

# PROPERTY AS NATIONAL SECURITY

Matthew S. Erie\*

*Draft. Please do not cite or forward without author's permission.*

## ABSTRACT

Two historically disparate fields of law—property and national security—are colliding and they are doing so through the hyper-activity of state governments. Against the backdrop of the U.S.-China trade/tech war, state governors and legislatures try to out-compete each other in introducing China-related 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 farther than federal efforts. State are laboratories of China-delinking. The China-related bills and laws which have been passed to date address a wide range of subjects from TikTok to Confucius Institutes to forced labor in Xinjiang. National security is often the justification for these bills and laws. However, these state bills and laws raise a host of questions for foreign affairs federalism as well as substantive and procedural constitutional protections. These issues have galvanized litigation that is, as of the time of this writing, working its way through the federal court system.

This Article is the first to analyze these bills and laws, specifically by focusing on those regulating property broadly conceived, including, land, but also corporate interests, and data, arguing that while there are national security threats posed by Chinese actors in the United States, the “securitization” of property law often goes too far, violates the Constitution, and shows U.S. property law trending towards illiberalism. I define “securitization” as the conversion of property into an asset that is, one, sacred to the nation-state, two, perceived to be under threat, and,

---

\* Associate Professor, University of Oxford. This work is part of the “China, Law and Development” (CLD) project, funded by the European Research Council under the European Union's Horizon 2020 research and innovation program (Grant No. 803763). An earlier draft of this Article benefited from a presentation at the “Rule of Law” Roundtable at Stanford Law School on May 25, 2023. I thank Diego Zambrano, Kim Lane Scheppele, Mark Jia, Intisar Rabb, Mila Versteeg, Adam Chilton, and Yvonne Tew for their comments. I thank Lara Manbeck for outstanding research assistance. All errors are my own.

three, requiring legal or regulatory protection. States have become laboratories for “securitization” because of traditional state rights to regulate real property within their jurisdiction. Yet the state bills and laws affect immigration and other foreign affairs matters with China, thus opening the door to federal pre-emption.

An analysis of a bespoke set of 150 state bills and laws regulating property rights shows that many of these bills are unconstitutional, for example, those pertaining to real estate fail on grounds of equal protection, due process, and the supremacy clause, as well as violate the Fair Housing Act. Some statutes are over-generalizing by equating Chinese citizens with the Chinese Communist Party (CCP). Hence, the property-related bills demonstrate some of the shortcomings of state governments in regulating their relationship with China.

This Article finds that the root of these issues 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 “securitization.” Correcting these issues likewise requires, firstly, an approach that brings state concerns into conversation with expert China knowledge. Secondly, states could be doctrinal innovators in developing methods to assess the level of risk posed by Chinese corporations.

This Article is organized as the following: Part I sets the stage in terms of 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 linked 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 “securitization” of property to explain the state’s response to the perceived problem. Part III is a deep dive into the state bills and laws. Part IV provides a doctrinal analysis of the legal problems pursuant to the China-related bills, including constitutional and legislative concerns, through the case of *Shen v. Simpson*, on appeal in the Eleventh Circuit. Part V suggests correctives to the current situation, and a conclusion follows.

Word Count: 25,673

## Contents

ABSTRACT .....	1
INTRODUCTION .....	4
I. U.S. STATES AND CHINA.....	8
A. <i>The Rise of Subnational Actors</i> .....	8
B. <i>Constitutional Framework</i> .....	10
C. <i>Whither Paradiplomacy</i> .....	11
II. “SECURITIZATION” OF PROPERTY LAW .....	14
A. <i>National Security Regnant</i> .....	14
B. <i>Aliens and Property</i> .....	21
III. RECENT CHINA-RELATED LEGISLATION AND REGULATION.....	24
A. <i>The China Threat to the U.S. Heartland</i> .....	24
B. <i>State Legislative Responses</i> .....	28
1. Categories of law .....	28
2. Explanations for harmonization.....	34
C. <i>Federal China-related Legislation and Regulation</i> .....	38
IV. CONSTITUTIONALITY AND LEGALITY .....	40
A. <i>Equal Protection Clause</i> .....	44
B. <i>Due Process Clause</i> .....	47
C. <i>Federal Preemption</i> .....	48
D. <i>Fair Housing Act</i> .....	50
E. <i>Broader Implications of Shen</i> .....	51
V. REFORMS .....	54
CONCLUSION .....	57

## INTRODUCTION

In May 2023, a group of five petitioners brought a lawsuit against officials in Florida, arguing that a state statute that prohibits Chinese from purchasing real estate in Florida is discriminatory and violates the Constitution and federal law.<sup>1</sup> The state law, which identifies the Chinese Government, the Chinese Communist Party (CCP), Chinese entities, and Chinese individuals, was championed by Governor Ron DeSantis who has been attracting national attention while campaigning for the Republican nomination for President in the 2024 election.<sup>2</sup> During a press release in advance of his signing the bill and two others into law, Gov. DeSantis stated, “Florida is taking action to stand against the United States’ greatest geopolitical threat—the Chinese Communist Party.”<sup>3</sup> The Florida law is one of over one hundred across the country that specifically identify Chinese parties, banning them from property ownership in that state. Supported by the American Civil Liberties Union (ACLU) and a Chinese law firm among other members of the legal team, the petitioners are Chinese citizens who reside in Florida, including one who was persecuted by the Chinese Government and fled to the United States for asylum, and one Florida-based real estate company, representing a large number of such immigrants in Florida and who contribute to the state economy and society in myriad ways.

Against the backdrop of the U.S.-China trade/tech war that has seen the world’s two largest economies locked in a contest with no clear end in sight and rising anti-Asian sentiment within the United States, the stakes of the lawsuit, *Yifan Shen et al. v. Wilton Simpson et al.* (herein, after “*Shen v. Simpson*”), could not be higher.<sup>4</sup> Historically, whether U.S.

---

<sup>1</sup> See *infra* §III(D).

<sup>2</sup> *Id.*

<sup>3</sup> Governor Ron DeSantis, *Governor Ron DeSantis Cracks Down on Communist China* (May 8, 2023), <https://tinyurl.com/5n99kav8>.

<sup>4</sup> *Yifan Shen et al. v. Wilton Simpson et al.* (N.D. Fla. 2023) (4:23-cv-208-AW-MAF). On the U.S.-China trade war, see UNITED STATES TRADE REPRESENTATIVE, 2022 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 2 (2023), <https://tinyurl.com/5n86bdmc> (“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) [PRC Min. Commerce] “Meiguo Lüxing shimao zuzhi guize yiwu qingkuang baogao 55 (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] (Aug. 11, 2023), <https://tinyurl.com/yzjxzwex> (“The hegemonic position of the United States ... forces other countries or regions to comply with U.S. intellectual property standards, which in turn further consolidates the US’s dominance in the field of intellectual property and trade and investment”). On the statistics on anti-Asian hate-crime in the United States, see Kimmy Yan, *Anti-Asian hate*

authorities mistreat aliens domestically has had the potential to exacerbate the U.S.'s relations with that home state during times of inter-state tension and conflict.<sup>5</sup> All eyes, including those of other U.S. state executives and legislatures, are on the outcome of the case which is pending as of the time of this writing. *Shen* could become a tie-breaker for the rest of the country: a decision for the plaintiffs finding that the Florida law is unconstitutional could have the effect of chilling other states' statutes that similarly prohibit Chinese from acquiring property in their state, or a finding for the State of Florida could embolden those states to enact more legislation limiting the ability of Chinese to participate in propertied transactions.

This Article is the first to examine the role of states as laboratories of China de-linking, that is, in many respects, states are the engines for legal and regulatory innovation that limits economic, diplomatic, educational, and cultural ties with the People's Republic of China (PRC or China). It does so through a unique perspective: the intersection of two historically disparate fields of law—property and national security—that are becoming increasingly alloyed in the context of the U.S.-China relationship. States are experimenting with legal and regulatory methods to sever their China links, and, to do 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 that may see advantages to blocking Chinese competitors, as well as the federal government which is also formulating its China policy in real time. All of these may influence states and, in turn, states and district courts become crucibles to stress-test legal and regulatory designs. One result of these experiments is what I call the “securitization” of property, that is the conversion of property into assets that are sacred to the nation-state, perceived to be under threat, and in need of legal and regulatory protection.<sup>6</sup>

Based on a unique dataset of 150 China-related state bills and laws that regulate some aspect of property, broadly construed, including real property, corporate interests, and data, I find that there are a number of constitutional and statutory roadblocks to some of the recent state laws. The crux of the issue is that while state legislatures rely on

---

*crimes increased 339 percent nationwide last year, report says*, NBC NEWS (Jan. 31, 2022), <https://tinyurl.com/3y6fat78> (comparing the 2021 and 2022 statistics as reported by the Center for the Study of Hate and Extremism).

<sup>5</sup> See *e.g.*, *Oyama v. California*, 332 U.S. 633, 653 (1948) (recounting how numerous discriminatory acts towards Japanese in the United States outraged the Japanese Government).

<sup>6</sup> See *infra* text accompanying note 47.

Tenth Amendment states' rights to regulate property, they do so in a way that touches on foreign affairs, immigration, and other domains conventionally the purview of the federal government under both Article I and implied Constitutional powers. My main argument is that the causes for problems attendant to the "securitization" of property are two-fold: epistemological, that is, who is making national security claims, and, structural or doctrinal, including steroidal states' rights and exclusionary uses of property law.

This Article makes the following contributions. First, it provides an extended case study of how state governments respond to pressures (and opportunities) during times of economic and political tension with foreign states, often through pro-active "subnational" engagement.<sup>7</sup> 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."

Second, this Article adds to a budding literature that examines how the U.S. and PRC legal systems are interacting and influencing each other, despite overall economic disassociation.<sup>8</sup> As someone who has practiced law in both China and in the United States and researches property law in both jurisdictions, my interest is in thinking comparatively about property. It is not the case that the Chinese Government or the CCP is intentionally trying to change U.S. property law through, for example, legal transplants or regulatory competition. Instead, it is the perception of China as a threat to the U.S. property

---

<sup>7</sup> See *infra* Part I(A).

<sup>8</sup> For work examining the role of Chinese in contributing to the genesis of immigration law in the United States, see 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 (Sucheng Chan ed., 1991). For more recent scholarship examining the legal interaction during the trade war, see Mark Jia, *American Law in the New Global Conflict*, N.Y.U. L. REV. (forthcoming); Ge Chen, *The "Constitutional" Rise of Chinese Speech Imperialism*, 2 J. FREE SPEECH L. 483, 483 (2023); Ryan Mitchell Martinez, *China's New Sanctions Regime and the Problem of Mimetic Unilateralism* (paper on file with the author); Cai Congyan, *Enforcing a New National Security? China's National Security Law and International Law*, 65 J. E. ASIA & INT'L L. 65, 65 (2017), 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, 731 (2023).

market and to the liberal values that market allegedly supports, namely, individualism, human flourishing, competitive principles, and so on, and the states' response to that perceived threat that is the focus. 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).

Third, the Article makes a theoretical contribution to the study of how property law intersects with national security. National security is quickly becoming a *grundnorm* in this period of geoeconomic rivalry. National security has influenced many areas of law, and this Article analyzes what it means for national security to shape property law, understood broadly, including law regulating land, corporate interests, and data. I argue this happens through the "securitization" of property law.<sup>9</sup> A theoretical account of the "securitization" of property is possible particularly in the context of U.S. state' 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. Hence the constitutionality of the state laws within the federal system is a question with not only theoretical and academic but also practical and policy-relevant value.

The remainder of this Article is structured as follows: Part I sets the stage in terms of 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 has become economically linked 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 "securitization" of property to explain the state's response to the perceived problem. Part III offers an overview of the recent China-related bills and laws. Part IV provides a doctrinal analysis of the legal problems pursuant to the China-related bills, including constitutional and legislative concerns. Part V suggests correctives to the current situation which include both building better institutional channels for China experts to engage with state officials and vice versa, and also creating a doctrine that would allow judicial review of state regulation and administrative decisions about the proximity between Chinese parties and the CCP.

---

<sup>9</sup> See *infra* Part 2.

## 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.<sup>10</sup> While the relationship has historically been “exceptionally consequential but also extremely complex,”<sup>11</sup> since the U.S.-China trade war started in 2017, the relationship has been on a crash course to nowhere, a prolonged prisoner’s dilemma with no clear end-game. 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, FDI volume, and history of Chinese in-migration, to name a few factors that differentiate them. For instance, as of 2020, California had the largest trade deficit with China of some \$144.8 billion.<sup>12</sup> Yet its outgoing FDI was \$18.28 billion more than incoming Chinese FDI.<sup>13</sup> 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.<sup>14</sup> Texas sells oil and gas to China whereas Connecticut sells aerospace products and parts.<sup>15</sup> As one factor shaping 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.<sup>16</sup> Because of these different profiles, state

---

<sup>10</sup> The Biden Administration has consistently taken this position. See e.g., Antony J. Blinken, Secretary of State, *A Foreign Policy for the American People* (Mar. 3, 2021), <https://tinyurl.com/mrxhdt6p> (calling the U.S.-China relationship, “the biggest geopolitical test of the 21st century”). This sentiment echoes a statement he made over a decade earlier while Vice President. See The White House Office of the Vice President, *Remarks by Vice President Joe Biden to the Opening Session of the U.S.-China Strategic & Economic Dialogue* (May 9, 2011), <https://tinyurl.com/2p8hwffj> (“It’s no exaggeration to say that our relationship and how we manage it will help shape the 21st century.”)

<sup>11</sup> Comments by Ambassador Daniel J. Kritenbrink, Assistant Secretary of State for the Bureau of East Asian and Public Affairs, *U.S.-China Relations FPC Briefing* (Feb. 22, 2023), <https://tinyurl.com/dkvcskrb>.

<sup>12</sup> USA Facts, *How a U.S.-China trade war might impact individual states*, (Oct. 15, 2020) <https://tinyurl.com/2ktpmupv>.

<sup>13</sup> The U.S.-China Investment Hub, <https://www.us-china-investment.org/fdi-data> (last accessed Aug. 24, 2023).

<sup>14</sup> See *supra* note 12 and *supra* note 13.

<sup>15</sup> THE U.S.-CHINA BUSINESS COUNCIL, *US EXPORTS TO CHINA 6-7* (2023), [https://www.uschina.org/sites/default/files/us\\_exports\\_to\\_china\\_2023\\_0.pdf](https://www.uschina.org/sites/default/files/us_exports_to_china_2023_0.pdf).

<sup>16</sup> Migration Policy Institute, *U.S. Immigrant Population by Metropolitan Area*, <https://tinyurl.com/2uky8443> (last accessed Aug. 24, 2023).



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 spill-over effects shaping the United States' relationship with China. Illustrating in snapshot the different relationships between the U.S. states and the PRC, the graph shows five states with five different trade profiles with China.

[Insert graph here]

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, a period during which there was considerable strain between Washington and Beijing, officials and investors in California and New York were actively seeking out investment opportunities in China.<sup>17</sup> Likewise, in 2011, Texas Governor Rick Perry lauded Huawei for its “really strong worldwide reputation” during a ribbon-cutting ceremony for the company's new corporate headquarters outside Dallas.<sup>18</sup> Perry shrugged off concerns by national security experts at the federal level that Huawei presented a security threat.<sup>19</sup> 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, one that is, to some degree, testing the Westphalian system of sovereign nation-states at a global level.<sup>20</sup> Pursuant to globalization and its

---

<sup>17</sup> Associated Press, *China's markets tantalize U.S.*, LAWRENCE JOURNAL-WORLD 10D (Apr. 7, 1994).

<sup>18</sup> Carol D. Leonnig & Karen Tumulty, *Perry welcomed Chinese firm despite security concern*, WASHINGTON POST (Aug. 14, 2011), <https://tinyurl.com/6rzsb3sj>. Article cited in Kyle A. Jaros and Sara A. Newland, *Paradiplomacy in Hard Times: Cooperation and Confrontation in Subnational U.S.-China Relations* (on file with the author).

<sup>19</sup> See Leonnig & Tumulty *supra* note 20.

<sup>20</sup> See e.g., William W. Burke-White, *Cities and Provinces in a World of States: Subnational Governments in the International Legal System 3* (unpublished paper, on file with the author) (arguing that subnational actors are “crafting and implementing collective policy solutions to trans-national threats that effect [sic] 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*

discontents, U.S. states and municipalities are increasingly playing the role of protagonists in cross-border trade and business. They are doing so for the reason that they have their own trade policies with foreign states and foreign subnational counter-parties, have alien residents, and foreign consulates necessitating quasi-diplomatic relations.<sup>21</sup>

### 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.<sup>22</sup> Next, there are a number of 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 without Congressional consent, “lay[ing] any Imposts or Duties on Imports or Exports” and “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...”<sup>23</sup>

Third, and in addition to these explicit prohibitions on states, there are at least two implied doctrines. The first is the Dormant Foreign Affairs Pre-emption which holds that state legislation may be pre-empted even in the absence of federal legislation or executive act.<sup>24</sup> The second is the Dormant Foreign Commerce Clause.<sup>25</sup> This implied doctrine, which parallels the Dormant Inter-state 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

---

GOVERNMENTS IN U.S. FOREIGN AFFAIRS (1998) (advocating for a larger role for individual states in foreign relations).

<sup>21</sup> Brannon P. Denning & Jack H. McCall, *State's Rights and Foreign Policy: Some Things Should Be Left to Washington*, 79 FOREIGN AFFAIRS 9, 11 (2000).

<sup>22</sup> U.S. Const. art. VI, cl. 2.

<sup>23</sup> U.S. Const. art. I, §10.

<sup>24</sup> *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 398 (2003) (holding that a California statute, the Holocaust Victim Insurance Relief Act (HVIRA) which aimed to facilitate Holocaust-era insurance claims by residents in California, conflicted with presidential policy even without an express executive agreement and therefore should be pre-empted).

<sup>25</sup> *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (“Yet, even in absence of a treaty, a State’s policy may disturb foreign relations.”); *Japan Lines Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979) (positing that the United States must speak with “one voice” in regulating foreign commerce).

be valid unless the burden imposed by statute outweighs its benefits.<sup>26</sup> Further, it screens out the burden of multiple taxation and any statute that threatens the “one-voice” of the country.<sup>27</sup> Counterbalancing these implied and the 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.”<sup>28</sup>

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 side-lining the states.<sup>29</sup> 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 foreign affairs.<sup>30</sup> 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. state’s 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 diplomatic in nature include conducting trade missions, facilitating mayor and governor visits, establishing sister cities, and fostering ties

---

<sup>26</sup> MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY 171 (2016).

<sup>27</sup> *Id.*

<sup>28</sup> U.S. Const. amend. X.

<sup>29</sup> See e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149 (2 ed. 1997) (“in respect of our foreign relations generally, state lines disappear. As to such purpose the State...does not exist”).

<sup>30</sup> See *supra* 26 at 14. 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 “federal revolution”); John Kincaid, *The International Competence of U.S. States and their Local Governments*, 9 REG. & 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).

between state officials and PRC consulates.<sup>31</sup> These activities would not likely violate any of the express prohibitions in Art. I or even the implied powers.

However, the same may not be true for the more formal-legalistic activities. These activities range from imposing economic sanctions on foreign states<sup>32</sup> to spearheading a greenhouse gas emissions trading system<sup>33</sup> to creating multilateral binding agreements<sup>34</sup> to forming hundreds of bilateral international commitments.<sup>35</sup> In supporting such international commitments, states thread the needle between prohibited treaties and permissible “Compacts”.<sup>36</sup> Yet the states’ international commitments have not been successfully challenged on constitutional grounds,<sup>37</sup> and, moreover, the most common foreign party was China, its provinces and cities, with a total of 115 commitments.<sup>38</sup> In summary,

---

<sup>31</sup> Chen Li & Xiuye Zhao, *America’s governors and mayors have a stake in U.S.-China relations*, BROOKINGS (Jan. 14, 2021), <https://tinyurl.com/4vx98sbb> (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; State Council of the PRC, China, U.S. have established 284 ‘sister’ pairs: video dialogue, XINHUA (Apr. 30, 2022), <https://tinyurl.com/4puppd85> (suggesting that there are 284 sister cities between the U.S. and China)

<sup>32</sup> *Crosby v. Nat’l For. 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).

<sup>33</sup> Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1653-58 (2008) (considering constitutional challenges to California’s GHG emissions trading system).

<sup>34</sup> Romney Manassa, *Federalism in the Era of Globalization: The Exercise of Foreign Affairs Powers by Subnational Entities*, 52 U. MIAMI INTER-AM. L. REV. 139, 141-143 (2021) (describing how 3,800 civic leaders formed the U.S. Climate Alliance to fill the void left by President 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).

<sup>35</sup> Ryan 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).

<sup>36</sup> *Compare supra* note 14 cl 1 (excluding treaties from state foreign relations’ powers) *with* Art. I § cl 3 (allowing states to enter into an “Agreement or Compact with another State” pending Congressional consent).

<sup>37</sup> *See supra* note 35 at 316 (citing the Trump’s failed bid to challenge an agreement between California and Québec on GHG emissions joint programs in *United States v. California*, 444 F. Supp. 3d 1181 (E.D. Cal. 2020) (No. 19-CV-02142)).

<sup>38</sup> *See id.* at 350.

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 assumed office, states have taken a U-turn in their China policy; the same creativity used to forge ties has subsequently been deployed to curtail them, often citing national security concerns. 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 CCP conduct influence operations through subnational relations with U.S. states and cities.<sup>39</sup> Fueled by a combination of populist nativism and corporate support, subnational actors, including mayors, governors, attorney generals, and lieutenant attorney generals, have initiated a range of measures to delink with Chinese counter-parties. These measures take the form of executive orders,<sup>40</sup> lawsuits against Chinese parties,<sup>41</sup> and other confrontational politics.<sup>42</sup> The China-related bills are a mainstay of

---

<sup>39</sup> Nat'l Counterintelligence & Sec. Center, Protecting Government and Business Leaders at the U.S. State and Local Level from People's Republic of China (PRC) Influence Operations 1 (July 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. of St., "U.S. States and the China Competition" Speech, Nat'l Governors Assoc. Winter Meeting, Washington, D.C. (Feb. 8, 2020), <https://2017-2021.state.gov/u-s-states-and-the-china-competition/index.html> ("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/> (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).

<sup>40</sup> See e.g., Sarah Huckabee Sanders, Gov. State of Arkansas, Executive Order to Protect State Information and Communications Technology from the Influence of Adversarial Foreign Governments, effective Jan. 10, 2023, <https://governor.arkansas.gov/wp-content/uploads/EO-23-06-TikTok-Ban.pdf> (naming China as "a foreign adversary that presents serious challenges to our values, our security, and our economy.")

<sup>41</sup> Complaint at 3, Missouri ex rel. Schmitt v. People's Republic of China, No. 1:20-cv-00099 (E.D. Mo. filed 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").

<sup>42</sup> *Where the Republican Candidates Stand on China*, N.Y. TIMES (Aug. 18, 2023),

these measures, and whereas Republican states are more likely to introduce such bills, Democratic states are also passing such bills into law.<sup>43</sup> 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, human and rights).<sup>44</sup> Hence, the form of these measures, namely, state statutory 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 section hones in on one particular type of state legislative activity, an activity that is potentially far-reaching for its impact not only for the world's most significant bilateral relationship but also for the future direction of a bedrock area of U.S. law.

## II. "SECURITIZATION" OF 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 long been called the *sine qua non* of property law,<sup>45</sup> under strain of protectionism in the U.S. economy, the right to exclude from access or use 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, and yet, at the same time, doing so in a way that builds on established structures of exclusionary rights in U.S. property law. The overlap of the two begs a number of questions: who can exclude, in this case, Chinese from owning property in the United States? Who exactly is excluded (Chinese resident/non-resident

---

<https://tinyurl.com/58kxmbn4> (listing the confrontational positions of all Republican candidates for the 2024 GOP nominee for President).

<sup>43</sup> See *infra* text accompanying note 127.

<sup>44</sup> THE UNITED STATES' SUBNATIONAL RELATIONS WITH DIVIDED CHINA: A CONSTRUCTIVIST APPROACH TO PARADIPLMACY (Czeslaw Tubilewicz & Natalie Omond, eds.) 13 (2021).

<sup>45</sup> Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("the right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."). But see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1961, 1964 (2012) (doubting whether the right to exclude is the "be-all and end-all of property").

citizens, Chinese corporations, etc.)? And, on what basis are these parties excluded?

Before addressing these and related questions,<sup>46</sup> 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. I call this a process of “securitization,” meaning not the conventional sense of pooling assets or debt for purposes of repackaging them as interest-bearing securities; rather, it is *the conversion of property—land, corporate interests, or data—into an asset that is, one, sacred to the nation-state,*<sup>47</sup> *two, perceived to be under threat, and three, requiring legal or regulatory protection.* To unpack this process, I first begin first 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.”<sup>48</sup> Partly due to its nature as a floating signifier, commentators have foregrounded national security’s function, observing that national security has become a convenient cover for arbitrary state action.<sup>49</sup> As a result, scholars have argued that the threshold question is an epistemic one—who can make claims about national security.<sup>50</sup> That is to say, if national security is defined by its

---

<sup>46</sup> See *infra* Part III.

<sup>47</sup> MATEO TAUSSIG-RUBBO, *Sacred Property: Searching for Value in the Rubble of 9/11*, in AFTER SECULAR LAW (ed. Barry Sullivan, Robert A. Yelle & Mateo Taussig-Rubbo) 322, 324 (2011) (describing property, including real property, that through encounters with sacrifice and sacralization, attains symbolic value, that is, beyond the commercial).

<sup>48</sup> BARRY BUZAN, PEOPLE, STATES AND FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA 34 (2016).

<sup>49</sup> See e.g., *id.* at 34 (“an essentially contested concept”); Arnold Wolfers, “National Security” as an Ambiguous Symbol, 67 POL. SCI. Q. 481, 481 (1952) (“an ambiguous symbol”); David B. Sentelle, *National Security Law: More Questions Than Answers* 31 FLA. ST. U. L. REV. 1, 1 (2003) (“a collection of fig leaves”).

<sup>50</sup> 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 Cohen, *Nations and Markets* 23 J. INT’L ECON. L. 793, 794 (2020) (“claims of national security are claims about the

threat, then who 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 side-lined in the process of claim-making. In the context of the U.S.-China relationship, one way this problem manifests itself is as 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.<sup>51</sup> The first and foundational period is that of 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.<sup>52</sup> At the same time, it was predicated on the rivalry of different systems, yet there was also stability as a result of this balancing. Benton Heath calls this the “Cold War Settlement,” and through it, adversaries attained a kind of homeostasis.<sup>53</sup>

This was not the case in the post-Cold War paradigm from 1989 (fall of Berlin Wall) or 1991 (collapse of USSR).<sup>54</sup> 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.<sup>55</sup> 9/11 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.<sup>56</sup> Kim Lane Scheppele has written how national

---

proper location of policymaking”).

<sup>51</sup> 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”).

<sup>52</sup> MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 6-12 (2001) (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).

<sup>53</sup> J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 1020 1050 (2020).

<sup>54</sup> *Id.* At 1033, *supra* note 51 at 656 (calling the period after 1991 the “Neoliberal order”).

<sup>55</sup> *Supra* note 53 at 1034.

<sup>56</sup> 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



security became incorporated into domestic law of most states everywhere through the UN Security Council Resolution 1373, pushed by the Americans and in fact modelled after the USA PATRIOT Act.<sup>57</sup> This was also a period that saw a massive expansion in the power of executives under domestic law.<sup>58</sup>

A final phase of national security dates to around the 2008 global financial crisis.<sup>59</sup> This period saw a further diversification of national security into fields as diverse as cybersecurity, infectious disease, and climate change.<sup>60</sup> In this phase, China is the “other,” and unlike the Cold War period of two distinct and separable systems or the post-Cold War one with a plurality of actors and systemic fragmentation, this period shows adversaries engaging within the same international economic order.<sup>61</sup> Unfortunately, the existing order, organized under the World Trade Organization, has, in its current incarnation, proved insufficient to the task of reconciling the differences between the United States and China, in part, because of their respective national security entrenchments.<sup>62</sup>

In this current paradigm, national security becomes the central organizing principle of inter-state economic relations.<sup>63</sup> As such, commercial transactions undergo “national security creep.”<sup>64</sup> 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 inter-agency committee which, under the President, has powers to review certain

---

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.”)

<sup>57</sup> Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMPLE INT’L & COMP. L. J. 27 241, 259 (2013).

<sup>58</sup> *Id.* at 247 (observing that the UN Resolution 1373 rearranged the “domestic political architecture” by increasing national executives’ power); Kathleen Claussen, *Trade’s Security Exceptionalism* 72 STAN. L. REV. 1097, 1103 (2020) (diagnosing the problem under the Trump Administration during which the executive’s foreign commerce authority was expanded).

<sup>59</sup> *Supra* note 53 at 1034 (naming this the “new national security” as it pertains to new vulnerabilities such as telecommunications, transportation, energy, health, etc.); *supra* note 51 at 656 (calling this period the “Goeconomic Order”).

<sup>60</sup> See Harlan *supra* note 50 at 806.

<sup>61</sup> *Supra* note 53 at 1024.

<sup>62</sup> Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 125 AJIL 622, 649 (2021).

<sup>63</sup> *Supra* note 51 at 657.

<sup>64</sup> Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COL. L. REV. 549, 551 (2023).

transactions that involve foreign investment into the United States.<sup>65</sup> 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.<sup>66</sup> Subsequently, the Foreign Investment and National Security Act of 2007 (FINSa) revised Section 721, effective on October 24, 2007, and the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), effective as of August 13, 2018.<sup>67</sup>

According to FIRRMA, “national security” refers to “those issues relating to ‘homeland security,’ including its application to critical infrastructure.”<sup>68</sup> The elliptical definition does not provide any meaningful guardrails on determining 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.<sup>69</sup> FIRRMA expanded CFIUS review in a number of ways, but most pertinent to this analysis, it demonstrates “national security creep” into property transactions. Specifically, FIRRMA broadened the scope of CFIUS review to include real estate transactions and certain non-controlling investments in critical infrastructure, critical technology, or sensitive personal data of U.S. citizens.<sup>70</sup> To sum up, at the federal level, national security review through investment screening applies to foreign real estate transactions and other property interests.

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.<sup>71</sup> The lack of transparency raises a number of concerns, including equal protection and due process

---

<sup>65</sup> 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. Subsequently, the Foreign Investment and National Security Act of 2007 revised Section 721, as effective on October 24, 2007, and the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), effective as of August 13, 2018.

<sup>66</sup> 50 U.S.C. § 4565 (2023).

<sup>67</sup> Foreign Investment and National Security Act of 2007 (FINSa), Pub. L. No. 110-49; Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, Title XVII Sub. A.

<sup>68</sup> FIRRMA, Sec. 1703(a)(1).

<sup>69</sup> Ji Li & Ruonan Tang, *Superpower Rivalry and the “Modernization” of Foreign Investment Review* 2 U. ILLINOIS L. REV. 461, 465 (2023).

<sup>70</sup> *Id.* at 471.

<sup>71</sup> Austin Law, *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).

concerns. These issues came to a head in *Ralls Corp. v. Comm. on Foreign Inv. in the United States* (hereinafter “*Ralls*”), the first and only case to challenge a CFIUS decision and one brought by a Chinese party, thus requiring some explanation.<sup>72</sup> 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.<sup>73</sup> After CFIUS determined that the transaction threatened national security and President Obama agreed, he then issued a Presidential Order to prohibit the transaction, requiring Ralls to divest itself of the project companies.<sup>74</sup> Ralls sued based on a claim that the Presidential Order violated Due Process under the Fifth Amendment as there was no opportunity to review and rebut the evidence.<sup>75</sup> In the opinion, Judge 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.”<sup>76</sup> The District Court found that Ralls did possess state law property interests when it acquired 100% interest in the project companies and their assets, thus triggering Due Process protection; the District Court required CFIUS to provide the relevant information upon which its decision was based to Ralls for an opportunity to rebut.<sup>77</sup>

*Ralls* has implications for not just Chinese investment in U.S. real estate, but also for the “securitization” of property law. First, the District Court did not weigh in on the merits of CFIUS’s determination of a national security threat; rather, it assessed the procedure by which the petitioner was given notice and allowed to respond. 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.<sup>78</sup> This disclosure should give Chinese investors more certainty in terms of future investments. The fact that the District Court ruled that the procedure was inadequate for Due Process reasons further suggests that courts may not assume a deferential posture towards CFIUS determinations, at least the procedure aspects, in the future.

---

<sup>72</sup> *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 758 F.3d 296 (D.C. Cir. 2014).

<sup>73</sup> *Id.* at 301.

<sup>74</sup> *Id.* at 302.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 315.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 305.

This conclusion is given further credence given that the District Court rejected CFIUS's argument that the property rights were "contingent" as *Ralls* allegedly forfeited them by not seeking pre-approval of the transaction.<sup>79</sup> However, since *Ralls*' 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 that have not yet vested. Accordingly, there may be some limitation to the applicability of *Ralls* going forward.

As for the "securitization" of property, *Ralls* clearly signals that corporate interests which potentially implicate "critical infrastructure," such as military or naval installations, henceforth are subject to national security review. *Ralls* does provide an enumerated list of eleven factors used to determine whether a transaction affects national security.<sup>80</sup> 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.).

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 decision-makers, namely, CFIUS, the President, and the District 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 District Court's decision shows alternatives to deference in terms of judicial review, alternatives which bode well for upholding constitutional norms.<sup>81</sup> 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*' 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 the means by which 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

---

<sup>79</sup> *Id.* at 315.

<sup>80</sup> *Id.* at 303.

<sup>81</sup> See *supra* note 64 at 584-85 (providing a typology of judicial review including deference, constriction, and bifurcation).

which may make them amenable to “securitization,” the next section turns to these.

### B. *Aliens 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 lend 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”<sup>82</sup> or “Goeconomic order”<sup>83</sup>—may catalyze these pre-existing structural features. In particular, when it comes to the issue of aliens and property ownership, the tradition of exclusionary rights has a very old pedigree, and one that has crystallized in U.S. jurisprudence through states’ rights.<sup>84</sup>

U.S. state legislation that discriminates against aliens, in this case, Chinese, may be relatively recent, but state legislatures draw on a long tradition in passing such laws. Laws limiting property ownership date to at least the colonial period if not earlier. English property law informed much of colonial law and post-independence property law, and included prohibitions on alien land ownership.<sup>85</sup> While the modern trend is to abolish these, a few states today still have such laws on their books.<sup>86</sup> 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.<sup>87</sup> While normally discriminating against or outright excluding Blacks and Native Americans, these laws eventually centered on Chinese as “illegal

---

<sup>82</sup> *Supra* note 53 at 1024.

<sup>83</sup> *Supra* note 51 at 656.

<sup>84</sup> Polly J. Price, *Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. L. HISTORY 152, 153 (1999) (“Restrictions on ‘property’ rights of non-citizens is, therefore, not a new or even recent concept.”)

<sup>85</sup> Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 623-4 (1976).

<sup>86</sup> *Id.*

<sup>87</sup> DAVID A. CHANG, *THE COLOR OF THE LAND: RACE, NATION AND THE POLITICS OF LANDOWNERSHIP IN OKLAHOMA, 1832-1929* 74-5 (2010) (analyzing the racial politics of allotment).

immigrants,”<sup>88</sup> most infamously in the 1882 Chinese Exclusion Act.<sup>89</sup>

The 1913 California Alien Land Law applied in practice to the Japanese, barred “aliens ineligible to citizenship” from owning fee simple absolute interest in agricultural land.<sup>90</sup> Keith Aoki saw a direct link between the 1882 law and the 1913 one through “racial nativism” which posited a “generalized Asiatic ‘foreign-ness’ marked by racial difference.”<sup>91</sup> Part of that pushback against immigration came from white labor, and specifically the labor unionists, who feared economic competition and from the politicians who sought the support of the union.<sup>92</sup> This combination of nativism, local labor and industry interests, and politicians willing to spur anti-immigrant sentiment would repeat, finding echoes in the contemporary U.S.-China context.

The early alien land laws also likely paved the way for the internment of Japanese Americans during World War II.<sup>93</sup> Waves of anti-Japanese sentiment galvanized white Americans to support the interment, a process which rested on weak rationales. In his dissenting opinion in *Korematsu v. United States*, Justice 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.”<sup>94</sup>

While the majority opinion in *Korematsu* notoriously rejected the idea that the concentration camps were racially motivated and thus did not

---

<sup>88</sup> SARAH BARRINGER GORDON, *Law and the Contact of Cultures*, in A COMPANION TO THE AMERICAN WEST (ed. William Devereil) 130, 136 (2004).

<sup>89</sup> Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 BOSTON COLLEGE L. REV. 37, 38 (1998) (alien land laws barred “aliens ineligible to citizenship” from owning real property).

<sup>90</sup> *Id.* at 55.

<sup>91</sup> *Id.* at 40.

<sup>92</sup> See *supra* note 5 at 651-52.

<sup>93</sup> *Supra* note 89 at 62.

<sup>94</sup> *Korematsu v United States*, 323 U.S. 214, 239-40 (1944) (Murphy, dissenting).

invoke Equal Protection for Korematsu, four years later, in *Oyama v. California*, the Supreme Court did invoke 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.<sup>95</sup> The holding in *Oyama*, however, has been deemed to be narrow as the Supreme Court explicitly chose not to extend their finding to aliens.<sup>96</sup>

Patterns of discriminatory laws directed at aliens and immigrants both from countries with whom the United States had adversarial relations repeated throughout the twentieth-century. Sometimes, the suspect class was ideological, for example, a Communist. 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.<sup>97</sup> The Supreme Court decided against his claim that he was deprived of his property rights in his benefits in violation of Due Process.<sup>98</sup> Other times, interest in anti-alien 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 in the 1980s.<sup>99</sup>

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.<sup>100</sup>

Property law, then, has a certain openness to “securitization.” National security foregrounds the role of the state and there are

---

<sup>95</sup> See *Oyama supra* note 92 at 272.

<sup>96</sup> *Id.* at 273. Rose Cuison Villazor, *Rediscovering Oyama V. California: At the Intersection of Property, Race, and Citizenship* 87 WASHINGTON 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 discriminatory property laws against Japanese noncitizens to continue”).

<sup>97</sup> *Flemming v. Nestor*, 363 U.S. 603, 605-06 (1960).

<sup>98</sup> *But see id.* at 630 (“Cutting off a person’s livelihood by denying him accrued social benefits -- part of his property interests -- is ... a punishment”) (Black, dissenting).

<sup>99</sup> *Supra* note 77 at 649.

<sup>100</sup> See *supra* 84 at 154.

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.<sup>101</sup> As a result, the state can do things with our property, for example, exclude others on our behalf. The property owner may be 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 section, 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 1904, the British geographer Halford Mackinder published “The Geographical Pivot of History” in which he proposed what came to be known as the “heartland theory.”<sup>102</sup> For Mackinder, writing at the time of the Paris Peace Conference, whoever controlled Eastern Europe, controlled the world. 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.” 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”<sup>103</sup> than it does Chinese military strategies. The idea—or fear—of the loss of the American heartland (somewhere in the Midwest but the exact location is not important) is too great. This is especially so when the loss is to the Chinese with their racial and ideological markers.<sup>104</sup> As stoked by certain politicians and corporate lobbies, the new heartland theory goads constituencies to demand action in the form of tougher laws.

As a result, and pursuant to the U.S.-China tech/trade war, recent years have seen the proliferation of state and federal legislation, as well

---

<sup>101</sup> GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 91 (2012).

<sup>102</sup> Halford J. Mackinder, *The Geographic Pivot of History*, 23 GEOGRAPHIC J. 421, 421 (1908). 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.”)

<sup>103</sup> AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 5 (2014).

<sup>104</sup> See e.g., Grady McGregor, *Buying the Heartland: Does the U.S. need to protect its farmland from China?*, THE WIRE CHINA (Apr. 16, 2023), <https://tinyurl.com/mttd4fjpm>.



as federal regulation, directed at severing commercial links with Chinese parties, incapacitating Sino-centric global supply chains, curtailing China's soft power overseas, and preventing Chinese parties from accessing the U.S. market. Much of the "securitization" of property in the United States in regards to potential Chinese buyers is driven by concerns that Chinese citizens, assumed to be equivalent to the Chinese Government and the CCP, are buying up property near "critical infrastructure" including U.S. military bases,<sup>105</sup> and also large tracts of agricultural land, thus endangering both U.S. national security and food security. A number of high-profile cases have garnered significant attention and stoked fears. 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. Smithfields, at the time of the deal, was the largest pork producer in the world, and Shuanghui, a smaller company, acquired Smithfields to secure China's own pork supply chain given that China is one of the largest consumers of pork globally.<sup>106</sup> 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.<sup>107</sup> The amount of the deal and its centrality to pork supply chains garnered policy-makers' 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.<sup>108</sup> 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.<sup>109</sup>

---

<sup>105</sup> See e.g., *supra* note 72.

<sup>106</sup> Hongjun Tao & Chaoping Xie, *A Case Study of Shuanghui International's Strategic Acquisition of Smithfield Foods*, 18 INT'L FOOD & AGRIBUS. MANAGEMENT REV. 145, 146, 147, 149 (2015).

<sup>107</sup> See *supra* note 104 (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), <https://tinyurl.com/mryewp75> (listing the gains by Shuanghui through the merger).

<sup>108</sup> Opening Statement of Chairwoman Debbie Stabenow (D-Mich), "Smithfield and Beyond: Examining Foreign Purchases of American Food Companies," (July 10, 2013), U.S. Senate Comm. Agr. Nutrition & Forestry, <https://tinyurl.com/2pmrwkej>.

<sup>109</sup> On the importance of the Shuanghui-Smithfield deal, see e.g., JI LI, THE CLASH OF CAPITALISMS 182 (2018) (finding that the merger "showcased the exposure of seemingly nonthreatening Chinese investments in the United States

A second transaction which elicited a public outcry in the United States was the Blue Hills Wind Farm project led by GH American Energy, a subsidiary of Chinese firm Guanghui Energy Company. Guanghui is owned by Sun Guangxin, a former Chinese military officer and a major landowner in Xinjiang.<sup>110</sup> 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 farm's potential environmental impact, the project was opposed by a diverse group, including ranchers, businesspeople, and conservationists.<sup>111</sup> Local politicians were particularly concerned about espionage and electric grid take-overs. 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.<sup>112</sup> LSIPA was a harbinger of the recent China-related state legislation and prohibits contracting with certain foreign-owned companies regarding critical infrastructure.<sup>113</sup> As a result of LSIPA, GH American Energy sold the project to a Spanish company.<sup>114</sup>

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. The \$700 million project would have boosted the local economy but its proposed site was only 12 miles from Grand Forks Air Force Base, and therefore encountered opposition. When CFIUS conducted a review, finding it did not have jurisdiction over the project,<sup>115</sup> the U.S. Air Force stepped in to halt the planned plant.<sup>116</sup>

---

to possible regulatory scrutiny on a national security basis”).

<sup>110</sup> Jack Detsch & Robbie Gramer, *Deep in the Heart of Texas, a Chinese Wind Farm Raises Eyebrows*, FOREIGN POLICY (June 25, 2020), <https://tinyurl.com/55s62c3n>.

<sup>111</sup> *See supra* note 104.

<sup>112</sup> Letter from Congressman Tony Gonzales to the Hon. Robert Lighthizer (Jan. 14, 2021), <https://tinyurl.com/bdzyzb9n> (asking the U.S Trade Representative to reverse CFIUS's decision to allow the Blue Hills Wind Farm project); <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB02116L.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> *See supra* note 104.

<sup>115</sup> Letter from Andrew Fair, *CFIUS Staff Chair to Stephen Murphy*, LOCKE LORD LLP, (Aug. 31, 2022), <https://tinyurl.com/4xuppjtc> (finding that the land acquisition was not a “covered transaction” under §721 of the Defense Production Act of 1950). Although the reasoning for this finding is not 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.

<sup>116</sup> Letter from Andrew P. Hunter, Office of the Assistant Secretary of the Department of the Air Force, to Hon. John Hoeven (Jan. 27, 2023), <https://tinyurl.com/mr43vya3> (stating that the project “presents a significant

Not only that, but a few days after the U.S. Air Force's intervention, a Chinese spy balloon made headlines for being spotted over Montana, sending anti-China "mass hysteria" to a fever pitch throughout many parts of the United States.<sup>117</sup> 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 § 721 of the Defense Production Act of 1950, the legislation authorizing CFIUS. The amendment added eight military installations to the list of those military installations that would be included for "covered transactions." 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.<sup>118</sup> 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 Hawaii which referenced the transaction in their own China-related state laws.<sup>119</sup>

These are just three examples that elicited high levels of public scrutiny, scrutiny that in many states led legislatures to draft their own China-related bills. However, as an empirical matter, the concern underlying state and federal legislation on foreign ownership—the notion that the Chinese are buying up U.S. land wholesale—appears largely inflated. While statistics of land ownership including foreign acquisition of land ownership are imperfect due to under-reporting,<sup>120</sup> according to

---

threat to national security.")

<sup>117</sup> Yangyang Cheng, *The All-American Myth of the TikTok Spy*, WIRED (Aug. 9, 2023) <https://tinyurl.com/wdsrrzdm> (arguing that the reaction "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.")

<sup>118</sup> Office of Investment Security, Department of the Treasury, *Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States*, (May 5, 2023), <https://tinyurl.com/494da9wx>.

<sup>119</sup> See e.g., H.R. 929, 32 Leg., Reg. Sess. (Haw. 2023) (stating as, an example, that "companies linked to the Chinese Communist Party has [sic] been actively purchasing real estate within the United States" that "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.")

<sup>120</sup> Agricultural Foreign Investment Disclosure Act, 7 U.S.C. §§3501-3508 (1978) (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 107 (identifying a number of

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).<sup>121</sup> Keeping in mind that these statistics are post-Smithfield which did double Chinese landholdings in the United States, Chinese ownership is infinitesimal.

## B. State Legislative Responses

### 1. Categories of law

Despite the marginality of the actual threat, the perceived threat to national security has become a catalyst for law-making 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 in that state.<sup>122</sup> Not all of these cite national security explicitly but security concerns are regnant.<sup>123</sup> As a non-exhaustive list, the bills' subject matter includes *inter alia* Chinese tech companies like TikTok and WeChat, Taiwan, human rights violations and forced labor in Xinjiang, procurement, steel, semiconductors, outbound investment, IP, foreign gifts, education, data protection, contract prohibition, COVID origins, computer chips, Confucius Institutes, and property interests. While some of the bills have been in the books for nearly a decade, a large number date to 2016 and 2017 and many are even more recent, arising in only the last couple of years (2022 to the present).<sup>124</sup>

While at the time of this writing, bills are still being rolled out, a few observations are possible. Since 2022, there has been an uptick in legislative activity. This timing is most likely because Joe Biden started

---

problems with foreign land ownership statistics including lack of incentives to self-report, non-transparency, and identify havens for foreign purchasers).

<sup>121</sup> USDA Farm Service Agency, Foreign Holdings of U.S. Agricultural Land Through December 31, 2023 3-4 (rev. July 12, 2023), <https://tinyurl.com/39ufu97z>.

<sup>122</sup> Kyle A. Jaros & Sara A. Newland, *Federal anti-China Sentiment is Increasingly Seeping into State Laws*, THE HILL (Aug. 28, 2023), <https://thehill.com/opinion/international/3975855-federal-anti-china-sentiment-is-increasingly-seeping-into-state-laws/>.

<sup>123</sup> See e.g., Idaho House Bill 274 <https://tinyurl.com/5h3cc4zf> (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”)

<sup>124</sup> Kyle A. Jaros & Sara A. Newland, *State Legislation Refined State-by-State Data* (updated as of June 15, 2023) (on file with the author).

his presidency in 2021 and Republican states may view the Biden Administration as “soft” on China.<sup>125</sup> 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 (4), Florida (4), Louisiana (4), Alabama (3), Indiana (3), and West Virginia (3).<sup>126</sup> However, complicating this generalization, Democratic coastal states, including California and Connecticut, have also introduced one bill each and New Jersey introduced the most (9).<sup>127</sup>

In 2022, there were 51 bills introduced, 15 of which have been signed into law.<sup>128</sup> The most common subjects are trade and labor issues, including forced labor in Xinjiang.<sup>129</sup> The 2023 legislative session has, to date, seen a jump in the overall number of bills introduced (118), 28 of which have been signed into law. The most active states were, again, Republican: Texas (9), Mississippi (8), Arkansas (6), Florida (6) and South Carolina (5). In 2023 to date, bills pertaining to TikTok were the most frequent type, comprising approximately 40% of the total.<sup>130</sup> Depending on a number of 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 150 bills focusing on protecting the national security interests of property.<sup>131</sup> Of the 150

---

<sup>125</sup> See e.g., Jim Geraghty, *The Functionally Pro-China Biden Administration*, NATIONAL REVIEW (Dec. 3, 2021), <https://www.nationalreview.com/the-morning-jolt/the-functionally-pro-china-biden-administration/> (“the Biden administration is proving more and more reticent to confront the Chinese government in substantive and consequential ways”).

<sup>126</sup> Data from U.S. non-profit (on file with the author) (updated as of July 24, 2023) (on file with the author).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See Appendix. The database generated for this Article is both narrower in scope than other such databases given its property focus but may also identify 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 August 24, 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

bills, 37 or 25% have been passed into law. With the exception of two bills, all of the bills have seen activity in 2023.<sup>132</sup>

Pursuant to the search criteria, each bill either names the prohibited parties as some variant of “China” or “Chinese,” 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.” The referent for “China” or “Chinese” is, alternately, the government, the CCP, companies, or individuals (or some combination thereof). This distinction is salient for the constitutionality of the bills.<sup>133</sup> Among the bills, there are, broadly, three different but overlapping categories of property interests that are implicated.<sup>134</sup>

[Insert map here]

The first is real property, including commercial and agricultural lands. Of this category, there have been 53 bills proposed, 8 (or 15%) of which have been passed into law. These include those in Alabama,<sup>135</sup> Florida,<sup>136</sup> Indiana,<sup>137</sup> Louisiana,<sup>138</sup> Montana,<sup>139</sup> Utah,<sup>140</sup> and two in Virginia.<sup>141</sup> 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.<sup>142</sup> The prohibited

---

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 references first the bill and then the statute. In this way, the footnotes and the appendix can be cross-referenced.

<sup>132</sup> Actions include engrossed, enacted, enrolled, introduced, passed by indefinitely, or referred to committee.

<sup>133</sup> See *infra* text accompany notes 247 and 248.

<sup>134</sup> When bills contain provisions that apply to more than one category, I include them in all relevant categories. See e.g., SB477, Ind. Code § 1-1-15-0.1; § 1-1-15-4; § 1-1-16 (2023). (contains provisions prohibiting both real estate purchases and business transactions).

<sup>135</sup> HB379, Alabama Property Protection Act, Ala. Code § 35-21-1 to -3 (2023).

<sup>136</sup> SB264, Act effective July 1, 2023, 2023 Fla. Laws, Ch. 2023-33.

<sup>137</sup> See *supra* note 134.

<sup>138</sup> HB537, La. Rev. Stat. Ann. § 9:2717.1 (2023).

<sup>139</sup> SB203, 2023 Montana Laws Ch. 434.

<sup>140</sup> HB186, Utah Code Ann. § 63L-13-101 (2023); Utah Code Ann. § 63L-13-201-2 (2023).

<sup>141</sup> SB1438, Va. Code Ann. § 3.2-102 (2023).

<sup>142</sup> The definitions of these terms vary slightly between the state laws. See e.g., *supra* note 136 (defining “agricultural land” pertaining to Florida Statutes §194.461 which provides for a state assessment scheme; “critical infrastructure



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 which ultimately adopted more generic language.<sup>143</sup> Others identify two tiers of treatment for different parties, including those from a “foreign country of concern” and those from China that face even more restrictions on their property acquisitions.<sup>144</sup> The bills provide for a range of civil and criminal penalties for their violation.<sup>145</sup> Some require any “restricted 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.<sup>146</sup> The overall logic of the bills is akin to a “not in my backyard” argument infused with national security fever.<sup>147</sup> The effect is to shut

---

facility” as meaning “a chemical manufacturing facility, a refinery, an electrical power plant as defined in [Florida Statutes] §403.031(20), a water treatment facility or wastewater treatment plant, a liquid natural gas terminal, a telecommunications central switching office, a gas processing plant, including a plant used in the processing, treatment, or fractionation of natural gas, a seaport as listed in [Florida Statutes] §311.09;” “military installation” as “a 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;” “real property” as “land, buildings, fixtures, and all other improvement to land.”

<sup>143</sup> Compare HB379, 2023 Leg., Reg. Sess. (Al. 2023) with Ala. Code § 35-1-01 (2023).

<sup>144</sup> See *infra* 136, comparing §§ 690.202(1)-690.203(1) (prohibiting “foreign principles” from a “foreign country of concern” from “directly or indirectly own[ing], having a controlling interest in, acquir[ing] by purchase, grant, devise, or descent” any agricultural land or real property within ten miles of any military installation or critical infrastructure facility, or any interest therein, “except a de minimus indirect interest” with §692.204 (prohibiting Chinese from buying any real property or interests in real property in the state and imposing harsher criminal sanctions on those who violate the law).

<sup>145</sup> See *e.g.*, HB125, 2023 Leg., Reg. Sess. (La. 2023) (requiring for civil penalties of fifty thousand dollars and forfeiture of property in question if “prohibited foreign actor” does not divest itself of property in question within one year of judgment entered); HB2069, 2023 Leg., Reg. Sess. (Ka. 2023); SB283, 2023 Leg., Reg. Sess. (Ka. 2023) (“establishing criminal penalties”).

<sup>146</sup> See *e.g.*, HB186, UC §63L-13-101, 201, 202 (Utah 2023).

<sup>147</sup> See *e.g.*, Travia Forte, *Montana Senate Bill 203 Passes During Thursday’s Committee Hearing*, KULR 8, (Feb. 16, 2023), <https://tinyurl.com/msudf7ek> (quoting Montana Senator Jon Tester (D), “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.”) See also Office of the Governor State of Alabama, “Governor Ivey Signs House Bill 369, Secures Alabama’s Lands (May 31, 2023), <https://tinyurl.com/yj63vvie> quoting Alabama Governor Kay

Chinese out of U.S. property 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, and 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. There are a total of 93 bills, 28 or 30% of which have been passed into law. The following states have passed such laws: Arizona (1), Florida (3), Georgia (2), Idaho (2), Indiana (1), Kentucky (1), Louisiana (5), Massachusetts (1), Mississippi (2), Montana (1), Nevada (1), South Dakota (1), Tennessee (2), Texas (4), and Virginia (1). Some of the bills in this category reference the Office of Foreign Assets Control’s (OFAC’s) “Specially Designated Nationals And Blocked Persons List” (hereinafter, “SDN”)<sup>148</sup> or the “Chinese Military-Industrial Complex Companies.”<sup>149</sup> Others impose a blanket ban on any contracts with “companies owned by China,”<sup>150</sup> while many others simply identify “TikTok” as the prohibited party.<sup>151</sup> As with the above, these bills present a range of civil and criminal liabilities.<sup>152</sup>

---

Ivey (R), “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, and I am proud to sign this bill and ensure that will never be the case going forward.”)

<sup>148</sup> H.B. 321, 2023 Leg., Reg. Sess. (Al. 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).

<sup>149</sup> H.B. 2984, 103<sup>rd</sup> Gen. Assemb., Reg. Sess. (Ill. 2023).

<sup>150</sup> Ga. Code Ann. § 50-5-84.2 (2023) (providing a reputable presumption for a Chinese company to show it is not owned or operated by the government of China).

<sup>151</sup> HB274, Idaho Code § 18-6726 (2023) (prohibiting state employees from using TikTok on a state-issued device).

<sup>152</sup> See e.g., SB419, Mont. Code Ann. § 30-14-XX1 (2023) (providing that any violation results in a fine of \$10,000 a day); Idaho Code § 18-6726 (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



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.).<sup>153</sup> 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.<sup>154</sup> The state law exponents allege that Chinese 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.<sup>155</sup>

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.<sup>156</sup> 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.<sup>157</sup> Related, other laws identify

---

misdemeanor.)

<sup>153</sup> See *supra* note 72 at 315 (finding that CFIUS infringed upon Chinese investors' property interests in invested companies).

<sup>154</sup> Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2056 (2003) (conceptualizing a model of propertized personal information to protect privacy rights); Steven H. Hazel, *Personal Data as Property*, 70 SYRACUSE L. REV. 1056, 1056 (2020) (arguing for extending property rights to data).

<sup>155</sup> Michael R. Pompeo, Secretary of State, *Press Briefing*, Washington, D.C. (July 8, 2020), <https://tinyurl.com/yy5ba29s> ("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.")

<sup>156</sup> Complaint at 25, *Alario v. Knudsen*, 2023 WL 3562754 (D.Mont. May 17, 2023) (No. 9:23-CV-00056) (identifying "intangible property interests" in social media accounts on TikTok).

<sup>157</sup> The academic literature features a number of intersecting debates regarding the relationship between property law and genetic and biological materials. See

concerns pertaining to chattels, that is, gifts and monetary donations from Chinese donors to American recipients. In total, there have been four of these bills, two or 50% of which have been passed. Laws in this category have been passed in Montana and Texas.<sup>158</sup> Bills in this category mostly impose civil penalties.<sup>159</sup>

## 2. Explanations for harmonization

Taking the three categories of property-related China-related state bills together, it is clear that 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.<sup>160</sup> Further, their temporal convergence—the fact that nearly all bills have seen activity within 2023—also suggests harmonization. Part of the explanation for the convergence is state legislatures’ general lack of experience and knowledge of China. Despite “foreign affairs federalism” and state legislatures engagement with Chinese provincial and municipal governments, generally, state governments 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.

---

*e.g.*, Danielle M. Wanger, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQUESNE 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 (2004) (making a normative case against ownership in one’s generic data based on utilitarian grounds).

<sup>158</sup> *See e.g.*, SB351, Genetic Information Privacy Act, Mont. Code Ann. § 30-XX-XXX and SB1040, Tex. Ins. Code Ann. § 8(E).

<sup>159</sup> *See ibid* (imposing a fine of \$2,500 per violation plus damages).

<sup>160</sup> *Compare* SB203, Mont. Code Ann. § 35-1-X (2023) (providing a definition of “foreign adversary”) *with* HB2325, Va. Code Ann. § 55.1-509 (providing analogous definition of “foreign adversary”); *compare* HB274, Idaho Code § 18-6726 (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 networked 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* SB20, Ky. Rev. Stat. Ann. § 61.9307 (West 2023) (“...no executive branch employee, executive 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.”)

Rather, China expertise is housed in the federal government: Foreign Affairs; Armed Services; Intelligence Committees of Congress; Departments of State, Defense, Treasury, and Justice; Homeland Security; the Central Intelligence Agency, etc.<sup>161</sup> 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, 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 law-making in the United States.<sup>162</sup> There are numerous examples of such “copycat laws” most notably in the area of immigration law.<sup>163</sup> Despite its prevalence, the practice of copying-and-pasting legislation has been criticized by

---

<sup>161</sup> See MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 28 (2016) (stating how 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.”)

<sup>162</sup> The National Conference of Commissioners on Uniform State Laws (“the Commission”), 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 Commission, see Marion W. Benfield, *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 AND POL. 605, 605 (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, 739 (2018).

<sup>163</sup> FRANCIS PAKES, *GLOBALIZATION AND THE CHALLENGE TO CRIMINOLOGY* 95 (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, et al. v. United States 567 U.S. 387 (2012) (ruling that the 2010 Arizona law was unconstitutional as pertains to warrantless arrest for people suspected of being undocumented, the “show me your papers” requirement, and the criminalization of irregular migrants).

scholars for resulting in sub-optimal outcomes.<sup>164</sup> In the China-related state legislation, there are examples of state legislators looking over the fence to follow developments in other states.<sup>165</sup>

One likely result of such copying and regulatory spill-over is a “race to the bottom.” State governments may try to outdo one another by enacting increasingly “tougher” laws on China. As many bills are led by governors who believe their constituencies respond to anti-China positions, they cater to such positions in promoting such bills. Legislatures dominated by the same political party as that to which the executive belongs are more than happy to facilitate such lawmaking. This phenomenon appears intensified by those governors who are either running for re-election or a national office. The controversial Florida law,<sup>166</sup> led by Governor Ron DeSantis (R) who is running for President in 2024, is the clearest example of this in the category of real property prohibitions.<sup>167</sup> Yet there are others. For instance, the Montana law, spearheaded by Governor Greg Gianforte (R) and who is running for re-election as Montana’s governor in 2024, out-competes other state TikTok bans by prohibiting any use of TikTok in the state—an extreme position.<sup>168</sup> 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 is lobbyist groups, especially those led by U.S. corporations. After a two-year investigation that examined nearly one million bills in all 50 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.<sup>169</sup> The report found that of the 10,000 bills that were copied, most were written by industry and conservative groups.<sup>170</sup> The American Legislative Exchange Council (ALEC), a conservative organization that promotes corporate interests in state law-

---

<sup>164</sup> See e.g., Dorrell et al. *supra* note 162 at 605 (finding that “policy plagiarism” creates less effective state legislation).

<sup>165</sup> See e.g., *supra* note 119.

<sup>166</sup> See *supra* note 136.

<sup>167</sup> See *infra*.

<sup>168</sup> Mont. Code Ann. § 30-14-XX1 (2023).

<sup>169</sup> Rob O’Dell & Nick Penzenstadler, *You elected them to write new laws. They’re letting corporations do it instead*, THE CENTER FOR PUBLIC 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/>

<sup>170</sup> *Id.*

making, was one of the most successful of those groups.<sup>171</sup> ALEC, which has a membership of over 2,000 state legislators, and is funded primarily from U.S. corporations, has carved out a specialty in providing legislative ideas, research, and resources that many legislators otherwise lack.<sup>172</sup> ALEC has been active in popularizing state legislation on a number of controversial topics, including gun control, abortion, and health care reform.<sup>173</sup>

Most recently, ALEC has set China in its cross-hairs. Since 2022, ALEC has introduced at least five pieces of model legislation that either explicitly target Chinese parties or do so through reference to “adversary nations” or “restricted foreign entities.”<sup>174</sup> 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.<sup>175</sup> Informed commentary on the activities of ALEC are unanimous in declaring the organization’s activities to be bad for transparent

---

<sup>171</sup> Cf. Allison Boldt, *Rhetoric Vs. Reality: Alec’s Disguise as a Nonprofit Despite Its Extensive Lobbying*, 34 HAMLINE J. PUB. L & POL’Y 35, 35-6 (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).

<sup>172</sup> ALEX HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES - AND THE NATION 5, 10 (2019).

<sup>173</sup> Molly Jackman, ALEC’s Influence over Lawmaking in State Legislatures, BROOKINGS (Dec. 6, 2013), <https://tinyurl.com/3zy7csbz>.

<sup>174</sup> ALEC, *Restrictions on Foreign Acquisition of Land Act* (July 28, 2023), <https://tinyurl.com/mwtsbc9d>; ALEC, *An Act to Prohibit State Contracts with Chinese Government-Owned or Affiliated Technology Manufacturers* (July 28, 2022); <https://tinyurl.com/3xancynz>; ALEC, *Act to Prohibit State Procurement of Electric Vehicles with Forced Labor Components* (July 28, 2023), <https://tinyurl.com/39apzhpx>; ALEC, *State Infrastructure Protection Act* (July 28, 2022), <https://tinyurl.com/2p8akhn6>; ALEC, *Act to Prohibit This State’s Board of Regents from Investing Public University Trust Funds in Companies Associated with the Government of China, ALEC Exposed* (July 28, 2022), <https://tinyurl.com/3ppjxfs5>.

<sup>175</sup> Compare *supra* note 174, *Restrictions on Foreign Acquisition of Land Act* (“(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 (2023) (Utah 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.”)

lawmaking, bad for democracy, and even bad for ALEC's own membership.<sup>176</sup>

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."<sup>177</sup> 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 multi-national corporations still have deep investments in China and would seek to minimize confrontation.<sup>178</sup>

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 may have such effects. According to the federal system, when Congress acts within the grant of powers allocated to it by the Constitution, it has broad powers to pass legislation 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.<sup>179</sup> 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.'"<sup>180</sup> Not only do federal laws reference state laws but so too do state laws reference federal laws.

### 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 times are drafted with an eye towards federal law or are otherwise influenced by the federal government. In 2023, to date, there have been some dozen bills introduced in either

<sup>176</sup> See *supra* notes 169, 171-172.

<sup>177</sup> See e.g., JULIAN GEWIRTZ, *UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS, AND THE MAKING OF MODERN CHINA* (2017).

<sup>178</sup> Compare Brian Entin, *N. Dakota town praises rejection of Chinese company development*, NEWSNATION (Feb. 7, 2023), <https://www.newsnationnow.com/business/city-cancels-corn-mill-china-based-company/> (discussing local business interests against the proposed FuFeng Group development) with US-CHINA BUSINESS COUNCIL, *MEMBER SURVEY 9* (2022) (showing how many major companies remain committed to the Chinese market despite a laundry list of challenges).

<sup>179</sup> Compare U.S. Const. art. VI, cl. 2 with U.S. Const. amend. XIV.

<sup>180</sup> Henry M. Hart, Jr., *The Relations between State and Federal Law*, 54 COL. L. REV. 489, 498 (1954).

chamber of Congress that both involve property interests and are targeted at China, one of which has been passed.<sup>181</sup>

Many of these bills expand CFIUS's powers, as does 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. While it is within the CFIUS program and is thus not a blanket ban and 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.<sup>182</sup> 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

---

<sup>181</sup> The federal bills are the following: (1) 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); (2) 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); (3) 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); (4) 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); (5) Foreign Adversary Risk Management 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); (6) 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); (7) Protecting Military Installations from Foreign Espionage Act, H.R. 917, 118th Cong. (2023); (8) 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); (9) 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); (10) Preemption of Real Property Discrimination Act, H.R. 3697, 118th Cong. (2023) (pre-empting state prohibitions on real estate purchases by foreign citizens); (11) 169 Cong. Rec. S3,000 (daily ed. July 18, 2023) (amendment of Sen. Jon Tester) (requiring the federal government to review farmland transactions involving at least 320 acres or \$5m purchase price from certain countries.)

<sup>182</sup> Email from attorney in charge of Shen v. Simpson case to author, Aug. 1, 2023 (on file with the author).

Mike Pompeo was known to caution governors about their paradiplomacy with Chinese parties and to underscore the CCP's relations with Chinese representatives.<sup>183</sup> These communications can also have effects. In other words, federal and state law are hardly two distinct spheres of activity and there is overlap. At the same time, states may not march to Washington's tune, and, where possible, likely pursue their own interests in regards to the China question. With that overview of state and federal legislation and regulation, the next section examines some of the key legal issues regarding the China-related state statutes.

#### IV. CONSTITUTIONALITY AND LEGALITY

Whereas the China-related state laws are quite new, there are already lawsuits pending. These lawsuits shed light on the sources of problems in the law, that is, why or how they are discriminatory. In particular, they reveal how both epistemological issues and structural or doctrinal elements combine to create state laws that may violate the Constitution. There are a number of suits pending in district courts. The first, *TikTok v. Austin Knudsen*, challenges the Montana TikTok ban, one of the strictest in the country.<sup>184</sup> Specifically, TikTok brought a number of claims against Montana including that the ban violates the First Amendment, violates the Commerce Clause, and is pre-empted by federal law.<sup>185</sup> For its part, the State of Montana stands by its TikTok ban on grounds that the social media app accesses private data of users which represents a national security threat.<sup>186</sup>

The second, *Coalition for Independent Technology Research v. Greg Abbott et al.* is similar to the first one.<sup>187</sup> The petitioners, comprised of faculty at a public university, are suing the State of Texas for banning TikTok in their university, and harming their research. The petitioners argue that the Texas ban is repugnant to their First Amendment rights. The law identifies a risk in a social media if the provider of that application may be required by a foreign government to provide

---

<sup>183</sup> See Pompeo *supra* note 39.

<sup>184</sup> *TikTok Inc. v. Knudsen*, No. 9:23-CV-00061, 2023 WL (D. Mont. May 22, 2023). The Act Banning TikTok in Montana prohibits the operation of TikTok anywhere in the state.

<sup>185</sup> See TikTok *supra* note 184.

<sup>186</sup> Mont. Code Ann. § 30-14-XXX (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).

<sup>187</sup> *Coalition for Indep. Tech. Rsch. v. Abbott*, No. 1:23-CV-783, 2023 WL 4532653 (W.D. Tex. 13 July, 2023).



confidential information to that foreign government.<sup>188</sup>

In terms of possible outcomes of these two cases, one previous effort led by President Trump to ban TikTok failed. Trump had issued a number of executive orders, including through his powers under the International Emergency Economic Powers Act (IEEPA) and the National Emergencies Act, which he used to ban any transactions by any person within the United States with TikTok's owner, ByteDance.<sup>189</sup> The President had issued similar orders against another app named WeChat. However, both TikTok and WeChat, separately, filed complaints to enjoin their respective bans. First WeChat won and then TikTok.<sup>190</sup> In the TikTok case, it was found that Trump's ban had exceeded the authority Congress granted the president under IEEPA.<sup>191</sup> There are additional precedents for courts finding that the President, in issuing an Executive Order based on the IEEPA, had exceeded his authority as granted under that statutory framework.<sup>192</sup> 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.<sup>193</sup>

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. In what follows, I recite the facts of the case and provide an analysis of the relevant issues. I then spotlight where and how the case represents broader concerns with related state bills and laws in regards to the "securitization" of property, in particular.

The state statute in question in that litigation is a piece of legislation that went into effect on July 1, 2023 (hereinafter, "Florida law.")<sup>194</sup> The Florida law prohibits contracting with entities of foreign countries of concern. These include the PRC, the Russian Federation, the Islamic Republic of Iran, the Democratic People's Republic of Korea, the Republic of Cuba, the Venezuelan regime of Nicolas Madura, and the Syrian Arab

---

<sup>188</sup> Tex. Gov't Code Ann. § 6(A), ch. 620 (West 2023).

<sup>189</sup> Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020). *See also* Anupam Chander, *Trump v. TikTok*, 55 *Vanderbilt J. Trans'l L.* 1145, 1146 (2022).

<sup>190</sup> *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912 (N.D. Cal. 2020); *Marland v. Trump*, 498 F. Supp. 3d 624, 641 (E.D. Pa. 2020).

<sup>191</sup> *See* *Marland supra* note 190.

<sup>192</sup> *Xiaomi Corp v. Dep't of Def.*, No. 21-280, 2021 WL 950144 at 2 (D.D.C. Mar. 12, 2021). *See also* *Luokung Tech. Corp. v. Dep't of Def.*, 583 F. Supp. 3d 174, 178-79 (D.D.C. 2021) (granting petitioners a preliminary injunction based on an Administrative Procedure Act claim).

<sup>193</sup> *See e.g., infra* note 225.

<sup>194</sup> *See supra* note 136.

Republic.<sup>195</sup> The Florida law applies to any “governmental entity” as well as “any other...person...acting on behalf of any public agency.”<sup>196</sup> It states that “[the main purpose is] prohibiting the People’s Republic of China, the Chinese Communist Party, any other political party or member of a political party in the People’s Republic of China, and certain persons and entities from purchasing or acquiring real property in this state or having more than a de minimus indirect interest in such real property.”<sup>197</sup> Specifically, the Florida law states that “A foreign principal may not directly or indirectly own, or having a controlling interest in, or acquire by purchase, grant, devise, or descent any interest, except a de minimus indirect interest, in real property or within ten miles of any military installation or critical infrastructure facility in this state.”<sup>198</sup> The definition for “foreign principal” includes:

The government or any official of the government of a foreign country of concern; a political party or member of a political party or any subdivision of a political party in a foreign country of concern, a partnership, association, 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 a subsidiary of such entity; or any person who is domiciled in a foreign country of concern and is not a citizen or lawful permanent resident of the United States.<sup>199</sup>

The definition for “critical infrastructure” provides for a list of qualifying institutions.<sup>200</sup> The law allows for one exception, namely, those individuals, on non-tourist visas who have been granted asylum, may purchase one residential property under two acres in size that is not within five miles of any “military installation” in the state of Florida.<sup>201</sup> The law further requires Chinese individuals to register properties they own or risk civil penalties and forfeiture.<sup>202</sup> In the event that they violate

---

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* Providing: “Critical infrastructure facility’ means any of the following, if it employs measures such as fences, barriers, or guard posts that are designed to exclude unauthorized persons: a chemical manufacturing facility[:]; a refinery[:]; an electrical power plant...[:]; a water treatment facility or wastewater treatment plant, a liquid natural gas terminal[:]; a telecommunications central switching office[:]; a gas processing plant, including a plant used in the processing, treatment, or fractionation of natural gas[:]; a seaport...[:]; an airport...”

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

the law, then they are subject to criminal charges, imprisonment, and fines.<sup>203</sup> The law further applies harsher criminal penalties to Chinese than other “foreign principals.”<sup>204</sup>

Four Chinese individuals and one real estate company in Florida brought a lawsuit against a number of Florida officials on June 5, 2023, filing for a preliminary injunction against the Florida law’s enforcement.<sup>205</sup> The plaintiffs include the following: first, Yifan Shen, a holder of a H-1B visa, as a nonimmigrant worker, and who has lived in the United States for seven years and in Florida for four years, working as a dietician. 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 (Orange County U.S. Army Recruiting Center Orlando) qualifies is indeterminate. As 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. Second, Zhiming Xu is a political asylee having fled China after being the subject of persecution and is awaiting the decision on his application for asylum. He has lived in Florida for four years and has signed a contract to buy a home near Orlando. Similar to Shen, it appears his intended home is within ten miles of a critical infrastructure facility. Like Shen, he would have to cancel the purchase and lose his deposit, \$31,250.

Third, Xinxi Wang holds an F-1 visa as an international Ph.D. student and has lived in Florida for five years. 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. Fourth, Yongxin Liu is a holder of an H-1B visa and has lived in Florida for four years as an assistant professor. 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. Liu is in the process of buying another home but fears that real estate agents will refuse to represent him because he is Chinese and he will face additional costs in securing the property due to this competitive disadvantage. Lastly, Multi-Choice Realty is a real estate brokerage firm that serves mainly Chinese-speaking clients in the United States. Their customers will need to register their properties and will be prohibited from acquiring new ones. Multi-Choice Realty estimates they will lose one-

---

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*, at §692.204 (stating that violations of the law by Chinese individuals are third-degree felonies, punishable up to five years’ imprisonment and a fine of up to \$5,000.)

<sup>205</sup> Complaint, Yifan Shen et al. v. Wilton Simpson et al. (N.D. Fla. 2023) (4:23-cv-208-AW-MAF).

quarter of their business due to the Florida law. None of the plaintiffs are CCP members or members of the Chinese Government.

The main arguments of the plaintiffs include the following: first, it violates equal protection and due process as provided for in the Constitution; 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.

### A. *Equal Protection Clause*

Taking these issues in turn, the plaintiffs argue that the Florida law violates the Equal Protection Clause (EPC) of the Fourteenth Amendment which states that “No state shall...deny to any person within its jurisdiction the equal protection of the laws.”<sup>206</sup> *Yick Wo v. Hopkins* interpreted the EPC to apply to all persons within the territorial jurisdiction of the United States, without regards to race, color, or nationality, including aliens.<sup>207</sup> The issue, however, is whether that interpretation applies to legislation restricting aliens' property rights. On this point, the plaintiffs cite to *Oyama* which found that the California Alien Land Law discriminatory against citizens.<sup>208</sup> However, as to whether EPC protections for property rights extend to aliens, 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.<sup>209</sup>

A narrow reading would thus conclude that the extension of the EPC to aliens on the issue of property rights protection is not supported. This is the argument put forth by an amicus brief authored by twelve states (“*amici curiae*”).<sup>210</sup> Further, the *amici curiae* put forth a somewhat

---

<sup>206</sup> U.S. Const. amend. XIV.

<sup>207</sup> *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.”). *See also* *Graham v. Richardson*, 403 U.S. 365 (1971) (extending EPC protection to aliens and announcing that classifications based on alien status are inherently suspect and warrant strict scrutiny).

<sup>208</sup> *See supra* note 5.

<sup>209</sup> *Id.* at 641.

<sup>210</sup> Brief of Amici Curiae Idaho, Arkansas, Georgia, Indiana, Mississippi,

confusing assertion that the Florida law does not discriminate on the basis of alienage but rather “[i]t is based on ties to totalitarianism and domicile.”<sup>211</sup> The introduction of political system is a new categorization and one that, to date, is not supported by the caselaw although courts are grappling with the implications of both law and citizens from such systems.<sup>212</sup>

Lastly, the amici curiae interpret the Florida law’s focus on “domicile,” a term which is defined neither in the Florida law nor Florida statutes, to apply to non-resident aliens,<sup>213</sup> meaning that the Florida law would not affect the petitioners who are all resident within the United States. Despite this contention, it is not certain that Floridian officials, judges, realtors, or lenders would agree with this interpretation of domicile, and some of the plaintiffs, according to their visa obligations, would likely have to return to the PRC and thus would be implicated under Florida’s law.<sup>214</sup> An amicus brief authored by the U.S. Attorney’s Office agrees with such conclusions, suggesting that under a plain definition of “domicile,” the plaintiff’s “permanent home” would be interpreted to mean the PRC and they would thus be affected by the Florida law.<sup>215</sup>

The State of Florida’s view that the Florida law does not violate the EPC is grounded in a states’ rights argument. “Real property has always been the domain of the state.”<sup>216</sup> Florida cites *Terrace v. Thompson*, *Frick v. Webb*, and *Webb v. O’Brien* (hereinafter, “the *Terrace* cases”) in support of this assertion.<sup>217</sup> On the issue of whether the EPC extends to aliens’ property rights within the United States, *Terrace* holds that a state may

---

Missouri, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, and Utah in Opposition to Plaintiff’s Motion for Preliminary Injunction, Yifan Shen et al. v. Wilton Simpson et al. (N.D. Fla. 2023) (4:23-cv-208-AW-MAF).

<sup>211</sup> *Id.*, at 3.

<sup>212</sup> See generally, Diego A. Zambrano, *Foreign Dictators in U.S. Court*, U. CHICAGO L. REV. 89 (2022) 157-252; Mark Jia, *Illiberal Law in American Courts*, U. PA. L. REV. 168 (2020) 1685-744; Donald C. Clarke, *Judging China: The Chinese Legal System in U.S. Courts*, 44 U. PA. J. INT’L L. 455 (2022).

<sup>213</sup> See *supra* note 210 at 7-8.

<sup>214</sup> Plaintiff’s Reply in Support of their Motion for a Preliminary Injunction, Yifan Shen et al. v. Wilton Simpson et al. (N.D. Fla. 2023) (4:23-cv-208-AW-MAF), at 1-2.

<sup>215</sup> Statement of Interest of the United States in Support of the Plaintiff’s Motion for Preliminary Injunction, Yifan Shen et al. v. Wilton Simpson et al. (N.D. Fla. 2023) (4:23-cv-208-AW-MAF), at 9.

<sup>216</sup> *Supra* note 210 at 1.

<sup>217</sup> *Terrace v. Thompson*, 263 U.S. 197 (1923); *Frick v. Webb*, 263 U.S. 326 (1923); and *Webb v. O’Brien*, 263 U.S. 313 (1925).

properly bar all noncitizens from owning land, and that it is not a violation of the EPC when a statute denies aliens who have not declared an intention to become citizens the right to hold land while permitting citizens and aliens who have so declared in good faith to do so.<sup>218</sup> *Terrace* relies on an outdated classification scheme that differentiated aliens eligible for citizenship from those ineligible, the latter referring to Asians.<sup>219</sup>

While the *Terrace* cases have not been overruled, state court decisions are starting to chip away at some of the holding's implications. For example, *Namba v. McCourt* concerns state legislation that regulates the acquisition of land by aliens in Oregon, finding that state legislation is subject to the EPC, the Due Process Clause (DPC), and the superior powers of the federal government over aliens and immigration.<sup>220</sup> In his opinion, Chief Justice Rossman tried to reconcile the *Terrace* cases with *Oyama*. Drawing on *Takahashi v. Fish and Game Commission*<sup>221</sup> 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 the DPC, EPC, and federal pre-emption.<sup>222</sup> 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 the DPC, EPC, and federal pre-emption on issues of aliens and immigration.<sup>223</sup> Rossman, in *Namba*, emphasizes that the immigration classification scheme and constitutional law has moved on since the *Terrace* cases, while taking pains not to suggest they should not be overruled.<sup>224</sup>

While as a state court decision *Namba* is not binding on the Supreme Court, it does have persuasive effect. Unfortunately, this was not the view taken by U.S. District Judge Allen Winsor, in *Shen*. Winsor, an appointee of President Trump, rejected the plaintiff's preliminary injunction citing, favorably, the *Terrace* cases. Winsor rejects the

---

<sup>218</sup> See *Terrace*, at 217.

<sup>219</sup> *Id.*, at 220 ("Generally speaking, the natives of European countries are eligible [for citizenship]. Japanese, Chinese and Malays are not.")

<sup>220</sup> *Namba v. McCourt*, 204 P.2d 569 (1949).

<sup>221</sup> *Takahashi v. Fish & Game Comm'n*, 334 U.S. 140 (1948) (holding that a California law that forbade the issuance of a commercial fishing license to ineligible aliens was repugnant to the EPC as it was based on an unreasonable and arbitrary classification on the basis of nationality.)

<sup>222</sup> See *supra* note 220 at 582.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

plaintiff's EPC 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.' *Terrace*, 263 U.S. at 218...Thus state laws restricting aliens' rights to acquire real property satisfy equal protection so long as they are rational."<sup>225</sup> The reliance on the century-old *Terrace* cases is misguided, and on appeal, the EPC claim will likely succeed.

### B. Due Process Clause

The plaintiff's second argument is that the Florida law violates the DPC. The DPC provides: "No State shall...deprive any person of life, liberty, or property, without the due process of the law."<sup>226</sup> *Yick Wo* similarly clarified that the DPC applies to aliens.<sup>227</sup> The DPC projects individuals' right to property from unreasonable governmental interference through, for example, expropriation or zoning. The Florida law presents a parallel challenge in that it excludes Chinese from ownership altogether. The plaintiffs in *Shen* argue that the Florida law violates the DPC as it is impermissibly vague because it does not clearly define "critical infrastructure facility" and also does not provide sufficient notice in terms of where the ten-mile zone surround such facilities begins and ends.<sup>228</sup>

*Ralls* cast a spotlight on procedural regularity, clarity, and certainty in the course of foreign investment review, specifically administrative processes for providing guidelines to would-be investors, reviewing transactions, and enforcement. Following in the wake of *Ralls*, *Shen* similarly casts light on the implications of what would effectively be "Chinese exclusion zones" in the State of Florida.<sup>229</sup> It is difficult to estimate how many military installations there are in Florida, yet it is clear that many of the core metropolitan areas in the state have a military installation within a ten-mile radius. This means that a Chinese person would effectively be prevented from purchasing a home within that city.

There is precedent to finding that a statute violates the DPC based on the vagueness of key terms. *Connally v. General Constr. Co.*

---

<sup>225</sup> Order Denying Preliminary Injunction Motion, *Yifan Shen et al. v. Wilton Simpson et al.* (N.D. Fla. 2023) (4:23-cv-208-AW-MAF), at 19.

<sup>226</sup> U.S. Const. amend. XIV.

<sup>227</sup> *See supra* note 207 at 369.

<sup>228</sup> *See supra* note 205 at 34.

<sup>229</sup> *Id* at 22.

established a vagueness doctrine which asks if a term is so vague that a person of common intelligence has to guess at its meaning, then it violates the DPC.<sup>230</sup> Subsequently, in *Chicago v. Morales*, Justice John Paul Stevens, writing for the majority, opined that the relevant statutory language of “loitering” “fail[ed] to meet the requirements of the Due Process Clause [as] it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.”<sup>231</sup> The lack of clarity concerning the key term “critical infrastructure facility” does not allow potentially affected individuals adequate notice that in fact either their home is already within such an affected zone or an intended purchase may be in such a zone.

Likewise, as discussed, the term “domicile” is subject to wide interpretation which throws into question who may be affected by the Florida law.<sup>232</sup> For example, asylees, such as plaintiff Xu, whose application is pending, would likely be considered domiciled in the PRC and thus subject to the Florida law. As a policy matter, the United States does not want to reject those seeking a safe harbour in the United States; these are, in fact, the individuals least likely to be CCP agents.

Lastly, the poorly-drafted language, including “critical infrastructure facility” allows for too much discretion for local law enforcement, and, further, if interpreted broadly, could lead to the unintended effect of Chinese being excluded from living in Florida’s major cities. For the above reasons, the vagueness of the Florida law presents challenges in the face of DPC protections.

### C. Federal Preemption

*Shen* raises the third 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 foreign investment, immigration, 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, then determines which level of government has authority over the matter.

Plaintiffs point to the down-stream knock-on effects of the Florida

---

<sup>230</sup> *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>231</sup> *Chicago v. Morales*, 527 U.S. 41, 56 (1999).

<sup>232</sup> See *supra* text accompanying notes 213-215.



law. They argue that the federal government has primary responsibility over matters of national security, immigration, and foreign affairs. On the matter of national security, CFIUS and OFAC are responsible for reviewing transactions and enforcing economic regulations, respectively. CFIUS, in particular, is empowered to review real estate transactions under FIRREA.<sup>233</sup> 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.”<sup>234</sup>

Since CFIUS has the power of national security review of real estate transactions, in particular, and the capacity and proficiency to do so, then it is not only superfluous but also unconstitutional pursuant to the implied doctrines, namely, the Dormant Foreign Affairs Preemption doctrine and the Dormant Foreign Commerce Clause, for the State of Florida to pursue its own version. Applying the reasoning in *Garamendi* and *Zschernig*, the United States has a policy of centralized national security review, including investment screening for real estate transactions. Foreign transactions is one area where the federal government wants to enjoy its Constitutionally-vested powers given the sensitivity of the China relationship. Conceding national security review over real estate transactions involving Chinese individuals to the states invites too much uncertainty in an already precarious relationship.

The state view focuses primarily on the issue of property law, noting that “Florida’s real property restrictions are undoubtedly part of its historic police powers.”<sup>235</sup> The states view the Florida law as merely a gap-filler, and take issue with the plaintiffs’ inability to identify a conflict between the Florida law and federal law.<sup>236</sup> Yet this view is wrong. In accordance with the implied powers, the existence of a federal law is not required. Pursuant dictum in *Garamendi*, the Dormant Foreign Affairs Doctrine recognizes not just conflict but also field preemption.<sup>237</sup> National security over real estate transactions is one field where the federal government via CFIUS has established its oversight. Along these lines, the plaintiffs state that “...federal law has ‘occupied’ the entire field

---

<sup>233</sup> See *supra* note 70.

<sup>234</sup> See *supra* note 72 at 303.

<sup>235</sup> See *supra* note 210 at 10.

<sup>236</sup> *Id* at 11.

<sup>237</sup> See *supra* note 24 at 418.

[of national security], thus precluding any state regulation.”<sup>238</sup> While true, the spirit of the statement may be counter-productive and lead to suboptimal results in protecting the nation’s interests. It raises the epistemic and normative question of who should be involved in the process of identifying national security threats and addressing them. In fact, there may yet be a role for state authorities to play.<sup>239</sup>

In addition, the federal approach through CFIUS and OFAC may simply be better than the state approach. CFIUS conducts a case-by-case review of a transaction whereas the Florida law is a blanket ban. CFIUS is the scalpel whereas the Florida law is a sledgehammer.<sup>240</sup> In the context of today’s anxious U.S.-China relationship, the scalpel approach is a much more prudent option. To summarize, federal law and policy may preempt the Florida law given its potential effects on national security, immigration, and foreign affairs more generally.

#### D. *Fair Housing Act*

Both the plaintiffs and more so the U.S. Attorney’s Office in its amicus brief make strong arguments for the Florida law as violating the Fair Housing Act.<sup>241</sup> The Fair Housing Act (FHA) of 1968 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.<sup>242</sup> Specifically, the Florida law appears to violate §3604 of the FHA as it discriminates based on national origin.<sup>243</sup> It makes distinctions based on

---

<sup>238</sup> First Amended Complaint, Yifan Shen et al. v. Wilton Simpson et al. (N.D. Fla. 2023) (4:23-cv-208-AW-MAF), at 40.

<sup>239</sup> See Part V.

<sup>240</sup> Even Chinese investors, upon studying *Ralls*, have mostly concluded that the process although opaque, is not unfair to foreign investors, including Chinese. See Li *supra* note 71 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”)

<sup>241</sup> See *supra* note 238 at 35-9; note 215 at 7-16.

<sup>242</sup> 42 U.S.C. §§3604, 3605, 3606, 3617.

<sup>243</sup> See also *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (1996) (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 (2018) (The FHA

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.<sup>244</sup>

While the Eleventh Circuit has not made the determination of which test should be used to determine 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.<sup>245</sup> To date, Florida has not offered a legitimate connection between the national security interests of the State and prohibiting individuals who are domiciled in China. As argued by the U.S. Attorney's Office, none of the plaintiffs are members of the Chinese Government or the CCP; there is simply no nexus to connect them to the idea that they are national security threats.<sup>246</sup> It is telling of the strength of the argument that the amicus authored by the twelve states does not address the FHA claim.

#### E. *Broader Implications of Shen*

The legal challenges to the Florida law laid out in *Shen*, namely unconstitutionality under the EPC, DPC, federal preemption and contravention of the FHA, are not unique among the recent rash of China-related bills and laws at the state level. 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. 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. While the District Court has rejected the plaintiff's preliminary injunction motion, the plaintiffs are already preparing an appeal to the Eleventh Circuit.

There are also some distinguishing elements to the Florida law at issue in *Shen*. First and foremost, the Florida law is somewhat unusual in singling out Chinese individuals in addition to the Chinese Government, CCP, and Chinese corporations. The majority of the bills determine that these latter entities are the clearest threat to national

---

prohibits discrimination on the basis of citizenship "when it has the purpose or unjustified effect of discriminating on the basis of national origin.)

<sup>244</sup> See *supra* note 215 at 10.

<sup>245</sup> *Id* at 13.

<sup>246</sup> *Id* at 14.

security and exclude individuals. However, there are a few other laws that, like the Florida one, identify “individuals,” “persons,” or “citizens.” These include laws in Indiana and Montana, as well as a number of pending bills, including in Arizona, Hawaii, Maryland, and Oklahoma. 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.

Although not addressed in *Shen* to date, the nature of the subject of the law (i.e., individual or corporate/governmental entity) may have legal significance. In the equal protection jurisprudence, for example, state statutes discriminating against alien individuals and alien corporations should theoretically receive the same standard of review (i.e., strict scrutiny).<sup>247</sup> However, this is not always the case in practice, and presents something of a blind-spot in both caselaw 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.<sup>248</sup>

Empirically, a Chinese state-owned enterprise is much more likely to serve as an instrumentality of the Chinese Government or CCP than a nonimmigrant visa-holding Chinese-born dietician who has been in the United States for seven years. In a sense, case outcomes track this in that they apply the higher standard of strict scrutiny to laws affecting individuals and rational basis, the lower standard, to those affecting corporations. Still, the unsystematic way in which these different

---

<sup>247</sup> See *Graham v. Richardson*, *supra* note 207.

<sup>248</sup> Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification* 59 MISSOURI L. REV. 569, 609 (1994). *Italics added.* Note that while Bungert’s survey dates to 1994, I am not able to find cases subsequent to that publication date which discusses the issue.

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

Despite a degree of harmonization among the bills and laws, the proliferation of state statutes leads to discoordination problems. While commentators have rightfully voiced skepticism that the federal government should have exclusive jurisdiction over foreign affairs and plurality of approaches to such governance issues (i.e., states as laboratories of democracy) can be beneficial,<sup>249</sup> on the question of the U.S.-China relationship, one that has whispers war, it can certainly be advantageous for the United States for the federal government to set the tone. It is true that this assertion depends largely on who occupies the Oval Office and who has control of Congress. During the Trump Administration, the states served as a ballast to some of President Trump's more harmful interventions in the U.S.-China relationship, and the position of the United States under international law, more generally.<sup>250</sup> Assuming that the executive and legislative branches are judicious and sapient, then the problem of discoordination can be mitigated.

Related, as Chinese in the United States become the scapegoat for myriad social ills, and politicians appeal to such anxieties among their constituencies, then it is likely that the China-related statutes may lead to a race to the bottom as governors and mayors try to outdo one another in vilifying the Chinese. For example, the Florida law's provisions that apply harsher criminal penalties toward Chinese could be mimicked and amplified assuming the law is allowed to continue to be enforced. This effect may, in turn, put greater strain on the U.S.-China relationship. Part of this problem lies with the nature of news and media in China whereby all things negative about or happening in the United States are broadcasted whereas mention of the country's achievements in social progress and equality is muted. Yet the United States does not need to give fodder to the Chinese propagandists.

---

<sup>249</sup> See *supra* note 26 at 32 ("Sometimes, it makes sense to 'let a thousand flowers bloom'").

<sup>250</sup> See *e.g.*, Manassa *supra* note 34.

## V. REFORMS

How can states generate better policy at the intersection of national security and property law? One of the insights 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. There is no simple one-size-fits-all solution to the proliferation of China-related bills and laws among the states, yet one place to start is with improving the state of knowledge about China in the fifty states. To date, the state bills and laws have grown out of a toxic mix of corporate interests, political ambition, and nationalism if not racism. This episteme is rank. 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.

Whereas scholars have put forth the suggestion that national security needs to incorporate more non-elite views,<sup>251</sup> 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 no small degree of xenophobia. 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.<sup>252</sup> China experts can serve as a counter-balance 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 conversant and dialogic. While not easy to do in polarized American society, a number of civil organizations have shown that it is not impossible.<sup>253</sup>

China knowledge needs to be baked into decision-making at all levels, so not just the federal government but also state and local governments, too. 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

---

<sup>251</sup> See e.g., Rana, Heath, and Cohen *supra* note 50.

<sup>252</sup> See e.g., TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019). 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).

<sup>253</sup> See e.g., Braver Angels, <https://braverangels.org/> (last accessed Aug. 31, 2023).

security policy about China; instead, those voices should be incorporated, but also in conversation with China experts. This suggestion is in line with what has variously been called “cooperative federalism”<sup>254</sup> “intergovernmental relations,”<sup>255</sup> or, simply, “coordination.”<sup>256</sup> 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.<sup>257</sup> This recommendation should be institutionalized, but even more upstream, 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. Establishing expert panels 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, and the Wilson Center that organizes a China Fellowship that has also hosted a number of cohorts. 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 stake-holders 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 of 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 policy-making.

Altering the epistemic environment for lawmaking on China may further help with the second and related issue which is how to address structural and doctrinal issues. Most of the issue with the state statutes

---

<sup>254</sup> THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* (1989)

<sup>255</sup> THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990).

<sup>256</sup> See Ahdieh *supra* note 30, at 1188.

<sup>257</sup> Kristen E. Eichensehr, *CFIUS Preemption* 13 HARV. NAT’L SEC. J. 1, 23 (2022).

to date occur at the level of the state executive and legislature. As for the courts, there is evidence to suggest that they are not always deferential to the executive and legislature when it comes to national security issues. However, as *Shen* shows, this is not always the case. Judges, too, may benefit from more China knowledge.<sup>258</sup> In so doing, greater attention to comparative questions may help modernize thinking regarding states' rights.

As discussed, one issue is the methods used for EPC 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."<sup>259</sup> A more thorough-going and systematic approach to these questions would improve doctrinal analysis. For instance, judicial review of a state statute that prohibits a Chinese individual from purchasing real estate in that state, in applying strict scrutiny, should consider a fact-based inquiry regarding, among other questions, that individual's reason for entering or being in the United States. One negative consequence of the securitization of property is that, in its over-inclusiveness, it alienates exactly those Chinese who the United States should embrace, among them, students, scholars, scientists, asylees, and others.

Developing a doctrine to understand the relationship between a Chinese corporation and the PRC Government or CCP presents its own challenges. However, a version of an alter ego/veil-piercing doctrine could help guide judicial decision-making 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.<sup>260</sup> At the federal level, CFIUS

---

<sup>258</sup> See Clarke *supra* note 212, at 464-5 (showing that U.S. judges often mischaracterize the Chinese legal system).

<sup>259</sup> Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 630 (1936).

<sup>260</sup> On varying corporate structures and their relation to the Chinese Government and CCP, see e.g., Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm* 103 GEORGETOWN L. J. 103, 103 (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 (2022).



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 in the course of litigation), the excesses of the “securitization” of property 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”? Reciprocity, while used in the past,<sup>261</sup> may be likely a non-option in the context of contemporary U.S.-China relations. But the question posed and the larger problem of the “securitization” of property raise the issue of how “open” the U.S. legal system, in this 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.

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 the Trump administration, despite its many bans against TikTok and WeChat, never disclosed what evidence it obtained proving that Chinese tech companies were involved in illicit data transfer to the PRC Government. 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 public are anything but. At the federal level, the problem of “unchecked secrecy”<sup>262</sup> 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

---

<sup>261</sup> *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 field of foreign affairs reserved to the Federal Government.”)

<sup>262</sup> HEIDI KITROSSER, *RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION* 2 (2015).

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.<sup>263</sup> As the review of U.S. property law’s structural biases shows,<sup>264</sup> 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.<sup>265</sup> Yet, balancing the national security urge, legislators, judges, and policy-makers 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. Otherwise, the United States faces the very real danger that it will continue to prioritize national security at all costs—precisely what the CCP has done.

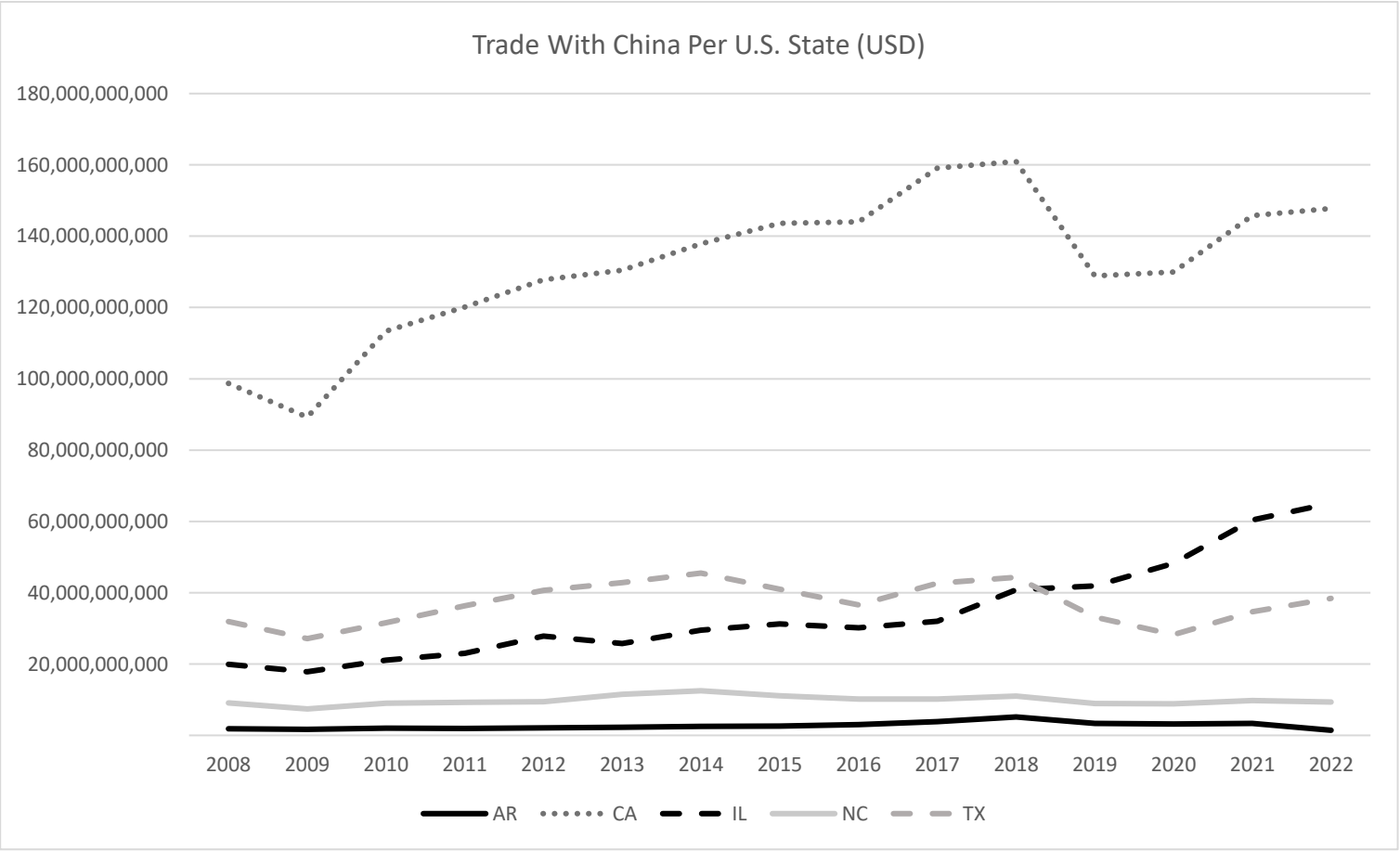
---

<sup>263</sup> See FRANK K. UPHAM, *THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES* x (2018); see also David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development* 1 ACCOUNTING, ECON., & L. 1, 2152, 2152 (2011); Katharina Pistor, *Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change*, 11 GLOBAL JURIST 1, 1 (2011).

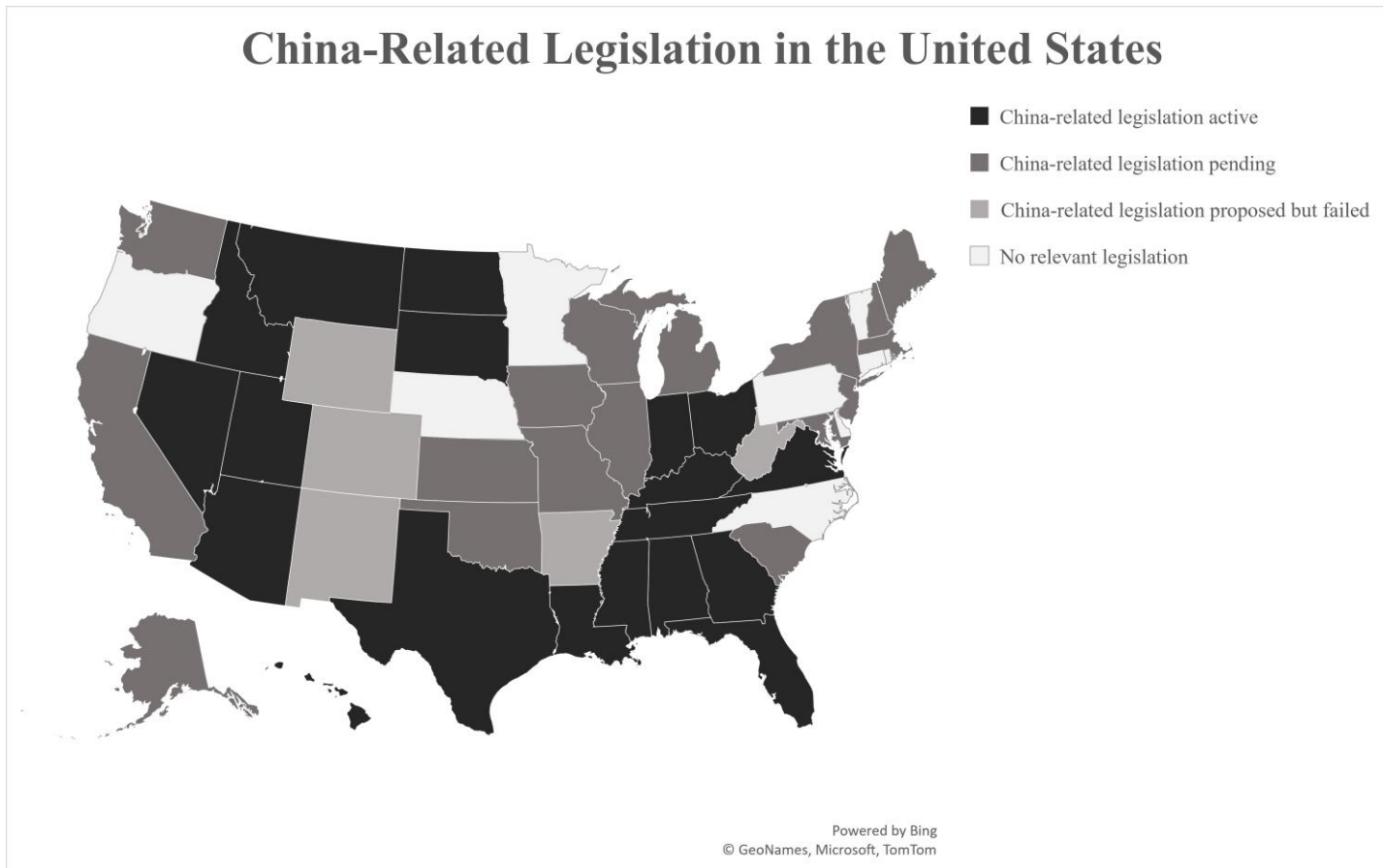
<sup>264</sup> See *supra* §II(B).

<sup>265</sup> Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community* 6 (Feb. 6, 2023).

Graph



Map



## 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/Last Actions and Status of Bill (as of Aug. 28, 2023)
Alabama	HB379	Real Property	Prohibit ownership of real property by Chinese governmental entities	EN 5/31/23
Arizona	SB1112	Real Property	“	RTC
Arizona	HB2376	Real Property	Prohibit ownership or lease of state lands by Chinese governmental entities	RTC
Florida	SB264	Real Property	Prohibit purchase of agricultural land by covered Chinese persons	EN 5/8/23
Hawaii	HB929	Real Property	Prohibit ownership of real property by Chinese citizens or entities within two miles of federal land	RTC

Hawaii	HB505	Real Property	Prohibit transfer of real estate to members of the CCP	RTC
Indiana	SB477	Real Property	Prohibit ownership or lease by Chinese citizens of real property adjacent to military installations	EN 5/1/23
Iowa	HF542	Real Property	Prohibit ownership of real property by Chinese citizens or entities	RTC, Recessed
Iowa	HF211	Real Property	“	RTC, Recessed
Kansas	HB2397	Real Property	Prohibit conveyance of certain real property to Chinese citizens or foreign adversaries	RTC
Kansas	SB283	Real Property	“	RTC
Kansas	HB2069	Real Property	“	EG

Louisiana	HB537	Real Property	Prohibit conveyance of certain real property to Chinese governmental entities or foreign adversaries	EN 6/27/23
Louisiana	SB91	Real Property	Prohibit conveyance of certain real property to Chinese citizens or entities	EG
Maryland	HB968	Real Property	Prohibit transfer of agricultural land to non-resident Chinese citizens or entities	RTC
Missouri	HB903	Real Property	“	EG
Missouri	SB649	Real Property	Prohibit ownership of real property by Chinese governmental entities or foreign adversaries	RTC
Montana	SB203	Real Property	Prohibit acquisition of agricultural land or critical infrastructure by Chinese governmental entities or foreign adversaries	EN 5/4/23; Effective 10/1/23
New York	SB6583	Real Property	Prohibit acquisition of agricultural land by Chinese governmental entities and foreign adversaries	RTC

New York	A06444	Real Property	“	RTC
North Dakota	SB2371	Real Property	Prohibit ownership of real property by Chinese entities or foreign adversaries	EN 4/29/23
Ohio	HB212	Real Property	“	RTC
Oklahoma	SB955	Real Property	Prohibit ownership of real property by any member of the CCP or present/former Chinese officials	RTC
South Carolina	HB3566	Real Property	Prohibit ownership of more than 100 acres of land by Chinese entities	RTC, Recessed
South Carolina	HB3118	Real Property	Prohibit possession by Chinese entities of real property within fifty miles of military bases	RTC, Recessed
South Carolina	SB576	Real Property	Prohibit possession of real property by Chinese foreign adversaries	RTC, Recessed



Texas	SB147	Real Property	Prohibit ownership of real property by Chinese entities or citizens	RTC, Recessed
Texas	SB552	Real Property	Prohibit transactions in agricultural land by Chinese-owned companies	RTC, Recessed
Utah	HB186	Real Property	Prohibit restricted Chinese entities from acquiring interests in land; requiring the alienation of those entities' existing interests in land	EN 3/13/23
Virginia	SB1438	Real Property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	EN 4/12/23
Virginia	HB2325	Real Property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	EN 4/12/23
Washington	SB5754	Real Property	Prohibit Chinese non-resident aliens, businesses, or governmental entities from acquiring any interest in agricultural, forest, or mineral land	RTC

Wisconsin	SB264	Real Property	Prohibit Chinese foreign adversaries from acquiring or transferring any interest in agricultural land	RTC
Wisconsin	AB269	Real Property	“	RTC
Alaska	HB94	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	RTC
Arizona	HB2488	Prohibited Transactions	Bans Chinese company from contracting with public entities unless said company certifies that it does not use Uyghur labor	EN 6/22/23
California	AB227	Prohibited Transactions	Prohibit installation of Chinese social media platforms on state-owned or state-issued electronic devices	RTC
Florida	FL ST § 288.860	Prohibited Transactions	Prohibit certain local government units from participating in agreement with or accepting grant from Chinese entity	EN 2021; latest effective 2023
Florida	SB264	Prohibited Transactions	Prohibit government entities from contracting with Chinese entities	EN 5/9/23

Florida	SB846	Prohibited Transactions	Prohibit state universities from accepting grants from or participating in agreements with Chinese higher education institution	EN 5/9/23
Georgia	SB93	Prohibited Transactions	Prohibit use of Chinese social media platforms on state equipment or by state employees	EN 5/2/23
Georgia	GA ST § 50-5-84.1	Prohibited Transactions	Prohibit state contracts with companies owned by the government of China	Amended 5/5/23
Hawaii	HB1200	Prohibited Transactions	Prohibit dept. of land and natural resources from purchasing, operating, or otherwise acquiring or using Chinese drones	EN 7/6/23
Hawaii	HB460	Prohibited Transactions	Prohibit the downloading or use of TikTok on government-issued devices or on government internet networks	RTC
Idaho	HB294	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	EN 4/6/23
Idaho	HB 274	Prohibited Transactions	Prohibit state employees from using TikTok on a state-issued device	EN 3/24/23

Illinois	HB2984	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	RTC
Illinois	HB3581	Prohibited Transactions	Prohibit governmental entity from entering into a contract or other agreement relating to critical infrastructure in the State with a company associated with China	RTC
Indiana	SB477	Prohibited Transactions	“	EN 5/1/23
Iowa	HB181	Prohibited Transactions	Prohibit state board of regents from investing public moneys in companies that are owned or controlled by Chinese military or government services	RTC, Recessed
Kentucky	SB20	Prohibited Transactions	Prohibit the use or download of TikTok on any state government network or any state government-issued device	EN 3/22/23
Louisiana	Tit. 38 § 2212.3	Prohibited Transactions	Allow any public entity is authorized to reject the lowest bid if received from a bidder domiciled in a Communist country, incl. China	EN 1985; latest effective 1999

Louisiana	Tit. 48 § 252	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 projects of materials or supplies manufactured in a Communist country, incl. China	EN 2003; latest effective 2021
Louisiana	Tit. 39 § 1602	Prohibited Transactions	Authorize public entity to reject lowest bid in supply contracts if lowest bidder is domiciled or manufactures its supplies in Communist country, incl. China	EN 1985; latest effective 2015
Louisiana	Tit. 33 § 4789	Prohibited Transactions	Authorize certain local units to adopt ordinances to prohibit the sale of products produced in any Communist country, incl. China	EN 1963; latest effective 2023
Louisiana	Tit. 51 § 3053	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	EN 2022
Maine	SB877	Prohibited Transactions	Prohibit company owned or operated by the PRC from bidding on contract with any entity that receives state funding	RTC

Maryland	HB1141	Prohibited Transactions	Prohibit the downloading or use of TikTok on government-issued devices or on government internet networks	RTC
Massachusetts	H84	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	RTC
Massachusetts	S37	Prohibited Transactions	Prohibit state employees from downloading Bytedance apps	RTC
Massachusetts	H82	Prohibited Transactions	Prohibit download or use of Chinese applications on any State-issued electronic device	RTC
Michigan	HB4041	Prohibited Transactions	Prohibit use of TikTok on state-owned devices	RTC
Michigan	SB0015	Prohibited Transactions	“	RTC
Mississippi	HB2853	Prohibited Transactions	Prohibit state agencies from purchasing or operating drones made of parts from China	EN 4/12/23

Mississippi	SB2140	Prohibited Transactions	Prohibit state employee from downloading or using TikTok on a state-issued device or network	EN 4/11/23
Missouri	HB919	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	EG
Montana	SB419	Prohibited Transactions	Ban TikTok from operating within territorial jurisdiction of Montana	EN 5/17/23
Nevada	SB11	Prohibited Transactions	Prohibit state agencies from purchasing drones made in China	EN 4/11/23
New Hampshire	HB86	Prohibited Transactions	Prohibit state contracts with Chinese government owned or affiliated technology manufacturers	RTC
New Jersey	A5080	Prohibited Transactions	Prohibit download or use of TikTok on any State-issued electronic device	RTC

New Jersey	S3462	Prohibited Transactions	“	RTC
New Jersey	S3710	Prohibited Transactions	Prohibit Chinese companies from construction, maintenance, or control of critical infrastructure	RTC
Ohio	HB17	Prohibited Transactions	Prohibit download or use of Chinese applications on any State-issued electronic device	RTC
Ohio	HB33	Prohibited Transactions	“	EN 7/4/23
Oklahoma	SB43	Prohibited Transactions	Prohibit state agency or political subdivision from purchasing any goods or services from or entering into contracts with a company owned or operated by the Government of China	RTC
South Carolina	HB3509	Prohibited Transactions	Prohibit local government units from investing in any Chinese company or development	RTC, Recessed



South Carolina	SB163	Prohibited Transactions	Prohibit award of incentive or development grant to companies majority-owned by PRC or CCP	RTC, Recessed
South Carolina	HB3510	Prohibited Transactions	“	RTC, Recessed
South Carolina	HB3119	Prohibited Transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	RTC, Recessed
South Dakota	SB189	Prohibited Transactions	Prohibit purchasing agencies from contracting with companies owned or controlled by Chinese government	EN 3/27/23
Tennessee	SB834	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	EN 4/13/23
Tennessee	HB1445	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	EN 4/13/23

Texas	Bus. & C. § 113.002	Prohibited Transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	EN 2021
Texas	GC § 2274.0102	Prohibited Transactions	Prohibit Chinese-owned companies from entering into agreements relating to critical infrastructure	EN 2021
Texas	SB1260	Prohibited Transactions	Prohibit certain entities operating airports from entering into certain contracts with Chinese entities misappropriating intellectual property under U.S. law	EN 5/23/23
Texas	SB1893	Prohibited Transactions	Prohibit state employees from downloading Bytedance apps	EN 6/14/23
Virginia	SB1459	Prohibited Transactions	“	EN 4/12/23
Montana	SB351	Personal Property	Prohibit storage of residents' genetic data and biometric samples in China	EN 6/7/23
Ohio	SB83	Personal Property	Prohibit state institution of higher education from accepting gifts or contributions from the PRC or anyone acting on its behalf	RTC

Ohio	HB151	Personal Property	“	RTC
Texas	SB1040	Personal Property	Prohibit insurance coverage of organ transplant in China or of transplant involving organs of Chinese origin	EN 6/18/23