

### **Assessing Potential Discriminatory Impact of U.S.-China Legislation**

There is growing bipartisan agreement that the Chinese Communist Party's (CCP) policies represent one of the greatest threats to U.S. national security. Especially following the rise in anti-China sentiment in the wake of COVID-19 pandemic, lawmakers have pursued a policy of increasing confrontation with the CCP, including escalatory economic measures, increased military spending, and ideological competition. Done indiscriminately, this approach often hurts American workers and industry, and alienated American allies with punitive unpredictability.

One of the primary challenges in developing a constructive U.S.-China strategy is being responsive to the lessons that history has taught us about how the Asian American community will be impacted by China threat inflation. Part of that is acknowledging that it is undeniable that the U.S. has a legacy of weaponizing national security to deny the civil rights and civil liberties of immigrants and members of the Asian American community. We need only look to [discriminatory immigration policies](#) in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the incarceration of 120,000 Japanese Americans in WWII, and the surveillance and violence perpetuated against Arab, Middle Eastern, Muslim, and South Asian communities post 9/11.<sup>1</sup>

Therefore, it is critical that in this moment of intensifying U.S.-China conflict that lawmakers, advocates, and directly impacted communities are armed with the tools necessary to evaluate legislation at both the state and federal level related to U.S.-China relations with an eye towards potentially discriminatory ramifications. To that end, Asian Americans Advancing Justice - AAJC recommends considering the following criteria to evaluate such legislation (see below).

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<sup>1</sup> Emma Newcombe, *How States Used Land Laws to Exclude and Displace Asian Americans*, Governing (Nov. 23, 2022), <https://www.governing.com/context/how-states-used-land-laws-to-exclude-and-displace-asian-americans>.

## **Evaluating U.S.-China Strategy**

- Has the legislative body identified the specific national security threat sought to be addressed by the policy?
  - Does this body have the expertise necessary to address the issue?
  - Is this policy response tailored and proportional to that issue?
  - Are other legislative/policymaking bodies better equipped to identify and address the issue?
    - For example, it is the federal government’s authority—not a states’ authority—to determine matters of U.S. foreign policy as it relates to foreign adversaries.
    - Furthermore, it is primarily the job of the Committee on Foreign Investment in the United States (CFIUS) – not Congress – to review transactions involving foreign investment in U.S. real estate and the implications on national security.
  
- Has the legislative body identified the specific human rights concern sought to be addressed by the policy?
  - Is this policy response tailored and proportional to that issue?
  
- Have specific hearings/studies been conducted to justify the measure being taken?
  - Have those hearings/studies been measured, collaborative, and bipartisan?
  - Have impacted communities’ voices been sought and considered?
  - Generalized concerns expressed about the threat posed by the Chinese government should not be considered sufficient.
  - Hypothetical scenarios about potential control by the Chinese government generally should not be considered sufficient.
  
- What are the harms that may be felt by Americans and American businesses if the proposed policy is enacted?
  - If enacted, would these policies specifically harm small businesses? Asian American-owned businesses? Iranian American-owned businesses?
  
- Would the proposed policy contribute to the misguided understanding that the CCP is a monolith and that all members of the CCP are similarly unified in their support of Xi Jinping’s agenda?
  
- Would the proposed policy feed into fear mongering and sensationalism? Would it alter long standing agreements or hamper ongoing U.S.-China efforts to work collaboratively?
  
- How could the policy negatively impact U.S. economic competitiveness and innovation?
  - If enacted, would the policy harm certain STEM industries’ ability to recruit and maintain top talent, specifically when it comes to tech fields?



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- Consider not only the number of working professionals in these fields, but also the number of students that this policy would cover.
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    - If enacted, would the policy specifically harm U.S. efforts to grow production, manufacturing, R&D capabilities?
    - If enacted, would the policy specifically harm the United States' ability to access technology necessary to make progress on green energy and fight climate change?
    - If enacted, what are the other industries that could be harmed such as energy, higher education, real estate, etc.?
  - Who would be responsible for enforcing the policy and are they equipped to do so?
    - For example, if a law prohibits the sale of land to a Chinese national or Chinese business, who would be responsible for verifying that an individual is not a Chinese national or Chinese business?
    - Is it possible that that Chinese Americans or Chinese American businesses would be profiled?
  - What civil rights mechanisms exist to prevent Chinese/Asian Americans from being discriminated against?
    - What is the likelihood that certain groups would be presumed suspect and forced to prove “innocence”?
    - For example, in many China Initiative cases, inexperienced FBI investigators presumed that individuals were engaged in deceitful conduct rather than practice that may have been considered standard in the industry (e.g., cross-border scientific collaborations)
  - What are the other communities that have been caught up in these bills?
    - While some legislation exclusively targets Chinese nationals, other bills explicitly will cause harm to Iranians, Venezuelans, Syrians, etc.
  - If this policy were to result in discrimination or racial profiling against Chinese/Asian Americans, what transparency, accountability, and oversight mechanisms exist to ensure that such behavior is identified, quantified, addressed, and remedied?
  - Have proponents of this policy consulted extensively with the Asian American community, specifically with respect to anticipated discriminatory blowback?
    - What was the community response to this policy?

## **Discriminatory Land Laws**

A large subset of the emerging U.S.-China legislation is referred to as so-called ‘alien’ land laws. These land laws are modern incarnations of older legislation; they are racist restrictions, first enacted in the late 1800’s, to prevent Asian immigrants from purchasing or even leasing property to prevent their communities from permanently settling in the U.S. The history of such land laws also cannot be divorced from policies such as the Immigration Act of 1917 and Chinese Exclusion Act of 1882.<sup>2</sup> Similar bills such as restrictive statutes against immigrants owning agricultural land were also passed in the 1970s by multiple states such as Missouri, Iowa, and Minnesota in response to anti-Japanese sentiment.<sup>3</sup>

Relevant case law has failed to completely shut the door on land laws as it pertains to foreign citizens. The [relevant U.S. Supreme Court case](#) is *Oyama v. California* (1948), and while the Supreme Court did declare that alien land laws were unconstitutional as applied to American citizens, it did not explicitly overturn alien land laws as applied to foreign individuals.<sup>4</sup> In fact, legal experts believe that *Oyama* “left open the authority of state and local governments to continue to use their police powers to regulate noncitizens’ access to property.”<sup>5</sup> Four years later, California’s own law was formally struck down by the California Supreme Court in 1952 in *Sei Fujii v. State of California*.<sup>6</sup> In [that case](#), the Court found that the Alien Land Law was enacted as an “instrument for effectuating racial discrimination” and thus violated the Equal Protection Clause of the 14<sup>th</sup> Amendment.

### ***Analysis***

Asian Americans Advancing Justice | AAJC views discriminatory land law on non-US individuals to be legally problematic and likely unconstitutional, especially if the law is [broad in scope](#), [vague in language](#), and [targets individuals](#). Approximately 20 states have introduced such legislation and several such as Florida and Tennessee have already enacted them. Multiple such bills have also been introduced at the federal level.

These bills would bar foreign nationals—including Chinese foreign nationals—from purchasing, leasing, or acquiring property in the U.S. Many of these bills include use language that is too vague, and therefore applicable to Americans with dual citizenship or lawful permanent residents. Furthermore, these bills often define covered land as not just (1) agricultural land and (2) critical infrastructure, but also (3) real property which applies broadly to all types of land.

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<sup>4</sup> *Oyama v. California*, 332 U.S. 633 (1948).

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<sup>5</sup> Rose C. Villanor, “Rediscovering *Oyama v. California*: At the Intersection of Property, Race, and Citizenship,” 87 Wash. U. L. Rev. 979, 985-986 (2010).

<sup>6</sup> *Sei Fujii v. State of California*, 38 Cal.2d 718 (Cal. 1952).



Not only are these land laws discriminatory but they will have a significant detrimental impact on the American economy. Many states have multiple industries heavily reliant on Chinese nationals such as higher education, research and development, and real estate. The same can be said for other communities targeted by these laws. For example, [H.B. 537](#) in Louisiana also applies to Venezuelans which will lead to negative consequences for the oil and gas industry.

Use this chart to do a topline legislative analysis of a land law’s immediate potential for harm.

Bill Language	Extremely Harmful	Very Harmful	Harmful
<b>Definition of covered land</b>	“Real property” can apply to “urban lands,” “commercial property” or a combination.	“Agricultural land” can apply to “farmland” or “agricultural land.”	“Critical infrastructure” can apply to land used for water plants, power plants, minerals, or military bases.
<b>The number of acres of covered land</b>	Any amount of land.	A limited number of acres.	
<b>Definition of ‘control’</b>	Indirect or partial ownership of covered land.	Direct ownership of covered land.	
<b>Definition of covered entities</b>	Individuals, usually defined as any person associated with the CCP, all Chinese nationals, or any individuals from a so-called ‘country of concern,’ which includes China.	Companies	Corporate entities
<b>Definition of designated country(s)</b>	While some bills covered up to seven foreign countries, other bills cover only China. All definitions of a covered country that include China are extremely harmful to the Asian American community.		
<b>Definition of the CCP</b>	“Foreign Adversaries,” “Members of the CCP,” and Connections to the People’s Liberation Army are all extremely harmful.		
<b>Enforcement mechanisms</b>	Criminal penalties	Civil penalties	Land registration and disclosure requirements
<b>Carve outs</b>	None	Homestead exceptions and carve outs for lawful permanent residents or people granted asylum	