

PROPERTY AS NATIONAL SECURITY

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Two historically disparate fields of law—property and national security—are colliding through the hyper-activity of state governments. Against the backdrop of the U.S.-China trade/tech war, state governors and legislatures are competing with each other in introducing bills to sever all ties with China, stunt the growth of Sinocentric supply chains, and neutralize China’s soft power in the world. While the state bills operate in parallel to federal legislation and regulation, in many instances, states’ activities go much further than federal efforts. States are laboratories of China-delinking. The China-related bills passed to date address a wide range of subjects: from TikTok and semiconductors, to educational exchange and Confucius Institutes, to human rights and forced labor in Xinjiang. National security is often the justification for these laws. While the state statutes have strong symbolic aspects, they are already affecting property relationships, and raise a host of constitutional and foreign affairs questions. These issues have galvanized litigation that is currently working its way through the federal court system. The infusion of national security into property law has potentially far-reaching consequences not only for Chinese citizens residing in the U.S. and for U.S.-China relations, but also for the future development of American property law.

Based on a bespoke data set of 152 state bills and laws, this Article is the first attempt to make sense of these bills and laws by diagnosing their common features and analyzing their constitutional implications regarding equal protection and federal preemption. Specifically, this Article focuses on those state legislative sources regulating property broadly conceived—including land, corporate interests, and data—arguing that while there are national security threats posed by Chinese actors in the United States, the state statutes often go too far, violate the Constitution, and show U.S. property law trending towards illiberalism. States have become sites for the integration of national security into property law because of traditional state rights to regulate real property. Yet the state statutes affect immigration and

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other foreign affairs matters with China, thus opening the door to federal preemption. The state laws have been met with lawsuits, one of which, *Shen v. Simpson*, is on appeal in the Eleventh Circuit and a focus of this Article.

This Article finds that the root of the issues pertaining to the China-related state statutes is both epistemic and doctrinal. On the one hand, political and corporate interests promote anti-China agendas through lawmaking, and, on the other hand, these sentiments are not wholly new and in fact they benefit from enduring structures in property law, even if they have become supercharged through national security. Correcting these issues requires an approach that creates structural centralization of such foreign affairs-related matters in the federal government while balancing this centralization with state interests. Mirroring the causes of the current problem, this balanced centralization necessitates both epistemic and doctrinal reforms. First, in terms of legislation, federal preemption of state statutes that touch on foreign affairs should obtain particular salience during periods of heightened bilateral tension. At the same time, the federal government cannot sideline state government concerns. Rather, state concerns can continue to play an important role in lawmaking in regard to China. Second, regarding judicial review, courts need to fine-tune standards for equal protection concerns, pursuant to the level of risk posed by a Chinese entity or person. Vitally, for both lawmaking and judicial review, China expertise needs to be more tightly integrated into both processes.

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INTRODUCTION

In May 2023, a group of five plaintiffs brought a lawsuit, arguing that a Florida statute prohibiting Chinese people from purchasing real estate in Florida is discriminatory and violates the Constitution and federal law.¹ The plaintiffs include Chinese citizens residing in Florida, one of whom was persecuted by the Chinese government and fled to the United States for political asylum.² The state law, which identifies the Chinese government, the Chinese Communist Party (CCP), Chinese entities, and Chinese domiciliaries, was championed by Governor Ron DeSantis who attracted national attention while campaigning for the 2024 Republican presidential nomination.³ In a press release, Governor DeSantis stated, “Florida is taking action to stand against the United States’ greatest geopolitical threat—the Chinese Communist Party.”⁴ The Florida law is one of over 150 bills across the country that ban Chinese parties from owning property in that state.⁵ Although the plaintiffs lost their initial bid for an injunction against Florida’s law, they succeeded in obtaining a partial injunction on appeal.⁶

This case, *Shen v. Simpson*,⁷ is the first to challenge the property bans and the stakes could not be higher. The United States and China are locked in a trade/tech war with no end in sight.⁸ Meanwhile, anti-Asian

1. See *infra* Section IV.C.

2. First Amended Complaint at 20, *Shen v. Simpson*, No. 23-cv-208 (N.D. Fla. June 5, 2023).

3. FLA. STAT. § 692.204(1)(a) (2023); *Fact Check: How DeSantis Has Restricted Chinese Influence and Investment in Florida*, NBC 6 S. FLA., <https://www.nbcmiami.com/news/local/fact-check-how-desantis-has-restricted-chinese-influence-and-investment-in-florida/3160384/> [https://perma.cc/7V3V-3XH8] (Nov. 15, 2023, 3:59 PM).

4. Press Release, Ron DeSantis, Governor Ron DeSantis Cracks Down on Communist China (May 8, 2023), <https://www.flgov.com/2023/05/08/governor-ron-desantis-cracks-down-on-communist-china/#:~:text=BROOKSVILLE%2C%20Fla.,in%20the%20state%20of%20Florida> [https://perma.cc/WCC2-8N64].

5. See *infra* Appendix. See also Kimberly Kindy, *State Lawmakers Move To Ban Chinese Land Ownership*, WASH. POST (Aug. 21, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/08/21/state-laws-chinese-land-ownership-military-bases/> [https://perma.cc/S87U-BV4C].

6. Order Denying Preliminary Injunction Motion at 51, *Shen v. Simpson*, No. 23-cv-208 (N.D. Fla. Aug. 17, 2023). But see Appeal from the United States District for the Northern District of Florida, D.C. Docket No. 4:23-cv-00208 at 2-4 (11th Cir. Feb. 1, 2024) (granting a preliminary injunction pending appeal).

7. No. 23-cv-208, 2023 WL 5517253 (N.D. Fla. Aug. 17, 2023).

8. U.S. TRADE REPRESENTATIVE, 2022 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 2 (2023) (“China . . . has a long record of violating, disregarding and evading WTO rules to achieve its industrial policy objectives.”); Zhongguo shangwubu fabu (中国商务部发布) [P.R.C. Min. Commerce], Meiguo Luxing shima

sentiment is rising within the United States.⁹ Historically, when U.S. authorities have mistreated noncitizens, that mistreatment has exacerbated relations with the noncitizens' home state, especially during times of conflict.¹⁰ All eyes, including those of other U.S. state executives and legislatures, are on the outcome of *Shen*, which is pending before the Eleventh Circuit. *Shen* could become a tiebreaker for the rest of the country: A decision for the plaintiffs, finding that the Florida law is unconstitutional, could chill other states from imposing similar restrictions on Chinese citizens in their state. A finding for Florida could embolden other states to enact more legislation limiting Chinese people from participating in property transactions.

This Article examines the intersection of two historically disparate fields of law which are becoming increasingly alloyed in the context of the U.S.-China relationship: property and national security. While the Washington-Beijing relationship is well-documented, this Article draws attention to the activities of the U.S. states. U.S. states are laboratories of China delinking through statutes that limit economic, diplomatic, educational, and cultural ties with the People's Republic of China (PRC or China). States are experimenting with legal and regulatory methods to sever their links to China. In doing so, they are also competing with and copying from one another. There are additional inputs from other stakeholders: ambitious politicians eager to fan nativist flames and corporate lobbies seeking to block Chinese competitors, as well as the federal government which is also formulating its China policy in real time. While there are valid national security concerns about Chinese acquisition of property in the U.S.,¹¹ anti-China sentiment, which is

zuzhi guize yiwu qingkuang baogao (美国履行世贸组织规则义务情况报告) [Report on U.S. Fulfillment of WTO Rules and Obligations] 43 (2023), <http://images.mofcom.gov.cn/sms/202308/20230811165019325.pdf> [https://perma.cc/3AHZ-ZSD8] (“[T]he hegemonic status of the United States . . . force[s] other countries or regions to comply with its intellectual property standards. . . . [S]eiz[ing] its leading position in the field of intellectual property and trade and investment.”).

9. See Plaintiffs-Appellants' Principal Brief at 2, *Shen v. Simpson*, No. 23-12737 (11th Cir. Oct. 2, 2023); Order Denying Preliminary Injunction, *supra* note 6 (denying the plaintiff's motion for preliminary injunction against the Florida law). For statistics on anti-Asian hate crime in the United States, see Kimmy Yam, *Anti-Asian Hate Crimes Increased 339 Percent Nationwide Last Year, Report Says*, NBC NEWS, <https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-339-percent-nationwide-last-year-repo-rcna14282> [https://perma.cc/K6FS-34HF] (Feb. 14, 2022, 9:23 AM) (comparing the 2021 and 2022 statistics reported by the Center for the Study of Hate and Extremism).

10. See, e.g., *Oyama v. California*, 332 U.S. 633, 653 (1948) (recounting how numerous discriminatory acts towards Japanese people in the United States outraged the Japanese government).

11. See *infra* note 150 and accompanying text.

pervasive in the United States,¹² is shaping legislation. Such China-related legislation is not unique to red states; rather, it is a bipartisan phenomenon, found throughout the country. In the face of deep polarization, contesting China remains one of the few goals shared by Republicans and Democrats alike.¹³

Based on a unique dataset of 152 China-related state bills and laws that regulate some aspect of property (broadly construed), including real property, corporate interests, and data, there are a number of constitutional and statutory roadblocks to some of the recent state laws. Whereas state legislatures rely on a broad reading of Tenth Amendment states' rights to regulate property, they do so in a way that not only turns on distinctions based on protected categories but also touches on foreign affairs, immigration, and other domains conventionally within the purview of the federal government. This Article suggests that the integration of national security into property law is problematic under current conditions for two reasons. The first is epistemological, that is, who is making national security claims. The second is structural or doctrinal, including steroidal states' rights and exclusionary uses of property law.

This Article makes the following contributions. First, the Article adds to a budding literature that examines how the U.S. and Chinese legal systems are interacting and influencing each other, despite overall economic disassociation.¹⁴ As someone who has practiced law in both

12. Kyle A. Jaros & Sara A. Newland, *Federal Anti-China Sentiment Is Increasingly Seeping into State Laws*, THE HILL (Apr. 28, 2023, 1:30 PM), <https://thehill.com/opinion/international/3975855-federal-anti-china-sentiment-is-increasingly-seeping-into-state-laws/>.

13. See *About the Committee*, SELECT COMM. ON CCP, <https://selectcommitteeontheccp.house.gov/about-committee> [https://perma.cc/TF86-5JGE] ("The Select Committee on the Chinese Communist Party is committed to working on a bipartisan basis to build consensus on the threat posed by the Chinese Communist Party and develop a plan of action to defend the American people, our economy, and our values.").

14. For work examining the role of the Chinese in contributing to the genesis of immigration law in the United States, see generally Charles J. McClain & Laurence Wu McClain, *The Chinese Contribution to the Development of American Law*, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, at 3 (Sucheng Chan ed., 1991). For more recent scholarship examining the legal interaction during the trade war, see generally Mark Jia, *American Law in the New Global Conflict*, N.Y.U. L. REV. (forthcoming); Ji Li, *Superpower Legal Rivalry and the Global Compliance Dilemma*, 45 U. PA. J. INT'L L. (forthcoming 2024); Ge Chen, *The "Constitutional" Rise of Chinese Speech Imperialism*, 2 J. FREE SPEECH L. 483 (2023); Ryan Martinez Mitchell, *China's New Sanctions Regime and the Problem of Mimetic Unilateralism* (unpublished manuscript); Congyan Cai, *Enforcing a New National Security? China's National Security Law and International Law*, 10 J. E. ASIA & INT'L L. 65 (2017); Mark A. Cohen, *Parallel Play: The Simultaneous Professional*

China and in the United States and researches property law in both jurisdictions, my interest lies in thinking comparatively about property. It is not the case that the Chinese Government or the CCP is trying to change U.S. property law through, for example, the use of its own legal transplants or regulatory competition.¹⁵ Instead, it is the perception of China as a threat to the U.S. property market and to the liberal values that market allegedly supports (*i.e.*, individualism, human flourishing, and competitive principles) that is generating legal change in the form of bills and statutes. In other words, Chinese parties are having inadvertent effects on U.S. property law, its institutions, and investment screening, more generally, through their participation in the market. This state of affairs opens up a novel way to think about how commercial actors from a home state (China) can influence a host state (United States).

Second, this Article provides a study of how state governments respond to pressures (and opportunities) during times of economic and political tension with foreign states, often through proactive “subnational” engagement.¹⁶ Too often U.S-China relations are relegated to the Washington-Beijing framework, but, in practice, there are many overlapping frameworks as state governments pursue their own foreign policies with China. Yet the measures states adopt can generate new problems, and hence, states’ legislative activities raise important questions for “foreign affairs federalism.”¹⁷

Third, this Article makes a theoretical contribution to the study of property law’s intersection with national security. National security has become a grundnorm in this period of geoeconomic rivalry.¹⁸ This Article analyzes what it means for national security to shape property law, understood broadly, including law regulating rights in land, corporate interests, and data. I argue this happens through the infusion of national security into property law.¹⁹ This process is enabled by U.S. states’ rights to regulate property within their jurisdiction. Yet the measures adopted also impinge on domains traditionally relegated to the federal government, including foreign affairs, immigration, human rights, and sovereignty. Property law is not merely a domestic concern, especially

Responsibility Campaigns Against Unethical IP Practitioners by the United States and China, 56 AKRON L. REV. 325 (2023); Matthew S. Erie, *Legal Systems Inside Out: American Legal Exceptionalism and China’s Dream of Legal Cosmopolitanism*, 44 U. PA. J. INT’L L. 731 (2023).

15. See generally Matthew S. Erie, *The Soft Power of Chinese Law*, 61 COL. J. TRANSNAT’L L. 1 (2023) (describing how China has sought to co-build international dispute resolution mechanisms in developing countries.)

16. See *infra* Section I.A.

17. See *infra* text accompanying notes 37–41.

18. See *infra* Section II.A.

19. See *infra* Section II.A.

in the case of foreign investors. In the absence of a bilateral investment treaty that would otherwise address conflicts, this Article examines the mutual effects between a home state's domestic property law and (obligations to) international investors.²⁰ Thus, the constitutionality of the state laws within the federal system is a question with not only academic but also practical value.

The remainder of this Article is structured as follows: Part I sets the stage, outlining the increasing role of state and city governments in shaping the U.S.-China relationship. Whereas in the period of the "opening and reform," the United States had become economically wedded to China, the U.S.-China trade/tech war has necessitated a U-turn, and state governments have provided much of the impetus for the change in direction. Part II introduces the integration of national security concerns into property law to explain the state's response to the perceived problem. Part III is a descriptive assessment of the bills and laws. Part IV provides a doctrinal analysis of the statutes, including interpretive and constitutional concerns. It does so through the case of *Shen v. Simpson*, the first case to challenge the China-related statutes. Part V suggests correctives to the current situation, and a conclusion follows.

I. U.S. STATES AND CHINA

A. *The Rise of Subnational Actors*

The U.S.-China relationship has been called the most important bilateral relationship in the world.²¹ While the relationship has historically been "exceptionally consequential but also extremely

20. The literature analyzing issues of property deprivation through expropriation or other means in the field of international law is extensive. *See, e.g.*, 2 INTERNATIONAL INVESTMENT LAW: AMERICAN CLASSICS IN INTERNATIONAL LAW § 4 (José E. Alvarez ed., 2017) (citing key legal scholarship). The question of how property exclusion works without an international investment agreement is, in comparison, less well studied.

21. The Biden Administration has consistently taken this position. *See, e.g.*, Antony J. Blinken, U.S. Sec'y of State, A Foreign Policy for the American People (Mar. 3, 2021), <https://au.usembassy.gov/secretary-blinken-speech-a-foreign-policy-for-the-american-people/> [<https://perma.cc/9CHY-9ZZY>] (calling the U.S.-China relationship "the biggest geopolitical test of the 21st century"). This sentiment echoes a statement Joe Biden made over a decade earlier while serving as vice president. *See* Joe Biden, U.S. Vice President, Remarks by Vice President Joe Biden to the Opening Session of the U.S.-China Strategic & Economic Dialogue (May 9, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/05/09/remarks-vice-president-joe-biden-opening-session-us-china-strategic-econ> [<https://perma.cc/NVR8-W9KB>] ("It's no exaggeration to say that [the U.S.-China] relationship and how we manage it will help shape the 21st century.").

complex,”²² since the U.S.-China trade war started in 2017, the relationship has been on a crash course to nowhere. In academic and policy analyses, the default approach is to focus on the Washington-Beijing relationship, and yet, in doing so, the role of the fifty states has been overlooked.

In practice, each of the U.S. states has a different relationship with China due to their unique trade status, foreign direct investment (FDI) volume, and history of Chinese immigration. For instance, as of 2020, California had the largest trade deficit with China: some \$144.8 billion.²³ Yet its outgoing FDI was \$18.28 billion more than incoming Chinese FDI.²⁴ Compare this with Louisiana which had a positive trade balance of \$1.6 billion and received over \$600 million more in Chinese FDI than it exported to China.²⁵ Texas sells oil and gas to China whereas Connecticut sells aerospace products and parts.²⁶ The concentration of Chinese immigrants is another factor that shapes some of the economic relationships; California and New York have the highest concentrations of Chinese immigrants whereas there are great swaths of the Midwest which have a negligible Chinese presence.²⁷

Because of these different profiles, state governments face different incentives to create legal and regulatory environments for Chinese business, environments which inevitably affect that state's relations with China and potentially have spillover effects shaping the United States's relationship with China. Illustrating in snapshot the different relationships between the U.S. states and China, Figure 1 shows five states with five different trade profiles with China.

22. *U.S.-China Relations FPC Briefing*, U.S. DEP'T OF STATE (Feb. 22, 2023, 4:00 PM), <https://www.state.gov/briefings-foreign-press-centers/us-china-relations> (transcribing Ambassador and Assistant Secretary of State for the Bureau of East Asian and Public Affairs Daniel J. Kritenbrink's comments).

23. *How a U.S.-China Trade War Might Impact Individual States*, USAFACTS (Oct. 15, 2020), <https://usafacts.org/articles/how-us-china-trade-war-might-impact-individual-states/> [<https://perma.cc/YT6R-43G2>].

24. U.S.-CHINA INV. HUB, <https://www.us-china-investment.org/fdi-data> [<https://perma.cc/8EJF-2SJU>].

25. *Id.*

26. *Compare U.S.-CHINA BUS. COUNCIL, US EXPORTS TO CHINA 7 (2023)*, https://www.uschina.org/sites/default/files/us_exports_to_china_2023_0.pdf, *with U.S.-CHINA BUS. COUNCIL, CONNECTICUT'S EXPORTS TO CHINA 1 (2023)*, https://www.uschina.org/sites/default/files/connecticut-us_exports_to_china_2023_state_and_district_data-6.pdf.

27. *See U.S. Immigrant Population by Metropolitan Area*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-metropolitan-area> [<https://perma.cc/3TQG-FUJW>].

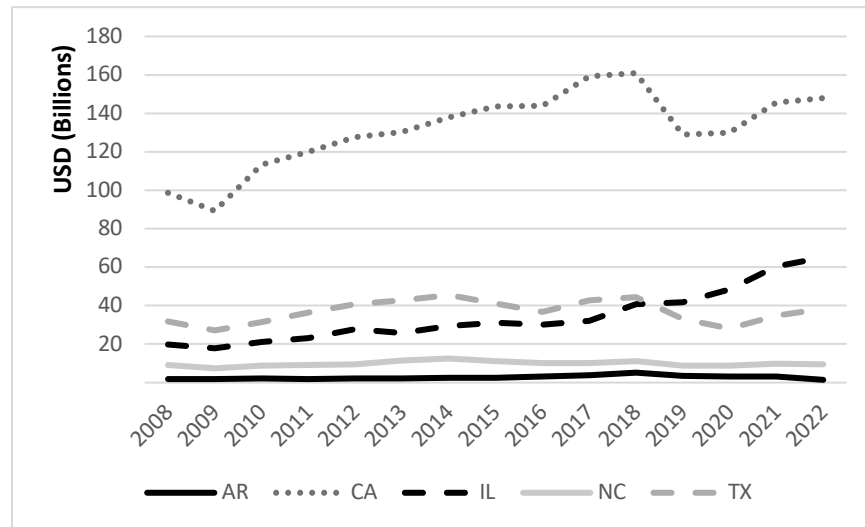


Figure 1. Trade with China per U.S. State.

Since the “opening and reform” period in China in the 1980s, U.S. states have clamored for trade relationships with China, seeking ways to access the Chinese market. For example, in the lead-up to President Bill Clinton’s 1994 decision to delink China’s most-favored nation status from its human rights record, officials and investors in California and New York actively sought out investment opportunities in China.²⁸ Likewise, in 2011, Texas Governor Rick Perry lauded Chinese manufacturer Huawei for its “really strong worldwide reputation” during a ribbon-cutting ceremony for the company’s new corporate headquarters outside Dallas.²⁹ Perry shrugged off concerns by federal national security experts that Huawei presented a security threat.³⁰ Hence, this period was a heyday for state and municipal governments to establish ties with Chinese businesses and other counterparties.

The rise of U.S. states and cities as international actors is part of a broader transformation in international law starting in the late 1990s.³¹

28. Associated Press, *China’s Markets Tantalize U.S.*, LAWRENCE J.-WORLD, Apr. 7, 1994, at 10D.

29. Carol D. Leonnig & Karen Tumulty, *Perry Welcomed Chinese Firm Despite Security Concern*, WASH. POST (Aug. 14, 2011), https://www.washingtonpost.com/politics/perry-welcomed-chinese-firm-despite-security-concern/2011/08/10/gIQAu80EJ_story.html, cited in Kyle A. Jaros & Sara A. Newland, *Paradiplomacy in Hard Times: Cooperation and Confrontation in Subnational U.S.-China Relations* (forthcoming) (on file with the author).

30. See Leonnig & Tumulty, *supra* note 29.

31. This transformation is testing the Westphalian system of sovereign nation-states at a global level. See, e.g., William W. Burke-White, *Cities and Provinces in a*

Pursuant to globalization and its discontents, U.S. states and municipalities are increasingly playing the role of protagonists in cross-border trade and business. They are doing so because they have their own trade policies with foreign states and foreign subnational counterparties, have noncitizen residents, and have foreign consulates, which necessitate quasi-diplomatic relations.³²

B. Constitutional Framework

States engage in such relations within a constitutional framework that grants foreign affairs powers between the federal and state governments through both express and implied allocations of authority. In the Constitution, the keystone of the federal system is the Supremacy Clause, granting superordinate authority of the Constitution and federal laws over state laws.³³ Next, there are several express prohibitions against state action. The Constitution expressly limits the foreign affairs powers of states by prohibiting them from “enter[ing] into any Treaty,” and “lay[ing] any Imposts or Duties on Imports or Exports” or “lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War” without congressional consent.³⁴

Third, and in addition to these explicit prohibitions on states, there are at least two implied doctrines. The first is the dormant foreign affairs preemption doctrine which holds that state legislation may be preempted even in the absence of federal legislation or executive action.³⁵ The second is the dormant Foreign Commerce Clause.³⁶ This implied

World of States: Subnational Governments in the International Legal System 3 (unpublished manuscript) (on file with the author) (arguing that subnational actors are “crafting and implementing collective policy solutions to trans-national threats that [a]ffect their citizens” in a way that has become a “blind-spot in the international legal system”); EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 9 (1998) (advocating for a larger role for individual states in foreign relations).

32. Brannon P. Denning & Jack H. McCall, *States’ Rights and Foreign Policy: Some Things Should Be Left to Washington*, 79 *FOREIGN AFFS.* 9, 11 (2000).

33. U.S. CONST. art. VI, cl. 2.

34. U.S. CONST. art. I, § 10.

35. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003) (holding that a California statute, the Holocaust Victim Insurance Relief Act, which aimed to facilitate Holocaust-era insurance claims by California residents, conflicted with presidential policy even without an express executive agreement and therefore should be preempted).

36. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (“Yet, even in the absence of a treaty, a State’s policy may disturb foreign relations.”); *Japan Line, Ltd. v. County*

doctrine, which parallels the dormant interstate commerce doctrine, holds that discriminatory state legislation is invalid but that non-discriminatory state statutes with no more than an incidental effect on commerce may be valid unless the burden imposed by statute outweighs its benefits.³⁷ Further, it screens out the burden of multiple taxation and any statute that threatens the “one-voice” of the country.³⁸ Counterbalancing these implied and explicit federal powers, the Tenth Amendment, the wellspring of states’ rights, provides that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”³⁹

This framework of rules is collectively known as “foreign affairs federalism” and has been extensively interpreted through legal scholarship. One conventional view is that the Constitution grants foreign affairs powers to the federal government as plenary powers, effectively sidelining the states.⁴⁰ A countervailing view is premised on the idea that the Constitution’s allocation of sovereignty is “not sharp or fixed” and, as a result, states retain unenumerated powers, including over foreign affairs.⁴¹ While foreign affairs federalism is far from settled in either judicial or scholarly terms, there is no question that states have become increasingly active in matters involving foreign countries.

C. Whither Paradiplomacy

U.S. states’ involvement in this area exhibits a degree of innovation and creativity in terms of how they forge foreign relations, including with China. Under the banner of “paradiplomacy,” state and municipal governments have engaged in a variety of activities, some of which are more formally legalistic than others. For example, those that are more

of *Los Angeles*, 441 U.S. 434, 451 (1979) (positing that the United States must speak with “one voice” in regulating foreign commerce).

37. MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 171 (2016).

38. *Id.*

39. U.S. CONST. amend. X.

40. *See, e.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149 (2d ed. 1996) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist.”).

41. *See* GLENNON & SLOANE, *supra* note 37, at 14–15. *See also* Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1191–92 (2008) (citing a string of cases ending in *United States v. Morrison*, 529 U.S. 598 (2000), as marking a “new beachhead” in the “federalism revolution”); John Kincaid, *The International Competence of US States and their Local Governments*, 9 REG’L & FED. STUD. 111, 112–13 (1999) (finding that the Constitution grants limited state international action subject to congressional consent and implicit international competences to states not occupied by the federal government).

diplomatic in nature include conducting trade missions, facilitating mayor and governor visits, establishing sister cities, and fostering ties between state officials and Chinese consulates.⁴² These activities would not likely violate any of Article I's express prohibitions or even the implied powers.

However, the same may not be true for the more formal legalistic activities. These activities include imposing economic sanctions on foreign states,⁴³ spearheading a greenhouse gas emissions trading system,⁴⁴ creating multilateral binding agreements,⁴⁵ and forming hundreds of bilateral international commitments.⁴⁶ In supporting such international commitments, states thread the needle between prohibited treaties and permissible "compacts."⁴⁷ Yet the states' international commitments have not been successfully challenged on constitutional grounds,⁴⁸ and, moreover, the most common foreign party was China,

42. Cheng Li & Xiuye Zhao, *America's Governors and Mayors Have a Stake in U.S.-China Relations*, BROOKINGS (Jan. 14, 2021), <https://www.brookings.edu/articles/americas-governors-and-mayors-have-a-stake-in-us-china-relations/> [https://perma.cc/2QWU-YDC3] (even during the nadir, between the start of the 2018 trade war and the suspension of travel in 2020 due to the COVID-19 pandemic, three governors undertook trade missions to China); *China, U.S. Have Established 284 'Sister' Pairs: Video Dialogue*, XINHUA (Apr. 30, 2022), <https://english.news.cn/20220429/3194ad35951f4ac88e852b81b0b798f5/c.html> [https://perma.cc/9W54-ULUJ] (suggesting that there are 284 sister cities between the U.S. and China).

43. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (finding that a Massachusetts law that restricted the authority of its agencies to purchase goods or services from companies doing business in Burma was unconstitutional under the Supremacy Clause).

44. Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1653–58 (2008) (considering constitutional challenges to California's greenhouse gas emissions trading system).

45. Romney Manassa, *Federalism in the Era of Globalization: The Exercise of Foreign Affairs Powers by Subnational Entities*, 52 U. MIA. INTER-AM. L. REV. 141, 143, 145 (2021) (describing how 3,800 civic leaders formed the U.S. Climate Alliance to fill the void left by President Donald Trump's withdrawal from the Paris Agreement in 2017 by signing the "We Are Still In" declaration, which was submitted to the United Nations as a formal pledge to commit to the Paris Agreement).

46. Ryan M. Scoville, *The International Commitments of the Fifty States*, 70 UCLA L. REV. 310, 317 (2023) (identifying more than 600 international commitments through freedom-of-information requests).

47. Compare U.S. CONST. art. I, § 10, cl. 1 (excluding treaties from state foreign relations' powers), with U.S. CONST. art. I, § 10, cl. 3 (allowing states to enter into an "Agreement or Compact with . . . a foreign Power" pending congressional consent).

48. See Scoville, *supra* note 46, at 316–17 (citing President Donald Trump's failed bid to challenge an agreement between California and Québec on greenhouse gas emissions joint programs in *United States v. California*, 444 F. Supp. 3d 1181 (E.D. Cal. 2020)).

its provinces and cities, with a total of 115 commitments.⁴⁹ In summary, states operate actively within the framework of foreign affairs federalism, and, increasingly, do so in a way that may push the structural boundaries in terms of permissibility to their benefit.

Starting in 2017 with the U.S.-China trade war, however, and accelerating in 2021 when the Biden Administration took the reins, states have taken a U-turn in their China policy; the same creativity used to forge ties has been deployed to curtail them, often citing national security concerns.⁵⁰ The very aim of state governments a mere decade ago—to cement economic and diplomatic links with Chinese counterparties—has, in the new upside-down world of nationalist politics, mutated into a source of deep anxiety as both federal and state governments suspect that the Chinese Government and the CCP conduct influence operations through subnational relations with U.S. states and cities.⁵¹ Fueled by a combination of populist nativism and corporate support, subnational actors, including mayors and governors, have initiated a range of measures to delink with Chinese counterparties.

49. See *id.* at 350.

50. KYLE A. JAROS, STATE-LEVEL US-CHINA RELATIONS AT THE CROSSROADS: PREDICAMENTS AND PROSPECTS FOR SUBNATIONAL ENGAGEMENT 82 (2023), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Jaros_2022-23%20Wilson%20China%20Fellowship_Understanding%20China%20Amid%20Change%20and%20Competition.pdf [<https://perma.cc/B96Q-VNCB>] (arguing that subnational relations have recently undergone “securitization”).

51. NAT’L COUNTERINTELLIGENCE & SEC. CTR., SAFEGUARDING OUR FUTURE: PROTECTING GOVERNMENT AND BUSINESS LEADERS AT THE U.S. STATE AND LOCAL LEVEL FROM PEOPLE’S REPUBLIC OF CHINA (PRC) INFLUENCE OPERATIONS 1 (2022) (warning that the goals of PRC influence operations are to curry favor for PRC interests among state and local leaders in order to use such relationships to pressure the federal government for pro-Beijing policies); Michael R. Pompeo, Sec’y of State, U.S. States and the China Competition (Feb. 8, 2020), <https://2017-2021.state.gov/u-s-states-and-the-china-competition/index.html> [<https://perma.cc/VM4H-3WBF>] (“What China does in Topeka and Sacramento reverberates in Washington, in Beijing, and far beyond.”); Flora Yan, *How Washington Soured on China-US Subnational Exchanges*, DIPLOMAT (Dec. 21, 2021), <https://thediplomat.com/2021/12/how-washington-soured-on-china-us-subnational-exchanges/> [<https://perma.cc/C95T-H4UD>] (observing a shift, during the second year of the Trump Administration, in the federal government’s view that subnational exchanges with the PRC were problematic).

These measures take the form of executive orders,⁵² lawsuits against Chinese parties,⁵³ and other confrontational politics.⁵⁴ The China-related bills are a mainstay of these measures, and while Republican states are more likely to introduce such bills, Democratic states are also passing such bills into law.⁵⁵ Moreover, with the China-related bills, the nature of states' engagement with China is changing from what has conventionally been a focus on "low politics" (*e.g.*, economy, environment, and migration) to "high politics" (*i.e.*, security, sovereignty, and human rights).⁵⁶ Hence, the form of these measures, namely, state legislation, and also their content, including national security, in particular, are putting pressure on the constitutional framework that divides federal and state foreign relations powers.

Having explained the current deterioration in U.S. states' relationships with Chinese counterparties and provided context in terms of states' responses to this problem, the next Part hones in on one particular type of state legislative activity, an activity that is potentially far-reaching for its impact not only for a sizeable minority in the United States and for the most significant bilateral relationship in the world, but also for the future direction of a bedrock area of American law.

II. THE INFUSION OF NATIONAL SECURITY INTO PROPERTY LAW

A. *National Security Regnant*

Under the pressures of the U.S.-China trade/tech war, national security concerns are shaping U.S. property law. Whereas exclusion has

52. See, *e.g.*, Ark. Exec. Order EO23-06, Executive Order to Protect State Information and Communications Technology from the Influence of Adversarial Foreign Governments (Jan. 10, 2023), <https://governor.arkansas.gov/wp-content/uploads/EO-23-06-TikTok-Ban.pdf> [<https://perma.cc/DKE6-2DY4>] (naming China as "a foreign adversary that presents serious challenges to our values, our security, and our economy").

53. Complaint at 1–3, *State ex rel. Schmitt v. China*, No. 20-cv-00099 (E.D. Mo. Apr. 21, 2020) (seeking damages from the Chinese government as the "COVID-19 pandemic is the direct result of a sinister campaign of malfeasance and deception").

54. Maggie Astor, *Where the Republican Candidates Stand on China*, N.Y. TIMES (Aug. 17, 2023), <https://www.nytimes.com/interactive/2023/08/18/us/politics/republican-candidates-2024-china.html> (listing the confrontational positions of all candidates for the 2024 Republican presidential nomination).

55. See *infra* text accompanying note 160.

56. CZESLAW TUBILEWICZ & NATALIE OMOND, THE UNITED STATES' SUBNATIONAL RELATIONS WITH DIVIDED CHINA: A CONSTRUCTIVIST APPROACH TO PARADIPLMACY 13 (2021).

long been called the *sine qua non* of property law,⁵⁷ under strain of protectionism in the U.S. economy, the right to exclude from access or use has been transmogrified into the right to exclude from ownership, both cementing the unlikely marriage of the two historically disparate fields of law: property and national security. At the same time, this process unfolds in such a way that it builds on established structures of exclusionary rights in U.S. property law. The overlap of the two begs several questions: Who can exclude Chinese people from owning property in the United States? Who exactly is excluded (Chinese resident/non-resident citizens, Chinese corporations, etc.)? And, on what basis are these parties excluded?

Before addressing these and related questions,⁵⁸ this Section lays a foundation by considering the underlying problem: how property has become conceptualized as a national security concern, and, conversely, how national security claims are made through property arguments. Property law is thus undergoing a new type of “securitization.” This is not happening in the conventional sense of pooling assets or debt for purposes of repackaging them as interest-bearing securities, but rather, the conversion of property—land, corporate interests, or data—into an asset that is sacred to the nation-state,⁵⁹ perceived to be under threat, and requiring legal or regulatory protection. To unpack this process, I begin by explaining how national security has seeped into other areas of law, and then analyze property as one such area of law that has undergone reinterpretation through national security concerns and claims.

First, national security, as a concept, industry, and field, has shifted and expanded significantly in different contexts and pursuant to specific historical time periods. The term has been defined capaciously as the “ability of states and societies to maintain their independent identity and their functional integrity.”⁶⁰ Partly due to its nature as a floating signifier, commentators have foregrounded national security’s function, observing

57. Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*.” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))). But see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1694 (2012) (doubting whether the right to exclude is the “be-all and end-all of property”).

58. See *infra* Sections III.B, III.C.

59. Mateo Taussig-Rubbo, *Sacred Property: Searching for Value in the Rubble of 9/11*, in AFTER SECULAR LAW 322, 324 (Winnifred Fallers Sullivan, Robert A. Yelle & Mateo Taussig-Rubbo eds., 2011) (describing property that attains symbolic value beyond the commercial through encounters with sacrifice and sacralization).

60. BARRY BUZAN, PEOPLE, STATES AND FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA 37 (25th Anniversary ed. 2016).

that national security has become a convenient cover for arbitrary state action.⁶¹ As a result, critical scholars have argued that the threshold question is an epistemic one: who can make claims about national security?⁶² That is to say, if national security is defined by its threat, then whoever is authorized to identify that threat and calibrate the response becomes the architect of that claim. At the same time, those who do not make claims or generate knowledge about national security may be sidelined in the process of claim-making. In the context of the U.S.-China relationship, this problem manifests in several ways, including the general lack of robust engagement with China experts and judicial deference to state legislatures. These propositions find a clear case in national security as it has developed in the United States as a brief historical overview shows.

There have been a number of paradigms for defining national security as deployed in the United States.⁶³ The first and foundational period is the Cold War, during which national security was seen mainly in terms of interstate rivalry and conflict. National security in this period was a zero-sum game that was also totalizing—it informed not only most other foreign policy commitments but also many domestic ones, as well.⁶⁴ At the same time, it was predicated on the rivalry of different systems, yet there was also stability because of this balancing. Benton Heath calls this the “Cold War Settlement,” and through it, adversaries attained a kind of homeostasis.⁶⁵

61. See, e.g., *id.* at 7 (“an essentially contested concept”); Arnold Wolfers, “National Security” as an Ambiguous Symbol, 67 POL. SCI. Q. 481, 481 (1952); David B. Sentelle, *National Security Law: More Questions Than Answers*, 31 FLA. ST. U. L. REV. 1, 1 (2003) (“a collection of fig leaves”).

62. See Aziz Rana, *Who Decides on Security?*, 44 CONN. L. REV. 1417, 1422 (2012) (suggesting that the basic question of national security is who decides on matters of war and emergency); J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT’L L. 289, 292, 312 (2022) (highlighting the “epistemic authority” of those who formulate national security policy); Harlan Grant Cohen, *Nations and Markets*, 23 J. INT’L ECON. L. 793, 794 (2020) (“[C]laims of national security are claims about the proper location of policymaking.”).

63. See Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT’L ECON. L. 655, 656 (2019) (suggesting the history of geoeconomics should be understood as one of periodic “security orders”).

64. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 6–12 (2000) (arguing that during the Cold War, to discredit the United States, the Soviet Union used anti-American propaganda to highlight civil rights inequalities, which in turn incentivized the U.S. government to improve racial equality at home).

65. J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1050 (2020).

This was not the case in the post–Cold War paradigm since the fall of the Berlin Wall in 1989 or the collapse of the Soviet Union in 1991.⁶⁶ This was a time of pluralization of actors, including non-state actors like terrorist networks, which saw a concomitant expansion of national security into such diverse fields as terrorism, transnational crime, corruption, and so on.⁶⁷ The September 11 attacks marked another turning point, perhaps what could be called a “big bang” moment for national security as *the* paradigm for certainly public but also private law.⁶⁸ Kim Lane Scheppele has written on national security’s incorporation into domestic law of most states through UN Security Council Resolution 1373, pushed by the United States and in fact modelled after the USA PATRIOT Act.⁶⁹ This was also a period that saw a massive expansion in the power of executives under domestic law.⁷⁰

A final phase of national security dates to around the 2008 global financial crisis.⁷¹ This period saw a further diversification of national security into fields as diverse as cybersecurity, infectious disease, and climate change.⁷² In this phase, China is the “other,” and unlike the Cold War period of two distinct and separable systems or the post–Cold War period with a plurality of actors and systemic fragmentation, this period shows adversaries engaging within the same international economic order.⁷³ Unfortunately, the existing order, organized under the World Trade Organization, has proven unable to reconcile the differences

66. *Id.* at 1033; Roberts, Moraes & Ferguson, *supra* note 63, at 656 (calling the period after 1991 the “Neoliberal order”).

67. Heath, *supra* note 65, at 1034.

68. Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT’L SEC. L. & POL’Y 437, 438 (2010) (“For perhaps the first time in history, and surely with the fastest speed, legal systems around the globe adapted to a changed world by responding to the same threat for the same reason: all states were commanded to fight global terrorism in a common template forged by international organizations.”).

69. See Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMP. INT’L & COMPAR. L.J. 241, 258–59 (2013).

70. *Id.* at 247 (observing that the U.N. Resolution 1373 rearranged the “domestic political architecture” by increasing national executives’ power); Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097, 1102–03 (2020) (diagnosing the problem under the Trump Administration during which the executive’s foreign commerce authority was expanded).

71. See Roberts, Moraes & Ferguson, *supra* note 63, at 656 (calling this period the “Goeconomic Order”); Heath, *supra* note 65, at 1034 (naming this the “new national security” as it pertains to new vulnerabilities such as telecommunications, transportation, energy, health, etc.).

72. See Cohen, *supra* note 62, at 806.

73. Heath, *supra* note 65, at 1024.

between the United States and China, in part, because of their respective national security entrenchments.⁷⁴

In this current paradigm, national security becomes the central organizing principle of interstate economic relations.⁷⁵ As such, commercial transactions undergo “national security creep.”⁷⁶ This process goes hand-in-hand with the further deepening of the executive’s power. The clearest example of this is the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee which, under the president, has the power to review certain transactions that involve foreign investment into the United States.⁷⁷ The authorizing legislation underwriting CFIUS is a 1988 amendment to Section 721 of the Defense Production Act of 1950, known as the Exon-Florio amendment.⁷⁸ Subsequently, the Foreign Investment and National Security Act of 2007 (FINSAs) revised Section 721, effective on October 24, 2007. The other important legislative source is the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), effective as of August 13, 2018.⁷⁹

According to FIRRMA, “national security” refers to “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”⁸⁰ The elliptical definition does not provide any meaningful guardrails to determine the scope of CFIUS review. It is clear, however, that while CFIUS nominally is not directed at any country’s investors, FIRRMA was a response to increased Chinese assertiveness in its international investment strategy.⁸¹ FIRRMA expanded CFIUS review in several ways, but most pertinent to this analysis, it demonstrates “national security creep” into property transactions. Specifically, whereas FIRRMA broadened the scope of CFIUS review to include real estate transactions and certain non-

74. See Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AM. J. INT’L L. 622, 649 (2021).

75. See Roberts, Moraes & Ferguson, *supra* note 63, at 657.

76. Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 550–51 (2023).

77. *CFIUS Laws and Guidance*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance#:~:text=The%20authority%20of%20the%20President,as%20the%20Exon%20Florio%20amendment.> [https://perma.cc/K6PS-E9VV].

78. *Id.*; 50 U.S.C. § 4565.

79. Foreign Investment and National Security Act (FINSAs), Pub. L. No. 110-49, 121 Stat. 246 (2007); Foreign Investment Risk Review and Modernization Act (FIRRMA), Pub. L. No. 115-232, 132 Stat. 2174, §§ 1701–28 (2018).

80. 50 U.S.C. § 4565(a)(1).

81. Ji Li & Ruonan Tang, *Superpower Rivalry and the “Modernization” of Foreign Investment Review*, 2023 U. ILL. L. REV. 461, 465.

controlling investments in critical infrastructure, critical technology, or sensitive personal data of U.S. citizens,⁸² it did so in a measured way that sets limits on CFIUS jurisdiction.⁸³

Importantly, little is known about how CFIUS conducts its reviews, that is, what tests or criteria it applies to a transaction to determine whether it presents a national security threat.⁸⁴ CFIUS may initially identify a suspect transaction based on information passed on by the U.S. intelligence community, information which while potentially subject to assessment and inquiry, given its origin, may also pass through CFIUS without raising questions. The lack of transparency raises several issues, including equal protection and due process concerns.

These issues came to a head in *Ralls Corp. v. CFIUS*,⁸⁵ the first and only case to challenge a CFIUS decision and one brought by a Chinese party.⁸⁶ In *Ralls*, the petitioner, a Delaware corporation owned by two Chinese nationals, purchased four American companies to develop windfarms in Oregon, and the transaction came under CFIUS review.⁸⁷ After CFIUS determined that the transaction threatened national security, President Barack Obama issued a presidential order prohibiting the transaction and requiring Ralls to divest itself of the project companies.⁸⁸ Ralls sued, claiming that the president's order violated due process under the Fifth Amendment because there was no opportunity to review and rebut the evidence.⁸⁹ In her opinion, Judge Karen L. Henderson wrote, "The gravamen of Ralls's challenge to the Presidential Order is that the President deprived it of its constitutionally protected property interests in the Project Companies and their assets without due process of law."⁹⁰ The D.C. Circuit Court found that Ralls did possess state law property interests when it acquired one hundred percent interest in the project companies and their assets, thus triggering due process protection; the

82. *Id.* at 471.

83. *See, e.g.*, 31 C.F.R. § 800 app. A (2022) (limiting critical infrastructure review to a finite set of categories); 31 C.F.R. § 802 (2022) (significantly circumscribing real estate reviews, with a particular focus on proximity to certain military assets).

84. Austin Law, Note, *The "Legal Black Hole": CFIUS and the Implications of Trump's Executive Order Against TikTok*, 31 CORNELL J.L. & PUB. POL'Y 217, 223 (2021); Ji Li, *Investing near the National Security Black Hole*, 14 BERKELEY BUS. L.J. 1, 6 (2017).

85. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).

86. *See id.* at 301–02.

87. *Id.* at 301.

88. *See id.* at 302.

89. *Id.*

90. *Id.* at 315.

circuit court required CFIUS to provide the relevant information upon which its decision was based to Ralls for an opportunity to rebut.⁹¹

Ralls has implications not just for Chinese investment in U.S. real estate, but also for the infusion of national security into property law. First, the circuit court did not weigh in on the merits of CFIUS's determination of a national security threat. Rather, the court assessed the procedure by which the petitioner was given notice and allowed to respond.⁹² While the determinations CFIUS makes remain secret as national security assessments, it was disclosed that the chief concern was likely that the project investments were in physical proximity to a restricted airspace owned by the U.S. Navy.⁹³ This disclosure should give Chinese investors some degree of certainty in terms of future investments. The fact that the circuit court ruled that the procedure was inadequate for due process reasons also suggests that courts may not assume a deferential posture towards CFIUS determinations, at least the procedural aspects, in the future.

This conclusion is afforded further credence given that the circuit court rejected CFIUS's argument that the property rights were "contingent" as Ralls allegedly forfeited them by not seeking pre-approval of the transaction.⁹⁴ However, because Ralls's property rights were vested and constitutionally protected pursuant to its completed transaction, the fact pattern in *Ralls* differs from that of many CFIUS disputes involving pending transactions wherein property rights have not yet vested. Accordingly, there may be some limitation to the applicability of *Ralls* going forward.

As for the integration of national security into property law, *Ralls* clearly signals that corporate interests which potentially implicate "critical infrastructure," such as military or naval installations, henceforth are subject to national security review.⁹⁵ *Ralls* does provide an enumerated list of eleven factors used to determine whether a transaction affects national security.⁹⁶ The list is a helpful start but does not shed any light on how determinations are made subsequent to a finding that one or more of the factors are triggered (*e.g.*, whether there is a hierarchy of "critical infrastructures" in terms of security interests, that is, how "sacred" they are, whether different types of investors represent different levels of threat, etc.).⁹⁷

91. *Id.* at 315, 319.

92. *Id.* at 319–20.

93. *See id.* at 304–05.

94. *Id.* at 316.

95. 50 U.S.C. § 4565(a)(1).

96. *See Ralls Corp.*, 758 F.3d at 303 n.4.

97. *See* 50 U.S.C. § 4565(a)(1); Taussig-Rubbo, *supra* note 59, at 324.

While of limited utility, the list nonetheless shows a baseline of rational inquiry. *Ralls* offers perhaps a mixed picture in terms of revealing the epistemological proficiencies of the decisionmakers, namely, CFIUS, the president, and the circuit court. On the one hand, the crux of the dispute is the adequacy of the procedures followed by CFIUS and the president in disclosing the nature of the national security threat and sharing evidence relied upon. On the other hand, the circuit court's decision shows alternatives to deference in terms of judicial review, alternatives which bode well for upholding constitutional norms.⁹⁸ A question remains however, how political branches and courts respond to analogous disputes at the state level.

Lastly, it is worth noting the role of state property rights. *Ralls*'s fully vested state property rights are the condition precedent for obtaining due process protections vis-à-vis CFIUS. In other property-related disputes, however, in the U.S.-China relationship, state property rights are how state governments discriminate against Chinese owners. There is thus further grounds to distinguish *Ralls* from other China-related property cases. As the states' practices, precedents, and traditions of property rights as state rights demonstrate distinct features which may make them amenable to national security concerns, the next Section turns to these features.

B. Noncitizens and Property

From the foregoing, it is apparent that national security law incorporates property law, but that is but one vector. The question remains whether there is another converging vector, that is, whether property law has features which may lead it to be so incorporated. While national security may be a mid-twentieth century concept, and these features of property law have a much older history, national security—especially “new national security”⁹⁹ or “Goeconomic order”¹⁰⁰—may catalyze these preexisting structural features. When it comes to the issue of noncitizens and property ownership, the tradition of exclusionary

98. Roberts, Moraes & Ferguson, *supra* note 63, at 656.

99. Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152, 152–53 (1999) (“Restrictions on ‘property’ rights of non-citizens is, therefore, not a new or even recent concept.”).

100. *Id.* at 153. U.S. states are not alone in doing so. See STEPHEN HODGSON, CORMAC CULLINAN & KAREN CAMPBELL, LAND OWNERSHIP AND FOREIGNERS: A COMPARATIVE ANALYSIS OF REGULATORY APPROACHES TO THE ACQUISITION AND USE OF LAND BY FOREIGNERS 1 (1999), https://www.fao.org/fileadmin/user_upload/legal/docs/lpo6.pdf [<https://perma.cc/AFW5-JTW3>].

rights has a very old pedigree, and one that has crystallized in U.S. jurisprudence through states' rights.¹⁰¹

State legislatures draw on a long tradition of passing laws that discriminate against noncitizens.¹⁰² Laws limiting property ownership date to at least the colonial period. English property law informed much of colonial and post-independence property law, and it included prohibitions on noncitizen land ownership.¹⁰³ While the modern trend is to abolish these prohibitions, a few states still have such laws on their books today.¹⁰⁴ With the "opening" of the western territories in the late eighteenth to mid-nineteenth centuries, and aided by states' rights arguments, land ownership was linked to ideas of race and nation.¹⁰⁵ While normally discriminating against or outright excluding Black and Native Americans, these laws eventually centered on Chinese people as "illegal immigrants,"¹⁰⁶ most infamously in the 1882 Chinese Exclusion Act.¹⁰⁷

The 1913 California Alien Land Law applied in practice to the Japanese, barring "aliens ineligible to citizenship" from owning fee simple absolute interest in agricultural land.¹⁰⁸ Keith Aoki saw a direct link between the Chinese Exclusion Act and the California Alien Land Law through "racial nativism" which posited a "generalized Asiatic 'foreign-ness' marked by racial difference."¹⁰⁹ Part of that pushback against immigration came from White labor, and specifically the labor unionists, which feared economic competition, and from the politicians who sought its support.¹¹⁰ This combination of nativism, local labor and industry interests, and politicians willing to spur anti-immigrant

101. Price, *supra* note 99, at 153 ("Restrictions on 'property' rights of non-citizens is, therefore, not a new or even recent concept.").

102. U.S. states are not alone in doing so. See *infra* note 393.

103. Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 623–24 (1976).

104. *Id.* at 626–29.

105. DAVID A. CHANG, *THE COLOR OF THE LAND: RACE, NATION, AND THE POLITICS OF LANDOWNERSHIP IN OKLAHOMA, 1832–1929*, at 74–75 (2010) (analyzing the racial politics of allotment); K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. (forthcoming) (examining how title registry was a mechanism of colonial territorial expansion).

106. Sarah Barringer Gordon, *Law and the Contact of Cultures*, in *A COMPANION TO THE AMERICAN WEST* 130, 136 (William Deverell ed., 2004).

107. See Keith Aoki, *No Right To Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 37–38 (1998) (alien land laws barred "aliens ineligible to citizenship" from owning real property).

108. *Id.* at 55.

109. *Id.* at 40.

110. See *Oyama v. California*, 332 U.S. 633, 651–52 (1948) (Murphy, J., concurring).

sentiment would repeat, finding echoes in the contemporary U.S.-China context.

The early noncitizen land laws also likely paved the way for the internment of Japanese Americans during World War II.¹¹¹ Waves of anti-Japanese sentiment galvanized White Americans to support the internment, a process which rested on weak rationales.¹¹² In his dissenting opinion in *Korematsu v. United States*,¹¹³ Justice Frank Murphy draws attention to the epistemological morass that led to the concentration camps, writing:

The reasons [for the camps] . . . appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially this is so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.¹¹⁴

While the majority opinion in *Korematsu* notoriously rejected the idea that the concentration camps were racially motivated and thus did not invoke equal protection for Fred Korematsu,¹¹⁵ four years later, in *Oyama v. California*,¹¹⁶ the Supreme Court did cite the Equal Protection Clause to find that the California Alien Land Law discriminated against the petitioner, an American citizen and son of a Japanese citizen ineligible for naturalization.¹¹⁷ The holding in *Oyama*, however, has been deemed to be narrow as the Supreme Court explicitly chose not to extend their finding to noncitizens.¹¹⁸

111. Aoki, *supra* note 107, at 62.

112. See *Korematsu v. United States*, 323 U.S. 214, 239–40 (1944) (Murphy, J., dissenting).

113. 323 U.S. 214 (1944).

114. *Id.* at 239–40 (Murphy, J., dissenting).

115. See *id.* at 218–20.

116. 332 U.S. 633 (1948).

117. *Id.* at 640.

118. *Id.* at 640–42; Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 1007 (2010) (“By recognizing equality in property rights as a privilege of U.S. citizenship and not personhood as guaranteed in the Fourteenth Amendment, the *Oyama* Court facilitated

Patterns of discriminatory laws directed at both noncitizens and immigrants from countries with whom the United States had adversarial relations repeated throughout the twentieth century. Sometimes the suspect class was ideological, for example, communists. This was the case for Ephram (Fedya) Nestor, a Bulgarian-born immigrant to the United States who was deprived of his old age insurance benefits when he was deported in 1956—at the height of McCarthyism—for his brief membership in the Communist Party.¹¹⁹ The Supreme Court decided against his claim that he was deprived of his property rights in his benefits in violation of due process.¹²⁰ Other times, interest in anti-noncitizen land laws is a reflection of evolving international economic relations, such as concerns that Arabs were buying up U.S. real estate in the 1970s or Japanese people in the 1980s.¹²¹

Many of these elements—xenophobia, nativism, embattled domestic labor, opportunistic politicians, neo-McCarthyism and anti-Communism, and a shifting locus of global capitalism—find resonance in today’s teetering U.S.-China relationship. Specifically, they produce deep structures in the law, and its attitudes towards race and alienage, that may survive landmark Supreme Court cases. This is what Polly Price calls the “relative autonomy of law” as embedded in structures and not merely a factor of politics.¹²²

Property law, then, has a certain openness to national security in the sense that it asserts state rights in property over and above private ones. There are traditions within property law, for example, the “social obligation norm,” which emphasize not just individual rights but also what the owner owes to the state.¹²³ As a result, the state can do things with our property, for example, exclude others on our behalf. Governmental intervention in private property in the forms of zoning, takings, eminent domain, or trespass reflect some of this rationale. Even prior to the vestment of property rights, the property owner may be

discriminatory property laws against Japanese noncitizens to continue.” (footnotes omitted)).

119. See *Flemming v. Nestor*, 363 U.S. 603, 605–06 (1960).

120. But see *id.* at 630 (Douglas, J., dissenting) (“Cutting off a person’s livelihood by denying him accrued social benefits—part of his property interests—is . . . a punishment.”).

121. See Terry Robards, *Arabs Seek Stake in U.S. Real Estate*, N.Y. TIMES, Feb. 5, 1975, at 47; Terry Pristin, *Echoes of the 80’s: Japanese Return to U.S. Market*, N.Y. TIMES (Jan. 26, 2005), <https://www.nytimes.com/2005/01/26/business/echoes-of-the-80s-japanese-return-to-us-market.html>.

122. See Price, *supra* note 99, at 154.

123. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745–46, 752–53 (2009). See also GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 91, 124 (2012).

content to allow the state regulator to step in, for instance, at the point of proposed sale of private property for the sake of national security. In the following Part, I provide some empirical evidence of this process, the latest in an iteration.

III. RECENT CHINA-RELATED LEGISLATION AND REGULATION

A. *The China Threat to the U.S. Heartland*

In 1908, the British geographer Halford Mackinder published *The Geographical Pivot of History*, in which he proposed what came to be known as the “heartland theory.”¹²⁴ For Mackinder, writing at the time of the Paris Peace Conference, whoever controlled Eastern Europe controlled the world.¹²⁵ Mackinder’s school of geopolitics gained currency among American strategists during the Cold War and appears to have yet another life with the rise of “global China.”¹²⁶ In the current contest, the heartland has moved west and now occupies the center of America, a new purported battleground of influence. Yet the bigger difference is that this new heartland perhaps says more about the “powerful mythology of American identity”¹²⁷ than it does Chinese military strategies. The fear of the loss of the American heartland—a protean concept equally located in the everglades of Florida as it is in the prairies of the Midwest—is too great. This is especially so when the loss is to China with its racial and ideological markers.¹²⁸

Along these lines, certain state governors, in conjunction with corporate lobbies, have stoked anti-China sentiment concerning the purported loss of the American heartland. The heartland is not only central to national security but also to American food security. A few

124. Halford J. Mackinder, *The Geographical Pivot of History*, 23 GEOGRAPHICAL J. 421, 421–22 (1904). See also GEOFF DEMAREST, GEOPROPERTY: FOREIGN AFFAIRS, NATIONAL SECURITY AND PROPERTY RIGHTS 114 (1998) (explaining that Mackinder’s Cold War heartland theory appealed to American identity as associated with the Europeans and British against the Russians or Germans through “property competition”).

125. See Mackinder, *supra* note 124, at 436.

126. Oliver Krause, *Mackinder’s “Heartland” – Legitimation of US Foreign Policy in World War II and the Cold War of the 1950s*, 78 GEOGRAPHICA HELVETICA 183, 194 (2023); Tom Harper, *Towards an Asian Eurasia: Mackinder’s Heartland Theory and the Return of China to Eurasia*, CAMBRIDGE J. EURASIAN STUD., Sept. 2017, at 1, 15, 22.

127. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 5 (2010).

128. See, e.g., Grady McGregor, *Buying the Heartland: Does the U.S. Need To Protect Its Farmland from China?*, WIRE CHINA (Apr. 16, 2023), <https://www.thewirechina.com/2023/04/16/buying-the-heartland-chinese-farmland/> [<https://perma.cc/DEL9-HMVQ>].

high-profile cases which purportedly threaten national and food security have garnered significant attention. I provide three examples:

First, Shuanghui International Holdings Ltd. acquired Smithfield Corp. in 2013 for \$7.1 billion (including \$4.7 billion investment and \$2.4 billion in debt), the largest investment by a Chinese company in the U.S. to date. Smithfield, at the time of the deal, was the largest pork producer in the world, and Shuanghui, a smaller company, acquired Smithfield to secure China's own pork supply chain given that China is one of the largest consumers of pork globally.¹²⁹ The deal included agricultural lands (that would effectively double the size of Chinese ownership of U.S. farmland), hogs, equipment, technology, water rights, and intellectual property.¹³⁰ The amount of the deal and its centrality to pork supply chains garnered policymakers' attention during a Senate hearing specifically held to review the merger. Among issues discussed were whether China was "[just] acquiring Smithfield's technology, which was developed with considerable assistance by U.S. taxpayers" and the future of U.S. pork exports to China.¹³¹ Whereas the deal ultimately passed CFIUS review, it nonetheless galvanized a public debate about national security implications of Chinese corporate acquisitions that has become a fixture of the political discourse.¹³²

A second transaction which elicited a public outcry was the Blue Hills Wind Farm project led by GH American Energy, a subsidiary of Chinese firm Guanghai Energy Company. Guanghai is owned by Sun Guangxin, a former Chinese military officer and a major landowner in Xinjiang.¹³³ As a result of the company's ownership, the proximity of the development to Laughlin Air Force Base in Del Rio, Texas, and the wind

129. Hongjun Tao & Chaoping Xie, *A Case Study of Shuanghui International's Strategic Acquisition of Smithfield Foods*, 18 INT'L FOOD & AGRIBUSINESS MGMT. REV. 145, 146–49 (2015).

130. See McGregor, *supra* note 128 (stating the size of the land acquisition); Ellyn Ferguson, *Gap in Data Complicates Legislation To Keep China Off U.S. Farms*, ROLL CALL (Mar. 15, 2023, 2:16 PM), <https://rollcall.com/2023/03/15/gap-in-data-complicates-legislation-to-keep-china-off-us-farms/> (listing the gains by Shuanghui through the merger).

131. *Smithfield and Beyond: Examining Foreign Purchases of American Food Companies: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 113th Cong. 1–3 (2013) (opening statement of Sen. Debbie Stabenow, Chairwoman, S. Comm. on Agric., Nutrition, & Forestry).

132. On the importance of the Shuanghui-Smithfield deal, see Ji LI, *THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES* 182 (2018) (finding that the merger "showcased the exposure of seemingly nonthreatening Chinese investments in the United States to possible regulatory scrutiny on a national security basis").

133. Jack Detsch & Robbie Gramer, *Deep in the Heart of Texas, a Chinese Wind Farm Raises Eyebrows*, FOREIGN POL'Y (June 25, 2020, 12:24 PM), <https://foreignpolicy.com/2020/06/25/texas-chinese-wind-farm-national-security-spyonage-electrical-grid/> [<https://perma.cc/LZW2-4WWM>].

farm's potential environmental impact, the project was opposed by a diverse group, including ranchers, businesspeople, and conservationists.¹³⁴ Local politicians were particularly concerned about espionage and electric grid takeovers.¹³⁵ In the face of CFIUS's review and approval of Blue Hills Wind Development Farm, the Texas legislature passed the Lone Star Infrastructure Protection Act (LSIPA) in 2021.¹³⁶ LSIPA was a harbinger of the recent China-related state legislation and prohibits contracting with certain foreign-owned companies regarding critical infrastructure.¹³⁷ As a result of LSIPA, GH American Energy sold the project to a Spanish company.¹³⁸

A third example is the acquisition of 370 acres of land to construct a wet corn milling plant by the Chinese conglomerate Fufeng Group near Grand Forks, North Dakota in 2023.¹³⁹ The \$700 million project would have boosted the local economy, but its proposed site was only twelve miles from Grand Forks Air Force Base, and therefore encountered opposition.¹⁴⁰ When CFIUS determined it did not have jurisdiction over the project,¹⁴¹ the U.S. Air Force stepped in to halt the planned plant.¹⁴²

134. See McGregor, *supra* note 128.

135. Detsch & Gramer, *supra* note 133.

136. Letter from Tony Gonzales, Member of Cong., to Robert Lighthizer, U.S. Trade Rep. (Jan. 14, 2021), https://gonzales.house.gov/_cache/files/7/e/7e1d9e22-3da4-4e6c-a68b-4eabbfedcf91/DD82A82F85B525BACC2067FAB6699240.01.14.21-congressman-gonzales-letter-to-ustr-lighthizer-re-blue-hills-wind-farm.pdf [<https://perma.cc/5ARZ-W8J6>] (asking the U.S. Trade Representative to reverse CFIUS's decision to allow the Blue Hills Wind Farm project); Lone Star Infrastructure Protection Act, S.B. 2116, 87th Sess. (Tex. 2021).

137. S.B. 2116, 87th Sess. (Tex. 2021).

138. See McGregor, *supra* note 128.

139. See Greg Norman, *Chinese Company's North Dakota Corn Mill Project Struck Down by Grand Forks, Prompting Cheers of 'USA!'*, Fox Bus., <https://www.foxbusiness.com/economy/china-fufeng-north-dakota-corn-mill-project-halted-grand-forks-city-council> [<https://perma.cc/9MCK-3475>] (Feb. 7, 2023, 9:58 AM).

140. *Id.*

141. Stacie Van Dyke, *Fufeng Moving Forward with Corn Milling Plant in Grand Forks*, VALLEY NEWS LIVE (Dec. 13, 2022, 8:05 PM), <https://www.valleynewslive.com/2022/12/14/fufeng-moving-forward-with-corn-milling-plant-grand-forks/> [<https://perma.cc/8WED-NB9R>] (summarizing an official CFIUS letter, which found that the land acquisition was not a "covered transaction" under Section 721 of the Defense Production Act of 1950). Although the reasoning for this finding is not included in the official CFIUS letter to FuFeng Group, it is likely because the acquisition was a greenfield investment and CFIUS's jurisdiction is limited in such transactions. Additionally, the Grand Forks Air Force Base was not on the list. *Id.*

142. Letter from Andrew P. Hunter, Assistant Sec'y of the Air Force for Acquisition, Tech., & Logistics, Dep't of the Air Force, to John Hoeven, Sen. (Jan. 27, 2023), <https://www.hoeven.senate.gov/imo/media/doc/USAIRFORCE-FUFENG-LETTER-HOEVEN.pdf> [<https://perma.cc/5CSH-KGFQ>] (stating that the project

Not only that, but a few days after the U.S. Air Force's intervention, a Chinese spy balloon made headlines after it was spotted over Montana, sending anti-China "mass hysteria" to a fever pitch across the United States.¹⁴³ In such an environment and as further fallout, the Office of Investment Security in the U.S. Department of Treasury moved to amend the regulations that implement the provisions pertaining to real estate transactions under Section 721 of the Defense Production Act of 1950, the legislation authorizing CFIUS.¹⁴⁴ The amendment added eight military installations to the list of "covered transactions."¹⁴⁵ These include not only Grand Forks Air Force Base but also Laughlin Air Force Base in Del Rio, Texas, which was at issue in the Blue Hills Wind Farm dispute.¹⁴⁶ Yet another knock-on effect of the failed real estate acquisition was that FuFeng Group became a cautionary tale for states well beyond North Dakota, indeed, all the way to Hawai'i, which referenced the transaction in their own China-related state laws.¹⁴⁷

These are just three examples that elicited high levels of public scrutiny and galvanized fears concerning endangered national security and food security. Yet the heartland is not just made of American soil, it also comprises American goods, services, products, and data. Further, the alleged threats to the American heartland extend outward to challenge American dominance in foreign affairs as a military, financial, and

"presents a significant threat to national security"). *See also* Letter from Carlos A. Gimenez, Michael Waltz, Scott Franklin, Virginia Foxx, Brian Mast et al., Members of Cong., to Lloyd Austin, Sec'y, U.S. Dep't of Def., Janet Yellen, Sec'y, U.S. Dep't of the Treasury, and Tom Vilsack, Sec'y, U.S. Dep't of Agric. (Sept. 26, 2022), <https://rutherford.house.gov/sites/evo-subsites/rutherford-evo.house.gov/files/Gimenez%20CCP%20Farmland%20Letter.pdf> [<https://perma.cc/RV3Z-XF43>] ("Acquisitions of this magnitude pose a threat not only to our national security but also to our food security.").

143. Yangyang Cheng, *The All-American Myth of the TikTok Spy*, WIRED (Aug. 9, 2023, 6:00 AM), <https://www.wired.com/story/china-espionage-tiktok-spying-national-security/> ("[T]he mass hysteria had less to do with the balloon itself—even the Pentagon acknowledged it posed minimal risk—and more to do with the state of the national psyche. The floating object was the materialization of a constant dread, the embodiment of an alien intrusion.").

144. Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 88 Fed. Reg. 29003 (May 5, 2023) (to be codified at 31 C.F.R. pt. 802).

145. *Id.*

146. *Id.*

147. *See, e.g.*, H.B. 929, 32d Leg. (Haw. 2023) ("[C]ompanies linked to the Chinese Communist Party ha[ve] been actively purchasing real estate within the United States. In 2022, it was reported that the Chinese manufacturing company Fufeng Group was seeking to purchase land near an air force base in North Dakota. This action prompted fifty-one Republican members of Congress to send a letter to three of President Biden's Cabinet secretaries concerning the national security threat posed by this development.").

corporate superpower. All of these defining features of the American identity are purportedly imperiled by China.

However, as an empirical matter, the notion that the Chinese are buying up U.S. land wholesale, which lies at the core of the heartland theory, appears inflated. While statistics of land ownership including foreign acquisition of land ownership are imperfect due to under-reporting,¹⁴⁸ according to the U.S. Department of Agriculture, at the end of 2021, foreign persons held about 40 million acres of U.S. farmland (3.1% of privately held farmland and 1.8% of all land in the country) and, of that, Chinese investors held only 383,935 acres or less than 1% of all foreign-held land (agricultural and non-agricultural).¹⁴⁹ Keeping in mind that these statistics are post-Smithfield which did double Chinese landholdings in the United States, Chinese ownership is infinitesimal.

None of the foregoing is meant to say that there is no such thing as a Chinese threat to U.S. national security. Indeed, there is ample evidence of intelligence gathering and IP theft within the United States; entrenched authoritarianism within the PRC including ongoing and pervasive human rights abuses in Xinjiang that contaminate global supply chains as well as both Chinese economic coercion and soft power in developing states that cut against democratization and liberal rule of law also affect U.S. foreign policy interests.¹⁵⁰

Yet on the issue of threats to American property interests, the Chinese threat appears overblown. The chief concern seems to be that individual or corporate agents of the CCP or the Chinese government are buying up property near to “critical infrastructure” or “military installations” within the U.S. to sabotage, surveil, or otherwise inflict damage on those institutions, affecting U.S. national and food security. There are data infrastructure equivalents of this argument in terms of Chinese tech companies gaining access to personal data of U.S. officials

148. See Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. §§ 3501(a)–(d) (requiring foreign investors who acquire, transfer, or hold an interest in U.S. agricultural land to report such holdings and transactions to the Secretary of Agriculture). *But see* Ferguson, *supra* note 130 (identifying a number of problems with foreign land ownership statistics, including lack of incentives to self-report, non-transparency, and identify havens for foreign purchasers).

149. FARM SERV. AGENCY, U.S. DEP’T OF AGRIC., FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 2021, at i, 4 (2023).

150. See OFF. OF THE DIR. OF NAT’L INTEL., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 6 (2023); U.S. DEP’T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE’S REPUBLIC OF CHINA II–IV (2023); MATTHEW REYNOLDS & MATTHEW P. GOODMAN, DENY, DEFLECT, DETER: COUNTERING CHINA’S ECONOMIC COERCION 1–4 (2023).

or citizens, thereby endangering data security.¹⁵¹ To date, however, there is little evidence showing Chinese conquest in the U.S. inland through real estate acquisitions. Likewise, the Trump Administration, despite its many bans against TikTok and WeChat, never disclosed what proof it obtained, demonstrating that Chinese tech companies were involved in illicit data transfer to the Chinese government.¹⁵² Chinese influence has historically focused more on shaping perceptions of American business, academic, and policy elite.¹⁵³ The Blue Hills Wind Farm project and Grand Forks corn milling plant suggest, however, that there may be real dangers lurking on the horizon. While there should be safeguards against such potential incursions, those safeguards must comport with constitutional protections and be sufficiently tailored in terms of those they target and their scope of prohibited acts. The next Section describes recent state legislation that regulates Chinese interests in U.S. property, some of which fails to strike the balance between national security and property rights.

B. State Legislative Responses

1. NATURE AND CATEGORIES OF LAW

Despite the marginality of the actual threat, the perceived threat to national security has become a catalyst for lawmaking in both state and federal governments. At the state level, there are hundreds of state bills that have been proposed to limit the economic, political, and cultural presence of Chinese parties.¹⁵⁴ Not all of these cite national security explicitly, but security concerns are regnant.¹⁵⁵ As a non-exhaustive list, the bills' subject matter includes inter alia Chinese tech companies like TikTok and WeChat, semiconductors and computer chips, Taiwan, human rights violations and forced labor in Xinjiang, procurement, steel, outbound investment, IP, foreign gifts, education, data protection, contract prohibition, COVID-19 origins, Confucius Institutes, and

151. See Associated Press, *Not Just Balloons: How US Sees China Spying as Major Worry*, VOA NEWS (Feb. 8, 2023, 8:58 PM), <https://www.voanews.com/a/not-just-balloons-how-us-sees-china-spying-as-major-worry/6954786.html>.

152. First Amended Complaint for Public Injunction & Retaliation at 3–6, *Yu v. ByteDance, Inc.*, No. CGC-23-606246 (Cal. Super. Ct. May 12, 2023) (accusing the tech company of illegal acts, including maintaining “backdoor” access to U.S. user data).

153. ALEX JOSKE, SPIES AND LIES: HOW CHINA’S GREATEST COVERT OPERATIONS FOOLED THE WORLD 3 (2022).

154. Jaros & Newland, *supra* note 12.

155. See, e.g., H.B. 274, 67th Leg., 1st Reg. Sess. (Idaho 2023) (banning the use of TikTok by state employees in order to preserve “the safety, security, privacy, and way of life of the State of Idaho and its citizens”).

property interests.¹⁵⁶ While some of the bills have been in the books for nearly a decade, many more have arisen in the last couple of years.¹⁵⁷

Since 2022, there has been an uptick in legislative activity. This timing is most likely because Joe Biden assumed office in 2021 and Republican states may view the Biden Administration as “soft” on China.¹⁵⁸ While many of the China-related state laws are proposed by Republican-majority state legislatures, this is not always the case. Accordingly, the most active states are Republican and located in the Midwest and the South: including Arizona (four), Florida (four), Louisiana (four), Alabama (four), Indiana (three), and West Virginia (three).¹⁵⁹ However, complicating this generalization, Democratic coastal states, including California and Connecticut, have also introduced one bill each and New Jersey introduced the most (nine).¹⁶⁰

In 2022, there were fifty-one bills introduced, fifteen of which have been signed into law.¹⁶¹ The most common subjects are trade and labor issues, including forced labor in Xinjiang.¹⁶² The 2023 legislative session saw a jump in the overall number of bills introduced (118), twenty-eight of which have been signed into law. The most active states were, again, Republican: Texas (nine), Mississippi (eight), Arkansas (six), Florida (six) and South Carolina (five). In 2023, bills pertaining to TikTok were the most frequent type, comprising approximately forty percent of the total.¹⁶³ Depending on several factors, including pending litigation, the short- to mid-term trend appears to be an increasing trend in bills and, proportionately, state laws.

This Article focuses on a subset of these bills—those relating to property. Its analysis is based on an original dataset of 152 bills focusing on protecting the national security interests of property.¹⁶⁴ Of the 152

156. See *infra* Appendix.

157. Kyle A. Jaros, Sara A. Newland & Mark Dellostritto, State Legislation Refined State-by-State Data (unpublished table) (last updated June 15, 2023) (on file with author).

158. See, e.g., Jim Geraghty, *The Functionally Pro-China Biden Administration*, NAT’L REV. (Dec. 3, 2021, 9:17 AM), <https://www.nationalreview.com/the-morning-jolt/the-functionally-pro-china-biden-administration/> [<https://perma.cc/643E-DTJP>] (“[T]he Biden administration is proving more and more reticent to confront the Chinese government in substantive and consequential ways.”).

159. State Legislative Tracker (unpublished table) (last updated July 24, 2023) (on file with author).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See *infra* Appendix. The database generated for this Article is both narrower in scope than other such databases given its property focus but may also identify

bills, thirty-seven or 24% have been passed into law; fifty-six or 36% have died, failed to pass in committee, were vetoed or withdrawn, or otherwise shelved “indefinitely” (*sine die*); the remaining fifty-nine or 39% are referred to committee, engrossed, or recessed.¹⁶⁵ Except for two, all of the bills saw activity in 2023.¹⁶⁶ The bills have been proposed by nearly all states irrespective of dominant political party, demonstrating the bipartisan support for such legislation.

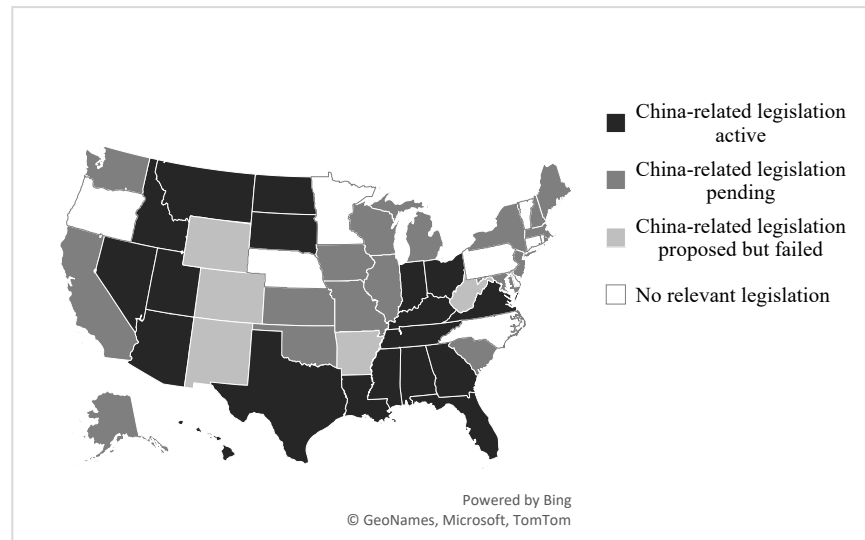


Figure 2. China-Related Legislation in the United States.

In terms of their nature, many of the bills and laws are symbolic. Symbolic legislation is chiefly concerned more with conferring political benefits to the executive and legislative branches than it is with functional aims, and ultimately presents unrealistic solutions to real-world

more bills for specific categories than other databases given that it employs a two-fold search. Searches were conducted in both LegiScan and Westlaw to confirm that all known bills were identified. Key terms consisted of “China,” “Chinese,” “foreign adversary,” and “restricted foreign entity.” The search is up to date as of October 14, 2023. While the database captures a snapshot of legislative activity, due to the quickly evolving nature of the legislation, the database is inevitably outdated. Whereas this Article cannot track all developments in real time, it identifies both the underlying reasons for the trends in such legislation and their legal effects. Note that the Appendix lists the bill names. The footnotes below either reference the bill or, if the bill has been enacted, then they reference first the bill and then the statute. In this way, the footnotes and the Appendix can be cross-referenced.

165. *Id.*

166. Actions include engrossed, enacted, enrolled, introduced, passed by indefinitely, or referred to committee. *Id.*

problems.¹⁶⁷ Yet it would be a mistake to dismiss the legislation as *merely* symbolic. As Mark Tushnet and Larry Yackle have written, “[s]ymbolic statutes are real laws, posing real problems of interpretation and administration.”¹⁶⁸ In other words, once symbolic statutes are created, they can have significant downstream effects in terms of implementation and enforcement.¹⁶⁹ It is not always the case that courts will simply strike them down. Rather, enforcement officers, judges, and, perhaps most importantly, citizens affected by the statutes must cope with the legislation that is often distorted through the lawmaking process. Even if symbolic legislation does not affect systemic change and its impact is random,¹⁷⁰ it can have potentially serious implications for civil liberties, procedural justice, and human rights.

I understand the China-related state statutes in this light. While there is no question they are, variably, symbolic, they have certainly entered the legal system and have even been upheld by a district court in Florida.¹⁷¹ I thus view the China-related statutes as a total sociolegal phenomenon and include the failed bills as part of my analysis. Some of these failed bills are perfunctory, egregiously poorly drafted, and plainly symbolic.¹⁷² Others are more borderline and may be having knock-on

167. John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 233–34 (1990) (analyzing the Clean Water Act as an example of symbolic legislation).

168. Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 3 (1997) (analyzing the Antiterrorism and Effective Death Penalty Act as an example of a symbolic statute).

169. One example parallel to the China-related legislation is sharia bans. Since 2010, state legislatures have introduced approximately 200 bills to ban Islamic law in their state. See Mark Fathi Massoud & Kathleen M. Moore, *God’s Law: Islam and Politics in the United States*, *BERLIN J.*, no. 37, 2023, at 62, 64. While many of these bills were primarily symbolic in othering Muslims as enemies of the state, they have had downstream effects, including litigation. See, e.g., *Awad v. Ziriax*, 966 F. Supp. 2d 1198 (W.D. Okla. 2013) (striking down a constitutional amendment in the State of Oklahoma to ban sharia). The further downstream effects of the type of thinking behind the sharia bans is apparent in President Donald Trump’s proclamation suspending admission of travelers from seven countries in the Middle East and North Africa. See *Trump v. Hawai’i*, 138 S. Ct. 2392, 2417, 2423 (2018) (upholding the “Muslim ban”).

170. See Massoud & Moore, *supra* note 169, at 62, 64.

171. See *infra* Section IV.C.

172. See, e.g., S.B. 2828, Reg. Sess. (Miss. 2023). The bill in its entirety consists of two main provisions: “[T]he Secretary of State shall take such actions as may be necessary to prohibit the purchase of public or private real estate located within the boundary of the State of Mississippi by members of the Chinese Communist Party,” and “[t]he Secretary of State shall promulgate rules and regulations pursuant to the Administrative Procedure Act to implement the prohibition provided in this act.” *Id.* The bill provides no definitions or guardrails in terms of types of land affected, does not

legislative and political effects within their state or in other (competing) states, given current trends toward a race to the bottom.

In terms of common features, all of the bills or laws impose restrictions on Chinese entities' or citizens' enjoyment of certain types of property rights. The "target" of the legislation is a legal or natural person of Chinese origin. The bills name the prohibited party or parties as some variant of "China," sometimes in a series with other parties such as those from Russia, North Korea, Venezuela, Iran, Cuba, and Syria, or uses a generic term such as "foreign adversary."¹⁷³ The referent for "China" (sometimes named as such, as the most generic category) includes "Chinese" (an ethnic-linguistic group), the PRC (a sovereign state), the CCP (a political party), corporations, persons, or some combination thereof. These distinctions are salient for the constitutionality of the bills.¹⁷⁴

Overall, a comparison of the language used by the state legislatures shows mixed results. On the one hand, the states demonstrate a degree of convergence, and it is apparent that there is some copying-and-pasting.¹⁷⁵ On the other hand, they diverge as they are part of and must harmonize with state codes which are often themselves the result of idiosyncratic historical processes of borrowings and accretions.¹⁷⁶ Likewise, as states have different interests with China, their statutes reflect those concerns. All bills are either proposed amendments to chapters of existing state codes, additions to state codes as new sections or chapters, or a combination of both amendments and enactments.

Among the bills, there are, broadly, three different but overlapping categories of property interests that are implicated.¹⁷⁷ The first is real property, including commercial and agricultural lands. A typical example that includes common elements is H.B. 5073, a bill proposed by the Michigan legislature.¹⁷⁸ The key provision of H.B. 5073 states: "[A] foreign principal shall not directly or indirectly own or acquire by purchase, grant, devise, or descent any interest in agricultural land or

clarify how CCP members are to be identified, fails to mention penalties, and is unclear as to implementation. *See id.*

173. *See, e.g.*, 15 C.F.R. § 7.4(a) (2022).

174. *See infra* Section IV.D.

175. *See infra* Section III.B.2.

176. *See, e.g.*, Andrew P. Morriss, "This State Will Soon Have Plenty of Laws"—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359, 361 (1995) (describing the pitfalls of Montana's learning from New York and California state laws).

177. When bills contain provisions that apply to more than one category, they are included in all relevant categories. *See, e.g.*, S.B. 477, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); IND. CODE §§ 1-1-15-0.1, -4, 1-1-16-6, -10 (2023).

178. *See* H.B. 5073, 102d Leg., Reg. Sess. (Mich. 2023).

real property located within 20 miles of any military installation or key facility in this state.”¹⁷⁹ It further specifies that if a foreign principal acquires such an interest, then they must register with the department of agriculture and rural development.¹⁸⁰ If they fail to do so or violate other terms of the bill, then the bill provides for a number of penalties, including civil fines, liens, and escheatment.¹⁸¹

These bills are usually proposed for chapters of state codes entitled, for example, “Property,”¹⁸² “Estates and Property,”¹⁸³ “Real Property and Conveyances,”¹⁸⁴ or “Agriculture.”¹⁸⁵ Occasionally, the bill is added to a preexisting section entitled “Alien Land Law.”¹⁸⁶ Several consist of new sections invariably called “Property Protection Act[s].”¹⁸⁷ Of this category, there have been fifty-four bills proposed, eight (or fifteen percent) of which have been passed into law. These include those in Alabama,¹⁸⁸ Florida,¹⁸⁹ Indiana,¹⁹⁰ Louisiana,¹⁹¹ Montana,¹⁹² Utah,¹⁹³ and two in Virginia.¹⁹⁴ All of these laws pertain to property acquisitions consisting of or near to “agricultural land,” “critical infrastructure,” “military installations,” or general real property within the state.¹⁹⁵

179. *Id.* § 36(a)(1). There are a number of ambiguities with the language in this provision alone, including “any interest” which could implicate leaseholds thus barring foreign principals from not only fee simple ownership but also rental arrangements which may or may not be the legislators’ intent. I thank Donald Clarke for this observation.

180. *Id.* § 36(a)(3).

181. *Id.* §§ 36(a)(4)–(6).

182. *E.g.*, MONT. CODE ANN. tit. 70 (2023).

183. *E.g.*, W. VA. CODE ch. 36 (2022).

184. *E.g.*, VA. CODE ANN. tit. 55.1 (2023).

185. *E.g.*, MONT. CODE ANN. tit. 80 (2023).

186. *See, e.g.*, S.B. 5754, 68th Leg., Reg. Sess. (Wash. 2023); WASH. REV. CODE § 64.16.005 (2023).

187. *See, e.g.*, H.B. 212 § 3, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

188. H.B. 379 §§ 2(1)–(3), 2023 Leg., Reg. Sess. (Ala. 2023).

189. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 287.138 (2023).

190. S.B. 477, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023); IND. CODE § 1-1-16 (2023).

191. H.B. 537, 2023 Leg., Reg. Sess. (La. 2023) (enrolled).

192. S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (enrolled).

193. H.B. 186, 2023 Leg., Gen. Sess. (Utah 2023); UTAH CODE ANN. §§ 63L-13-101, 201-2 (West 2023).

194. VA. CODE ANN. §§ 3.2-102(B)(4), 55.1-508(A) (2023).

195. The definitions of these terms vary slightly between the state laws. *See, e.g.*, FLA. STAT. § 193.461 (2023) (providing for a state assessment scheme to classify lands as “agricultural lands”); FLA. STAT. § 330.41(2)(a) (defining “Critical infrastructure facility” to include certain chemical manufacturing facilities, refineries, electrical power plants, water treatment facilities or wastewater treatment plants, liquid natural gas terminals, telecommunications central switching offices, gas processing plants, and seaports); FLA. STAT. § 692.201(5) (defining “Military installation” as “a

Implementation and enforcement are often the responsibility of the state attorney general or local officials such as county auditors or county prosecutors.¹⁹⁶

The prohibited parties of some bills were changed through the revision process, such as the bill from Alabama which initially applied exclusively to “Chinese citizens, the Chinese government, or Chinese entities,” but ultimately adopted more generic language.¹⁹⁷ The bills provide for a range of civil and criminal penalties for their violation.¹⁹⁸ Some require any “restricted foreign entity” that acquires an interest in land to alienate the land within five years of acquisition or, failing that, the interest in land shall escheat to the state.¹⁹⁹ The overall reasoning of the bills is akin to a “not in my backyard” argument infused with national security fever.²⁰⁰ The effect is to shut Chinese people out of U.S. property

base, camp, post, station, yard, or center encompassing at least 10 contiguous acres that is under the jurisdiction of the Department of Defense or its affiliates”); FLA. STAT. § 692.201(6) (defining “Real property” as “land, buildings, fixtures, and all other improvements to land”).

196. See, e.g., H.B. 4006 § 5.252, 88th Leg., Reg. Sess. (Tex. 2023) (identifying the attorney general as the enforcement officer); OHIO REV. CODE ANN. § 5301.256(F)(2) (West 2023) (specifying that the county auditor oversees the administrative process and coordinates with county prosecutor on enforcement).

197. Compare H.B. 379, 2023 Leg., Reg. Sess. (Ala. 2023) (as introduced Apr. 25, 2023), with ALA. CODE § 35-1-1 (2022) (defining prohibited parties as resident or nonresident aliens).

198. See, e.g., H.B. 125 § 1, 2023 Leg., Reg. Sess. (La. 2023) (requiring civil penalties of \$50,000 and forfeiture of property in question if a “prohibited foreign actor” does not divest itself of property in question within one year of judgment entered); S. Sub. for H.B. 2069, 2023 Leg., Reg. Sess. (Kan. 2023); S.B. 283, 2023 Leg., Reg. Sess. (Kan. 2023) (establishing criminal penalties).

199. See, e.g., H.B. 186, 2023 Leg., Gen. Sess. (Utah 2023); UTAH CODE ANN. §§ 63L-13-101(3), -202 (West 2023).

200. See, e.g., Travia Forte, *Montana Senate Bill 203 Passes During Thursday's Committee Hearing*, KULR 8 (Feb. 16, 2023), https://www.kulr8.com/news/montana-senate-bill-203-passes-during-thursdays-committee-hearing/article_07fa1de6-ae61-11ed-bbac-87591a4d618f.html

[<https://perma.cc/G4K4-U8DT>] (“This is different, this is China, you know this isn’t Bill Jones your next-door neighbor this is somebody who wants this county to be second rate to them and so I think we need to take that seriously and by the way, that is a fact, they are doing everything militarily and economically to replace U.S. in the world.” (quoting Jon Tester, Mont. Sen.)); *Governor Ivey Signs House Bill 369, Secures Alabama’s Lands*, OFF. ALA. GOVERNOR (May 31, 2023), <https://governor.alabama.gov/newsroom/2023/05/governor-ivey-signs-house-bill-379-secures-alabamas-lands/> (“Across the United States, we have seen alarming instances of foreign entities purchasing large tracts of land, which could have severe consequences for our country’s national defense and economy, if no action is taken From our forests to our farmland, Alabama is blessed with an abundance of highly valuable natural resources that must be protected. We also have a large military presence, and Alabama will always do our part to put the security of our country and our people first. The simple fact of the matter is that foreign governments have no business owning land in Alabama,

markets, including in specific sectors such as agricultural land, but also, in some cases, any real property in that state.

While this first category is of chief concern in this Article as the bailiwick of property “securitization” has been land (especially agricultural land), there are two other categories that deserve mention. The first of these (*i.e.*, the second of the three categories), is prohibited transactions. These range from TikTok bans to moratoriums on materials or supplies from China to restrictions on critical infrastructure. A representative bill is H.B. 294 introduced in Idaho.²⁰¹ The bill specifies, in part, that

[a] public entity in this state may not enter into a contract with a company to acquire or dispose of services, supplies, information technology, or construction unless the contract includes a written certification that the company is not currently owned or operated by the government of China and will not for the duration of the contract be owned or operated by the government of China.²⁰²

H.B. 294 further provides definitions and penalties, in this case, the voiding of any contract for a transaction in which the public entity has failed to obtain the required certification.²⁰³

The bills for this second category are amendments and additional sections for chapters of state codes across a wide range of legal areas. The majority are amendments to state code sections that pertain to the subject of the transaction (*e.g.*, “unmanned aerial vehicles,”²⁰⁴ “county and municipal airports,”²⁰⁵ or the default category, “critical infrastructure”²⁰⁶). Several bills also prohibit transactions pertaining to goods and services produced by forced labor of Uyghurs, and, as such, may be proposed as additions to chapters of the handling of public funds.²⁰⁷ Or, the bills prohibit donations from China and other “foreign countries of concern,” and, are amendments to chapters on “commercial development and capital improvements.”²⁰⁸

and I am proud to sign this bill and ensure that will never be the case going forward.” (quoting Kay Ivey, Ala. Governor)).

201. H.B. 294, 67th Leg., 1st Reg. Sess. (Idaho 2023).

202. *Id.*

203. *Id.*

204. S.B. 11, 2023 Leg., 82d Sess. (Nev. 2023).

205. TEX. TRANSP. CODE ANN. § 22.019 (West 2023).

206. TEX. BUS. & COM. CODE ANN. § 117.002 (West 2023).

207. *See, e.g.*, H.B. 2488, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

208. S.B. 846, 2023 Leg., Reg. Sess. (Fla. 2023); FLA. STAT. § 288.860 (2023).

Numerically, this category is the largest of the three. There are a total of ninety-two bills, twenty-nine or thirty-two percent of which have been passed into law. The following states have passed such laws: Arizona (one), Florida (three), Georgia (two), Hawai‘i (one), Idaho (two), Indiana (one), Kentucky (one), Louisiana (five), Mississippi (two), Montana (one), Nevada (one), Ohio (one), South Dakota (one), Tennessee (two), Texas (four), and Virginia (one). Some of the bills in this category reference the Office of Foreign Assets Control’s (OFAC) “Specially Designated Nationals And Blocked Persons List” (SDN List)²⁰⁹ or the “Chinese Military-Industrial Complex Companies.”²¹⁰ Others impose a blanket ban on any contracts with “companies owned by China,”²¹¹ while many others simply identify “TikTok” as the prohibited party.²¹² As with the above, these bills present a range of civil and criminal liabilities.²¹³

While these are mainly contractual in nature, they also touch on property concerns. First, corporate mergers and acquisitions can create, transfer, assign, or convey property interests (*e.g.*, titles to assets, intellectual property, real property and leases, personal property, etc.).²¹⁴ Second, as many of the bills in this category pertain to prohibitions on contracting with Chinese tech companies, such as ByteDance Ltd., which owns TikTok, there are at least two ways in which property rights arguments have been deployed in the context of China-related state laws that address Chinese tech companies. The first argument has been made by those who support such laws, and it is one predicated on the idea that data is a type of property.²¹⁵ The state law exponents allege that Chinese

209. *E.g.*, H.B. 321, 2023 Leg., Reg. Sess. (Ala. 2023) (prohibiting a governmental body from purchasing an unmanned aircraft system if the manufacturer of the system is on the SDN list and based in China).

210. *E.g.*, H.B. 2984, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

211. *E.g.*, GA. CODE ANN. § 50-5-84.2 (2023) (providing a rebuttable presumption for a Chinese company to show it is not owned or operated by the government of China).

212. *E.g.*, IDAHO CODE § 18-6726 (2023) (prohibiting state employees from using TikTok on a state-issued device).

213. *See, e.g.*, S.B. 419, 68th Leg., Reg. Sess. (Mont. 2023) (providing that any violation results in a fine of \$10,000 a day); MONT. CODE ANN. § 30-14-158(b)(2) (2023). *See also* IDAHO CODE §§ 18-6726(2)(c), (4) (2023) (providing that any state employee who should “download or use the TikTok application or visit the TikTok website on any network owned by, operated by, or otherwise under the control of state government” shall be guilty of a misdemeanor).

214. *See Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014) (finding that CFIUS infringed upon Chinese investors’ property interests in invested companies).

215. *See* Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056 (2004) (conceptualizing a model of propertized personal information to

tech companies, with their access to the personal data of U.S. citizens including politicians, pose a national security risk as that data could be used in ways counter to U.S. interests.²¹⁶

A second argument has been made by those challenging such state laws, namely, that the users of such platforms have intangible property rights in social media and the laws deprive them of such rights.²¹⁷ While the property perspective is secondary to the contractual elements of the laws, the category of prohibited transactions shows how property rights have become fodder for both those promoting and opposing the rise in security concerns in relations with China.

The third and final category of property-related bills include different forms of personal property. Overlapping with the previous category but less focused on Chinese tech companies, these include the genetic data, biometrics, and organs of state citizens.²¹⁸ An example is the Genetic Information Privacy Act in Montana which prohibits genetic data and biometric samples from Montana residents from being stored within a country sanctioned by OFAC or designated as a “foreign adversary” under 15 C.F.R. § 7.4(a).²¹⁹ Relatedly, other laws identify concerns pertaining to chattels, that is, gifts and monetary donations from Chinese donors to American recipients. In total, there have been six of these bills, two or thirty-three percent of which have been passed.²²⁰

protect privacy rights); Steven H. Hazel, *Personal Data as Property*, 70 SYRACUSE L. REV. 1055 (2020) (arguing for extending property rights to data).

216. Michael R. Pompeo, Sec’y of State, Secretary Michael R. Pompeo at a Press Availability (July 9, 2020), <https://china.usembassy-china.org.cn/secretary-michael-r-pompeo-at-a-press-availability-07082020/> [<https://perma.cc/5V49-CSZN>] (“The infrastructure of this next hundred years must be a communications infrastructure that’s based on a Western ideal of private property and protection of private citizens’ information in a transparent way. That is not the model that Chinese Communist Party software and hardware companies are engaged in.”).

217. Complaint at 25, *Alario v. Knudsen*, No. 23-CV-00056 (D. Mont. May 17, 2023) (identifying “intangible property interests” in social media accounts on TikTok).

218. The academic literature features a number of intersecting debates regarding the relationship between property law and genetic and biological materials. *See, e.g.*, Danielle M. Wagner, Comment, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931, 932 (1995) (noting the lack of consistency in state laws dealing with property rights in the body and calling for uniform laws that provide for possessory rights in the body). *But see* Richard A. Spinello, *Property Rights in Genetic Information*, 6 ETHICS & INFO. TECH. 29, 29–30 (2004) (making a normative case against ownership in one’s genetic data based on utilitarian grounds).

219. S.B. 351, 68th Leg., Reg. Sess. (Mont. 2023); MONT. CODE ANN. § 30-23-104 (2023).

220. TEX. INS. CODE ANN. § 1380.003 (West 2023).

Laws in this category have been passed in Montana and Texas.²²¹ Bills in this category mostly impose civil penalties.²²²

2. EXPLANATIONS FOR HARMONIZATION

Taking the three categories of property-related China-related state bills together, despite a certain level of local variance, there is some degree of harmonization between the bills. This is apparent not only in their definitions but also in their substantive provisions.²²³ Further, their temporal convergence—the fact that nearly all bills have seen activity within 2023—also suggests harmonization. A root cause for the convergence is a combination of Sinophobia (including deriving from political risk in being perceived as China-friendly) coupled with state legislatures’ general lack of experience and knowledge of China. As to the latter, despite “foreign affairs federalism” and state legislatures’ engagement with Chinese provincial and municipal governments, state governments generally lack the capacity to develop in-depth expertise on such issues as Chinese corporate governance, Chinese technology, public-private partnerships, and the interface between the CCP and Chinese industry and civil society. Rather, China expertise is housed in the federal government: Congress’s committees on foreign affairs, the armed services, and intelligence; the Departments of State, Defense, the Treasury, Justice, and Homeland Security; the Central Intelligence Agency, etc.²²⁴ Even with these capacities and resources, the federal government struggles to understand China with its internal variation and constant evolution. If that is the case, then how are state governments,

221. See MONT. CODE ANN. § 30-23-104; TEX. INS. CODE § 1380.003.

222. See MONT. CODE ANN. § 30-23-106(3)(d).

223. Compare S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023) (providing a definition of “foreign adversary”), with H.B. 2325, Gen. Assemb., Reconvened Sess. (Va. 2023) (providing an analogous definition of “foreign adversary”). Compare IDAHO CODE § 18-6726(2) (2023) (“No person or entity that contracts with the state government . . . shall download or use the TikTok application or visit the TikTok website on any network owned by, operated by, or otherwise under the control of state government or on any state government-issued device, including but not limited to a cellular phone, a computer, or any other device capable of internet connectivity.”), with KY. REV. STAT. ANN. § 61.9307(2) (West 2023) (“[N]o executive branch employee, executive branch agency, or person or entity who contracts with the Commonwealth shall download or use the TikTok application or visit the TikTok website on any[] network owned, operated, or otherwise under the control of state government; or, state-government-issued device, including but not limited to[] cellphone; computer; or any other device capable of Internet connectivity.”).

224. See GLENNON & SLOANE, *supra* note 37, at 28 (stating that the federal agencies “benefit from centuries of institutional memory, terabytes of data, and thousands of employees armed with education and experience in virtually every aspect of foreign policy”).

with much smaller budgets, cross-agency capacity, and abbreviated institutional histories of bilateral engagement, expected to manage?

Because of their own insufficient capacity, state governments often rely on the perceived expertise of other authorities, and one effect of such borrowing is degrees of convergence, convergence which paves the way for the “securitization” of property. Three such sources are other states, corporate lobbyists, and federal legislation and regulation. As to the first, other states, the process by which state legislatures mimic other states’ laws has long been recognized as a feature of state lawmaking in the United States.²²⁵ There are numerous examples of such “copycat laws,” most notably in the area of immigration law.²²⁶ Despite its prevalence, the practice of copying and pasting legislation has been criticized by scholars for resulting in suboptimal outcomes.²²⁷ In the China-related state legislation, there are examples of state legislators looking over the fence to follow developments in other states.²²⁸

One likely result of such copying and regulatory spillover is a “race to the bottom.”²²⁹ State governments may try to outdo one another by enacting increasingly “tougher” laws on China, led by governors catering to their constituencies’ anti-China sentiment.²³⁰ This phenomenon appears intensified by those governors who are either running for reelection or national office. The controversial Florida law,²³¹ led by

225. The National Conference of Commissioners on Uniform State Laws—composed of commissioners from all fifty states plus Puerto Rico, the Virgin Islands, and the District of Columbia—was established in 1892 to create uniform laws for the fifty states. For a history and assessment of the conference, see Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037, 1038 (1996). Uniformity may also occur through other less centralized mechanisms. See, e.g., Robert M. Dorrell, Jr. & Joshua M. Jansa, *Copy, Paste, Legislate, Succeed? The Effect of Policy Plagiarism on Policy Success*, 50 POL’Y & POL. 605, 618–19 (2022); Joshua M. Jansa, Eric R. Hansen & Virginia H. Gray, *Copy and Paste Lawmaking: Legislative Professionalism and Policy Reinvention in the States*, 47 AM. POL. RES. 739, 760–61 (2019).

226. Juliet P. Stumpf, *Two Profiles of Crimmigration Law: Criminal Deportation and Illegal Migration*, in GLOBALIZATION AND THE CHALLENGE TO CRIMINOLOGY 91, 95 (Francis Pakes ed., 2013) (observing how other states enacted “copycat legislation” based on Arizona’s 2010 law that permitted non-federal police officers to stop a person based on a suspicion that the individual was in the United States unlawfully). But see *Arizona v. United States*, 567 U.S. 387 (2012) (ruling that the 2010 Arizona law was unconstitutional as it pertains to warrantless arrest for people suspected of being undocumented, the “show me your papers” requirement, and the criminalization of irregular migrants).

227. See, e.g., Dorrell & Jansa, *supra* note 225, at 605 (finding that “policy plagiarism” creates less effective state legislation).

228. See, e.g., *supra* note 145 and accompanying text.

229. See Jaros & Newland, *supra* note 12.

230. See *id.*

231. FLA. STAT. § 287.138 (2023).

Republican Governor Ron DeSantis, is the clearest example of this in the category of real property prohibitions.²³² Yet there are others. For instance, the Montana law, spearheaded by Republican Governor Greg Gianforte, who has been running for reelection, out-competes other state TikTok bans by prohibiting any use of TikTok in the state—an extreme position.²³³ To sum up, in the context of a general lack of China knowledge and under the strain of nativist politics, state governments may learn from and compete with one another to legislate against China.

In addition to other states, another source for harmonization among the China-related state laws are lobbyists, especially those led by U.S. corporations. After a two-year investigation that examined nearly one million bills in all fifty states, the Center for Public Integrity found that at least 10,000 bills were copied from model legislation and introduced across the country in the past eight years and more than 2,100 of those were signed into law.²³⁴ The report found that of the 10,000 bills that were copied, most were written by industry and conservative groups.²³⁵ The American Legislative Exchange Council (ALEC), a conservative organization that promotes corporate interests in state lawmaking, was one of the most successful of those groups.²³⁶ ALEC, which has a membership of over 2,000 state legislators, and is funded primarily by U.S. corporations, has carved out a specialty in providing legislative ideas, research, and resources that many legislators otherwise lack.²³⁷ ALEC has been active in popularizing state legislation on a number of controversial topics, including gun control, abortion, and health care reform.²³⁸

Most recently, ALEC has set China in its crosshairs. Since 2022, ALEC has introduced at least five pieces of model legislation that either

232. See *infra* Section IV.B.

233. See MONT. CODE ANN. § 30-14-158(1) (2023).

234. Rob O'Dell & Nick Penzenstadler, *You Elected Them To Write New Laws. They're Letting Corporations Do It Instead*, CTR. FOR PUB. INTEGRITY (Apr. 4, 2019), <https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead/> [https://perma.cc/7PGF-JXKU].

235. *Id.*

236. See Allison Boldt, *Rhetoric vs. Reality: ALEC's Disguise as a Nonprofit Despite Its Extensive Lobbying*, 34 HAMLINE J. PUB. L. & POL'Y 35, 36–37 (2012) (showing that ALEC's extensive lobbying activity—despite its claims on its tax returns that it does not lobby—violates the Tax Code restrictions).

237. ALEX HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 5, 10 (2019).

238. Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/> [https://perma.cc/4MPP-2KCF].

explicitly target Chinese parties or do so through reference to “adversary nations” or “restricted foreign entities.”²³⁹ The wording of some of the model legislation proposed by ALEC appears strikingly similar to the China-related state bills, particularly as it pertains to land acquisition.²⁴⁰ Commentators have argued that the activities of ALEC are bad for transparent lawmaking, bad for democracy, and even bad for ALEC’s own membership.²⁴¹

There is some irony that certain U.S. corporations would lobby for state legislation that facilitates delinking with China, given that it was U.S. corporations which were so enthusiastic about investing in China after its “opening and reform.”²⁴² Some of this contradiction can be explained by the fact that corporations differ widely in their views of China: often smaller and more local corporations want to exclude Chinese competition from entering their market whereas multinational corporations still have deep investments in China and would seek to minimize confrontation.²⁴³

The third source of harmonization is federal law and regulation. In the federal system, federal law does not exist to shape state law, but it

239. See RESTRICTIONS ON FOREIGN ACQUISITIONS OF LAND ACT (AM. LEGIS. EXCH. COUNCIL 2023), <https://tinyurl.com/mwtsbc9d>; ACT TO PROHIBIT STATE CONTRACTIONS WITH CHINESE GOV’T-OWNED OR AFFILIATED TECH. MFRS. (AM. LEGIS. EXCH. COUNCIL 2022), <https://tinyurl.com/3xancynz>; ACT TO PROHIBIT STATE PROCUREMENT OF ELECTRIC VEHICLES WITH FORCED LAB. COMPONENTS (AM. LEGIS. EXCH. COUNCIL 2023), <https://tinyurl.com/39apzhpx>; STATE INFRASTRUCTURE PROT. ACT (AM. LEGIS. EXCH. COUNCIL 2022), <https://tinyurl.com/2p8akhn6>; ACT TO PROHIBIT THIS STATE’S Bd. OF REGENTS FROM INVESTING PUB. UNIV. TRUST FUNDS IN COS. ASSOCIATED WITH THE GOV’T OF CHINA (AM. LEGIS. EXCH. COUNCIL 2022), <https://tinyurl.com/3ppjxf5>.

240. Compare RESTRICTIONS ON FOREIGN ACQUISITION OF LAND ACT, *supra* note 239 (“(1) A restricted foreign entity that acquires an interest in land by grant, gift, donation, devise, or bequest shall alienate the interest within five years after the date of acquisition. (2) If a restricted foreign entity fails to alienate an interest in land in accordance with Subsection (1), the interest escheats to the state.”), with UTAH CODE ANN. §§ 63L-13-101, -201, -202 (West 2023) (“(1) A restricted foreign entity that acquires an interest in land on or after May 3, 2023, by grant, gift, donation, devise, or bequest shall alienate the interest within five years after the date of acquisition. . . . If a restricted foreign entity fails to alienate an interest in land in accordance with Subsection (1), the interest escheats to the state.”).

241. See O’Dell & Penzenstadler, *supra* note 234; Jackman, *supra* note 238.

242. See, e.g., JULIAN GEWIRTZ, UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS, AND THE MAKING OF GLOBAL CHINA 43 (2017).

243. Compare Brian Entin, *N. Dakota Town Praises Rejection of Chinese Company Development*, NEWSNATION, <https://www.newsnationnow.com/business/city-cancels-corn-mill-china-based-company/> [<https://perma.cc/9BBP-XGBC>] (Feb. 7, 2023, 4:50 PM) (discussing local business interests against the proposed FuFeng Group development), with US-CHINA BUS. COUNCIL, MEMBER SURVEY 13 (2022) (showing how many major companies remain committed to the Chinese market despite a laundry list of challenges).

may have such effects. When Congress acts within the grant of powers allocated to it by the Constitution, it has broad powers to pass legislation.²⁴⁴ And when it does so, it trumps any state law with which it may conflict; however, in all other respects, authority lies with the states or with the people themselves.²⁴⁵ Such an allocation of authority may suggest separability, but in practice “legal problems repeatedly fail to come wrapped up in neat packages marked ‘all-federal’ or ‘all-state.’”²⁴⁶ Not only do federal laws reference state laws but so too do state laws reference federal laws.²⁴⁷

C. Federal China-Related Legislation and Regulation

While the focus of this Article is state-level statutory legislation that involves Chinese parties, it is noteworthy that state statutes do not appear in a vacuum and often are drafted with an eye towards federal law or are otherwise influenced by the federal government. In 2023, there were about a dozen bills introduced in Congress that both involve property interests and target China, one of which has been passed.²⁴⁸

244. See U.S. CONST. art. I, § 8, cl. 18.

245. Compare U.S. CONST. art. VI, cl. 2, with U.S. CONST. amend. XIV.

246. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954).

247. *Id.*

248. The federal bills are the following: Not One More Inch or Acre Act, S. 1136, 118th Cong. (2023) (providing a blanket prohibition of any Chinese individual or corporation owning land in the United States); Prohibition of Agricultural Land for the People’s Republic of China Act, H.R. 7892, 117th Cong. (2022) (prohibiting the purchase of public or private agricultural land in the United States by foreign nationals associated with the Government of the People’s Republic of China); Promoting Agriculture Safeguards and Security (PASS) Act, H.R. 8274, 117th Cong. (2022) (requiring CFIUS to consider agriculture needs when making determinations affecting national security); This Is Our Land Act, S. 684, 118th Cong. (2023) (prohibiting Chinese individuals and corporations affiliated with the CCP from acquiring or leasing United States land); Foreign Adversary Risk Management (FARM) Act, H.R. 513, 118th Cong. (2023) (requiring CFIUS to recognize the agriculture industry and agriculture supply chains as critical infrastructure, adding the Secretary of Agriculture to CFIUS); Protecting Military Installations and Ranges Act of 2023, S. 369, 118th Cong. (2023) (requiring CFIUS to review any purchase or lease of real estate near a military installation or military airspace in the United States by a foreign person connected with the PRC among other countries); Protecting Military Installations from Foreign Espionage Act, H.R. 917, 118th Cong. (2023); H.R. 558, 118th Cong. (2023) (proposing to amend the Defense Production Act of 1950 to prohibit certain foreign countries from purchasing or leasing property near sensitive sites); Security and Oversight for International Landholdings (SOIL) Act of 2023, S. 1066, 118th Cong. (2023) (increasing oversight of foreign direct investment in agricultural land and land within a certain distance from military installations); Preemption of Real Property Discrimination Act, H.R. 3697, 118th Cong. (2023) (preempting state prohibitions on real estate purchases by foreign

Many of these bills expand CFIUS's powers, such as the one passed into law. That law, an amendment to the National Defense Authorization Act for Fiscal Year 2024, applies to both corporations and individuals.²⁴⁹ While it is within the CFIUS program and is thus not a blanket ban, but rather a case-by-case inquiry, a concern is that state governments will interpret the law as a green light to enact harsher and more discriminatory laws.²⁵⁰ Hence, federal statutory law can send signals to state legislatures that may differ from their stated goals.

In addition to federal law affecting state law, another way that the federal government may influence the states is through policy statements from top officials. For instance, former Secretary of State Mike Pompeo was known to caution governors about their paradiplomacy with Chinese parties and to underscore the CCP's relations with Chinese representatives.²⁵¹ These communications can also have effects. In other words, federal and state law are hardly two distinct spheres of activity. There is overlap. At the same time, states may decide not to march to Washington's tune, and, where possible, pursue their own interests with regard to China. With that overview of state and federal legislation and regulation, the next Part examines some of the key legal issues regarding the China-related state statutes.

IV. CONSTITUTIONALITY AND LEGALITY

A. Challenges to the China-Related State Statutes

While the China-related state laws are quite new, there are already lawsuits pending. These lawsuits shed light on the discriminatory nature of the statutes. They reveal how both epistemological issues and structural or doctrinal elements combine to create state laws that may violate the Constitution. There are several suits pending in district courts. The first, *TikTok v. Knudsen*,²⁵² challenges the Montana TikTok ban, one

citizens); 169 Cong. Rec. S3090, SA 926 (July 18, 2023) (amendment of Sen. Jon Tester) (requiring the federal government to review farmland transactions involving at least 320 acres or \$5 million purchase price from certain countries).

249. H.R. 8274.

250. Email from attorney representing the plaintiffs in *Shen v. Simpson* to Matthew Erie, Assoc. Professor, Univ. of Oxford (Aug. 1, 2023, 7:55 PM) (on file with author). See generally *Shen v. Simpson*, No. 23-cv-208, 2023 WL 5517253 (N.D. Fla. Aug. 17, 2023).

251. See Pompeo, *supra* note 51.

252. *Alario v. Knudsen*, No. 23-CV-0061-M, 2023 WL 8270811 (D. Mont. Nov. 30, 2023).

of the strictest in the country.²⁵³ Specifically, TikTok brought a number of claims against Montana including that the ban violates the First Amendment and the Commerce Clause and is preempted by federal law.²⁵⁴ For its part, the State of Montana stands by the ban, arguing that the social media app accesses private data of users which represents a national security threat.²⁵⁵

The second suit, *Coalition for Independent Technology Research v. Abbott*,²⁵⁶ is similar to the previous one. The plaintiffs, comprised of faculty at a public university, sued the State of Texas for banning TikTok at their university and harming their research.²⁵⁷ The plaintiffs argue that the Texas ban is repugnant to their First Amendment rights.²⁵⁸ The law identifies social media platforms as a risk if a foreign government may require the platform to disclose confidential user information.²⁵⁹ Texas argues that TikTok may be required to disclose confidential user information to the Chinese government.²⁶⁰

In terms of possible outcomes of these two cases, one previous effort led by President Donald Trump to ban TikTok failed. Invoking his powers under the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act, President Trump issued a number of executive orders in attempt to ban any transactions between TikTok's parent company, ByteDance, and any person within the United States.²⁶¹ President Trump also issued similar orders against another app, WeChat.²⁶² However, both TikTok and WeChat successfully enjoined their respective bans.²⁶³ In the TikTok case, the court found that President Trump's ban exceeded the authority Congress granted the president under IEEPA.²⁶⁴ There are additional precedents for courts finding that the president, in issuing an executive order based on the IEEPA,

253. *Id.* at *1. The act banning TikTok in Montana prohibits the operation of TikTok anywhere in the state.

254. *Id.*

255. S.B. 419, 68th Leg., Reg. Sess. (Mont. 2023) (stating that the PRC “has an interest in gathering information about Montanans, Montana companies, and the intellectual property of users to engage in corporate and international espionage”).

256. No. 23-cv-783, 2023 WL 8582597 (W.D. Tex. Dec. 11, 2023).

257. *Id.* at *2.

258. *Id.*

259. TEX. GOV'T CODE ANN. § 620.002 (West 2023).

260. *Abbott*, 2023 WL 8582597, at *8.

261. *See, e.g.*, Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020). *See also* Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145, 1146 (2022).

262. Exec. Order No. 13943, 85 Fed. Reg. 48641 (Aug. 6, 2020).

263. *See U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 930 (N.D. Cal. 2020); *Marland v. Trump*, 498 F. Supp. 3d 624, 645 (E.D. Pa. 2020).

264. *Marland*, 498 F. Supp. at 642–43.

exceeded his authority as granted under that statutory framework.²⁶⁵ While these cases demonstrate courts' unwillingness to defer to executive orders, the Montana and Texas cases rest on state police powers, which may be accorded more deference.²⁶⁶

These issues come to a head in *Shen v. Simpson*, the first lawsuit to challenge the new China-related state legislation with a focus on real property. A study of *Shen* sheds light on broader constitutional issues regarding the legality of the recent China-related state statutes. Before turning to the issues in *Shen*, I first highlight the source of those issues in the state statute that demonstrates the infusion of national security into property law.

B. The Florida Law

The Florida statute at issue in *Shen* is based on bill S.B. 264, which has features that make it distinct.²⁶⁷ To start, S.B. 264 is unusually long; it runs nearly thirty pages as opposed to many bills which are two to three pages.²⁶⁸ The length reflects the Florida legislature's efforts to cover a wide ground, including prohibiting contracting with entities of "foreign countries of concern,"²⁶⁹ prohibiting "foreign principals"²⁷⁰ from purchasing agricultural land or other real estate,²⁷¹ requiring foreign principals that own such land to register with a specified department,²⁷² and imposing various penalties for the failure to meet the foregoing

265. *Xiaomi Corp. v. Dep't of Def.*, No. 21-280, 2021 WL 950144, at *1, *7 (D.D.C. Mar. 12, 2021). See also *Luokung Tech. Corp. v. Dep't of Def.*, 583 F. Supp. 3d 174, 195 (D.D.C. 2021) (granting plaintiffs a preliminary injunction based on an Administrative Procedure Act claim).

266. *Alario v. Knudsen*, No. 23-cv-0061, 2023 WL 8270811 (D. Mont. Nov. 30, 2023); *Coalition for Indep. Tech. Rsch. v. Abbott*, No. 23-cv-783, 2023 WL 8582597 (W.D. Tex. Dec. 11, 2023).

267. FLA. STAT. § 287.138 (2023); S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

268. S.B. 264.

269. *Id.* § 287.138(1)(c).

270. "Foreign principal" is defined as:

The government or any official of the government of a foreign country of concern; (b) A political party or member of a political party or any subdivision of a political party in a foreign country of concern; (c) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country of concern; or (d) any person who is domiciled in a foreign country of concern and is not a citizen of the United States.

Id. § 692.201(4).

271. *Id.* §§ 692.202–03.

272. *Id.* § 692.202(3)(a).

obligations.²⁷³ Given the topics it addresses, the bill has been incorporated into different parts of the Florida Statutes, including Title XIX relating to “Public Business” and Title XL relating to “Real and Personal Property.”²⁷⁴

Of particular relevance, S.B. 264 is singular among the bills in that it creates a two-tiered system for property prohibitions, one pertaining to “foreign principals” from “foreign countries of concern” (*i.e.*, the PRC, Russia, Iran, North Korea, Cuba, Venezuela, and Syria²⁷⁵) and the other pertaining specifically to China,²⁷⁶ and imposing harsher penalties for violations of the latter category.²⁷⁷

Section 692.204, which is specific to China, requires additional scrutiny as it departs from those generic sections pertaining to other “foreign countries of concern.” Section 692.204 makes three kinds of distinctions: first, who it applies to; second, the types of land ownership it prohibits; and, third, the penalties for violations. Starting with its intended targets, Section 692.204 applies to:

1. The People’s Republic of China, the Chinese Communist Party, or any official or member of the People’s Republic of China or the Chinese Communist Party.
2. Any other political party or member of a political party or a subdivision of a political party in the People’s Republic of China.
3. A partnership, an association, a corporation, an organization, or any other combination of persons organized under the laws of or having its principal place of business in the People’s Republic of China, or a subsidiary of such entity.
4. Any person who is domiciled in the People’s Republic of China and who is not a citizen or lawful permanent resident of the United States.
5. Any person, entity, or collection of persons or entities described in subparagraphs 1. through 4. having a controlling interest in a partnership, association, corporation, organization, trust, or any other legal entity or subsidiary formed for the purpose of owning real property in this state.²⁷⁸

273. *Id.* §§ 692.202(3)(b), (6)(a)–(f), (7), (8).

274. FLA. STAT. §§ 288.860, 692.201–05.

275. S.B. 264, 2023 Leg., Reg. Sess., § 692.201(3)–(4) (Fla. 2023).

276. *Id.* § 692.204.

277. *Id.* §§ 692.204(8)–(9).

278. *Id.* § 692.204(1)(a).

This enumerated list mirrors the definition of “foreign principal,” but singles out for special treatment those from China.²⁷⁹ Litigation has focused attention on the fourth provision’s problematic nature, identifying “[a]ny person who is domiciled in the People’s Republic of China.”²⁸⁰

Second, the generic sections provide that any “foreign principal” cannot “directly or indirectly own, or have a controlling interest in, or acquire by purchase, grant, devise, or descent any interest, except a de minimus indirect interest, in real property on or within 10 miles of any military installation or critical infrastructure facility in this state.”²⁸¹ Section 692.204, however, states that Chinese people may not “directly or indirectly own, have a controlling interest in, or acquire by purchase, grant, devise or descent any interest, except a de minimus indirect interest, in real property in this state,” effectively posing a ban on any real estate ownership statewide.²⁸² The one permissible exception pertains to people with a valid non-tourist visa or who have been granted asylum; such individuals are allowed to purchase one residential property, but only if such property is less than two acres and not within five miles of a military installation.²⁸³

Third, the differences between the criminal penalties stipulated in the generic sections versus Section 692.204 are stark. For the former, a foreign principal who violates the law commits a misdemeanor of the second degree whereas a Chinese citizen who violates the same law commits a felony of the third degree.²⁸⁴ Because of the nature of the law and its disparate impact on Chinese citizens and businesses in the State of Florida, the Florida law has become the subject of the first lawsuit pertaining to a China-related law to reach a federal circuit court, and one with potentially significant implications for the constitutionality of the China-related bills and laws throughout the country.²⁸⁵

279. Compare *id.* § 692.204(1)(a), with *id.* § 692.201(4).

280. See *infra* Section IV.C; S.B. 264, 2023 Leg., Reg. Sess. § 692.204(1)(a)(4) (Fla. 2023).

281. S.B. 264 § 692.203(1). See also *id.* § 692.201(2) (defining “Critical infrastructure facility” as “(a) A chemical manufacturing facility. (b) A refinery. (c) An electrical power plant . . . (d) A water treatment facility or wastewater treatment plant. (e) A liquid natural gas terminal. (f) A telecommunications central switching office. (g) A gas processing plant, including a plant used in the processing, treatment, or fractionation of natural gas. (h) A seaport . . . (i) A spaceport . . . (j) An airport . . .”).

282. *Id.* § 692.204(1)(a)(4). See *supra* note 179 (noting that “any interest” may implicate not only fee simple ownership but also leasehold interest.)

283. *Id.* § 692.204(2).

284. Compare *id.* § 692.203(8), with *id.* § 692.204(8).

285. *Shen v. Simpson*, No. 23-cv-208, 2023 WL 5517253 (N.D. Fla. Aug. 17, 2023).

C. Shen v. Simpson

Four Chinese individuals and one real estate company in Florida brought a lawsuit against a number of Florida officials on May 22, 2023, filing for a preliminary injunction against the Florida law's enforcement.²⁸⁶ The plaintiffs include the following: first, Yifan Shen, a holder of an H-1B visa as a nonimmigrant worker, who has lived in the United States for seven years and in Florida for four years, working as a dietician.²⁸⁷ Shen contracted to buy a home in Orlando to serve as her primary residence on a property which appears to be within ten miles of a critical infrastructure facility, although whether the facility (the Orange County U.S. Army Recruiting Center in Orlando) qualifies is indeterminate. Because the closing date for her purchase falls after the enforcement date of the Florida law, she has to cancel the contract, losing her deposit of \$25,000.²⁸⁸ Second, Zhiming Xu is an asylum applicant who fled China after being persecuted.²⁸⁹ He has lived in Florida for four years and has signed a contract to buy a home near Orlando.²⁹⁰ Like Shen, it appears Xu's intended home is within ten miles of a critical infrastructure facility.²⁹¹ And like Shen, Xu would have to cancel the purchase and lose his deposit of \$31,250.²⁹²

Third, Xinxi Wang holds an F-1 visa as an international Ph.D. student, and she has lived in Florida for five years.²⁹³ Because Wang's home is within ten miles of a critical infrastructure facility, she needs to register her property which she argues is stigmatizing and discriminatory.²⁹⁴ Fourth, Yongxin Liu is a holder of an H-1B visa, and he has lived in Florida for four years while working as an assistant professor.²⁹⁵ As his property is within ten miles of a critical infrastructure facility, he will also need to register, which he also argues is stigmatizing and discriminatory.²⁹⁶ Liu is in the process of buying another home, but he fears that real estate agents will refuse to represent him because his Chinese ancestry will result in additional costs to secure a new

286. Complaint at 40, *Shen v. Simpson*, No. 23-cv-208 (N.D. Fla. May 22, 2023).

287. *Id.* at 18.

288. *Id.*

289. *Id.* at 18–19.

290. *Id.* at 19.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 19–20.

295. *Id.* at 20.

296. *Id.*

property.²⁹⁷ Finally, Multi-Choice Realty is a real estate brokerage firm that “primarily serves Chinese-speaking clients in the United States.”²⁹⁸ Their customers will need to register their properties and will be prohibited from acquiring new ones. Multi-Choice Realty estimates they will lose one-quarter of their business due to the Florida law.²⁹⁹ None of the plaintiffs are CCP members or members of the Chinese government.

The plaintiffs lost their suit for a preliminary injunction,³⁰⁰ and subsequently appealed to the Eleventh Circuit Court of Appeals.³⁰¹ During that time, the Florida law has had negative effects on the Florida real estate market, specifically with regard to Chinese purchasers. This suggests that even if the Florida law is merely “symbolic,” it still has real-world effects. For instance, the Florida law imposes penalties on would-be sellers to Chinese buyers,³⁰² and this provision has a chilling effect on many lenders and title companies that have stopped working with Chinese clients unless they have green cards for fear of violating the law.³⁰³ Moreover, the Chinese media has taken note of the discriminatory law and has identified it as one factor in deteriorating U.S.-China relations.³⁰⁴ While Chinese propaganda typically emphasizes negative aspects of the American democratic system, the Florida law and many of the other China-related state bills give Chinese propagandists no shortage of fodder. In short, *Shen* has implications for not only Chinese citizens

297. *Id.* at 20–21.

298. *Id.* at 21.

299. *Id.* at 21–22.

300. Order Denying Preliminary Injunction Motion, *Shen v. Simpson*, No. 23-cv-208 (N.D. Fla. Aug. 17, 2023).

301. See Plaintiff-Appellants’ Time-Sensitive Motion for Injunction Pending Appeal and Motion for Expedited Appeal, *Shen v. Simpson*, No. 23-12737 (11th Cir. Aug. 26, 2023).

302. S.B. 264, 2023 Leg., Reg. Sess. § 692.204(9) (Fla. 2023) (“A person who knowingly sells real property . . . in violation of [the Florida law] commits a misdemeanor of the first degree . . .”).

303. E-mail from attorney representing plaintiffs to Matthew Erie (on file with author).

304. Zhang Wu (张武), Meiguo Fozhou “Jinfangling”: “Laizi Zhongguo” Youcheng Li Yuanzui? (美国佛州 禁房令: 来自中国又成了原罪) [Florida’s “Housing Ban”: Has “Coming from China” Become the Original Sin Again?], ShangGuan (上观) [Shanghai Observer] (May 19, 2023), <https://export.shobserver.com/baijiahao/html/614267.html> (“Historically, when Sino-US relations are under great pressure and official exchanges face obstacles, non-governmental relations should play an important role as a ‘stabilizer’ and ‘safety valve.’ However, more and more U.S. congressmen and politicians are sparing no effort to exaggerate the threat to China as a ‘performance tool’, driving the entire U.S. society in the wrong direction of anti-China and containment. It is these exclusionary and discriminatory bills that make the international community doubt the moral standards and values of the United States.”).

in Florida, and, by extension, in other states, too, but also for the adversarial and consequential U.S.-China bilateral relationship.

The main arguments of the plaintiffs include the following: first, it violates their constitutional rights to equal protection and due process; second, it runs afoul of the federal government's powers to superintend foreign affairs, foreign investment, and national security; and third, it violates the Fair Housing Act.³⁰⁵ For purposes of this Article, I focus on equal protection and federal preemption as the most significant constitutionally and bracket the more technical due process³⁰⁶ and Fair Housing Act claims.³⁰⁷ Indeed, on appeal in the Eleventh Circuit, the court denied the plaintiffs' preliminary injunction on equal protection

305. Complaint at 27, 30, 32, 36, *Shen v. Simpson*, No. 23-cv-00208 (N.D. Fla. May 22, 2023).

306. Due process protects individuals' right to property free from unreasonable governmental interference through, for example, expropriation or zoning. The Florida law presents a parallel challenge in that it excludes Chinese people from ownership altogether. *Yick Wo v. Hopkins* extends due process to [noncitizens]. See *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) ("The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China."). More recently, under *Ralls*, due process has been used by Chinese plaintiffs to challenge CFIUS. See *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014). There are a number of arguments based on the vagueness doctrine that would find the Florida law at issue in *Shen* repugnant to due process. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *Chicago v. Morales*, 527 U.S. 41, 56 (1999). These vague terms include "domicile," "critical infrastructure facility," and "military installation" among others. Taken together, the Florida law's terms are impermissible as they create uncertainty as to scope of the regulated real estate and potential buyers as well as enforcement issues.

307. The Fair Housing Act of 1968 (FHA) makes it illegal to discriminate against individuals when they are engaged in housing-related activities, including purchasing real estate, on the basis of race, color, national origin, religion, sex, familial status, and disability. See 42 U.S.C. §§ 3604–06, 3617. Specifically, the Florida law appears to violate Section 3604 of the FHA as it discriminates based on national origin. See also *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498 (10th Cir. 1995) (noting that housing practices that intentionally discriminate on the basis of protected characteristics including national origin and race are impermissible under the FHA). See also *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 903 F.3d 415, 432 (4th Cir. 2018). The FHA prohibits discrimination on the basis of citizenship "when it has the purpose or unjustified effect of discriminating on the basis of national origin." *Id.* The Florida law makes distinctions based on a person's nationality such that a nonimmigrant visa holder from a country that is not deemed to house "foreign principals" would not be subject to the Florida law whereas those that are from such countries, such as Shen, would be subjected to the law's prohibitions. While the Eleventh Circuit has not determined which test should be used to decide when a facially discriminatory policy may be justified under the FHA, it is unlikely that the State of Florida could meet the burden to demonstrate that the discrimination is valid. Florida has not offered a legitimate connection between the national security interests of the state and limiting the property rights of people domiciled in China.

grounds, but did grant it, pending appeal, on federal preemption grounds.³⁰⁸ Both claims warrant attention.

1. EQUAL PROTECTION

The Florida law violates the Fourteenth Amendment's Equal Protection Clause which states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."³⁰⁹ *Yick Wo v. Hopkins*³¹⁰ interpreted the Equal Protection Clause to apply to all persons within the territorial jurisdiction of the United States, without regard to race, color, or nationality, including noncitizens.³¹¹ Subsequent case law established that classifications based on citizenry status warrant strict scrutiny, meaning that the state must show a "compelling governmental interest" and that the law must be narrowly tailored to achieve that interest.³¹² The issue, however, is whether that interpretation applies to legislation restricting noncitizens' property rights. On this point, the plaintiffs cite to *Oyama*, which found that the California Alien Land Law was discriminatory against citizens.³¹³ However, as to whether equal protection for property rights extend to noncitizens, the language in the decision is unequivocal:

At this point, however, the road forks. The California law points in one direction for minor citizens like Fred Oyama, whose parents cannot be naturalized, and in another for all other children—for minor citizens whose parents are either citizens or eligible aliens, and even for minors who are themselves aliens though eligible for naturalization.³¹⁴

308. See Appeal from the United States District for the Northern District of Florida, *supra* note 6.

309. U.S. CONST. amend. XIV, § 1.

310. 118 U.S. 356 (1886).

311. See *id.* at 368 ("The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China.").

312. *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971) (extending equal protection to noncitizens and announcing that classifications based on noncitizen status are inherently suspect and warrant strict scrutiny). For the modern test of strict scrutiny, see, for example, *Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))).

313. See *Oyama v. California*, 332 U.S. 633, 640 (1948).

314. *Id.* at 641.

A narrow reading would thus conclude that the extension of equal protection to noncitizens on the issue of property rights protection is not supported.³¹⁵ Supporters of the Florida law have put forward a confusing assertion that the law does not discriminate on the basis of citizen status, but rather “[i]t is based on ties to totalitarianism and domicile.”³¹⁶ The introduction of political system is a new categorization and one that, to date, is not supported by the case law—although courts are grappling with the implications of both law and citizens from such systems.³¹⁷

More fundamentally, the State of Florida contends that the Florida law does not violate equal protection, a position grounded in a states’ rights argument. “Real property has always been the domain of states.”³¹⁸ Florida cites *Terrace v. Thompson*,³¹⁹ *Frick v. Webb*,³²⁰ and *Webb v. O’Brien*³²¹ (the *Terrace* cases) to support this assertion.³²² On the issue of whether equal protection extends to noncitizens’ property rights within the United States, *Terrace* holds that a state may bar all noncitizens from owning land, and that it is not a violation of equal protection when a statute denies noncitizens who have not declared an intention to become citizens the right to hold land while permitting citizens and noncitizens who have so declared in good faith to do so.³²³ *Terrace* relies on an outdated classification scheme that differentiated noncitizens eligible for citizenship from those ineligible, the latter referring to Asians.³²⁴

While the *Terrace* cases have not been overruled, state court decisions are starting to chip away at some of the holdings’ implications. For example, *Namba v. McCourt*³²⁵ concerns state legislation that regulates the acquisition of land by noncitizens in Oregon, finding that state legislation is subject to the Equal Protection Clause, the Due Process

315. Brief of Amici Curiae Idaho, Arkansas, et al. in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 2–3, *Shen v. Simpson*, No. 23-cv-208 (N.D. Fla. Aug. 17, 2023).

316. *Id.* at 3.

317. See generally Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHI. L. REV. 157 (2022); Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685 (2020); Donald Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, 44 U. PA. J. INT’L L. 455 (2023).

318. Brief of Amici Curiae Idaho, Arkansas, et al. in Opposition to Plaintiffs’ Motion for Preliminary Injunction, *supra* note 315, at 1.

319. 263 U.S. 197 (1923).

320. 263 U.S. 326 (1923).

321. 263 U.S. 313 (1923).

322. See *Terrace*, 263 U.S. at 216–17; *Frick*, 263 U.S. at 333; *O’Brien*, 263 U.S. at 321–22.

323. See *Terrace*, 263 U.S. at 217.

324. *Id.* at 220 (“Generally speaking, the natives of European countries are eligible [for United States citizenship]. Japanese, Chinese and Malays are not.”).

325. 204 P.2d 569 (1949).

Clause, and the superior powers of the federal government over noncitizens and immigration.³²⁶ In his opinion, Chief Justice George Rossman tried to reconcile the *Terrace* cases with *Oyama*. Drawing on *Takahashi v. Fish and Game Commission*³²⁷ alongside *Oyama*, he wrote that whereas *Oyama* and *Takahashi* disapproved of the parts of *Terrace* concerning classification, he does not interpret those later cases to disapprove of those portions of *Terrace* which held that state legislation regarding alien land acquisition must conform to due process, equal protection, and federal preemption.³²⁸ Accordingly, he disregards the portion of *Terrace* regarding classification and follows *Oyama* and *Takahashi* holding that state legislation concerning land acquisition by aliens is subject to due process, equal protection, and federal preemption on issues of noncitizens and immigration.³²⁹ Chief Justice Rossman, in *Namba*, emphasizes that the immigration classification scheme and constitutional law has moved on since the *Terrace* cases.³³⁰

While as a state court decision *Namba* is not binding on the U.S. Supreme Court, it does have persuasive effect. Unfortunately, this was not the view taken by Judge Allen Winsor in *Shen*. Winsor, an appointee of President Trump, rejected the plaintiffs' preliminary injunction citing the *Terrace* cases favorably.³³¹ Judge Winsor rejected the plaintiffs' equal protection claim that the Florida law requires strict scrutiny, and instead, makes the states' rights argument: "The Court recognized that in exercising that power, derived from common-law restrictions on alien landownership, states possess 'wide discretion.' Thus state laws restricting aliens' right to acquire real property satisfy equal protection so long as they are rational."³³² The reliance on the century-old *Terrace* cases is misguided, and on appeal, the equal protection claim will likely succeed.

326. *Id.* at 580–83.

327. 334 U.S. 410 (1948) (holding that a California state law forbidding the issuance of a commercial fishing license to ineligible noncitizens was repugnant to the Equal Protection Clause because it was based on an unreasonable and arbitrary classification on the basis of nationality).

328. *Namba*, 204 P.2d at 582.

329. *Id.*

330. *Id.* at 579.

331. *See* Order Denying Preliminary Injunction Motion, *supra* note 300, at 2, 16–17.

332. *See id.* at 20 (citations omitted) (quoting *Terrace v. Thompson*, 263 U.S. 197, 217 (1923)).

2. FEDERAL PREEMPTION

Shen also raises the question of which level of government is controlling when property is being “securitized.” On the one hand, the federal government has significant albeit not exclusive authority to regulate matters of immigration, foreign investment, and national security. On the other hand, the states’ rights argument emphasizes that, on the issue of law regulation, it is the state that is the controlling authority. How the Florida law is characterized, either in terms of its immediate effect (land law) or its downstream effects, including affecting immigration and possibly international commerce, determines which level of government has authority over the matter.

Critics of the Florida law point to the law’s negative knock-on effects. They argue that the federal government has primary responsibility over matters of national security, immigration, and foreign affairs. For example, since at least *Arizona v. United States*,³³³ it is well settled that the federal government and not the states regulate matters of immigration.³³⁴ A key term of the Florida law is “domicile,” one which has clear implications for Florida’s immigration policy.³³⁵ By barring those domiciled in China from owning real property in the state and permitting an exception only for asylees and green card holders, the Florida law makes determinations based on immigration status. Whether domicile is interpreted to mean non-resident or resident noncitizens, either reading actively shapes Florida’s immigration policy towards Chinese citizens.³³⁶ Even under a reading that the Florida law pertains to non-resident noncitizens only, under the property ban, those Chinese

333. 567 U.S. 387 (2012).

334. *See id.* at 395 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”). There are earlier precedents suggesting that immigration is a plenary power of the federal government. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275, 278–80 (1875) (finding a California statute unconstitutional on grounds of federal preemption in the field of immigration, and, further, finding that the state statute may be met by retaliation from the affected country (China) against not just the State of California but the entire nation).

335. *See* FLA. STAT. § 692.204(1)(a)(4) (2023).

336. *See* Brief of Amici Curiae Idaho, Arkansas, et al. in Opposition to Plaintiffs’ Motion for Preliminary Injunction, *supra* note 315, at 7–8 (interpreting “domicile” to mean non-resident foreign nationals). Whereas the implication of this interpretation is that most of the plaintiffs in *Shen* would not be subject to enforcement actions of the Florida law as they are resident, a minority, such as Xu the asylum applicant, would likely have to return to the PRC. The alternative reading that “domicile” means “permanent home” would result in many of the plaintiffs being implicated by the Florida law as their permanent home is the PRC. *See* Statement of Interest of the United States in Support of the Plaintiffs’ Motion for Preliminary Injunction at 9, *Shen v. Simpson*, No. 3-cv-208 (N.D. Fla. June 27, 2023).

citizens who do not reside in Florida will clearly be disincentivized to immigrate to Florida.

On the matter of national security, there are strong policy arguments that such powers should be centralized in the federal government, particularly during a period of heightened bilateral tension and possible conflict. According to federal statutory regimes, CFIUS and OFAC are responsible for reviewing transactions and enforcing economic regulations, respectively.³³⁷ CFIUS is empowered to review real estate transactions under FIRRMA.³³⁸ As explained in *Ralls*,

if CFIUS determines that “the transaction threatens to impair the national security of the United States and that threat has not been mitigated,” it must “immediately conduct an investigation of the effects of [the] covered transaction on the national security [] and take any necessary actions in connection with the transaction to protect the national security” CFIUS is given express authority to “negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction.”³³⁹

Since the federal government has an established statutory scheme that empowers CFIUS to conduct national security review of select real estate transactions, and the capacity and proficiency to do so, then it is duplicative for states to exercise such powers based on their own legislation. As noted by the *Shen* plaintiffs, CFIUS exercises a case-by-case analysis and exercises considerable expertise in doing so.³⁴⁰ The Florida law, in contrast, is a one-size-fits-all ban on Chinese ownership of real property in the state. CFIUS is a scalpel where the Florida law is

337. See *supra* note 77 and accompanying text. See generally 31 C.F.R. § 500 (2023) (outlining the regulatory responsibilities and procedures of the Office of Foreign Assets Control).

338. See *supra* notes 82–83 and accompanying text.

339. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 303 (D.C. Cir. 2014) (first quoting 50 U.S.C. § 2170(b)(2)(A); then quoting § 2170(b)(2)(B); and then quoting § 2170(l)(1)(A)).

340. See *supra* note 250 and accompanying text.

a sledgehammer.³⁴¹ It is clear that in a time of international tension, a more nuanced approach is the prudent course of action.³⁴²

Whereas the arguments for federal preemption in the fields of immigration and national security are robust, the argument for preemption in foreign affairs is less so. As mentioned, in the absence of an express treaty, one must rely on the implied doctrines, namely, the dormant foreign affairs preemption doctrine and the dormant Foreign Commerce Clause, and these, especially the former, are not without controversy.³⁴³ One reason for this controversy is that the relevant case law in support of the dormant foreign affairs preemption doctrine, *Zschernig*³⁴⁴ and *Garamendi*,³⁴⁵ is not particularly strong.³⁴⁶ Pursuant to dictum in *Garamendi*, the dormant foreign affairs doctrine recognizes not just conflict but also field preemption, although the Supreme Court has shown a preference for the former.³⁴⁷ Indeed, the nexus between the Florida law and foreign affairs is attenuated but for the overlap with immigration and national security. Whereas, as a general matter, the dormant Foreign Commerce Clause stands on more solid jurisprudential grounds,³⁴⁸ the Florida law's emphasis on real property may not be the most fruitful opportunity to employ such an argument against the China-related state statutes.³⁴⁹ In short, the arguments for federal preemption are strongest in the areas of immigration and national security.

341. Even Chinese investors, upon studying *Ralls*, have mostly concluded that the process, although opaque, is not unfair to foreign investors, including Chinese investors. See Li, *supra* note 84, at 26 (“It is important to note that the case, rather obscure in the United States, made headline news in China. All major newspapers and online media outlets trumpeted the decision as a historic victory for Chinese companies expanding abroad. Because of its publicity, *Ralls* educated Chinese investors about the importance of law in the CFIUS process, which explains why more companies consulted lawyers on the matter afterwards.”).

342. See *supra* note 10 and accompanying text.

343. See GLENNON & SLOANE, *supra* note 37, at 109–29.

344. *Zschering v. Miller*, 389 U.S. 429 (1968).

345. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

346. See Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2155 (book review) (agreeing with Glennon and Sloane in “burying *Zschernig*”).

347. *Garamendi*, 539 U.S. at 418. See also H.R. 3697, 118th Cong. (2023) (introducing a federal bill that would preempt state prohibitions on real estate purchases by foreign citizens, thus filling a gap by providing a direct conflict with the China-related state statutes discussed herein).

348. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 371 (2000).

349. See, e.g., *id.* at 374 n.8 (2000) (declining to affirm the lower courts’ rulings on the foreign affairs power or the dormant Foreign Commerce Clause because the “conclusion that the Act conflicts with federal law [in violation of the Supremacy Clause] is sufficient to affirm the judgment below”).

To summarize, based on equal protection and federal preemption, there are valid arguments against the constitutionality of the Florida law. The Eleventh Circuit's partial injunction on federal preemption grounds may chill future China-related litigation in other states. However, the circuit court has yet to hold a hearing on an injunction as it pertains to the entire case. Given that the China-related bills and laws are a national phenomenon, *Shen* will likely have repercussions for similar statutes in other states as well as potential future litigation.

D. Broader Implications of Shen

The legal challenges to the Florida law laid out in *Shen* may have wider relevance for challenging the China-related bills and laws. Given the degree of harmonization among the bills and laws, many of the key terms (*e.g.*, “critical infrastructure facility,” “foreign principal,” “domicile,” etc.) are common to the statutory language.³⁵⁰ Moreover, the discriminatory animus of the Florida law similarly operates in other state bills and statutes. For these reasons, the outcome of *Shen* may determine the future of China-related statutes in other states. As such, this Section puts the legal arguments at issue in *Shen* within the broader context of the China-related state bills and statutes.

In assessing the implications of *Shen* to address the broader problem of the proliferation of anti-China bills and laws at the state level, it is helpful to draw attention to the issues of who the underlying statute regulates and how. The following will use the Florida law as a baseline for such an analysis which may help identify the constitutional limits of state legislation to regulate noncitizens' property rights more broadly.

Starting with the first category of who the bill or law acts on, whereas the vast majority of state bills and laws target the broad category of “China” or the “PRC,” many either list China as one of many targeted countries, reference “foreign adversary” as defined by 15 C.F.R. § 7.4, or employ some generic category of foreign adversaries.³⁵¹

350. Compare FLA. STAT. § 692.201(2) (2023), with TEX. GOV'T CODE ANN. § 2275.0101(2) (West 2023).

351. See 15 C.F.R. § 7.4 (2024) (“The Secretary has determined that the following foreign governments or foreign non-government persons have engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons and, therefore, constitute foreign adversaries . . . The People's Republic of China . . .”).

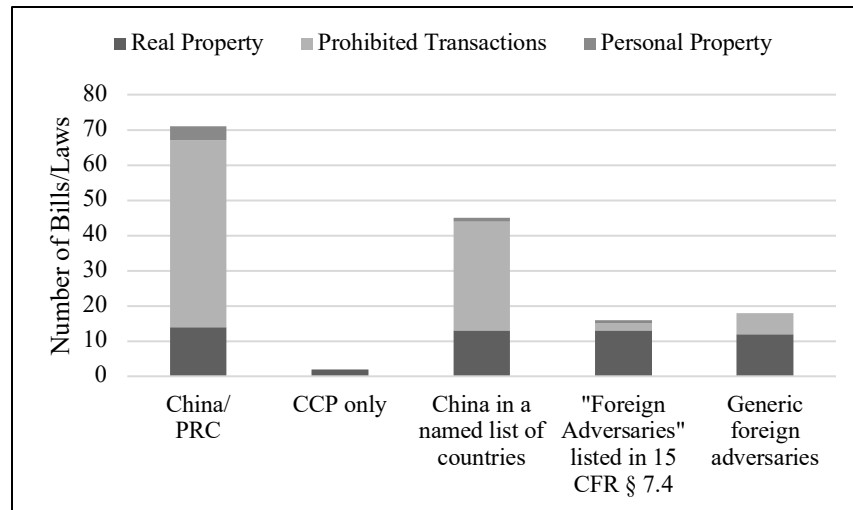


Figure 3. The Target of the Bills'/Laws' Regulatory Action.

Legal consequences follow. For instance, a state statute's reference to 15 C.F.R. § 7.4 may serve as a proxy for its tracking federal legislation more generally and potentially avoid preemption problems. The Florida law does not mention 15 C.F.R. § 7.4 and is thus unhinged from federal law on that point. As many of the other state bills and laws similarly do not mention 15 C.F.R. § 7.4, this absence of citing the federal law is another point of commonality between the Florida law and other state legislation. Consequently, some of the arguments from *Shen* may carry over to future challenges to similar state statutes.

A related inquiry to the "who" question is when the state bill or law mentions China as a target, how it does so. The Florida law is somewhat unusual in providing an enumerated list of Chinese targets, including the Chinese government, the CCP, Chinese corporations, and those "domiciled" in China.³⁵² The majority of the bills do not have such specific lists, but rather deploy vague categories like "China."³⁵³ Further, they may determine that corporate entities are the clearest threat to national security and exclude individuals.³⁵⁴ However, there are bills and laws that, like the Florida one, identify "individuals," "persons," or

352. FLA. STAT. § 692.204(1)(a) (2023).

353. See, e.g., S.B. 2853, 2023 Leg., Reg. Sess. (Miss. 2023); MISS. CODE ANN. § 31-7-67(4) (2023) (prohibiting state purchase of drones "manufactured in the People's Republic of China").

354. See, e.g., UTAH CODE ANN. § 63L-13-201(1) (West 2023) (prohibiting only "restricted foreign entit[ies]" from acquiring real property interests in Utah).

“citizens.”³⁵⁵ These include laws in Indiana³⁵⁶ and Montana,³⁵⁷ as well as several pending bills, including in Arizona,³⁵⁸ Hawai‘i,³⁵⁹ Maryland,³⁶⁰ and Oklahoma.³⁶¹ However, the scope of the application varies. For example, some, like the Indiana law, refer to “citizens of China” whereas others, refer strictly to (former) CCP members or identified foreign nongovernmental persons.³⁶² In fact, most bills and laws, including the Florida statute, mention Chinese companies (or other synonymous categories).³⁶³ Again, because of this similarity, it is likely that the findings in *Shen* may have wider implications.

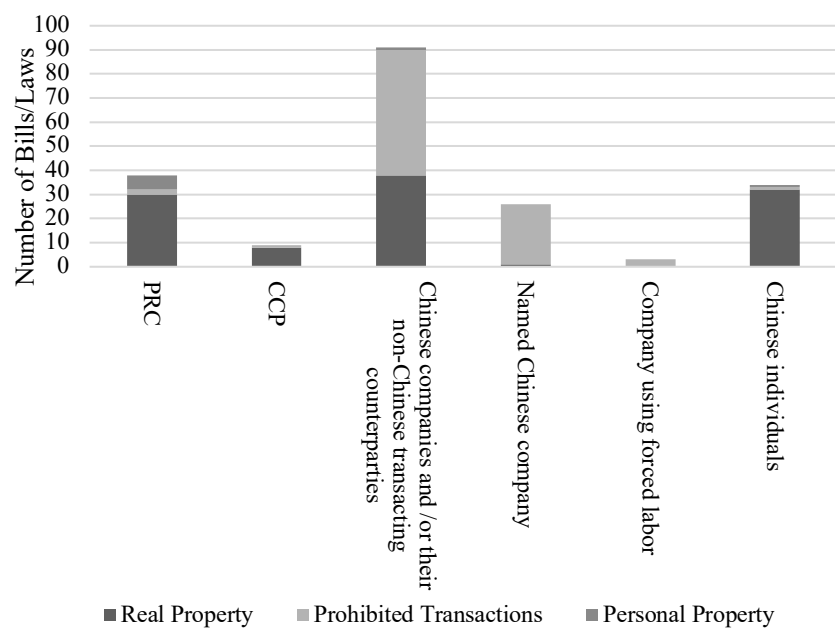


Figure 4. References to China in State Bills and Laws Restricting Property Ownership.

355. See FLA. STAT. § 692.204 (2023).

356. See IND. CODE § 1-1-16-10 (2023) (prohibiting purchase of real property adjacent to military installation).

357. See MONT. CODE ANN. § 35-30-103 (2023) (discussing prohibited transactions with foreign adversaries).

358. See H.B. 2376, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

359. See H.B. 929, 32d Leg., Reg. Sess. (Haw. 2023).

360. H.B. 968, 445th Gen. Assemb., Reg. Sess. (Md. 2023).

361. See S. 955, 59th Leg., 1st Sess. (Okla. 2023).

362. Compare IND. CODE § 1-1-16-6 (2023), with H.B. 505, 32d Leg., Reg. Sess. (Haw. 2023) (defining “prohibited person”).

363. FLA. STAT. § 692.204(1)(a) (2023). See also *infra* Appendix.

The question of who the law regulates, that is, natural person versus legal person (or, Chinese citizen versus Chinese corporation) may have legal significance. In the equal protection jurisprudence, for example, state statutes discriminating against noncitizen individuals and foreign corporations should theoretically receive the same standard of review (*i.e.*, strict scrutiny).³⁶⁴ However, this is not always the case in practice, and it presents something of a blind spot in both case law and academic study of the topic. According to Hartwin Bungert, who conducted a survey of the topic of equal protection for foreign and alien corporations:

A review of Supreme Court cases that apply the Equal Protection Clause to alien or foreign corporations evidences constant use of the weakest standard of review, the rational basis test. Interestingly enough, as far as I can see, the nationality of corporations has never been discussed under the perspective of suspect or quasi-suspect criteria of classification in legal literature or court decisions. *Particularly, none of the cases discussed the question of intensity of constitutional review methodologically in an extensive way* In [*G.D. Searle*] & *Co. v. Cohn*, for example, a New Jersey tolling statute for foreign corporations which were not represented in New Jersey by a registered agent was upheld under the Equal Protection Clause. Explicitly, merely rational basis review was applied.³⁶⁵

The issue of which standard of review is applied to what kind of actor matters. Empirically, a Chinese state-owned enterprise is much more likely to serve as an instrumentality of the Chinese government or the CCP than a nonimmigrant visa-holding Chinese-born dietician who has been in the United States for seven years. In a sense, courts track this in applying the higher standard of strict scrutiny to laws affecting individuals and in applying rational basis review, the lower standard, to those affecting corporations.³⁶⁶ Still, the unsystematic way in which these different methodologies are carried out is problematic. If China-related statutes gain momentum, these issues of different individuals and entities subject to the law will become more relevant. This calls for more reflection on developing judicial tests of state statutes that can more

364. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

365. Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 Mo. L. REV. 570, 609–10 (1994) (emphasis added) (footnotes omitted). Note that while Bungert's survey dates to 1994, I am not able to find cases after that publication date which discuss the issue.

366. *Id.* at 610–11.

accurately gauge the proximity between a subject and the Chinese government or the CCP.

In terms of the second question—how the Florida law regulates its targets—it is clear that the Florida law is somewhat distinct. Specifically, its two-tier approach, including rules pertaining to generic “foreign principals” versus those from China, and stipulating disparate criminal penalties for both is unique.³⁶⁷ In short, the Florida law doubly discriminates. Almost all other China-related bills and laws have only a single-tier approach, that is, they either differentiate “China” from the population writ large or include China within a category of “foreign countries of concern.”³⁶⁸ Thus, there are grounds to differentiate the Florida law from other China-related statutes in other states.

Relatedly, the scope of the Florida law marks another distinction. The Florida law prohibits Chinese nationals and entities from all real estate transactions in the state.³⁶⁹ Many of the other bills and laws prohibit merely acquisition of agricultural land or specify a prohibited radius around “critical infrastructure.”³⁷⁰ The Florida law is an outlier in this regard. Under the strict scrutiny test, the closer the legislation adheres to the compelling governmental interest—in this case, safeguarding “critical infrastructure” and therefore prohibiting real estate transactions within a specified radius from such installations—then the more likely it is that the legislation passes judicial review.

Despite these differences, the equal protection and federal preemption arguments may be applicable to other states’ laws. If those laws are making distinctions based on race, nationality, or national origin, or using terms like “domicile” as proxies for such prohibited distinctions, then the arguments may carry over. Likewise, to the extent that the state law affects immigration or national security, as does the Florida law, then the preemption argument may find traction in such subsequent challenges.

To summarize, while the Florida law under review in *Shen* has a few distinct features, including its detailed list of Chinese targets, emphasis on individuals, its two-tiered regime, and expansive definition

367. Compare FLA. STAT. § 692.202(7) (2023) (“A foreign principal that purchases or acquires agricultural land or any interest therein in violation of this section commits a misdemeanor of the second degree”), and FLA. STAT. § 692.203(8) (“A foreign principal that purchases or acquires real property or any interest therein in violation of this section commits a misdemeanor of the second degree”), with FLA. STAT. §§ 692.204(1)(a), (8) (“A violation of this section constitutes a felony of the third degree”).

368. See *infra* Appendix.

369. FLA. STAT. § 692.204(1)(a).

370. See, e.g., TEX. GOV’T CODE ANN. § 2275.0101(2) (West 2023).

of prohibited real estate transactions,³⁷¹ it nonetheless demonstrates similarities with many of the other state bills and laws. For these reasons, a final judgment for the plaintiffs will likely stifle the passing of other anti-China state bills, but, likewise, a judgment for Florida may increase the passage of such bills and potentially dampen the prospects of future challenges.

V. REFORMS

A confluence of factors—including, “national security creep” into U.S. corporate transactions, worsening U.S.-China relations, the rise of xenophobia and nationalism in the United States, and “uncooperative” foreign affairs federalism—have created the toxic conditions under which there has been a proliferation of China-related state bills and laws, many of which present serious constitutional issues. These state statutes present a host of questions for lawmakers, lawyers, and judges, as well as the general public. The chief amongst these is how can the federal and state governments better work together to produce better law and policy at the intersection of property and national security?

Developments may provide an opportunity to re-envision state and federal relations across the overlapping areas of national security, rights, and federalism. This vision of balanced centralization seeks to integrate state interests and share power, but also to ensure that state law accords with the federal constitution, particularly on foreign affairs related to China. Hence, balanced centralization focuses on two areas (mirroring the causes of the bills and laws, that is, their epistemic and structural or doctrinal roots): the first is lawmaking at the state level and the second is judicial review of those laws.

Beginning with lawmaking, one of the fundamental reasons for the rash of China-related bills and laws is the state of China knowledge at the state level. A core insight of the literature on national security is that who makes national security claims has much to do with the nature of those claims, how they are enforced, and against whom.³⁷² To date, the state bills and laws have been incubated in settings that, frankly, lack China expertise. One corrective to this situation would be to have more experienced and knowledgeable China experts contributing to debates and local lawmaking at the state level. To implement such an approach requires an assessment of both supply and demand sides of the equation.

As for supply of China expertise: scholars have put forth the suggestion that national security needs to incorporate more non-elite

371. See FLA. STAT. § 692.204(1)(a).

372. See sources cited *supra* note 62.

views,³⁷³ and while I agree in principle with this idea and do not advocate a return to elitism, it may not work in the case of addressing the issue of China. Part of the problem is that local knowledge-making has become injected with Sinophobia. Scholars of democracy and comparative politics have shown that xenophobic populism is often born of a willful ignorance about others and a self-serving form of exclusionary identity politics that ultimately erodes democratic accountability.³⁷⁴ China experts can serve as a counterbalance to some of these voices. The point is to engage in dialogue and to learn from local concerns while also helping to inform and educate. To be clear: the flow of information is not unilateral, but rather dialogic.

China knowledge needs to be baked into decisionmaking at all levels, so not just the federal government but also state and local governments, too. A number of bodies at the federal level invite Chinese experts to provide expert testimony to generate reports that are used to inform policy- and lawmaking.³⁷⁵ However, there are fewer conduits of knowledge-sharing at the state level. States and municipalities face their own distinct challenges when it comes to China-related trade, immigration, education, and labor. The states should not be sidelined in the process of developing national security policy about China; instead, those voices should be incorporated and exist in conversation with China experts.

This suggestion is in line with what has variously been called “cooperative federalism,”³⁷⁶ “intergovernmental relations,”³⁷⁷ or, simply, “coordination.”³⁷⁸ Recently, Kristen Eichensehr has suggested that state officials should work with federal representatives to provide input to CFIUS and channel state information to the committee.³⁷⁹ This recommendation should be institutionalized, but even more upstream,

373. See, e.g., Rana, *supra* note 62, at 1425; Heath, *supra* note 62, at 300; Cohen, *supra* note 62, at 802–03.

374. See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); PANKAJ MISHRA, *AGE OF ANGER: A HISTORY OF THE PRESENT* (2017); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (2018).

375. See, e.g., *About*, CONG.-EXEC. COMM’N ON CHINA, <https://www.cecc.gov/> [<https://perma.cc/R6JP-TU5Y>]; U.S.-CHINA ECON. & SEC. REV. COMM’N, 2023 REP. TO CONG. iii (2023).

376. THOMAS R. DYE, *AMERICA FEDERALISM: COMPETITION AMONG GOVERNMENTS* 7 (1990).

377. THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* 35 (1989).

378. See Ahdieh, *supra* note 41, at 1187.

379. See Kristen E. Eichensehr, *CFIUS Preemption*, 13 HARV. NAT’L SEC. J. 1, 23 (2022).

China experts can exchange with local leaders about what they are finding and experiencing. For example, expert panels or committees could be prescribed by state constitutional provision or resolution to discuss China-related issues, conflicts, and controversies. China experts would work to understand the issues within the legal remit of their respective panel or committee and identify areas for the body to consider within that body's jurisdiction. Establishing expert bodies is not in any way to deny that real security threats exist (to be clear: they do), but rather, the panel would be empowered to make such determinations.

There are organizations such as the National Committee on U.S.-China Relations which features a Public Intellectuals Program, consisting of some 140 experts,³⁸⁰ and the Wilson Center that organizes a China Fellowship that has also hosted a series of cohorts.³⁸¹ While these organizations are based in New York City and Washington, D.C., respectively, the point of the suggestion to integrate China experts and local stakeholders is not to promote an "coastal elite" view. Instead, many of the scholars and fellows who belong to these organizations are based in their respective universities, think tanks, law firms, businesses, or NGOs around the country. They have valuable insights about such topics as Chinese corporate governance, the operation of the CCP, Chinese overseas investment, Chinese law, Chinese propaganda and media, and Chinese politics, to name a few. These experts could participate in local committees to understand Chinese investment in the state or city, and contribute to knowledge-making around, for example, the relationship between Chinese tech companies and the CCP. There is deep China knowledge in the U.S., but it needs institutional bridges to help inform local policymaking.

As for the demand for China expertise: it could be said that state executives and legislatures who prioritize winning over their constituencies are not interested in the nuances of Chinese corporate governance. Yet scapegoating Chinese citizens in their state may result in a number of consequences that most governors would not welcome, including not only protest and litigation but also the perception that their jurisdiction invites market distortions. In short, executives and legislatures may incur economic fallout and political backlash as a result of discriminatory laws.

380. See *Public Intellectuals Program*, NAT'L COMM'N ON U.S.-CHINA REL., <https://www.ncusr.org/program/public-intellectuals-program/> [https://perma.cc/7GUM-EE3H].

381. See *Wilson China Fellowship*, WILSON CTR., <https://www.wilsoncenter.org/the-wilson-china-fellowship> [https://perma.cc/3NAH-4Q69].

Opening up policy debates to expert opinion may further help shed light on the counterfactual in terms of whether, in the absence of such property bans, state national security would actually be endangered.³⁸² Hence, engaging China experts to provide pragmatic knowledge on sensitive policy concerns may not only curb the most egregious examples of symbolic legislation, but also result in more optimal law that balances the protection of property rights with security concerns. While mediating polarized opinions is not easy in contemporary American society, a number of civil organizations are already doing precisely this kind of work.³⁸³

The second area for reform pertains to the judicial review of China-related state bills and laws, an area that may address structural and doctrinal issues in the law. Most of the issues with the state statutes to date occur at the level of the state executive and legislature. As for the courts, there is evidence to suggest that they may not necessarily be deferential to the executive and legislature when it comes to national security issues.³⁸⁴ However, as *Shen* shows, this is not always the case. Far from “mere” symbolic statutes, the China-related bills and laws, once they enter the legal and judicial system, may have downstream effects including requiring judges to interpret them. To accurately do so, judges, too, may benefit from more China knowledge.³⁸⁵

On the side of doctrinal reform, and intersecting with epistemological fine-tuning, there are additional avenues for improvement. More accurate judicial review may be possible through a loose adaptation of the metaphor of “veil-piercing” or “alter ego” as developed in corporate law.³⁸⁶ “Piercing the corporate veil” is a court-created common law doctrine used against limited liability corporations to go after the assets of shareholders.³⁸⁷ Applying the metaphor of “veil-piercing” to the present context requires the following adjustments: first, the doctrine would be used for cases involving not only corporations but also Chinese citizens in terms of their relationship to the PRC government or the CCP. Second, the goal is not to go after shareholders’

382. I thank Kyle Jaros for this suggestion.

383. See, e.g., *Our Mission*, BRAVER ANGELS, <https://braverangels.org/our-mission/> [https://perma.cc/Y2WH-RF8Y].

384. See *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 85 (D.D.C. 2020) (discussing how the United States takes national security seriously).

385. See Clarke, *supra* note 317, 464–65 (showing that U.S. judges often mischaracterize the Chinese legal system).

386. *Automotriz del Golfo de Cal. v. Resnick*, 306 P.2d 1, 3–5 (Cal. 1957).

387. David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 372 (1981); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991).

assets, but rather to reveal the political affiliations of the target corporate or individual.

Analogous to the corporate context, China experts could help develop sets of factors that courts can consider in determining whether to “pierce” the veil of the Chinese entity or citizen.³⁸⁸ There could be different sets of factors for different types of targets, whether state-owned enterprises, private companies, or individual persons. For example, for private companies, factors include ownership and control, and identification of the ultimate beneficial owner.³⁸⁹ For individuals, a fact-based analysis would consider such factors as that individual’s reason for entering or being in the United States which may shed light on possible connections to PRC authorities.

As discussed, one issue is the methods used for equal protection doctrinal analysis when the relevant statute refers to an individual versus a corporation. Currently, by way of default, courts appear to apply strict scrutiny to statutes involving individuals and rational basis to those pertaining to corporations. However, this differential treatment is something akin to a “judicial hunch.”³⁹⁰ A more thorough-going and systematic approach to these questions would improve doctrinal analysis. Under the equal protection analysis, states would bear the burden to show a compelling governmental interest in restricting Chinese ownership of property in the way that they have done so. A more finely tuned analysis would help guarantee outcomes that do not over-generalize. One negative consequence of the “securitization” of property is that, in its over-inclusiveness, it alienates exactly the Chinese people who the United States should embrace.

Developing a doctrine to understand the relationship between a Chinese corporation and the Chinese government or the CCP presents its own challenges.³⁹¹ However, a version of an alter ego/veil-piercing

388. See Barber, *supra* note 387, at 374–75.

389. Some of the China-related bills include a rebuttable presumption that an entity is controlled by the PRC authorities. This presumption may be, on its face, discriminatory. See, e.g., H.F. 542, 90th Leg., Reg. Sess. § 7 (Iowa 2023). (“If the ultimate beneficial owner of any real property located in this state cannot be one hundred percent determined, the presumption shall be that the real property is owned by a resident of the People’s Republic of China.”).

390. Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 630 (1936).

391. There are manifold obstacles. On the corporate side, Chinese entities are well-versed in disguising their ownership structure, often more for tax reasons than for purposes of evading national security review. See, e.g., H.B. 3353, 2023 Leg., Reg. Sess. § 31-15-6d(a)(3) (W. Va. 2023) (“Through complex layering of various company legal entities interested in doing business with the State of West Virginia, a company may obfuscate the beneficiaries of the proposed commercial activity that are in fact foreign entities that have values contrary to that of the State of West Virginia.”). On the side of

doctrine could help guide judicial decisionmaking to understand when a company is a mere front for a CCP organization, for example. While, under the rational basis test, judges may defer to state statute and while that may lead to correct outcomes in some cases, Chinese corporations demonstrate a great variety of institutional diversity with different types of ownership and control running from state and CCP organs. Assessments of them as threats should be calibrated, accordingly.³⁹² At the federal level, CFIUS regulators are already doing much of this work, although their methods remain non-transparent for national security reasons. While it is resource-intensive for courts to conduct their own review of federal or state administrative decisions (for example, parties would incur costs hiring their own China experts during litigation), the excesses of the infusion of national security into property law suggest that courts may be behooved to do so.

CONCLUSION

In conducting research for this Article, one American businessperson I spoke to asked rhetorically, “Can I buy real estate in China”?³⁹³ Reciprocity, while used in the past,³⁹⁴ is likely not an option in the context of contemporary U.S.-China relations. But the question raises the underlying issue of how “open” the U.S. legal system—in this

individuals, while one can use the Chinese search engine Baidu to read many Chinese officials’ resumes that include their CCP membership, many Chinese nationals simply deactivate their membership upon entry into the United States and then reactivate it upon return to China so as to avoid confrontational interrogations with homeland security officers.

392. On varying corporate structures and their relation to the Chinese Government and CCP, see, for example, Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 667–68 (2015); Colin Hawes, *Why Is Huawei’s Ownership So Strange? A Case Study of the Chinese Corporate and Socio-Political Ecosystem*, 21 J. CORP. L. STUD. 1, 1 (2021).

393. While foreigners are not allowed to own property for investment purposes in China, they may purchase real estate for “self-use” in limited circumstances. See Zhufang chengxiang jianshe bu deng bumen guanyu tiaozheng fangdichan shichang waizi zhun ru he guanli youguan zhengce de tongzhi (住房城乡建设部等部门关于调整房地产市场外资准入和管理有关政策的通知) [Notice of the Ministry of Housing and Urban Rural Development and Other Departments on Adjusting Policies Related to the Access and Management of Foreign Investment in the Real Estate Market] (promulgated by Min. of Commerce Aug. 19, 2015, effective Aug. 19, 2015), at art 3. Most countries restrict, rather than outright ban, foreigners’ land ownership. See HODGSON, *supra* note 100.

394. *Clarke v. Allen*, 331 U.S. 503, 504 (1947) (“Section 259 of the California Probate Code as it existed in 1942, which made the right of nonresident aliens to acquire personal property dependent upon the reciprocal rights of American citizens to do so in the countries of which such aliens are inhabitants or citizens, is not unconstitutional as an invasion by the State of the field of foreign affairs reserved to the Federal Government.”).

case, the aspects governing the property market—should be, especially when the Chinese Government views the United States as an adversary, and is itself increasingly closed to foreign, including U.S., investment. This Article suggests that while restrictions on noncitizens' property ownership are not inherently bad, they must be fair and reasonable within the constraints of the U.S. Constitution.

There is no question that Chinese agents are responsible for spying, intellectual property theft, and influence efforts. Such behavior likely extends to theft of data-as-property, although, to date, there is little concrete evidence of Chinese tech companies transferring private data to PRC authorities. So much of what transpires in the U.S.-China relationship is shrouded in national security non-transparency on both sides that it is difficult for constituencies to know which governmental acts are based on verifiable evidence. The informed publics are anything but. At the federal level, the problem of “unchecked secrecy”³⁹⁵ meets, at the state level, capacity constraints, and both are justified by the meta-justification of “national security.” Certainly, states have the right to protect their critical infrastructures, military installations, and citizens' data; however, these protections need to be carried out in a sufficiently tailored way. State statutes which are over-inclusive, vague, and discriminatory do no service to American democracy and its image in the world.

So, how “open” does the United States want to be in terms of its property law? One could argue that U.S. property law has always been more “open” in its representation of itself, for example, to developing countries abroad who are seeking to reform their property regimes, than the United States is in practice.³⁹⁶ As the review of U.S. property law's structural biases shows,³⁹⁷ the history of U.S. property law is one of partial enclosures and race-based exclusions. At present, the United States faces national security threats in the form of cyber-attacks, espionage, surveillance, and censorship, among other real-world threats from China and other states.³⁹⁸ Yet, balancing the national security urge, legislators, judges, and policymakers need to develop a more granular assessment of perceived risks to the U.S. legal, political, and economic systems, one informed by China expertise and not by nativist zeal.

395. HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 2 (2015).

396. See FRANK K. UPHAM, THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES ix–x (2018). See also David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCT. ECON. & L. 1, 2–3 (2011).

397. See *supra* Section II.B.

398. See sources cited *supra* note 150.

Otherwise, the United States faces the possibility of prioritizing national security over other concerns—precisely what the CCP has done.

APPENDIX

State	Name of Bill (see both bill and law-if enacted-in text)	Category	Summary of Effect(s) on Chinese Nationals and/or Government	Important/Latest Actions and Status of Bill (as of Aug. 28, 2023)
Alabama	H.B. 379 ³⁹⁹	Real property	Prohibit ownership of real property by Chinese governmental entities	Enrolled May 30, 2023
Arizona	S.B. 1112 ⁴⁰⁰	Real property	“	Returned to committee
Arizona	H.B. 2376 ⁴⁰¹	Real property	Prohibit ownership or lease of state lands by Chinese governmental entities	Returned to committee
Florida	S.B. 264 ⁴⁰²	Real property	Prohibit purchase of agricultural land by covered Chinese persons	Enrolled May 8, 2023
Hawai‘i	H.B. 929 ⁴⁰³	Real property	Prohibit ownership of real property by Chinese citizens or entities within two miles of federal land	Returned to committee
Hawai‘i	H.B. 505 ⁴⁰⁴	Real property	Prohibit transfer of real estate to members of the CCP	Returned to committee

399. H.B. 379, 2023 Leg., Reg. Sess. (Ala. 2023).

400. S.B. 1112, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

401. H.B. 2376, 56th Leg., 1st Reg. Sess. (Ariz. 2023).

402. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

403. H.B. 929, 32d Leg., Reg. Sess. (Haw. 2023).

404. H.B. 505, 32d Leg., Reg. Sess. (Haw. 2023).

Indiana	S.B. 477 ⁴⁰⁵	Real property	Prohibit ownership or lease by Chinese citizens of real property adjacent to military installations	Enrolled May 1, 2023
Iowa	H.F. 542 ⁴⁰⁶	Real property	Prohibit ownership of real property by Chinese citizens or entities	Returned to committee, recessed
Iowa	H.F. 211 ⁴⁰⁷	Real property	“	Returned to committee, recessed
Kansas	H.B. 2397 ⁴⁰⁸	Real property	Prohibit conveyance of certain real property to Chinese citizens or foreign adversaries	Returned to committee
Kansas	S.B. 283 ⁴⁰⁹	Real property	“	Returned to committee
Kansas	H.B. 2069 ⁴¹⁰	Real property	“	engrossed
Louisiana	H.B. 537 ⁴¹¹	Real property	Prohibit conveyance of certain real property to Chinese governmental entities or foreign adversaries	Enrolled June 27, 2023

405. S.B. 477, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023).

406. H.F. 542, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).

407. H.F. 211, 90th Gen. Assemb., Reg. Sess. (Iowa 2023).

408. H.B. 2397, 2023 Leg., Reg. Sess. (Kan. 2023).

409. S.B. 283, 2023 Leg., Reg. Sess. (Kan. 2023).

410. S.B. 2069, 2023 Leg., Reg. Sess. (Kan. 2023).

411. H.B. 537, 2023 Leg., Reg. Sess. (2023); LA. STAT. ANN. § 9:2717.1 (2023).

Louisiana	S.B. 91 ⁴¹²	Real property	Prohibit conveyance of certain real property to Chinese citizens or entities	engrossed
Maryland	H.B. 968 ⁴¹³	Real property	Prohibit transfer of agricultural land to non-resident Chinese citizens or entities	Returned to committee
Missouri	H.B. 903 ⁴¹⁴	Real property	“	Engrossed
Missouri	S.B. 649 ⁴¹⁵	Real property	Prohibit ownership of real property by Chinese governmental entities or foreign adversaries	Returned to committee
Montana	S.B. 203 ⁴¹⁶	Real property	Prohibit acquisition of agricultural land or critical infrastructure by Chinese governmental entities or foreign adversaries	Enrolled May 4, 2023; effective October 1, 2023
New York	S.B. 6583 ⁴¹⁷	Real property	Prohibit acquisition of agricultural land by Chinese governmental entities and foreign adversaries	Returned to committee

412. S.B. 91, 2023 Leg., Reg. Sess. (La. 2023).

413. H.B. 968, 2023 Leg., Reg. Sess. (Md. 2023).

414. H.B. 903, 102d Gen. Assemb., Reg. Sess. (Mo. 2023).

415. S.B. 649, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023).

416. S.B. 203, 68th Leg., Reg. Sess. (Mont. 2023); MONT. CODE ANN. § 35-30-103 (2023).

417. S.B. 6583, 2023 Leg., Reg. Sess. (N.Y. 2023).

New York	A.B. 06444 ⁴¹⁸	Real property	“	Returned to committee
North Dakota	S.B. 2371 ⁴¹⁹	Real property	Prohibit ownership of real property by Chinese entities or foreign adversaries	Enrolled April 29, 2023
Ohio	H.B. 212 ⁴²⁰	Real property	“	Returned to committee
Oklahoma	S.B. 955 ⁴²¹	Real property	Prohibit ownership of real property by any member of the CCP or present/former Chinese officials	Returned to committee
South Carolina	H. 3566 ⁴²²	Real property	Prohibit ownership of more than 100 acres of land by Chinese entities	Returned to committee, recessed
South Carolina	H. 3118 ⁴²³	Real property	Prohibit possession by Chinese entities of real property within fifty miles of military bases	Returned to committee, recessed
South Carolina	S. 576 ⁴²⁴	Real property	Prohibit possession of real property by Chinese foreign adversaries	Returned to committee, recessed

418. A.B. 6444, 2023 Leg., Reg. Sess. (N.Y. 2023).

419. S.B. 2371, 68th Leg. Assemb., Reg. Sess. (N.D. 2023).

420. H.B. 212, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

421. S.B. 955, 59th Leg., 1st Reg. Sess. (Okla. 2023).

422. H.B. 3566, Gen. Assemb., 125th Sess. (S.C. 2023).

423. H.B. 3118, Gen. Assemb., 125th Sess. (S.C. 2023).

424. S.B. 576, Gen. Assemb., 125th Sess. (S.C. 2023).

Texas	S.B. 147 ⁴²⁵	Real property	Prohibit ownership of real property by Chinese entities or citizens	Returned to committee, recessed
Texas	S.B. 552 ⁴²⁶	Real property	Prohibit transactions in agricultural land by Chinese-owned companies	Returned to committee, recessed
Utah	H.B. 186 ⁴²⁷	Real property	Prohibit restricted Chinese entities from acquiring interests in land; requiring the alienation of those entities' existing interests in land	Enrolled March 13, 2023
Virginia	S.B. 1438 ⁴²⁸	Real property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	Enrolled April 12, 2023
Virginia	H.B. 2325 ⁴²⁹	Real property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	Enrolled April 12, 2023
Washington	S.B. 5754 ⁴³⁰	Real property	Prohibit Chinese non-resident aliens, businesses, or governmental entities from acquiring any interest in agricultural,	Returned to committee

425. S.B. 147, 88th Leg., Reg. Sess. (Tex. 2023).

426. S.B. 552, 88th Leg., Reg. Sess. (Tex. 2023).

427. H.B. 186, 2023 Gen. Sess. (Utah 2023); UTAH CODE ANN. §§ 63L-13-201 to -202 (West 2023).

428. S.B. 1438, Gen. Assemb., Reg. Sess. (Va. 2023).

429. H.B. 2325, Gen. Assemb., Reg. Sess. (Va. 2023).

430. S.B. 5754, 68th Leg., Reg. Sess. (Wash. 2023).

			forest, or mineral land	
Wisconsin	S.B. 264 ⁴³¹	Real property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	Returned to committee
Wisconsin	A.B. 269 ⁴³²	Real property	“	Returned to committee
Alaska	H.B. 94 ⁴³³	Prohibited transactions	Prohibit exports to China by state governmental agencies; prohibit docking of Chinese ships in state ports; ban use of TikTok on state or municipal agency assets	Returned to committee
Arizona	H.B. 2488 ⁴³⁴	Prohibited transactions	Bans Chinese company from contracting with public entities unless said company certifies that it does not use Uyghur labor	Enrolled June 22, 2023
California	A.B. 227 ⁴³⁵	Prohibited transactions	Prohibit installation of Chinese social media platforms on state-owned or state-issued electronic devices	Returned to committee

431. S.B. 264, 2023–24 Leg., Reg. Sess. (Wis. 2023).

432. A.B. 269, 2023–24 Leg., Reg. Sess. (Wis. 2023).

433. H.B. 94, 33d Leg., 1st Reg. Sess. (Alaska 2023).

434. H.B. 2488, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

435. A.B. 227, 2023–24 Leg., Reg. Sess. (Cal. 2023).

Florida	FLA STAT. § 288.860 ⁴³⁶	Prohibited transactions	Prohibit certain local government units from participating in agreement with or accepting grant from Chinese entity	Enrolled 2021; latest effective 2023
Florida	S.B. 264 ⁴³⁷	Prohibited transactions	Prohibit government entities from contracting with Chinese entities	Enrolled May 9, 2023
Florida	S.B. 846 ⁴³⁸	Prohibited transactions	Prohibit state universities from accepting grants from or participating in agreements with Chinese higher education institution	Enrolled May 9, 2023
Georgia	S.B. 93 ⁴³⁹	Prohibited transactions	Prohibit use of Chinese social media platforms on state equipment or by state employees	Enrolled May 2, 2023
Georgia	GA. CODE ANN. § 50-5-84.1 ⁴⁴⁰	Prohibited transactions	Prohibit state contracts with companies owned by the government of China	Amended May 5, 2023
Hawai'i	H.B. 1200 ⁴⁴¹	Prohibited transactions	Prohibit Department of Land and Natural Resources from purchasing, operating, or otherwise acquiring or using Chinese drones	Enrolled July 6, 2023

436. FLA. STAT. § 288.860 (2023).

437. S.B. 264, 2023 Leg., Reg. Sess. (Fla. 2023).

438. S.B. 846, 2023 Leg., Reg. Sess. (Fla. 2023).

439. S.B. 93, Gen. Assemb., Reg. Sess. (Ga. 2023).

440. GA. CODE ANN. § 50-5-84.2 (2023).

441. H.B. 1200, 32d Leg., Reg. Sess. (Haw. 2023).

Hawai'i	H.B. 460 ⁴⁴²	Prohibited transactions	Prohibit the downloading or use of TikTok on government-issued devices or on government internet networks	Returned to committee
Idaho	H.B. 294 ⁴⁴³	Prohibited transactions	Prohibit a public entity from entering into services, supplies, information technology, or construction contracts with companies owned or operated by the government of China	Enrolled April 6, 2023
Idaho	H.B. 274 ⁴⁴⁴	Prohibited transactions	Prohibit state employees from using TikTok on a state-issued device	Enrolled March 24, 2023
Illinois	H.B. 2984 ⁴⁴⁵	Prohibited transactions	Prohibit the investment of state moneys and public funds in certain investments or institutions tied to the Chinese Communist Party or the People's Republic of China	Returned to committee
Illinois	H.B. 3581 ⁴⁴⁶	Prohibited transactions	Prohibit governmental entity from entering into a contract or other agreement relating to critical infrastructure in	Returned to committee

442. H.B. 460, 32d Leg., Reg. Sess. (Haw. 2023).

443. H.B. 294, 67th Leg., 1st Reg. Sess. (Idaho 2023).

444. H.B. 274, 67th Leg., 1st Reg. Sess. (Idaho 2023).

445. H.B. 2984, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

446. H.B. 3581, 103d Gen. Assemb., Reg. Sess. (Ill. 2023).

			the state with a company associated with China	
Indiana	S.B. 477 ⁴⁴⁷	Prohibited transactions	“	Enrolled May 1, 2023
Iowa	H.F. 181 ⁴⁴⁸	Prohibited transactions	Prohibit state board of regents from investing public moneys in companies that are owned or controlled by Chinese military or government services	Returned to committee, recessed
Kentucky	S.B. 20 ⁴⁴⁹	Prohibited transactions	Prohibit the use or download of TikTok on any state government network or any state government-issued device	Enrolled March 22, 2023
Louisiana	LA. STAT. ANN. § 38:2212.3 ⁴⁵⁰	Prohibited transactions	Allow any public entity is authorized to reject the lowest bid if received from a bidder domiciled in a communist country, including China	Enrolled 1985; latest effective 1999
Louisiana	LA. STAT. ANN. § 48:252 ⁴⁵¹	Prohibited transactions	Allow public entity to reject the lowest bid if received from a bidder domiciled in communist country and may prohibit the use or incorporation on department	Enrolled 2003; latest effective 2021

447. S.B. 477, 123d Gen. Assemb., 1st Reg. Sess. (Ind. 2023).

448. H.F. 181, 90th Gen. Assemb., Reg Sess. (Iowa 2023).

449. S.B. 20, Gen. Assemb., Reg. Sess. (Ky. 2023).

450. LA. STAT. ANN. § 38:2212.3 (2023).

451. LA. STAT. ANN. § 48:252 (2021).

			projects of materials or supplies manufactured in a communist country, including China	
Louisiana	LA. STAT. ANN. § 39:1602 ⁴⁵²	Prohibited transactions	Authorize public entity to reject lowest bid in supply contracts if lowest bidder is domiciled or manufactures its supplies in communist country, including China	Enrolled 1985; latest effective 2015
Louisiana	LA. STAT. ANN. § 33:4789 ⁴⁵³	Prohibited transactions	Authorize certain local units to adopt ordinances to prohibit the sale of products produced in any communist country, including China	Enrolled 1963; latest effective 2023
Louisiana	LA. STAT. ANN. § 51:3053 ⁴⁵⁴	Prohibited transactions	Prohibit governmental entity from entering into certain contracts relating to critical infrastructure with companies majority-owned by Chinese citizens or domiciled in China	Enrolled 2022
Maine	S.B. 877 ⁴⁵⁵	Prohibited transactions	Prohibit company owned or operated by the PRC from bidding on contract with any	Returned to committee

452. LA. STAT. ANN. § 39:602 (2015).

453. LA. STAT. ANN. § 33:4789 (2023).

454. LA. STAT. ANN. § 51:3053 (2023).

455. S.B. 877, 131st Leg., 1st Reg. Sess. (Me. 2023).

			entity that receives state funding	
Maryland	H.B. 1141 ⁴⁵⁶	Prohibited transactions	Prohibit the downloading or use of TikTok on government-issued devices or on government internet networks	Returned to committee
Massachusetts	H. 84 ⁴⁵⁷	Prohibited transactions	Prohibit state-funded entities from purchase or use of any electronic or cyber security equipment or component parts produced by entities based in China	Returned to committee
Massachusetts	S. 37 ⁴⁵⁸	Prohibited transactions	Prohibit state employees from downloading Bytedance apps	Returned to committee
Massachusetts	H. 82 ⁴⁵⁹	Prohibited transactions	Prohibit download or use of Chinese applications on any state-issued electronic device	Returned to committee
Michigan	H.B. 5073 ⁴⁶⁰	Personal property	Prohibit land sales to certain foreign entities	Returned to committee
Michigan	H.B. 4041 ⁴⁶¹	Prohibited transactions	Prohibit use of TikTok on state-owned devices	Returned to committee

456. H.B. 1141, Gen. Assemb., Reg. Sess. (Md. 2023).

457. H.B. 84, 193d Gen. Ct. (Mass. 2023).

458. S.B. 37, 193d Gen. Ct. (Mass. 2023).

459. H.B. 82, 193d Gen. Ct. (Mass. 2023).

460. H.B. 5073, 102d Leg., Reg. Sess. (Mich. 2023).

461. H.B. 4041, 102d Leg., Reg. Sess. (Mich. 2023).

Michigan	S.B. 0015 ⁴⁶²	Prohibited transactions	“	Returned to committee
Mississippi	H.B. 2853 ⁴⁶³	Prohibited transactions	Prohibit state agencies from purchasing or operating drones made of parts from China	Enrolled April 12, 2023
Mississippi	S.B. 2140 ⁴⁶⁴	Prohibited transactions	Prohibit state employee from downloading or using TikTok on a state-issued device or network	Enrolled April 11, 2023
Missouri	H.B. 919 ⁴⁶⁵	Prohibited transactions	Prohibit state employee from using on state device any social media application that is owned, in whole or in part, by the Chinese government or any company that shares its user’s data with the Chinese Communist Party	Engrossed
Montana	S.B. 419 ⁴⁶⁶	Prohibited transactions	Ban TikTok from operating within territorial jurisdiction of Montana	Enrolled May 17, 2023
Nevada	S.B. 11 ⁴⁶⁷	Prohibited transactions	Prohibit state agencies from purchasing drones made in China	Enrolled April 11, 2023

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462. S.B. 15, 102d Leg., Reg. Sess. (Mich. 2023).
 463. S.B. 2853, 2023 Leg., Reg. Sess. (Miss. 2023).
 464. S.B. 2140, 2023 Leg., Reg. Sess. (Miss. 2023).
 465. H.B. 919, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023).
 466. S.B. 419, 68th Leg., Reg. Sess. (Mont. 2023).
 467. S.B. 11, 82d Sess. (Nev. 2023).

New Hampshire	H.B. 86 ⁴⁶⁸	Prohibited transactions	Prohibit state contracts with Chinese government owned or affiliated technology manufacturers	Returned to committee
New Jersey	A. 5080 ⁴⁶⁹	Prohibited transactions	Prohibit download or use of TikTok on any State-issued electronic device	Returned to committee
New Jersey	S. 3462 ⁴⁷⁰	Prohibited transactions	“	Returned to committee
New Jersey	S. 3710 ⁴⁷¹	Prohibited transactions	Prohibit Chinese companies from construction, maintenance, or control of critical infrastructure	Returned to committee
Ohio	H.B. 17 ⁴⁷²	Prohibited transactions	Prohibit download or use of Chinese applications on any state-issued electronic device	Returned to committee
Ohio	H.B. 33 ⁴⁷³	Prohibited transactions	“	Enrolled July 4, 2023
Oklahoma	S.B. 43 ⁴⁷⁴	Prohibited transactions	Prohibit state agency or political subdivision from purchasing any goods or services from or entering into contracts with a company owned or	Returned to committee

468. H.B. 86, 2023 Sess. (N.H. 2023).

469. A.B. 5080, 220th Leg., Reg. Sess. (N.J. 2023).

470. S.B. 3462, 220th Leg., Reg. Sess. (N.J. 2023).

471. S.B. 3710, 220th Leg., Reg. Sess. (N.J. 2023).

472. H.B. 17, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

473. H.B. 33, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

474. S.B. 43, 59th Leg., 1st Sess. (Okla. 2023).

			operated by the Government of China	
South Carolina	H.B. 3509 ⁴⁷⁵	Prohibited transactions	Prohibit local government units from investing in any Chinese company or development	Returned to committee, recessed
South Carolina	S.B. 163 ⁴⁷⁶	Prohibited transactions	Prohibit award of incentive or development grant to companies majority-owned by PRC or CCP	Returned to committee, recessed
South Carolina	H.B. 3510 ⁴⁷⁷	Prohibited transactions	“	Returned to committee, recessed
South Carolina	H.B. 3119 ⁴⁷⁸	Prohibited transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	Returned to committee, recessed
South Dakota	S.B. 189 ⁴⁷⁹	Prohibited transactions	Prohibit purchasing agencies from contracting with companies owned or controlled by Chinese government	Enrolled March 27, 2023
Tennessee	S.B. 834 ⁴⁸⁰	Prohibited transactions	Prohibit public postsecondary institution from allowing an individual to access a social media platform using the institution’s	Enrolled April 13, 2023

475. H. 3509, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

476. S. 163, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

477. H. 3510, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

478. H. 3119, 125th Gen. Assemb., Reg. Sess. (S.C. 2023).

479. S.B. 189, 98th Leg., Reg. Sess. (N.D. 2023).

480. S.B. 834, 113th Gen. Assemb. (Tenn. 2023).

			network if the platform is operated or hosted by a company based in China	
Tennessee	H.B. 1445 ⁴⁸¹	Prohibited transactions	Prohibit public postsecondary institution from allowing an individual to access a social media platform using the institution's network if the platform is operated or hosted by a company based in China	Enrolled April 13, 2023
Texas	TEX. BUS. & COM. CODE ANN. § 113.002 ⁴⁸²	Prohibited transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	Enrolled 2021
Texas	TEX. GOV'T CODE ANN. § 2274.010 ⁴⁸³	Prohibited transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	Enrolled 2021
Texas	S.B. 1260 ⁴⁸⁴	Prohibited transactions	Prohibit certain entities operating airports from entering into certain contracts with Chinese entities misappropriating intellectual property under U.S. law	Enrolled May 23, 2023

481. H.B. 1445, 113th Gen. Assemb. (Tenn. 2023).

482. TEX. BUS. & COM. CODE ANN. § 113.002 (West 2022).

483. TEX. GOV'T CODE ANN. § 2274.0102 (West 2022).

484. S.B. 1260, 88th Leg., Reg. Sess. (Tex. 2023).

Texas	S.B. 1893 ⁴⁸⁵	Prohibited transactions	Prohibit state employees from downloading Bytedance apps	Enrolled June 14, 2023
Virginia	S.B. 1459 ⁴⁸⁶	Prohibited transactions	“	Enrolled April 12, 2023
Montana	S.B. 351 ⁴⁸⁷	Personal property	Prohibit storage of residents’ genetic data and biometric samples in China	Enrolled June 7, 2023
Ohio	S.B. 83 ⁴⁸⁸	Personal property	Prohibit state institution of higher education from accepting gifts or contributions from the PRC or anyone acting on its behalf	Returned to committee
Ohio	H.B. 151 ⁴⁸⁹	Personal property	“	Returned to committee
Texas	S.B. 1040 ⁴⁹⁰	Personal property	Prohibit insurance coverage of organ transplant in China or of transplant involving organs of Chinese origin	Enrolled June 18, 2023

485. S.B. 1893, 88th Leg., Reg. Sess. (Tex. 2023).

486. S.B. 1459, Gen. Assemb., 2023 Sess. (Va. 2023).

487. S.B. 351, 68th Leg., Reg. Sess. (Mont. 2023).

488. S.B. 83, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

489. H.B. 151, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

490. S.B. 1040, 88th Leg., Reg. Sess. (Tex. 2023).

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