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AMERICAN LAW IN THE NEW GLOBAL CONFLICT

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ABSTRACT

International conflict has profoundly influenced American law. It has shaped the scope of our civil rights and civil liberties, transformed the balance of our constitutional institutions, and fostered shifts in our legal culture. This Article is the first to comprehensively assess how today's principal conflict, a growing rivalry between the United States and China, is shaping the American legal system. It contends that the new global 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 connections to a geopolitical adversary. But there has also been a modest expansion in rights where affected constituencies have linked desired reforms with geopolitical goals. Institutionally, the new global conflict has at times fostered executive overreach and increased interbranch and interparty consensus. Legal-culturally, it has evinced a decline in legal rationality resulting from the return of familiar ideological and nationalistic frames. Although these developments do not rival in magnitude 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 periods of conflict, and offers some tentative reflections on what comes next in the new global conflict, and how best to shape it.

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INTRODUCTION

International conflict has profoundly shaped American law. From the Founding through the Cold War, competition with our putative adversaries has influenced the creation and evolution of our constitutional order,[1] structural changes in federal and executive power,[2] and shifts in our legal and political culture.[3] The effects can be contingent and complex. Both canons and anticanons of our constitutional law were drafted in the shadow of foreign threat and global competition. *Brown* on one end.[4] *Korematsu* on another.[5]

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[1] *See* J.R. Pole, *Reflections on American Law and the American Revolution*, WILLIAM & MARY Q., Jan. 1993 ("As a logical consequence of the Revolution, responsibility for American law passed into American hands."); Daniel M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 NYU L. Rev. 932, 937 (2010) (arguing that the "core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states"); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L. J. 423, 437-50 (1996) (describing how anti-Nazism and anti-Sovietism shaped constitutional jurisprudence); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1091 & n.24 (collecting sources on how "fear of foreign totalitarianism" led to a more "antistatist, judicially enforced character" for civil liberties law).

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

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

[4] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (stating that *Brown* "helped to provide immediate credibility to America's struggle with Communist countries"); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988) (arguing that "*Brown* served U.S. foreign policy interests"); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 26 (1994) (describing how "desegregation as a Cold War imperative became standard political fare" following World War II); Robert A. Burt, Brown's *Reflection*, 103 YALE L. J. 1483, 1487 (1994) (suggesting that Justice Jackson's Nuremberg experiences shaped his views on Jim Crow).

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

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

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

This Article argues that U.S.-China conflict is beginning to reproduce patterns and pathologies associated historically with global rivalry and American law. As in earlier conflicts, the politics of threat has led to significant downstream effects on our law. It has diminshed rights and liberties, especially among groups with imputed connections to a geopolitical adversary. It has also led to a limited expansion in rights, but only where affected constituencies have successfully linked desired reforms with geopolitical goals. More institutionally, the politics of threat has led to attempts at executive aggrandizement, increased interbranch collaboration, and a growing bipartisan consensus on the China threat. Lower courts have checked these developments in some areas, while in

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[6] David Brooks, *The Cold War With China Is Changing Everything*, N.Y. Times, Mar. 23, 2023, https://www.nytimes.com/2023/03/23/opinion/cold-war-china-chips.html.

[7] *See infra* Part I.B; III.B.

[8] *See* Part I.B.

[9] *See* Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145 (2021).

[10] *See* Angela Huyue Zhang, *Strategic Comity*, 44 YALE J. INT'L L. 281 (2019).

[11] *See* Kristen Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023); Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT'L L. & BUS. 395 (2014); Timothy Webster, *Why Does the United States Oppose Asian Investment?* 37 NW. J. INT'L. L. & BUS. 213 (2017).

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

[13] *See* Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145 (2022).

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other areas there has been a marked erosion in structural and partisan accountability. Finally, the new global conflict has evinced a decline in legal rationality. On notable occasions, legal or prosecutorial judgments appear to have been unduly affected by the politics and psychology of threat. Familiar ideological and nationalistic frames have returned to political-legal discourse, risking overreaction and overprescription.

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

The Article advances scholarship in several ways. First, it provides a framework for understanding legal developments in the new global conflict. By assessing historical and political patterns in three transubstantive domains—rights, structure, and rationality—the Article shows how patterns associated with war can illuminate legal-institutional dynamics today. Second, the Article reinvigorates important scholarly debates on whether there is a "generally ameliorative trend" in civil liberties violations in "wartime."[16] While it is too early to conclusively assess how U.S.-China conflict fits into these discussions, 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 recommending possible paths forward, the Article extends and adapts scholarly proposals during previous conflicts, showing how and why movement from one conflict to the next only underscores the need for heightened vigilance among political, judicial, bureaucratic, and civil society actors.

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

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[14] Edward Corwin famously described the second world war as a "total war." EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 1-3 (1947); *see also* Ernst & Jew, *supra* note 2, at 2.

[15] *See infra* Part I.B.

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

[17] This is the subject of a rich and growing literature. *See, e.g.*, Tom Ginsburg, *Authoritarian International Law*, 114 AM. J. INT'L L. 221 (2020); Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607 (2020); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016); Matthew S. Erie

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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, the Article acknowledges that China's rise presents real challenges that merit a significant government response.[18] Indeed, the Chinese Party-state's policies have contributed significantly to many of the problems identified. A secondary contribution of the Article is to show how China's global strategies uniquely exacerbate wartime pathologies in American law. For example, the Party-state's recruitment of its diaspora communities complicates efforts to reduce racial bias in law enforcement, heightening incentives, consciously or not, to target groups instead of individuals.[19] Similarly, the opacity of Chinese firms' connections to the party-state, coupled with the party-state's own encompassing conception of national security, can frustrate efforts to accurately assess risks posed by Chinese firms.[20] My aim is not to arrest a robust China policy, but to encourage a more thoughtful and informed discussion of how we can meet genuine challenges without abandoning 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 recent 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. Despite some positive notes, the general trends are troubling. Part V closes with a discussion of conceptual and practical implications, including thoughts on the road ahead.

& Thomas Streinz, *The Beijing Effect: China's Digital Silk Road as Transnational Data Governance*, 54 NYU J. INT'L L. & POLITICS 1 (2021); *Remarks by Jacques deLisle*, PROCEEDINGS OF THE 116TH ANNUAL MEETING OF THE AM. SOC'Y INT'L L., at 75 (2018); Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1 (2006).

[18] For a too brief account of some of these challenges, see Part I.B.

[19] *See China's Influence & American Interests*, HOOVER INST. (Larry Diamond & Orville Schell, eds., 2019), at xiii.

[20] *See* Testimony, Sheena Chestnut Greitens, *Internal Security and Chinese Strategy*, Senate Armed Services Committee (2021); Christopher Balding & Donald C. Clarke, *Who Owns Huawei?*, SSRN Draft, May 8, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669.

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I. BACKGROUND

Part I sets the scene. It begins by explicating factors that have shaped China's historic impact on American law. These themes, which sound in areas like politics, ideology, and race, continue to matter in the story of China's legal impact in America 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 is evocative of earlier era-defining rivalries.

A. China and American Law

To understand China's impact on American law, it helps first to consider history. This initial section surveys some of the surprisingly ways in which China has influenced American legal development, focusing on how political, ideational, and racial factors have shaped China's downstream legal effects.

China has been an important presence in American legal development from the very 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 which colonial merchants could serve only as middlemen.[21] The 1773 Boston Tea Party, where 46 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."[22] The China 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."[23]

Several Founders shared an interest in Chinese philosophy and law.[24] In searching for alternatives to British governance, the founding generation looked extensively to foreign models.[25] China, depicted in many writings as a

[21] JEDIDIAH J. KRONCKE, THE FUTILITY OF LAW AND DEVELOPMENT 26 (2016).

[22] *Id.*; TEEMU RUSKOLA, LEGAL ORIENTALISM 45 (2013); BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS 2-3 (2010).

[23] KRONCKE, *supra* note 21, at 26.

[24] GORDON CHANG, FATEFUL TIES 23-25(2015);RUSKOLA, *supra* note 22, at 45 ("[M]any thinkers of the American Enlightenment admired the political wisdom of Confucianism").

[25] *See* Michael Hoeflich, *Comparative Law in Antebellum America*, 4 WASH. U. GLOBAL STUDIES REV. 535 (2005); *cf.* NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON (74-76) (describing James Madison's study of ancient and foreign confederations).

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isolationist and agrarian meritocracy, had a natural appeal to some.[26] Thomas Jefferson was an "avid collector of books on China."[27] James Madison sought similar texts and hung a picture of Confucius in his home.[28] Thomas Paine extolled Confucian moral teachings.[29] Benjamin Franklin described China as "the most ancient, and, from long Experience, the wisest of Nations."[30] His letters in *The Pennsylvania Gazette*, "The Morals of Confucius," lauded Chinese governance.[31] One letter praised "the extraordinary Precautions which the [Chinese] Judges took before any Cause was brought before their Tribunal."[32] When veterans of the Revolution proposed creating an order of hereditary knighthood, Franklin objected by invoking Confucian principles of meritocracy.[33]

In the nineteenth century, a mix of social, economic, and demographic forces led thousands of Qing subjects to emigrate abroad, including to the United States.[34] Drawn initially to the gold rush, Chinese emigres spread throughout the country as railroad workers, storekeepers, laundrymen, gardeners, factory workers, and merchants.[35] By 1870, approximately 63,000 Chinese lived in the United States.[36] In time, economic insecurities and cultural xenophobia gave way to racial violence and calls to limit Chinese immigration.[37]

The ensuing era of Chinese Exclusion was a milestone one in American law. State laws discriminated against Chinese immigrants; federal laws banned Chinese from entry and citizenship.[38] The 1882 Chinese Exclusion Act and its successors produced several landmark cases in constitutional law. In *Chae*

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[26] RUSKOLA, *supra* note 22, at 44 (writing that the Confucian "vision of a peaceful, stable agrarian empire governed by a virtuous ruler and a bureaucracy composed of men of letters held great appeal for the young nation"). This was especially so for Jeffersonians. *Cf.* ROBERT W. TUCKER & DAVID C. HENDRICKSON, EMPIRE OF LIBERTY 246 (1990) (describing Thomas Jefferson speaking of the "desirability of Chinese isolation").

[27] Kroncke, *supra* note 21, at 24.

[28] *Id.* at 15, 24.

[29] *Id.* at 23.

[30] Dave Wang, *The US Founders and China*, US, EDUCATION ABOUT ASIA, vol. 16, 2011, at 6.

[31] PATRICK MENDIS, PEACEFUL WAR 50 (2015).

[32] *Continuation of the Morals of* Confucius, THE PENN. GAZETTE, Mar. 14-21, 737; RUSKOLA, *supra* note 22, at 44.

[33] Wang, *supra* note 30, 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).

[34] *See* JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 202 (2013).

[35] *Id.* at 204; JURGEN OSTERHAMMEL, THE TRANSFORMATION OF THE WORLD 862-63 (2014)

[36] ERIKA LEE, THE MAKING OF ASIAN AMERICA 59 (2015).

[37] SPENCE, supra note 34, at 204-207; LEE, *supra* note 36, at 89-95.

[38] *See Chinese Immigration and the Chinese Exclusion Acts*, U.S. Department of State Office of the Historian, accessed May 17, 2023, https://history.state.gov/milestones/1866-1898/chinese-immigration [https://perma.cc/P2WL-AL5L].

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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."[39] In *Fong Yue Ting v. United States*, the Court extended *Chae Chan Ping*'s federal-power proclamation from exclusion to deportation.[40] Together, these decisions "gave Congress [then] essentially a free hand with respect to non-citizens."[41] The Exclusion Era also shaped important cases in constitutional equal protection and due process. *Yick Wo v. Hopkins*,[42] 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.[43] Emily Prifogle argues that *Muller v. Oregon*,[44] 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."[45]

If Founding Era admiration of China was rooted in domestic politics and ideology,[46] so too was Exclusion Era denigration of the Chinese. Politicians exploited racial tensions through xenophobic 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."[47] 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."[48] Racist views soon bled into legal argument. The United States' brief in *Fong Yue Ting* urged that "the most insidious and

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[39] 130 U.S. 581 (1889). A leading immigration law casebook describes *Chae Chan Ping* as "the granddaddy of all immigration cases." STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY (SIXTH EDITION) 103 (2014).

[40] 149 U.S. 698 (1893)

[41] Gabriel J. Chin, Chae Chan Ping & Fong Yue Ting: *The Origins of Plenary Power*, *in* IMMIGRATION LAW STORIES 23 (David Martin & Peter Schuck, eds., 2005).

[42] 118 U.S. 356 (1886).

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

[44] 208 U.S. 412 (1908).

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

[46] *See* KRONCKE, *supra* note 21, 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").

[47] MILTON R. KONVITZ, 11 THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946) (quoting M.R. COOLIDGE, CHINESE IMMIGRATION 91 (1901)).

[48] *Id.* at 10 n.29.

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dangerous enemies [are] those alien races who are incapable of assimilation, and come among us to debase our labor and poison [our] health and morals."[49]

In the early twentieth century, China not only influenced American law in the form of ongoing exclusion policies,[50] it also became a literal site of American jurisdiction. In 1906, Congress established the United States District Court for China, a federal district court headqartered in Shanghai with appeals to the Ninth Circuit.[51] 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.[52] 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*."[53] 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.[54] 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.[55]

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."[56] 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.[57] Politically, these changes were made tenable by vastly improved perceptions of the Chinese.[58] During the War, *The San Francisco Chronicle* praised Chinatown residents as "American

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

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

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

[52] *See id.*

[53] RUSKOLA, *supra* note 22, at 161; *see also* KRONCKE, *supra* note 21, at 64.

[54] RUSKOLA, *supra* note 22, at 162.

[55] *Id.* at 7; *see* LON FULLER, THE MORALITY OF LAW 39, 46-91 (1964).

[56] *Repeal of the Chinese Exclusion Act, 1943*, U.S. Department of State Office of the Historian, accessed May 18, 2023, https://history.state.gov/milestones/1937-1945/chinese-exclusion-act-repeal [https://perma.cc/2PW8-MWXE].

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

[58] *See* CHANG, *supra* note __, at 169-71.

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through and through" for their aid of the war effort.[59] In 1942, gubernatorial candidate Earl Warren claimed that he "had cherished during [his] entire life a warm and cordial feeling for the Chinese people, [whose] leader [was] at the forefront of the battle for freedom."[60] From a land of wisdom to barbarism to lawlessness, China had become part of the righteous fight for freedom.[61]

All of this changed again, of course, when the Chinese Communist Party 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 puppet" of the Soviet Union,"[62] 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.[63] 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.[64] Similarly, China's military support for North Vietnam contributed substantially to the United States' miring in that conflict.[65] 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.[66] On the domestic rights front, Cold War relations with China led to both new challenges and new opportunites. On one end, fears of Communist infiltration led to heightened monitoring and persecution of Asian-Americans.[67] On the other end, Cold War politics shined a negative light on

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[59] K. Scott Wong, Americans First: Chinese Americans and the Second World War 89 (2005).

[60] *Id.*

[61] For an insightful account of one American effort to change Chinese law during this period, see William P. Alford & Xingzhong Yu, *Pound for Pound? Roscoe Pound's Adventures in China and Questions They Pose for Scholars of Contemporary China*, 18 U. PA. ASIAN L. REV. 1 (2022).

[62] Matthew S. Hirshberg, *Consistency and Change in American Perceptions of China*, POL. BEHAVIOR, vol. 15, Sep. 1993, at 247, 251.

[63] *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579, 495 (1952).

[64] *Id.*; *see* Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown's Shadow*, 53 St. Louis U. L.J. 29, 31 (2008) (describing Jackson's "separation-of-powers functionalism").

[65] John W. Garver, *Sino-Vietnamese Conflict and the Sino-American Rapproachment*, POL. SCI. Q., vol. 96, 1981, at 445, 447 (describing how Chinese troop deployments "placed serious constraints on the U.S. attack against the North"); Chen Jian, *China's Involvement in the Vietnam War, 1964-69*, CHINA Q., June 1995, at 356, 378.

[66] *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (holding that the government could not enjoin publication of a classified study on the "History of U.S. Decision-Making Process on Viet Nam Policy"); War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1973).

[67] CINDY I-FEN CHENG, CITIZENS OF ASIAN AMERICA, 3-4, 117-47, 153-72(2013).

Electronic copy available at: https://ssrn.com/abstract=4545459

racist quotas in the country's immigration laws, leading ultimately to the enactment of more egalitarian immigration reforms in 1965.[68]

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 one the one hand to ideas about barbarism, despotism, and oppression on the other. Third, China's effect on Amerian law has often been tied to racial politics and ideologies. While Chinese and Chinese-Americans were sometimes cast as loyal Americans, they have more often been linked to concepts of 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.[69] 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.[70] Domestically, the party-state has turned more repressive, sharpening the contrast with archetypes of Western liberal democracy.[71] Internationally, it has become more

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[68] *See Id.* at 19-20, 173-189; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N. CAROLINA L. REV. 273, 298-302 (1996) (arguing that the Immigration and Nationality Act of 1965 was passed with with "foreign policy" and "racial egalitarian motivations"); DANIEL J. TICHENOR, DIVIDING LINES (1978) (similar).

[69] David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, https://www.nytimes.com/2010/08/16/business/global/16yuan.html; *China expands defense budget 7.2%, marking slight increase*, Associated Press, Mar. 4, 2023, https://apnews.com/article/china-defense-budget-aircraft-carriers-cdac45c8d36a47cffda68be99b7c9ee7.

[70] *See* Maria Adele Carrai, *Chinese Political Nostalgia and Xi Jinping's Dream of Great Rejuvenation*, INT'L J. ASIAN STUDIES, 2021, at 7, 7-8 (analyzing Xi's treatment of historical memory in the rhetoric of rejuvenation).

[71] *See* Susan L. Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, J. DEMOCRACY, vol. 29, Apr. 2018, at 22; ELIZABETH ECONOMY, THE THIRD REVOLUTION 21-54 (2018); Carl Minzner, *China After the Reform Era*, J. DEMOCRACY, vol. 26, July 2015, at 129; Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, J. CONT. CHINA, 26, 2017, at 68, 77-78.

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assertive, seeking to shape regional order through trade and infrastructure projects while aspiring to "lead the reform of the global governance system."[72] Perceiving a decline in American power, Xi has described this moment as one of strategic opportunity, of "great changes unseen in a century."[73]

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."[74] 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.[75] The Biden Administration describes China as "the only country with the economic, diplomatic, military, and technological power to seriously challenge" the American-led order.[76] It has maintained most of the Trump-era tariffs,[77] legislated to enhance American competitiveness,[78] and acted to limit development of foundational technologies in China.[79]

Beneath these policy shifts has been mounting frustration with Chinese policies on an array of axes. American politicians have accused Chinese

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[72] Timothy R. Heath, *China Prepares for an International Order After U.S. Leadership*, LAWFARE, Aug. 1, 2018, https://www.lawfareblog.com/china-prepares-international-order-after-us-leadership; *see* TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 245-85 (2021); RUSH DOSHI, THE LONG GAME 261-98 (2021); JONATHAN HILLMAN, THE EMPEROR'S NEW ROAD 3-15 (2020).

[73] Rush Doshi, *The long game: China's grand strategy to displace American order*, Brookings, Aug. 2, 2021, https://www.brookings.edu/essay/the-long-game-chinas-grand-strategy-to-displace-american-order/.

[74] Janine Davidson, *The U.S. "Pivot to Asia"*, AM. J. CHINESE STUDIES, vol. 21, June 2014, at 77; James McBride et al., *What's Next for the Trans-Pacific Partnership (TPP)?*, Councl on Foreign Relations, Sep. 20, 2021, https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp.

[75] *See* Ryan Haas & Abraham Denmark, *More pain than gain: How the US-China trade war hurt America*, Brookings, Aug. 7, 2020, https://www.brookings.edu/blog/order-from-chaos/2020/08/07/more-pain-than-gain-how-the-us-china-trade-war-hurt-america/.

[76] Speech, Antony J. Blinken, *A Foreign Policy for the American People*, U.S. Dep't of State, Mar. 3, 2021, https://www.state.gov/a-foreign-policy-for-the-american-people/. The Chinese Embassy in the United States disagreed point by point with Blinken's address. *See China's comprehensive, systematic and elaborate response to Secretary Antony Blinken's China policy speech*, Embassy of the People's Republic of China in the United States of America, June 19, 2022, http://us.china-embassy.gov.cn/eng/zmgx/zxxx/202206/t20220619_10706097.htm (arguing *inter alia* that the "so-called international order" was a fig leaf for perpetuating American "hegemony").

[77] Editorial, *Call Them the Biden-Trump Tariffs Now*, WALL ST. J., Oct. 26, 2022, https://www.wsj.com/articles/call-them-the-biden-trump-tariffs-now-section-232-aluminum-steel-tariffs-beverage-manufacturers-11666721317.

[78] *See* Zolan Kanno-Youngs, *Biden Signs Industrial Policy Bill Aimed at Bolstering Competition with China*, N.Y. TIMES, Aug. 9, 2022, https://www.nytimes.com/2022/08/09/us/politics/biden-semiconductor-chips-china.html.

[79] Gavin Bade, *"A sea change": Biden reverses decades of Chinese trade policy*; POLITICO, Dec. 26, 2022, https://www.politico.com/news/2022/12/26/china-trade-tech-00072232.

Electronic copy available at: https://ssrn.com/abstract=4545459

economic practices of hollowing out the American industrial base, decimating communities, and stealing American intellectual property and trade secrets;[80] 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;[81] and they have been disturbed by worsening repression and persecution of dissidents and religious minorities.[82] 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.[83] And even more basic to the new dynamic, some have argued, is a sense that American hegemony may have peaked, with China posing the serious challenge to the United States' global dominance since the fall of the Soviet Union.[84]

The new global conflict is in critical ways unlike previous contests. Most importantly, it involves no military violence. Even the Cold War ran hot in proxy conflicts throughout Cuba, Korea, Vietnam, Congo, Nicaragua, and Afghanistan.[85] Not so here—or at least, not yet. Second, the new global conflict involves a still high level of economic and social integration between its principal

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[80] *See, e.g.*, Sherrod Brown, *Brown Statement on Industrial Policy with China*, Mar. 24, 2009, https://www.brown.senate.gov/newsroom/press/release/brown-statement-on-industrial-policy-with-china; *Countering Unfair Chinese Economic Practices and Intellectual Property Theft*, Carnegie Endowment for International Peace, Apr. 25, 2022, https://carnegieendowment.org/2022/04/25/countering-unfair-chinese-economic-practices-and-intellectual-property-theft-pub-86925. For academic work on similar issues, see David H. Autor et al., *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, AM. ECON. REV., Oct. 2013, at 2121.

[81] *See, e.g.*, John Grady, *China Upping Bullying Tactics Against Neighbors, Says Top State Department Diplomat*, USNI, July 3, 2023, https://news.usni.org/2023/07/03/china-upping-bullying-tactics-against-neighbors-says-top-state-department-diplomat; Blinken, *supra* note 76.

[82] *See, e.g.*, Matt Pottinger, *Remarks by Deputy National Ssecurity Advisor Matt Pottinger to London-based Policy Exchange*, White House, Oct. 23, 2020, https://trumpwhitehouse.archives.gov/briefings-statements/remarks-deputy-national-security-advisor-matt-pottinger-london-based-policy-exchange/; Blinken, *supra* note 76.

[83] *See* Matthew Choi, *Pompeo: U.S. engagement with China has failed*, July 23, 2020, POLITICO, https://www.politico.com/news/2020/07/23/pompeo-china-speech-nixon-380251. *But see* Neil Thomas, *Matters of Record: Relitigating Engagement with China*, MACRO POLO, Sep. 3, 2019, https://macropolo.org/analysis/china-us-engagement-policy/. For a skeptical view of this strategy at the time with respect to development of an autonomous legal profession, see William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionals in the People's Republic of China*, *in* EAST ASIAN LAW: UNIVERSAL NORMS AND LOCAL CULTURES (Lucie Cheng, Arthur Rosett, Margaret Woo eds., 2002).

[84] *See* Graham Allison, *The Thucydides Trap: Are the U.S. and China Headed for War?*, ATLANTIC, Sep. 24, 2015, https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756/.

[85] Mark O. Yeisley, *Bipolarity, Proxy Wars, and the Rise of China*, STRATEGIC STUDIES Q., Winter 2011, at 75, 80-81.

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competitor.[86] In 2022, U.S.-China trade volume hit a record 690 billion dollars.[87] Trade between the United States and the Soviet Union was "small," even "inconsequential" during much of the Cold War.[88] 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;[89] nor has it sought to export its Leninist state organization abroad.[90] The United States and China are both more similar and more interdependent today than the United States and the Soviet Union last century.

In other respects, 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 stake."[91] Senator Tom Cotton's (R-AR) 2021 report on China references the "Cold War" a dozen times.[92] 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."[93] In a recent order banning the social media app from government-issued devices, the Texas Governor warned that the "Chinese government . . . wields TikTok to attack our way of life."[94]

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

[87] Doug Palmer, *What cold war? U.S. trade with Chian hits new high*, POLITICO, Feb. 7, 2023, https://www.politico.com/news/2023/02/07/trade-china-relations-economies-00081301.

[88] Report, *American-Soviet Trade*, CQ Researcher, Sep. 2, 1959, https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1959090200; Abraham S. Becker, *U.S.-Soviet Trade in the 1980s*, RAND Corporation, Nov. 1987, https://www.rand.org/content/dam/rand/pubs/notes/2009/N2682.pdf.

[89] *See* Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013).

[90] *See* Nye, *supra* note 86 ("The United States and its allies are not threatened by the export of Communism in the same way they were in the days of Stalin or Mao").

[91] *Chairman Gallagher's Opening Remarks*, The Select Committee on the Chinese Communist Party, Feb. 28, 2023, https://selectcommitteeontheccp.house.gov/media/press-releases/chairman-gallaghers-opening-remarks [hereinafter Gallagher Remarks].

[92] *See Beat China: Targeted Decoupling and the Economic Long War*, Office of Senator Tom Cotton, United States Senate, Feb. 2021, https://www.cotton.senate.gov/imo/media/doc/210216_1700_China%20Report_FINAL.pdf.

[93] *Id.* at 6.

[94] Governor Greg Abbott, Letter to State Agency Heads, Dec. 7, 2022,

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Chinese political discourse has likewise begun to evoke Cold War themes. Encirclement frames, once dominant in Soviet and Chinese discourse, have returned.[95] In March 2023, Xi stated that, "Western countries—led by the U.S.—have implemented all-round containment, encirclement and suppression against us, bringing unprecedently severe challenges to our country's development."[96] Xi's views echo a longstanding "encirclement complex" in Soviet thinking, *Einkreisung*, *kapitalisticheskoe okruzhenie*, "anxiety about one's own nation being ringed in a systematically, in the manner of a conspiracy planned and executed by foreign enemies."[97] Charges of Western hypocrisy, also prevalent during the Cold War, have recently intensified. Chinese diplomats have responded to criticisms of Chinese human rights violations with pointed critiques of American abuses; one diplomat called American police "inhumane";[98] another decried the "slaughtering" African-Americans.[99] In the last century, the Soviet press routinely disseminated of stories of lynchings and other racial abuses to undercut American government narratives.[100]

The new global conflict also resembles the Cold War in several of its 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 defense analysts were concerned about Soviet advances in metallurgy, physical chemistry, geophysics, and electronics, as well as the sheer volume of Soviet engineers generally.[101] 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."[102] The White

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https://gov.texas.gov/uploads/files/press/State_Agencies_Letter_1.pdf.

[95] *See* Alfred Vagts, *Capitalist Encirclement; A Russian Obsession—Genuine or Feigned?*, J. POLITICS, Aug. 1956, at 499, 515 (quoting Chinese politburo statement criticizing "the encirclement of imperialism").

[96] Chun Han Wong et al., *China's Xi Jinping Takes Rare Direct Aiim at U.S. in Speech*, WALL ST. J., Mar. 6, 2023, https://www.wsj.com/articles/chinas-xi-jinping-takes-rare-direct-aim-at-u-s-in-speech-5d8fde1a.

[97] Vagts, *supra* note 95, at 499-500.

[98] PETER MARTIN, CHINA'S CIVILIAN ARMY: THE MAKING OF WOLF WARRIOR DIPLOMACY 3 (2021).

[99] *U.S. tells China it does not seek conflict; but will stand up to principles, friends*, REUTERS, Mar. 18, 2021, https://www.reuters.com/world/us/us-tells-china-it-does-not-seek-conflict-will-stand-up-principles-friends-2021-03-18/.

[100] MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 37 (2000).

[101] Robert A. Kilmarx, *Soviet Competition in Science and Technology*, CURRENT HISTORY, vol. 43, Oct. 1962, at 201, 202, 204 (stating that "Soviets already have a total of over a million trained engineers").

[102] Rush Doshi, *The United States, China, and the context for the Fourth Industrial Revolution*, Brookings, July 31, 2020, https://www.brookings.edu/testimonies/the-united-states-china-and-the-contest-for-the-fourth-industrial-revolution/.

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House's explainer of its CHIPS and Science Act cites the mid-1960s "race to the moon" to justify the Act's substantial investments in the American semiconductor industry—part of an effort, it says, to "counter China."[103]

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.[104] The United States has sought to cut China out of strategic global supply chains,[105] block inbound investments from Chinese firms,[106] and to limit certain forms of outbound investments to China.[107] While the two economies remain highly integrated, the move towards decoupling threatens to reduce economic interdependence in high-value domains.

Third, competitive dynamics have intensified military planning. Congress, thinktanks, and defense researchers are increasingly focused on wargames involving China, 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 such paramount important that "reunification" is listed in the preamble of the state constitution.[108] Congressman Seth Moulton (D-MA), a

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[103] Fact Sheet, CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China, White House, Aug. 9, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/.

[104] John S. Van Oudenaren, *Xi Seeks to Accelerate China's Drive for Self-sufficiency*, JAMESTOWN FOUNDATION CHINA BRIEF, Jun. 17, 2022, https://jamestown.org/program/xi-seeks-to-accelerate-chinas-drive-for-self-sufficiency/; Michael Pettis, *Will China's Common Prosperity Upgrade Dual Circulation?*, Carnegie Endowment for Int'l Peace, Oct. 15, 2021, https://carnegieendowment.org/chinafinancialmarkets/85571.

[105] Orange Wang, *US adds 36 Chinese companies to export blacklist, including country's top flash memory chip maker*, SOUTH CHINA MORING POST, Dec. 16, 2022, https://www.scmp.com/news/china/article/3203494/us-adds-36-chinese-companies-export-blacklist-including-countrys-top-flash-memory-chip-maker.

[106] Eichensehr & Hwang, *supra* note 11, at 550-51.

[107] Gavin Bade, *White House nears unprecedented action on U.S. investment in China*, POLITICO, Apr. 18, 2023, https://www.politico.com/news/2023/04/18/biden-china-trade-00092421; Emily Benson & Gregory C. Allen, *A New National Security Instrument: The Executive Order on Outbound Investment*, CSIS, Aug. 10, 2023, https://www.csis.org/analysis/new-national-security-instrument-executive-order-outbound-investment.

[108] *See, e.g.*, Mark Cancian et al., *The First Battle of the Next War: Wargaming a Chinese Invasion of Taiwan*, Center for Strategic and International Studies, Jan. 9, 2023, https://www.csis.org/analysis/first-battle-next-war-wargaming-chinese-invasion-taiwan; Sophia Cai, *House China committee to war-game Taiwan invasion scenario*, AXIOS, Apr. 18, 2023, https://www.axios.com/2023/04/19/house-china-committee-taiwan-war-game.

There are also significant concerns about China's possible military support of Russia in its war with Ukraine. *See* Oona A. Hathaway & Ryan Goodman, *Why China giving Military Assistance to Russia Would Violate International Law*, JUST SECURITY, Mar. 17, 2022.

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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 chipmaker.[109] Taiwan's defense minister retorted that his armed forces would not "tolerate" America wanting to "bomb this or that."[110] 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 is becoming increasing bipartisan. This has led to productive legislative activity in important areas, but it also produced bandwagoning and groupthink. Congresswoman Stephanie Murphy (D-FL) describes it, albeit hyperbolically, as a "second era of McCarthyism." "Basically, no politican, 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."[111] Bipartisan consensus characterized American politics during the Cold War, up until Vietnam.[112] As a later section will detail, such consensus risks eroding important mechanisms of partisan and interbranch accountability.

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 connections to a geopolitical rival. Where there has been limited rights enlargement, groups have framed desired reforms as geopolitically beneficial.

[109] Opinion, Jason Willick, *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/.

[110] *Id.*

[111] Bade, *supra* note 79.

[112] *See* Eugene R. Wittkopf & James M. McCormick, *The Cold War Consensus: Did It Exist?*, POLITY, vol. 22, Summer, 1990, at 627, 628, 651-53 (finding empirical support for the existence of a "Cold War consensus"); Peter Trubowitz & Nicole Mellow, *Foreign Policy, bipartisanship and the paradox of post-September 11 America*, INT'L POLITICS, 2011, at 164, 166.

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It should be noted at the outset that rights expansion does not always have a positive valence, nor rights contraction a negative one. Rights grow or shrink from particular baselines, which are themselves good or bad for independent reasons.[113] Without agreeing on a general theory on what rights are good and when, all who care about rights should be interested in their evolution over time, especially in periods of disequilibrium.

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 linked to wartime needs or ideas.

Conflict-driven rights contraction is perhaps the more intuitive of the two effects—well captured in Cicero's epigram: *silent enim leges inter arma*.[114] States have amassed power during emergencies for millennia; both autocrats and democrats continue to do so today.[115] No exception to this trend, American history is replete with wartime rights derogations.[116] "During every serious war in our nation's history," Jack Goldsmith and Cass Sunstein write, "civil liberties have been curtailed."[117] 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

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[113] One can reasonably dispute whether the Supreme Court's modern enlargement of speech rights has been an unalloyed good, for example. *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 603-22 (2011).

[114] LYNN S. FOTHERINGHAM, PERSUASIVE LANGUAGE IN CICERO'S PRO MILONE 87 (2013) ("For in war, the laws are silent.")

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

[116] *But cf.* Samuel Issacharoff & Richard H. Pildes, *Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime*, I.CON, 2004, at 296, (arguing that American courts have taken a more process-based approach to emergencies).

[117] Jack Goldsmith & Cass R. Sunstein, *Military Tribunals & Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENTARY 261, 284-85 (2002).

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> 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."[118]

American politics in the early years of U.S.-Soviet conflict was dominated by fear over Communist infiltration. McCarthyism and the rise of the House Un-American Activities Committee were only its most prominent expressions.[119] Federal laws first mandated the registration of Communist Party members before outlawing the Party entirely.[120] Other acts with speech and associational consequences included "loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of . . . undercover informers to infiltrate dissident organizations," "and direct prosecution of leaders and members of the Communist Party."[121]

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.[122] Some may subjectively believe rights restrictions to be necessary; others may claim greater authorities on pretext.[123] Either way, there are strong incentives for officials to "exaggerate the dangers . . . to persuade legislators and the public to grant them" more power."[124] Even

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[118] Mark A. Graber, *Counter-stories: Maintaining and Expanding Civil Liberties in Wartime*, *in* THE CONSTITUTION IN WARTIME 95 (Mark Tushnet, ed. 2005). For more on several of these examples, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951); NOAH FELDMAN, THE BROKEN CONSTITUTION 187-223 (2021); PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979); William M. Wiecek, *Sabotage, Treason, and Military Tribunals in World War II*, *in* ERNST & JEW, *supra* note __, at 45-69; David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. CIVIL RIGHTS & CIVIL LIBERTIES L. REV. 1, 2 (2003).

[119] *See* RICHARD M. FRIED, NIGHTMARE IN RED (1990) (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).

[120] Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 BOSTON U. L. REV. 1315, 1325-26 (2006).

[121] *Id.* at 1326; *see also* MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE, 35-115 (1977) (analyzing Smith Act prosecutions).

[122] *See* MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY 107-110 (2019); Essay, Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constistutionality of National-Security State*, 83 U. CHI. L. REV. 199, 203 (2016).

[123] *See* Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1850 (2010).

[124] Stone, *supra* note 120, at 1328; *see also* Robert H. Jackson, *Wartime Security and Liberty under Law*, 1 BUFFALO L. REV. 103, 116 (1951) ("It is easy . . . to reduce our liberties to a shadow, foten in answer to exaggerated claims of security."). Other branches that might otherwise check executive prerogative in crisis times are hampered by informational

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where government officials may not want to take rights-restrictive acts, they may nevertheless do so under pressure from political opponents exploiting conflict for partisan gain.[125] In a polity mobilizing to defeat a foreign foe, the political space for reserve begins to shrink.

Conflict-driven rights contraction tends to more greatly impact groups with imputed connections 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."[126] 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."[127] Shirin Sinnar recently urged an end to two decades of post-9/11 security policies deployed against these communities.[128]

Rights are not always violated in wartime, however. Sometimes they are protected or left untouched.[129] Other times, they grow.[130] The Civil War is associated with both restrictions on liberties and the emancipation of slaves.[131] The First World War involved both overreaching sedition prosecutions and federal enactment of an eight-hour workday.[132] World War II entailed both the forced relocation of Japanese residents and increased workplace opportunities

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assymetries as well as coordination and collective action problems. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 10 (2010).

[125] Stone, *supra* note 120, 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.*

[126] Issacharoff & Pildes, *supra* note 116, at 310.

[127] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1042-43, 1075 (2004).

[128] *Written Statement of Shirin Sinnar*, Hearing on Discrimination and the Civil Rights of the Muslim, Arab, and South Asian American Communities, House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Mar. 1, 2022; *see also* Cole, *supra* note __, at 2 (documenting the detention of two thousand people "largely because of their ethnic identity" and discriminatory treatment of "Arab and Muslim noncitizens.").

[129] *See, e.g.*, FLAHERTY, *supra* note 122, at 118-19; Wiecek, *supra* note 118, at 45.

[130] Wars are especially closely linked to expansions of the franchise. *See* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMM. 295, 300-301 (2000) (describing black (male) participation during the Reconstruction-era); Paula A. Monopoli, *Women, Democracy, and the Ninteenth Amendment*, 100 BOSTON U. L. REV. 1727, 1728 (2020) (rooting Ninteenth Amendment in World War I dynamics); Jenny Diamond Cheng, *Voting Rights for Millenials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 670 (2017) (tracing lowering in voting age in part to the Vietnam War).

[131] *Cf.* JOHN FABIAN WITT, LINCOLN'S CODE 212-19 (2012) (describing the Emancipation Proclamation as a "morally momentous" " war measure based in military necessity").

[132] Graber, *supra* note 118, at 106-108.

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for African Americans and women.[133] Cold War dynamics underlay both McCarthyism and doctrinal "revolutions" in speech and equal protection.[134]

Like rights contraction, conflict-driven rights expansion is rooted in the politics of threat. As civil society actors mobilize to expand their liberties, 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.[135] 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.[136] Frames like these deliberately tapped into U.S. government alarm over the Soviet Union's criticism of American racial abuses.[137]

At the elite level, conflict dynamics can cause 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 in any circumstances suffer the nation to be hampered in the essential matter of national defense."[138] 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."[139] 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."[140] In subtler ways, conflict dynamics can help enlarge rights through ideational contrast with "negative models" associated with the enemy, a phenomenon that Kim Lane Scheppele calls "aversive

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[133] *See* PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH 159-160 (1999);

[134] Primus, supra note 1, at 437-50. See *generally* DUDZIAK, *supra* note 100. There is disagreement on the extent to which Cold War dynamics mattered to this story. *See* Paul B. Stephan, *The Impact of the Cold War on Soviet and US Law: Reconsidering the Legacy*, *in* THE LEGAL DIMENSION IN COLD-WAR INTERACTIONS 141, 147 (Tatiana Borisova & William Simons, eds., 2012).

[135] *See* Klarman, *supra* note 4, at 23, 26-28. *But cf.* Gregory Briker & Justin Driver, Brown *and Red*, 74 STAN. L. REV. 447, 464-500 (2022) (arguing that anticommunism also played a central role in segregationists' opposition to desegregation and civil rights).

[136] Dudziak, *supra* note 1, at 111 n.287.

[137] 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 100, at 12, 250.

[138] Graber, *supra* note 118, at 106-107 (describing fear that labor unrest would cripple the war effort).

[139] Klarman, *supra* note 4, at 27-28.

[140] *Id.* at 28; *cf.* ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 7, 8-9 (2020) (arguing that rights are better realized where there are vested and organized interests in protecting them).

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constitutionalism."[141] *Barnette*, for example, the canonical case in which the Supreme Court held unconstitutional a flag-salute requirement, was driven in part "by the Court's desire to distinguish American from wartime Germany."[142] 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."[143]

As the following sections will show, the new global conflict is beginning to mimic 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 identified in the historical scholarship.

B. Rights Contraction

Consider first three examples of attempted or actual rights contraction. The case studies that follow sound in both federal and state action, law-making and law-enforcement. Yet they all reprise familiar patterns of politics-driven threat inflation, with uneven effects on groups with imputed links to an adversary.

1. Espionage

The new global conflict has been associated with heightened fears of industrial spies. Although the Economic Espionage Act, which criminalizes trade secret theft to benefit foreign governments, was enacted in 1996,[144] law enforcement, did not systematically focus on China until the mid-2010s.[145] A pivotal moment, observes Margaret Lewis,[146] 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.[147] American officials were alarmed not merely by China's ambitions, but also by its longstanding and

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[141] Kim Lane Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, I.CON, 2003, at 196, 300; *cf.* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 551 (2001) (defining "negative comparativism").

[142] RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 198 (1999); *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640-41 (1943) (criticizing the "fast failing efforts of our present totalitarian enemies" to coerce uniformity of sentiment").

[143] Primus, *supra* note 1, at 456; *see also* Scheppele, *supra* note , at 314-19.

[144] 18 U.S.C. § 1831 (1996).

[145] Lewis, *supra* note 9, at 158-60; *cf.* Samuel J. Rascoff, *The Norm against Economic Espioinage for the Benefit of Private Firms: Some Theoretical Reflections,* 83 U. CHI. L. REV. 249, 265 (2016).

[146] *Id.* at 160-61.

[147] Scott Kennedy, *Made in China 2025*, Center for Strategic and International Studies, June 1, 2015, https://www.csis.org/analysis/made-china-2025.

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escalating use of intellectual property theft, forced technology transfers, and industrial spies to secure them.[148] Of special concern were China's talent recruitment plans, designed, in the words of a Senate report, "to exploit American's openness to advance [China's] own national interests."[149] The Thousand Talents Plan offered salaries, funds, and labs to encourage researchers to transmit knowledge to China.[150]

The Justice Department's most systematic response to these challenges was its China Initiative, launched by former Attorney General Jeff Sessions in 2018.[151] The Initiative sought to focus resources on combatting Chinese economic espionage, led by a steering committee under the Department's National Security Division.[152] 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.[153] In 2021, he said that the FBI had over 2,000 China-related investigations, with a new investigation opening every 10 hours.[154] 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.[155]

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[148] *See* Remarks, Christopher Wray, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security fo the United States*, Federal Bureau of Investigation, July 7, 2020, https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states [hereinafter Wray Remarks].

[149] Staff Report, *Threats to the U.S. Research Enterprise: China's Talent Recruitment Plans*, Committee on Homeland Security and Governmental Affairs, Permanent Subcomittee on Investigations, United States Senate, Nov. 18, 2019, 1, https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2019-11-18%20PSI%20Staff%20Report%20-%20China's%20Talent%20Recruitment%20Plans%20Updated2.pdf.

[150] *Id.*

[151] Remarks, *Attorney General Jeff Sessions Announces New Initiative to Combat Chinese Economic Espionage*, Department of Justice, Nov. 1, 2018, https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-announces-new-initiative-combat-chinese-economic-espionage [https://perma.cc/G9YR-A88R].

[152] *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).

[153] Remarks, Christopher Wray, *The Threat Posed by the Chinese Government and the Chinese Communist Party to the Economic and National Security of the United States*, Federal Bureau of Investigation, July 7, 2020, https://www.fbi.gov/news/speeches/the-threat-posed-by-the-chinese-government-and-the-chinese-communist-party-to-the-economic-and-national-security-of-the-united-states [https://perma.cc/G2M9-8E9Y].

[154] Mike Conte et al., *FBI opens a new investigation into China "every 10 hours," bureau director says*, CNN, Apr. 15, 2021, https://www.cnn.com/2021/04/14/politics/fbi-director-china-investigations-intl-hnk/index.html.

[155] Gina Kolata, *Ex-Harvard Professor Sentenced in China Ties Case*, N.Y. TIMES, Apr. 26, 2023, https://www.nytimes.com/2023/04/26/science/charles-lieber-sentence-china.html.

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Although the Justice Department had some genuine success in uncovering industrial theft, the China Intiative 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 semiconductor applications to Chinese agents.[156] Dr. Xi, a naturalized American citizen, was placed on leave, lost his title, and was banned from speaking with certain colleagues.[157] It turned out that the schematics were not for a pocket heater; in fact, they were "patented and publicly available to anyone."[158] Prosecutors were forced to drop all changes.[159]

The first researcher to go to trial under the China Initiative was Dr. Anming Hu. A Chinese-Canadian, Dr. Hu was a laser physics professor at the University of Tennessee (Knoxville) when the FBI began investigating him in 2018.[160] The government surveilled Dr. Hu and his family for nearly two year before accusing him of concealing his ties with a Chinese university and defrauding the government of NASA funds.[161] Dr. Hu was fired from his university and kept under house arrest for over a year.[162] 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."[163] The judge later granted a motion of acquittal on a "no rational jury" standard.[164]

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.[165] A U.S. citizen, Dr. Chen was placed

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

[157] *Id.*

[158] *Id.* at 161.

[159] *Id.*

[160] Natasha Gilbert, *"I lost two years of my life": US scientist falsely accused of hiding ties to China speaks out*, NATURE, Mar. 7, 2022, https://www.nature.com/articles/d41586-022-00528-2.

[161] Amy Qin, *As U.S. Hunts for Chinese Spies, University Scientists Warn of Backlash*, N.Y. TIMES, Nov. 28, 2021, https://www.nytimes.com/2021/11/28/world/asia/china-university-spies.html.

[162] *Id.*; Gilbert, *supra* note 160.

[163] Mara Hvistendahl, *"Ridiculous Case": Juror Criticizes DOJ for Charging Scientist with Hiding Ties to China*, THE INTERCEPT, Jun. 23, 2021, https://theintercept.com/2021/06/23/anming-hu-trial-fbi-china/.

[164] Memorandum Opinion and Order, United States of America v. Anming Hu, No. 3:20-CR-21-TAV-DCP-1 (E.D. Tenn. Sep. 9 2021), at 52.

[165] Ellen Barry, *"In the End, You're Treated Like a Spy," Says M.I.T. Scientist*, N.Y. TIMES, Jan. 24, 2022, https://www.nytimes.com/2022/01/24/science/gang-chen-mit-china.html.

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on leave by MIT, forbidden to enter campus or contact his colleagues.[166] Prosecutors accused Dr. Chen of concealing Chinese affiliations when he applied for Department of Energy grants.[167] In 2022, however, prosecutors abandoned the case upon realizing, belatedly, that Dr. Chen never had to disclose those affiliations in the first place.[168]

Voices in and out of government began raising concerns.[169] In 2021, 90 members of Congress asked the Attorney General to investigate "the repeated, wrongful targeting of individuals of Asian descent for alleged espionage.[170] 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."[171] The ACLU and Asian-Americans Advancing Justice filed Freedom of Information Act requests for federal materials relating to these prosecutions.[172] The Asian American Scholars Forum began assembling resources to support researchers under investigation.[173]

Among legal scholars, the most prominent critic of the China Initiative was Margaret Lewis. Her influential 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." [174] By "conflat[ing] ideas of government, party, nationality, national origin, and ethnicity and meld[ing] them into an amorphous threat," she wrote, "the China Initiative has created threat by association."[175] Andrew Kim has found empirical evidence that even in

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[166] *Id.*

[167] *Id.*

[168] Josh Gerstein, *Report details collapse of China Initiative case*, POLITICO, Feb. 18, 2022, https://www.politico.com/news/2022/02/18/china-initiative-case-00010281.

[169] Michael German & Alex Liang, *End of Justice Department's "China Initiative" Brings Little Relief to U.S. Academics*, Brennan Center for Justice, Mar. 25, 2022, https://www.brennancenter.org/our-work/analysis-opinion/end-justice-departments-china-initiative-brings-little-relief-us (describing how the China Initiative "quickly gained infamy for dubious investigations and abusive prosecutions")

[170] Press Release, Rep. Lieu and 90 Members of Congress Urge DOJ Probe into Alleged Racial Profiling of Asians, July 20, 2021, https://lieu.house.gov/media-center/press-releases/rep-lieu-and-90-members-congress-urge-doj-probe-alleged-racial-profiling.

[171] Letter to the Honorable Merrick B. Garland, Sep. 8, 2021, Stanford University, https://sites.google.com/view/winds-of-freedom. The letter was later endorsed by several thousand professors at other universities. *Id.*

[172] Lewis, *supra* note 9, at 195.

[173] AASF Webinar: Chinese American Scientists: What Do You Have to Pay Attention to Under the China Initiative?, Asian-American Scholar Forum, https://www.aasforum.org/2021/02/06/chinese-american-scientists-what-do-you-have-to-pay-attention-to-under-the-china-initiative/

[174] Lewis, *supra* note 9, at 171.

[175] *Id.* at 152.

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pre-Initiative Economic Espionage Act cases, "Asian-Americans [were] disproportionately charged . . . , receive much longer sentences, and [were] significantly more likely to be innocent than defendants of other races."[176]

These events recalls historic patterns. As in previous red scares, new espionage fears have led to a rise in questionable spy investigations and prosecutions. The political response has reflected both well-founded concerns and inflated threats; President Trump proclaimed falsely in 2018 that "almost every student that comes over to this country [from China] is a spy."[177] Either way, 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."[178] 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."[179]

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 America's enemies."[180] In one case against a Chinese national accused of trade theft, "[t]he atmosphere surrounding economic espionage investigations became so explosive that the federal judge . . . barred unnecessary mention of [the defendant's] ethnicity."[181] Perceptions of racial profiling have also led to over-deterrence among Chinese and Chinese-American researchers. Yiguang Ju, a Princeton engineering professor asked by NASA in 2010 to develop "a plan for the future of American

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[176] Kim, *supra* note 156, 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").

[177] *Id.* at 749.

[178] Commentary by Carol Lam for the Committee of 100, https://www.committee100.org/wp-content/uploads/2021/09/FINAL-CLam-C100-Commentary-1.pdf.

[179] *Id.* Perverse bureaucratic incentives generated by rigid top-down quotas is, of course, a longstanding problem in Chinese governance as well. *See, e.g.*, Carl F. Minzner, *Riots and Cover-ups: Counterproductive Control of Local Agents in China*, 31 U. PA. J. INT'L L. 53, 53-57 (2009).

[180] Graber, *supra* note 118, at 1328

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

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rocketry," told journalists he would be too "scared" to accept that invitation today.[182] 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 US. Government, compared to only 11.7% of non-Chinese scientists."[183]

Complicating efforts to discern discrimination in such prosecutions is that while China's industrial recruitment initiatives have targeted a range of scientists, there has been a concerted effort to recruit scientists of Chinese ancestry.[184] This is consistent with the party-state's broader policy of seeking to enlist overseas Chinese communities to support its national strategies, in what Audrye Wong has termed "diaspora statecraft."[185] Wong notes, however, that "governments do not always have a good track record of identifying such incidents," as recent investigations in the United States have shown.[186] A central law-enforcement challenge then is how to unsurface 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."[187]

The China Initiative's well-known issues persuaded the Attorney General to terminate it in 2022.[188] 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

[182] Qin, *supra* note 161.

[183] Jenny J. Lee, Xiaojie Li, & staff at Committee of 100, *Racial Profiling Among Scientists of Chinese Descent and Consequences for the U.S. Scientific Community*, Committee of 100, 2021, at 9, https://www.committee100.org/wp-content/uploads/2021/10/C100-Lee-Li-White-Paper-FINAL-FINAL-10.28.pdf; *see also* Yu Xie et al., *Caught in the crossfire: Fears of Chinese-American scientists*, PNAS, vol. 120, Apr. 18, 2023 (similar survey findings).

[184] *See* Kate O'Keeffe & Aruna Viswanatha, *How China Targets Scientists via Global Network of Recruiting Stations*, Wall St. J., Aug. 20, 2020, https://www.wsj.com/articles/how-china-targets-scientists-via-global-network-of-recruiting-stations-11597915803 (describing talent recruitment stations co-oganized by the Party's United Front Work Department's Western Returned Scholars Association and Overseas Chinese Affairs Office).

[185] *See* Audrye Wong, *The Diaspora and China's Foreign Influence Activities*, WILSON CENTER, 2022, 623, https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Wong_The%20Diaspora%20and%20China%27s%20Foreign%20Influence%20Activities.pdf.

[186] *Id.*

[187] *Id.* at 608.

[188] Josh Gerstein, *DOJ Shuts Down China-focused Anti-espionage Program*, Politico, Feb. 23, 2022, https://www.politico.com/news/2022/02/23/doj-shuts-down-china-focused-anti-espionage-program-00011065.

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differently."[189] Chinese spy cases would continue, he said, under a broader organizational framework.[190]

2. Property Bans

The politics of threat has begun to impact subnational lawmaking as well. According to forthcoming research by two political scientists, "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."[191] 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 2017-2022, that number rose to 127.[192] Many such laws have taken the form of barring a 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 woud bar all Chinese citizens from enrolling in state public universities.[193] These laws have been defended on several grounds, from protecting military bases to combating Party influence to guarding the American food supply.[194]

Many of these anti-China bills have sought to ban Chinese citizens from buying property. In Texas, the initial version of a proposed bill would have barred citizens of China (and several other countries), including permanent residents, from purchasing any real property in the state.[195] 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

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[189] *Id.*

[190] *Id.*

[191] Kyle A. Jaros & Sara A. Newland, *Federal anti-China sentiment is increasingly seeping into state laws*, Hill, Apr. 28, 2023, https://thehill.com/opinion/international/3975855-federal-anti-china-sentiment-is-increasingly-seeping-into-state-laws/. Of course, mere introduction of a bill tells us little of enactment likelihood when only one legislator is required to introduce a bill. But the dramatic increase in introductions is doubtless a sign of China's growing importance in domestic politics.

[192] Kyle Jaros & Sara Newland, PARADIPLOMACY IN HARD TIMES: COOPERATION AND CONFRONTATION IN SUBNATIONAL US-CHINA RELATIONS, Apr. 10, 2023 (working paper).

[193] Tori Otten, *Texas GOP Bill Would Ban Students From China and 3 Other Countries From All Public Universities*, NEW REPUBLIC, Mar. 17, 2023, https://newrepublic.com/post/171238/texas-gop-bill-ban-students-china-3-countries-public-universities.

[194] *See* David J. Lynch, *Heartland lawmakers push bans on Chinese purchases of American farms*, Wash. Post, Apr. 4, 2023, https://www.washingtonpost.com/us-policy/2023/04/04/china-farm-land-tensions/; *Gov. DeSantis signs bills targeting China influence*, CBS, May 8, 2023, https://www.cbsnews.com/miami/news/gov-desantis-signs-bills-targeting-china-influence/.

[195] S.B. No. 147, A Bill to be entitled An Act relating to the purchase of or acquisition of title to real property by certain liens or foreign entities, https://capitol.texas.gov/tlodocs/88R/billtext/html/SB00147I.htm.

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greatest foe."[196] After local communities protested, the bill was watered down and enacted by one house before meeting its end at the other.[197] Likewise in Alabama, a proposed bill would have banned Chinese citizens from purchasing real estate anywhere in the state.[198] Local groups objected, and the enacted version bars only certain foreign governments or affiliates from buying farmland, forestland, or real property near sensitive sites.[199]

The successful moderation of such bills would be encouraging if not for Florida's recent enactment of SB 264.[200] The 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 10 miles of any military or critical infrastructure facility.[201] Second, the law bans Chinese citizens "domiciled" in China from purchasing real property anywhere in Florida.[202] Chinese citizens who violate this latter provision will have committed third-degree felony, punishable by up to five years' imprisonment.[203] The law contains an exception whereby natural persons with a valid non-tourist visa or who has been granted political asylum may purchase a single residential property under two acres and not within five miles of a military installation.[204] The law also requires those who had purchased such properties prior to the operative date to register with the state.[205]

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 origin,[206] violates

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[196] Robert Downen, *Bill to ban Chinese citizens and government from buying Texas land gains steam among Republicans*, Tex. Tribune, Jan. 20, 2023, https://www.texastribune.org/2023/01/20/texas-legislature-china-land-ownership/; Opinion, Sid Miller, *Ban China from Buying Texas Land*, TEX. BORDER BUS., May 12, 2023, *https*://texasborderbusiness.com/op-ed-ban-china-from-buying-texas-land-sid-miller/.

[197] Jeremy Wallace, *Bill banning Chinese citizens from buying Texas land dies in Legislature, with help from protesters*, HOUSTON CHRON., May 22, 2023, https://www.houstonchronicle.com/politics/texas/article/bill-banning-chinese-citizens-buying-texas-land-18112969.php.

[198] AHB 379 Introduced, LEGISCAN, accessed June 16, 2023, https://legiscan.com/AL/text/HB379/id/2791729.

[199] HB379 Enrolled, LEGISCAN, accessed June 16, 2023, https://legiscan.com/AL/text/HB379/id/2816815.

[200] Laws of Fla. Ch. 2023-33, §§ 3-8, at 5-15 (to be codified at Fla. Stat. §§ 692.201-.205).

[201] Fla. Stat. §§ 692.202, .203.

[202] *Id.* § 692.204. The law does not define "domicile."

[203] *Id.* § 692.204(8); *id.* §§ 775.082(3)(e), 0.83(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).

[204] *Id.* § 692.203(4); 204.(2).

[205] *Id.* § 692.202(3)(a), (b).

[206] Complaint at 86, *Yifan Shen et al. v. Wilton Simpson et al.*, Case No. 4:23-cv-208 (N.D.

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procedural due process on grounds of vagueness,"[207] establishes discriminatory housing practices in violation of the Fair Housing Act,[208] and is preempted under the Supremacy Clause "by federal regimes governing foreign affairs, foreign investment, and national security."[209] The complaint further alleges that SB 264 would lead sellers to discriminate against Asian buyers for fear of incurring criminal penalties, and would stigmatize people of Chinese and Asian descent.[210] A federal judge recently denied plaintiffs' request for a preliminary injunction.[211]

The rise of SB 264 recalls several historical patterns discussed earlier. First, it is rooted in a familiar 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.[212] The other two laws, SB 846 and SB 258, limited state universities' collaboration with educational institutions in countries like China and sought to address cybersecurity threats from similar places.[213] DeSantis framed these bills in familiar terms: "Florida is taking action to stand against the United States' greatest geopolitical threat—the Chinese Communist Party," he said. Given DeSantis's presidential ambitions, it is not surprising that Florida was the first to adopt restrictive property bans. Exclusion-Era anti-Chinese laws were almost invariably enacted "on the eve of national elections."[214]

In facially discriminating against groups with imputed links to an "enemy," SB 264 parallels other historic trends. Most immediately, it evokes early twentieth-century alien land laws that effectively banned Asians from acquiring property.[215] Alien land laws sought both to protect American labor and to combat threats from Japan, a rising power whose people were seen as a "fifth column . . . waiting to be activated at the emperor's command."[216] California was the first to enact an alien land law, and was soon followed by over

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Fla., May 22, 20230).

[207] *Id.* at 95.

[208] *Id.* at 103.

[209] *Id.* at 114. For an analysis of related preemption issues, see Essay, Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT. SEC. J. 1(2022).

[210] *Id.* at 68, 69.

[211] Niha Masih, *Florida judge refuses to halt law restricting Chinese land ownership*, WASH. POST, Aug. 18, 2023, https://www.washingtonpost.com/nation/2023/08/18/florida-chinese-property-law-desantis/.

[212] News Release, *Governor Ron DeSantis Cracks Down on Communist China*, Office of the Governor, May 8, 2023, https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/.

[213] *Id.*

[214] KONVITZ, *supra* note 47, at 11.

[215] *See* Edgar Chen, *With New "Alien Land Laws" Asian Immigrants Are Once Again Targeted by Real Estate Bans*, JUST SECURITY, May 26, 2023, https://www.justsecurity.org/86722/with-new-alien-land-laws-asian-immigrants-are-once-again-targeted-by-real-estate-bans/.

[216] *Id.* (quoting Professor Keith Aoki).

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a dozen states, including Florida.[217] SB 246 is especially ironic because Florida was the *last* state to remove constitutional language referencing alien land restrictions in 2018.[218]

As in previous eras, SB 264 sweeps far more broadly than any fair notion of threat would permit. Its statutory logic necessarily presumes that a large heterogenous group of individuals connected to a foreign adversary is inherently untrustworthy and disloyal.[219] 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 Florida for seven years on an H-1B visa.[220] 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.[221] 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.[222] All are presumably subject to the law's prohibitions solely by reason of their connection to China. Yet none can be fairly connected to the threats Governor DeSantis describes.

Similar laws remain under consideration in other state legislatures.[223] SB 91, introduced in Louisiana, forbids non-permanent resident Chinese citizens from not only owning, but even *leasing*, immovable property within fifty miles of certain military facilities or other sensitive installations.[224] As a result, explains Edgar Chen, "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."[225] Such measures do not appear to be proportional to the articulated threat.

3. App Bans

[217] *Id.*

[218] *Id.*

[219] *See* Bruce Ritchie, *Chinese citizens seek to block Florida's law banning them from owning property*, POLITICO, Jun. 7, 2023, https://www.politico.com/news/2023/06/07/chinese-citizens-ask-federal-court-to-delay-land-ownership-bill-00100809 (reporting that co-sponsor Rep. David Borrero claimed that only Communist Party members would be affected by the legislation).

[220] Complaint, *supra* note 206, at 60. Shen purchased property within 10 miles of a critical infrastructure facility. *Id.*

[221] *Id.* at 61. Xu also purchased property near a critical infrastructure facility. *Id.*

[222] *Id.* at 62. Wang would be subject to the registration requirement because her property was also near a critical infrastructure facility. *Id.*

[223] Chen, *supra* note 215.

[224] Senate Bill No. 91, SLS 23RS-327, https://legis.la.gov/legis/ViewDocument.aspx?d=1317999.

[225] Chen, *supra* note 215.

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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 led to the effective disablement of two social media companies—TikTok and WeChat—from operating in the United States.[226] One order alleged that TikTok, a video-sharing app owned by a Chinese parent, Bytedance,[227] gave the Communist Party access to Americans' personal data, enabled censorship, and was used for disinformation campaigns.[228] The other alleged that WeChat, a messaging, payment, and social media app developed by a Chinese company, Tencent,[229] presented similar risks.[230] Implementing regulations made clear that such apps would effectively be banned.[231]

Both 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.[232] For authority, the orders relied principally on the International Emergency Economic Powers Act (IEEPA), which confers on the President certain peacetime emergency powers.[233] The President had earlier invoked a national emergency under IEEPA with respect to information and communications technology and services (ICTS) provided by "foreign adversaries"[234] The WeChat and TikTok orders were framed as "additional steps" needed to address the ICTS emergency.[235]

The implementing regulations for each order were soon enjoined by federal district courts.[236] A group of WeChat users won a preliminary injunction on First Amendment grounds.[237] 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

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[226] Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); Exec. Order No. 13943, 85 Fed. Reg. 48,641 (Aug. 6, 2020).

[227] Marland v. Trump, 498 F. Supp. 3d 624, 630 (E.D. Pa. 2020).

[228] Exec. Order No. 13942, *supra* note 226.

[229] U.S. WeChat Users All. V. Trump, 488 F. Supp. 3d 912, 917 (N.D. Cal. 2020).

[230] Exec. Order No. 13943, *supra* note 226.

[231] *See U.S. WeChat Users All.*, 488 F. Supp. 3d at 916.

[232] *Supra* note 226.

[233] 50 U.S.C. §§ 1701-08. The orders also relied on the National Emergency Act, 40 U.S.C. §§ 1601-51.

[234] Exec. Order 13873, 84 Fed. Reg. 22,689 (May 17, 2019).

[235] *Supra* note 226.

[236] This saga is well chronicled in Chander, *supra* note 13, at 1156-61.

[237] *U.S. WeChat Users All.*, 488 F. Supp. 3d at 926-28.

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materials."[238] A group of TikTok influencers won a preliminary injunction in federal court on similar statutory grounds.[239]

The orders at issue were a familiar product of electoral politics. Issued three months before the election, they were likely motivated by the President's desire to bolster his anti-China credentials, particularly following the outbreak of what he termed the "China flu."[240] Days later, Trump warned that "China will own the United States if this election is lost by Donald Trump."[241] "You're going to have to learn to speak Chinese, you want to know the truth."[242] TikTok, specifically, had also become a political nuisance for the President. It was the only major social media platform not widely used by his supporters, and had in fact become a site of resistance.[243] Just as the Adams Administration targeted critical publishers for sedition, writes Anupam Chander, Trump may have been "targeting a social media platform that had proven a thorn in his side."[244] Finally, the President may have been leveraging the ban to engineer the sale of TikTok to an allied 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.[245]

Political incentives likely led the Administration to overstate the degree of threat. All three judges involved 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."[246] 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."[247] In the WeChat suit, the judge stated that "while the general evidence about the threat to national security

[238] Tiktok v Trump, 490 F. Supp. 3d 73, 80-83 (D.D.C. 2020); Tiktok v. Trump, 507 F. Supp. 3d 92, 102-12 (D.D.C. 2020).

[239] *Marland*, 498 F. Supp. 3d at 636-41.

[240] *See* Ana Swanson & David McCabe, *U.S. Judge Temporarily Halts Trump's WeChat Ban*, N.Y. TIMES, Sep. 20, 2020, https://www.nytimes.com/2020/09/20/business/economy/court-wechat-ban.html.

[241] Kevin Liptak, *Trump says Americans wil have to learn Chinese if Biden wins but offers little condemnation of Beijing*, CNN, Aug. 11, 2020, https://www.cnn.com/2020/08/11/politics/trump-china-biden-learn-chinese/index.html.

[242] *Id.*

[243] Chander, *supra* note 226, at 1149 (describing anti-Trump activities on TikTok).

[244] *Id.* at 1148

[245] *Id.* at 1150-51.

[246] *Tiktok*, 490 F. Supp. 3d, at 85; *Tiktok*, 507 F. Supp. 3d at 114.

[247] *Marland*, 498 F. Supp. 3d at 642.

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related to China . . . is considerable, the specific evidence about WeChat is modest."[248]

As in previous conflicts, an expansive state response threatened to limit civil liberties, especially among those with imputed "enemy" ties. Plaintiffs showed convincingly 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."[249] In an affidavit, Erwin Chemerinsky, a leading dean and constitutional law scholar, 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."[250] 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."[251] Even if the regulation was content-neutral, she added, plaintiffs had shown "serious questions" whether it could withstanding intermediate scrutiny.[252] 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, in addition, ignored "obvious alternatives."[253]

The TikTok order also raised serious First Amendment concerns. Although judges enjoined it on statutory grounds, one court hinted at constitutional concerns. 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."[254] She further noted that the government misapplied precedent in its speech analysis.[255] Had judges reached the constitutional question, 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

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[248] *U.S. WeChat Users All.*, 488 F. Supp. 3d at 929.

[249] *Id.* at 918. One plaintiff explained how her mental health nonprofit effectively could not operate without WeChat to communicate with its primarily non-English-speaking patients. *Id.* at 918-19.

[250] Decl. of Ervin Chemerinsky in Supp. of Pls.' Mot. for Prelim. Inj. at 2, WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020).

[251] *U.S. WeChat Users All.*, 488 F. Supp. 3d at 926.

[252] *Id.* at 927.

[253] *Id.*

[254] *Marland*, 498 F. Supp. 3d 630.

[255] *Id.* at 638 n.6.

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argued that its regulations were a regulation of purely commercial conduct—a point that Judge Nichols made in his statutory analysis.[256] Even if the "ban" was content-neutral, it likely would have "burden[ed] substantially more speech than . . . necessary" to further the state's interests.[257] As both judges already noted, the government had provided only speculative evidence of national security harms.[258] And it did not well address why tailored alternatives, such as better data security standards, would not have achieved the same goals.[259]

As later addressed, Chinese firms can present distinctive security challenges stemming from local laws that require intelligence sharing and the infusion of party-state institutions within ostensibly private firms.[260] For example, TikTok's parent Bytedance, is a Beijing-headquartered firm with a Party Committee, Party Secretary, and has been accused of sharing dissident data with the party-state.[261] The point of this section is not to categorically oppose federal action against Chinese technology companies, but to observe that the U.S. government's recent efforts against such firms have often failed to comply with federal law or to adequately explain why expansive actions with serious rights implications, such outright app bans, have been warranted in each case. This reflexive tendency towards overprescription is consistent with threat politics, but it does not well serve our ability to meet 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 once instance. Until recently, the State Department enforced a policy of "assignment restrictions" that precluded certain employees from specific country or country-desk assignments, based on their personal ties to those countries.[262] According to the Department's Foreign Affairs Manual, these restrictions served "to mitigate foreign influence" and to "prevent potential targeting and harassment

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[256] *Tiktok*, 507 F. Supp. 3d at 106 ("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.").

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

[258] *See supra* note n.246-248.

[259] *See U.S. WeChat Users All.*, 488 F. Supp. 3d at 926.

[260] *See infra* Part III.B.

[261] *See* Yaqiu Wang, *Targeting TikTok's privacy alone misses a larger issue: Chinese state control*, Human Rights Watch, Jan. 24, 2020, https://www.hrw.org/news/2020/01/24/targeting-tiktoks-privacy-alone-misses-larger-issue-chinese-state-control; Peter Hoskins, *TikTok: ByteDance accused of helping China spy on Hong Kong activists*, BBC, June 7, 2023, https://www.bbc.com/news/business-65817608.

[262] Foreign Affairs Manual, U.S. Department of State, 12 FAM 233.5(a)-(c), https://fam.state.gov/FAM/12FAM/12FAM0230.html#M233_5.

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by foreign intelligence services."[263] Though long criticized as discriminatory, assignment-restriction policies were not abandoned until 2023.[264] Their abolition owes in large part to the use and resonance of familiar geopolitical frames.

Assignment restrictions have long been a source of unhappiness within the State Department.[265] 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.[266] Kim was born in America, did not speak much Korean, and "barely" knew his relatives in South Korea.[267] "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."[268] An association representing Asian-American diplomats began raising concerns over assignment restrictions in 2009.[269] It won a modest victory in 2016 and 2017 in the form of greater procedural protections.[270]

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.[271] The Asian-American Foreign Affairs Association's (AAFAA's) conducted a member survey in 2020, finding that 70% of 132 respondents perceived bias in the assignment restriction process.[272] Most respondents with a restriction did not receive a reasoned explanation; among

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[263] *Id.* at 233.5(a).

[264] Kylie Atwood, *US State Department Ends Assignment Restrictions That Wwere Perceived as Discriminatory*, CNN, Mar. 22, 2023, https://www.cnn.com/2023/03/22/politics/state-department-end-assignment-restrictions/index.html.

[265] *See* Lydia DePillis, *At the State Department, diversity can count against you*, WASH. POST, Sep. 24, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/09/24/at-the-state-department-diversity-can-count-against-you/.

[266] Ryan Heath, *Foreigners in their own country: Asian Americans at State Department confront discrimination*, POLITICO, Mar. 18, 2021, https://www.politico.com/news/2021/03/18/asian-americans-state-department-477106.

[267] Tweet Thread by @AndyKimNJ, Mar. 20, 2021, https://twitter.com/AndyKimNJ/status/1373282035633119233?s=20.

[268] *Id.*

[269] Christina T. Le & Thomas T. Wong, *Lack of fairness and transparency in the assignment restrictions process undercuts both employees and the State Department. Asian-American employees took it on*, FOREIGN SERVICE J., Sep. 2017, https://afsa.org/pursuit-transparency-assignment-restriction-policies.

[270] *See id.*; Heath, *supra* note 266 (describing language inserted into 2017 State Department Authorization Act that created "a formal appeals process").

[271] Laura Kelly, *Asian American lawmakers say State's "assignment restrictions" discriminate*, HILL, May 11, 2021, https://thehill.com/homenews/administration/552887-asian-american-lawmakers-say-states-assignment-restrictions/ (Assignment-restriction recipients nearly doubled from 168 employees in 2016 to 307 employees in 2017).

[272] Heath, *supra* note 266.

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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.[273] 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."[274]

In March 2021, over a hundred Asian-American diplomats and national security officials issued a letter opposing discriminatory practices. 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."[275] "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.[276] "We must . . . learn from painful elements of American history, when hostilities abroad resulted in undue prejudice [against] Japanese-Americans."[277]

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."[278] Congressman Kim has spoken out about his own experiences with assignment restrictions in popular media, describing them as bureaucratic jargon for a "fail[ed] loyalty test."[279] In 2021, four congressmen introduced the *Accountability in Assignment Restrictions Act* to establish an independent appeals process and to mandate the tracking of race and ethnicity data.[280]

As more policy elites began to speak out, many framed the problem around security. One thinktank leader described assignment-restrictions

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[273] *Id.*

[274] Kelly, *supra* note 271.

[275] *Asian-Americans and Pacific Islanders in National Security Statement on Anti-Hate and Discriminatory Practices*, accessed May 3, 20223, https://docs.google.com/forms/d/e/1FAIpQLSeiE69q4M8Jk8JcQuBFiW102zzoz2kOkYICTrY5g1x2L50fGA/viewform [https://perma.cc/P8ZJ-UTKZ] [hereinafter National Security Professionals Letter].

[276] *Id.*

[277] *Id.*

[278] Heath, *supra* note 266.

[279] Tweet Thread, *supra* note 267.

[280] Press Release, *Rep Lieu Introduces Bill to Ensure Accountability in State Department Assignment Restrictions Process*, Sep. 16, 2021, https://lieu.house.gov/media-center/press-releases/rep-lieu-introduces-bill-ensure-accountability-state-department [hereinafter Lieu Release].

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reform as a "national security imperative."[281] 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."[282] Many have stressed the need to draw on employees' "cultural and linguistic skills."[283] 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.[284] The AAFAA has said that assignments-restriction reform would improve our "national security readiness."[285]

The Biden Administration came into power hoping to distinguish its China policy from its predecessor's, despite substantive continuity in several areas.[286] Contra Trump, Biden officials stressed the importance of promoting democratic and egalitarian values at home.[287] 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."[288] 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.[289]

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

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] National Security Professionals Letter, *supra* note 275.
[285] Lieu Release, *supra* note 280.
[286] Biden officials stressed that the new Administration's China strategy "represented a departure from the approach favored by former U.S. President Donald Trump." *Kurt Campbell: U.S. and China Can Co-Exist Peacefully*, Asia Society Policy Instistute, July 6, 2021, https://asiasociety.org/policy-institute/kurt-campbell-us-and-china-can-co-exist-peacefully.
[287] *See* Jacob M. Schlesinger, *What's Biden's New China Policy? It Looks a Lot Like. Trump's*, WALL ST. J., Sep. 10, 2020 (describing "strengthening . . . U.S. . . . democracy" as a key component of Biden's China strategy)
[288] Speech, Antony J. Blinken, *The Administration's Approach to the People's Republic of China*, U.S. Department of State, May 26, 2022, https://www.state.gov/the-administrations-approach-to-the-peoples-republic-of-china/ [https://perma.cc/RQ6W-ZYEJ] [hereinafter Blinken Speech].
[289] *Id.*

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process.[290] 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."[291] And in March 2023, Blinken announced that the Department would no longer issue assignment restrictions at all.[292]

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 various powerholders, including 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 of diversity and security goals was especially appealing to Biden officials seeking to distinguish their more pro-democratic China policies from their predecessors'.

The story told above is evocative of historic episodes of rights expansion. While the scale of impact here is not comparable to what was at stake in 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."[293] Secretary Blinken framed his decision to end new assignment restrictions as an effort to "unlock the full potential of our workforce."[294] Understood in this way, expanding opportunities for Asian-American employees was not a concession that could undermine security; rather it stood to enhance the government's ability to compete effectively. Graber observes that rights can expand in periods of conflict "when the conflict requires . . . mobilization of the beneficiaries of a rights protective policy for success."[295]

Still others have argued against assignment restrictions on grounds that even more closely recall Cold War narratives around race and democracy. One

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[290] Heath, *supra* note 266.

[291] Remarks, *Secretary Antony J. Blinken on the Modernization of American Diplomacy*, U.S. Department of State, Oct. 27, 2021, https://www.state.gov/secretary-antony-j-blinken-on-the-modernization-of-american-diplomacy/ [https://perma.cc/KBF5-NYZS].

[292] Antony J. Blinken, Letter to Colleagues, Mar. 2023, https://www.politico.com/f/?id=00000187-0a39-d989-a7a7-afbd4d460000 [https://perma.cc/D2ED-MXD9] [hereinafter Blinken Letter]. Existing assignment restrictions would be subject to "a review and appeals process consistent with that of security clearance denials or revocations" and several other designations would be retained. *Id.*

[293] National Security Professionals Letter, *supra* note 275.

[294] Blinken Letter, *supra* note 292.

[295] Graber, *supra* note __, at 97.

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anti-assignment-restrictions advocate wrote in 2022 that such policies, along with pandemic-related surge in Anti-Asian rhetoric, "undermine[d] U.S. credibility on human rights abroad."[296] 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.[297] 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.

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

III. Structure

Global rivalry is also 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 ways in which 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

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[296] Opinion, Aimee Yan, *Asian American Representation is a National Security Imperative*, Center for International and Strategic Studies, Jan. 28, 2022, https://defense360.csis.org/asian-american-representation-is-a-national-security-imperative/ [https://perma.cc/B25F-825Z].

[297] *See supra* Part I.B.

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expand.[298] 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."[299] Part of the reason is structural.[300] Alexander Hamilton predicted that the executive would enjoy inherent advantages in crisis: speed, decisiveness, and secrecy.[301] Other reasons sound more in politics. Presidents are most directly accountable for wartime success and failure and thus highly motivated to acrrue more powers.[302]

Whatever the causes, history is replete with episodes of conflict-driven executive aggrandizement that undermine Madisonian ideals of power diffusion.[303] Starting with Jefferson, American Presidents have routinely deployed military forces abroad without congressional approval."[304] President Lincoln suspended the writ of habeas corpus without congressional authorization during the Civil War.[305] 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.[306] Courts too have "have long deferred to the political branches in times of war and

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[298] Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) ("Conflict abroad almost always enhances executive power at home.");

[299] Clinton Rossiter, *War, Depression, and the Presidency, 1933-50*, SOCIAL RESEARCH, vol. 17, Dec. 1950, at 417; *see also* CORWIN, *supra* note 14, at 38-64 (detailing World War II's effects on enlarging executive power).

[300] *See* HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION 118-119 (1990) ("The presidency . . . is ideally structured for the receipt and exercise of power.").

[301] *See* The Federalist No. 70 (at 424) (Alexander Hamilton) (Clinton Rossiter, ed., 1961) ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number"); Essay, Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2523 (2006); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 287-88 (2001). *But see* Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 31 CONN. L. REV. 1549, 1553 (2009). For a more general exposition of presidential incentives to unilateral action, see Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, J. LAW, ECON., & ORGANIZATION, vol. 15, at 132 (1999).

[302] *Cf.* Erik Voeten & Paul R. Brewer, *Public Opinion, the War in Iraq, and Presidential Accountability*, J. CONFLICT RESOLUTION, vol. 50, Oct. 2006, at 809, 811 (analyzing different forms of presidential accountability by the public during the Iraq War).

[303] *See* THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961). Justice Frankfurter's concurrence in *Youngstown* spoke of the "long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 (1952) (Frankfurter, J., concurring).

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

[305] *See* FELDMAN, *supra* note 118, at 246.

[306] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 191 (2009); *see also* POSNER & VERMEULE, *supra* note 124, at 86 (describing the War Powers Resolution as "dead letter . . . after President Clinton's rather clear breach of its terms during the Kosovo conflict").

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emergency."[307] They have upheld the curfew and internment of Japanese citizens and residents,[308] validated the use of military commissions to try saboteurs and war criminals,[309] and sustained prosecutions against wartime dissenters under the Espionage Act and the Smith Act.[310] 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."[311]

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.[312] John Mueller first used the phrase, "rally around the flag," to denote short-term crisis-driven boosts to presidential popularity,[313] but the concept can also describe longer time horizons. For example, the Cold War 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.[314] 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.[315]

The conventional story of the unfettered wartime executive does not always hold however.[316] Congress, courts, and parties have on notable occasions sought to limit executive prerogatives in times of conflict. Josh Chafetz writes

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[307] Amanda L. Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 496 (2023); *see also id.* at 496-512 (detailing cases).

[308] *See* 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); Essay, Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEX. L. REV. 735, 736 (2020).

[309] Ex parte Quirin, 317 U.S. 1, 1 (1942); In re Yamashita, 327 U.S. 1, 18 (1946); *see* JACK GOLDSMITH, THE TERROR PRESIDENCY 50-53 (2007); Wiecek, *supra* note 118, at 45-55, 60-64.

[310] Stone, *supra* note 120, at 1317-19, 1325-27.

[311] *Id.* at 1317 (noting that during the first world war, one person was sentenced to twenty years for distributing leaflets urging the non-reelection of conscription supporters).

[312] Trubowitz & Mellow, *supra* note 112, at 166-68 (analyzing data from voteview.com).

[313] John E. Mueller, *Presidential Popularity from Truman to Johnson*, AM. POLITICAL SCI. REV., Mar. 1970, at 18, 21.

[314] Wittkopf & McCormick, *supra* note 112, at 627.

[315] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329-30 (2006) (arguing that historic "competition between the legislative and executive branches was displaced by competition between two major parties"). *But see* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 28-35 (2017) (contending contra partisanship-based arguments that Congress has the motivation to assert itself against other branches).

[316] *See* KOH, *supra* note 300, at 4; David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568 (2003).

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that "Congress has . . . repeatedly used its powers of the purse to end, limit, or forestall military action."[317] 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.[318] "By all accounts Congress's behavior changed dramatically following the Vietnam War," adds James Lindsay.[319] "The deference Congress once accorded the president gave way to active questioning of presidential initiatives."[320] Courts too have on notable occasions sought to check wartime assertions of executive power. Cases include: *Ex parte Milligan*,[321] *Ex parte Endo*,[322] *Duncan v. Kahanamoku*,[323] *Youngstown Sheet & Tube Co. v. Sawyer*,[324] *New York Times Co. v. United States*,[325] *Rasul*,[326] *Hamdi*,[327] and *Hamdan*.[328] Of course, not all of these case were durably successful or influential. *Milligan*'s sweeping rhetoric nothwithstanding, its outcome was effectively undone two years later in *Ex parte McCardle*.[329] On the whole, however, these cases show that courts have not "followed an unyielding practice of deference to the political branches in times of war and crisis."[330] Finally, the flipside to rally-around-the-flag effects is that foreign conflicts can still generate partisan opposition. The Cold War foreign policy consensus was "shattered" by the Vietnam War.[331] So too was the post-September 11 consensus

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[317] CHAFETZ, *supra* note 315, at 74-75.

[318] *Id.*; *see also* Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility: Constitutional Lessons of Vietnnam and its Aftermath, 92 MICH. L. REV. 1374, 1390-91 (1994) (documenting uses of congressional power to halt U.S. use of force in conflicts in Angola and Hawaii).

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

[320] *Id.*

[321] 71 U.S. 2 (1866) (invalidating President Lincoln's use of military tribunals to try and sentence civilians).

[322] 323 U.S. 283, 302 (1944) (freeing Japanese-American citizien-detainee who was "concededly loyal").

[323] 327 U.S. 304, 324 (1946) (vacating convictions of U.S. citizens tried by military commission under Hawaiian martial law).

[324] 343 U.S. 579 (1952) (affirming injunction against presidential seizure of steel mills to avert wartime strike)

[325] 403 U.S. 713 (1971) (holding that government cannot constitutionally enjoin publication of the Pentagon Papers).

[326] 542 U.S. 466 (2004) (finding habeas jurisdiction to review legality of Guantanamo detentions)

[327] 542 U.S. 507 (2004) (holding that Guantanamo citizen-detainee cannot be detained indefinitely)

[328] 126 S. Ct. 2749 (2006) (finding illegality in Bush-era military commissions to try Guantanamo detainees).

[329] 74 U.S. (7 Wall.) 506 (1868); Issacharoff & Pildes, *supra* note __, at 301 (writing that in concluding the Court lacked jurisdiction, *McCardle*'s practical effect "was to permit the use of military tribunals").

[330] Tyler, *supra* note 307, at 513.

[331] Wittkopf & McCormick, *supra* note 112, at 628.

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by the war in Iraq.[332] William Howell and Jon Pevehouse assert that the "partisan composition of Congress" was often a "decisive factor in determining whether lawmakers will oppose or acquiesce in presidential calls for war."[333]

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 basic contours of the China threat. Still, lower courts have not always deferred to executive proclamations of emergency, acting on notable occasion 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,"[334] 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).[335] These advantages make executive orders an especially favored tool in times of exigency.

China-related presidential orders 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

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[332] William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars*, FOREIGN AFFAIRS, Sep./Oct. 2007, at 96.

[333] *Id.*

[334] 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 (2001) ("Presidents . . . discovered long ago that they could use executive orders . . . to take various unilateral actions, sometimes of considerable importance."); Note, Erica Newland, *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).

[335] Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1778 (2019); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552-53 (2005); Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (holding that the Administrative Procedure Act's "agency" references do not refer to the president).

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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.[336]

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."[337] Major orders include the imposition of sanctions on Chinese officials for human rights violations,[338] termination of preferential treatment for Hong Kong and of certain exchanges with China and Hong Kong,[339] prohibitions on transacting with WeChat and TikTok,[340] prohibitions on trading the securities of firms tied to China's military,[341] and prohibitions on transacting with certain Chinese-connected software applications.[342] Most of these orders contained or relied on declarations of emergency. In addition, President Trump issued in 2020 a proclamation banned the entry of Chinese students with perceived military ties.[343]

President Biden has issued more than a half dozen executive orders connected to China.[344] 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.[345] The new order nevertheless framed itself as an implementation of President Trump's 2019 emergency

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

[337] Timeline of Executive Actions on China (2017-2021), U.S. China Economic and Security Review Commission, Apr. 1, 2021, https://www.uscc.gov/research/timeline-executive-actions-china-2017-2021. This is not to mention the Administration's well over a hundred other China-related measures, including CFIUS-related activity. *Id.*

[338] Exec. Order No. 13818, 82 Fed. Reg. 60,839 (Dec. 20, 2017).

[339] Exec. Order No. 13936, 85 Fed. Reg. 43,413 (July 14, 2020).

[340] *Supra* note 226.

[341] Exec. Order No. 13959, 85 Fed. Reg. 73,185 (Nov. 12, 2020); Exec. Order No. 13974, 86 Fed. Reg. 4,875 (Jan. 13, 2021).

[342] Exec. Order No. 13971, 86 Fed. Reg. 1,249 (Jan. 5, 2021).

[343] Proclamation 10043, 85 Fed. Reg. 34,353 (May 29, 2020).

[344] 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* Executive Order 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021);Exec. Order No. 14005, 86 Fed. Reg. 7,475 (Jan. 25, 2021); Exec. Order No. 14080, 87 Fed. Reg. 52847 (Aug. 25, 2022).

[345] Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 9, 2021).

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declaration as to ICTS risks from foreign adversaries.[346] On foreign tech firms generally, President Biden 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.[347] The order, the first presidential directive on appropriate CFIUS considerations, "formalize[d] a new, broader interpretation of the committee's authority."[348] Biden has also barred U.S. entities from investing in Chinese companies linked to China's defense and surveillance sectors.[349] The order "expand[ed] the scope of the national emergency" declared in an earlier Trump order.[350] Finally, the Biden Administration recently announced a new order that begins a process of prescribing certain forms of outbound investment to China on national security grounds as well.[351]

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."[352] By preventing U.S. users from sharing and receiving content on TikTok, the TikTok prohibitions fell well within these exceptions.[353] IEEPA lists, as sample "informational materials," news, artworks, films, and photographs.[354] These are all pervasively shared items on TikTok.[355] Moreover, TikTok users, as in other platforms, routinely share personal data with no economic value in

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[346] *See id.* ("I, Joseph R. Biden Jr., find that it is appropriate to elaborate upon measures to address the national emergency . . . declared in Executive Order 13873 of May 15, 2019").

[347] Exec. Order No. 14083, 87 Fed. Reg. 57,369 (Sep. 15, 2022).

[348] Fact Sheet, President Biden Signs Executive Order to Ensure Robust Reviews of Evolving National Security Risks by the Committee on Foreign Investment in the United States, White House, Sep. 15, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/15/fact-sheet-president-biden-signs-executive-order-to-ensure-robust-reviews-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states/; David E. Sanger, *Biden Issues New Order to Block Chinese Investment in Technology in the U.S.*, N.Y. TIMES, Sep. 15, 2022, https://www.nytimes.com/2022/09/15/us/politics/biden-china-tech-executive-order.html.

[349] Exec. Order No. 14032, 86 Fed. Reg. 30,145 (Jun. 3, 2021).

[350] *Id.*

[351] Exec. Order No. ___, 88 Fed. Reg. 54,961 (Aug. 14, 2023).

[352] 50 U.S.C. § 1702(b)(1), (3).

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

[354] 50 U.S.C. § 1702(b)(3).

[355] *See TikTok,* 490 F. Supp. 3d at 81.

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their posts, comments, and messages.[356] So the TikTok prohibitions were *ultra vires* on grounds of IEEPA's "personal communication" exception as well.[357] The WeChat prohibitions were unauthorized for substantively similar reasons.

The Trump Administration has also deployed questionable readings of its statutory authorities in enforcing an executive order to address 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.[358] 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.[359] That law defines a CCMC as any person "owned or controlled by, or affiliated with" certain Chinese state and military entities.[360] 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.[361]

The two cases, *Xiaomi Corporation v. Department of Defense* and *Luokung Technology Corporation v. Department of Defense,* illustrate how threat politics can lead to dubious readings of the executive's statutory authorities and a disregard for ordinary administrative process. In the course of the Xiaomi litigation, for example, it was revealed that the Department's decision document relied on two thin bases for its designation: that Xiaomi's CEO was recognized by the Ministry of Industry and Information Technology (MIIT) as an "Outstanding Builder[] of Socialism with Chinese Characteristics," and that Xiaomi had plans to invest in 5G and AI capabilities, which, according to the Department, are "[c]ritical [t]echnologies essential to modern military operations."[362] 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.[363] As the district court judge explained, however,

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[356] *Id.* at 83.

[357] 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.

[358] Exec. Order No. 13959, 85 Fed. Reg. 73,185 (Nov. 12, 2020).

[359] *Id.* The order was later modified by Exec. Order No. 13974, 86 Fed. Reg. 4,875 (Jan. 13, 2021).

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

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

[362] Xiaomi, 2021 WL 950144 at *3-*4.

[363] *Id.* at *5.

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Xiaomi specialized in consumer electronics, where 5G and AI were "quickly becoming industry standard."[364] That certain technologies have potential military applications did not prove an actual military affiliation.[365] As for the MIIT award, plaintiffs' evidence suggested that the award was given to entrepreneurs from various industries, including companies that made hot sauce, infant milk powder, and wine.[366] That Xiaomi's CEO received it was not substantial evidence of the company's military affiliations either.[367] 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."[368] The judge shows through various cases and regulations, including the Department's own regulatory definitions of "affiliate," why the Department's definition was unconvincing.[369]

The Luokung litigation revealed substantively the same problems. The Department's decision document was thin and conclusory, focusing on the *potential* military applications of Luokung's business in areas like AI and commercial space, rather than evidence of an actual affiliation.[370] And the Department urged an expansive reading of the term "affiliated," which the same judge rejected on similar grounds.[371] The court also stated that although APA violations decided the case, it was "concerned that the Department . . . subject a public company to de-listing . . . with no notice or process whatsoever."[372]

Like the WeChat and TikTok cases, the CCMC cases evidence legally dubious attempts at executive aggrandizement 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 geopolitical antagonist. As the district court found in the course of weighing the equities, the purported national security justifications were substantially overstated.[373]

Although the Trump Administration appears to have overreached in these specific cases, Chinese firms can in fact present special security challenges that are especially hard to discern. There is a rich literature on the various ways

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[364] *Id.* at *8.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.* at *6.
[369] *Id.* at *6-7
[370] Luokung Tech. Corp., 538 F. Supp. 3d at 189.
[371] *Id.* at 184-88.
[372] *Id.* at 191 n.13.
[373] *Id.* at 195 (stating that the government had only a "diminished national security interest"); *Xiaomi Corp.*, 202 WL 950144, at *12 (expressing "skeptic[ism] that weighty national security interests are actually implicated).

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in which party-state institutions are embedded within Chinese firms of all types—not only state-owned enterprises, which are all held by a single state agency,[374] but also "private" firms which are required to have Party Committees, a Party Secretary, and to study Xi Jinping Thought and align with national policies.[375] 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.[376] And while the Defense Department's evidence on Xiami was weak, this does not prove that evidence of its military ties are non-existent, or that other ostensibly private firms, such as Huawei, are similarly situated.[377] The point rather is that in our efforts to address dangers associated with Chinese firms, it ignores our laws and values to simply assume significant risks or malign intentions without actual evidence. The opacity of the Chinese private sector is a reason for more careful scrutiny, not an excuse to abandon ordinary rules of legal 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.

Many have commented on a growing cross-party consensus on China. One thinktank researcher called "China policy . . . the one last bastion of biparstian policy on the national security side."[378] Among Kevin McCarthy's first major acts as House Speaker was forming the House Select Committee on the CCP—an act overwhelmingly approved 366-65, with support from 146

[374] *See* Wu, *supra* note 17, at 271 (describing State-owned Assets Supervision and Administration Commission (SASAC), located within the State Council, which is China's chief administrative authority); Milhaupt & Lin, *supra* note 89, at 700, 734-45).

[375] Wang, *supra* note 261.

[376] *See* Joe McDonald & Zen Soo, *Why does US see Chinese-owned TikTok as a security threat?*, AP, Mar. 24, 2023, https://apnews.com/article/tiktok-bytedance-shou-zi-chew-8d8a6a9694357040d484670b7f4833be (describing provisions of China's 2017 National Intelligence Law and 2014 Counter-Espionage Law that seemingly require organizations to assist with state intelligence work).

[377] *See* Remarks, Christopher Ashley Ford, *Huawei and Its Siblings, the Chinese Tech Giants: National Security and Foreign Policy Implications*, U.S. Department of State, Sep. 11, 2019, https://2017-2021.state.gov/huawei-and-its-siblings-the-chinese-tech-giants-national-security-and-foreign-policy-implications/; Balding & Clarke, *supra* note 20.

[378] Benjy Sarlin & Sahil Kapur, *Why China may be the last bipartisan issue left in Washington*, NBC NEWS, Mar. 21, 2021, https://www.nbcnews.com/politics/congress/why-china-may-be-last-bipartisan-issue-left-washington-n1261407.

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Democrats.[379] "This is an issue that transcends our political parties," McCarthy said.[380] 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 in the United States. The White House framed the Act as a necessary response to China's rise—though of course, various interests have also sought to leverage China fears to pursue their own political agendas[381]

It is impossible to pinpoint an exact moment when politicans coalesced around the China challenge. As David Shambaugh explains, the new consensus "developed progressively and over time," and largely in response to the "Xi Jinping regime's internally repressive and externally assertive policies."[382] Human rights advocates, security hawks, trade protectionists and others have seen their interests slowly align over a host of Xi-era policies, from the persecution of Uighurs in Xinjiang to bullying 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 23-point increase from 2013.[383] Public attitudes have no doubt shaped the views of politicians, and vice versa.[384] The professional class—experts who brief, advise, and lobby political leaders on China—have also begun to converge.[385] One recent study canvassed leading American thinktanks, finding in them a "consensus on the issue of China" regardless of "ideological orientations."[386]

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.[387] During the first

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[379] Joan E. Greve & Lauren Gambino, *Capitol Hill finds rare bipartisan cause in China—but it could pose problems*, GUARDIAN, Feb. 26, 2023, https://www.theguardian.com/us-news/2023/feb/26/chinese-balloon-bipartisan-capitol-hill-risk.

[380] *Id.*

[381] *See* Fact Sheet, *supra* note 103.

[382] David Shambaugh, *The New American Bipartisan Consensus on China Policy*, China-US Focus, Sep. 21, 2018, https://www.chinausfocus.com/foreign-policy/the-new-american-bipartisan-consensus-on-china-policy.

[383] Christine Huang et al., *China's Partnership with Russia Seen as Serious Problem for the U.S.*, Pew Research Center, Apr. 28, 2022, https://www.pewresearch.org/global/2022/04/28/chinas-partnership-with-russia-seen-as-serious-problem-for-the-us/.

[384] *See* Shambaugh, *supra* note 382 (describing how Trump "tapped into" changing sentiment on China).

[385] *See id.*

[386] D. A. Kochegurov, *Formation of an Anti-Chinese Consensus among US "Think Tanks": From D. Trump to J. Biden*, Herald of the Russian Academy of Sciences, 2022, at S609.

[387] *See, e.g.*, Gibbs McKinley, *The Pyrrhic Victory of a China Consensus*, Diplomat, Mar.

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hearing of the House Select Committee on the CPC, all four witnesses urged, according to Max Boot, "the hardest of hard lines against Beijing."[388] "Utterly missing," he continues, "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.[389] Jessica Chen Weiss agrees: the chair "has set the has set the stage for anyone who raises questions about U.S. policy to be smeared as a friend of the Chinese Communist Party."[390] The concern, to be clear, is not merely an impoverishment of public discourse. It is the unreflective pursuit of highly 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 were enacted with significant bipartisan majorities.[391] Both decisions arguably count among the most egregious foreign policy mistakes of the last century.

Growing interparty consensus does not mean complete unanimity of political 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.[392] 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.[393] But even some variations 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 idea of partisan consensus is interbranch consensus, and in particular, a growing unity of purpose across legislative and executive institutions in confronting the China threat. If party competition is a primary driver of interbranch dynamics,[394] increasing party consensus will naturally reduce Madisonian competition. The concern is both that Congress is failing to vigorously exercising its oversight authority over the executive and that it is actively fueling the accumulation of presidential authorities. While the latter is

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9, 2023, https://thediplomat.com/2023/03/the-pyrrhic-victory-of-a-china-consensus/.

[388] Opinion, Max Boot, *Democrats and Republicans Agree on China. That's a problem*, WASH. POST, Mar. 6, 2023, https://www.washingtonpost.com/opinions/2023/03/06/republican-democrat-china-consensus-hysteria/.

[389] *Id.*

[390] *Id.*

[391] McKinley, *supra* note 387.

[392] *See* Greve & Gambino, *supra* note 379.

[393] *See* Huang, *supra* note 383.

[394] *See* Levinson & Pildes, *supra* note 315, at 2315.

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preferable to executive unilateralism, as it entails a level of congressional participation in policymaking, it risks a long-run erosion in institutional checks.

Consider two examples. First, Congress has actively enabled somewhat 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."[395] 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.[396] Another order declared an emergency after China imposed a draconian national security law in Hong Kong.[397] The order likewise did not explain how such acts, shameful as they were, constituted a national emergency here. In the latter case, 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.[398] 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 expansive emergency powers.[399]

The concern, to be sure, is not that the United States has responded vigorously to deeply repressive acts taken by Beijing. From a policy perspective, I concur with many recent executive acts on human rights or Hong Kong (save for the cancellation of the Fulbright program in China, which risks stunting our understanding of China at a time when such understanding is greatly needed). 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, or clear limiting principle constraining, the meaning of "emergency." If this pattern continues, it could lead to a greater accumulation of presidential authorities and the adoption of policies that are far more unwise or dangerous than the relatively uncontroversial acts taken thus far.

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[395] 50 U.S.C. § 1701(a).

[396] Exec. Order No. 13818, 82 Fed. Reg. 60,839 (Dec. 20, 2017).

[397] Exec. Order No. 13936, 85 Fed. Reg. 43,413 (July 14, 2020).

[398] H.R. 7440, Pub. L. 116-149 (July 15, 2020).

[399] Robert L. Tsai, *Manufactured Emergencies*, YALE L.J. FORUM, Feb. 15, 2020, at 590, 591; *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.

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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.[400] Congress and the President have modified it several times, most significantly in 2018 in view of new concerns relating to China.[401] 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."[402] 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.[403] They show how an initially narrow mandate evolved into an expanding scope of review, with CFIUS blocking, for example, a Chinese firm from owning 60% of a U.S. dating app.[404]

As with Congress inviting the President to invoke her 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 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."[405] But "[f]or those interested in the separation of powers," they continue, "the unity of effort across the executive and legislative branches raises some caution flags. A

[400] Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975) (codified at 3 C.F.R. 159 (1976). It is chaired today by the Treasury Secretary and is composed of representatives from various other departments, including Commerce, Defense, and State. *CFIUS Overview*, U.S. Dep't of Treasury, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview.

[401] *See* Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, §§ 1701-1728, 132 Stat. 1653, 2174-2207 (2018).

[402] *Id.* § 1701(c)(1); *see* Eichensehr & Hwang, *supra* note 11, at 567-70.

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

[404] Eichensehr & Hwang, *supra* note 11, at 559.

[405] *Id.* at 583. It is thus not a story of unfettered 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); *cf.* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 808 (2011).

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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."[406] 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 a critical mass of legislators would ever speak out against a security-rooted 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 effectively 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—in their ways—remarked upon the thinness of the executive's evidence of national security risks. In both CCMC cases, the court declared itself "skeptical that weighty national security interests are actually implicated."[407] "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."[408] Judges in the app-ban cases likewise noted that the purported national security risks cited by the executive were "less substantial," "hypothetical," and "modest."[409]

Because these cases have already been addressed in detail, I will avoid redundancy here. For reasons to be explained in Part V, however, these opinions may not be representative of how national security deference will work moving forward.

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[406] *Id.*
[407] Xiaomi, 2021 WL 950144 at *12; Luokung Tech. Corp., 538 F. Supp. 3d at 194-95.
[408] Luokung Tech. Corp., 538 F. Supp. 3d at 195.
[409] *Tiktok*, 490 F. Supp. 3d, at 85; *Tiktok*, 507 F. Supp. 3d at 114; *Marland*, 498 F. Supp. 3d at 642; *U.S. WeChat Users All.*, 488 F. Supp. 3d at 929.

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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,[410] but like judges they act legal-rationally when they apply general non-arbitrary 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 general norms."[411] Commitment to legal rationality is manifest in American law. Federal judges must "impartially discharge" their duties and to "administer justice without respect to persons."[412] Federal posecutors may not charge based on extrinsic considerations like race, national origin, or certain kinds of "personal feelings."[413] Legal rationality promotes congruence, ensuring that general norms are evenly implemented.[414]

History teaches that legal rationality is prone to lapse in times of conflict. Scholars have documented war's tendency to inspire patriotism and fervor in judges and prosecutors.[415] Melvin Urosky's chapter on the Supreme Court during World War II opens with Justice Felix Frankfurter banging his fist against the table the day after Pearl Harbor. "Everything has changed," he said,

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[410] 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 61-62 (1988).

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

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

[413] Principles of Federal Prosecution 9-27.260, U.S. Department of Justice, accessed June 7, 2023, https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

[414] FULLER, *supra* note , at 55; *cf.* Jeremy Waldron, *The Concept and the Rule of Law*, 43 Ga. L. Rev. 1, 7 2008) ("The Rule of Law is not just about general rules; it is about their impartial administration.").

[415] *See, e.g.*, Melvin I. Urofsky, Inter Arma Silent Leges*: Extrajudicial Activity, Patriotism, and the Rule of Law*, *in* ERNST & JEW, *supra* note 2; Brad Snyder, *Taking Great Cases: Lessons from the* Rosenberg *Case*, 63 VAND. L. REV. 885, 934-35 (2010).

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"and I am going to war."[416] On Urofsky's telling, Frankfurter's "fiercely burning patriotism" unduly influenced the discharge of his duties.[417] Most egregiously, 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.[418] Frankfurter's improprieties, Urofsky claims, was the clearest manifestation of how the "patriotism of the justices . . . in fact affected the decisions they reached."[419]

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 "freedom from pollical oppression"; or another way that "relies upon terror and oppression," "fixed elections," and "suppression of personal freedom."[420] McCarthyism, broadly defined, constituted "a social practice that worked to maintain" these views among the general population, including legal actors.[421] "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.[422]

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."[423] Brad Snyder attributed what he saw as the Court's abdication in that case partially to the Justices' "anti-communism."[424] Justice William Douglas recounted:

> The country was out for blood. The Court was blind to any reason . . . . [T]his is the only time I had ever seen the spirit of a mob, the spirit of the streets, dominate a court. The Rosenbergs died Friday night and the whole country exulted in some strange orgasm of hate.[425]

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[416] Urofsky, *supra* note 415, at 19. Justice Frank Murphy sought commission as a lieutenant colonel in the infantry. *Id.* at 20.

[417] *Id.* at 21.

[418] *Id.* at 27; *see also* SNYDER, *supra* note 119, at 397.

[419] Urofsky, *supra* note 415, at 26.

[420] B. Thomas Trout, *Rhetoric Revisited: Political Legitimation and the Cold War*, INT'L STUDIES Q., Sep. 1975, at 251, 258.

[421] CHENG, *supra* note 67, at 144.

[422] Stone, *supra* note 120, at 1326; Belknap, *supra* note 121, at 42-46.

[423] Snyder, *supra* note 415, at 886.

[424] *Id.* at 934.

[425] *Id.* at 935.

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Later in the Cold War, the Supreme Court itself criticized lower courts for ruling on the basis of anti-communist fervor. *Zschernig v. Miller* is best known for its application of the dormant foreign affairs power.[426] En route to that holding, the Court pointed out that probates courts were inappropriately "critici[zing] nations established on a more authoritarian basis than our own."[427] "As one reads the [those] decisions," the Court lamented, "it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' . . . are the real desiderata."[428]

Ideological frames like "free world," and "communist" are a kind of "symbolic language whose references lie in the social order."[429] The risk in conflict is that such frames can overwhelm rational consideration of specific policies. George Kennan, the architect of Cold War's containment strategy, was himself critical of the U.S. government's tendency to universalize specific decisions during the war.[430] "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.[431] As the following section shows, such tendencies are starting to reappear in American law.

B. Legal Irrationality

The new global conflict is beginning to surface cases of conflict-driven legal irrationality. As earlier explained, Cold War-style ideological frames have returned to our political discourse. Senator Rick Scott 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."[432] 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."[433] The FBI's transnational repression

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[426] 389 U.S. 429 (1968); Carlos Manuel Vázquez, *W(h)kither Zschernig?*, 46 VILL. L. REV. 1259, 1262 (2001).

[427] 389 U.S. 429, 440 (1968).

[428] 389 U.S. at 437.

[429] Trout, *supra* note __, at 259.

[430] *Id.* at 278.

[431] GEORGE F. KENNAN, MEMOIRS: 1925-1950 322 (1967).

[432] Speech, *Senator Rick Scott at America First Policy Institute: Communist China is America's Enemy*, Feb. 10, 2022, https://www.rickscott.senate.gov/2022/2/sen-rick-scott-at-america-first-policy-institute-communist-china-is-america-s-enemy.

[433] The China Threat, Federal Bureau of Investigation, https://www.fbi.gov/investigate/counterintelligence/the-china-threat.

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initiative, which addresses the Chinese party-state's abuses of American legal process, is framed similarly.[434]

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.[435] 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, whisteblower complaints prompted the Senate Committee on Commerce, Science, and Transportation to investigate the ITMS for misconduct.[436] 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.[437] Obsessed with identifying employees with Chinese-state ties, the ITMS "targeted department divisions with comparably high proportions of Asian-American employees."[438] It "opened frivolous investigations . . . without evidence" and engaged in "repeated instances of malfeasance."[439] The Committee concluded that these activities "likely resulted in preventable violations of civil liberties and other constitutional rights."[440]

The most prominent victim of ITMS misconduct was Sherry Chen, a Chinese-American hydrologist at the National Weather Service.[441] 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

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[434] Transnational Repression, Federal Bureau of Investigation, https://www.fbi.gov/investigate/counterintelligence/transnational-repression.

[435] Kennan, *supra* note __.

[436] *Committee Investigation Report: Abuse and Misconduct at the Commerce Deparrtment*, U.S. Senate Committee on Commerce, Science, & Transportation, July 2021, at 1 (hereinafter *Committee Report*).

[437] *Id.* at 4.

[438] *Id.* at 5.

[439] *Id.* at 5, 24.

[440] *Id.* at 36. ITMS was later shuttered following an internal review.

[441] Xiafen (Sherry) Chen, Claim for Damage, Injury, or Death (Form 95) against the United States Department of Commerce and the United States Department of Justice, Nov. 1, 2021, at 2, https://www.aclu.org/cases/sherry-chen-v-united-states?document=sherry-chen-administrative-complaint-against-departments-commerce-and-justice (hereinafter "Chen Claim").

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funded repairs of aging reservoirs.[442] 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.[443] The administrator reported Chen to her agency's security division, expressing concern that Chen "is a U.S. citizen but a Chinese National" who was "made to" act "by a foreign interest."[444] Two ITMS agents interrogated Chen for seven hours, without food, water, or a restroom break.[445] They forbade Chen from discussing the interrogation with others, which she understood to include counsel.[446] They then intimidated her, Chen claims, into drafting a statement with prepared language.[447]

In 2014, Chen was arrested and charged with unlawfully downloading data from a government database and making false statements to federal agents.[448] "My 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."[449] News outlets surrounded her home and portrayed her as a spy.[450] A week before trial, however, the government asked the court to dismiss all charges.[451] The Merit Systems Protection Board later noted that Chen was a "victim of gross injustice."[452] Chen ultimately won a settlement in 2022.

The rise of ITMS well illustrates how conflict dynamics can drive investigory irrationality. As political attention turned to countering threats from China, a security unit with a modest mandate began to expand into criminal and intelligence that extended beyond its statutory authorization.[453] Without proper management or oversight, the unit began to abuse authorities

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[442] *Id.* at 3.

[443] *Id.* at 3-4; *see also* Sherry Chen, *My Personal Story*, Sherry Chen Legal Defense Fund, Dec. 25, 2015, https://www.sherrychendefensefund.org/my-story.html (hereinafter "Chen Story").

[444] Chen Claim, *supra* note 441, at 4.

[445] *Id.* at 4-5.

[446] *Id.*

[447] *Committee Report, supra* note 436, at 12.

[448] *Id.* at 5. 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 156, at 761.

[449] Kimmy Yam, *After Being Falsely Accused of Spying for China, Sherry Chen Wins Significant Settlement*, NBC NEWS, Nov. 15, 2022, https://www.nbcnews.com/news/asian-america/falsely-accused-spying-china-sherry-chen-wins-significant-settlement-rcna56847.

[450] Chen Story, *supra* note 443.

[451] Chen Claim, *supra* note 441, at 6.

[452] *Court Cases:* Sherry Chen v. United States, American Civil Liberties Union, last updated Dec. 16, 2022, https://www.aclu.org/cases/sherry-chen-v-united-states.

[453] *Report of the Programmatic Review of the Investigations and Threat Management Service*, United States Departmet of Commerce Office of the General Counsel, Sep. 3, 2021, 1, 7-15 https://www.commerce.gov/sites/default/files/2021-09/20210903-ITMS-Report.pdf (hereinafter Commerce General Counsel Report).

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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."[454] 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."[455]

Beyond law enforcement, there are hints that the new global conflict may also be leading to legal irrationality in American courts. In *Shanghai Yongrun Inv. Management Co. v. Kashi Galaxy Venture Capital Co*, the New York Supreme Court was asked to determine whether China's legal system had impartial tribunals as a precondition to recognizing and enforcing a Chinese judgment.[456] The court's 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.[457] 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."[458] 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."[459]

In ultimately refusing to enforce the Chinese judgment, the court made several more unusual moves.[460] 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.[461] These reports, however, are typically treated as ordinary evidence at trial, not special evidence meriting conclusive deference on

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[454] *Committee Report, supra* note 436, at 18.
[455] *Id.*
[456] 2021 WL 1716424 (N.Y. Sup. Ct. 2021).
[457] *Id.* at *1-*2.
[458] *Id.*
[459] *Id.* Cold War judicial opinions were sometimes framed similarly. *See, e.g.*, Commonwealth v. Koczwara, 155 A.2d 825, 823-33 (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").
[460] *See* Clarke, *supra* note 12, at 576.
[461] *Id.*

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a dismissal motion.[462] Second, the court held for the first time in U.S. law that a Chinese judgment could not be enforced because China's system was systemically unfair.[463] As legal scholars pointed out as *amici*, U.S. courts have historically addressed deficiencies in Chinese law on case-specific grounds of unfairness.[464] By holding that Chinese law was systematically unfair, the court implied that no New York court could ever recognize a Chinese judgment.[465]

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."[466] 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 a novel issue in New York specifically, where a court had held differently just four months earlier.[467] With only a written record, it is hard to know for certain. But the overwritten preamble and unqualified deference to the State Department suggests that patriotic-ideological biases may have influenced the outcome. Not unlike the probate courts in *Zschnernig*, the court may have unconsciously applied ideological frames in interpreting the law. Its paeans to Washington and the Magna Carta are clues 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," the judge proclaimed.[468]

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

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[462] *Id.*; *see* Jia, *supra* note 12, at 1703; Armadillo Distrib. Enters., Inc. v. Hai Yun Musical Instruments Mfr. Co., No. 12-1839, 2014 WL 2815943, at *4-5 (M.D. Fla. June 23, 2014).

[463] William S. Dodge & Wenliang Zhang, *Reciprocity in China-U.S. Judgments Recognition*, 53 VAND. J. TRANSNAT'L L. 1541, 1564 (2020) ("Courts in the United States have consistently rejected such arguments).

[464] Brief for Aimici Curiae George Bermann et al. in support of Plaintiff-Appellant, Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co., Case No. 2021-01637 (N.Y. App. Div. 2021), 8-9.

[465] *Id.* at 10.

[466] Shanghai Yongrun Inv. Mgmt. Co. v. Xu, 160 N.Y.S.3d 874 (N.Y. App. Div. 2022).

Donald Clarke agrees that State Department country reports ought not be "conclusive" in these matters, but he argues that "they should be considered relevant and reasonably reliable for what they say about specific features of the Chinese legal system." *See* Donald Clarke, *Enforcing Chinese Judgments: A Response*, TRANS. LITIG. BLOG, Oct. 10, 2022, https://tlblog.org/enforcing-chinese-judgments-a-response/.

[467] Huizhi Liu v. Guoqing Guan, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020).

[468] Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co., 2021 WL 1716424 (N.Y. Sup. Ct. 2021), at *6.

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might still be tempered by forces militating the other direction.[469] But at a time in which judicial rhetoric in some corners is becoming more dramatic,[470] it will be not surprising to see similar frames return.

The preceding examples address legally irrational acts already completed. At this likely early stage of conflict, however, *proposed* acts to counter China also merit study. For example, several senators have recently introduced legislation reinstating the China Initiative.[471] The China Initiative was canceled, said Senator Marco Rubio (R-FL), "because a band of woke activists smeared it as racist and xenophobic."[472] Senator Scott (R-FL) another co-sponsor, framed the bill as a necessary response to "a new Cold War with the United States."[473] As problematic as the Initiative was, a version launched on these terms will 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.[474]

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.[475] 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).[476] 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.[477] The Commission had just heard troubling testimony about the Chinese party-state's

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

[470] *See* Jonathan L. Entin, *Over the Top: Judges, Lawyers, and COVID-19 Rhetoric*, 31 HEALTH MATRIX 51, 53 (2021) (analyzing instance of "gratuitous" over-the-top judicial rhetoric).

[471] Press Release, *Rubio, Scott, Colleagues Introduce Bill to Reestablish DOJ's China Initiative*, Mar. 31, 2022, https://www.rubio.senate.gov/public/index.cfm/2022/3/rubio-scott-colleagues-introduce-bill-to-reestablish-doj-s-china-initiative [hereinafter Rubio Press Release].

[472] *Id.*

[473] *Id.*

[474] A bill to establish the CCP Initiative program, and for other purposes, S.3960, 117th Cong. § 1(d)(1) (2022).

[475] Charter, U.S.-China Economic and Security Review Commission, accessed June 13, 2023, https://www.uscc.gov/charter.

[476] Hearing, *Rule by Law: China's Increasing Global Reach*, U.S.-China Economic and Security Review Commission, May 4, 2023, https://www.uscc.gov/hearings/rule-law-chinas-increasingly-global-legal-reach.

[477] *See* Foreign Agents Registration Act of 1938, ch. 327, 52 Stat. 631 (codified as amended at 22 U.S.C. §§ 611–621 (2018); Nick Robinson, *"Foreign Agents" in an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE L.J. 1075, 1077 (2020).

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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 on lobbyists seeking to influence U.S. policy.[478] 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.[479] FARA's express exemption for lawyers representing foreign principals exemplifies its policy focus.[480] 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.[481] Under FARA, covered entitles must disclose potentially sensitive materials to the government or risk fines and imprisonment.[482] For an attorney, the most troubling of these disclosure requirements include "a comprehensive statement of the nature and method of performance" of its contract with the principal (i.e. their client)."[483] Other burdensome disclosures include fee arrangements, payment histories, and spending logs.[484] FARA also confers upon the Attorney General expansive authorities to require disclosure of any other "statements, information, or documents" as she may deem fit, based on considerations of "national security and the public interest."[485] 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.

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[478] Robinson, *supra* note 477, at 1095-96; 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").

[479] *See* Zambrano, *supra* note __, at 12.

[480] 22 U.S.C. § 613(g); *see also* Attorney General of U.S. v. Covington and Burling, 411 F. Supp. 371, 373-77 (D.D.C. Apr. 23, 1976) (reading the attorney-client privilege into FARA based on FARA's statutory purposes).

[481] *See* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 57-58 (summarizing principles of the adversary system).

[482] 22 U.S.C. § 618(a).

[483] *Id.* § 612(a)(4).

[484] *Id.* § 612(a)(4), (5), (8).

[485] *Id.* § 612(a)(10).

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Du Bois and other leaders of the Peace Information Center for distributing literature advocating a ban on nuclear weapons.[486] The Justice Department saw Du Bois's work as "communist propaganda meant to encourage American pacifism in the face of Soviet aggression."[487] 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 more critical of U.S. environmental policies than China's, asserting that as a result, NRDC somehow needed to register as a Chinese agent.[488] Both cases illustrate the susceptibility of FARA to abuse—a feature that has inspired autocrats in other countries to enact statutory analogs.[489] Extending the law to lawyers would likely invite further abuses, consistent with these historic patterns.

V. CONCEPTUAL AND PRACTICAL IMPLICATIONS

The preceding sections highlighted several ways in which the new global conflict is beginning to reprise historic patterns associated with global rivalry and law. This final Part reflects on the scholarly implications of these findings. In so doing, it highlights safeguards that ought to be maintained and fortified in the years ahead.

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 as it progresses. 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 be of use in understanding future events. History teaches, and the Article has shown, 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 certain transubstantive categories like rights and rationality in times of conflict can help contextualize seemingly unconnected developments, explaining why spy investigations, app bans, and foreign service reforms share a common thread.

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[486] *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.

[487] *Id.* Du Bois was acquitted but "the trial and the publicity around it ruined his career." *Id.*

[488] Robinson, *supra* note 477, at 1121-24.

[489] *See id.* at 1084-92.

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The Article also renews important academic debates on whether there is, in the words of the late Chief Justice Rehnquist, a "generally ameliorative trend" in American wartime rights protection.[490] Goldsmith and Sunstein have argued that wartime liberty protections have increased over time—a result, they say, of post 1960's legal-cultural shifts away from trust in the executive and military authorities and in favor of rights protection.[491] 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 are appropriate" during new wars, generating a "ratchet effect, over time, in favor of more expansive civil liberties during wartime."[492] These factors, they say, explain why President Bush's 2001 order enabling military commissions to try terorrists met popular and political resistance, while President Roosevelt's order establishing a similar commission to try Nazi saboteurs did not.[493] 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.[494] "All we have learned from history is how to mask the repetition, not how to avoid the mistakes."[495]

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 at this early stage 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 received significant criticism from members of Congress, civil society organizations, academics, and the media, with many invoking negative historical examples—internment, McCarthyism, red scares—to morally condemn state action.[496] More generally, we live now in a time of heightened institutional sensitivities to issues of inclusion. Even the chairman of the House Select Committee on the CCP, not to mention the FBI Director among others, has noted concerns over racial bias.[497]

[490] REHNQUIST, *supra* note 16, at 221.
[491] Goldsmith & Sunstein, *supra* note 117, at 262.
[492] *Id.* at 285.
[493] *Id.* at 281-84.
[494] Cole, *supra* note 118, at 1-4.
[495] *Id.* at 3-4.
[496] *See supra* Part II.B, III.C, IV.B.
[497] Gallagher Remarks, *supra* note 91 ("[T]his committee must constantly distinguish between the Chinese Communist Party and the Chinese people")); Wray Remarks, *supra* note 148 ("This is not about the Chinese people, and it's certainly not about Chinese Americans").

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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 that war.[498] If current conflict dynamics endure, it may well be that troubling policies are enacted but soon modified or reversed, in a continous 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 from this that some progress has been made, at least compared to historic nadirs. 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."[499] Existential, "total' wars may very well be in an analytic category of their own.

Even in current conflict dynamics, there is evidence that state actors are seeking to "mask" historic repetition.[500] As explained, several senators have sought to restore the China Initiative.[501] They would rename it the CCP Initiative, presumably to allay racial concerns over a "China" framing.[502] While this change is not nothing, the Senators have otherwise proposed reinstating the exact same organization, with the same aggressive targets.[503] Even with expected backlash, the China Initiative may very well be restored, just as public criticism of Bush-era counterterrorism 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 diaspara communities "as a special priority in the PRC's global influence-seeking activities."[504] This can impede efforts to reduce racial bias in law enforcement, bolstering latent tendencies to target groups

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[498] Goldsmith & Sunstein, *supra* note 117, at 280.

[499] *Scalia: Internment could happen again*, POLITICO, Feb. 4, 2014, https://www.politico.com/story/2014/02/antonin-scalia-internment-ruling-103079.

[500] Cole, *supra* note 118, at 3-4.

[501] Rubio Press Release, *supra* note 471.

[502] *Id.*

[503] *Id.*

[504] *China's Influence & American Interests*, HOOVER INST. (Larry Diamond & Orville Schell, eds., 2019), at xiii.

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instead of individuals. Second, Chinese firms, including private ones such as Huawei, have complex ties to the party-state that are exceedingly hard to disentangle; some firms may, for relevant purposes, pose little actual risk, while others that look formally similar may in fact raise troubling security concerns. 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 could help 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 "peaceless era" "without a "visible end-point."[505] Finally, the new global conflict is playing out against a backdrop of democratic erosion around the world, including here in the United States.[506] Crises tend to enable backsliding in democratic institutions, which in turn become more susceptible to autocratic exploitation.[507] This taps into 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.[508] When Madisonian checks fail, one might look to "internal separation of powers"—constraints within the executive branch to keep power in check.[509] Among the executive offices with responsibility for rights protection, some are what Margo Schlanger calls "Offices of Goodness": advisory, values-driven offices that are internal to their agency.[510] Other bureaucratic actors like Inspector Generals (IGs) are more accountable to Congress.[511] While both offices have a role to play in curbing overreach, IGs are are especially well poised to do so given their statutory insulation from presidential control and broader array

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[505] MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES (2012).

[506] *See generally* Aziz Huq & Tom Ginsburg, *How to Lose a Constituitonal Democracy*, 65 UCLA L. REV. 78 (2018).

[507] *Cf.* Essay, Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 570 (2018).

[508] For reasons of scope, I focus here on legal safeguards rather than general policies relating to China. I note however, that thoughtful proposals exist as to the latter. *See, e.g.*, Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073 (2022); Gary Corn, Jennifer Daskal, Jack Goldsmith, Chris Inglis, Paul Rosenzweig, Samm Sacks, Bruce Schneier, Alex Stomas & Vincent Stewart, *Chinese Technology Platforms Operating in the United States: Assessing the Threat*, Hoover Inst. & Am. Univ. Wash. Coll. Of L. (2021).

[509] Essay, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319 (2006); Essay, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 427 (2009); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. 1655, 1697 (2006).

[510] Margo Schlanger, *Offices of Goodness: Influence without Authority in Federal Agencies*, 36 Cardozo L. Rev. 53, 60-62 (2014). .

[511] *Id.* at 62.

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of investigatory powers.[512] The Department of Justice IG's reports have led to the disciplining of prison guards and the termination of FBI search policies.[513]

But while some IGs have a record of enforcing an agency's "secondary mandates,"[514] IGs have not played a notable role in policing instances of China-related overreach.[515] Several reforms proposed by Sinnar in the context of the War on Terror would enhance IG's constructive capacities in these areas. First, Congress might enlarge the Justice Department IG's jurisdiction to include misconduct allegations concerning "the exercise of the authority of an attorney to investigate, litigate, or provide legal advice."[516] Unlike other IGs, the DOJ IG must refer any such allegations to the Department's Office of Professional Responsibility—an office that "reports solely to the Attorney General."[517] Given the many questionable spy prosecutions in recent years, there is good reason to empower a more independent body within the Justice Department 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.[518] While ad hoc mandates to examine particular issues are helpful,[519] a designated 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.

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

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

[513] Sinnar, Institutionalizing Rights, *supra* note 512, at 311.

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

[515] One minor exception is the Commerce Department IG, which investigated allegations of ITMS abuse. *See* Commerce General Counsel Report, *supra* note 453, at 1.

[516] *See* Sinnar, Protecting Rights, *supra* note 512, at 1084; Inspector General Act of 1978 § 8E(b)(3).

[517] Sinnar, Protecting Rights, *supra* note 512, at 1084.

[518] *See* Sinnar, Institutionalizing Rights, *supra* note 512, at 357.

[519] Sinnar, Protecting Rights, *supra* note 512, at 1036-37.

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remedy" perceived American biases, suggesting that American courts will remain an important forum in mediating future business disputes as well.[520]

The perennial question in such cases is how much deference courts will accord to government national security claims. Courts today are asked to apply an array of deference doctrines that elevate executive branch decisionmaking, lawmaking, and factfinding on matters of international consequence.[521] 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.[522] These opinions exemplify how foreign affairs deference does not preclude courts from subjecting executive claims to a measure of genuine scrutiny.

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 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."[523] Scholars and judges have expressed similar doubts.[524] Judge Contreras, who presided over both CCMC cases, expressed not only disagreement with the government's position, but also exasperation at its sloppiness.[525] Future aggrandizing acts without these deficiencies may well survive deferential review.

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

[521] Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659-63 (2000).

[522] *See*

[523] Katie Rogers & Cecilia Kang, *Biden Revokes and Replaces Trump Order That Banned TikTok*, N.Y. TIMES, June 9, 2021, https://www.nytimes.com/2021/06/09/us/politics/biden-tiktok-ban-trump.html.

[524] When judges heard TikTok v. Trump on appeal, Judge Judith Rogers exclaimed about the TikTok order that "Congress wrote this language [in IEEPA], it seems to just fly in the face of that." Oral Argument at 23:38, TikTok, Inc. v. Trump, No. 20-5302 (D.C. Cir. Dec. 14, 2020), https://www.cadc.uscourts.gov/recordings/recordings2020.nsf/31F182605F720B498525863E0064C310/$file/20-5302.mp3; *see also* Sitaramin, *supra* n.508, at 1148 (agreeing that IEEPA is likely preclusive).

[525] Xiaomi, 2021 WL 950144 at *5 (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").

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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.[526] 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.[527] 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 "could not substitute [its] own assessment for the Executive's predictive judgments on such matters."[528] 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.[529] 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.[530] 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 Justice's view China generally. A search of such documents between 1989 and 2022 yields limited but notable insights.

First, and least surprisingly, there is a shared recognition that China has a repressive government.[531] 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.[532] During oral argument in

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[526] *See* Eichensehr & Hwang, *supra* note 11, at 586-87; Holder v. Humanitarian L. Project, 561 U.S. 1, 33-35 (2010); Dep't of Navy v. Egan, 484 U.S. 518, 528-29 (1988).

[527] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2404-07, 2417 (2018).

[528] *Id.* at 2421.

[529] *See* Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultanaeously Overturned and Revived* Korematsu*,* 128 YALE L.J. FORUM 641, 656.

[530] Eichensehr & Hwang, *supra* note 11, at 588.

[531] Justices have noted the Chinese government's persecution of ethnic minorities and dissidents. *See* Transcript of Oral Argument at 59-60, Fed. Rep. of Germany v. Philipp, No. 19-351 (Dec. 7, 2020); Transcript of Oral Argument at 30, Wilkinson v. Ming Dai, No. 19-1155 & 19-1156 (Feb. 23, 2021).

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

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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.[533] Second, there is some recognition of historic discrimination against Chinese immigrants and citizens. Exclusion-era laws and cases are frequently invoked in legal analyses.[534] Several justices have urged that procedural protections that existed *even* during the Exclusion era ought of course to attach today.[535] 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 the Chinese ministry may have been prevaricating in its filings to support Chinese firms in litigation.[536]

Finally, there are hints that the justices may increasingly see China as a threat. During oral argument in *Trump v. Vance*, Chief Justice Roberts highlighted the "burden on the President" from having to review subpoenaed records, citing the President's need to deal with difficult affairs, including "China's causing all sorts of trouble."[537] The Chief's *sua sponte* invocation of China suggests not only a recognition that China is a policy problem, but 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."[538] It stressed the "considered judgment of the executive" in prosecuting them.[539]

In combination, these findings suggest that the Justices generally view China as 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

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[533] Transcript of Oral Argument at 54, Dobbs v. Jackson Women's Health Org., No. 19-1392 (Dec. 1, 2021).

[534] *See, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715 (2018) (Gorsuch, J., concurring in part and dissenting in part (discussing *Yick Wo*); INS v. St. Cyr, 533 U.S. 289, 325 n.55 (2001); Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (citing The Chinese Exclusion Case).

[535] *See* Jennings v. Rodriguez, 138 S. Ct. 830, 866 (2018) (Breyer, J., dissenting); Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2004-2005 (2020).

[536] *See, e.g.*, China Agritech Inc. v. Resh, 138 S. Ct. 1800 (2018); Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007); Animal Science Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018) (noting "conflicting statements").

[537] Transcript of Oral Argument at 93, Trump v. Vance, 140 S. Ct. 2412 (2020) (No. 19-635).

[538] Transcript of Oral Argument at 54, 82, Halkbank v. United States, No. 21-1450 (Jan. 17, 2023).

[539] *Id.* at 82.

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Chinese immigrants in our own history. Others may see conflict with China as reason for affording minimal external oversight over the executive.

More important than courts or executive offices is the vitality of our democratic processes. As shown, turns in popular opinon can dispel crisis-driven rally effects, rekindling interbranch and partisan competition.[540] 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 there are external partners to amplify their shared concerns.[541] Federalism might also play a stronger role in policing federal executive overreach. Historically, states have sometime sought to check executive foreign affairs authorities.[542] Even today, states are evincing considerable policy variation on China-related matters.[543]

With luck, the new global conflict may even reinvigorate our democratic institutions. Joshua 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.[544] 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 diplomatic advocates, 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 alongside other tools in the broader effort to improve American democracy.[545] Global conflicts present not only the risk of regression, history teaches, but also the promise of renewal.

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[540] *See supra* Part III.A.

[541] *See* Schlanger, *supra* note 510, at 110-11; Sinnar, *supra* note 512, at 357.

[542] *See* Anthony A. D'Amato, *The Massachusetts Antiwar Bill*, 42 N.Y. State Bar J. 639 (1970).

[543] *See* Jaros & Newland, *supra* note 192.

[544] *See* Josh Chafetz & David E. Pozen, 65 UCLA L. REV. 1430, 1452-56 (2018).

[545] *See* DUDZIAK, *supra* note __, at 251-53 (on how the Cold War helped formal equality expand but not social and economic rights); *see also* CAROL ANDERSON, EYES OFF THE PRIZE 7 (2003).

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