TABLE OF CONTENTS

I. INTRODUCTION ......................................................................................................................1

II. A HISTORY OF EXON-FLORIO AND CFIUS – AN ASIAN-AMERICAN JURISPRUDENCE
PERSPECTIVE..................................................................................................................................4

III. THEMES OF RACIALIZATION, POLITICIZATION, AND “FOREIGNNESS” PLAYING A
ROLE IN CFIUS REVIEW OF CHINESE CORPORATIONS......................................................11

IV. CONCLUSION..........................................................................................................................20

I. INTRODUCTION

This article seeks to apply Asian-American jurisprudence theories and methods to the
realm of corporate law. Specifically, it addresses the U.S. legal and regulatory review
of inbound foreign direct investment under the Exon-Florio Amendment of the
Omnibus Trade and Competitiveness Act of 1988 (Exon-Florio).¹ The primary regulatory
institution under Exon-Florio is the Committee on Foreign Investment in the United States
(CFIUS).² Over the past several decades, CFIUS has taken charge of identifying problematic
inbound transactions, mitigated their effects on national security, and granted the President
the authority to intervene and stop such transactions when necessary.³

Before delving into the specifics of Exon-Florio and analyzing its provision under an
Asian-American jurisprudence framework, it is important to explain and justify this article’s
theoretical basis. Asian-American jurisprudence, similar to all race-based approaches to the
analysis of law, is part of the larger Critical Race Theory (CRT) school of legal thought.
CRT arose from the Critical Legal Studies (CLS) movement, tracing its origins to the 1977
Conference on CLS at the University of Wisconsin.⁴ The CLS movement has been

² Yiheng Feng, “We Wouldn’t Transfer Title to the Devil”: Consequences of the Congressional
Politicization of Foreign Direct Investment on National Security Grounds, 24 NYU J. INT’L L. & POL. 253,
264 (2009-2010).
³ Id. at 263
⁴ Guyora Binder, Critical Legal Studies, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL
THEORY (BLACKWELL COMPANIONS TO LEGAL PHILOSOPHY) 267, 267 (Dennis Patterson ed., 2010).
influential primarily in the areas of legal and constitutional theory, legal history, labor and employment law, international law, local government, and administrative law. While the intellectual movement is complex and difficult to summarize, CLS’s foundational tenet provides that “law is politics[,] and it is not neutral or value free.” Essentially, CLS scholars argue that law is not pure; instead, it grows out of the power relationships in society and exists to advocate the interests of the party or class that supports it. It is a “rhetorical apparatus” that has been historically used as justification for state power and intervention. Law does not exist as a posited rule or norm, but as a “collection of beliefs and prejudices that legitimize the injustices of society.” Law, in sum, is ideological.

CRT emerged in the late 1980s, as both an off-shoot of and as a response to CLS, espousing a race-conscious form of legal criticism. The main charge of the CRT movement toward CLS was that very few CLS scholars made “more than a token effort to address racial domination specifically, and their work does not seem grounded in the reality of the racially oppressed.” Generally, the CRT movement considers the impact of race as a contributing factor when evaluating laws or their effects on society. Within CRT, the concept of intersectionality broadens the inquiry of legal oppression by not only looking at race, but also at other dimensions that can account for the disempowerment of individuals or entities under the law. These other dimensions include race, sex, class, national origin, sexual orientation, or a combination of those factors.

As part of the CRT school, Asian-American jurisprudence-based scholarship has predominately focused on the racial and national identity of Asians and Asian-Americans, reinterpreting cases, statutes, regulations, and histories in three central narratives: immigration, citizenship, and race. Through this racial lens, Asian-American jurisprudence has specifically pointed to the notions of Asiatic unassimilability and the process of "Asiatic

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5 Id.


7 Id.

8 A rhetorical apparatus is a method of political discourse.

9 MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 7 (1987).

10 Cornell Law School Legal Information Institute, supra note 6.

11 M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1491 (8th ed. 2008).


15 Id.


17 Id.
These theories argue that the Asiatic racial categorization continuously prevents American and foreign-born Asian-Americans from “obtaining full citizenship rights” and “den[ies] them full political participation.” Essentially, Asian-American jurisprudence scholars argue that Asians and Asian-Americans, under the law, have been victimized and treated differently because there is something more foreign and, therefore, more dangerous to authorities about an individual’s or group’s distinctly Asian identity. This foreignness makes it impossible for Asians to fully assimilate into American society.

The general argumentative methodology and framework of Asian-American jurisprudence has generally been applied to substantive areas of law, such as criminal law and constitutional law. It is especially applicable, however, to immigration law, “the most familiar terrain of Asian-American jurisprudence.” Focus on these substantive areas is not surprising, as these areas highlight an individual Asian-American’s treatment and experience under the law, challenges associated with standing up to prejudices and assumptions of unassimilability, and threatening foreignness.

This article seeks to expand the traditional areas of substantive law affecting Asian-American jurisprudence to the realm of corporate law. Specifically, it will examine the experience of some Chinese and, to a lesser extent, Japanese corporations that have gone through CFIUS review. In turn, this article hypothesizes that the outcome of these Chinese and Japanese corporations’ transactions involving CFIUS were influenced, to some extent, by Asian-American jurisprudential themes of racialization, foreignness, and politicking. The outcomes of these transactions are akin to what individual Asians and Asian-Americans face in their quest for immigration or citizenship. At the very least, this article suggests that when individual Chinese and Japanese corporations are subject to CFIUS review, it is difficult to distinguish between legitimate national security concerns and more politically and racially-motivated concerns regarding the corporation’s identity.

This article will first explore the history of Exon-Florio and CFIUS from an Asian-American jurisprudence perspective, arguing first that Exon-Florio arose from racial and

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19 Id.

20 Gotanda, New Directions, supra note 16, at 8.

21 Gotanda, Citizenship Nullification, supra note 18, at 79, 80, 83.

22 Gotanda, New Directions, supra note 16, at 8

23 Id.

24 Id.

25 Gotanda, Citizenship Nullification, supra note 18, at 80; Gotanda, New Directions, supra note 16, at 8 (for example, the scholarship examining the justifications for the Chinese Exclusion Act of 1882).

26 Research conducted for this article reveals a lack of scholarly work using the CRT perspective. Additionally, the use of an Asian-American jurisprudential lens is almost unprecedented when examining any topic in corporate law.

27 Regarding foreignness, it more precisely refers to the attributes of foreignness to the corporation in question.
political concerns surrounding Japanese corporations in the 1980s. Essentially, since the beginning and very enactment of Exon-Florio, racial concerns about the foreignness of Asian corporations were present. From this politicized and racialized historical basis, this article will then examine selected case studies of Chinese corporations and how they fared under CFIUS review. This article will argue that racialization, politicization, and attributions of “foreignness,” unsurprisingly, continued in these cases. The premise underlying this article maintains that there is something enriching about examining CFIUS review and, more generally, corporate law from an Asian-American jurisprudence perspective. Applying Asian-American jurisprudence techniques and methods to CFIUS review highlights the true complexity and multidimensional nature of foreign direct-investment review in the United States.

Before delving into the analysis of CFIUS, another theoretical remark is in order. It may seem natural to apply the Asian-American jurisprudence themes of foreignness and racialization to a single Asian-American or Asian individual, or group of individuals who are applying for citizenship or immigration. It may seem odd, however, to apply such themes to a corporation, which of course, biologically, is not a real person. For purposes of the legal analysis in this article, though, such an approach is nevertheless sound, as under U.S. law, corporations have been granted “corporate personhood.”28 For nearly a century, U.S. courts have recognized corporations, like people, have constitutional rights.29 Most notably in 
Citizens United v. Federal Election Commission,
the Supreme Court held corporations should be afforded certain First Amendment protections.30 Thus, viewing corporations as persons, who can be racialized and labeled as overly “foreign,” is not without a theoretical and, indeed, a legal basis.31

II. A History of Exon-Florio and CFIUS – An Asian-American Jurisprudence Perspective

This section will argue the very history of Exon-Florio and CFIUS has been colored by Asian-American jurisprudential themes of racialization, politicization, and foreignness—specifically, fear of Japanese corporations exerting too much influence over the U.S. economy. It will not provide a comprehensive or descriptive history of Exon-Florio and

31 For example, consider the experience of Computer Associates with the owner, Charles Wang, a Shanghai-born Chinese-American, and his company, Computer Associates. In 1998, Wang tried to execute a major hostile takeover of Computer Sciences Corporation, an American IT services company. The transaction eventually failed as Wang and his company were both “victimized” by allegations that Wang was “insufficiently assimilated” and thus could not be trusted due to continuing ties and contacts to China. Gotanda, Citizenship Nullification, supra note 18, at 96-97.
CFIUS, as much scholarly work has already done so.32 America’s current foreign direct-investment review process is codified largely under Exon-Florio, which authorizes the President to block “mergers, acquisitions, or takeovers” involving foreign entities if they threaten to impair national security.33 The aforementioned presidential action is typically a last resort measure if the President feels other laws are inadequate to protect national security.34 The primary regulatory institution that identifies and investigates the aforementioned transactions is CFIUS. CFIUS was created by executive order under President Gerald Ford on May 7, 1975,35 in response to concerns stemming from growing foreign direct investment in the United States and in response to stagflation and the weakened U.S. dollar.36 CFIUS’s mandate encompassed monitoring and coordinating U.S. policy on foreign investment.37 Exxon-Florio expanded CFIUS’s power and, most importantly, authorized the President to block problem transactions.38 Exxon-Florio was developed and enacted between 1980 and 1988 when there was increasing foreign investment in the United States. Indeed, foreign direct investment during that eight-year time period increased 300% from 90 billion to 304.2 billion.39 In terms of composition, CFIUS is an interagency committee with sixteen members and is chaired by the Secretary of the Treasury. Other members include the chairs and heads of various Departments, including State, Defense, Justice, Homeland Security, and Energy.40

In addition to congressional concern over an increasing trend of foreign direct-investment rates in the United States in the 1980s, two specific, high-profile, controversial bids by foreign firms in the mid-1980s directly brought about the rise and passage of Exxon-Florio. A U.K. citizen initiated one deal,41 while the other was led by a Japanese company.42


34 Id.


36 Feng, supra note 2, at 258-59.


38 Id.


41 See Hicks, infra note 54.

In comparing the two deals and, particularly, the U.S. government’s response to each, the effects of racialization and foreignness are evident, especially in the Japanese case, which was arguably the impetus for Exon-Florio.

The first deal involved U.K. citizen Sir James Goldsmith’s attempted takeover of Goodyear Tire and Rubber in 1986. 43 Goldsmith had a reputation as a corporate raider, a “flamboyant billionaire financier” and “imposing buccaneering…figure” who acquired much of his immense wealth through some of the “boldest and most outrageous takeover bids ever seen.”44 Goldsmith and a group of allied investors purchased 11.5% of Goodyear stock in a greenmail, hostile takeove...
taking over Goodyear and emphasized the deal's negative impact on the U.S. economy. Importantly, there was no emphasis on Goldsmith's race or foreign national origin; instead, justification for opposition to the deal was presented using macroeconomic arguments. Due to continued opposition from Goodyear, the federal government, and the Ohio state government, Goldsmith dropped his bid after he agreed to be bought out by Goodyear for approximately $620.7 million. As a result, Goldsmith pocketed a $90 million profit.

The other transaction that triggered the enactment of Exon-Florio involved a Japanese corporation, Fujitsu. In 1986, Fujitsu attempted to acquire Fairchild Semiconductor Corporation, a manufacturer of sensitive technology equipment, including computer chips. In contrast to the aforementioned Goldsmith-Goodyear deal, congressional reactions were arguably more racialized and politically-charged, resulting in framing the opposition in terms of fear of a uniquely Japanese takeover in the United States. In hindsight, this racialized language is ironic since this potential acquisition was a friendly takeover in contrast to Goldsmith's hostile greenmail transaction. Fairchild invited Fujitsu to bid because it desperately needed to raise its capital to maintain its business operations. Thus, for Fairchild, Fujitsu was the “white Samurai” who offered $200 million for the acquisition. When the Fujitsu-Fairchild deal collapsed, however, Fairchild's market value significantly declined, and a U.S. rival, National Semiconductor, acquired Fairchild for about one-half of the price of Fujitsu's original offer.

The reaction to the Fujitsu-Fairchild deal was very different than the reaction to the Goldsmith-Goodyear deal due to the intense interest that came from every federal agency,

52 Id. at 273 (statement of Michael DeWine, Rep. from Ohio).
53 Galvanized by Goldsmith's attempted takeover, the Ohio legislature passed an anti-takeover law, which was signed by the governor on November 22, 1986. For a discussion of the anti-takeover statute, see Michael Ryngaert & Jeffry M. Netter, Shareholder Wealth Effects of the Ohio Anti-takeover Law, 4 J. L. ECON. & ORG. 373, 373, 375 (1988). The law makes it harder for hostile takeovers to be consummated in that (among other provisions) it includes a clause concerning directors' fiduciary duties in takeover resistance (i.e., directors owe a duty to shareholders in resisting takeovers); the standard of takeover resistance is consistent with director fiduciary duties “if it is based on consideration ‘of long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.’” (quoting Ohio Rev. Code Ann. § 1701.59 (West)).
55 Id.
56 Feng, supra note 2, at 260.
57 Id.
58 Id. at 260-261. In contrast to the private demise of Goldsmith, the Fujitsu deal endured a much more public funeral in part because it tapped into American fears of Japanese expansion into American lands and major defense contractors.
59 William C. Rempel & Donna K.H. Walters, supra note 42.
60 Id.
61 Id.
62 Id.
especially the Treasury, Defense, Commerce, and Justice Departments. As political pressure intensified, President Ronald Reagan ordered CFIUS review. Some observers stated that letting Fujitsu acquire Fairchild was akin to “selling Mt. Vernon to the Redcoats.” This analogy was, quite ironically, not used to attack U.K. citizen Goldsmith’s deal. By the end of 1987, total Japanese investment in the United States increased to $33.3 billion, by 195% from 1982, instilling fear that the Japanese would take over the U.S. economy. Rather than frame opposition to the Fujitsu-Fairchild deal in broad, economic, and generalized terms, anti-Japanese racialized rhetoric was employed. This outlook was exemplified by U.S. Commerce Secretary Baldrige’s view that America’s future was at stake when he attacked the sale as a “threat to national security,” and “something that [gave him] great problems.” Administrators declared the deal was “part of a master plan of the Japanese to take over the U.S. information industry.” A former Fairchild executive, Wilfred Corrigan, warned any acquiescence to the Fujitsu-Fairchild deal could initiate the “domino theory,” in which “all the major Japanese companies would be coming in to acquire U.S. semiconductor manufacturing” companies by the end of 1987.

Ironically, such inflammatory Cold War-style rhetoric was used against Japan, even though Japan was a military ally to the United States. Others referred to a “Japanese conspiracy,” in which the Japanese Ministry of International Trade and Industry and Japanese corporations targeted U.S. industries by heaping “green tea and dirty tricks” on U.S. industries. Charles Geruson of the Massachusetts Institute of Technology’s Center for Technology, Policy, and Industrial Development threatened that “the Japanese are coming.” Such language and reference to the phrase commonly attributed to Paul Revere would have been rhetorically more effective if used to attack the Goldsmith-Goodyear deal. One critic of the dominant opposition summarized the response as “sheer Japan bashing.” In the end, there was never any clarity on whether the Fujitsu-Fairchild deal actually posed a national security threat; thus, the opposition was arguably based on a perceived Japanese threat. For example, some top-ranking officials like Richard Armitage, the Assistant Secretary of Defense, supported the deal, as he believed Fujitsu could contribute new technologies to Fairchild that would subsequently be provided to the U.S. military.

64 Id. at 60; Feng, supra note 2, at 261.
65 Feng, supra note 2, at 261.
67 Rempel & Walters, supra note 42.
68 Id.
69 Id.
71 Rempel & Walters, supra note 42.
Additional evidence suggesting the Fujitsu-Fairchild deal was rejected due to specific fears of Japanese “foreignness” stems from the lack of concerns expressed about Fairchild’s purchase by the French-controlled company, Schlumberger,75 which continued to own Fairchild at the time of Fujitsu’s proposed acquisition.76 It is only natural to wonder why there were such pronounced concerns over the Japanese acquisition of Fairchild but none over the 1979 French acquisition. This contrast suggests racialization and fears of Asiatic “foreignness” played a large role in the public opposition to Fujitsu-Fairchild.

The same elements that drove public opposition to the Fujitsu-Fairchild deal also influenced Exon-Florio. The concerns arising from the Fujitsu-Fairchild deal were arguably more influential on the enactment of Exon-Florio than fears over the Goldsmith-Goodyear deal, giving the legislation the potential to be racially charged from the outset. Indeed, Senator Florio, one of the main sponsors of the Exon-Florio legislation, specifically mentioned the Fujitsu-Fairchild deal, and not the Goldsmith-Goodyear deal, when he spoke favorably of the bill, stating, “When Fujitsu, a Japanese semiconductor firm, tried to take over Fairchild, a United States-based semiconductor firm, earlier this year, the President found that he had very little authority to act. This provision [of Exon-Florio] would give the President important powers to protect our national security.”77

At this point, some background information regarding the CFIUS review process and post-Exon-Florio developments is helpful. Under Exon-Florio, CFIUS has the authority to review certain business dealings, known as covered transactions, to determine their effect on U.S. national security.78 A covered transaction is defined as “any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.”79 With regards to initiating CFIUS review, “CFIUS review can begin with either a voluntary notice from a party of a potential or proposed ‘covered transaction’ or on recommendation from a CFIUS member agency that believes a given transaction might affect U.S. national security.”80 Although pre-notification by a party involved in a covered transaction is voluntary, it is important to note that CFIUS has the authority to review problematic transactions even after a deal has been consummated.81 Accordingly, many parties choose to file notice with CFIUS beforehand to avoid the prospect of CFIUS subsequently interfering with a completed transaction.82

75 Id.
76 Greidinger, supra note 66, at 115.
79 Id.
81 Goldstein, supra note 33, at 223.
82 Id.
Subsequent amendments and additional regulations have added substance to Exon-Florio. In 1992, the Byrd Amendment authorized CFUUS to investigate proposed transactions, in which the “acquirer...is controlled by or acting on behalf of a foreign government.” In 2007, the Foreign Investment and National Security Act broadened the CFUUS definition of “national security,” and in November 2008, new CFUUS regulations were promulgated, establishing new timelines for CFUUS review. The regulations maintained the voluntary notification system but added a thirty-day deadline for CFUUS to review a party’s application and a forty-five day deadline to investigate if such action is deemed necessary. After the maximum forty-five day period, CFUUS can either (1) dismiss the investigation, (2) draft a mitigation agreement to reduce the threats posed by the transaction, (3) allow or recommend parties to withdraw the transaction or resubmit the application after divestment or some other activity, or (4) submit the findings to the President for him to make a decision within fifteen days. If CFUUS has chosen to carry out an investigation, they must send a report to the President requesting that he make a decision. Such a report must be sent if: “(1) The Committee recommends that the President suspend or prohibit the transaction; (2) The members of the Committee...are unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or (3) The Committee requests that the President make a determination with regard to the transaction.” Most importantly, the regulations attempted to eliminate the presumption that foreign direct investment in a U.S. business contributes positively to the U.S. economy. Previously, CFUUS had the burden of establishing that there was a threat to national security; now, that burden is transferred to the transacting parties.

When comparing the number of covered transactions that have been filed in recent years, it is evident that there is a trend of an increasing number of filed covered transactions that fall under CFUUS’s purview. Companies file notices of transactions, and CFUUS will

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83 Id.
87 Id.
88 Id.
90 Reinis, supra note 86, at 44.
91 Id.
later determine whether or not the filed transaction is a “covered transaction.”\footnote{Id.} In 2008, 155 notices were filed; of those notices, eighteen notices were withdrawn during review, twenty-three CFIUS investigations were held, and five notices were withdrawn during investigation.\footnote{Id.} In 2009, sixty-five notices were filed; of those filed notices, five notices were withdrawn during review, twenty-five CFIUS investigations were held, and two notices were withdrawn during investigations.\footnote{Id.} In 2010, ninety-three notices were filed; of those notices, six notices were withdrawn during review, thirty-five CFIUS investigations were held, and six notices were withdrawn during investigation.\footnote{Id.} In 2011, 111 notices were filed; of those filed notices, one notice was withdrawn during review, forty CFIUS investigations were held, and five notices were withdrawn during investigation.\footnote{Dep’t. of the Treasury, \textit{Covered Transactions, Withdrawals, and Presidential Decisions}, 1 (2009-2011), http://www.treasury.gov/resource-center/international/foreign-investment/Documents/CFIUS\%20Stats\%202009-2011.pdf.} From 2008 to 2011, there were no presidential decisions rendered on any of the CFIUS-reviewed transactions.\footnote{Dep’t. of the Treasury, \textit{Committee on Foreign Investment in the United States – Annual Report}, supra note 90; Id.} Since the enactment of Exon-Florio, the only two stymied transactions by presidential decision involved Chinese companies.\footnote{Kristy E. Young, \textit{The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act that Needs Revision}, 15 U.C. DAVIS J. INT’L L. POL’Y 46, 46 (2008-2009). \textit{See also infra note 179.}}

\section*{III. THEMES OF RACIALIZATION, POLITICIZATION, AND "FOREIGNNESS" PLAYING A ROLE IN CFIUS REVIEW OF CHINESE CORPORATIONS}

Having now covered the history of Exon-Florio from an Asian-American jurisprudence perspective as well as providing the basic background information related to CFIUS, we will now proceed to look at the continued racialization, politicization, and attribution of “foreignness” to Asian corporations that have faced CFIUS review. Instead of Japan, however, we will now look at China, who is now one of the United States’ largest foreign investors.

In line with the racialized history of Exon-Florio, the themes of racialization and “foreignness”—namely, Gotanda’s notion of “political foreignness”\footnote{Gotanda, \textit{Citizen Nullification}, supra note 18, at 93.}—have continued to play a role in CFIUS review of Asian and, specifically, Chinese corporations. Indeed, many argue that the debate over Japan in the 1980s has recently transitioned to China, as China increases its foreign direct investment in the United States.\footnote{Graham & Marchick, \textit{supra} note 32, at 95.} Similar to the furor over

Fujitsu-Fairchild, the debates over Chinese investment are “often heated, emotional, and a topic of conversation” throughout the United States.\textsuperscript{102} Congress responded to China’s emergence as a major economic competitor by reforming CFIUS to “address the emergence of China economically, diplomatically, and military.”\textsuperscript{103} Thus, Chinese corporations appear to have been specifically singled out for CFIUS review.

The attempted 1989 acquisition of MAMCO Manufacturing Inc. (“MAMCO”) by the China National Aero-Technology Import and Export Corporation (“CATIC”) reflects the special attention CFIUS has placed on reviewing Chinese corporations. Out of the then fifteen possible cases subjected to CFIUS investigation, President George H.W. Bush ostensibly appeared to use his authority to stop the acquisition of MAMCO because the purchasing company, CATIC, was a Chinese company.\textsuperscript{104} Following CATIC’s proposed purchase of MAMCO, an airplane parts manufacturer, MAMCO voluntarily notified CFIUS of the proposal on November 3, 1989.\textsuperscript{105} CFIUS conducted an investigation, which resulted in President Bush issuing an order in accordance with CFIUS’s recommendation that CATIC divest from MAMCO.\textsuperscript{106} The precise logic and rationale for voiding the transaction was arguably weak—in Bush’s message to Congress, he relied heavily on mere juxtaposition in his arguments:

CATIC is an export-import company of the Ministry of Aerospace Industry of the People's Republic of China. CATIC has business dealings with various companies in this country, in several sectors including commercial aircraft. The Ministry engages in research and development, design, and manufacture of military and commercial aircraft, missiles, and aircraft engines. MAMCO machines and fabricates metal parts for aircraft. Much of MAMCO's production is sold to a single manufacturer for production of civilian aircraft. Some of its machinery is subject to U.S. export controls. It has no contracts with the United States Government involving classified information.\textsuperscript{107}

President Bush justified his decision by arguing the acquisition was a danger to national security.\textsuperscript{108} Specifically, he argued that CATIC’s association with the Chinese government, and possibly its military, posed a threat to national security.\textsuperscript{109} President Bush,

\textsuperscript{102} Id.

\textsuperscript{103} See National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (Jan. 6, 2006), §§1234(c)(8) and 1234(b).


\textsuperscript{105} Gavioli, supra note 32, at 13.

\textsuperscript{106} Young, supra note 104, at 47; see also Andrew Rosenthal, Bush, Citing Security Law, Voids Sale of Aviation Concern to China, N.Y. TIMES, Feb. 3, 1990, at 1.

\textsuperscript{107} 136 CONG. REC.761-05, (1990) (message from President Bush received during recess).

\textsuperscript{108} Id.

\textsuperscript{109} Id.
however, never clearly explained why this association and the MAMCO acquisition posed such a threat.\footnote{110 Id.} In addition, CFIUS inadequately justified its recommendation that CATIC break ties with MAMCO—CFIUS did not explain why CATIC’s ties to the Chinese military would result in “unique access” to U.S. aerospace and how that might pose a threat to national security.\footnote{111 Id.}

In contrast to the allegations from President Bush and CFIUS, there was evidence to contradict the alleged threat to national security, as MAMCO did not design actual airplane parts and did not have classified contact with the federal government.\footnote{112 Young, supra note 104, at 47.} Moreover, MAMCO never exported its products out of the United States,\footnote{113 Gavioli, supra note 32, at 13.} was described as nothing more than a “machine shop” and “metal basher” used to produce metal airplane and helicopter components for civilian aircrafts,\footnote{114 Jim Mendehall, United States: Executive Authority to Divest Acquisitions Under the Exon-Florio Amendment: The MAMCO Divestiture, 32 HARV. INT’L L.J. 286, 290 (1991).} did not design its products, and did not employ full-time designers or engineers.\footnote{115 Id. at 292.} Furthermore, MAMCO’s products were unlikely to pose a threat to national security because its production of simple components, such as simple metal brackets, were prohibited from export to China.\footnote{116 Id. at 292.} If CATIC was truly unable to and did not produce items for export, it seems that the security threat argument was without merit. It seems, therefore, that the very identity of CATIC as a Chinese corporation with ties to the Chinese government doomed the deal.\footnote{117 See Susan W. Liebeler & William H. Lash III, Exon Florio: Harbinger of Economic Nationalism?, REGULATION: CATO REV. OF BUS. AND GOV’T (Winter 1993), http://www.cato.org/pubs/regulation/regv16n1/reg16n1d.html.}

CATIC-MAMCO cannot, however, compare to the firestorm that surrounded the 2005 China National Offshore Oil Corporation (“CNOOC”)–Unocal deal. In CNOOC-Unocal, negative outcries arose after the Chinese corporation entered a bid for an American corporation.\footnote{118 Id.} Rhetoric akin to the allegations attacking the Fujitsu-Fairchild deal, based on national origin grounds rather than general economic arguments or takeover policy, resurfaced in the CNOOC-Unocal deal.

On April 4, 2005, the Unocal Board accepted a rival U.S. corporation’s, Chevron’s, offer to acquire Unocal for approximately $16.5 billion, which was funded with a mixture of debt and equity.\footnote{119 Id. at 272.} Thereafter, on June 23, 2005, CNOOC made an unsolicited all-cash bid of $18.5 billion for Unocal through its Hong Kong subsidiary, CNOOC, Ltd.\footnote{120 Id. at 273.} Even though the deal appeared positive for all parties involved, there were concerns raised because
CNOOC was a Chinese state-owned petroleum company, its management had ties with the Chinese government, and the purchasing funds were advanced by a Chinese state-owned bank loan.122

The reaction in Washington, DC, and across the country, was swift and intense, harkening back to Fujitsu-Fairchild,123 and “[h]ardly a day went by in Washington without another attack on the transaction.”124 In 2005, Congressman Richard Pombo (R-California) introduced a resolution which attacked the proposed deal by alleging threats to national security, stating that the “People’s Republic of China remains strongly committed to national one-party rule by the Communist Party.”125 Essentially, Representative Pombo equated CNOOC with the Chinese government, and assumed that association to be a threat on its face. Similar rhetoric criticized the CNOOC transaction as the “Communist government gaining foothold in the U[.]S[.] economy.”126 R. James Woolsey, director of the CIA during the Clinton Administration, even remarked, “China is pursuing a national strategy of domination of the energy markets and strategic domination of the western Pacific,” CNOOC is “an organ, effectively, of the world’s largest communist dictatorship,”127 and allowing CNOOC to buy Unocal “should be beyond the pale, given the nature of the Chinese government.”128

Concerns similar to those raised in the 1980s regarding Japan buying up the United States were voiced by some, including the Chairman of the U.S.-China Economic and Security Review Commission, who asserted China was going on a “buying spree into the American economy.”129 Duncan Hunter, then-Chairman of the House Armed Services Committee, also said that:

the Chairman of the Chinese company, Fu Chengyu, also happens to be Secretary of the Leading Group of the Communist Party. Can anyone honestly believe that his primary interest lies in protecting the interest of his shareholders and the stability of global energy markets? Of course not. He answers to the Politburo in Beijing.130

121 Id. at 273-274.
122 Id.
123 Id. at 274.
124 Feng, supra note 2, at 274.
128 Id.
129 Hearing on the Unocal-China Oil Merger before the House Committee on Armed Services (statement of C. Richard d’Amato, Chairman of the U.S. China Economic and Security Review Commission), (July 13, 2005), 2005 WL 1673246.
130 Hearing on the Unocal-China Oil Merger before the House Committee on Armed Services, 109th Cong. 2 (2005) (statement of Duncan Hunter, Chairman of the House Armed Services Committee).
Other members of Congress wrote letters to the President urging him to kill the deal. 131

Congress also cut off funding to CFIUS and prohibited the Treasury from spending any money to approve the CNOOC-Unocal deal. 132 Chevron also went on the offense, offering a forty percent cash amount of $17 billion dollars. 133 In addition, Congress included a provision in an energy bill, which required a four-month study of Chinese energy needs before any transaction between CNOOC and Unocal could be consummated. 134 This legislation targeted the pending deal, as CNOOC had to present its offer to Unocal shareholders before their vote on August 10, 2005. Consequently, with the mandated study, there would not have been enough time for the deal to come to fruition. 135 CNOOC withdrew its bid on August 2, 2005, enabling Chevron to purchase Unocal about a week later. 136 To explain its actions, CNOOC released a statement blaming the failed deal on political opposition: “[t]he unprecedented political opposition that followed the announcement of our proposed transaction, attempting to replace or amend the CFIUS process that has been successfully in operation for decades, was regrettable and unjustified.” 137 The Chinese Ministry of Foreign Affairs also expressed its displeasure, demanding the U.S. Congress correct its “mistaken ways of politicizing economic and trade issues” and “to stop interfering in the normal commercial exchanges between enterprises of the two countries.” 138

In the end, it was very difficult to separate true national security concerns from politicization, racialization, and the attribution of the Chinese “foreignness” threat, as epitomized by China’s non-Western Communist government, held to be completely antithetical to that of American democracy, to CNOOC. 139 Many argued that the deal posed little or no national security threat because the CNOOC-Unocal transaction was of a small scale. 140 Unocal was a minor player in the world’s oil and gas scene, and, had the deal been


133 Feng, supra note 2, at 276.


135 Feng, supra note 2, at 276.

136 Id. at 276-77.


138 Goldstein, supra note 33, at 242; see also Chris Baker, China Tells US Not to Meddle in Bid for California Oil Giant, WASH. TIMES (June 30, 2005), at A1.

139 See Joshua W. Casselman, China’s Latest ‘Threat’ to the United States: The Failed CNOOC-Unocal Merger and its Implications for Exxon-Florio and CFIUS, 17 IND. INTL & COMP. L. REV. 155, 156 (2007) (explaining the failure of CNOOC’s bid and proposed amendments that would alter the definition of “national security”).

140 See id.
consummated, the combined oil production of CNOOC and Unocal would have only amounted to about 0.3% of domestic U.S. consumption.\textsuperscript{141} Some observers believed xenophobia and racism toward China played a role in killing the CNOOC-Unocal deal.\textsuperscript{142} For example, James Feinerman, one of the United States’ leading experts on Chinese law, maintained that the threat from the proposed transaction “seems almost negligible” and that the “national security argument [was] bound-up in a zero-sum view of China: the idea that we can’t give them any advantage, any edge, if they are going to be a future enemy . . . everything they gain, in other words, is a loss for us.”\textsuperscript{143} Feinerman also asserted that blocking the CNOOC-Unocal merger, a “relatively harmless economic transaction,” would be seen as a “protectionist, xenophobic, or maybe even racist reaction.”\textsuperscript{144}

Feinerman compared the CNOOC-Unocal merger with Daimler-Benz’s acquisition of Chrysler, and emphasized that there may have been something about the perceived threat of Chinese foreignness which led to the deal being blocked. He paralleled this to the perceived threat of Japanese foreignness in the 1980s deal:

[\textit{w}h\textit{e}n Daimler-Benz acquired Chrysler, people didn’t say, \textit{t}his company served the Nazis and my \textit{g}lo\textit{sh}, the people who caused the Holocaust are taking over an American engineering and technical icon. They were white Europeans, and a lot of their surnames they share with a number of American citizens. But when it’s the Chinese, or before them, the Japanese, then all of a sudden we get worried because they’re different.\textsuperscript{145}]

Thus, a transaction that would have been arguably a good economic deal and an opportunity for China to put money in the hands of Unocal’s U.S. shareholders was ultimately blocked by a decision marked by the intrusion of racialization and politicization.

Another deal highlighting the difficulty of separating true national security concerns from themes such as foreignness involved a 2009 acquisition deal, in which Northwest Nonferrous International Company Ltd. (“Northwest”), a company controlled by the Shaanxi Provincial Government, made a friendly offer of $26 million to acquire a majority of the outstanding shares of Firstgold (“Firstgold”), a U.S. mining and gold company.\textsuperscript{146} The

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\textsuperscript{141} See \textit{id.} at 165.
\textsuperscript{142} \textit{Seven Questions: China and Unocal – Interview with Professor James Feinerman}, FOREIGN POLICY (July 1, 2005), http://www.foreignpolicy.com/articles/2005/06/30/seven_questions_china_and_unocal.
\textsuperscript{143} See \textit{id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\end{flushleft}
deal was quite small,\textsuperscript{147} but the parties involved in the transaction nevertheless filed notice to CFIUS on October 5, 2009.\textsuperscript{148}

One month later, the parties learned that CFIUS had decided to initiate a forty-five day investigation, and in December 2009, CFIUS announced it was going to advise President Barack Obama to block the investment.\textsuperscript{149} Unlike the circumstances surrounding the prior deals reviewed by CFIUS, Firstgold leaked a memorandum to the New York Times from external legal counsel regarding the CFIUS review process upon learning about the rejection.\textsuperscript{150} The leak was an unprecedented source of information considering CFIUS proceedings usually remain confidential.\textsuperscript{151} Based on the leaked information, CFIUS was allegedly concerned about the proximity of Firstgold properties to the Fallon Naval Air Base and other related facilities.\textsuperscript{152} Firstgold, a Delaware corporation, owned or leased mining exploration and development properties in Nevada,\textsuperscript{153} with its main mining property, Relief Canyon Mine, located 100 miles northeast of Reno, Nevada, “adjacent to or in the same proximate area as the Fallon Naval Air Base and related facilities.”\textsuperscript{154}

In a conference call arranged on December 10, 2009, among the parties and CFIUS, CFIUS simply recited the proximity to the air base and “other sensitive and classified security and military assets that cannot be identified” as its justification.\textsuperscript{155} Disagreeing with CFIUS, Firstgold’s CEO “fail[ed] to see the connection between [U.S.] national security and [the company’s] principal asset – the Relief Canyon mine – which has existed at its present location since the early 1980s.”\textsuperscript{156} CFIUS pressure resulted in Northwest and Firstgold withdrawing from the deal on December 21, 2009.\textsuperscript{157} The lack of clear justification for rejecting the deal, as well as accusations that the rejection was based on concerns over China “hoarding gold,”\textsuperscript{158} led some to believe that the rejection was influenced by various political factors and by a fear of Chinese foreignness and anti-Chinese sentiment.\textsuperscript{159}

\textsuperscript{147} Id. at 15.
\textsuperscript{148} Id. at 12.
\textsuperscript{149} Id.
\textsuperscript{150} See id. at 15.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{154} Id. at 2.
\textsuperscript{155} Id. at 3.
\textsuperscript{156} Press Release, Firstgold, (Dec. 18, 2009), quoted in Sullivan, supra note 146, at 16.
\textsuperscript{157} Sullivan, supra note 146, at 16.
\textsuperscript{159} Timothy J. Keeler & Simeon M. Kriesberg, The United States Rejects Chinese Investment on National Security Grounds, MAYER BROWN CLIENT ALERT (Dec. 22, 2009),
An even clearer indication of the role of racialization and fear of and attribution of Chinese “foreignness” on the corporation is present in the 2008 Huawei-3Com deal.\textsuperscript{160} Huawei, China’s largest telecommunications equipment maker and the world’s third largest mobile gear maker behind Ericsson and Nokia,\textsuperscript{161} along with Bain Capital, attempted to buy a stake in 3Com, an American maker of internet router equipment, in a $2.2 billion dollar deal.\textsuperscript{162} Washington was concerned that Huawei could negatively alter 3Com’s electronic equipment; this was of specific concern because 3Com sold certain types of equipment to the U.S. military.\textsuperscript{163}

Congress responded with intense rhetoric, attributing racialized, political foreignness to Huawei. As Gotanda has argued, aspects of Asiatic political foreignness continue to “remain active in the American imagination;” these aspects include related ideas of “political disloyalty and a preference for despotic, antidemocratic rule...[A]sians, both in the United States and in Asia, are seen as naturally averse to democracy and likely to betray American democracy.”\textsuperscript{164} Representative Thaddeus McCotter’s (R-Michigan) drew on such themes of political disloyalty and despotism, stating that if the Huawei-3Com deal were approved, “Communist China’s Huawei Technologies stake in the 3Com Corporation will gravely compromise our free Republic’s national security.”\textsuperscript{165} Representative McCotter painted a stark picture between the “despotism” that Huawei symbolized and the democratic principles as represented by 3Com.\textsuperscript{166} He further added the deal was “unacceptable on its face to our free people’s sensibility[,]” and “it endangers our military and our security.”\textsuperscript{167} Representative McCotter also equated the deal with “pulling the plug on America’s happy days” and “threatening our liberty, our security, and the bounds of sanity itself.”\textsuperscript{168} Similarly, Representative Frank Wolf (R-Virginia) argued that even if Huawei was only attempting to increase its market share in the United States, it was still controlled “by the same government that jails Catholic bishops and Protestant pastors, oppresses the Uyghur Muslims, has plundered Tibet, and that is providing the very rockets that Sudanese President Bashir is using to kill his own people.”\textsuperscript{169} In the end, CFIUS blocked the deal,\textsuperscript{170} which was later withdrawn.\textsuperscript{171}

\textsuperscript{161} Id.
\textsuperscript{162} Bruce Einhorn, Huawei’s 3Com deal Flops, BUS. WEEK EYE ON ASIA, (Feb. 21, 2008), http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2008/02/huaweis_3com_deal_flops.html.
\textsuperscript{164} Gotanda, Citizen Nullification, supra note 18, at 79, 93.
\textsuperscript{166} See id.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
The antagonism toward Huawei resumed in May 2011, when Huawei purchased assets worth $2 million from 3Leaf, a U.S. server technology company. Huawei did not file with CFIUS until November 2011, and, according to Huawei, CFIUS suggested Huawei voluntarily divest the assets it purchased. Congress responded as it did with the Huawei-3Com deal with several congressmen arguing that the “3Leaf acquisition appears certain to generate transfer to China by Huawei of advanced U.S. computing technology” and that “[a]llowing Huawei and, by extension, communist China to have access to this core technology could pose a serious risk as U.S. computer networks come to further rely on and integrate this technology.” Furthermore, accusations were made that “Huawei has well-established ties with the People’s Liberation Army” and has “[l]ikewise, supplied equipment to Saddam Hussein and the Taliban.”

Huawei’s vice president of government affairs, William Plummer, vociferously denied these accusations, maintaining that Huawei is “100% employee-owned and has no ties with any government, nor with the [People’s Liberation Army].” Despite the denial, Huawei dropped its bid in February 2011, and a Chinese Ministry of Commerce official asserted the United States “used all kinds of excuses, including national security, to engage in the obstruction and interference in the trade and investment activities of Chinese businesses in the United States.” As in the Huawei-3Com deal, we see continued attribution of political foreignness to Huawei. More recently, President Obama blocked Ralls Corp., a Chinese company, from constructing wind turbines near a U.S. naval site in Oregon following the CFIUS review process; Ralls Corp. has since filed a lawsuit against CFIUS, and as of October 2012, the case is still proceeding.

It can be argued that the racialization or attribution of foreignness to Chinese companies such as Huawei and CNOOC are valid and legitimate because China, after all, is neither an ally nor entirely a political or military friend of the United States. This argument, however, does not negate a central argument of this article: namely, that racialization and attribution of foreignness are present and play a role in CFIUS review of Chinese

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171 See Huawei Backs Away from 3Leaf Acquisition, supra note 160.

172 Id.

173 Id.


175 Id.


corporations. Indeed, considering the example of 1980’s, Japan was a clear military and political ally to the United States, but Japanese companies were nevertheless affected by racialization, politicization, and attribution of foreignness when compared to European bidders such as Goldsmith.

IV. CONCLUSION

Chinese and Japanese corporations and the outcome of their CFIUS-involved transactions were influenced to some extent by racialization, the attribution of foreignness, and politicization, all of which are central themes and theories in Asian-American jurisprudence scholarship. Moreover, when certain Chinese and Japanese corporations were subjected to CFIUS review, national security concerns became enmeshed with those themes. Racialization and the attribution of foreignness often doomed deals initiated by Chinese and Japanese companies, even when those deals brought about mutual economic benefit for the parties involved, such as the Fujitsu-Fairchild and Northwest-Firstgold deals. The failed deals were often of a small scale, economically speaking, such as the CNOOC-Unocal and Northwest-Firstgold deals; this raises questions as to whether national security concerns were the true driving factor in CFIUS’s recommendations to prohibit such transactions. Indeed, one scholar examined and selected twenty major foreign, direct-investment deals initiated by Chinese-multinational corporations to various destination countries from 2002 to 2009. Out of the twenty deals, he found only four failures, of which three occurred in the United States, including the Huaiwei-3Com and CNOOC deal. Such data suggests that the CFIUS review process is neither as simple nor as insulated from outside factors as some may think.

On a broader scale, this article argues for the efficacy of utilizing themes and methods of Asian-American jurisprudence to analyze components of corporate law, a substantive area of law which has received little attention from a CRT perspective. The importance of applying Asian-American jurisprudence methodologies to this area of corporate law is neither a purely intellectual, nor academic exercise and has the ability to have significant implications on the practice of law. For example, Asian-American jurisprudence can reveal that the CFIUS review process may be more burdensome on Chinese (and was more burdensome on Japanese) companies due to the influx of racialization and attribution of foreignness factors. This observation may allow corporate law practitioners representing, for example, Chinese clients to better deal with this problem and to help present a more assimilated image of Chinese companies before CFIUS and before Congress. If the problem of racialization and foreignness in the CFIUS process had not been uncovered, however, such practitioners may never have had the opportunity to overcome such issues.

179 Syed Tariq Anwar, CFIS, Chinese MNCs’ Outward FDI, and Globalization of Business, 2 J. WORLD TRADE 419, 439 tbl.3 (2010).