presidency, 1933–50*, SOC. RSCH.: AN INT’L Q. POL. & SOC. SCI., Dec. 1950, at 417; see also CORWIN, *supra* note 14, at 38–64 (detailing World War II’s effects on enlarging executive power).

³¹² See HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 118–19 (1990) (“The presidency . . . is ideally structured for the receipt and exercise of power.”).

³¹³ See THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number”); Jide Nzelibe & John Yoo, Essay, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006) (“As Alexander Hamilton argued in *The Federalist No. 70*, the executive is structured for speed and decisiveness in its actions and is better able to maintain secrecy in its information gathering and its deliberations”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 287–88 (2001) (describing the “vaunted advantages of a unitary executive—vigor, dispatch, and secrecy”). *But see* Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1553 (2009) (highlighting that, especially in the context of counterterrorism operations, the “attention to the structural benefits of flexibility, unity, and speed grossly discounts the burdens that such organizational characteristics impose on the executive branch”). For a more general exposition of presidential incentives to unilateral action, see Terry M. Moe &

That presidents are directly accountable for wartime performance drives them to accrue more power.³¹⁴

Whatever the causes, history is replete with episodes of conflict-driven executive aggrandizement that undermine Madisonian ideals of power diffusion.³¹⁵ Starting with Jefferson, American Presidents have routinely deployed military forces abroad without congressional approval.³¹⁶ President Lincoln suspended the writ of habeas corpus without congressional authorization during the Civil War.³¹⁷ The War Powers Resolution, Congress's post-Vietnam effort to constrain presidential use of armed forces abroad, has largely failed to reign in executive branch unilateralism in force deployment.³¹⁸ Courts too have "long deferred to the political branches in times of war and emergency."³¹⁹ They have upheld the curfew and internment of Japanese citizens and residents,³²⁰ validated the use of military commissions to

William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG., 132, 132 (1999).

³¹⁴ Cf. Erik Voeten & Paul R. Brewer, *Public Opinion, the War in Iraq, and Presidential Accountability*, J. CONFLICT RESOL., Oct. 2006, at 809, 811 (analyzing different forms of public accountability presidents may face while waging and managing wars). Both structure and politics interact to expand executive power. See Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678 (2005) ("The advantages conferred by the President's first-mover position and the rally round the flag effect enable Presidents to obtain quite generous authorizations from Congress, which they can then use as springboards for a wide range of actions.").

³¹⁵ See THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("[U]nless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."). Justice Frankfurter's concurrence in *Youngstown* spoke of the "long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).

³¹⁶ Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1818 (1996).

³¹⁷ See FELDMAN, *supra* note 122, at 246.

³¹⁸ See PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 191 (2009) ("In the area of military policy making, the War Powers Resolution, in its current form, has simply proven inadequate to discipline executive branch unilateralism."); see also POSNER & VERMEULE, *supra* note 128, at 86 (describing the War Powers Resolution as "dead letter especially after President Clinton's rather clear breach of its terms during the Kosovo conflict").

³¹⁹ Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 496 (2023); see also *id.* at 496–512 (detailing cases). Emergencies further heighten the rationale for judicial foreign affairs deference generally. See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 365–67 (2019) (reviewing judicial foreign affairs deference doctrines).

³²⁰ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (upholding a dusk-to-dawn curfew on everyone of Japanese ancestry on the West Coast); *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding constitutionality of the exclusion order); see also Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster*, 98 TEX. L. REV. 735, 735–37 (2020).

try saboteurs and war criminals,³²¹ and sustained prosecutions against wartime dissenters under the Espionage Act and the Smith Act.³²² In many of these cases, asserts Geoffrey Stone, judges largely “*presumed* that the actions of . . . officials were constitutional whenever they acted in the name of national security.”³²³

Foreign conflicts can also erode political competition by generating pressure for bipartisanship and public solidarity. Political scientists have documented surges in bipartisanship around both world wars, the Cold War, and after the September 11 attacks.³²⁴ John Mueller first used the phrase, “rally around the flag,” to denote short-term crisis-driven boosts to presidential popularity,³²⁵ but the concept can also describe longer time horizons. For example, the Cold War is said to have involved over two decades of “bipartisan consensus about the means and ends of American foreign policy,” when opposition parties were more likely to defer to presidential foreign affairs initiatives.³²⁶ Rally effects can lead to effective government, but they also risk styming inter-branch and inter-party competition, locking in policy positions that would benefit from scrutiny. Conflict-driven bipartisanship is thus worrying on both Madisonian and political realist accounts of the separation of powers.³²⁷

The conventional story of the unfettered wartime executive does not always hold however.³²⁸ Congress, courts, and parties have on

³²¹ *Ex parte Quirin*, 317 U.S. 1, 18–19, 46 (1942) (denying eight Nazi saboteurs’ habeas corpus petitions and holding that the Constitution authorized their trial by military commission); *In re Yamashita*, 327 U.S. 1, 25 (1946) (holding that the trial of those charged with war crimes before a military commission “did not violate any military, statutory, or constitutional command”); see JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 50–52 (2007) (describing the Supreme Court’s acquiescence to Roosevelt’s plan to try saboteurs by military court); Wiecek, *supra* note 122, at 45–55, 60–64 (tracing the Court’s deference to the Executive regarding the use of military commissions to try both the Nazi saboteurs and Japanese commanders accused of war crimes).

³²² Stone, *supra* note 124, at 1317–19, 1325–27.

³²³ *Id.* at 1317–18 (noting that during the First World War, one person was sentenced to twenty years for distributing leaflets urging the non-reelection of conscription supporters).

³²⁴ Trubowitz & Mellow, *supra* note 116, at 166–68 (analyzing data from *voteview.com*).

³²⁵ John E. Mueller, *Presidential Popularity from Truman to Johnson*, *AM. POL. SCI. REV.*, Mar. 1970, at 18, 21.

³²⁶ Wittkopf & McCormick, *supra* note 116, at 627–28.

³²⁷ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2312–13 (2006) (arguing that historic “competition between the legislative and executive branches was displaced by competition between two major parties”). *But see* JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 28–35 (2017) (contending contra partisanship-based arguments that Congress has the motivation to assert itself against other branches).

³²⁸ See KOH, *supra* note 312, at 4 (arguing that “the nation has adhered to a foreign policy decision-making structure premised on the balanced institutional participation of all three governmental branches”); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 *MICH. L. REV.* 2565, 2568 (2003) (arguing that certain

notable occasions sought to limit executive prerogatives in times of conflict. Josh Chafetz writes that “Congress has . . . repeatedly used its powers of the purse to end, limit, or forestall military action.”³²⁹ As public opposition to the Vietnam War grew, for example, Congress twice forbade funding the war effort, first for ground combat troops in Cambodia, and then for the war entirely.³³⁰ “[B]y all accounts Congress’s behavior changed dramatically following the Vietnam war,” adds James Lindsay.³³¹ “The deference Congress once accorded the president gave way to active questioning of presidential initiatives.”³³² Courts too have on notable occasions sought to check wartime assertions of executive power. Cases include: *Ex parte Milligan*,³³³ *Ex parte Endo*,³³⁴ *Duncan v. Kahanamoku*,³³⁵ *Youngstown Sheet & Tube Co. v. Sawyer*,³³⁶ *New York Times Co. v. United States*,³³⁷ *Rasul*,³³⁸ *Hamdi*,³³⁹ and *Hamdan*.³⁴⁰ Of course, not all of these cases were durably successful or influential. *Milligan*’s sweeping rhetoric notwithstanding, its outcome was effectively undone two years later in *Ex parte McCardle*.³⁴¹ And while the terrorist detention cases have gotten much attention, Sinnar highlights how the Supreme Court has, since those cases, “nearly always deferred to the

academics underestimate “the valuable role that courts have played . . . in constraining emergency powers”).

³²⁹ CHAFETZ, *supra* note 327, at 74–75.

³³⁰ *Id.*; see also Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1390–91 (1994) (documenting uses of congressional power to halt U.S. use of force in conflicts in Angola and Hawaii).

³³¹ James M. Lindsay, *Congress and Foreign Policy: Why the Hill Matters*, POL. SCI. Q., Winter 1992–1993, at 607, 608.

³³² *Id.*

³³³ 71 U.S. 2, 131 (1866) (invalidating President Lincoln’s use of military tribunals to try and sentence civilians).

³³⁴ 323 U.S. 283, 302 (1944) (freeing Japanese-American citizen-detainee who was “concededly loyal”).

³³⁵ 327 U.S. 304, 324 (1946) (vacating convictions of U.S. citizens tried by military commission under Hawaiian martial law).

³³⁶ 343 U.S. 579 (1952) (affirming injunction against presidential seizure of steel mills to avert wartime strike).

³³⁷ 403 U.S. 713, 714 (1971) (holding that government cannot constitutionally enjoin publication of the Pentagon Papers).

³³⁸ 542 U.S. 466, 470–73 (2004) (finding habeas jurisdiction to review legality of Guantanamo detentions).

³³⁹ 542 U.S. 507, 509 (2004) (holding that Guantanamo citizen-detainee cannot be detained indefinitely without a meaningful opportunity to contest the basis for detention).

³⁴⁰ 548 U.S. 557, 567 (2006) (finding illegality in Bush-era military commissions to try Guantanamo detainees).

³⁴¹ 74 U.S. (7 Wall.) 506, 514 (1868) (“Without jurisdiction, the court cannot proceed at all in any cause.”); see also Issacharoff & Pildes, *supra* note 120, at 301 (writing that, in concluding the Court lacked jurisdiction, *McCardle*’s practical effect “was to permit the use of military tribunals”).

executive branch when the latter invokes national security.”³⁴² Finally, the flipside to rally-around-the-flag effects is that foreign conflicts can sometimes still generate partisan opposition. The Cold War foreign policy consensus was “shattered” by the Vietnam War.³⁴³ So too was the post-September 11 consensus by the war in Iraq.³⁴⁴ William Howell and Jon Pevehouse assert that the “partisan composition of Congress” can be a “decisive factor in determining whether lawmakers will oppose or acquiesce in presidential calls for war.”³⁴⁵

B. Accountability Decline

The new global conflict is beginning to reprise conventional legal patterns associated with foreign conflict. Executives have at times overextended to meet challenges associated with China, while the political branches and parties are increasingly agreed on the contours of the China threat. Still, lower courts have not always deferred, acting on notable occasions to curb executive overreach.

1. The National Security Executive

At the presidential level, the new global conflict has led to a proliferation of China-related executive orders. While not all of these orders have been power-enhancing, several, to be explained below, have been *ultra vires* in their design or implementation. Executive orders and related proclamations and directives present special accountability risks. Although they have historically “effected significant, lasting policy and structural change,”³⁴⁶ they are limited by few *ex ante* constraints. Unlike statutes, they need not meet the requirements of bicameralism and presentment; and unlike agency action, they need not conform with the Administrative Procedure Act (APA).³⁴⁷ These advantages make executive orders an especially favored tool in times of exigency.

³⁴² Shirin Sinnar, *A Label Covering a “Multitude of Sins”: The Harm of National Security Deference*, 136 HARV. L. REV. F. 59, 69 (2022).

³⁴³ Wittkopf & McCormick, *supra* note 116, at 628.

³⁴⁴ See William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars: Partisan Politics and Presidential Power*, FOREIGN AFF., Sept.–Oct. 2007, at 95, 96.

³⁴⁵ *Id.*

³⁴⁶ Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119, 1179 (2020); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2291 (2001) (“Presidents . . . discovered long ago that they could use executive orders . . . to take various unilateral actions, sometimes of considerable importance.”); Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2032–33 (2015) (listing executive orders that suspended habeas, desegregated the military, stalled stem cell research, and authorized surveillance).

³⁴⁷ See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1778 (2019) (“[T]he APA’s standards of review still do not apply to the actions or orders of the president.”); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV.

China-related presidential orders noticeably increased from the Bush to the Obama Administrations. A major driver was the Committee on Foreign Investment in the United States (CFIUS), an interagency committee that conducts national security reviews of inbound foreign investments. Beginning with Obama, CFIUS began to scrutinize Chinese investments more closely. CFIUS reviews prompted President Obama to issue an order blocking a Chinese company from acquiring a U.S. semiconductor firm—the first time a President had formally invoked CFIUS to block an acquisition before consummation—and another order forcing a company owned by Chinese nationals to divest itself of four wind farm project companies located near U.S. naval airspace.³⁴⁸

President Trump stands out in his use of presidential authorities to address China. According to a legislative commission, he issued, in a single term, eight executive orders that “primarily involved China” and seven orders that “affected key policy areas relating to the U.S.-China relationship.”³⁴⁹ Major orders include the imposition of sanctions on Chinese officials for human rights violations,³⁵⁰ termination of preferential treatment for Hong Kong and of certain exchanges with China and Hong Kong,³⁵¹ prohibitions on transacting with WeChat and TikTok,³⁵² prohibitions on trading the securities of firms tied to China’s military,³⁵³ and prohibitions on transacting with certain Chinese-connected software applications such as Alipay.³⁵⁴ Most of these orders contained or relied on declarations of emergency. In addition, President

539, 552–53 (2005) (“In contrast to legislation or agency regulation, there are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive.”); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that the Administrative Procedure Act’s “agency” references do not refer to the president).

³⁴⁸ See Order, 81 Fed. Reg. 88607 (Dec. 2, 2016); Order, 77 Fed. Reg. 60281 (Sept. 28, 2012). President Obama also issued two other orders with a China connection. One order called for a “whole-of-government effort” to build a new generation of supercomputers—believed to be a response to China’s record-holder status. See Exec. Order No. 13702, 80 Fed. Reg. 46177 (July 29, 2015). Another took measures against foreign persons engaged in significant “malicious cyber-enabled activities.” Exec. Order No. 13694, 80 Fed. Reg. 18077 (Apr. 1, 2015).

³⁴⁹ *Timeline of Executive Actions on China (2017–2021)*, U.S.-CHINA ECON. & SEC. REV. COMM’N (Apr. 1, 2021), <https://www.uscc.gov/research/timeline-executive-actions-china-2017-2021> [<https://perma.cc/4KLS-QCZH>]. This is not to mention the Administration’s well over a hundred other China-related measures, including CFIUS-related activity. *Id.*

³⁵⁰ Exec. Order No. 13818, 82 Fed. Reg. 60839 (Dec. 20, 2017).

³⁵¹ Exec. Order No. 13936, 85 Fed. Reg. 43413 (July 14, 2020).

³⁵² *Supra* note 237.

³⁵³ Exec. Order No. 13959, 85 Fed. Reg. 73185 (Nov. 12, 2020); Exec. Order No. 13974, 86 Fed. Reg. 4875 (Jan. 13, 2021) (amending the previous order to allow for divestitures).

³⁵⁴ Exec. Order No. 13971, 86 Fed. Reg. 1249 (Jan. 5, 2021).

Trump issued in 2020 a proclamation forbidding Chinese students with perceived military ties from entering the country.³⁵⁵

President Biden has issued more than a half dozen executive orders connected to China.³⁵⁶ He began by rescinding the TikTok, WeChat, and Alipay et al. orders, calling instead for a general “evidence-based” review of the risks of software apps linked to foreign adversaries.³⁵⁷ The new order nevertheless framed itself as an implementation of President Trump’s 2019 emergency declaration of ICTS risks from foreign adversaries.³⁵⁸ President Biden later issued an executive order seeking to focus CFIUS’s national security reviews on risks widely associated with Chinese firms, including a transaction’s effects on critical U.S. supply chains, U.S. technological leadership, and the security of sensitive personal data.³⁵⁹ The order, the first presidential directive on appropriate CFIUS considerations, “formalize[d] a new, broader interpretation of the committee’s authority.”³⁶⁰ President Biden has also barred U.S. entities from investing in Chinese companies linked to China’s defense and surveillance sectors.³⁶¹ The order “expand[ed] the scope of the national emergency” declared in an earlier Trump order.³⁶²

³⁵⁵ Proclamation No. 10043, 85 Fed. Reg. 34353 (May 29, 2020).

³⁵⁶ Other than the executive orders discussed below, they include orders to bolster supply chain resiliency, to strengthen “Made in America” policies, and to implement the CHIPS Act. *See* Exec. Order No. 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021); Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021); Exec. Order No. 14080, 87 Fed. Reg. 52847 (Aug. 25, 2022). While these orders are not explicitly targeted at China, the context in which they were issued indicates US-China relations played a role. *See, e.g.*, Jim Tankersley & Ana Swanson, Amid Shortfalls, Biden Signs Executive Order to Bolster Critical Supply Chains, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/02/24/business/biden-supply-chain-executive-order.html> [<https://perma.cc/CN7U-A7YD>] (noting in the context of Executive Order 14017 that “the executive order did not target imports from any specific country, but it is being viewed as an early salvo in the administration’s economic battle with China”).

³⁵⁷ Exec. Order No. 14034, 86 Fed. Reg. 31423 (June 9, 2021).

³⁵⁸ *See id.* (“I, Joseph R. Biden Jr., President of the United States of America, find that it is appropriate to elaborate upon measures to address the national emergency . . . declared in Executive Order 13873 of May 15, 2019 . . .”).

³⁵⁹ Exec. Order No. 14083, 87 Fed. Reg. 57369 (Sept. 15, 2022).

³⁶⁰ David E. Sanger, *Biden Issues New Order to Block Chinese Investment in Technology in the U.S.*, N.Y. TIMES (Sept. 15, 2022), <https://www.nytimes.com/2022/09/15/us/politics/biden-china-tech-executive-order.html> [<https://perma.cc/ZHU5-A8QJ>]; *see also* *Fact Sheet, President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States*, WHITE HOUSE (Sept. 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states> [<https://perma.cc/XJ4G-3KTZ>] (“Specifically, this E.O. provides direction to CFIUS by elaborating on existing statutory factors and adds several national security factors for CFIUS to consider . . .”).

³⁶¹ Exec. Order No. 14032, 86 Fed. Reg. 30145 (June 3, 2021).

³⁶² *Id.*

Finally, the Biden Administration issued an order that began a process of proscribing forms of outbound investment to China on national security grounds.³⁶³

In several of these cases, inflated national security considerations have led the executive to exceed its statutory authorities or to violate procedural norms. President Trump's TikTok and WeChat orders, discussed in Part II, are exemplars of conflict-driven executive aggrandizement. Although IEEPA empowers presidents to ban harmful transactions during emergencies, presidents may not prohibit or regulate, directly or indirectly, the importation or exportation "of any information or informational materials" or "any . . . personal communication, which does not involve a transfer of anything of value."³⁶⁴ By preventing U.S. users from sharing and receiving content on TikTok, the TikTok prohibitions fell well within these exceptions.³⁶⁵ IEEPA lists, as sample "informational materials," news, artworks, films, and photographs.³⁶⁶ These are all pervasively shared items on TikTok.³⁶⁷ Moreover, TikTok users, as in other platforms, routinely share personal data with no economic value in their posts, comments, and messages.³⁶⁸ So the TikTok prohibitions were probably *ultra vires* on grounds of IEEPA's "personal communication" exception as well.³⁶⁹ The WeChat prohibitions were likely unauthorized for similar reasons.

The Trump Administration has also deployed questionable readings of its statutory authorities to enforce its order addressing China's civil-military industrial complex. The order in question declared a national emergency stemming from the support given by ostensibly private Chinese companies to the country's military and intelligence sectors.³⁷⁰ To address this emergency, the order forbade all U.S. persons from inter alia transacting in the publicly traded securities of "Communist Chinese military companies" (CCMCs), as designated by the Secretary of Defense pursuant to the National Defense Authorization Act for Fiscal Year 1999.³⁷¹ That law defines a CCMC to include any person

³⁶³ Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 9, 2023).

³⁶⁴ 50 U.S.C. § 1702(b)(1), (b)(3).

³⁶⁵ See *TikTok v. Trump*, 490 F. Supp. 3d 73, 81 (D.D.C. 2020).

³⁶⁶ 50 U.S.C. § 1702(b)(3).

³⁶⁷ See *TikTok*, 490 F. Supp. 3d at 81 (noting that TikTok content qualifies as "information and informational materials" under 50 U.S.C. § 1702(b)(3)).

³⁶⁸ *Id.* at 83.

³⁶⁹ The government's countervailing arguments were weak. It asserted, for example, that plaintiff's argument would create an implausible "IEEPA-free" zone, but the statute's specific enumeration of exceptions forecloses that argument. See *id.* at 82.

³⁷⁰ Exec. Order No. 13959, 85 Fed. Reg. 73185 (Nov. 12, 2020).

³⁷¹ *Id.* The order was later modified by Exec. Order No. 13974, 86 Fed. Reg. 4875 (Jan. 13, 2021).

“owned or controlled by the People’s Liberation Army.”³⁷² Two Chinese companies that later appeared in the Secretary’s CCMC lists—Xiaomi Corporation and Luokung Technology Corporation—successfully sued under the APA to prevent the Department of Defense from enforcing their CCMC designations.³⁷³

The two cases, *Xiaomi Corporation v. Department of Defense* and *Luokung Technology Corporation v. Department of Defense*, illustrate how threat politics can lead to dubious readings of the executive’s statutory authorities and a disregard for ordinary administrative process. In the course of the Xiaomi litigation, for example, it was revealed that the Department’s decision document relied on two thin bases for its designation: that Xiaomi’s CEO was recognized by the Ministry of Industry and Information Technology (MIIT) as an “Outstanding Builder[] of Socialism with Chinese Characteristics,” and that Xiaomi had plans to invest in 5G and AI capabilities, which, according to the Department, are “[c]ritical [t]echnologies essential to modern military operations.”³⁷⁴ Other than reciting these facts, the document offered no analysis as to why Xiaomi was therefore “owned or controlled by, or affiliated with” Chinese military entities.³⁷⁵ As the district court judge explained, however, Xiaomi specialized in consumer electronics, where 5G and AI were “quickly becoming industry standard.”³⁷⁶ That certain technologies have potential military applications did not prove an actual military affiliation.³⁷⁷ And because the MIIT award had been given to entrepreneurs of hot sauce, infant milk powder, and wine,³⁷⁸ that Xiaomi’s CEO received it was not substantial evidence of the company’s military affiliations either.³⁷⁹ Seeking to close this gap, the Department urged an implausibly expansive conception of the word “affiliated” to include entities with “common purpose” or “shared characteristics.”³⁸⁰ But that reading, the judge concluded, was belied by other sources, including the Department’s own regulatory definitions.³⁸¹

The Luokung litigation revealed substantively the same problems. The Department’s decision document was thin and conclusory, focusing

³⁷² Pub. L. 105-261, § 1237, 112 Stat. 2160 (Oct. 17, 1998).

³⁷³ *Xiaomi Corp. v. Dep’t of Def.*, No. 21-280, 2021 WL 950144 (D.D.C. Mar. 12, 2021); *Luokung Tech. Corp. v. Dep’t of Def.*, 538 F. Supp. 3d 174 (D.D.C. 2021).

³⁷⁴ *Xiaomi*, 2021 WL 950144, at *3–*4 (alterations in original).

³⁷⁵ *Id.* at *5.

³⁷⁶ *Id.* at *8.

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Xiaomi Corp. v. Dep’t of Def.*, No. 21-280, 2021 WL 950144, at *8 (D.D.C. Mar. 12, 2021).

³⁸⁰ *Id.* at *6.

³⁸¹ *Id.* at *6–*7.

on the *potential* military applications of Luokung’s business in AI and commercial space, rather than evidence of an actual affiliation.³⁸² And the Department urged an expansive reading of the term “affiliated with,” which the same judge rejected on similar grounds.³⁸³ The court also stated that although APA violations decided the case, it was “concerned” that a public company was subject to delisting “with no notice or process whatsoever.”³⁸⁴

Like the WeChat and TikTok cases, the CCMC cases evidence executive overreach in the face of threats associated with China. Weak evidence of military affiliations was combined with improbably broad readings of the executive’s powers to target certain firms associated with a global rival. As the district court found in the course of weighing the equities, the purported national security justifications were substantially overstated.³⁸⁵

Although the Trump Administration appears to have overreached in these specific cases, certain Chinese firms can of course present security challenges. It is well established that Party institutions embed themselves within Chinese firms of all types—not only state-owned enterprises, which are all held by a single state agency,³⁸⁶ but also “private” firms.³⁸⁷ Local laws also appear to require Chinese firms to share data with intelligence services—a concern that has received significant attention in recent public debates over the future of TikTok in the United States.³⁸⁸ While the Defense Department’s evidence on Xiaomi was weak, this does not prove that evidence of its military ties are nonexistent, or that other ostensibly private firms, such as Huawei, are similarly situated.³⁸⁹ The point rather is that in its efforts

³⁸² *Luokung Tech. Corp. v. Dep’t of Def.*, 538 F. Supp. 3d 174, 189 (D.D.C. 2021) (“The reference to a ‘potential affiliation’ between Luokung and the PRC National Police is completely conclusory and lacks any sort of support in the record.”).

³⁸³ *Id.* at 184–88.

³⁸⁴ *Id.* at 191 n.13.

³⁸⁵ *Id.* at 195 (stating that the government had only a “diminished national security interest”); *Xiaomi Corp.*, 2021 WL 950144, at *12 (expressing “skeptic[ism] that weighty national security interests are actually implicated”).

³⁸⁶ See Wu, *supra* note 17, at 275 (describing State-owned Assets Supervision and Administration Commission (SASAC), located within the State Council, which is China’s chief administrative authority); Lin & Milhaupt, *supra* note 91, at 700, 734–45.

³⁸⁷ Wang, *supra* note 271.

³⁸⁸ See Joe McDonald & Zen Soo, *Why Does US See Chinese-Owned TikTok As a Security Threat?*, AP (Mar. 24, 2023), <https://apnews.com/article/tiktok-bytedance-shou-zi-chew-8d8a6a9694357040d484670b7f4833be> [<https://perma.cc/SFY4-8BEL>] (describing provisions of China’s 2017 National Intelligence Law and 2014 Counter-Espionage Law that seemingly require organizations to assist with state intelligence work).

³⁸⁹ See Christopher Ashley Ford, Remarks at the U.S. Department of State: Huawei and Its Siblings, the Chinese Tech Giants: National Security and Foreign Policy Implications (Sept. 11, 2019), <https://2017-2021.state.gov/huawei-and-its-siblings-the-chinese-tech-giants->

to address dangers associated with Chinese firms, the executive has at times appeared to assume significant risks or malign intentions without evidence. The opacity of the Chinese private sector is a reason for careful scrutiny, not an excuse to abandon ordinary process.

2. *Interbranch and Interparty Consensus*

Another notable development from an accountability perspective is a growing interparty and interbranch consensus on the China threat. Although increasing agreement can lead to productive and effective government, it can also narrow space for policy disagreement, lessening consideration of critical perspectives while raising the risks of policy blunder. The new global conflict risks what Ashley Deeks and Kristen Eichensehr call “frictionless government,” where “overwhelming agreement fosters an absence of friction in the policy-making process that comes at a cost to checks and balances and to sound policy decisions born of those checks.”³⁹⁰

Many have commented on a growing crossparty consensus on China. One thinktank researcher called “China policy . . . the one last bastion of bipartisan policy on the national security side.”³⁹¹ Among Kevin McCarthy’s first major acts as House Speaker was forming the House Select Committee on Strategic Competition between the United States and the Chinese Communist Party—an act overwhelmingly approved 366–65, with support from 146 Democrats.³⁹² “This is an issue that transcends our political parties,” McCarthy said.³⁹³ Converging views on China have helped break logjams associated with modern polarized politics, most notably, with the CHIPS and Science Act, a major effort to bolster semiconductor manufacturing and other strategic industries

national-security-and-foreign-policy-implications [https://perma.cc/W9QN-AN8B]; Balding & Clarke, *supra* note 21, at 2 (noting that Huawei’s structure and ownership suggest deeper state-linked control, challenging its private status).

³⁹⁰ Ashley Deeks & Kristen E. Eichensehr, *Frictionless Government & Foreign Relations*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 6).

³⁹¹ Benjy Sarlin & Sahil Kapur, *Why China May Be the Last Bipartisan Issue Left in Washington*, NBC NEWS (Mar. 21, 2021, 6:46 AM), <https://www.nbcnews.com/politics/congress/why-china-may-be-last-bipartisan-issue-left-washington-n1261407> [https://perma.cc/PZC2-JLCF].

³⁹² Joan E. Greve & Lauren Gambino, *Capitol Hill Finds Rare Bipartisan Cause in China—But it Could Pose Problems*, GUARDIAN (Feb. 26, 2023, 8:00 AM), <https://www.theguardian.com/us-news/2023/feb/26/chinese-balloon-bipartisan-capitol-hill-risk> [https://perma.cc/YSB7-5XWD].

³⁹³ *Id.*

in the United States.³⁹⁴ The White House framed the Act as a necessary response to China's rise.³⁹⁵

It is hard to pinpoint the exact moment politicians coalesced around the China challenge. As David Shambaugh explains, the new consensus “developed progressively and over time,” largely in response to the “Xi Jinping regime’s internally repressive and externally assertive policies.”³⁹⁶ Human rights advocates, security hawks, trade protectionists, and others have seen their interests slowly align over a host of Xi-era policies, from the treatment of Uyghurs in Xinjiang to hostile behavior in the South China Sea. Pew research surveys have documented an increasing souring of American public opinion about China. In 2022, Pew found that 82% of surveyed adults had unfavorable views of China, and that two-thirds described China as a “major threat,” a five-point increase since 2020 and a twenty-three-point increase from 2013.³⁹⁷ Public attitudes have no doubt shaped the views of politicians, and vice versa.³⁹⁸ The professional class—experts who brief, advise, and lobby political leaders on China—have also begun to converge.³⁹⁹ A recent study of American thinktanks found a “consensus on the issue of China” regardless of “ideological orientations.”⁴⁰⁰

The risks of such agreement are well known. Conflict-driven consensus raises the political costs of dissent, encouraging groupthink and rally effects and discouraging reasoned consideration of critical perspectives.⁴⁰¹ During the first hearing of the House Select Committee

³⁹⁴ China was also a factor in the enactment of the Bipartisan Infrastructure Deal. *See Fact Sheet—The Bipartisan Infrastructure Deal*, WHITE HOUSE (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal> [<https://perma.cc/5FRT-YS4Z>].

³⁹⁵ *See* Fact Sheet, *supra* note 105 (stating that the Act’s funds come with “strong guardrails” against building facilities in China and other countries of concern).

³⁹⁶ David Shambaugh, *The New American Bipartisan Consensus on China Policy*, CHINA-US FOCUS (Sept. 21, 2018), <https://www.chinausfocus.com/foreign-policy/the-new-american-bipartisan-consensus-on-china-policy> [<https://perma.cc/P7UH-BE2T>].

³⁹⁷ Christine Huang, Lauren Silver & Laura Clancy, *China’s Partnership with Russia Seen as Serious Problem for the U.S.*, PEW RSCH. CTR. (Apr. 28, 2022), <https://www.pewresearch.org/global/2022/04/28/chinas-partnership-with-russia-seen-as-serious-problem-for-the-us> [<https://perma.cc/N766-N3ND>].

³⁹⁸ *See* Shambaugh, *supra* note 396 (describing how Trump “tapped into” changing sentiment on China).

³⁹⁹ *See id.*

⁴⁰⁰ D.A. Kochegurov, *Formation of an Anti-Chinese Consensus Among US “Think Tanks”*: *From D. Trump to J. Biden*, 92 HERALD RUSSIAN ACAD. SCIS. S601, S609 (2022).

⁴⁰¹ *See, e.g.*, Gibbs McKinley, *The Pyrrhic Victory of a China Consensus*, DIPLOMAT (Mar. 9, 2023), <https://thediplomat.com/2023/03/the-pyrrhic-victory-of-a-china-consensus> [<https://perma.cc/3WJS-NL5V>] (emphasizing that “[m]utual validation is not a substitute for individual judgment” and can “very easily lead to disastrous consequences”); *see also* Deeks & Eichensehr, *supra* note 390.

on the CPC, all four witnesses urged, according to Max Boot, “the hardest of hard lines against Beijing.”⁴⁰² Unrepresented, he said, “were any of the numerous experts in the China-watchers community who would have warned of the risks of reckless confrontation,” of crossing the line from deterrence into provocation.⁴⁰³ Jessica Chen Weiss, a major voice on these issues, expressed a similar sentiment: The chair “has set the stage for anyone who raises questions about U.S. policy to be smeared as a friend of the Chinese Communist Party.”⁴⁰⁴ The concern, to be clear, is not merely an impoverishment of public discourse; it is the unreflective pursuit of consequential foreign policies. Both the 1964 Gulf of Tonkin Resolution authorizing military action in North Vietnam and the 2002 authorization of military force against Iraq enjoyed significant bipartisan majorities.⁴⁰⁵ Both decisions arguably count among the largest foreign policy mistakes of the last century.

Growing interparty consensus does not mean unanimity of opinion. American politicians were not at one on every aspect of foreign policy even at the height of early Cold War consensus, and there continue to be important variations on China policy today.⁴⁰⁶ Pew surveys suggest that Republicans generally view China more unfavorably than Democrats, and Republican politicians have generally spearheaded the harshest of the anti-China responses today.⁴⁰⁷ Yet according to a recent systematic analysis of China-related laws and legislative messaging, the new consensus is “undeniably substantive.”⁴⁰⁸ Moreover, even some variation in partisan views does not necessarily mean full consideration of contrary perspectives. Such variations may mask even deeper policy disagreements that are too politically risky to articulate. Or they may be a result of politicians proposing even more hawkish policies to differentiate themselves from those across the aisle.

Related to the idea of partisan consensus is interbranch consensus, and in particular, a growing unity of purpose across legislative and executive institutions in responding to China. If party competition is a primary driver of interbranch dynamics,⁴⁰⁹ increasing party consensus

⁴⁰² Max Boot, Opinion, *Democrats and Republicans Agree on China. That's a Problem*, WASH. POST (Mar. 6, 2023), <https://www.washingtonpost.com/opinions/2023/03/06/republican-democrat-china-consensus-hysteria> [https://perma.cc/TF2C-RPB5].

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ McKinley, *supra* note 401.

⁴⁰⁶ See Greve & Gambino, *supra* note 392.

⁴⁰⁷ See Huang, Silver & Clancy, *supra* note 397.

⁴⁰⁸ Christopher Carothers & Taiyi Sun, *Bipartisanship on China in a Polarized America*, 37 INT'L REL. 1, 2–3 (2023).

⁴⁰⁹ See Levinson & Pildes, *supra* note 327, at 2315 (“[T]he degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear,

will naturally reduce Madisonian competition. The concern is both that Congress is failing to vigorously exercise its oversight authority over the executive and that it is actively fueling the accumulation of presidential authorities. While the latter may be preferable to executive unilateralism because it entails congressional participation, it risks a long-run erosion in institutional checks.

Consider two examples. First, Congress has actively enabled what have at times been questionable uses of presidential emergency powers to deal with China. The most aggrandizing of the executive orders discussed earlier all relied on IEEPA, first enacted to circumscribe presidential emergency powers by limiting emergencies to only “unusual and extraordinary threat[s] . . . to the national security, foreign policy, or economy of the United States.”⁴¹⁰ Yet a cursory review of these orders reveals how thin the concept of “emergency” has been stretched. One order, for example, declared a “national emergency” because of “serious human rights abuse and corruption around the world,” without explaining why or whether such abuses were unusually grave today.⁴¹¹ Another order declared an emergency after China imposed a repressive national security law in Hong Kong.⁴¹² The order likewise did not explain how such acts, troubling though they were, constituted a national emergency here. Congress had itself specified in the Hong Kong Autonomy Act of 2020 that the president “may exercise all authorities” under IEEPA “necessary to carry out” certain sanctions related to Hong Kong.⁴¹³ This was thus not a case of the President exploiting vague statutory language for selfish institutional ends. Rather, Congress was explicitly urging the President to assume emergency powers.⁴¹⁴

The concern, to be sure, is not that the United States has responded vigorously to deeply repressive acts taken by Beijing—much of that response has been well merited. The concern rather is that we are beginning to see historically familiar patterns of congressional aid of expansive presidential powers, without any genuine public debate on the meaning of “emergency,” or any clear limiting principle constraining it.

depending on whether the House, Senate, and presidency are divided or unified by political party.”).

⁴¹⁰ 50 U.S.C. § 1701(a).

⁴¹¹ Exec. Order No. 13818, 82 Fed. Reg. 60839 (Dec. 20, 2017).

⁴¹² Exec. Order No. 13936, 85 Fed. Reg. 43413 (July 14, 2020).

⁴¹³ Hong Kong Autonomy Act, Pub. L. 116–149, 134 Stat. 663.

⁴¹⁴ See Robert L. Tsai, *Manufactured Emergencies*, 129 *YALE L.J.F.* 590, 591 (2020) (describing how Congress has “carved out more and more areas for potential emergency governance” with “over 136 different statutes currently authoriz[ing] a President to assert an emergency”); see also *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Feb. 8, 2023), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use> [https://perma.cc/8RJD-UEZW].

These developments risk a greater accumulation of presidential authorities and the pursuit of policies that are more unwise or dangerous than the relatively uncontroversial acts taken thus far.

Recent developments relating to CFIUS have raised similar structural concerns. CFIUS was first established in 1975 to review inbound foreign investments for national security concerns.⁴¹⁵ Congress and the President have modified it several times, most significantly in 2018 in view of new concerns relating to China.⁴¹⁶ Among other changes, the revision expanded CFIUS's jurisdiction to cover new kinds of transactions, and included, as an important factor in assessing national security risk, whether transactions involved a country of "special concern" that has a "demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect U.S. leadership in areas related to national security."⁴¹⁷ Kristen Eichensehr and Cathy Hwang have well documented how CFIUS's China focus has produced a "national security creep" that conflates national security and economic considerations⁴¹⁸—not entirely unlike Beijing's own expansive concept of security.⁴¹⁹ They show how an initially narrow mandate expanded over time, with CFIUS blocking, for example, a Chinese firm from owning 60% of a U.S. dating app.⁴²⁰

As with Congress inviting the President to invoke their emergency powers, CFIUS's expanding reach has been fundamentally the product of interbranch collaboration. "This is not a circumstance where the executive has grabbed power at the expense of Congress," Eichensehr

⁴¹⁵ Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), *codified at* 3 C.F.R. 159 (1976) ("It is the policy of the United States to support unequivocally such [international] investment, consistent with the protection of the national security."). CFIUS is chaired today by the Treasury Secretary and is composed of representatives from various other departments, including Commerce, Defense, and State. U.S. DEP'T OF TREASURY, *CFIUS Overview*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> [<https://perma.cc/H37N-6NMK>].

⁴¹⁶ See Foreign Investment Risk Review Modernization Act of 2018 (FIRMA), Pub. L. No. 115-232, §§ 1701–28, 132 Stat. 1653, 2174–2207 (2018).

⁴¹⁷ *Id.*, § 1701(c)(1); see also Eichensehr & Hwang, *supra* note 11, at 567–70.

⁴¹⁸ Eichensehr & Hwang, *supra* note 11, at 557–70. On expanding concepts of national security, see generally Donohue, *supra* note 2, at 1575–76, and in trade, see Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1106 (2020); see also J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1031–34 (2020). Others have found that political opposition to Chinese mergers and acquisitions of U.S. firms has been rooted in part in non-security factors. See Dustin Tingley, Christopher Xu, Adam Chilton & Helen V. Milner, *The Political Economy of Inward FDI: Opposition to Chinese Mergers and Acquisitions*, CHINESE J. INT'L POL., Spring 2015, at 27–29.

⁴¹⁹ See Greitens Testimony, *supra* note 21, at 3 ("[T]he framing of 'security' under the new concept is very broad. Xi's original formulation lists 11 types of security that fall under the comprehensive national security concept . . .").

⁴²⁰ Eichensehr & Hwang, *supra* note 11, at 559.

and Hwang argue: “Rather, Congress has repeatedly provided broad authorities to the executive branch and pushed the executive to use them, and the executive is doing so robustly.”⁴²¹ However, “for those interested in the separation of powers,” they continue, “the unity of effort across the executive and legislative branches raises some caution flags. A Congress seemingly pushing the executive to exercise power may not scrupulously monitor that such power is used properly, and an executive pushed to use delegated authorities (and to use them in secret) by the branch doing the delegating may be less careful than it would if facing robust critical oversight.”⁴²²

Such concerns are heightened where, as here, the politics of threat is further driving executives to act expansively and Congress to support them. As explained, bipartisan consensus here is not so much a static outcome as it is a dynamic process of agreement and revision, where both sides face common incentives to avoid the appearance of weakness. Given the political stakes, it is increasingly unlikely that a critical mass of legislators would ever speak out against a decision to prevent Chinese investment in an American firm, even if the benefits were significant and the security implications were negligible. The new global conflict has raised the costs of dissent.

C. Judicial Checks

While there is a general trend towards accountability decline, lower courts have on several occasions curbed instances of executive overreach. Earlier sections explained how regulations implementing the TikTok and WeChat orders were enjoined by three judges on constitutional and statutory grounds, and how the CCMC designations for two Chinese firms were similarly enjoined for APA violations. The judges in these cases did not unflinchingly defer to presidential proclamations of emergency. Instead, they each remarked upon the thinness of the executive’s evidence of national security risks. In both CCMC cases, the court declared itself “skeptical that weighty

⁴²¹ *Id.* at 583. It is thus not a story of unilateral executive expansionism, consistent with earlier accounts of CFIUS. See David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83 (2009) (highlighting Congress’s oversight of CFIUS, which essentially transformed the Committee into a “congressional notification service”); cf. Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 808 (2011) (noting that with CFIUS “the President employs an internal institutional redesign with the apparent effect of limiting White House control,” which challenges the prevailing perception of the Executive as power-aggrandizing).

⁴²² Eichensehr & Hwang, *supra* note 11, at 583.

national security interests are actually implicated.”⁴²³ “Deference is only appropriate when national security interests are actually at stake,” the court said in *Luokung*, “which the Court concludes is not evident here.”⁴²⁴ Judges in the app-ban cases likewise noted that the purported national security risks cited by the executive were “less substantial,”⁴²⁵ “hypothetical,”⁴²⁶ and “modest.”⁴²⁷

Because these cases have already been addressed in detail, I will not repeat what is known. For reasons to be discussed in Part V, however, these opinions—all district court decisions reviewing hastily crafted Trump-era executive acts—may not be representative of how national security deference will operate in future cases.

IV LEGAL RATIONALITY

Beyond rights and structure, the American legal system is also defined by a commitment to rationality in legal administration. Legal rationality, as used here, refers to reason-constrained neutrality in law enforcement and adjudication. History teaches that ideology and nationalism can inhibit reasoned and dispassionate application of law, especially in times of conflict. Part IV will highlight recent events where conflict-driven lapses in legal rationality arguably parallel historic examples.

A. *Historical Patterns*

Legal rationality is an aspirational feature of most modern legal systems, encoded in basic concepts of the rule of law. It does not require neutrality in every form. Prosecutors, for example, are not neutral as a matter of their role morality,⁴²⁸ but like judges they act legal-rationally when they apply general nonarbitrary norms instead of following whim or passion. Weber described legal decisions as irrational “to the extent that decision is influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by

⁴²³ *Xiaomi Corp. v. Dep’t of Def.*, No. 21-280, 2021 WL 950144, at *12 (D.D.C. Mar. 12, 2021); *Luokung Tech. Corp. v. Dep’t of Def.*, 538 F. Supp. 3d 174, 194–95 (D.D.C. 2021).

⁴²⁴ *Luokung Tech. Corp.*, 538 F. Supp. 3d at 195.

⁴²⁵ *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 85 (D.D.C. 2020).

⁴²⁶ *Marland v. Trump*, 498 F. Supp. 3d 624, 642 (E.D. Pa. 2020).

⁴²⁷ *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 929 (N.D. Cal. 2020).

⁴²⁸ Prosecutors are obligated under the adversary system to advocate one’s case, though they have a higher standard of candor than defense counsel. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 61–62 (1988).

general norms.”⁴²⁹ An aspirational commitment to legal rationality is manifest in aspects of American law.⁴³⁰ Federal judges must “impartially discharge” their duties and to “administer justice without respect to persons.”⁴³¹ Federal prosecutors may not charge based on extrinsic considerations like race, national origin, or certain kinds of “personal feelings.”⁴³² Legal rationality promotes congruence, ensuring that general norms are evenly implemented.⁴³³

Legal decisionmakers are, of course, vulnerable to biases during all periods—not just crises or conflicts—but history teaches that legal rationality is especially prone to lapsing in times of conflict. Scholars have documented war’s tendency to inspire patriotism and fervor in judges and prosecutors.⁴³⁴ Justice Felix Frankfurter was well known for crossing legal-ethical lines in service of his anti-Nazism. Most famously, Frankfurter failed to recuse himself from *Ex Parte Quirin*, the case endorsing military tribunals to try Nazi saboteurs, despite having specifically advised the war secretary on how to design and staff those tribunals.⁴³⁵ Frankfurter’s improprieties, Melvin Urofsky claims, were the clearest manifestation of how the “patriotism of the justices did in fact affect the decisions they reached.”⁴³⁶

Risks to legal rationality grow even greater where nationalism fuses with ideological antipathy towards the enemy. The Cold War was especially ideological in its narrative frames. The *New York Times* described the stakes succinctly in 1947: “At the present moment in history nearly every nation must choose between alternative ways of life”: one way based on “free elections,” “individual liberty,” and

⁴²⁹ MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 63 (1954); see also Clarence Morris, *Law, Reason, and Sociology*, 107 U. PA. L. REV. 147, 148 (1958).

⁴³⁰ This commitment arguably breaks down in other areas, such as judicial elections.

⁴³¹ Pub. L. 101-650, 62 Stat. 907 (oaths of justices and judges).

⁴³² U.S. Dep’t of Just., Just. Manual § 9-27260 (2023), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> [<https://perma.cc/DB95-YKXZ>].

⁴³³ See FULLER, *supra* note 57, at 52 (“[T]he validity of retrospective legislation is largely regarded as a problem of due process.”); cf. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7 (2008) (“The Rule of Law is not just about general rules; it is about their impartial administration.”).

⁴³⁴ See, e.g., Melvin I. Urofsky, *Inter Arma Silent Leges: Extrajudicial Activity, Patriotism, and the Rule of Law*, in *TOTAL WAR AND THE LAW*, *supra* note 2 (examining the influence of patriotic values on judicial decisionmaking during the Second World War); Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 VAND. L. REV. 885, 934–35 (2010) (describing how Cold War anxieties impacted the Supreme Court’s handling of the *Rosenberg* case); “No” Attitude Is Said to Hurt Our War Effort: Government Attorneys Who Quibble over Niceties of Law Likened to Saboteurs, *AM. L. & LAWS.*, Aug. 22, 1942, at 8 (reporting a speech from the Assistant Solicitor General demanding that government lawyers direct their loyalty towards the implementation of war policy rather than “legal niceties”).

⁴³⁵ Urofsky, *supra* note 434, at 27; see also SNYDER, *supra* note 123, at 397.

⁴³⁶ Urofsky, *supra* note 434, at 26.

“freedom from political oppression”; or another way that “relies upon terror and oppression,” “fixed elections,” and “suppression of personal freedom.”⁴³⁷ McCarthyism, broadly defined, constituted “a social practice that worked to maintain” these views among the general population, including legal actors.⁴³⁸ “Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression,” Stone writes, enforced by prosecutors and police eager to protect the homefront from totalitarianism.⁴³⁹

At the Supreme Court, anti-communist fervor was perhaps most discernible from the *Rosenberg* case, which saw the execution of two convicted atomic spies “at the height of Cold War America’s obsession with Communism.”⁴⁴⁰ Brad Snyder attributed what he saw as the Court’s abdication in that case partially to the Justices’ “anti-communism.”⁴⁴¹ Later in the Cold War, the Supreme Court itself criticized lower courts for ruling on the basis of anti-communist fervor. *Zschernig v. Miller* is best known for its application of the dormant foreign affairs power.⁴⁴² En route to that holding, the Court pointed out that probate courts were inappropriately “critici[zing] nations established on a more authoritarian basis than our own.”⁴⁴³ “As one reads [those] decisions,” the Court lamented, “it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ . . . are the real desiderata.”⁴⁴⁴

Ideological frames like “free world,” and “communist” are a kind of “symbolic language whose references lie in the social order.”⁴⁴⁵ The risk in conflict times is that such frames can overwhelm rational consideration of specific policies. George Kennan, the architect of the Cold War’s containment strategy, was himself critical of the U.S. government’s tendency to universalize specific decisions during the war.⁴⁴⁶ “We like to find some general governing norm to which, in each instance, appeal can be taken, so that individual decision may be made not on their particular merits but automatically,” he said.⁴⁴⁷ As the following section shows, such tendencies are starting to reappear in American law.

⁴³⁷ B. Thomas Trout, *Rhetoric Revisited: Political Legitimation and the Cold War*, INT’L STUD. Q., Sept. 1975, at 251, 258.

⁴³⁸ CHENG, *supra* note 68, at 144.

⁴³⁹ Stone, *supra* note 124, at 1326; BELKNAP, *supra* note 125, at 42–46.

⁴⁴⁰ SNYDER, *supra* note 434, at 886.

⁴⁴¹ *Id.* at 934.

⁴⁴² 389 U.S. 429 (1968); *see also* Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262 (2001).

⁴⁴³ *Zschernig*, 389 U.S. at 440.

⁴⁴⁴ *Id.* at 437.

⁴⁴⁵ Trout, *supra* note 437, at 259.

⁴⁴⁶ *Id.* at 278.

⁴⁴⁷ GEORGE F. KENNAN, MEMOIRS: 1925–1950, at 322 (1967).

B. *Legal Irrationality*

While current examples of legal irrationality do not match the levels of Cold War hysteria, they have resurfaced in troubling ways. Cold War-style ideological frames have returned to our political discourse. Senator Rick Scott (R-FL) calls “Communist China . . . the greatest threat to the freedoms that we love and enjoy,” accusing President Biden of being an “appeaser-in-chief” to “an evil regime.”⁴⁴⁸ Law enforcement has expressed more muted versions of a similar sentiment. The FBI’s page on “The China Threat” states that the Chinese “government . . . is trying to . . . influence the world with a value system shaped by undemocratic, authoritarian ideals and actions.”⁴⁴⁹ The FBI’s transnational repression initiative, which addresses the Chinese Party-state’s abuses of American legal process, is framed similarly.⁴⁵⁰

The danger of these frames is not that they propound the wrong values; it’s that their oversimplification can distort government perception and action. If every China-related prosecution is viewed as part of an ongoing battle between freedom and oppression, one might begin to over-enforce weak cases or over-target certain demographics. To paraphrase Kennan, investigatory decisions “may be made not on their particular merits,” but more “automatically” as dictated by general ideologies.⁴⁵¹ Such tendencies may well have been at play in the China Initiative, but they have not been limited to that program.

Arguably the most egregious story of China-driven investigatory legal irrationality involves a Commerce Department security unit called the Investigations and Threat Management Service (ITMS). In 2021, whistleblower complaints prompted the Senate Committee on Commerce, Science, and Transportation to investigate the ITMS for misconduct.⁴⁵² Committee staff found that the unit, initially established to provide simple security services to the Commerce Secretary, had “mutat[ed] . . . into a rogue unaccountable police force” that

⁴⁴⁸ Press Release, Rick Scott, Senator Rick Scott at America First Policy Institute: Communist China Is America’s Enemy (Feb. 10, 2022), <https://www.rickscott.senate.gov/2022/2/sen-rick-scott-at-america-first-policy-institute-communist-china-is-america-s-enemy> [<https://perma.cc/LY5K-R7X4>].

⁴⁴⁹ *The China Threat: Protecting the Cornerstones of Our Society*, FBI, <https://www.fbi.gov/investigate/counterintelligence/the-china-threat/protecting-the-cornerstones-of-our-society> [<https://perma.cc/27LV-8CTH>].

⁴⁵⁰ See *Transnational Repression*, FBI, <https://www.fbi.gov/investigate/counterintelligence/transnational-repression> [<https://perma.cc/SMT5-TC62>].

⁴⁵¹ KENNAN, *supra* note 447, at 322.

⁴⁵² MINORITY STAFF OF S. COMM. ON COM., SCI., & TRANSP., 117TH CONG., COMMITTEE INVESTIGATION REPORT: ABUSE AND MISCONDUCT AT THE COMMERCE DEPARTMENT 1 (2021) [hereinafter COMMITTEE REPORT], <https://www.commerce.senate.gov/services/files/C4ABC46A-7CB0-4D51-B855-634C26E7CF70> [<https://perma.cc/V4YL-39KR>].

engaged in unauthorized law-enforcement and counterintelligence activities.⁴⁵³ Obsessed with identifying employees with Chinese-state ties, the ITMS “targeted departmental divisions with comparably high proportions of Asian-American employees.”⁴⁵⁴ It “opened frivolous investigations . . . without evidence” and engaged in “repeated instances of malfeasance.”⁴⁵⁵ The Committee concluded that these activities “likely resulted in preventable violations of civil liberties and other constitutional rights.”⁴⁵⁶

The most prominent victim of ITMS misconduct was Sherry Chen, a Chinese-American hydrologist at the National Weather Service.⁴⁵⁷ While visiting her parents in China, Chen reconnected with a college classmate, a water-resources official, who at one point asked her how the United States funded repairs of aging reservoirs.⁴⁵⁸ Chen consulted with an administrator at another federal agency, and on her advice, sent the Chinese official a link to a public government website and the administrator’s office number.⁴⁵⁹ The administrator reported Chen to her agency’s security division, expressing concern that Chen, a U.S. citizen but a “Chinese National,” was “being made to” act “by a foreign interest.”⁴⁶⁰ Two ITMS agents interrogated Chen for seven hours, without food, water, or a restroom break.⁴⁶¹ They forbade Chen from discussing the interrogation with others, which she understood to include counsel.⁴⁶² They then intimidated her, Chen claims, into drafting a statement with prepared language.⁴⁶³

In 2014, Chen was arrested and charged with unlawfully downloading data from a government database and making false

⁴⁵³ *Id.* at 4.

⁴⁵⁴ *Id.* at 5.

⁴⁵⁵ *Id.* at 5, 24.

⁴⁵⁶ *Id.* at 36. ITMS was later shuttered following an internal review. Shawn Boburg, *Commerce Dept. Security Unit To Be Shut Down After Overstepping Legal Limits in Launching Probes, Officials Say*, WASH. POST (Sept. 3, 2021, 4:48 PM), https://www.washingtonpost.com/investigations/commerce-disband-itms-investigations-unit/2021/09/03/43e1c8ee-0c0b-11ec-ae1-42a8138f132a_story.html [<https://perma.cc/LLN2-VQPC?type=standard>].

⁴⁵⁷ XIAFEN (SHERRY) CHEN, ADMINISTRATIVE COMPLAINT AGAINST DEPARTMENTS OF COMMERCE AND JUSTICE 2 (Nov. 1, 2021) [hereinafter *Chen Claim*], <https://www.aclu.org/cases/sherry-chen-v-united-states?document=sherry-chen-administrative-complaint-against-departments-commerce-and-justice> [<https://perma.cc/ME56-ZXH9>].

⁴⁵⁸ *Id.* at 3.

⁴⁵⁹ *Id.* at 3–4; *see also* Sherry Chen, *My Personal Story*, SHERRY CHEN LEGAL DEF. FUND (Dec. 25, 2015) [hereinafter *Chen Story*], <https://www.sherrychendefensefund.org/my-story.html> [<https://perma.cc/MS4Q-95PT>].

⁴⁶⁰ *Chen Claim*, *supra* note 457, at 4.

⁴⁶¹ *Id.* at 4–5.

⁴⁶² *Id.* at 4.

⁴⁶³ COMMITTEE REPORT, *supra* note 452, at 12.

statements to federal agents.⁴⁶⁴ “[M]y entire life was shattered,” Chen said. “I was arrested in front of my co-workers, led out of a building in handcuffs, and held in solitary confinement at a courthouse jail.”⁴⁶⁵ News outlets surrounded her home and portrayed her as a spy.⁴⁶⁶ A week before trial, however, the government asked the court to dismiss all charges.⁴⁶⁷ The Merit Systems Protection Board later noted that Chen was a victim of “gross injustice.”⁴⁶⁸ Chen ultimately won a settlement in 2022.⁴⁶⁹

The rise of ITMS illustrates how conflict dynamics can drive investigatory irrationality. As political attention turned to countering threats from China, a security unit with a modest mandate began to expand into criminal and intelligence work that went beyond its statutory authorization.⁴⁷⁰ Without proper management or oversight, the unit began to abuse authorities in the name of defeating a foreign foe. Whistleblowers alleged that ITMS leaders routinely refused to close inconclusive investigations against minority employees and instructed agents to “run ethnic surnames through secure databases [without] evidence suggesting potential risk to national security.”⁴⁷¹ The security unit’s mission creep was an unfortunate but unsurprising byproduct of escalating bilateral tensions. A former senior Commerce official cited “tense relations between the U.S. and Chinese governments” as a prime reason for ITMS’s “xenophobia.”⁴⁷²

Beyond law enforcement, there are hints that the new global conflict may also be leading to legal irrationality in American courts. In *Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co.*, a judge on the New York Supreme Court—a general jurisdiction trial court composed of elected judges—was asked to determine whether China’s legal system had impartial tribunals as a precondition

⁴⁶⁴ *Id.* False statements included that she had told investigators she last saw a former classmate in “I think, 2011” when the true date was 2012. Kim, *supra* note 161, at 761.

⁴⁶⁵ Kimmy Yam, *After Being Falsely Accused of Spying for China, Sherry Chen Wins Significant Settlement*, NBC NEWS (Nov. 15, 2022, 4:16 PM), <https://www.nbcnews.com/news/asian-america/falsely-accused-spying-china-sherry-chen-wins-significant-settlement-rcna56847> [<https://perma.cc/E39V-DHS3>].

⁴⁶⁶ Chen Story, *supra* note 459.

⁴⁶⁷ Chen Claim, *supra* note 457, at 6.

⁴⁶⁸ *Court Cases: Sherry Chen v. United States*, ACLU, <https://www.aclu.org/cases/sherry-chen-v-united-states> [<https://perma.cc/K3EG-5GQZ>] (last updated Dec. 16, 2022).

⁴⁶⁹ Yam, *supra* note 465.

⁴⁷⁰ See U.S. DEP’T OF COM., OFF. OF THE GEN. COUNS., REPORT OF THE PROGRAMMATIC REVIEW OF THE INVESTIGATIONS AND THREAT MANAGEMENT SERVICE 1, 4, 7–15 (2021) [hereinafter COMMERCE GENERAL COUNSEL REPORT], <https://www.commerce.gov/sites/default/files/2021-09/20210903-ITMS-Report.pdf> [<https://perma.cc/8WKA-DAC2>] (detailing various ways in which ITMS exceeded its scope through its practices and claims of authority).

⁴⁷¹ COMMITTEE REPORT, *supra* note 452, at 18.

⁴⁷² *Id.*

to recognizing and enforcing a Chinese judgment.⁴⁷³ His opinion was atypical in several ways. Stylistically, it evoked highly ideological opinions from last century, beginning with a 600-word “Preamble” constructed to convey the storied prestige of the Western legal tradition.⁴⁷⁴ The preamble variously quotes Winston Churchill, the Magna Carta, and George Washington’s 1798 letter to William Randolph, in which the first president said: “The true administration of justice is the firmest pillar of good government.”⁴⁷⁵ The opinion then describes New York as a “bastion” of due process, before noting that the “iconic” courthouse where the court sat “has emblazoned [Washington’s] hallowed sentence forth from its pediment.”⁴⁷⁶

In ultimately refusing to enforce the Chinese judgment, the court made several more unusual moves.⁴⁷⁷ First, it held that the State Department’s country reports, which assess the human rights conditions of foreign countries, constituted “conclusive documentary evidence” that could end a case at the dismissal stage of litigation.⁴⁷⁸ These reports, however, are typically treated as ordinary evidence at trial, not special evidence meriting conclusive deference on a dismissal motion.⁴⁷⁹ Second, the court held for the first time in state or federal law that a Chinese judgment could not be enforced because China’s system was systemically unfair.⁴⁸⁰ As legal scholars pointed out as *amici*, U.S. courts have historically addressed deficiencies in Chinese law on case-specific

⁴⁷³ No. 156328/2020, 2021 WL 1716424, at *3 (N.Y. Sup. Ct. Apr. 30, 2021).

⁴⁷⁴ *See id.* at *1–2.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at *1. Cold War judicial opinions were sometimes framed similarly. *See, e.g.,* Commonwealth v. Koczwara, 155 A.2d 825, 832–33 (Pa. 1959) (Musmanno, J., dissenting) (lamenting that such a decision was rendered in “the home of the Liberty Bell, the locale of Independence Hall, and the place where the fathers of our country met to draft the Constitution of the United States, the Magna Charta of the liberties of Americans and the beacon of hope of mankind seeking justice everywhere”).

⁴⁷⁷ *See* Clarke, *supra* note 12, at 576 (analyzing the court’s reasoning in *Shanghai Yongrun* in comparison to other cases wherein a party sought enforcement of a Chinese judgment).

⁴⁷⁸ *Id.*

⁴⁷⁹ *See id.*; Jia, *supra* note 12, at 1703 (“In the foreign judgments recognition setting, parties have sometimes relied on State Department country reports”); Clarke, *supra* note 12, at 576–77; Armadillo Distrib. Enters., Inc. v. Hai Yun Musical Instruments Mfr. Co., No. 8:12-CV-1839-T-33EAJ, 2014 WL 2815943, at *4–6 (M.D. Fla. June 23, 2014) (weighing country report against other evidence); Yancheng Shanda Yuanfeng Equity Investment Partnership v. Wan, 2022 WL 411860, at *9 (C.D. Ill. Jan. 10, 2022) (applying no conclusive deference to county report).

⁴⁸⁰ *See* William S. Dodge & Wenliang Zhang, *Reciprocity in China-U.S. Judgments Recognition*, 53 VAND. J. TRANSNAT’L L. 1541, 1564 (2020) (“[C]ourts in the United States have consistently rejected such arguments.”); *see also* Clarke, *supra* note 12, at 576 (finding that, among all cases in which parties either sought dismissal to China on forum non conveniens grounds or enforcement of a Chinese judgment, the *Shanghai Yongrun* court “uniquely . . . examined the Chinese legal system as a whole and found it wanting”).

grounds of unfairness.⁴⁸¹ By holding that Chinese law was systemically unfair, the court implied that no New York court could ever recognize a Chinese judgment.⁴⁸²

As the appellate court soon made clear on reversal, the trial court committed several legal errors. The country reports are not incontrovertible “documentary evidence” under New York law, and “the reports, which primarily discuss the lack of judicial independence in proceedings involving politically sensitive matters, do not utterly refute plaintiff’s allegation that the civil law system governing this breach of contract business dispute was fair.”⁴⁸³ More puzzling from my perspective is why the lower court held as it did. This was not a novel area of the law generally, nor was it an entirely novel issue in New York specifically, where a court had held differently just fifteen months earlier.⁴⁸⁴ With only a written record, it is hard to know for certain. But the overwritten preamble and unqualified deference to the State Department suggests that patriotic-ideological biases may have influenced the outcome. Not unlike the probate courts in *Zschnernig*, the court may have unconsciously applied ideological frames in interpreting the law. Its paeans to Washington and the Magna Carta are clues as to how the judge was thinking through the case generally—not only as a court applying law and precedent, but also as a stalwart guardian of American due process. “New York judges do not rubber stamp foreign judgments,” he proclaimed.⁴⁸⁵

It remains to be seen whether such opinions will be isolated occurrences, or form a growing trend. Biases that foster legal irrationality in times of conflict might still be tempered by forces moving the other

⁴⁸¹ See Brief for George Bermann et al. as Amici Curiae Supporting Plaintiff-Appellant, *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co.*, N.Y.S.3d 874 (App. Div. 2022) (No. 2021-01637), at 8–9 (citing cases where U.S. courts have declined to find the Chinese legal system impartial or incompatible with due process requirements).

⁴⁸² *Id.* at 10.

⁴⁸³ *Shanghai Yongrun Inv. Mgmt. Co. v. Maodong Xu*, 160 N.Y.S.3d 874, 874 (App. Div. 2022). Donald Clarke agrees that State Department country reports ought not be “conclusive” in these matters, but he argues that “they should be considered relevant and reasonably reliable for what they say about specific features of the Chinese legal system.” See Donald Clarke, *Enforcing Chinese Judgments: A Response*, TRANSNAT’L LITIG. BLOG (Oct. 10, 2022), <https://tlblog.org/enforcing-chinese-judgments-a-response> [<https://perma.cc/597R-W6MD>].

⁴⁸⁴ See *Huizhi Liu v. Guoqing Guan*, Index No. 713741/2019 (N.Y. Sup. Ct. Jan. 7, 2020). The facts of that case were different in that defendants had earlier successfully moved for forum non conveniens dismissal to China. *Id.* at *1–2. That said, in direct contrast with the *Shanghai Yongrun* decision, the court in *Liu* concluded that “Plaintiff’s submissions demonstrate that the Chinese legal system comports with the due process requirements and the public policy of New York.” *Id.* at *3.

⁴⁸⁵ *Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co.*, No. 156328/2020, 2021 WL 1716424, at *6 (N.Y. Sup. Ct. Apr. 30, 2021).

direction.⁴⁸⁶ But given our history of conflict-driven legal irrationality, and at a time in which judicial rhetoric in some corners is becoming more dramatic,⁴⁸⁷ it will not be surprising to see similar frames return in greater numbers, especially if U.S.-China conflict worsens over time.

The preceding examples address legally irrational acts already completed. At this likely early stage of conflict, *proposed* acts to counter China also merit study. For example, several senators have introduced legislation reinstating the China Initiative.⁴⁸⁸ The China Initiative was canceled, said Senator Marco Rubio (R-FL), “because a band of woke activists smeared it as racist and xenophobic.”⁴⁸⁹ Senator Scott (R-FL) another co-sponsor, framed the bill as a necessary response to a “new Cold War with the United States.”⁴⁹⁰ As problematic as the Initiative was, a version launched on these terms would likely be worse. The bill’s requirement that “all investigations and prosecutions shall be set as priority and not based on discretion” would likely compound incentives to over-target certain groups or to pursue weak cases.⁴⁹¹

Consider next a proposal made at a hearing of the U.S.-China Economic and Security Review Commission, a government body that advises Congress on China.⁴⁹² At a session on “The CCP and Foreign Legal Systems,” the commission chair proposed requiring all law firms representing Chinese companies to register under the Foreign Agent Registration Act (FARA).⁴⁹³ FARA is a public-disclosure law that imposes extensive reporting requirements on “agents” of foreign principals who engage in covered activities in the United States.⁴⁹⁴

⁴⁸⁶ Cf. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (explaining why doctrines concerning the separation of powers, international comity, and others have produced a judicial tendency to avoid transnational litigation).

⁴⁸⁷ See Jonathan L. Entin, *Over the Top: Judges, Lawyers, and COVID-19 Rhetoric*, 31 HEALTH MATRIX 51, 53 (2021) (analyzing instance of “gratuitous” over-the-top judicial rhetoric in a COVID-19 pandemic-related case).

⁴⁸⁸ Press Release, Marco Rubio, Rubio, Scott, Colleagues Introduce Bill to Reestablish DOJ’s China Initiative (Mar. 31, 2022) [hereinafter Rubio Press Release], <https://www.rubio.senate.gov/public/index.cfm/2022/3/rubio-scott-colleagues-introduce-bill-to-reestablish-doj-s-china-initiative> [<https://perma.cc/Y6DJ-UTSX>].

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ A Bill to Establish the CCP Initiative Program, and for Other Purposes, S. 3960, 117th Cong. § 1(d)(1) (2022).

⁴⁹² *Charter*, U.S.-CHINA ECON. & SEC. REV. COMM’N, <https://www.uscc.gov/charter> [<https://perma.cc/7Q4C-V6EZ>].

⁴⁹³ *Hearing on Rule by Law: China’s Increasing Global Reach Before the U.S.-China Econ. & Sec. Rev. Comm’n*, 118th Cong. 209 (2023) [hereinafter *Hearing*], https://www.uscc.gov/sites/default/files/2023-05/May_4_Hearing_Transcript.pdf [<https://perma.cc/Q6RU-ASCS>].

⁴⁹⁴ See Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611–621 (2018); Nick Robinson, “*Foreign Agents*” in an *Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE L.J. 1075, 1077 (2020).

The Commission had just heard troubling testimony about the Chinese Party-state's use of proxy companies in the United States to sue and harass Chinese citizens living here.⁴⁹⁵ Several Commissioners were understandably eager to devise creative ways to deter or punish Chinese government efforts to exploit American law. Yet, as we have seen, well-intentioned strategies to combat foreign threat can lead to overbreadth or misdirection. Such would be the case here.

First, FARA is not really the right statute for addressing these problems. The law's principal focus is on exposing the work done by lobbyists seeking to influence U.S. policy on behalf of a foreign interest.⁴⁹⁶ Lawyers representing Chinese firms today rarely seek to alter American policies. Even the fraction of lawyers representing Chinese firms to harass dissidents or anti-corruption targets do so in order to force the defendants to repatriate, not to alter federal policy.⁴⁹⁷ FARA's express exemption for lawyers representing foreign principals exemplifies its policy focus.⁴⁹⁸ The proposal here is not so much an extension as it is a transformation of FARA to encompass legal representation for private ends.

Second, the FARA revisions would undermine basic legal values. Singling out lawyers who represent "odious" clients for burdensome treatment is antithetical to the adversary system's commitment to equality before the law.⁴⁹⁹ Under FARA, covered entities must disclose potentially sensitive materials to the government or risk fines and imprisonment.⁵⁰⁰ For an attorney, the most troubling of these disclosure requirements includes "a comprehensive statement of the nature and method of performance" of its contract with the principal (i.e., their client).⁵⁰¹ Other burdensome disclosures include fee arrangements, payment histories, and spending logs.⁵⁰² FARA also confers upon the Attorney General expansive authorities to require disclosure of any

⁴⁹⁵ *Hearing, supra* note 493, at 184.

⁴⁹⁶ Robinson, *supra* note 494, at 1095–96; *see also* 22 U.S.C. § 611(o) (covering agents of foreign principals who engage in "political activities . . . with reference to formulating, adopting, or changing the domestic or foreign policies of the United States").

⁴⁹⁷ *See Hearing, supra* note 493, at 184 (statement of Prof. Diego Zambrano).

⁴⁹⁸ 22 U.S.C. § 613(g) (exempting lawyers who represent foreign principals so long as that representation "does not include attempts to influence agency personnel or officials" other than in the course of judicial, administrative or law enforcement proceedings); *see also* Att'y Gen. of U.S. v. Covington & Burling, 411 F. Supp. 371, 376–77 (D.D.C. 1976) (reading the attorney-client privilege into FARA based on FARA's statutory purposes).

⁴⁹⁹ *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57–58 (1998) (summarizing principles of the adversary system).

⁵⁰⁰ *See* 22 U.S.C. § 618(a) (allowing violators of the Act to be punished with a fine up to \$10,000, imprisonment up to five years, or both).

⁵⁰¹ *Id.* § 612(a)(4).

⁵⁰² *See id.* §§ 612(a)(4), (5), (8).

other “statements, information, or documents” as she may deem fit, based on considerations of “national security and the public interest.”⁵⁰³ Under this provision, client confidences and attorney work product presumably could be set aside.

FARA expansion is all the more concerning given its history of politicization. During the Cold War, the law was weaponized to prosecute W.E.B. Du Bois and other leaders of the Peace Information Center for distributing literature advocating a ban on nuclear weapons.⁵⁰⁴ The Justice Department saw Du Bois’s work as “communist propaganda meant to encourage American pacifism in the face of Soviet aggression.”⁵⁰⁵ More recently, the House Committee on Natural Resources began investigating four U.S. environmental nonprofits in 2018 for failing to register under FARA. Several members were displeased that the Natural Resources Defense Council (NRDC) was apparently more critical of American environmental policies than China’s, asserting that as a result, NRDC somehow needed to register as a Chinese agent.⁵⁰⁶ Both cases illustrate the susceptibility of FARA to abuse—a feature that has inspired autocrats in other countries to enact statutory analogs.⁵⁰⁷ Extending the law to lawyers would likely invite further abuses, consistent with these historic patterns.

V

CONCEPTUAL AND PRACTICAL IMPLICATIONS

The preceding parts highlighted several ways in which the new global conflict is beginning to reprise patterns associated with global rivalry and law. This final Part reflects on the scholarly and practical implications of these findings.

A primary contribution of this Article is to outline a framework for analyzing the myriad legal developments that will likely grow out of U.S.-China conflict in the years ahead. While it is hard to know how the conflict will evolve or what policies it will engender, principles associated with wartime rights, structure, and rationality will likely aid understanding of future events. History teaches that the politics of threat can yield predictable effects in these three areas. To be sure, the

⁵⁰³ *Id.* § 612(a)(10).

⁵⁰⁴ See Andrew Lanham, *When W.E.B. Du Bois Was Un-American*, Bos. REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american> [https://perma.cc/CR5Z-USRY].

⁵⁰⁵ *Id.* Du Bois was acquitted but “the trial and the publicity around it ruined his career.” *Id.*

⁵⁰⁶ Robinson, *supra* note 494, at 1121–24.

⁵⁰⁷ See *id.* at 1084–92.

Article has traversed many different areas of the law at a high level; the importance of deep sector-specific scholarship on China's legal effects endures. But even as that work proceeds, a historical and political understanding of transsubstantive categories like rights and rationality can help contextualize seemingly unconnected developments, explaining why spy investigations, platform bans, and foreign service reforms share a common thread.

The Article also renews important academic debates on whether American wartime rights protections are improving.⁵⁰⁸ Goldsmith and Sunstein have argued that wartime liberty protections have increased over time—a result, they say, of post-1960s legal-cultural shifts away from trust in the executive and military authorities and in favor of rights protection.⁵⁰⁹ Because wartime abuses often only seem unwarranted in retrospect, they argue, the violations of the “last war are used as the baseline for determining which civil liberties restrictions are appropriate” during new wars, generating a “ratchet effect, over time, in favor of more expansive civil liberties during wartime.”⁵¹⁰ These factors, they say, explain why President Bush's 2001 order enabling military commissions to try terrorists met popular and political resistance, while President Roosevelt's order establishing a similar commission to try Nazi saboteurs did not.⁵¹¹ David Cole, on the other hand, argues that there was “not so much a *repudiation* as an *evolution* of political repression” in the War on Terror.⁵¹² He concludes that “[a]ll we have learned from history is how to mask the repetition, not how to avoid the mistakes.”⁵¹³

It is too early to definitively assess how the new global conflict will fit into this debate. On the one hand, there is some evidence that modern legal-cultural attitudes may be checking “wartime” excesses. The China Initiative was shuttered after only four years; abuses at the Commerce Department led to the termination of a rogue security unit; the harshest forms of many state-level anti-China laws were watered down; and the most overreaching implementations of President Trump's China-related executive orders were enjoined. Unlike the public acclamation that met Roosevelt's treatment of Nazi saboteurs, many of these initiatives were criticized by members of Congress, civil society organizations, academics, and the media, with many invoking negative

⁵⁰⁸ See Goldsmith & Sunstein, *supra* note 121, at 262 (discussing how wartime rights protections have shifted from the Cold War to a post-9/11 world); Cole, *supra* note 122, at 1–4.

⁵⁰⁹ Goldsmith & Sunstein, *supra* note 121, at 262.

⁵¹⁰ *Id.* at 285.

⁵¹¹ *Id.* at 281–84, 287–88.

⁵¹² Cole, *supra* note 122, at 2.

⁵¹³ *Id.* at 3–4.

historical examples—internment, McCarthyism, red scares—to morally condemn state action.⁵¹⁴ More generally, we live now in a time of heightened sensitivities to issues of inclusion. Even the chairman of the House Select Committee on the CCP, not to mention the FBI Director among others, have noted bias-related concerns.⁵¹⁵

On the other hand, the present conflict may still be at an early stage. It is not now a literal war of violence—and with luck, it will not turn into one. Even if there is no such thing as an “ameliorative trend” in history, it would be hard to know for sure given that conflicts vary in intensity. Sunstein and Goldstein acknowledge that different public reactions to the Bush and Roosevelt tribunals may be because World War II was an existential war “that mobilized the entire Nation,” while the War on Terror involved “none of the mobilization and sacrifice (or call to sacrifice)” of World War II.⁵¹⁶ If current conflict dynamics endure, it may well be that troubling policies are enacted but soon modified or reversed, in a continuous ebb and flow that never quite reaches the level of historic tidal waves. Even this should be of great concern, of course, as such policies will have real victims and costs. But if the question is whether wartime rights are improving, one might be tempted to conclude that some progress has been made. If, however, the conflict turns into a hot war, whether in the Taiwan Strait or beyond, I suspect that the legal pathologies of war will likely revisit American law with far greater force and impact. Justice Antonin Scalia once quipped that while “*Korematsu* was wrong . . . you are kidding yourself if you think the same thing will not happen again.”⁵¹⁷ Existential, “total wars” may very well be in an analytic category of their own.

Even at current conflict levels, there is evidence that state actors are seeking to “mask” historic repetition.⁵¹⁸ As explained, several senators have sought to restore the China Initiative.⁵¹⁹ They would rename it the CCP Initiative, presumably to allay racial concerns over a “China” framing.⁵²⁰ While this change is not nothing, the senators have otherwise proposed reinstating the exact same organization, with

⁵¹⁴ See *supra* Sections II.B, III.C, IV.B.

⁵¹⁵ Gallagher Remarks, *supra* note 93 (“[T]his committee must constantly distinguish between the Chinese Communist Party and the Chinese people.”); Wray Remarks, *supra* note 153 (“This is not about the Chinese people, and it’s certainly not about Chinese Americans.”).

⁵¹⁶ Goldsmith & Sunstein, *supra* note 121, at 280.

⁵¹⁷ *Scalia: Internment Could Happen Again*, POLITICO (Feb. 4, 2014, 7:09 AM), <https://www.politico.com/story/2014/02/antonin-scalia-internment-ruling-103079> [<https://perma.cc/92W9-4RCY>].

⁵¹⁸ See Cole, *supra* note 122, at 3–4.

⁵¹⁹ Rubio Press Release, *supra* note 488.

⁵²⁰ *Id.*

the same aggressive targets.⁵²¹ The China Initiative may very well be restored, just as public criticism of Bush-era counterterrorism policies did not end those policies at inception.

More worrying still, the new global conflict has distinctive attributes that may exacerbate “wartime” legal pathologies. As noted, the Chinese Party-state explicitly targets its diaspora communities “as a special priority in the PRC’s global influence-seeking activities.”⁵²² This can impede efforts to reduce racial bias in law enforcement, bolstering latent tendencies to target groups instead of individuals. Second, Chinese firms, including private ones such as Huawei, have complex ties to the Party-state that are hard to disentangle; some firms may, for relevant purposes, pose little actual risk, while others that look formally similar in fact threaten security. Third, deep economic integration between the two countries means that Chinese firms, workers, students, and others will remain a constant presence in American life. While this will hopefully reduce tensions, it could also inflame fears and inflate threats through thousands of low-level encounters and frictions. Even if it never becomes a true war, the conflict may remain a “peace-less era” without a “visible end-point.”⁵²³ Finally, the new global conflict is playing out against a backdrop of democratic erosion around the world, including here in the United States.⁵²⁴ Crises tend to enable backsliding in democratic institutions, which become in turn more susceptible to autocratic exploitation.⁵²⁵ Thus a broader concern: Efforts to compete with China may unwittingly lead us to emulate it.

Certain legal-institutional changes can help mitigate overreach in the coming years.⁵²⁶ When Madisonian checks fail, one might look to “internal separation of powers”—constraints within the executive branch to keep power in check.⁵²⁷ Among the executive offices with responsibility for rights protection, some are what Margo Schlanger calls

⁵²¹ *Id.*

⁵²² HOOVER INST., CHINA’S INFLUENCE & AMERICAN INTERESTS, xiii (Larry Diamond & Orville Schell eds., 2019).

⁵²³ MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 127 (2012).

⁵²⁴ See generally Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

⁵²⁵ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 569–70 (2018).

⁵²⁶ For reasons of scope, I focus here on legal safeguards rather than general policies relating to China. I note however, that thoughtful proposals exist as to the latter. See, e.g., Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073 (2022); GARY CORN ET AL., HOOVER INST. & AM. UNIV. WASH. COLL. OF L., CHINESE TECHNOLOGY PLATFORMS OPERATING IN THE UNITED STATES: ASSESSING THE THREAT (2021).

⁵²⁷ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427–28 (2009); Anne Joseph O’Connell, *The Architecture of Smart Intelligence:*

“Offices of Goodness”: advisory, values-driven offices that are internal to their agency.⁵²⁸ Other bureaucratic actors like Inspectors General (“IGs”) are more accountable to Congress.⁵²⁹ While both offices have a role to play in curbing overreach, IGs are especially well poised to do so given their statutory insulation from presidential control and broader array of investigatory powers.⁵³⁰ When successful, the Department of Justice IG’s reports have led to the disciplining of prison guards and the termination of FBI search policies.⁵³¹

But while some IGs have a record of enforcing an agency’s “secondary mandates,”⁵³² IGs have not played a notable role in policing instances of China-related overreach.⁵³³ Several reforms proposed by Sinnar in the context of the War on Terror would enhance IGs’ constructive capacities in these areas. First, Congress might enlarge the Justice Department IG’s jurisdiction to include misconduct allegations concerning “the authority of an attorney to investigate, litigate, or provide legal advice.”⁵³⁴ Unlike other IGs, the DOJ IG must refer such allegations to the Department’s Office of Professional Responsibility—an office that “reports solely to the Attorney General.”⁵³⁵ Given recent questionable spy prosecutions, there is good reason to empower a more independent body to review investigatory or litigation misconduct. Second, Congress could provide IGs with a “standing mandate to investigate the impact of national security policies on individual rights” under the auspices of new Assistant IGs for Civil Rights.⁵³⁶ While ad hoc mandates to examine particular issues are helpful,⁵³⁷ a designated

Structuring and Overseeing Agencies in the Post-9/11 World, 94 CALIF. L. REV. 1655, 1697 (2006).

⁵²⁸ Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 60–62 (2014).

⁵²⁹ *Id.* at 62.

⁵³⁰ See Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 310 (2015) [hereinafter Sinnar, *Institutionalizing Rights*]; cf. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, xii (2012) (describing IG successes in constraining the CIA). Yet IG work has also varied between agencies and faces important limitations. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1031–32 (2013) [hereinafter Sinnar, *Protecting Rights*].

⁵³¹ Sinnar, *Institutionalizing Rights*, *supra* note 530, at 311.

⁵³² J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2219 (2005).

⁵³³ One exception is the Commerce Department IG, which investigated allegations of ITMS abuse. See COMMERCE GENERAL COUNSEL REPORT, *supra* note 470, at 1.

⁵³⁴ See Sinnar, *Protecting Rights*, *supra* note 530, at 1084; Inspector General Act of 1978 § 8E(b)(3), 5 U.S.C. § 413(b)(3).

⁵³⁵ Sinnar, *Protecting Rights*, *supra* note 530, at 1084.

⁵³⁶ See Sinnar, *Institutionalizing Rights*, *supra* note 530, at 357.

⁵³⁷ Sinnar, *Protecting Rights*, *supra* note 530, at 1036–38.

high-ranking officer focusing on civil rights can ensure continuing attention to these issues. This would be especially useful during periods of interbranch consensus, when Congress is less focused on policing rights violations.

There is also a need for more China expertise in policymaking circles generally. The growth in state-level bills targeting China is especially worrying for this reason. As susceptible as federal actors are to the politics of threat, many federal departments are staffed by foreign policy and area studies experts whose knowledge can inform sound policy. State governments, on the other hand, have no deep reservoir of foreign affairs talent, and yet are a primary growth area for China-focused legislation.⁵³⁸ While there is a need for more involvement of China experts in policymaking generally, that need is particularly acute in state governments where institutional capacities are programmatically lacking. Expert voices can urge caution where threat narratives balloon beyond reason.

Courts too will have an important role in the current conflict. Many of the case studies examined here involve judicial review, from lawsuits seeking to enjoin Trump's executive orders to challenges to Florida's property ban. As Ji Li has shown, Chinese multinational companies are inclined to use "formal domestic measures—litigation and administrative appeals—to mitigate and remedy" perceived American biases, suggesting that American courts will remain an important forum in mediating future business disputes as well.⁵³⁹ A number of lawsuits remain pending in American courts today, many of them challenging recent TikTok bans enacted by state legislatures.⁵⁴⁰

The perennial question in such cases is how much deference courts will accord to the state's national security justifications. Courts today are asked to apply an array of deference doctrines that elevate executive branch decisionmaking, lawmaking, and factfinding on matters of international consequence.⁵⁴¹ Despite calls to defer, the district courts that enjoined agency implementations of Trump's app and securities orders all found the state's security justifications to be wanting.⁵⁴² These opinions exemplify how foreign affairs deference does not preclude courts from subjecting executive claims to a measure of genuine scrutiny.

⁵³⁸ See Erie, *supra* note 202.

⁵³⁹ Ji Li, *In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias*, 62 HARV. INT'L L.J. 375, 396 (2021).

⁵⁴⁰ See Erie, *supra* note 202, at 46–48 (summarizing pending litigation).

⁵⁴¹ Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659–63 (2000).

⁵⁴² See *supra* Section III.C.

It is hard to predict how courts will address future efforts to expand presidential power to meet a purported China threat. The outcome will of course depend on specifics: the particular acts taken, their legal basis, the quality of lawyering, the jurisprudence of the presiding judge(s), and so on. For several reasons, however, we should be careful not to extrapolate too much from these several cases about the judiciary's future performance.

First, most of these cases were highly dubious on the merits. The Biden Administration hinted at this when it rescinded the Trump-era app bans in favor of assessing national security risks with "clear intelligible criteria," noting that the Trump orders were not carried out "in the soundest fashion."⁵⁴³ Scholars and judges have expressed similar doubts.⁵⁴⁴ Judge Contreras, who presided over both CCMC cases, expressed not only disagreement with the government's position, but also exasperation at its sloppiness.⁵⁴⁵ Future aggrandizing acts without these deficiencies may well survive deferential review.

Second, none of these cases were resolved on appeal, leaving open the question of whether courts of appeal or the Supreme Court would have held similarly. The modern Court is highly deferential to both agency interpretations of national security laws and executive determinations of foreign affairs facts.⁵⁴⁶ This is so even where clear evidence of bias exists. In *Trump v. Hawaii*, the Court upheld President Trump's order banning the entry of foreign nationals from predominantly Muslim-majority countries, despite significant evidence that the order was motivated by anti-Muslim animus.⁵⁴⁷ The Court argued that it was essentially irrelevant whether it thought that the order was "overbroad" or "little . . . serve[d] national security interests," maintaining that it

⁵⁴³ Katie Rogers & Cecilia Kang, *Biden Revokes and Replaces Trump Order That Banned TikTok*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/us/politics/biden-tiktok-ban-trump.html> [<https://perma.cc/ZY5X-DLQD?>].

⁵⁴⁴ When judges heard *TikTok v. Trump* on appeal, Judge Judith Rogers remarked about the TikTok order that "Congress wrote this language [in IEEPA], [the order] seems to just fly in the face of that." Oral Argument at 24:11, *TikTok, Inc. v. Trump*, No. 20-5302 (D.C. Cir. Dec. 14, 2020), [https://www.cadc.uscourts.gov/recordings/recordings2020.nsf/31F182605F720B498525863E0064C310/\\$file/20-5302.mp3](https://www.cadc.uscourts.gov/recordings/recordings2020.nsf/31F182605F720B498525863E0064C310/$file/20-5302.mp3); see also Sitaraman, *supra* note 526, at 1148 (agreeing that IEEPA is likely preclusive).

⁵⁴⁵ See *Xiaomi Corp. v. Dep't of Def.*, No. 21-280, 2021 WL 950144, at *5 (D.D.C. Mar. 12, 2021) (noting that the Defense Department's legal memo fails to cite its statutory authority and misquotes key statutory language, calling into question "the fastidiousness of the agency's decision-making process").

⁵⁴⁶ See, e.g., Eichensehr & Hwang, *supra* note 11, at 586–87; *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33–35 (2010); *Dep't of the Navy v. Egan*, 484 U.S. 518, 528–30 (1988); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017); see also Sinnar, *supra* note 342, at 69–74 (detailing the Supreme Court's consistently deferential posture in national security cases over the past two decades).

⁵⁴⁷ See 138 S. Ct. 2392, 2404–07, 2417, 2423 (2018).

“cannot substitute [its] own assessment for the Executive’s predictive judgments on such matters.”⁵⁴⁸ From here, it is not hard to imagine the Court upholding, for instance, a federal equivalent of entry bans or property bans against Chinese citizens, with *Hawaii*-grade deference overriding record evidence of racial animus or thin evidence of national security harms.⁵⁴⁹ And if congressional-executive consensus on China-related matters endures, courts will be even more inclined to defer to the President’s authority—at an apex under *Youngstown*.

How much the Justices defer in the new global conflict may also depend on their general perceptions of China. It is possible that a “constant drumbeat of headlines” about China’s rise may turn the judiciary into a more “deferentially disposed audience” for expansive executive branch claims.⁵⁵⁰ While it is hard to know what China-related media the Justices consume, judicial writings and comments at argument offer clues as to how the Justices view China generally. A search of these records and transcripts between 1989 and 2022 yields limited but notable insights.

First, and least surprisingly, there is a shared recognition that China has a repressive government.⁵⁵¹ Justices have several times invoked China as a negative comparator, observing, for example, that China is one of only very few countries that have retained the death penalty.⁵⁵² During oral argument in *Dobbs*, Chief Justice Roberts noted that the only countries that shared America’s viability standard for abortion were China and North Korea. “I don’t think you have to be in favor of looking to international law to set our constitutional standard to be concerned if those are your . . . ,” he said, without finishing his sentence.⁵⁵³ Second, there is some recognition of historic discrimination against Chinese immigrants and citizens. Exclusion-era laws and cases

⁵⁴⁸ *Id.* at 2421.

⁵⁴⁹ See Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 *YALE L.J.F.* 641, 656 (2019). Judicial opinions can operate as “a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

⁵⁵⁰ Eichensehr & Hwang, *supra* note 11, at 588.

⁵⁵¹ Justices have noted the Chinese government’s persecution of ethnic minorities and dissidents. See Transcript of Oral Argument at 59–60, *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351); Transcript of Oral Argument at 30, *Wilkinson v. Ming Dai*, 141 S. Ct. 1669 (2021) (No. 19-1155 & 19-1156).

⁵⁵² See *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring); *Glossip v. Gross*, 576 U.S. 863, 944 (2015) (Breyer, J., dissenting).

⁵⁵³ Transcript of Oral Argument at 54, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

are frequently invoked in legal analyses.⁵⁵⁴ Several Justices have urged that procedural protections that existed *even* during the Exclusion era ought of course to attach today.⁵⁵⁵ Third, there is a sense that Chinese firms play an important role in the American economy. Cases involving Chinese companies have increased on the Court's docket, and in one case, the Court considered that a Chinese ministry may have been prevaricating in its filings to support Chinese firms in litigation.⁵⁵⁶

Finally, there are hints that the Justices may increasingly see China as a threat. During oral argument in *Trump v. Vance*, Chief Justice Roberts highlighted the “burden on the . . . President” from having to review subpoenaed records, citing the President's need to deal with difficult affairs, including “China's causing all sorts of trouble.”⁵⁵⁷ The Chief's *sua sponte* invocation of China was of course just an offhanded quip, but it does suggest that the Chief is clued in to the common public recognition that China is a policy problem. And it hints that, consistent with his views on foreign affairs deference generally, the Chief may believe that the Court should hesitate to interfere with the executive because of it. Litigants have sometimes invoked threats from China as well. In a case addressing whether certain foreign government instrumentalities could be sued criminally, the government noted twice its recent prosecutions of “Chinese-owned corporation[s]” for “economic espionage” and theft of “nuclear information.”⁵⁵⁸ It stressed the “considered judgment of the executive” in prosecuting them.⁵⁵⁹

In combination, these findings suggest that the Justices generally view China as a repressive country, and that at least some of them see its rise as a threat to the United States. Several have recognized historical mistreatment of Chinese immigrants in our own history. Others may see conflict with China as reason for affording minimal external oversight over the executive.

⁵⁵⁴ See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorsuch, J., concurring in part and dissenting in part) (discussing *Yick Wo*); *INS v. St. Cyr*, 533 U.S. 289, 325 n.55 (2001); *Zadyvdas v. Davis*, 533 U.S. 678, 695 (2001) (citing *The Chinese Exclusion Case*).

⁵⁵⁵ See *Jennings v. Rodriguez*, 138 S. Ct. 830, 866 (2018) (Breyer, J., dissenting); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 2004–05 (2020) (Sotomayor, J., dissenting).

⁵⁵⁶ *Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1871, 1873 (2018) (noting “conflicting statements” made by the Chinese Ministry in support of a Chinese seller's price-fixing scheme). *China Agritech Inc. v. Resh*, 138 S. Ct. 1800 (2018), and *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), are other examples of commercial cases.

⁵⁵⁷ Transcript of Oral Argument at 93–94, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635).

⁵⁵⁸ Transcript of Oral Argument at 54, 83, *Halkbank v. United States*, 598 U.S. 264 (2023) (No. 21-1450).

⁵⁵⁹ *Id.* at 83.

More important than courts or executive offices is the vitality of our democratic processes. As shown, turns in popular opinion can dispel crisis-driven rally effects, rekindling interbranch and partisan competition.⁵⁶⁰ Similarly, judicial and institutional checks may only be as strong as the civil society actors that support them. Courts cannot act until parties bring suit; watchdog offices are their most effective where external partners amplify their shared concerns.⁵⁶¹ Federalism might also play a stronger role in policing federal executive overreach. Historically, states have sometimes sought to check executive foreign affairs authorities.⁵⁶² Even today, states are evincing considerable policy variation on China-related matters.⁵⁶³

With luck, the new global conflict may even reinvigorate our democratic institutions. Josh Chafetz and David Pozen have suggested that Trump's open defiance of constitutional norms may have strengthened American democracy by activating civic groups and the citizenry at large.⁵⁶⁴ A similar story may be unfolding in the new global conflict, with community and affinity groups speaking out in support of a variety of victims, from scientists to homebuyers. Advocacy groups may even see the new conflict as an opportunity to enlarge rights. They might argue, following advocates challenging assignment restrictions, that inclusion is needed to enhance national strength, or that democratic reforms would bolster American credibility. Such arguments may well privilege some rights over others, but they ought to be considered in the broader effort to improve democracy.⁵⁶⁵ Global conflicts present not only the risk of regression, history teaches, but also the promise of renewal.

⁵⁶⁰ See *supra* Section III.A.

⁵⁶¹ See Schlanger, *supra* note 528, at 110–11; Sinnar, *Institutionalizing Rights*, *supra* note 530, at 357.

⁵⁶² See e.g., Anthony A. D'Amato, *The Massachusetts Antiwar Bill*, 42 N.Y. STATE BAR J. 639, 639–40 (1970) (discussing the Massachusetts Antiwar Bill as an example of state's seeking to limit the executive).

⁵⁶³ See Jaros & Newland, *supra* note 199 (comparing the extent of three states' cooperation and confrontation with China).

⁵⁶⁴ See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1452–56 (2018).

⁵⁶⁵ See DUDZIAK, *supra* note 102, at 251–53 (commenting on how the Cold War helped expand formal equality but not social and economic rights); see also CAROL ANDERSON, *EYES OFF THE PRIZE* 7 (2003) (similar).