ASIAN LAW JOURNAL

Vol. 9 2002 No. 1

Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950

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This essay explores the relationship between Asian American population and the applicability of anti-miscegenation laws to that group in the first half of the 20th Century, testing legal scholar Gilbert Thomas Stephenson's theory that racial restrictions would arise whenever non-whites of any race "exist in considerable numbers." Several states prohibited Asian-white intermarriage even though the Asian American numbers failed even remotely to approach those of the white population in those states. These anti-miscegenation statutes were unique in the Jim Crow regime in the degree of specificity with which they defined the racial categories subject to the restrictions, using precise terms like "Japanese" or "Mongolians" rather than broad terms like "colored." Further, the number of statutes applicable to Asians more than doubled between 1910 and 1950, even though census data shows that the proportion of the Asian population was stable or declining in these states, and in any event tiny.

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The proliferation of anti-Asian miscegenation laws raises important questions about the racial landscape of our country during this period. Correlating census data with the development of anti-miscegenation statutes suggests that population did have an impact on whether states would restrict Asian marriage, but in a more complex way than Stephenson proposed. In all states in which Asian-white marriage was restricted by race, so too was African American-white intermarriage; no statutes targeted Asians alone. But in virtually all states restricting African American intermarriage where there was a discernable Asian population—1/2000th or more—Asian intermarriage was also regulated. The combination of a state's inclination to segregate, plus a visible Asian population, reliably predicts when Asians would be covered by a statute. This suggests that in the states where racially diverse populations were seen as threats appropriately subject to legal regulation, the nature of the problems presented by the various races was the same.

I. INTRODUCTION

In his 1910 treatise, *Race Distinction in American Law*, legal scholar Gilbert Thomas Stephenson examined the laws of all forty-eight existing states[1] and the District of Columbia identifying regulations prescribing different rules of conduct for members of different races. Stephenson noted that such distinctions were not merely confined to "Negro,"[2] but "[w]here . . . other race elements exist in considerable numbers, similar distinctions are sanctioned."[3] He cited as examples the restrictions against intermarriage and integrated schooling between "Mongolians"[4] and Caucasians in California, as well as similar laws in other states applying to Native Americans. Stephenson concluded that "[w]herever . . . any two races have lived together in this country in anything like equal numbers, race distinctions have been recognized in the law sooner or later . . . ."[5] With specific reference to statutes prohibiting intermarriage, Stephenson stated, "[t]he States which have a large Indian or Mongolian population include these races within the prohibition."[6]

This essay challenges Stephenson's population-based explanation for such statutes, specifically in the context of anti-miscegenation statutes[7]—

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1. Although New Mexico and Arizona did not gain statehood until 1912, Stephenson includes them in his discussion, making no distinction on this basis.

2. After a lengthy discussion regarding the legal definition of the word "Negro" and the propriety of its use to describe African-Americans, Stephenson concluded that "the word 'Negro' (with the capital 'N') will eventually be applied to the black man in America. White people are distinctly in favor of it: what Negroes now object to it do so because of its corrupt form, 'Nigger.' As the Negro shows his ability to develop into a respectable and useful citizen, contemptuous epithets will be dropped by all save the thoughtless and vicious, and 'Negro' will be recognized as the race name." GILBERT THOMAS STEPHENSON, RACE DISTINCTION IN AMERICAN LAW 23-24 (1910).

3. STEPHENSON, *supra* note 2, at 350.

4. The language referring to various Asian-American populations as "Mongolians" was drawn specifically from the California statute. 1905 Cal. Stat. 554. Similar terminology was commonly employed by other jurisdictions, as well. *See, e.g.*, STEPHENSON, *supra* note 2, at 82-83.

5. STEPHENSON, *supra* note 2, at 350-51.

6. *Id.* at 82.

7. *See* discussion *infra* Part II. Although this essay focuses on the particular context of miscegenation laws, there is a growing body of literature dealing with discrimination against Asian

laws prohibiting intermarriage between different races, particularly between Asian Americans[8] and whites.[9] First, the paper presents historical population data to refute the contention that any of the states adopting anti-miscegenation statutes contained "large" Asian American populations, let alone figures resembling "anything like equal numbers" to white populations. The population statistics represent cross-sectional data taken at two definitive historical points, cross-referenced with state anti-miscegenation statutes existing at those two points.[10]

The first historical reference point is the year 1910, the year Stephenson published his book. At this point, seven states, primarily those in the western part of the country, had adopted anti-miscegenation statutes applying to Asian Americans.[11] The second reference point is the year 1950. By this time, fifteen states had applied anti-miscegenation statutes to Asian Americans, including all seven that had applied such restrictions in 1910. Moreover, by this time, anti-miscegenation statutes applying to Asian Americans had expanded to include not only the West Coast states, but also states in the Midwest, South, and East.[12] The year 1950 provides a useful historical lens for our purposes because it represents the height of Jim Crow regulation of marriage; in 1950 the last of the anti-miscegenation statutes had been adopted, but, four years before *Brown v. Board of*

Americans in other contexts, including work by one of the co-authors of this essay. *See, e.g.*, Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 (2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998), *reprinted in* 19 IMMIGR. & NAT'LITY L. REV. 3 (1998); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996), *reprinted in* 17 IMMIGR. & NAT'LITY L. REV. 87 (1995-96); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996). There are also several important recent books. *See, e.g.*, FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002); ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001); BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (1993).

8. The repeated use of the full term "Asian Americans" throughout this work may appear cumbersome to the reader. However, this terminology is deliberately employed, considered by the authors to be preferable to the less accurate, albeit more concise, term "Asian." The term "Asian" connotes a sense of permanent foreignness, ignoring the fact that a significant portion of the population to whom these statutes applied were native-born American citizens of Asian descent, or Asian immigrants who were ineligible to attain American citizenship only by virtue of their racial ancestry. Thus, although the term "Asian American" does not appear in the text of any anti-miscegenation statute, we see no reason to perpetuate the insensitivities of the statute's drafters by employing the original terminology in our discussion.

9. Although written nearly a century ago, Stephenson's theories are still relevant to the conventional discourse regarding American race law. While Stephenson's conclusions are clearly incorrect and unsupported by empirical data, much of the modern discussion of race has failed adequately to recognize and correct these shortcomings. Many modern observers may believe that Asian American discrimination in the Jim Crow era was limited either to the West Coast or to regulations broadly encompassing "colored people." Though largely true, this perception ignores the peculiar example of the anti-miscegenation laws, which often targeted Asian Americans with meticulous specificity, even in eastern states. This essay explores the dual questions of why this phenomenon occurred distinctly in the context of miscegenation and why it existed in this particular group of states. In so doing, the authors seek to provide answers that will enrich the contemporary discourse about the history of racial discrimination against Asian Americans.

10. *See infra* Part III. A.

11. *See infra* Part III. B.

12. *See infra* Part III. C.

Education,[13] widespread legislative repeal or judicial invalidation of such statutes had not yet occurred.

After refuting Stephenson's "critical density" explanation for such statutes, the essay then suggests an alternative explanation for the widespread adoption of anti-miscegenation statutes targeting Asian Americans. This analysis concentrates on a number of factors in attempting to discern the motivation behind the statutes. It examines the history and character of anti-miscegenation laws, including their roots in the slavery system and black-white marriage prohibitions, as well as the uniquely pernicious qualities and effects of these statutes in the course of American history. It also examines the racial dynamic of the country throughout the early part of the 20th century, with a focus on the broader context of statutory racial discrimination. Additionally, it looks to the language of the statutes themselves, as well as the judicial opinions interpreting and upholding them, in an effort to better understand the true motivations behind this form of discrimination against the Asian American population.[14]

The explanation begins by observing that Asian Americans never existed in sufficiently large numbers independently to challenge the quantitative dominance of the white population. Rather, the legacy of white socioeconomic hegemony, coupled with the population dynamic in a number of southern states, fueled a broader effort to jealously guard the benefits flowing to the white population and to relegate Asian Americans to the subordinate social stratum occupied by other non-white populations, particularly blacks. Given the unique ability of anti-miscegenation policy to define and control the concept of "whiteness," Asian Americans were included within the purview of these policies not as an independent result of their numerical strength or threat to white social dominance, but as a result of their intrinsic "non-whiteness" amidst an atmosphere of racial exclusivity.[15]

II. WHY MISCEGENATION?[16]

The analysis in this essay focuses on miscegenation laws because they are unique in the Jim Crow regime in several respects. Miscegenation laws are perhaps the most venerable forms of racial regulation, and they were among the last to be struck down by the Supreme Court. Moreover, unlike many other forms of legal segregation, anti-miscegenation laws targeted relationships that were desired by both parties to the relationship. Finally, these statutes were particularly likely to identify the restricted races by name rather than with a generic term like "colored" or "non-white."

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13. 347 U.S. 483 (1954).

14. *See infra* Part V. A-C.

15. *See infra* Part V. D-E, VI.

16. "Miscegenation is an awkward term to use in [2002]; the implication it carries is that 'race' is a meaningful construct and that sex and reproduction between the races is something akin to bestiality. But it is impossible to write about anti-miscegenation laws without using the term." Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 560 n.1 (2000).

A. Anti-Miscegenation Statutes Have Arguably Spanned the Longest Time Frame

Anti-miscegenation statutes have arguably spanned the longest time frame of any modern form of statutory racial discrimination. Although the term "miscegenation" was not coined until 1864,[17] the first anti-miscegenation statutes were enacted by the colonies in 1662 (Virginia) and 1663 (Maryland),[18] applying prohibitions to marriages between free white persons and slaves. These statutes continued well into the post-Jim Crow era and even survived the first wave of the Civil Rights Revolution[19] before being invalidated in 1967 by the Supreme Court in *Loving v. Virginia.*[20] At that time, sixteen states still had such statutes in effect.[21]

B. Anti-Miscegenation Statutes Targeted Consensual Relationships

Another reason for focusing on anti-miscegenation statutes is the unique operational nature of these statutes. While traditional Jim Crow statutes providing "separate but equal"[22] accommodations or educational programs may have sought to shield whites from undesired interactions with other races, restrictions on miscegenation prohibited voluntary, and indeed *desired,* intimate contact by whites with other races. Therefore, instead of relying solely on notions of social custom, or "separate but equal" arguments, defenders of anti-miscegenation statutes further justified them by citing the "proper governmental objective[s] . . . [of] preserv[ing] the racial integrity of its citizens" and preventing the development of a "mongrel breed of citizens."[23] This argument, of course, completely disregarded the fact that "the only race kept 'pure' [was] the Caucasian, because these laws [did] not prohibit, for example, Negroes from marrying Mongolians."[24]

Courts distinguished anti-miscegenation statutes from other Jim Crow provisions by asserting the "equal application" theory, which held that anti-miscegenation laws were not discriminatory because both whites *and* Negroes were prevented from intermarrying. This language from the 1883

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17. *Id.*

18. *Id.* at 560 n.2.

19. A 1944 study revealed that, while white southerners most strongly resisted the idea of interracial sex and marriage, African Americans ranked the question dead last in importance. GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 60-61 (1944).

20. 388 U.S. 1 (1967).

21. *See* Sealing, *supra* note 16, at 560 (citing Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective,* 52 VA. L. REV. 1189, 1190 n.8 (1966) (identifying those states as Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia)). Maryland repealed its statute during the course of the *Loving* litigation. *See* Sealing, *supra* note 16, at 560 n.4.

22. *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

23. Naim v. Naim, 87 S.E.2d 749, 755-56 (Va. 1955).

24. William D. Zabel, *Interracial Marriage and the Law,* ATLANTIC MONTHLY, October 1965, *reprinted in* INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 59 (Werner Sollors ed., 2000).

Supreme Court case of *Pace v. Alabama*[25] was theoretically consistent not only with *Plessy*, but even with *Brown v. Board of Education*,[26] since it technically applied the same prohibitions and penalties to whites as it did to other races. Moreover, the courts could legitimately argue that, even after enacting the Fourteenth Amendment, the drafters probably intended to allow states to ban interracial marriages.[27] Such strategically deployed arguments allowed defenders of these statutes effectively to prevent consensual interracial unions, despite successful constitutional challenges to other forms of Jim Crow discrimination (e.g., school and public facility segregation).

C. Anti-Miscegenation Statutes Contained More Specific Racial Categories Than Most Other Jim Crow Statutes

A third reason for looking at anti-miscegenation statutes is the unique specificity of these statutes in relation to other Jim Crow statutes. While many statutes dictated separation broadly between the "white and colored races,"[28] the drafters of anti-miscegenation laws took much greater pains to specify the particular racial groups to whom those restrictions applied.

This variance is evident, for example, in Mississippi, a state which imposed discriminatory restrictions extensively throughout the Jim Crow era. A provision from the 1890 Mississippi Constitution still in effect in 1950 declared that "[s]eparate schools shall be maintained for the children of the white and colored races,"[29] and the Mississippi Supreme Court in the 1925 case, *Rice v. Gong Lum*,[30] determined that the term "colored" applied to a native born child of Chinese descent. Specifically, the court held that "the word 'white,' when used in describing race, is limited strictly to the Caucasian race, while the word 'colored' is not strictly limited to negroes or persons having negro blood."[31] The case was ultimately affirmed by the United States Supreme Court,[32] which found the law consistent with the Fourteenth Amendment on authority of *Plessy v. Ferguson*.

By contrast, the Mississippi anti-miscegenation statute,[33] adopted in 1892—just two years after the state's 1890 Constitution—and still in force in 1950, was much more specific in its racial prohibitions. The statute declared "unlawful and void" a marriage between "a white person and a negro or mulatto or person who shall have one-eighth or more of negro

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25. 106 U.S. 583 (1883).

26. 347 U.S. 483 (1954).

27. *See* Sealing, *supra* note 16, at 570 (citing Alfred Avins, *Anti-miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1253 (1966) (positing that based upon original intent analysis, anti-miscegenation statutes are constitutional)).

28. *See, e.g.*, GA. CODE ANN. § 32-909 (1935), *reprinted in* STATES' LAWS ON RACE AND COLOR 90 (Pauli Murray ed., 1950).

29. MISS. CONST. of 1890, art. VIII, § 207, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 237.

30. 104 So. 105 (Miss. 1925), *aff'd*, 275 U.S. 78 (1927).

31. *Id.* at 108.

32. *See* Gong Lum v. Rice, 275 U.S. 78 (1927).

33. MISS. CODE ANN. § 459 (1942) (originally MISS. CODE ANN. § 2859 (1892), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 246.

blood, or with a Mongolian or a person who shall have one-eighth or more of Mongolian blood."[34] The plain language of this statute required no judicial interpretation to establish that its prohibitions applied to Asian Americans.

This distinction begs the question: "[W]hy did the Constitution use the term 'negro' in one section and the term 'colored' in the other section?"[35] The Mississippi Supreme Court purported to analyze this question in *Rice*, but its answer is unsatisfying. The court first proclaimed that "the dominant purpose of the two sections of the Constitution of our state was to preserve the integrity and purity of the white race."[36] While the court conceded that the "negro race was the only race of consequence so far as numbers were concerned" at the time the public school system was created, it blithely concluded that "it was intended that the white race should be separated from all other races."[37] This assertion, however, completely failed to address the disparity in terminology between the two provisions. Instead, the court merely focused on the fact that the "word 'white' . . . is universally limited to the Caucasian race," adding that "[i]n the decisions of the [S]upreme [C]ourt of the United States it is expressly held that Mongolians do not come within the term 'white' as used in reference to race."[38] This language by the court offers little insight into why the Mississippi legislature deemed anti-miscegenation statutes to warrant more specific racial descriptions than other Jim Crow statutes. This essay, therefore, seeks to provide a closer analysis of this issue.

D. Anti-Miscegenation Statutes Covered a Different Geographical Landscape From Other Jim Crow Statutes

Another distinguishing characteristic of anti-miscegenation statutes, which augments their analytical appeal is the geographical landscape covered by these statutes as applied against Asian Americans through the first half of the 20th century. Unlike discrimination statutes involving areas such as education, public accommodation, and transportation, which were most prevalent in the traditional Jim Crow states of the South, the prevalence of anti-miscegenation statutes—as they pertained to Asian Americans—followed a different pattern. While such statutes existed in a number of western states, where Asian American populations tended to be larger, they did not universally pervade these states the way Jim Crow statutes targeting African Americans (including prohibitions against black-white intermarriage) pervaded the South. Additionally, anti-miscegenation statutes affecting Asian Americans cropped up throughout the early 1900s in states in the Midwest, East Coast, and the South, where Asian American populations were relatively sparse.

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34. *Id.*
35. *Rice*, 104 So. at 108.
36. *Id.*
37. *Id.*
38. *Id.* (citing *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878), Ozawa v. United States, 260 U.S. 178 (1922), and Yamashita v. Hinkle, 260 U.S. 199 (1922)).

This unusual pattern of anti-miscegenation statutes specifically targeting Asian Americans invites a more detailed investigation into the nature and motivations of these statutes. The argument from *Rice* that the term "colored" people was intended to include Asian Americans is belied by the language of statutes in states such as Alabama, Kentucky, or Tennessee—which require the separation of "white and colored"[39] races in schools and on public carriers, but expressly include only "negroes"[40] in their anti-miscegenation statutes, avoiding any reference to Asian Americans. The *Rice* decision demonstrates that while courts may sometimes have included Asian Americans within the term "colored" once specifically presented with the issue, legislatures may not necessarily have contemplated Asian Americans when adopting these statutes. It may be the case that Asian American populations in many southern states were insufficiently numerous to prompt legislators specifically to include them within their intermarriage prohibitions; however, in many states where Asian Americans were included, their numbers were not significantly larger. Anti-miscegenation statutes, therefore, offer the unique advantage of showing where Asian Americans were consciously and deliberately included within Jim Crow restrictions by state legislatures.

III. THE DATA

The Appendices at the end of this essay lay out in detail the landscape of the Asian American and African American populations throughout the first half of the twentieth century, as well as the breadth of anti-miscegenation statutes that targeted these groups. The following section provides a general outline of the portrait depicted by this data—a gradual diffusion of both minority populations, accompanied by a steady proliferation of anti-miscegenation statutes targeting Asian Americans.

A. Methodology of Data Selection and Compilation

The population data contained in Appendix A was compiled using statistics directly from the United States Census Bureau depicting racial characteristics of the American population in the decennial years from 1900 through 1950. However, limitations in the nature of these statistics ultimately have been incorporated into this compilation for the purpose of consistency. Most significantly, numbers for specific Asian populations such as Koreans, Filipinos, and Asian Indians were not available

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39. *See* ALA. CODE tit. 52, § 93 (1940); ALA. CODE tit. 48, § 196 (1940); KY. REV. STAT. § 158.020 (1948); KY. REV. STAT. § 276.440 (1948); TENN. CODE ANN. § 11395 (1934); TENN. CODE ANN. § 5518 (1934); *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 22, 34, 165, 169, 429, 439-40.

40. Alabama's statute made it illegal "[i]f any white person and any negro, or the descendant of any negro intermarry. . . ." ALA. CODE tit. 14, § 360 (1940), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 30. Kentucky's statute prohibited marriage between "a white person and a Negro or mulatto and declares such marriages are void." KY. REV. STAT. § 402.020 (paraphrased in STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 168). Tennessee's statute provided that "[t]he intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro . . . is prohibited." TENN. CODE ANN. § 8409, *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 438.

consistently through this period. In most years, these populations were combined with other Asian and non-Asian populations in categories such as "all other,"[41] making it difficult to determine the precise size of Asian American populations in each state. As a result, the data included in this study have been confined to the only two Asian American groups for whom figures are consistently available for all six censuses: Chinese Americans and Japanese Americans.

Despite this limitation, the integrity of the analysis may not be severely compromised. Numbers from the 1940 Census, for which detailed information about other Asian American groups *is* available, indicate that Chinese Americans and Japanese Americans constituted over eighty percent of the national Asian American population. In addition, the distribution of the Filipino American population, the next largest Asian American group, very closely resembled that of these two groups, indicating that exclusion of this group from the study will not significantly alter our analysis of population distribution.

Another factor mitigating this limitation is that the 1910 figures indicate that the national total of the "all other"[42] population, which was not explicitly restricted to Asian American categories, amounted to only slightly over two percent of the combined "Chinese" and "Japanese" population. This suggests two possible explanations, either of which would help redeem this paper's methodology. The first is that significant Asian American populations of other than Chinese or Japanese origin did not exist in large numbers at this period in American history. The other is that the census takers so oversimplified the racial classifications as to include other Asian American populations under either the "Chinese" or "Japanese" categories. Since this study uses only these two groups and makes no distinctions between them, either or both of these explanations would indicate that utilizing these two categories serves as a reasonably accurate proxy for the nationwide Asian American population in 1910.

B. General Trends in Asian American Population Through the Early 1900s

As indicated by the figures in Appendix A, the nation's overall Asian American population steadily increased through the early 1900s, except for a brief decline between 1930 and 1940. In every other decennial period, the Asian American population increased from between one-fifth and one-quarter of its size in the previous census, with the largest single gain occurring in the post-WWII period, between 1940 and 1950.[43]

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41. *See* United States Bureau of the Census, 1950 United States Summary, Table 59 – Race, by Regions, Divisions, and States: 1950.

42. The specified categories in this population were: White, Negro, Indian, Chinese, and Japanese. Therefore, the "all other" category would include all additional races, not necessarily limited to other Asian American groups. *See* United States Bureau of the Census, 1910 Abstract of the Census—Population, Table 12 – Color or Race, by Divisions and States: 1910 and 1900.

43. Since these figures are limited to cross-sectional population data in each period and do not consider immigration numbers, the question of whether these increases arose from higher immigration or higher birth-death ratios is not addressed. This issue is beyond the scope of this essay since the focus

A closer look at the state-by-state distribution also illustrates a number of trends. First, as expected, the largest share of the Asian American population remained on the West Coast throughout this fifty-year period, with over half the total Asian American population residing in California in every year after 1900. However, while the proportion of the Asian American population that was situated in the Pacific States—California, Oregon, and Washington—rose steadily over the first forty years, this proportion shrunk to its lowest level of the century between 1940 and 1950, to 62.5 percent. This may have been the result of Japanese American relocation during WWII, greater availability of employment opportunities for Asian Americans further inland, or a host of other contributing factors. In contrast, the smallest proportion of Asian Americans throughout this period existed in northern New England—Maine, New Hampshire, and Vermont—in the South Atlantic states—Delaware, West Virginia, and the Carolinas—and in the East South Central states—Kentucky, Tennessee, and Alabama.

Some particularly noteworthy trends in specific states are also apparent from the data. Montana, for instance, in contrast to many of its neighboring states in the West, experienced a consistent decline in its Asian American population throughout the fifty-year period. New York, by contrast, far removed from the center of the Asian American community, saw a steady increase in its Asian American population between the years 1910 and 1950. Additionally, a few states in the East and Midwest—Massachusetts, Pennsylvania, and Illinois—as well as a couple of mountain states—Colorado and Utah—which had substantial and growing Asian American populations through the first quarter of the century, witnessed a sharp decline between 1930 and 1940. As mentioned, however, this trend was representative of the entire nation during this period.

Finally, the diffusion of Asian Americans out of the West between 1940 and 1950 contributed to dramatic increases in Asian American populations elsewhere in the country during this decade. As suggested above, the lasting effects of relocation and internment following WWII may account, to some extent, for this eastward migration, although the breadth of the increase in other areas of the country is striking. The Asian American population in all of the core midwestern states—Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota—tripled. The Asian American population more than doubled in nearly all of the South Atlantic areas—including Maryland, the District of Columbia, Virginia, West Virginia, North Carolina, and South Carolina. Also, the East South Central states of Kentucky, Tennessee, and Alabama all experienced their only noteworthy population shifts during this time, with the population essentially quadrupling in each state. Oklahoma and Texas also witnessed significant increases during this period. In fact, only five states—Montana, Wyoming, Nevada, Washington, and Oregon—experienced a decrease in absolute Asian American population between these years. This increasing

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here is to examine the ultimate effect of *population* in motivating the adoption of anti-miscegenation statutes.

dispersion of the population is fundamental to understanding the evolving legal status of Asian Americans throughout this period.

C. *Proportion of Asian Americans in Overall State Populations: 1910 and 1950*

After evaluating some of the general trends in Asian American population and migration over the early twentieth century, we next consider the relative size of this group with respect to total population in individual states, since this measure lies at the very heart of Stephenson's thesis. Our analysis looks at two snapshots of state populations—one in 1910 and another in 1950—to correspond with our examination of the legal restrictions in force at those two times.

As stated in the previous section, the largest Asian American populations in 1910 resided in the western states, with the exception of a sizeable population in New York. The proportions bear this out for the most part, as indicated in Appendix B. With New York's large overall population, however, Asian Americans constituted only 0.07 percent of the state's population in 1910. In fact, the District of Columbia is the only territory east of the Rocky Mountains in 1910 where Asian Americans constituted greater than one-tenth of one percent of the population, with 0.13 percent.

By contrast, all eleven states west of the Rockies contained an Asian American population above this threshold. However, in only five of these states was this population greater than one percent: California, Nevada, Oregon, Washington, and Wyoming, in decreasing order of percentage. Two of the other six states contained fewer than one-half percent Asian Americans—Colorado, with 0.33 percent, and New Mexico, with 0.15 percent.

The 1950 numbers suggest that the growth and dispersal of the Asian American population was accompanied by a similar growth in the overall American population. By 1950, the District of Columbia was still the non-western territory with the largest proportion of Asian American residents. However, while the 1950 Asian American population in D.C. was over five times as large as the 1910 population, the proportion had only doubled—thus, Asian Americans still constituted only one-quarter of one percent of the District's population. The other major states of growth—New York, Massachusetts, and Illinois—similarly experienced proportional growth to a far lesser degree than the corresponding numerical growth. Also, in no other eastern state did Asian American populations constitute even 0.1 percent of the statewide population.

The western states were mixed in terms of overall growth or decline in Asian American population, with six states losing numbers and five states gaining. However, a more telling indicator is the fact that in only two states—Colorado and Utah—did Asian Americans increase proportionally, and even then, only slightly. Eight states contained fewer than 0.5 percent Asian Americans, as compared with only two states in 1910. Moreover, the largest Asian American population, in California, now only constituted 1.35 percent of that state's total population, down from over 3 percent in

1910. These numbers indicate that although Asian American numbers were increasing nationwide, they were not growing as fast as the rest of the national population, and they were becoming increasingly spread out across the country.

D. The "Negro" Population in 1910 and 1950

A closer look at the African American population—categorized as "Negro" on the Census in all relevant years—presents quite a different dynamic. In 1910, the nationwide African American population was 67 times as large as the nationwide Asian American population. In 31 states, blacks existed in numbers in excess of 10,000. In 21 states, their numbers exceeded the largest single-state Asian American population, that of California. In 14 states, they exceeded the nationwide Asian American population.

These numbers bore out proportionally as well. In 30 states, the African American population exceeded one percent of the state population, compared with just five such states for Asian Americans. In 10 states, the African American population exceeded 25 percent of the state population, a figure over seven times larger than the proportion of Asian Americans in California. Finally, in South Carolina and Mississippi, African Americans actually constituted a majority of the statewide population in 1910.

The distribution of this population was expectedly different from the Asian American population, as well. The largest African American populations existed in the South Atlantic and South Central states, spanning from Delaware, through the south, and west to Texas. In the 17 territories included in this area, African Americans existed in double-digit proportions in all except two states: West Virginia and Oklahoma. In the West, African Americans lived in much smaller proportions, although in four of the Mountain states—Wyoming, Colorado, New Mexico, and Arizona—African American numbers exceeded Asian American numbers.

While the African American population grew much more in pure numbers between 1910 and 1950, as compared with the Asian American population, proportionally the growth of the African American population was smaller: a 53 percent increase, versus 79 percent for Asian Americans. The national black population was 58 times as large as the Asian American population in 1950, down from 67 times in 1910. The number of states with African American populations exceeding 10,000, however, grew from 31 to 38. The numbers also illustrate that, as African American numbers grew, the population tended to spread out. While the number of states with black populations in excess of one percent grew to 36, the number in which blacks exceeded a quarter of the population shrank from 10 to 7. Moreover, African Americans no longer constituted majorities in Mississippi or South Carolina, with those proportions falling to 45 percent and 38 percent, respectively.

This dissemination of the African American population included a westward migration, with the result that black populations surpassed Asian American populations in a number of western states. In 1950, 24 states contained African American populations larger than California's Asian

American population, including California itself. In fact, the migration of African Americans to California over this forty-year period was so significant that California's black population—as well as the black population of 20 other (mostly southern and eastern) states—now exceeded the *nationwide* Asian American population. In addition, of the eleven states in the West, nine now had larger African American than Asian American populations, the only exceptions being Utah and Idaho.

In 1910, African Americans were mostly concentrated in the southern and eastern states, constituting majorities in two states. Asian Americans were situated largely in the West at this time and, although much smaller nationally, outnumbered African Americans in seven western states. By 1950, both Asian Americans and African Americans constituted minority populations in every state in the nation, and in almost every state, the black population vastly outnumbered the Asian American population. The only exceptions to this phenomenon existed in two small western states, in which non-whites constituted less than two percent of the total statewide population. Such was the racial dynamic in the early days and at the height of the Jim Crow era.

IV. ANTI- MISCEGENATION STATUTES

Now that the nation's racial landscape at these two temporal indices has been described in detail, we examine the breadth of anti-miscegenation statutes within this context.

A. Methodology of Compilation

The initial references through which the data presented in Appendix B was gathered were the Stephenson[44] and Murray[45] publications, for the years 1910 and 1950, respectively. To the extent possible, dates of adoption for anti-miscegenation statutes have been collected to correlate with population data. However, due to data limitations, and because many of these restrictions originated in early colonial times,[46] specific adoption dates for a number of statutes in effect in 1910 are unavailable, although the oldest available statutory reference is provided.

For statutes enacted subsequent to 1910, dates of adoption similarly are provided as accurately as available. This information was collected by referring to the citations provided in Murray[47] to previous versions of state compilations, as well as by cross-referencing to state session laws, in order to determine the original adoption date, original text, and effect of any subsequent amendments.

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44. *See* STEPHENSON, *supra* note 2, at 81-83.
45. *See generally* STATES' LAWS ON RACE AND COLOR, *supra* note 28.
46. *See* Sealing, *supra* note 16, at 560 n.2.
47. *See generally* STATES' LAWS ON RACE AND COLOR, *supra* note 28.

B. 1910 Anti-Miscegenation Statutes

Prior to the Civil War, a number of states had statutes prohibiting "intermarriage . . . [or] forms of illicit intercourse between the races."[48] Notably, "during the years of Reconstruction in the South . . . none of the statutes against miscegenation appear to have been repealed."[49] Even outside the South, only a handful of states repealed their anti-miscegenation statutes in the wake of the Civil War.[50] By 1910, 28 states still had such statutes in effect.[51] Six of these states, all Southern, prohibited racial intermarriage through a constitutional provision.[52]

Although the text of these statutes varied by state, all 28 statutes expressly prohibited intermarriage between whites and blacks. Seven states prohibited marriages between whites and Asians in some form.[53] The universal application to African Americans suggests that these prohibitions primarily sought to prevent white-black intermarriage; legislators may have added Asian Americans by subsequent amendment in a number of cases, rather than including them at the time of original enactment.

Statutes prohibiting white-black intermarriage existed predominantly in the South, where blacks resided in the most significant numbers. Sixteen of the southern states in the belt between Delaware and Texas, with the single exception of the District of Columbia, prohibited black-white miscegenation by statute. This, however, also included states like West Virginia—with a 5.26 percent black population—as well as Oklahoma—with a 8.30 percent black population. Missouri, with its 4.78 percent black population, also imposed such a restriction.

Such statutes were by no means confined to the southern states, where African American numbers were the most significant. Indiana, for example, imposed intermarriage restrictions on its 2.23 percent black population. Nebraska, which contained fewer than 8,000 African Americans amongst its 1.2 million people, merely 0.64 percent maintained an anti-miscegenation provision in 1910. North Dakota, a state that was nearly 99 percent white, imposed a similar restriction. Eight western states with meager African American numbers also enacted prohibitions on intermarriage; the *largest* black population in the West was in Colorado, whose 11,453 African American residents constituted 1.43 percent of the

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48. STEPHENSON, *supra* note 2, at 78.

49. *Id.* at 78. In Burns v. State, 48 Ala. 195 (1872), the Supreme Court of Alabama held that the state's anti-miscegenation statute violated the state and federal constitutions. Five years later, however, in Green v. State, 58 Ala. 190 (1877), the court explicitly overruled this decision and reinstated the prohibition on intermarriage.

50. *See* STEPHENSON, *supra* note 2, at 78. The states were: New Mexico, Rhode Island, Maine, Michigan, and Ohio.

51. These states were: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. *Id.* at 81.

52. *Id.*

53. The specific terminology of these statutes varied, but included the terms "Chinese," "Indian," or "Mongolian." *Id.* at 82-83.

state's population. The existence of anti-miscegenation statutes in states with such marginal African American populations undermines Stephenson's theory that this phenomenon correlates with multiple races living in "anything like equal numbers."[54] In all, 91.8 percent of the African American population in 1910 resided in states where they were subject to intermarriage restrictions.

The seven states applying their prohibitions to people of Asian descent were Arizona, California, Mississippi, Montana, Nevada, Oregon, and Utah. The specific language in these statutes referring to Asian people varied from state to state. The statutes of Arizona, California, Mississippi, and Utah all referred to "Mongolians."[55] Nevada and Oregon used the term "Chinese,"[56] and Montana specified both "Chinese" and "Japanese"[57] persons. The reasons behind the inconsistent terminology are unclear, although the evidence suggests that the importance of these distinctions should not be exaggerated. First, the history of Asian American jurisprudence suggests a tendency by courts to read inclusive racial categories narrowly,[58] while reading exclusive categories broadly.[59] Secondly, a number of courts refer to dictionary classifications of race, such as "that of Blumenbach, who makes five... [including] [t]he Mongolian, or yellow race, occupying Tartary, China, Japan, etc.... and... the Malay, or brown race, occupying the islands of the Indian Archipelago."[60] Both of these factors suggest that any court interpreting its state's anti-miscegenation statute would be inclined to read the term "Mongolian" broadly.

Although Oregon and Nevada mentioned only "Chinese" in their intermarriage prohibitions, there is no case law from either state to illustrate how broadly the courts interpreted this term. The California case

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54. *Id.* at 350-51.

55. *See id.* at 81-83 (citing ARIZ. REV. STAT. §§ 3092, 3094 (1901); 1905 Cal. Stat. 554; MISS. CODE §§ 1031, 3244 (1906); UTAH COMP. LAWS § 1184 (1907)).

56. *See* STEPHENSON, *supra* note 2, at 82-83. (citingNEV. COMP. LAWS §§ 4851-52 (1861-1900); OR. CODES & STAT. I, §§ 1999-2001; II, § 5217 (Bellinger and Cotton)).

57. 1909 Mont. Laws ch. 49, §§ 2-3.

58. *See* Ozawa v. United States, 260 U.S. 178, 198 (1922) (holding that a Japanese person did not qualify for naturalization as a "free white person" since "the words 'white person' are synonymous with the words 'a person of the Caucasian race,' [and the party was] clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side."); *In re* Ah Yup, 1 F. Cas. 223, 224 (C.C.D. Cal. 1878) (holding that "[n]either in popular language .. nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race.").

59. *See* Rice v. Gong Lum, 104 So. 105, 108 (Miss. 1925), *aff'd*, 275 U.S. 78 (1927) (holding that "the word 'colored' is not strictly limited to negroes or persons having negro blood."); People v. Hall, 4 Cal. 399, 403 (1854) (holding that "[t]he word 'black' may include all negroes, but the term 'negro' does not include all black persons."); State v. Treadaway, 52 So. 500, 508 (La. 1910) (holding that "[t]here are no negroes who are not persons of color; but there are persons of color who are not negroes."); L. I. Shelley, Case Note, *Constitutional Law: Naturalization: Who is a White Person?*, 2 CORNELL L. Q. 115, 116 (1916-17) ("[T]he reasons, good or bad, that debar the Chinese from naturalization apply with equal force to their allied racial stocks, and the courts have refused to naturalize Japanese, Burmese, or Filipinos, on the ground that they are Mongolians.").

60. *In re* Ah Yup, 1 F. Cas. at 223; *see also* Perez v. Sharp, 198 P.2d. 17, 28 (Cal. 1948); Roldan v. Los Angeles County, 18 P.2d 706, 707 (Cal. Ct. App. 1933); *Rice*, 104 So. at 109.

of *Roldan v. Los Angeles County*,[61] however, offers a helpful analogy. In *Roldan*, a Filipino litigant successfully utilized Blumenbach's racial terminology to assert that California's prohibition applying to "Mongolians" did not include him, since he was a member of the "Malay" race. The California legislature, however, quickly responded by explicitly adding "member[s] of the Malay race" to the state's anti-miscegenation statute.[62] The holdings in cases like *Rice* and *Hall*, and the legislative response to *Roldan*, emphasize the multiplicity of efforts broadly to prohibit marriage between whites and any group of Asian Americans. Even, however, if such terminology were to be interpreted narrowly as covering only a smaller subset of Asian Americans, it would only further discredit Stephenson's theory that such statutes corresponded to "other race elements exist[ing] in considerable numbers."[63]

Assuming that intermarriage prohibitions applied to the entire Asian American population within the states in which they existed, no state enforcing such a restriction contained an Asian American population even close to the "anything like equal numbers" standard posited by Stephenson. Although Mississippi contained a majority black population, its total Asian American population—to whom it also extended its intermarriage prohibition—amounted to only 259 people, or 0.01 percent of the statewide population. Even in the West, three of the states in which Asian Americans were prohibited from intermarrying with whites—Montana, Arizona, and Utah—contained fewer than one percent Asian Americans. Of the three remaining states, California had the largest Asian American population, over 77,000, but this figure amounted to only 3.26 percent of the total population of California. Thus, while over two-thirds of the national Asian American population were restricted by anti-miscegenation statutes in their home states, in no such state did Asian Americans amount to even 1/30th of the population. Such statistics strongly undermine the assertion that growing Asian American numbers, threatening to disrupt the continuing dominance of the white population, provided the primary motivation for these statutes.

C. 1950 Anti-Miscegenation Statutes

By 1950, whites had secured a majority of the population in each of the forty-eight states and the District of Columbia. The African American population had grown at a rate slightly below the national average, and the Asian American population had grown at a slightly above-average rate. In both cases, however, this growth was accompanied by increasing dissemination throughout the country. African Americans had moved west and now surpassed Asian Americans in every state except Idaho and Utah. Asian American numbers also grew significantly in eastern states with

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61. 18 P.2d 706, 707 (Cal. Ct. App. 1933). *See generally* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000) (discussing *Roldan*).

62. 1933 Cal. Stat. 561.

63. *See* STEPHENSON, *supra* note 2, at 350.

large metropolitan areas, like Illinois, Pennsylvania, and New York. With both groups moving away from their centers of density, the largest concentrations of population were getting smaller. African Americans constituted less than a quarter of the population in most of the southern states, and Asian Americans comprised less than one percent of the population in every state except California, where they now formed only 1.35 percent.

Despite this diffusion of both the black and Asian American populations all 28 existing anti-miscegenation statutes remained in effect, with two additional states adopting such statutes and eight states adding Asian Americans to their prohibitions for the first time. The states that adopted new anti-miscegenation statues after 1910 were Wyoming, in 1913,[64] and South Dakota, around 1919.[65] The Wyoming statute applied to "Negroes, Mulattoes, Mongolians, or Malays," forbidding the marriage of any of these races with "white persons."[66] The new South Dakota statute forbade the marriage of "any person belonging to the African, [K]orean, Malayan, or Mongolian race with any person of the opposite sex belonging to the Caucasian or white race."[67] Both statutes specifically included both African Americans and Asian Americans within their prohibitions, supporting the thesis that such prohibitions never independently targeted Asian Americans.

Examination of the population patterns of these two states during this time directly contradicts Stephenson's population-driven theory. In 1920, the first census year following the adoption of these two statutes, Wyoming's African American population had shrunk by about a thousand people from the previous census, down to only 0.71 percent of the state population. The Asian American population had similarly decreased by nearly 400, down to 0.74 percent of the total. In South Dakota, the numbers had essentially remained stagnant, amounting to combined Asian American and African American numbers of slightly over 1,000 people in a state of well over 600,000, just 0.15 percent of the population. With the addition of these two statutes, a total of thirty states prohibited intermarriage between whites and African Americans in 1950. With the dispersion of the black population, however, the total proportion of African Americans covered by such statutes had decreased—from nearly 92 percent in 1910 to 72.9 percent by 1950.

The six other states adding Asian Americans to their prohibitions for the first time between 1910 and 1950 were: Georgia,[68] Idaho,[69] Maryland,[70] Missouri,[71] Nebraska,[72] and Virginia.[73] Four of these states—

64. 1913 Wyo. Sess. Laws, ch. 57, § 1.
65. S.D. REV. CODE §§ 106-08, 128 (1919).
66. 1913 Wyo. Sess. Laws, ch. 57, § 1.
67. S.D. CODE § 14.0106 (1939) (citing §§ 106, 108, and parts of §§ 107 and 128 of S.D. REV. CODE (1919), revised in form only and combined to unite all subject matter relating to void marriages).
68. 1927 Ga. Laws 277.
69. 1921 Idaho Sess. Laws 115, § 1.
70. MD. CODE ANN., ch. 60 (1935).
71. MO. REV. STAT. § 7299 (1919).

Idaho, Maryland, Missouri, and Nebraska—specifically added a reference to Asian Americans in some form in their anti-miscegenation statutes. Nebraska added the categories "Japanese or Chinese" in 1911.[74] However, these two groups combined in the 1910 Census constituted only 702 people in a state of about 1.2 million, amounting to just 0.06 percent. Similarly, Missouri added the term "Mongolians" in 1919,[75] and Idaho did the same in 1921.[76] However, the 1920 Census shows that Missouri's Asian American population actually decreased slightly from the previous census, while the total state population had slightly grown. Asian Americans still totaled less than 0.02 percent. The same Census shows that Idaho's Asian American population had also slightly shrunk since 1910, while the overall state population had grown by almost a third. In 1920, Asian Americans in Idaho comprised less than 0.5 percent of the total population. Maryland, for the first time in 1935, added "member[s] of the Malay race"[77] to its prohibitions. Asian American numbers in Maryland, however, hovered around 500 between 1930 and 1940, constituting about 0.03 percent of the state's population. For reference, Filipinos—a group commonly associated by the courts with the term "Malay"—totaled only 272 in Maryland in 1940. Thus, in none of these states did Asian American numbers approach those of the white population in the period immediately preceding the inclusion of Asian Americans within anti-miscegenation statutes. Contrary to Stephenson's thesis, these numbers remained low and, in some cases, even decreased.

Georgia and Virginia did not include Asian Americans specifically within their anti-miscegenation statutes, but instead declared it illegal for a white person to marry anyone "save"[78] a white person—Georgia in 1927 and Virginia in 1924. In the same session, however, the Georgia legislature defined "white person" as "only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins."[79] Therefore, the specific contemplation of Asian Americans in the adoption of the statute is unquestionable. Likewise, the Virginia legislature in the same session adopted legislation authorizing the State Registrar of Vital Statistics to certify the "racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains,"[80] thereby establishing the specific intent of the legislature that Asian Americans be included with all other "non-Caucasic" groups for legal purposes. Again, the Census

72. 1913 Neb. Laws 72, §§ 1, 216.
73. 1924 Va. Acts 535.
74. 1913 Neb. Laws 72, §§ 1, 216.
75. MO. REV. STAT. § 7299 (1919).
76. 1921 Idaho Sess. Laws 115, § 1.
77. MD. CODE ANN., ch. 60 (1935).
78. 1927 Ga. Laws 277; 1924 Va. Acts 535 (although the Virginia statute provided an exception for "American Indians").
79. 1927 Ga. Laws 277.
80. 1924 Va. Acts 534.

numbers depict an unusual background for these legislative actions. Virginia contained only about 335 Asian Americans throughout the 1920s, constituting only 0.01 percent of the state's nearly 2.5 million people. Georgia's Asian American population remained at around 250, not even reaching 0.01 percent of the state's population.

In all, the proliferation of anti-miscegenation statutes targeting Asian Americans kept pace with the diffusion of this group throughout the country so that, by 1950, the 15 effective statutes covered 64 percent of the Asian American population nationwide—as compared with 7 statutes reaching 67.3 percent in 1910. However, as Asian Americans became decreasingly concentrated on the West Coast, they existed in smaller niches and communities in states across the country. While Asian American numbers may have substantially increased in areas of previous scarcity by the middle of the twentieth century, in no territory did they constitute even 1/74th of the residential population. Stephenson's model—contending that statutory "distinctions" arose when other races resembled "equal numbers" to whites—therefore fails adequately to explain the gradual proliferation over this period of intermarriage restrictions targeting Asian Americans.

V. ALTERNATIVE THEORIES

Although the casual critic may be content simply to attribute this expansion of anti-miscegenation statutes to the dual—and symbiotically operating—forces of hyper-racism and complacency that characterized the Jim Crow period, a closer look at the historical, judicial, and cultural factors functioning in America during this period suggests that these elements operated within the framework of a much larger and more complex social scheme. This section explores these factors in order to construct a more credible theory about why so many states felt compelled to adopt and retain such odious restrictions in the face of definitively marginal Asian American populations.

A. Roots of Anti-Miscegenation Policy and the System of Race Identity in Slavery

It is no historical revelation that "race-mixing" predates even colonial times.[81] There is even considerable reason to believe that sexual interactions with African American slaves may have been common among, and generally tolerated by, many slave-owning whites in colonial America.[82] The status of the children borne from these relationships tended to follow the mother, creating an economic advantage for white planters to "miscegenate" with female slaves.[83] Statutory restrictions began appearing in the mid-seventeenth century, but they were largely ineffective in prohibiting such relations.[84]

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81. *See* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1500 (2000).

82. *See id.* at 1501; *see also* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1998).

83. *See* Jones, *supra* note 81, at 1501.

84. *See id.* at 1502.

The response to persistent miscegenation throughout the slavery era varied in different regions even within the South. In the Upper South, subjecting the children of slave mothers to slavery could not effectively prevent race-mixing, since "mulatto" children of free white or black women would remain free.[85] Thus, states in the Upper South enacted draconian penalties for miscegenation, such as subjecting the mother of "a bastard child by any Negro or mulatto" to a period of five years of servitude and the child to a period of thirty years of servitude.[86] In determining the status of existing "mulattoes," states in the Upper South, such as Virginia, resolved that this group be "firmly classed as Negroes and in effect lumped on that side of the race bar." [87] As the number of free blacks and mulattoes increased, and authorities became increasingly pressed to make distinctions between the rights of whites and those of free blacks, race became defined as a proportion of one's "blood." Eventually, "the one-drop rule"—under which one drop of black blood sufficed to classify an individual as black—emerged.[88]

States in the Lower South were more tolerant of race-mixing, and consequently adopted a more favorable view of free mulattoes.[89] Enslaved mulattoes were sometimes given preferential treatment, viewed in part as a "mediating influence to help control Black slaves." [90] As a result, the Lower South developed a three-tiered society, with mulattoes constituting a "buffer class" between blacks and whites.[91] Unlike the Upper South, where mulattoes were generally treated as blacks, "proper acting" mulattoes in the Lower South were treated as whites.[92]

Through the early nineteenth century, the blurring of the color line throughout the South made it increasingly difficult for whites to defend a system of slavery based on racial distinctions.[93] Consequently, tolerance for miscegenation declined, and the Lower South's three-tier system eroded.[94] By the time of the Civil War, the common interest of southern whites in preserving slavery propelled a movement to identify all persons as either white or black, and the one-drop rule gained widespread acceptance throughout the South.[95]

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85. *See id.* at 1503.

86. *See id.* at 1504.

87. JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 13 (1980).

88. *See* Randall Kennedy, *The Enforcement of Anti-Miscegenation Laws, in* INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW, *supra* note 24, at 147.

89. *See* Jones, *supra* note 81, at 1506.

90. *Id.* at 1508.

91. *See id.*

92. *See id.* at 1509.

93. *See id.* at 1510.

94. *See id.*

95. *See id.*

B. *Rise of Eugenics in the Post-Civil War Era*

After the abolition of slavery following the War, whites perpetuated the racial hierarchy by establishing a system of laws that enforced the physical separation of the races—among these, laws prohibiting interracial marriage.[96] Clear racial classifications defined by sharp color lines were essential to effectively enforce these Jim Crow laws.[97] Further fueling these efforts to separate the races were rising concerns that racial mixing would lower the biological quality of the white race.[98] Professor Keith E. Sealing describes the paradigm that provided the groundwork for these pseudo-scientific theories of white superiority: first, there is a natural hierarchy of all beings in the universe; second, humans are part of this chain; third, "race" is a valid concept; fourth, the races can be ranked hierarchically—Whites are [the] superior race, Asians/Indians are second, and Blacks last; fifth, this ranking of the races is immutable; sixth, miscegenation, the crossing of the races, produces crosses that are inferior to either parent; seventh, mixed races have lower fertility; eighth, mixing of the races brings the better down to the level of the lower, rather than improving the lower.[99]

Under this paradigm of racial superiority, opponents of miscegenation developed both religious and scientific justifications for anti-miscegenation laws. The religious theories essentially took on two strains. The first, or monogenist, strain, stated that all men derived from Adam, but insisted that human racial variation occurred through subsequent adaptation, with whites improving from the common ancestor and blacks degenerating from it.[100] The polygenist strain saw blacks as a wholly separate species, "descended from a different Adam."[101] The introduction of Darwin's theory of evolution in the mid-nineteenth century potentially could have undermined both of these religious arguments. Instead, however, the Darwinian theory provided "both sides [with an] even better rationale for their shared racism."[102] Darwin believed that through evolution man had diverged into races that differed in many respects, including mental ability,[103] and predicted that at "some future period, not very distant as measured by centuries, the civilized races would exterminate the savage races throughout the earth."[104] These scientific and religious arguments provided a new form of support for anti-miscegenation statutes that had not existed in common law.[105]

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96. *See id.* at 1511.
97. *See id.*
98. *See id.*
99. *See* Sealing, *supra* note 16, at 565-569.
100. *See id.* at 577-78.
101. *Id.*
102. *Id.* at 583 (citing STEPHEN JAY GOULD, THE MISMEASURE OF MAN 24 (1981)).
103. *See id.* at 584.
104. *Id.* (citing CHARLES DARWIN, ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION 168 (1859)).
105. *See id.* at 586.

The adoption of the Fourteenth Amendment did not immediately threaten the continued enforcement of anti-miscegenation statutes in the early Jim Crow era, since the supporters of the Amendment likely opposed "amalgamation" and supported anti-miscegenation efforts.[106] At any rate, the Supreme Court conclusively settled the issue shortly after the Reconstruction period, in *Pace v. Alabama*.[107] In *Pace*, a defendant challenged his adultery conviction, asserting that it violated the Equal Protection Clause of the Fourteenth Amendment to punish interracial adultery more severely than a similar crime committed by members of the same race.[108] The Court rejected this claim, holding:

> [The law] applies the same punishment to both offenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed . . . is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.[109]

In the years following this decision, virtually every judicial challenge to anti-miscegenation statutes was defeated, with courts often infusing eugenicist doctrine into their opinions. The Missouri Supreme Court ruled on the constitutionality of its anti-miscegenation statute the year after *Pace*, upholding a miscegenation conviction and justifying the state's regulation as being equivalent to its regulation of first cousins and other blood relations,[110] as applying equally to both races,[111] and as a right that generally was reserved to the state.[112] The court also invoked notions of scientific racism, stating that:

> It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . . .[113]

Similarly, the Georgia Supreme Court also defended the state's prohibition on black-white marriage on eugenic grounds, stating:

> The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the inferior race to the position of the superior, but they bring down the superior to that of the

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106. *See id.* at 590-91 (citing Alfred Avins, *Anti-miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1253 (1966)).

107. 106 U.S. 583 (1882), *overruled*, McLaughlin v. Florida, 379 U.S. 184 (1964).

108. *See id.* at 583-84.

109. *Id.* at 585.

110. *See* State v. Jackson, 80 Mo. 175, 176 (1883).

111. *See id.* at 177.

112. *See id.* at 178.

113. *Id.* at 179.

> inferior. They are productive of evil, and evil only, without any corresponding good.[114]

The Georgia court's opinion added that, while the law created legal equality, "it [did] not create . . . moral or social equality between the different races or citizens of the State."[115]

In addition to defending the validity of existing anti-miscegenation statutes against constitutional challenge, eugenicists also succeeded in securing additional state laws on the basis of these beliefs.[116] Virginia's statute, for example, candidly titled the "Racial Integrity Act of 1924," "forbade miscegenation on the grounds that racial mixing was scientifically unsound and would 'pollute' America with mixed-blood offspring."[117] Such statutes were widely upheld on the authority of *Pace*, which would prove to have an even more lasting legacy in Jim Crow jurisprudence than *Plessy v. Ferguson*.[118]

C. *Racial Protectionism*

Utilization of policies such as the one-drop rule of racial categorizing, fueled by eugenic notions of white purity and supremacy, reinforced the system of social and economic dominance by the white majority in the Jim Crow era. The proliferation of anti-miscegenation statutes growing out of these elements helped protect whites against the threat of usurpation by a "degraded class of colored"[119] people of their vast and valuable system of property rights. Eva Saks described this concept of "property-in-race" through which, much the same way as a "corporation was treated by law as a person . . . , a person [was] treated as property through the legal regime of blood, fractional holdings, and inheritance"[120]:

> To the law, a black person was not represented by a perceptible physical phenomenon like black skin, but instead consisted in black blood . . . . Legal race, as determined by legal blood, perpetuated the prewar economy of the human body, in which the body could be alienated because it was potentially another form of property . . . the new property of race.[121]

Within this system, claimed Saks, the marriage contract served as the "law's mechanism for the transmission of property."[122] For example, in *Ferrall v. Ferrall*,[123] the court refused to permit a man to abandon his family on the grounds that his wife was negro "within the prohibited

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114. Scott v. State, 39 Ga. 321, 323 (1869).

115. *Id.* at 326

116. *See* James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 102 (1993).

117. VA. CODE § 20-54 (1960 Rep. Vol.), *quoted in* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 423 (1988).

118. 163 U.S. 537 (1896).

119. People v. Washington, 36 Cal. 658, 684 (1869) (Crocket, J., dissenting).

120. Eva Saks, *Representing Miscegenation Law*, RARITAN 8.2 (Fall 1988): 39-69, *reprinted in* INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW, *supra* note 24, at 68.

121. *Id.* at 68-69.

122. *Id.* at 69.

123. 69 S.E. 60 (N.C. 1910).

degree,"[124] although she appeared white, holding that "[t]he law may not permit him thus to bastardize his own innocent children."[125] By declaring the inalienability of this "shared 'race-as-property,'" the court was able to "conceive all whites as members of a family . . . , [treating] blood . . . [as] a form of collective property."[126] Thus, the task of miscegenation law was "defining the boundaries of this extended family, and making this property stable . . . ."[127]

In this context arose the "taboo against racial intermarriage, lend[ing] support to a caste system of superior and inferior social and economic roles for whites and blacks . . . ."[128] This taboo "was reflected in [the] suggestive and typical association of miscegenation and incest,"[129] as evidenced by the common juxtaposition of these two prohibited acts in statutory provisions—either in the same code section, or in consecutive sections.[130] Saks suggests that this juxtaposition represents the "strange affinity of the taboo of 'too different' with 'too similar,'" noting that "both crimes rely on a pair of bodies which are mutually constitutive of each other's deviance."[131]

Southern whites attached this stigma of "deviance" to intermarriage in order to discourage the "conjunction of different bodies," which would signal "the breakdown of legal boundaries, which were the boundaries of property and representation."[132] In doing so, "the national body was explicitly conceived as a white body, while blacks were portrayed as the fraction of polluting blood within this body, an unassimilable *clot* in the national body and the white family."[133] A number of court decisions upholding the validity of anti-miscegenation statutes in the South employed this powerful rhetoric of deviance, contrasted with purity, to reinforce the legal barriers between the races. In *Kinney v. Commonwealth*,[134] in which a Virginia couple attempted to evade the state's anti-miscegenation statute by temporarily removing themselves to the District of Columbia—which had no such statute—the court invalidated the marriage, asserting that "[t]he laws enacted to further and uphold this declared policy would be futile . . . , [if] both races might, by stepping across an imaginary line, bid defiance to the law . . . ."[135] The court went on to justify its decision on the basis of both political, and racial sovereignty:

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124. *Id.* at 61.
125. *Id.* at 62 (Clark, C.J., concurring).
126. Saks, *supra* note 120, at 70.
127. *Id.* at 70.
128. ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 10 (1972).
129. Saks, *supra* note 120, at 71.
130. *See* 1921 Idaho Sess. Laws 115, § 1; IND. CODE ANN. tit. 44, §§ 103-04 (West 1934); LA. CIV. CODE ANN. art. 94 (Dinow 1947); MO. ANN. STAT. § 3361 (West 1939); NEB. REV. STAT. ANN. § 5302 (1911); N.C. GEN. STAT. § 51-53 (1950); S.D. CODIFIED LAWS § 14.0106 (Michie 1939).
131. Saks, *supra* note 120, at 71.
132. *Id.* at 78.
133. *Id.*
134. 71 Va. 858 (1878).
135. *Id.* at 866.

> Marriage, the most elementary and useful of all [social relations], must be regulated and controlled by the sovereign power of the state. The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.[136]

Arguably the most powerful symbol of property-in-race in the Jim Crow South, however, and the one most warranting protection against usurpation, was that of "white womanhood."[137] The white woman was regarded as both an object of property herself, as well as a means through which blacks could erode the system of white social dominance. "To the white man whose personality [was] largely defined by caste, the question 'Would you want your daughter to marry [a Negro]?' [was] real."[138] Indeed, legislators often "invoked the specter of miscegenation" to prevent passage of civil rights legislation in the Reconstruction era.[139] One representative argued:

> Now, what does all this mean but mixed schools and perfect social equality? It is nothing more or less; and the next step will be that they will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters . . . ; the sooner the alarm is given and the people take heed the better it will be for our civilization.[140]

In reality, Southern whites may not have been as concerned with "free and unrestrained social intercourse" as they were with "loss of sexual control over white women, and loss of economic and political power to African Americans."[141] James Davis argues that "[w]hite womanhood was the highly emotional symbol, but the system protected white economic, political, legal, educational, and other institutional advantages . . . , not just the sexual and racial purity of white women."[142]

D. Extending the Principle to Asian Americans

Given the prominence of themes of racial exclusivity, eugenics, race-as-property, and sexual protectionism in the social and political discourse of the Jim Crow era, it seems logical that Asians would incur the same treatment as Southern blacks as their numbers in this country grew. In a society structured by a rigid "us/them" dichotomy of racial identity, whites were no more willing to share their superior position in the racial hierarchy with Asians than they had been with the group they had previously labeled

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136. *Id.* at 869.
137. Trosino, *supra* note 116, at 100.
138. SICKELS, *supra* note 128, at 13.
139. Trosino, *supra* note 116, at 101.
140. *Id.* at 101 (citing Avins, *supra* note 106, at 1250).
141. Trosino, *supra* note 116, at 101.
142. F. JAMES DAVIS, WHO IS BLACK? 63 (1991).

"incapable of assimilation"[143] in the waning days of slavery. In the early days of Jim Crow, faced with rising numbers of Asian immigrants and forced to rule on issues such as the citizenship of these people, the Supreme Court expressed its similar belief about the unassimilability of this group:

> [T]he presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests . . . .[144]

Justice Harlan, in his dissent in *Plessy*, echoed this sentiment when he stated that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[145]

"While the so-called 'Chinese problem' was initially conceptualized as one of economic competition . . . the issue of sexual relationships between whites and Chinese" also fueled animosity by whites toward Asian immigrants, invoking "fears of hybridity."[146] One delegate to the 1878 California constitutional convention declared: "[w]ere the Chinese to amalgamate at all with our people, it would be the lowest, most vile and degraded of our race, and the result of that amalgamation would be a hybrid of the most despicable, a mongrel of the most detestable [of our race] that has ever afflicted the earth."[147] Other concerns were that the Chinese were "full of filth and disease,"[148] that "American institutions and culture would be overwhelmed by the habits of people . . . [who were] sexually promiscuous, perverse, lascivious, and immoral,"[149] and that Chinese men would "attend Sunday school in order to debauch . . . white, female teachers."[150]

Apparently heeding this admonition, the California legislature prohibited the licensing of marriages between "Mongolians" and "white persons" in 1880.[151] Over the next twenty years, an increase in Japanese

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143. Xi Wang, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Emancipation and the New Conception of Freedom: Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2161 (1996) (citing CONG. GLOBE, 36th Cong., 1st Sess. 1684 (1860)).

144. Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893).

145. Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

146. Volpp, *supra* note 61, at 801.

147. John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 325 (1997) (citing Debates and Proceedings of the Constitutional Convention of California, 1878-79, at 632 (Sacramento State Office, 1880)).

148. Volpp, *supra* note 61, at 802 (citing Nayan Shah, *Lives at Risk: Epidemics and Race in San Francisco's Chinatown* (2000) (on file with Leti Volpp, American University, Washington College of Law)).

149. Volpp, *supra* note 61, at 802 (citing Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in* The Birth of a Nation, The Cheat, *and* Who Killed Vincent Chin?, 5 ASIAN L.J. 41, 57-58 (1998); Megumi Dick Osumi, *Asians and California's Antimiscegenation Laws, in* ASIAN AND PACIFIC AMERICAN EXPERIENCE: WOMEN'S PERSPECTIVES 8 (Nobuya Tsuchida ed., 1982)).

150. *Id.*

151. *See* 1880 Cal. Stat. 41, § 1, 3.

immigration followed the trend of the Chinese, prompting further prohibitions. Even in the context of school integration, Japanese children were portrayed as "an immoral and sexually aggressive group of people" by individuals disseminating propaganda warning that "Japanese students would defile their white classmates."[152] Miscegenation between whites and the Japanese was described as "international adultery,"[153] and many government officials "warned that racial amalgamation between whites and Asians would destroy America because it would destroy Whiteness."[154] These fears prompted new California legislation in 1905, which now not only prohibited the issuance of licenses for such marriages but declared all *existing* "marriages of white persons with negroes, Mongolians, or mulattoes . . . illegal and void."[155] "This paranoia over amalgamation was unfounded,"[156] however, since "[i]n those days, Chinese, Japanese, or Koreans were not particularly inclined to marry whites."[157] Therefore, the anti-miscegenation laws that arose in California, and later in other states, "seemed to carry more symbolic value than practical effect."[158] Instead, "[t]hey were just another expression of the frenzied obsession to preserve the aesthetic value of the White race from the exaggeratedly imagined yellow peril."[159]

E. Asian-White Miscegenation in the Twentieth Century

The specific degree of Asian-white miscegenation occurring through the early 1900s is difficult to determine for various reasons. First, it is unclear what effect anti-miscegenation statutes had in deterring intermarriages in the states where they existed. Such practices no doubt occurred, as they had with southern blacks, but the frequency may be indeterminable to the extent they occurred clandestinely or were never formally recorded. In addition, the absence of a multi-racial census category further complicates the task of examining trends in intermarriage over time.

While Sucheng Chan suggests that Asian Americans were unlikely to marry whites at the beginning of the century,[160] there is evidence that this trend changed in subsequent generations. Professor Randall Kennedy reports that in the 1940s, about ten to fifteen percent of Japanese American marriages were to whites, and this figure increased to nearly half of Japanese American marriages by the 1960s.[161] Professor Kennedy,

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152. Volpp, *supra* note 61, at 802 (citing Osumi, *supra* note 149, at 13).

153. *Id.* at 802-803 (citing the testimony of an unidentified Republican member of the California Assembly).

154. Kang, *supra* note 147, at 325-26 (citing RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 330 (1989)).

155. CAL. CIV. CODE § 60 (1906).

156. Kang, *supra* note 147, at 326.

157. SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY 60 (1991).

158. Kang, *supra* note 147, at 326.

159. *Id.*

160. *See* CHAN, *supra* note 157, at 60.

161. Randall Kennedy, *How are we doing with* Loving*?: Race, Law, and Intermarriage*, 77 B.U. L. REV. 815, 818 (1997) (citing John N. Tinker, *Intermarriage and Assimilation in a Plural Society:*

however, does not provide state-specific data that can be cross-referenced with anti-miscegenation statutes, so the incidence of permitted versus illicit intermarriage remains unclear. He also cites no statistics regarding intermarriage among other Asian groups—such as Chinese or Koreans—although he notes that "the rates at which individuals in these groups intermarry with whites have always been greater than black-white rates of intermarriage."[162]

Even assuming that a substantial amount of Asian-white intermarriage in the early twentieth century occurred in states where anti-miscegenation statutes did not exist, Asian American populations in every state were so small—almost always under one percent—that they could not possibly threaten to grow into a substantial proportion of the population for several generations. This supports John Kang's assertion that the proliferation of such statutes targeting Asian Americans was symbolically, rather than practically, driven.[163]

The states adopting these statutes probably perceived no real threat of losing their numerical dominance over Asian Americans through intermarriage. Instead, the states recognized an opportunity to assert and reinforce the cultural and economic marginality of Asians early in the process of their development in America. This was an opportunity that had been somewhat inefficiently executed with African Americans following the Civil War. In the aftermath of slavery, there was a substantial free black population in the South. Given the ubiquity of the "one-drop" rule, the African American population was significantly augmented by a "mulatto" class. Although the white population preferred to recognize differences rather than similarity with this class—thereby placing it firmly on the opposite side of the "white/non-white" color line—this collective "non-white" population became substantially larger as a result, constituting a majority in some instances. The most effective way to stem the tide of expanding "non-whiteness" was to prevent any further amalgamation between the "white" and "non-white" races, thereby ensuring that the existing white population would sustain and proliferate itself. As a result, the states in which blacks and other "non-whites" constituted majorities or substantial minorities adopted anti-miscegenation statutes to prevent any further erosion of white racial purity.

When these states were faced with the prospect of a growing group of Asian immigrants, they did not encounter any independent threat of "corruption of [the] races."[164] Nevertheless, the states wished quickly to assert the proper position of this new group on the "other" side of the color line. Consequently, anti-miscegenation statutes were broadened specifically to include this group, and definitions of race were reformulated to affirm the principle that "the term 'white person' shall apply only to such

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Japanese-Americans in the United States, 5 MARRIAGE & FAM. REV. 61, 63 (1982); PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 47-61 (1989)).

162. Kennedy, *supra* note 161, at 818.

163. *See* Kang, *supra* note 147, at 326.

164. Nevada *ex rel.* Stoutmeyer v. Duffy, 7 Nev. 342, 359 (1872).

person as has no trace whatever of any blood other than Caucasian."[165] Such a policy effectively excluded Asian Americans from the white social network and system of property, while leaving their associations with other minority groups unregulated, since almost all anti-miscegenation statutes "implicitly allowed non-white peoples, regardless of their race, to marry each other with impunity."[166]

The argument that Asian Americans never posed any imminent threat to white racial purity is further supported by the fact that no state ever enacted a statute prohibiting Asian-white miscegenation unless a black-white prohibition already existed or was enacted simultaneously with the Asian-white provision—even in western states in which Asian Americans outnumbered African Americans. Even in California, where Asian Americans were the most numerous and most highly concentrated, they were prohibited from intermarrying with whites pursuant to an amendment to an existing black-white prohibition.[167] Thus, the systematic white dominance over African Americans, which had been firmly established through slavery and continued into the Jim Crow era, was ultimately extended to Asian Americans by analogy of their mutual "non-whiteness."

VI. THE NEW MODEL

We may now view the pattern of Asian American anti-miscegenation statutes through an alternative paradigm. Contrary to Stephenson's theory, these statutes did not arise only when Asian Americans appeared in "considerable" or "anything like equal" numbers to whites.[168] In reality, such proportions of Asian Americans never existed in any state at any time during the Jim Crow period. Rather, anti-miscegenation statutes incorporated Asian Americans when two fundamental elements were present within a state.

First, the white population in a state perceived a threat by the collective "non-white" population to its racial purity or racially defined system of property. This threat may have been actual—as in many of the southern states, in which blacks constituted majority or substantial minority populations—or merely psychologically perceived—as in most western states, where whites nonetheless may have branded their small but growing "non-white" populations with the powerful Jim Crow stigma of cultural inferiority and moral depravity. In either case, these states either already had existing statutes prohibiting black-white miscegenation on their books, or included black-white prohibitions when adopting provisions targeting Asian Americans, suggesting that Asian Americans as a group never constituted the sole, independent target of these statutes.

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165. Naim v. Naim, 87 S.E.2d 749, 750-51 (Va. 1955) (quoting 1924 Va. Acts ch. 371).

166. *See* Kang, *supra* note 147, at 326. The exception to this principle is Maryland, which restricted marriages "between a negro and a member of the Malay race." MD. CODE ANN. ch. 60 (1935).

167. *See* 1905 Cal. Stat. ch. 414, § 2, 554.

168. *See* STEPHENSON, *supra* note 2, at 350-51.

The second requisite element was not a substantial Asian American population, but merely one large enough to constitute a *cognizable entity* that could be included within the purview of statutes targeted at "non-whites" as a collective group. The definition of "cognizable entity" is, of course, rather nebulous, but the data suggests that the line could be drawn in the vicinity of 0.05 percent, or 1/2000th, of the state population. According to the 1950 data, the only states that did not cover Asian Americans by existing anti-miscegenation statutes were those in which Asian Americans comprised less than 0.05 percent of the population, with the single exception of Colorado. Investigation into this anomaly revealed a complete absence of miscegenation case law from Colorado from this period, hinting that anti-miscegenation prohibitions may never have been rigorously enforced in that state against African Americans in the first place.

While there are instances of such statutes applying to Asian Americans in states where this group constitutes less than 0.05 percent of the population, this figure is meant to signify a maximum threshold for presumptive *incognizability*, rather than a minimum threshold for presumptive *cognizability*. In other words, we presume only that a group reaching this size *has been* collectively identified, not the inverse—that a group *must* reach this size before being collectively identified.

The data in other ways supports the thesis that Asian Americans were included under these statutes only in a broader effort to solidify existing distinctions between white and "non-white." In any state that was, for any reason, not inclined to apply such distinctions to its African American population, Asian Americans were similarly not targeted, regardless of their size or proportion of the population. This principle is borne out most strongly in the case of Washington State, which had a substantially larger Asian American than African American population throughout the early 1900s—until the black population jumped from 7,400 to over 30,000 between 1940 and 1950. Despite the fact that Washington was home to the largest Asian American population outside of California between 1910 and 1940, its small African American population was insufficient to prompt any initial drawing of color lines in that state, and, consequently, no restrictions ever applied to Asian Americans, despite their relatively significant size. Similarly, New Mexico, which had a cognizable Asian American population throughout the early 1900s, but never enacted any black-white intermarriage restrictions, also never enforced such prohibitions against its Asian American group. The other states containing growing proportions of Asian Americans—New York, Illinois, and the District of Columbia—likewise were all states traditionally associated with progressive, liberal ideology, in contrast to the states of the Jim Crow South, and therefore these states were also disinclined ever to apply such restrictions to Asian Americans alone. Finally, the most powerful illustration of this component of the New Model is the example of Texas, where, despite having a substantial African American population and a legacy of discrimination in the Jim Crow South, the Asian American population—though large in pure numerical terms—never constituted a cognizable *proportion* of the state

population, and therefore was never included within the scope of the state's anti-miscegenation statute.

This theory also helps explain why states described racial categories with exceptional specificity in anti-miscegenation provisions, in contrast to other Jim Crow statutes. Unlike segregation requirements in schools or public carriers, which generally regulated casual social interactions between whites and "non-whites," miscegenation involved intimate relations between these groups and went to the very heart of what it meant to be "white." Moreover, the consequences—conceiving interracial children—were more lasting when individuals crossed state lines in order to "bid defiance to the law"[169] and subsequently returned. Miscegenation therefore posed a unique threat to the future *constitution* of the white population, threatening to undermine white majorities and the system of white social and psychological dominance in ways these other activities did not. Therefore, once states were prompted by this threat—whether actual or merely perceived—to draw a clear line between white and "non-white," any newly cognizable group had to be firmly classified in one of these two categories.

Furthermore, since anti-miscegenation provisions, unlike other Jim Crow statutes, were aimed not only at oppressing black populations, but also at restraining any tendencies by the white population to "corrupt"[170] itself, states explicitly declared that Asian Americans fell on the opposite side of the color line. Even implicitly permitting Asian-white intermarriage would allow white and black blood to mix if the children of Asian-white marriages were subsequently permitted to marry African Americans. Therefore, in order to avoid this result, the only options for whites were specifically to forbid Asian-black marriages, to forbid Asian-white marriages, or both—leaving Asian Americans only to marry each other. In choosing only to forbid Asian-white marriages, this group sent the message that its primary concern was preserving white racial purity and that its desire to prevent a "mongrel breed of citizens"[171] only applied to the extent that intermarriage threatened the "contamination of the *white* blood."[172]

Finally, the data reveals that such statutes did not disappear from the statute books of western states as Asian American populations migrated eastward and black populations migrated toward the West. Instead, these statutes, once extended to Asian Americans, essentially remained permanent, while existing statutes in eastern and southern states were broadened to include Asian Americans once this group constituted a cognizable entity within their borders. This pattern only further supports the argument that such statutes were motivated by an exaggerated desire to protect white racial purity, rather than by any legitimately perceived threat from substantial Asian American populations.

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169. Kinney v. Commonwealth, 71 Va. 858, 866 (1878).
170. Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893).
171. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955).
172. Gregory v. Baugh, 25 Va. 611, 657 (1827) (Coalter, J., concurring) (emphasis added).

VII. THE DEMISE OF ANTI-MISCEGENATION STATUTES

Not until around the middle of the twentieth century, in the waning days of Jim Crow, did states eventually begin to repeal or judicially overrule these statutes. California's was the first state supreme court to declare anti-miscegenation statutes unconstitutional in 1948—although the prohibition remained on the statute books until the 1950s. In *Perez v. Sharp*,[173] the California Supreme Court held that the state's anti-miscegenation statute violated both the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment.[174] The court held marriage to be "a fundamental right of free men" that could not be prohibited absent "an important social objective and by reasonable means."[175] The court then clarified this standard by holding that legislation restricting marriage "must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."[176]

The court also discredited the long-standing "equal protection" defense to such statutes by declaring that "[t]he equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasian race, or any other race, but to the rights of individuals,"[177] adding that "[t]he right to marry is the right of individuals, not of racial groups."[178] Finally, the court rejected the state's argument about the "stigma of . . . inferiority"[179] suffered by the progeny of interracial marriages, responding that "the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices."[180]

Following *Perez*, other states began repealing or overruling their anti-miscegenation statutes, but such statutes persisted in seventeen states[181] for two more decades, including three states in which such provisions applied to Asian Americans.[182] Although the United States Supreme Court had declared other forms of segregation unconstitutional in the 1954 case of *Brown v. Board of Education*,[183] the "justices were by no means eager to push an equal-rights agenda on the matter of miscegenation."[184]

In the same year as *Brown*, the Court denied certiorari on an appeal from an Alabama Supreme Court decision[185] upholding the state's anti-

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173. 198 P.2d 17 (Cal. 1948).
174. *See id.* at 29.
175. *Id.* at 19.
176. *Id.*
177. *Id.* at 20.
178. *Id.*
179. *Id.* at 27.
180. *Id.*
181. *See supra* note 21.
182. Those states were: Georgia, Mississippi, and Virginia.
183. 347 U.S. 483 (1954).
184. Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 415 (1994).
185. *See* Jackson v. State, 72 So. 2d 114 (Ala.), *cert. denied*, 348 U.S. 888 (1954).

miscegenation statute on the authority of *Pace v. Alabama*.[186] This suggested that *Brown* had not overruled *Pace*, as it had *Plessy v. Ferguson*.[187] The next year, the Court refused to hear argument on the appeal in *Naim v. Naim*,[188] in which a unanimous Virginia Court of Appeals rejected the Asian litigant's Equal Protection argument, which he had made on the authority of *Brown*. The court declared that "intermarriage of the races . . . [is not] a right which must be made available to all on equal terms."[189] The Supreme Court stated simply that the appeal was "devoid of a properly presented federal question."[190] The Court's specific reasons for refusing to explicitly rule on the miscegenation issue in the 1950s are unclear, but one reason may have been a belief that "airing this inflammatory subject, of little practical significance, would [not have been] in the public interest while strident opposition [was] being voiced to less controversial desegregation because it allegedly [led] to intermarriage."[191] Another motivating factor may have been that in the context of interracial relations, "white southerners most strongly resisted the idea of interracial sex and marriage, [while] African Americans ranked the question dead last in importance."[192]

Finally, in 1967, the Court "proved ready to address the one major area in which Jim Crow legislation lived on,"[193] when it heard the case of *Loving v. Virginia*.[194] Finally declaring anti-miscegenation statutes unconstitutional, the Court explicitly repudiated the argument that "the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense [are] similarly punished."[195] It held that"[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[196] The Court concluded by articulating the principle that"[u]nder our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."[197] Upon this declaration, over a century after the conclusion of the Civil War, statutorily enforced notions of white racial purity and racial property finally came to an end.

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186. 106 U.S. 583 (1882).
187. 163 U.S. 537 (1896).
188. 87 S.E.2d 749 (Va. 1955).
189. *Id.* at 755.
190. Naim v. Naim, 350 U.S. 985 (1956).
191. Wallenstein, *supra* note 184, at 415 (citing JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 345 (1959)).
192. Wallenstein, *supra* note 184, at 435 (citing MYRDAL, *supra* note 19, at 60-62).
193. *Id.* at 436.
194. 388 U.S. 1 (1967).
195. *Id.* at 10.
196. *Id.* at 12.
197. *Id.*

VIII. CONCLUSION

Gilbert Thomas Stephenson's blithe assertion that racial restrictions in the Jim Crow era correlated with "considerable numbers" of particular racial groups fails adequately to account for the complex legal and racial landscape of the country during this period. In fact, a confluence of factors operated to construct and preserve an exclusive notion of white racial identity. Nowhere is this pattern more apparent than in the proliferation of anti-miscegenation statutes. In the mid-nineteenth century, whites confronted a society in which the color line decreasingly denoted legal and social status. While the existence of free blacks and mixed-race people contributed to this trend even before the abolition of slavery, the Thirteenth Amendment threatened a formal end to the legal definition of race. As a result, the post-Reconstruction era witnessed an increased effort to construct such legal definitions, as well as greater attempts to prevent the blurring of these distinctions through intermarriage. Couched in terms of "racial integrity," the statutes that developed constituted exclusive definitions of "whiteness," in contrast to "non-whiteness," and operated to preserve the system of social dominance and control over property that the white population had enjoyed since colonial times.

With a growing Asian immigrant population in the late 1800s and early 1900s, states were forced to group this class of people exclusively within a specific category—"white" or "non-white." Not surprisingly, the pseudo-scientific ideas of racial inferiority and unassimilability that had previously been applied to southern blacks ultimately extended to Asians as well. Asian Americans never independently constituted substantial populations in any state throughout the Jim Crow period. Yet, their collective association with a broader group of "non-whites," in conflict with notions of white racial purity and superiority, fueled an expanded effort to prevent any "dilution" of white blood—and, consequently, the exclusive system of white social, economic, and political advantage. Anti-miscegenation statutes represented the product of this effort to preserve "white" racial identity. In the context of these statutes, any group perceived as "non-white" was prohibited from mixing with the white race. In any state, therefore, where the "non-white" group was prohibited from intermarrying with whites, Asian Americans were included under this prohibition, provided they constituted a cognizable presence within the state. This systematic process of enforcing and reinforcing notions of fundamental difference between the white and "non-white" populations persisted longer than any other incarnation of Jim Crow, continuing an important symbolic rejection of the idea of equality between the races. The United States Supreme Court ultimately struck down these statutory prohibitions in 1967, after they had existed for three full centuries in the canon of American law.

Despite the *Loving* decision, however, the specter of these laws remained. Anti-miscegenation statutes, although no longer enforceable,

remained on the statute books in South Carolina until 1998[198] and in Alabama until 2000.[199] Moreover, a 1997 study by the Gallup Organization revealed that only 61 percent of whites in America approved of interracial marriages.[200] These phenomena demonstrate that, 35 years after *Loving*, the task of confronting the legacy of these statutes remains unfinished.

198. *See* S.C. CONST. Art. III, § 33 (repealed 1998), *reprinted in* STATES' LAWS ON RACE AND COLOR, *supra* note 28, at 407 (Pauli Murray ed., 1950).

199. *See* ALA. CONST. Art. IV, § 102 (repealed 2000).

200. *See* The Gallup Organization, Gallup Poll Social Audit, Black/White Relations in the United States (1997).

APPENDIX A
Asian, Black, and Total Population, by State (1900-1920)

State	1900			1910			1920		
	Asian	Black	Total	Asian	Black	Total	Asian	Black	Total
Maine	123	1319	694466	121	1363	742371	168	1310	768014
New Hampshire	113	662	411588	68	564	430572	103	621	443083
Vermont	39	826	343641	11	1621	355956	15	572	352428
Massachusetts	3021	31974	2805346	2733	38055	3366416	2735	45466	3852356
Rhode Island	379	9092	428556	355	9529	542610	260	10036	604397
Connecticut	617	15226	908420	533	15174	1114756	668	21046	1380631
New York	7524	99232	7268894	6513	134191	9113614	8479	198483	10385227
New Jersey	1445	69844	1883669	1345	89760	2537167	1515	117132	3155900
Pennsylvania	1967	156845	6302115	1974	193919	7665111	2084	284568	8720017
Ohio	398	96901	4157545	1816	111452	4767121	1071	186187	5759394
Indiana	212	57505	2516462	314	60320	2700876	364	80810	2930390
Illinois	1583	85078	4821550	2388	109049	5638591	3248	182274	6485280
Michigan	249	15816	2420982	290	17155	2810173	976	60082	3668412
Wisconsin	217	2542	2069042	260	2900	2333860	311	5201	2632067
Minnesota	217	4959	1751394	342	7084	2075708	593	8809	2387125
Iowa	111	12693	2231853	133	14973	2224771	264	19005	2404021
Missouri	458	161234	3106665	634	157452	3293335	547	178241	3404055
North Dakota	180	286	319146	98	617	577056	196	467	646872
South Dakota	166	465	401570	163	817	583888	180	832	636547
Nebraska	183	6269	1066300	702	7689	1192214	993	13242	1296372
Kansas	43	52003	1470495	123	54030	1690949	120	57925	1769257
Delaware	52	30697	184735	34	31181	202322	51	30335	223003
Maryland	553	235064	1188044	402	232250	1295346	400	244479	1449661
District of Columbia	462	86702	278718	416	94446	331069	564	109966	437571
Virginia	253	660722	1854184	168	671096	2061612	334	690017	2309187
West Virginia	56	43499	958800	93	64173	1221119	108	86345	1463701
North Carolina	51	624469	1893810	82	697843	2206287	112	763407	2559123
South Carolina	67	782321	1340316	65	835843	1515400	108	864719	1683724
Georgia	205	1034813	2216331	237	1176987	2609121	220	1206365	2895832
Florida	121	230730	528542	241	308669	752619	287	329487	968470
Kentucky	57	284706	2147174	64	261656	2289905	71	235938	2416630
Tennessee	79	480243	2020616	51	473088	2184789	65	451758	2337885
Alabama	61	827307	1828697	66	908282	2138093	77	900652	2348174
Mississippi	237	907630	1551270	259	1009487	1797114	364	935184	1790618
Arkansas	62	366856	1311564	71	442891	1574449	118	472220	1752204
Louisiana	616	650804	1381625	538	713874	1656388	444	700257	1798509
Oklahoma	58	55684	790391	187	137612	1657155	328	149408	2028283
Texas	849	620722	3048710	935	690049	3896542	1222	741694	4663228
Montana	4180	1523	243329	2870	1834	376053	1946	1658	548889
Idaho	2758	293	161772	2222	651	325594	2154	920	431866
Wyoming	854	940	92531	1842	2235	145965	1446	1375	194402
Colorado	647	8570	539700	2673	11453	799024	2755	11318	939629

State	1900			1910			1920		
	Asian	Black	Total	Asian	Black	Total	Asian	Black	Total
New Mexico	349	1610	195310	506	1628	327301	422	5733	360350
Arizona	1700	1848	122931	1676	2009	204354	1687	8005	334162
Utah	989	672	276749	2481	1144	373351	3278	1446	449396
Nevada	1580	134	42335	1791	513	81875	1443	346	77407
Washington	9246	2514	518103	15638	6058	1141990	19750	6883	1356621
Oregon	12898	1105	413536	10781	1492	672765	7241	2144	783389
California	55904	11045	1485053	77604	21645	2377549	100764	38763	3426861
Total	114189	8833994	75994575	144909	9827803	91972266	172649	10463131	105710620

Asian, Black, and Total Population, by State (1930-1950)

State	1930			1940			1950		
	Asian	Black	Total	Asian	Black	Total	Asian	Black	Total
Maine	118	1096	797423	97	1304	847226	107	1221	913774
New Hampshire	84	790	465293	67	414	491524	118	731	533242
Vermont	35	568	359611	24	384	359231	48	449	377747
Massachusetts	3174	52365	4249614	2671	55391	4316721	4011	73171	4690514
Rhode Island	214	9913	687497	263	11024	713346	428	13903	791896
Connecticut	521	29354	1606903	456	32992	1709242	704	53472	2007280
New York	12595	412814	12588066	16269	571221	13479142	24064	918191	14830192
New Jersey	2222	208828	4041334	1498	226973	4160165	3602	318565	4835329
Pennsylvania	2850	431257	9631350	1701	470172	9900180	3287	638485	10498012
Ohio	1612	309304	6646697	1084	339461	6907612	3528	513072	7946627
Indiana	350	111982	3238503	237	121916	3427796	814	174168	3934224
Illinois	3756	328972	7630654	2918	387446	7897241	15853	645980	8712176
Michigan	1257	169453	4842325	1063	208345	5256106	3136	442296	6371766
Wisconsin	387	10739	2939006	313	12158	3137587	1119	28182	3434575
Minnesota	593	9445	2563953	602	9928	2792300	1769	14022	2982483
Iowa	172	17380	2470939	110	16694	2538268	620	19692	2621073
Missouri	728	223840	3629367	408	244386	3784664	1046	297083	3954653
North Dakota	194	377	680845	139	201	641935	143	257	619636
South Dakota	89	646	692849	55	474	642961	100	727	652740
Nebraska	868	13752	1377963	582	14171	1315834	821	19234	1325510
Kansas	97	66344	1880999	152	65138	1801028	431	73158	1905299
Delaware	46	32602	238380	61	35876	266505	99	43598	318085
Maryland	530	276379	1631526	473	301931	1821244	1084	385972	2343001
District of Columbia	476	132068	486869	724	187266	663091	2178	280083	802178
Virginia	336	650165	2421851	282	661449	2677773	758	734211	3318680
West Virginia	89	114893	1729205	60	117754	1901974	145	114867	2005552
North Carolina	85	918647	3170276	104	981298	3571623	443	1047353	4061929
South Carolina	56	793681	1738765	60	814164	1899804	135	822077	2117027
Georgia	285	1071125	2908506	357	1084927	3123723	639	1062762	3444578

State	1930			1940			1950		
	Asian	Black	Total	Asian	Black	Total	Asian	Black	Total
Florida	353	431828	1468211	368	514198	1897414	667	603101	2771305
Kentucky	69	226040	2614589	109	214031	2845627	409	201921	2944806
Tennessee	81	477646	2616556	72	598736	2915841	334	530603	3291718
Alabama	77	944834	2646248	62	963290	2832961	275	979617	3061743
Mississippi	562	1009718	2009821	744	1074578	2183796	1073	986494	2178914
Arkansas	263	478463	1854482	435	482578	1949387	705	426639	1909511
Louisiana	474	776326	2101593	406	849303	2363880	653	882428	2683516
Oklahoma	310	172198	2396040	169	168849	2336434	534	145503	2233351
Texas	1222	854964	5824715	1489	924391	6414824	3392	977458	7711194
Montana	1239	1256	537606	766	1120	559456	733	1232	591024
Idaho	1756	668	445032	1399	595	524878	2224	1050	588637
Wyoming	1156	1250	225565	745	956	250742	556	2557	290529
Colorado	3446	11828	1035791	2950	12176	1123296	5870	20177	1325089
New Mexico	382	2850	423317	286	4672	531818	417	8408	681187
Arizona	1989	10749	435573	2081	14993	499261	2731	25974	749587
Utah	3611	1108	507847	2438	1235	550310	4787	2729	688862
Nevada	1091	516	91058	756	664	110247	663	4302	160083
Washington	20032	6840	1563396	16910	7424	1736091	13102	30691	2378963
Oregon	7033	2234	953786	6156	2565	1089684	5762	11529	1521341
California	134817	81048	5677251	133273	124306	6907387	143280	462172	10586223
Total	213782	11891143	**122775046**	204444	12935518	**131669180**	259397	15041567	**150697361**

APPENDIX B

Population and Miscegenation Statutes, by State (1910)

State	% Asian	Asian	% Black	Black	Total
Maine	0.02	121	0.18	1363	742371
New Hampshire	0.02	68	0.13	564	430572
Vermont	0.00	11	0.46	1621	355956
Massachusetts	0.08	2733	1.13	38055	3366416
Rhode Island	0.07	355	1.76	9529	542610
Connecticut	0.05	533	1.36	15174	1114756
New York	0.07	6513	1.47	134191	9113614
New Jersey	0.05	1345	3.54	89760	2537167
Pennsylvania	0.03	1974	2.53	193919	7665111
Ohio	0.04	1816	2.34	111452	4767121
Indiana	0.01	314	2.23	60320	2700876
Illinois	0.04	2388	1.93	109049	5638591
Michigan	0.01	290	0.61	17155	2810173
Wisconsin	0.01	260	0.12	2900	2333860
Minnesota	0.02	342	0.34	7084	2075708
Iowa	0.01	133	0.67	14973	2224771
Missouri	0.02	634	4.78	157452	3293335
North Dakota	0.02	98	0.11	617	577056
South Dakota	0.03	163	0.14	817	583888
Nebraska	0.06	702	0.64	7689	1192214
Kansas	0.01	123	3.20	54030	1690949
Delaware	0.02	34	15.41	31181	202322
Maryland	0.03	402	17.93	232250	1295346
District of Columbia	0.13	416	28.53	94446	331069
Virginia	0.01	168	32.55	671096	2061612
West Virginia	0.01	93	5.26	64173	1221119
North Carolina	0.00	82	31.63	697843	2206287
South Carolina	0.00	65	55.16	835843	1515400
Georgia	0.01	237	45.11	1176987	2609121
Florida	0.03	241	41.01	308669	752619
Kentucky	0.00	64	11.43	261656	2289905
Tennessee	0.00	51	21.65	473088	2184789
Alabama	0.00	66	42.48	908282	2138093
Mississippi	0.01	259	56.17	1009487	1797114
Arkansas	0.00	71	28.13	442891	1574449
Louisiana	0.03	538	43.10	713874	1656388
Oklahoma	0.01	187	8.30	137612	1657155
Texas	0.02	935	17.71	690049	3896542
Montana	0.76	2870	0.49	1834	376053
Idaho	0.68	2222	0.20	651	325594
Wyoming	1.26	1842	1.53	2235	145965
Colorado	0.33	2673	1.43	11453	799024
New Mexico	0.15	506	0.50	1628	327301
Arizona	0.82	1676	0.98	2009	204354
Utah	0.66	2481	0.31	1144	373351
Nevada	2.19	1791	0.63	513	81875
Washington	1.37	15638	0.53	6058	1141990
Oregon	1.60	10781	0.22	1492	672765
California	3.26	77604	0.91	21645	2377549

* Bold numbers indicate existence of statute applying to specified group.

Population and Miscegenation Statutes, by State (1950)

State	Adopted	% Asian	Asian	Adopted	% Black	Black	Total
Maine		0.01	107		0.13	1221	913774
New Hampshire		0.02	118		0.14	731	533242
Vermont		0.01	48		0.12	449	377747
Massachusetts		0.09	4011		1.56	73171	4690514
Rhode Island		0.05	428		1.76	13903	791896
Connecticut		0.04	704		2.66	53472	2007280
New York		0.16	24064		6.19	918191	14830192
New Jersey		0.07	3602		6.59	318565	4835329
Pennsylvania		0.03	3287		6.08	638485	10498012
Ohio		0.04	3528		6.46	513072	7946627
Indiana		0.02	814	1871**	**4.43**	**174168**	3934224
Illinois		0.18	15853		7.41	645980	8712176
Michigan		0.05	3136		6.94	442296	6371766
Wisconsin		0.03	1119		0.82	28182	3434575
Minnesota		0.06	1769		0.47	14022	2982483
Iowa		0.02	620		0.75	19692	2621073
Missouri	1919	**0.03**	**1046**	1845**	**7.51**	**297083**	3954653
North Dakota		0.02	143	1909	**0.04**	**257**	619636
South Dakota	1919	**0.02**	**100**	1919	**0.11**	**727**	652740
Nebraska	1913	**0.06**	**821**	1905**	**1.45**	**19234**	1325510
Kansas		0.02	431		3.84	73158	1905299
Delaware		0.03	99	1852**	**13.71**	**43598**	318085
Maryland	1935	**0.05**	**1084**	1884**	**16.47**	**385972**	2343001
District of Columbia		0.27	2178		34.92	280083	802178
Virginia	1924	**0.02**	**758**	1849**	**22.12**	**734211**	3318680
West Virginia		0.01	145	1849**	**5.73**	**114867**	2005552
North Carolina		0.01	443	1871**	**25.78**	**1047353**	4061929
South Carolina		0.01	135	1879	**38.83**	**822077**	2117027
Georgia	1927	**0.02**	**639**	1868	**30.85**	**1062762**	3444578
Florida		0.02	667	1832**	**21.76**	**603101**	2771305
Kentucky		0.01	409	1903**	**6.86**	**201921**	2944806
Tennessee		0.01	334	1896**	**16.12**	**530603**	3291718
Alabama		0.01	275	1876**	**32.00**	**979617**	3061743
Mississippi	1906**	**0.05**	**1073**	1890**	**45.27**	**986494**	2178914
Arkansas		0.04	705	1838	**22.34**	**426639**	1909511
Louisiana		0.02	653	1894**	**32.88**	**882428**	2683516
Oklahoma		0.02	534	1908	**6.52**	**145503**	2233351
Texas		0.04	3392	1837	**12.68**	**977458**	7711194
Montana	1909	**0.12**	**733**	1909	**0.21**	**1232**	591024
Idaho	1921	**0.38**	**2224**	1867**	**0.18**	**1050**	588637
Wyoming	1913	**0.19**	**556**	1913	**0.88**	**2557**	290529
Colorado		0.44	5870	1877**	**1.52**	**20177**	1325089
New Mexico		0.06	417		1.23	8408	681187
Arizona	1901**	**0.36**	**2731**	1901**	**3.47**	**25974**	749587
Utah	1898	**0.69**	**4787**	1898	**0.40**	**2729**	688862
Nevada	1861	**0.41**	**663**	1861	**2.69**	**4302**	160083
Washington		0.55	13102		1.29	30691	2378963
Oregon	1893**	**0.38**	**5762**	1893**	**0.76**	**11529**	1521341
California	1905	**1.35**	**143280**	1905	**4.37**	**462172**	10586223

* Bold numbers indicate existence of statute applying to specified group.

** Due to data limitations, denotes oldest available code or amendment reference, although date of original adoption is unknown.