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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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, structural changes in federal and executive power, and shifts in our legal and political culture. The effects can be contingent and complex. Both canons and anticanons of our constitutional law were


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

We are in the midst today of what some believe to be a “new cold war.” 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. 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.

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, business and investment law, transnational law and procedure, and national security law. They show that China’s rise has begun to

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7 See infra Sections I.B, III.B.

8 See infra Section I.B.


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. Yet in its rhetoric, its politics, and its competitive dynamics, U.S.-China conflict is beginning to recall historic patterns. 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.  

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


Of course, domestic legal developments caused by U.S.-China conflict can have recursive transnational and international legal effects, see Ji Li & Ruohan 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.

target groups instead of individuals. 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. 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

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which colonial merchants could serve only as middlemen.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{24}

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

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\textsuperscript{22} Jedidiah J. Kroncke, \textit{The Futility of Law and Development} 26 (2016).

\textsuperscript{23} Id.; see also Teemu Ruskola, \textit{Legal Orientalism} 120–21 (2013); Benjamin L. Carp, \textit{Defiance of the Patriots} 2–3 (2010).

\textsuperscript{24} Kroncke, supra note 22, at 26.


\textsuperscript{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, \textit{Empire of Liberty} 246 (1990) (describing Thomas Jefferson speaking of the “desirability of Chinese isolation”).

\textsuperscript{28} Kroncke, supra note 22, at 24.

\textsuperscript{29} Id. at 15, 24.

\textsuperscript{30} Id. at 23.


\textsuperscript{32} Ruskola, supra note 23, at 44; see also Patrick Mendis, \textit{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

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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).
41 149 U.S. 698 (1893).
protection and due process. *Yick Wo v. Hopkins*, 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. Emily Prifogle argues that *Muller v. Oregon*, 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.” 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.”

If Founding Era admiration of China was rooted in domestic politics and ideology, 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.” 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.” 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.”

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

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43 118 U.S. 356 (1886).
45 208 U.S. 412 (1908).
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”).
50 Id. at 10 n.29.
51 *Brief for the Respondents at 55, Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
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. 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. 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.” 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. 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.

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.” 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. Politically, these changes were made tenable by vastly improved perceptions of the Chinese. During the War, The San Francisco Chronicle praised Chinatown residents as “American through and through” for their aid of the war effort. In 1942, gubernatorial candidate Earl Warren claimed that he had “cherished during [his]
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’ miring 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

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62 Id. at 89.
64 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 583 (1952).
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

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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

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; 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; and they have been disturbed by worsening repression and persecution of dissidents and religious minorities. 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. 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.

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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.²⁶ Not so here—or at least, not yet.²⁷ Second, the new global conflict involves a still high level of economic and social integration between its principal competitors.²⁸ In 2022, U.S.–China trade volume hit a record 690 billion dollars.²⁹ Trade between the United States and the Soviet Union was “small,” even “inconsequential” throughout the Cold War.³⁰ 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;³¹ nor has it pushed to export its Leninist state organization abroad.³² 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
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.”

Senator Tom Cotton’s (R-AR) 2021 China report references the “Cold War” a dozen times. 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.” 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.”

Chinese political discourse has likewise begun to evoke Cold War themes. Encirclement frames, once dominant in Soviet and Chinese discourse, have returned. 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.” Xi’s views echo a longstanding “encirclement complex” in Soviet thinking, Einkreisung, kapitalistischesko okruzhenie, “anxiety about one’s own nation being ringed in systematically, in the manner of a conspiracy planned and executed by foreign enemies.” 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”; another decried the “slaughtering”

95 Id. at 6.
99 Vagts, supra note 97, at 499–500.
100 Peter Martin, China’s Civilian Army: The Making of Wolf Warrior Diplomacy 3 (2021).
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. 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.” 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.”

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. The United States

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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”).


has sought to cut China out of strategic global supply chains, block inbound investments from Chinese firms, and to limit certain forms of outbound investments to China. 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. 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. 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

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


Taiwan’s defense minister retorted that his armed forces would not “tolerate” America wanting to “bomb this or that.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{115} Bipartisan consensus characterized American politics during the Cold War, up until Vietnam.\textsuperscript{116} As later detailed, such consensus risks eroding important mechanisms of partisan and interbranch accountability.\textsuperscript{117}

\section*{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.

\begin{hangingfigure}
\begin{itemize}
\item \textsuperscript{112} Jason Willick, Opinion, \textit{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].
\item \textsuperscript{113} Id. (internal quotations omitted).
\item \textsuperscript{114} Bade, \textit{supra} note 80 (internal quotations omitted).
\item \textsuperscript{115} Id. (alteration in original).
\item \textsuperscript{117} See \textit{infra} Section III.B.
\end{itemize}
\end{hangingfigure}
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 legis 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.”).


\(^{122}\) 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 habeus 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. Federal laws first mandated the registration of Communist Party members before outlawing the Party entirely. 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.”

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. Some may subjectively believe rights restrictions to be necessary; others may claim greater authorities on pretext. Either way, there are strong incentives for officials to “exaggerate the dangers . . . to persuade legislators and the public to grant them” more power.

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).


125 Stone, supra note 124, at 1326; see also Michal R. Belknap, Cold War Political Justice 35–115 (1977) (analyzing Smith Act prosecutions).


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).

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

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.
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

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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).


148 Primus, *supra* note 1, at 456; see also Scheppelle, *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.

I. 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, but law enforcement did not systematically focus on Chinese economic spies until the mid-2010s. A pivotal moment, observes Margaret Lewis, 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. 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. 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.”

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].
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

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155 Id.
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.
banned from speaking with certain colleagues.\textsuperscript{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.”\textsuperscript{163} Prosecutors had no choice but to drop all charges.\textsuperscript{164}

The first researcher to go to trial under the China Initiative was Dr. Anming Hu.\textsuperscript{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.\textsuperscript{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.\textsuperscript{167} Dr. Hu was fired from his university and kept under house arrest for over a year.\textsuperscript{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.”\textsuperscript{169} The judge later granted a motion of acquittal on a “no rational jury” standard.\textsuperscript{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.\textsuperscript{171} A U.S. citizen, Dr. Chen was placed on leave by MIT, forbidden to enter campus or contact his colleagues.\textsuperscript{172} Prosecutors accused Dr. Chen of concealing Chinese affiliations when he applied for Department of Energy grants.\textsuperscript{173} In 2022, however, prosecutors abandoned the case upon

\begin{itemize}
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at 761.
\item \textsuperscript{164} Id.
\item \textsuperscript{168} Id.; Gilbert, supra note 166.
\item \textsuperscript{170} See United States v. Anning 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).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\end{itemize}
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).


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).


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.
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].
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.
189 Qin, supra note 167.
190 JENNY J. LEE, XIAOHE 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/CL100-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 ACADEMY SCIENCES, 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).
“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.
196 Id.
197 Id.
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

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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].


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

The successful moderation of such bills stands in contrast with Florida’s recent enactment of S.B. 264.\textsuperscript{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.\textsuperscript{210} Second, the law bars Chinese citizens “domiciled” in China from purchasing real property anywhere in Florida.\textsuperscript{211} Chinese citizens who violate this latter provision will have committed a third-degree felony, punishable by up to five years’ imprisonment.\textsuperscript{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.\textsuperscript{213} S.B. 264 also requires those who had purchased such properties prior to the law’s operative date to register with the state.\textsuperscript{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


\textsuperscript{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].


\textsuperscript{211} Id. § 692.204. The law does not define “domicile.”

\textsuperscript{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).

\textsuperscript{213} Id. §§ 692.203(4), .204(2).

\textsuperscript{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

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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.


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


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.\footnote{See Edgar Chen, \textit{With New \textquotedblright Alien Land Laws\textquotedblright 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].} 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 \textquoteleft\textquoteleft fifth column . . . waiting to be activated at the emperor\textquoteleft s command.\textquoteright\footnote{Id. (quoting Professor Keith Aoki).} California enacted its first alien land law in 1913, and was soon followed by over a dozen states, including Florida.\footnote{Id.} S.B. 246 is especially poignant because Florida was the last state to remove constitutional language referencing alien land restrictions in 2018.\footnote{Id.}

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.\footnote{See Bruce Ritchie, \textit{Chinese Citizens Seek to Block Florida\textapos;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].} 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.\footnote{Complaint, supra note 215, ¶ 60. Shen purchased property within ten miles of a critical infrastructure facility. \textit{Id.}} 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.\footnote{Id. ¶ 61. Xu also purchased property near a critical infrastructure facility. \textit{Id.}} 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.\footnote{Id. ¶ 62. Wang would be subject to the registration requirement because her property was also near a critical infrastructure facility. \textit{Id.}} All are presumably subject to the law\textquotesingle 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.\footnote{Chen, supra note 226.} S.B. 91 forbids non-permanent resident Chinese citizens from not only owning, but even \textit{leasing}, immovable property within fifty miles of certain military facilities or other sensitive installations in Louisiana.\footnote{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.” 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. One order alleged that TikTok, a video-sharing app owned by a Chinese parent, ByteDance, gave the Communist Party access to Americans’ personal data, enabled censorship, and fostered disinformation. The other order alleged that WeChat, a messaging, payment, and social media app developed by a Chinese company, Tencent, presented similar risks. Implementing regulations made clear that these platforms would effectively be banned.

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. For authority, the orders relied principally on the International Emergency Economic Powers Act (IEEPA), which confers on the President certain peacetime emergency powers.
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

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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).
253 Id.
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.

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." 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." 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."

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." 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." 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." 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.
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.
261 U.S. WeChat Users All., 488 F. Supp. 3d at 926.
it could withstand intermediate scrutiny.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{264} She further noted that the government misapplied precedent in its speech analysis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{267} As both judges noted, the government had provided only speculative evidence of national security harms.\textsuperscript{268} And it did not well address why tailored alternatives, such as better data security standards, would not have achieved the same goals.\textsuperscript{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.\textsuperscript{270} For example, TikTok’s parent ByteDance is a Beijing-headquartered firm with a Party Committee and has been accused of

\textsuperscript{262} Id. at 927.
\textsuperscript{263} Id.
\textsuperscript{265} Id. at 638 n.6.
\textsuperscript{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 . . . .”).
\textsuperscript{268} See supra notes 256–58 and accompanying text.
\textsuperscript{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)).
\textsuperscript{270} See infra Section III.B.
sharing dissident data with the Party-state.\textsuperscript{271} WeChat has been accused of facilitating disinformation and interference with foreign elections.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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/xDgHrsrOUZe [https://perma.cc/7SJW-SNQV] (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).

\textsuperscript{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.” 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. 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. 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. Kim was born in America, did not speak much Korean, and “barely” knew his relatives in South Korea. “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.” An association representing Asian-American diplomats began raising concerns over assignment restrictions in 2009. It won a modest victory in 2016 and 2017 in the form of greater procedural protections.

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. The Asian-American Foreign Affairs Association’s (AAFAA’s) conducted a member survey in 2020, finding

275 Id. § 233.5(a).
280 Id.
282 See id.; Heath, supra note 278 (describing language inserted into 2017 State Department Authorization Act that created “a formal appeals process”).
that 70% of 132 respondents perceived bias in the assignment restriction process.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{288} “We must . . . learn from painful elements of American history, when hostilities abroad resulted in undue prejudice . . . [against] Japanese-Americans.”\textsuperscript{289}

Concerns from within the foreign policy establishment struck a chord with several legislators. Like others, Congressmen 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 . . . .”\textsuperscript{290} Congressman Kim spoke publicly about his experiences with assignment restrictions, describing them as bureaucratic jargon for a “fail[ed] loyalty test.”\textsuperscript{291} In 2021, four congressmen introduced the \textit{Accountability in Assignment Restrictions}\textsuperscript{284} Heath, \textit{supra} note 278.

\textsuperscript{285} Id.

\textsuperscript{286} Kelly, \textit{supra} note 283 (internal quotation marks omitted).

\textsuperscript{287} Asian-Americans and Pacific Islanders in National Security Statement on Anti-Hate and Discriminatory Practices, https://docs.google.com/forms/d/e/1FAIpQLSeiE69q4M8Jk8JeQuBFW102zzos2kOyY1CTFy5g1x2L50fG4/viewform [https://perma.cc/P8ZJ-UTKZ] [hereinafter National Security Professionals Letter].

\textsuperscript{288} Id.

\textsuperscript{289} Id.

\textsuperscript{290} Heath, \textit{supra} note 278 (internal quotation marks omitted).

\textsuperscript{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
the capacity to “unleash [the people’s] full potential.” 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 country . . . .

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. 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. And in March 2023, Blinken announced that the Department would no longer issue assignment restrictions at all.

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 AAFAA 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

301 Id.
302 Heath, supra note 278.
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[. . . ].” Secretary Blinken framed his decision to end new assignment restrictions as an effort to “unlock the full potential of our workforce . . . .” 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.”

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.” 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. 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).
309 See supra Section I.B.
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. 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.” Part of the reason is structural. Alexander Hamilton predicted that the executive would enjoy inherent advantages in crisis: speed, decisiveness, and secrecy. Other reasons sound more in politics.
That presidents are directly accountable for wartime performance drives them to accrue more power.\textsuperscript{314}

Whatever the causes, history is replete with episodes of conflict-driven executive aggrandizement that undermine Madisonian ideals of power diffusion.\textsuperscript{315} Starting with Jefferson, American Presidents have routinely deployed military forces abroad without congressional approval.\textsuperscript{316} President Lincoln suspended the writ of habeas corpus without congressional authorization during the Civil War.\textsuperscript{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.\textsuperscript{318} Courts too have “long deferred to the political branches in times of war and emergency.”\textsuperscript{319} They have upheld the curfew and internment of Japanese citizens and residents,\textsuperscript{320} validated the use of military commissions to

\textsuperscript{314} Cf. Erik Voeten & Paul R. Brewer, \textit{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, \textit{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.”).

\textsuperscript{315} See \textit{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 \textit{Youngstown} spoke of the “long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.” \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).


\textsuperscript{317} See \textit{Feldman}, supra note 122, at 246.

\textsuperscript{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, \textit{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”).


\textsuperscript{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, and sustained prosecutions against wartime dissenters under the Espionage Act and the Smith Act. 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.”

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. John Mueller first used the phrase, “rally around the flag,” to denote short-term crisis-driven boosts to presidential popularity, 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. 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.

The conventional story of the unfettered wartime executive does not always hold however. 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).


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.
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”).
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).
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).
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.

343 Wittkopf & McCormick, supra note 116, at 628.
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).
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, prohibitions on trading the securities of firms tied to China’s military, 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

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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).


349 Timeline of Executive Actions on China (2017–2021), U.S.-CHINA ECON. & SEC. REV. COM’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.


352 Supra note 237


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

President Biden has issued more than a half dozen executive orders connected to China. 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. The new order nevertheless framed itself as an implementation of President Trump’s 2019 emergency declaration of ICTS risks from foreign adversaries. 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. The order, the first presidential directive on appropriate CFIUS considerations, “formalize[d] a new, broader interpretation of the committee’s authority.” President Biden has also barred U.S. entities from investing in Chinese companies linked to China’s defense and surveillance sectors. The order “expands the scope of the national emergency” declared in an earlier Trump order.

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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”).
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 . . . ”).
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

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.
“owned or controlled by the People’s Liberation Army.”\textsuperscript{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.\textsuperscript{373}

The two cases, \textit{Xiaomi Corporation v. Department of Defense} and \textit{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 “critical [t]echnologies essential to modern military operations.”\textsuperscript{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.\textsuperscript{375} As the district court judge explained, however, Xiaomi specialized in consumer electronics, where 5G and AI were “quickly becoming industry standard.”\textsuperscript{376} That certain technologies have potential military applications did not prove an actual military affiliation.\textsuperscript{377} And because the MIIT award had been given to entrepreneurs of hot sauce, infant milk powder, and wine,\textsuperscript{378} that Xiaomi’s CEO received it was not substantial evidence of the company’s military affiliations either.\textsuperscript{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.”\textsuperscript{380} But that reading, the judge concluded, was belied by other sources, including the Department’s own regulatory definitions.\textsuperscript{381}

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

\textsuperscript{374} Xiaomi, 2021 WL 950144, at *3–*4 (alterations in original).
\textsuperscript{375} Id. at *6.
\textsuperscript{376} Id. at *8.
\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{380} 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. And the Department urged an expansive reading of the term “affiliated with,” which the same judge rejected on similar grounds. 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.”

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.

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, but also “private” firms. 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. 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. The point rather is that in its efforts

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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.
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.”

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.” 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. “This is an issue that transcends our political parties,” McCarthy said. 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

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393 Id.
in the United States.\textsuperscript{394} The White House framed the Act as a necessary response to China’s rise.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{397} Public attitudes have no doubt shaped the views of politicians, and vice versa.\textsuperscript{398} The professional class—experts who brief, advise, and lobby political leaders on China—have also begun to converge.\textsuperscript{399} A recent study of American thinktanks found a “consensus on the issue of China” regardless of “ideological orientations.”\textsuperscript{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.\textsuperscript{401} During the first hearing of the House Select Committee

\textsuperscript{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].

\textsuperscript{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).


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

\textsuperscript{399} See id.


\textsuperscript{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.” 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. 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.” 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. 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. 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. Yet according to a recent systematic analysis of China-related laws and legislative messaging, the new consensus is “undeniably substantive.” 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, increasing party consensus

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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.”).

414 See Robert L. Tsai, Manufactured Emergencies, 129 YALE L.J. 590, 591 (2020) (describing how Congress has “carved out more and more areas for potential emergency governance” with “over 136 different statutes currently authorizing 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. Congress and the President have modified it several times, most significantly in 2018 in view of new concerns relating to China. 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.”

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 considerations—not entirely unlike Beijing’s own expansive concept of security. 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.

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

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


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.” 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.”

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 unfailingly 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

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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

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

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. 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. 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.”

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

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430 This commitment arguably breaks down in other areas, such as judicial elections.
435 Urofsky, *supra* note 434, at 27; see also Snyder, *supra* note 123, at 397.
“freedom from political oppression”; or another way that “relies upon terror and oppression,” “fixed elections,” and “suppression of personal freedom.”

McCarthyism, broadly defined, constituted “a social practice that worked to maintain” these views among the general population, including legal actors. “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.

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.” Brad Snyder attributed what he saw as the Court’s abdication in that case partially to the Justices’ “anti-communism.”

Later in the Cold War, the Supreme Court itself criticized lower courts for ruling on the basis of anti-communist fervor.

Ideological frames like “free world,” and “communist” are a kind of “symbolic language whose references lie in the social order.” 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. “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. As the following section shows, such tendencies are starting to reappear in American law.

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Notes:

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 Zschernig v. Miller is best known for its application of the dormant foreign affairs power.
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.”

Id.

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

The most prominent victim of ITMS misconduct was Sherry Chen, a Chinese-American hydrologist at the National Weather Service.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{460} Two ITMS agents interrogated Chen for seven hours, without food, water, or a restroom break.\textsuperscript{461} They forbade Chen from discussing the interrogation with others, which she understood to include counsel.\textsuperscript{462} They then intimidated her, Chen claims, into drafting a statement with prepared language.\textsuperscript{463}

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

\textsuperscript{453} Id. at 4.
\textsuperscript{454} Id. at 5.
\textsuperscript{455} Id. at 5, 24.
\textsuperscript{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-aee1-42a8138f132a_story.html [https://perma.cc/LLN2-VQPC?type=standard].
\textsuperscript{458} Id. at 3.
\textsuperscript{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].
\textsuperscript{460} Chen Claim, supra note 457, at 4.
\textsuperscript{461} Id. at 4–5.
\textsuperscript{462} Id. at 4.
\textsuperscript{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 con-
flict 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 juris-
diction 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/asia-america/falsely-accused-spying-china-sherry-chen-wins-significant-settlement-
rena56847 [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-
469 Yam, supra note 465.
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. 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. 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.” 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.”

In ultimately refusing to enforce the Chinese judgment, the court made several more unusual moves. 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. These reports, however, are typically treated as ordinary evidence at trial, not special evidence meriting conclusive deference on a dismissal motion. 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. As legal scholars pointed out as amici, U.S. courts have historically addressed deficiencies in Chinese law on case-specific

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474 See id. at *1–2.
475 See 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”).
476 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).
477 Id.
479 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. By holding that Chinese law was systemically unfair, the court implied that no New York court could ever recognize a Chinese judgment.

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.” 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. 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 paean 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.

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...

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482 Id. at 10.


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.

direction. But given our history of conflict-driven legal irrationality, and at a time in which judicial rhetoric in some corners is becoming more dramatic, 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. The China Initiative was canceled, said Senator Marco Rubio (R-FL), “because a band of woke activists smeared it as racist and xenophobic.” Senator Scott (R-FL) another co-sponsor, framed the bill as a necessary response to a “new Cold War with the United States.” 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.

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. 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). 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.
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. 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. 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. FARA’s express exemption for lawyers representing foreign principals exemplifies its policy focus. 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. Under FARA, covered entities must disclose potentially sensitive materials to the government or risk fines and imprisonment. For an attorney, the most troubling of these disclosure requirements includes “a comprehensive statement of the nature and method of performance” of their client. Other burdensome disclosures include fee arrangements, payment histories, and spending logs. 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).
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.”\footnote{Id. § 612(a)(10).} 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.\footnote{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].} The Justice Department saw Du Bois’s work as “communist propaganda meant to encourage American pacifism in the face of Soviet aggression.”\footnote{Id. Du Bois was acquitted but “the trial and the publicity around it ruined his career.” Id.} 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.\footnote{Robinson, supra note 494, at 1121–24.} Both cases illustrate the susceptibility of FARA to abuse—a feature that has inspired autocrats in other countries to enact statutory analogs.\footnote{See id. at 1084–92.} 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
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. 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. 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.” 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. 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. He concludes that “[a]ll we have learned from history is how to mask the repetition, not how to avoid the mistakes.”

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. 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.

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. 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.” 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. As explained, several senators have sought to restore the China Initiative. They would rename it the CCP Initiative, presumably to allay racial concerns over a “China” framing. While this change is not nothing, the senators have otherwise proposed reinstating the exact same organization, with

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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.
519 Rubio Press Release, supra note 488.
520 Id.
the same aggressive targets.\textsuperscript{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.”\textsuperscript{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 may 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.”\textsuperscript{523} Finally, the new global conflict is playing out against a backdrop of democratic erosion around the world, including here in the United States.\textsuperscript{524} Crises tend to enable backsliding in democratic institutions, which become in turn more susceptible to autocratic exploitation.\textsuperscript{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.\textsuperscript{526} When Madisonian checks fail, one might look to “internal separation of powers”—constraints within the executive branch to keep power in check.\textsuperscript{527} Among the executive offices with responsibility for rights protection, some are what Margo Schlanger calls

\textsuperscript{521} Id.

\textsuperscript{522} Hoover Inst., China’s Influence & American Interests, xiii (Larry Diamond & Orville Schell eds., 2019).


\textsuperscript{524} See generally Aziz Huq & Tom Ginsburg, How to Lose a Constitutional Democracy, 65 UCLA L. Rev. 78 (2018).

\textsuperscript{525} Kim Lane Schepple, Autocratic Legalism, 85 U. Chi. L. Rev. 545, 569–70 (2018).


\textsuperscript{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

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⁵²⁹ Id. at 62.
⁵³¹ Sinnar, Institutionalizing Rights, supra note 530, at 311.
⁵³³ One exception is the Commerce Department IG, which investigated allegations of ITMS abuse. See Commerce General Counsel Report, supra note 470, at 1.
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.
540 See Erie, supra note 202, at 46–48 (summarizing pending litigation).
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

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\(^{545}\) *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.
550 Eichensehr & Hwang, supra note 11, at 588.
are frequently invoked in legal analyses.\textsuperscript{554} Several Justices have urged that procedural protections that existed \textit{even} during the Exclusion era ought of course to attach today.\textsuperscript{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.\textsuperscript{556}

Finally, there are hints that the Justices may increasingly see China as a threat. During oral argument in \textit{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.”\textsuperscript{557} The Chief’s \textit{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.”\textsuperscript{558} It stressed the “considered judgment of the executive” in prosecuting them.\textsuperscript{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.


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

\textsuperscript{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.\textsuperscript{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.\textsuperscript{561} Federalism might also play a stronger role in policing federal executive overreach. Historically, states have sometimes sought to check executive foreign affairs authorities.\textsuperscript{562} Even today, states are evincing considerable policy variation on China-related matters.\textsuperscript{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.\textsuperscript{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.\textsuperscript{565} Global conflicts present not only the risk of regression, history teaches, but also the promise of renewal.

\begin{footnotesize}
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  \item[560] See supra Section III.A.
  \item[561] See Schlanger, supra note 528, at 110–11; Sinnar, Institutionalizing Rights, supra note 530, at 357.
  \item[563] See Jaros & Newland, supra note 199 (comparing the extent of three states’ cooperation and confrontation with China).
  \item[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).
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