Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities

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In this article, I use state-level anti-miscegenation legislation to examine how Asian ethnic groups became categorized within the American racial system in the period between the Civil War and the civil rights movement of the 1960s. I show how the labels used to describe Asian ethnic groups at the state level reflected and were constrained by national-level debates regarding the groups eligible for U.S. citizenship. My main point is that Asian ethnic groups originally were viewed as legally distinct—racially and ethnically, and that members of these groups recognized and used these distinctions to seek social rights and privileges. The construction of "Asian" as a social category resulted primarily from congressional legislation and judicial rulings that linked immigration with naturalization regulations. Anti-miscegenation laws further contributed to the social exclusion of those of Asian ancestry by grouping together U.S.-born and foreign-born Asians.

In 1861, Nevada became the first state to pass a law specifically barring marriages between whites and Asians. Over the course of the next century, until the 1967 Supreme Court decision *Loving v. Virginia* declared anti-miscegenation laws unconstitutional, an additional 14 states came to ban marriages between whites and Asians (Pascoe 1996). The first states to pass anti-miscegenation statutes against Asians were located primarily in the West, but over the next hundred years states in the Midwest, South, and East also enacted such laws. The passage of state anti-miscegenation laws against Asian ethnic groups were both a response to increased immigration from Asia and a reflection of persistent concerns regarding racial purity and the nature of American citizenship.

Researchers have long recognized the importance of demographic conditions in shaping the attitudes of whites toward

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minority groups (Blalock 1957; Blumer 1958; Heer 1959). Park and Burgess [1921](1970) argue that as the population of a minority group increases, the majority group reacts by creating discriminatory laws and customs to prevent their incorporation. With respect to anti-miscegenation laws, Kennedy (2003:219) points out that every state in which blacks constituted more than 5 percent of the population enacted laws prohibiting intermarriage between whites and blacks. With regard to Asians, Karthikeyan and Chin (2002) show that a state's predisposition to segregate blacks and a visible Asian population was the best predictor of whether Asians would be covered by anti-miscegenation statutes.

While social scientists have detailed extensively how whites created laws to limit the rights and privileges of minority groups within the United States, less frequently examined are the manner by which these laws helped shape and determine the meaning of racial groups and the features selected to demarcate group boundaries. As Pascoe (1996) points out, "[t]he legal system does more than reflect social or scientific ideas about race; it also produces and reproduces them" (1996:47). Further, as has been noted by scholars such as Espiritu (1992), Hing (1993), and Takaki (1989), researchers who have examined the impact of laws on the development of racial stratification systems have typically focused on white/black or white/nonwhite differences. Although this focus reflected the demographic importance and historical significance of "whites" and "blacks" in defining the boundaries of U.S. racial hierarchies (Omi & Winant 1994), it also created an oversimplified view of American race relations. More recently, race scholars have begun the critical task of examining legal attempts to classify other racial and ethnic groups, allowing us to explore in greater depth the complicated process of racial categorization in America. In this article, I build on this work by using state-level anti-miscegenation legislation directed against Asian ethnic groups as a lens to study their incorporation into the evolving American racial system.

While it is clear that legislation regarding Asian immigration and incorporation was shaped by the demands of the U.S. economy, the political interests of the white majority, and public opinions on matters of race, immigration, and assimilation, it is also true that these various factors evolved and changed over time, and frequently worked at cross-purposes. For example, in the initial period of industrial development on the West Coast, Asians were viewed as a vital and welcome part of the labor force, but once white workers saw Chinese as a threat to their wages, both political parties in California competed to vilify their presence (Daniels 1988).

Similarly, while the legal system's attempts to create legal social categories that defined practices of inclusion/exclusion were

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influenced by external forces, they were not simply a result of economic and political pressures nor solely a reflection of public opinion, but also followed their own logic based on the internal consistency of legal distinctions. The legal system, in other words, both reflected the dynamics of ethnic and racial stratification and influenced it through its own internal developments. Moreover, the complexity of the U.S. legal system generated internal tensions between the federal and state legislatures, each with its own responsibilities and its own way of relating to external pressures. For instance, as described below, states enacted anti-miscegenation laws that conflicted with Civil War amendments and statutes guaranteeing racial equality; yet these coexisted, somewhat uneasily, until state anti-miscegenation laws were finally repealed in *Loving v. Virginia* (1967).

My primary goal in this article is to examine *how* the legal system came to group together Asian ethnic groups that originally were viewed as racially distinct. I analyze legal attempts to create exclusionary language that encompassed multiple Asian ethnic groups, and the justifications given for these definitions. In addressing this issue I also consider two related questions: First, why did Asian ethnic groups not become defined as part of a single broader nonwhite (or colored) category in American society? And second, why, arguably until the 1970s, did various Asian ethnic groups not become grouped together into a pan-ethnic racial category such as "Asiatic" or "Oriental"?

In addition, I examine how states successfully used anti-miscegenation laws to restrict the rights of U.S.-born Asians by linking them with their foreign-born co-ethnics. Anti-miscegenation laws are particularly illustrative of the complexity of race relations in the United States because while they justify the differential treatment of groups based on their supposed differences, these laws by their very existence reveal the necessity of barriers to maintain these distinctions. In fact, many of the motivations for other forms of racial discrimination have their roots in the fear that social contact between groups eventually leads to racial mixing through legal or illegal sexual unions, thereby complicating racial distinctions between groups.[1] As noted by Myrdal, with respect to blacks,

> No excuse for other forms of social segregation is so potent as the one that sociable relations on an equal basis between members of

[1] The creation of the term *miscegenation* seems to have been based on exploiting this fear. According to Kaplan (1949), the word first appeared in an 1863 pamphlet titled "Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and Negro," and it soon replaced the term *amalgamation* in common usage. Kaplan argues that despite its stated intent of promoting racial mixing, the actual purpose of the anonymously authored tract appears to have been to sway the 1864 election against Republicans by equating support for abolishing slavery with promoting interracial mixing.

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> the two races may possibly lead to intermarriage" (cited in Johnson 2003:5).

Furthermore, unlike other forms of "contracts" between individuals, marriage was considered to be a "public concern," and thus the domain of the state. States, therefore, had a large degree of latitude in choosing whether or not to pass anti-miscegenation legislation, in deciding which groups were considered unsuitable partners for whites, and in creating the language used to label these groups.

Background: The Dynamics of Asian Immigration

The period after the Civil War was marked by demographic and legal challenges to existing racial understandings. New, previously underrepresented groups began to enter the United States. Particularly significant was the rapid growth among Asian populations—initially with immigration from China and Japan, followed by immigration from the Philippines, Korea, and India (see Table 1). Between 1860 and 1890, the Chinese population tripled from a little more than 30,000 to more than 100,000; and once Chinese immigrants were barred from entering the United States with the passage of the Chinese Exclusion Act of 1882, immigration from Japan helped increase the Japanese ancestry population from less than 2,000 in 1890 to more than 70,000 in 1920 (Hing 1993). When the Gentleman's Agreement of 1908 led to the informal restriction of Japanese immigrants, employers seeking sources of cheap labor began recruiting from other Asian countries.

Increased immigration from Asia occurred at the same time that immigrants began arriving in greater numbers from South, Central, and Eastern Europe, leading to hostility toward all these

Table 1. Asian Ancestry Population, by Group and Decade

Decade Ending	Chinese	Japanese	Filipino	Asian Indian	Korean
1860	34,933[a]				
1870	64,199[a]				
1880	105,465[a]				
1890	107,488[a]				
1900	118,746	85,716			
1910	94,414	152,745	2,767	5,424	5,008
1920	85,202	220,596	26,634		6,181
1930	102,159	278,743	108,424	3,130	8,332
1940	106,334	285,115	98,535	2,405	8,568
1950	150,005	326,379	122,707		
1960	237,292	464,332	176,310	12,296[b]	11,000[c]

Note: Compiled from Tables 3, 4, 5, 7, and 8 in Hing (1993).
[a]Includes only Chinese living on the mainland.
[b]Includes only foreign-born Asian Indians.
[c]Includes only foreign-born Koreans.

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groups and greater support among the general public for more restrictive immigration policies.[2] The influx of these non-Anglo-Saxon immigrants raised questions about which immigrants should be allowed entry into the United States, who should be able to naturalize and gain American citizenship, and what social characteristics should determine these rights. Immigration from Asian countries also coincided with changes in the legal status of blacks at the end of the Civil War. In the Naturalization Act of 1790, Congress had originally restricted naturalization to "white persons," laying the foundations for a racially defined citizenship. After the Civil War, passage of the Civil Rights Act of 1866 and the Fourteenth Amendment (1868) granted the right of citizenship to blacks, and thus *potentially* to other groups previously deemed "nonwhite."

Legal attempts to restrict Asian ethnic groups from full participation in American society thus required constructions applicable to diverse groups, and within a new racial framework with respect to white-black relations. In addition, these constructions had to take into account rights that differed for immigrants and their U.S.-born offspring.

Critical Race Theory: Incorporating Asians

The theoretical approach I utilize in this study is derived from Critical Race Theory (CRT; see Delgado 1995). The basic premise underlying CRT is that race is socially constructed from available and created "meanings" that are formed and transformed under constant social and political pressure (Haney López 1996; Omi & Winant 1994). While critical race theorists have contributed greatly to our theoretical understanding of race, until the mid-1990s, scholars such as Chang (1993) justifiably could criticize this literature for focusing on blacks and whites, and for not adequately incorporating the experiences of other racial and ethnic groups. Since then, however, an increasing number of scholars have examined how the legal inclusion or exclusion of Asian Americans, Hispanics, and Native Americans has shaped racial understandings in the United States (Foley 2004; Glenn 2002; Haney López 1996; Koshy 2004; Okihiro 2001; Palumbo-Liu 1999).

Scholars such as Glenn (2002), Okihiro (2001), and Takaki (2002) illustrate how America's notion of "whiteness" developed in tandem with the conquest and colonization of non-Western

[2] However, it is important to note that Asian immigrants constituted a minor fraction of total immigrants during this period. In the 1900 U.S. Census, only 1.2 percent of the foreign-born originated from countries in Asia, compared to the nearly 85.0 percent who came from European countries (Daniels & Graham 2001).

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societies by Europeans. For instance, Glenn describes how "imagining non-European 'others' as dependent and lacking the capacity of self-governance helped the Europeans rationalize the takeover of their lands, resources, and labor" (2002:19), and even justify the extermination of Native Americans and enslavement of blacks. Okihiro (2001) traces the formation of a white/European-based identity to the United States' growing interests abroad and increasing divisions at home beginning in the mid-1800s. Citing the historian Nell Irvin Painter, Okihiro explains that:

> Domestic divisions and expansion abroad demanded "an identity as well as an identity of interest" that excluded America's racialized, gendered, and classed minorities and helped create transnational identities of white and non-white (2001:25–26).

In addition, Okihiro stresses the critical role of Asian ethnic groups for the construction of both the "white" and "nonwhite" category, as well as for the creation of racial hierarchies. For example, he describes how Asian ethnic groups have at times been grouped with blacks (and Native Americans) in contrast to whites, at times positioned as an intermediary group between whites and blacks, and at times even placed with whites. For instance, in *The People v. George W. Hall* (1854), the Supreme Court of California ruled that a Chinese person could not testify against a white person because it violated state strictures in criminal proceedings that "No Black or Mulatto person, or Indian, shall be allowed to give evidence against a white man." In this case, the court argued that since the term *white* had been intended generically to exclude "black, yellow, and all other colors," Chinese and Asians as nonwhites "were among those signified as black, mulatto, and Indian (Okihiro 2001:47).[3] At the same time, some courts recognized Asian ethnic groups as a distinct intermediate racial category between the "savage" African and the "civilized" European (see *In re Camille* 1880).

Perhaps the best explication of both the importance of the legal system in constructing racial categories and the role of Asian ethnic groups for these constructions is seen in Haney López's book *White by Law* (1996), which documents the role of Asian naturalization cases in forming new understandings of the meaning of *white*. Some of the key insights provided by Haney López are the fluid nature of "racial" meanings, the role of courts in defining the legal boundaries of "whiteness," and the importance of laws based on these

[3] This grouping of Chinese with "blacks" through their contrast with "whites" is also seen in the U.S. Supreme Court case *Gong Lum v. Rice* (1927). Chief Justice William Howard Taft presented the position of the court that the state of Mississippi's constitution, which provided that "Separate schools shall be maintained for children of the white and colored races," allowed for the segregation of Chinese from whites since it allowed for their education with other colored students.

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definitions "to structure racial dominance and subordination into the socio-economic relations of this society" (1996:17). Haney López illustrates the messy, contested, and social nature of racial definitions by comparing two Supreme Court cases: *Ozawa v. United States* (1922) and *United States v. Bhagat Singh Thind* (1923). Using these cases, he shows how the Supreme Court shifted from a "scientific" explanation that prohibited Japanese naturalization based on their "biological" status as "yellow" Mongolians to a "common knowledge" justification that prohibited the naturalization of Asian Indians based on their perceived differences from those of European heritage *despite* their status as "whites" under existing racial classification systems.[4] Through this comparison, Haney López also emphasizes the role of the legal system in establishing rather than merely reflecting "racial knowledge" (1996:119).

Other race scholars have examined how members of various Asian ethnic groups legally challenged their grouping with other Asian and non-Asian minority groups, as well as their status as social inferiors. For example, Calavita (2000) shows how after passage of the Chinese Exclusion Act of 1882, Chinese immigrants challenged restrictions on their entry into the United States by exploiting a congressional loophole allowing entry to the "merchant class." Specifically, she shows how Chinese immigrants were able to use problematic assumptions that "inferior classes" were readily identifiable through their physical features to resist enforcement of race-based exclusionary policies. Likewise, Volpp (2000) and Haney López (1996) demonstrate how Filipinos and Asian Indians respectively used existing scientific racial categories to legally challenge their grouping with other Asian groups and thus as nonwhites.

Critical race theorists have brought attention to the role played by the legal system in the construction of racial categories. Specifically, these scholars stress how the legal system has served to translate public concerns and anxieties regarding the social incorporation of diverse groups into coherent legal principles distinguishing the rights and privileges of different racial and ethnic groups. Furthermore, recent scholarship in this area has highlighted the diverse experiences of racial and ethnic groups in dealing with the white/black dichotomy that frames much of American racial discourse. However, while this work provides an essential starting point for understanding how various minority groups

[4] Justice George Sutherland, in presenting the opinion of the court in *United States v. Bhagat Singh Thind* (1923), contrasts the assimilability of "the children of English, French, German, Italian, Scandinavian, and other Europe [*sic*] parentage" who "quickly merge into the mass of our population and lose the distinctive hallmarks of their European heritage," with that of Hindus, whose children "retain indefinitely the clear evidence of their ancestry" (*United States v. Bhagat Singh Thind*, 261 U.S. 204 [1923]).

other than blacks came to be excluded from social rights and privileges based on their "racialization" as nonwhites, it fails to articulate how U.S. law helped shape and form *distinct* nonblack/nonwhite identities. In addition, its emphasis on the role of "race" in creating systems of racial stratification and group differentiating, while an obvious precondition for understanding how these "groups" became groups, downplays the importance of other social distinctions that are particularly crucial to understanding the social construction of "Asians."

My research builds on and contributes to the CRT literature by examining the extent to and processes by which Asian ethnic groups came to be grouped together. At the same time, my analysis of how state-level anti-miscegenation laws conformed to and differed from national-level debates concerning those eligible for naturalization and citizenship reveals the tensions that arose between these two levels of legal discourse as they reacted to a common set of external pressures.

Intermarriage and Anti-Miscegenation

Scholars studying race relations and immigration have long recognized the significance of intermarriage for understanding intergroup dynamics. Intermarriage rates frequently have been used as an indicator of social distance between racial groups (Bogardus 1968) and as a measure of assimilation for immigrants (Gordon 1964; Hirschman 1983; Kalmijn 1998; Waters & Jiménez 2005). Legal race scholars focus instead on whether these marriages were even possible. These scholars tend to examine the role of anti-miscegenation laws in prohibiting marriage between members of certain racial and ethnic groups. Key for these scholars is the role of anti-miscegenation legislation in defining racial identities and in creating and maintaining systems of racial privilege and domination (Kennedy 2003; Moran 2001; Wallenstein 2002).

The first anti-miscegenation legislation can be traced to the colonial period, when in the 1660s Maryland and Virginia passed prohibitions against interracial marriage and interracial sex between blacks and whites (Martyn 1979). A key consideration underlying restrictions on interracial sexual unions appears to have been the practical concern that racial mixing would undermine the distribution of economic and social privileges in a race-based stratification system (Higginbotham & Kopytoff 2003:25). As Moran notes, "[m]arriages across the color line could give blacks and their mixed-race offspring access to white economic privileges by affording them the property protections that marriage and inheritance laws afforded" (2001:19). In addition, these unions by their

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very existence challenged the subjugation of blacks as subhumans (Moran 2001:19).

Koshy (2004:5) further illustrates the link between marriage and economic privilege by comparing how attitudes toward intermarriage between white European men and respectively Native American and Mexican women changed over time. For instance, she describes how in the early colonial period, when the livelihood of white settlers was dependent on their relations with local Indian tribes, and when there existed few white women available as potential spouses, intermarriage between white males and Native American women was accepted and even encouraged.[5] Similarly, she describes how marriages between white men and Mexican women were accepted in the West in areas where land was under the control of Spanish and Mexican citizens. In both cases, however, as whites gained control of Native American and Mexican landholdings, these marriages became less and less acceptable, and came to be viewed as diluting the purity of "American" blood.[6] In contrast to these two groups, Koshy argues that anti-miscegenation laws directed against Asians were aimed at preventing the incorporation of a primarily male immigrant labor force "through marriage and through the creation of a subsequent generation of U.S.-born citizens" (2004:6).

While anti-miscegenation laws reflected a broad range of social, economic, and political concerns, my main goal in examining state anti-miscegenation laws is to analyze how Asian ethnic groups were legally defined in these statutes, and the context under which these labels were created and justified. In addition, going beyond the focus on racial distinctions as master categories that define the most fundamental aspects of societal inclusion, I examine the role of these laws in specifying the relation between U.S.-born Asians and their immigrant counterparts.

Data

The data used for this study come from two major sources. State anti-miscegenation laws were compiled from Martyn's (1979)

[5] The legacy of this acceptance can be found in Virginia's anti-miscegenation statute, which contained the "Pocahontas exception" allowing persons with 1/16 or less Native American blood to be classified as white (Koshy 2004:5).

[6] It is important to note that the issue of racial purity was only considered relevant for white Europeans. For instance, only one state appears to have forbidden marriages between blacks and Asians (Maryland prohibited marriages "between a negro and a member of the Malay race," Md. Laws ch. 60 [1935]). Similarly, while Mexicans were legally considered racially white (*In re Rodriguez* 1897) and thus technically barred from marrying nonwhites, they were in practice allowed to marry Asians and blacks based on similar skin coloration between partners (Koshy 2004:6).

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extensive history of anti-miscegenation legislation. Drawing from this historical account, I developed a data set listing all 15 states that passed anti-miscegenation legislation specifically directed against members of Asian ethnic groups. Included in this data set are the years these laws were passed, the labels used to identify which Asians could not marry whites, and the way new Asian ethnic groups were identified and classified in revised versions of states' laws. Descriptions of the court cases that helped determine the racial categories and citizenship rights for members of Asian ethnic groups were compiled using the database Lexis-Nexis Law. These cases are analyzed both to understand the rationale of the courts in trying to place Asian ethnic groups within the evolving American racial order, and to examine how Asians attempted to contest their legal status within the courts.

Legislation, Litigation, and the Legal Status of Asians

State Anti-Miscegenation Laws

The first anti-miscegenation laws prohibiting marriage with Asians, not surprisingly, were directed against the Chinese. Chinese immigrants first began to arrive in the United States in the 1840s. Although initially welcomed as necessary labor in the rapidly developing West, the Chinese soon found their growing presence threatening to whites. In addition to restrictions placed on where they could live, work, and go to school, the Chinese were confronted with barriers to marriage. Between 1861 and 1890, six states in the West passed statutes prohibiting marriage between whites and Asians (see Table 2).

States used either of two categories of labels to identify Chinese: one, the ethnic identifier *Chinese*, or two, the racial identifier *Mongolian*. Illustrative of the use of the ethnic identifier is Nevada, which in 1861, while still a U.S. territory, became the first to prohibit white-"Asian" cohabitation and marriage. This statute stipulated:

> SECTION 1. If any white man or woman intermarry with any black person, mulatto, Indian or *Chinese*, the parties of such marriage shall be deemed guilty of a misdemeanor, and, on conviction thereof, be imprisoned in the territorial prison for a term not less than one year, nor more than two years.
> . . .
> SEC. 3. That, if any white person shall live and cohabit with any black person, mulatto, Indian, or *Chinese*, in a state of fornication, such person as offending shall, on conviction thereof, be fined in any sum not exceeding five hundred, and not less than one hundred dollars, or be imprisoned in the county jail, not less than one, nor more than six months, or both such fine and

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Table 2. State by Year of First Asian Anti-Miscegenation Law: Language Used to Label Groups and Modifications

State	Year	Asian Groups Excluded	Anti-Miscegenation Statutes and Amendments
Nevada	1861	Chinese	Nev. Terr. Laws ch. 32, sec. 1, 3 (1861)
	1912	Mongolian (Yellow) and Malay (Brown)	Nev. Rev. Laws sec. 6514 [249] (1912)
Idaho	1864	Chinese	Idaho Terr. Gen Laws at 604 (1864)
	1921	Mongolian	Idaho Laws ch. 115 (1921)
Arizona	1865	Mongolian	Ariz. Terr. Laws ch. 30, secs, 3, 4, 5 (1865)
	1912	Mongolian, Malay, and Hindu	Ariz. Terr. Laws ch. 17 (1931)
Oregon	1866	Chinese	Ore. Laws at 10, secs. 1-2 (1866)
	1893	Mongolian	Ore. Laws at 41 (1893)
California	1880	Mongolian	Cal. Code Amend. ch. 41, sec. 1 (1880) amending Cal. Civ. Code sec. 69 (1872)
	1933	Mongolian and Malay	Cal. Stat. chs. 104, 105 (1933) amending Cal. Civ. Code secs. 60, 69
Utah	1888	Mongolian	Utah Laws. ch 45, secs. 2, 5, 14, 15 (1888)
	1939	Mongolian and Malay	Utah Laws. ch. 50 (1939)
Mississippi	1892	Mongolian	Miss. Code Ann. sec. 2859 (1892)
Missouri	1909	Mongolian	Mo. Rev. Laws sec. 4727, 4728, 8820 (1909)
Montana	1909	Chinese and Japanese	Mont. Laws ch. 49 sec. 1-7 (1909)
Nebraska	1913	Chinese and Japanese	Neb. Laws ch. 72 (1913)
South Dakota	1913	Mongolian, Malay, and Korean	S.D. Laws. ch. 266 (1913)
Wyoming	1913	Mongolian and Malay	Wyo. Laws ch. 57, sec. 1-2 (1913)
Virginia	1924	Nonwhite, Mongolian, Malay, and Asiatic Indian	Va. Acts ch. 371, sec. 1-7 (1924)
Georgia	1927	Nonwhite, persons of color, Mongolian, Chinese, Japanese, and Asiatic Indian	Ga. Acts No. 317 (1927) Codified in GA. Code Ann. secs. 53 [106], 53 [312] (1933)
Maryland	1935	Malay	Md. Laws ch. 60 (1935)

Note: Compiled from Martyn (1979).

> imprisonment, as the court may order (Nev. Terr. Laws ch. 32, sec. 1, 3 [1861]; emphasis added).

Illustrative of the usage of the racial identifier is Arizona, which in 1865 became the third state to pass anti-miscegenation laws targeting Asians, and the first to use the term *Mongolian*, when it passed the following statute (Martyn 1979:564–5):

> All marriages of white persons with negroes, mulattoes, Indians, or *mongolians* are declared illegal and void (Ariz. Terr. Laws. ch. 30, sec. 3 [1865]; emphasis added).

Of the six states to pass anti-miscegenation laws for Asians between 1861 and 1890, three states used the term *Chinese* (Nevada, 1861; Idaho, 1864; and Oregon, 1866), and three the term *Mongolian* (Arizona, 1865; California, 1880; and Utah, 1888).

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When Japanese immigrants started arriving in the United States in large numbers at the end of the nineteenth century and the beginning of the twentieth century, state legislatures that wished to ban racial mixing were faced with how to incorporate Japanese into their statutes. One response among the second wave (from 1890 to 1920) of states that passed anti-miscegenation laws was to list both Chinese and Japanese separately in their statutes. For instance, in 1909, we find Montana passing its first anti-miscegenation act: "An Act Prohibiting Marriage between White Persons and Negroes, Persons of Negro Blood, and between White Persons, Chinese and Japanese, and making such marriages Void, and prescribing punishment of Solemnizing such Marriages (Martyn 1979:898)." Four years later in 1913, Nebraska took the same tack by adding Chinese and Japanese to their previous prohibition for blacks. This act declared:

> Marriages are void:
> When one party is a white person and the other is possessed of one-eighth or more negro, *Japanese* or *Chinese* blood (Neb. Laws. ch. 72 [1913]; emphasis added).

For the most part, however, states during this period used the more inclusive "racial" category *Mongolian* to include both Chinese and Japanese. For example, Mississippi in 1892, Missouri in 1909, and South Dakota and Wyoming in 1913, all created or added to preexisting marriage laws prohibitions against white-Mongolian marriages. In addition, all three western states from the first period that had previously used the term *Chinese* in their statutes changed these to the more general racial category of *Mongolian*. For instance, in 1893, Oregon changed its preexisting statute from 1866 to read:

> The following marriages are prohibited:
> When either of the parties is a white person and the other a negro, or *Mongolian*, or a person of one-fourth or more of negro or *Mongolian* blood (Ore. Laws at 41 [1893]; emphasis added).

Oregon was followed in succession by Nevada in 1912, and Idaho in 1921. Eventually, 12 of the 15 states that passed anti-miscegenation laws against ethnic groups from Asia would use the racial identifier *Mongolian*.

This trend toward a single generalized racial category for Asians ended with the inflow of new arrivals from other regions of Asia, such as the Philippines, Korea, and India who were being recruited to replace Japanese labor restricted by the Gentleman's Agreement of 1908. Particularly significant was the use of workers from the recently annexed Philippines, whose special status as noncitizen nationals allowed them to enter freely into the United States (Hing 1993). Thus we find Nevada in 1912, updating its previous legislation to

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include the racial category *Malays*. Interestingly, Nevada also added color descriptors in its revised prohibition such that it read:

> It shall be unlawful for any person of the Caucasian or white race to intermarry with any person of the Ethiopian or black race, *Malay or brown race, Mongolian or yellow race*, or the American Indian or red race, within the State of Nevada (Nev. Rev. Laws Sec. 6514 [249] [1912]; emphasis added).

A year later in 1913, we find South Dakota passing legislation prohibiting "intermarriage or illicit cohabitation of persons belonging to the African, *Corean* [*sic*], *Malayan*, or *Mongolian* race with any person of the opposite sex belonging to the Caucasian or White race" (S.D. Laws Ch. 266 [1913]; emphasis added), and Wyoming prohibiting "all marriages of white persons with Negroes, Mulattoes, *Mongolians* or *Malays*" (Wyo. Laws. Ch. 57, Sec. 1 & 2 [1913]; emphasis added).

By the 1920s, states were using a mixture of racial and national labels to identify Asian ethnic groups with whom marriage by whites was prohibited. In 1924, Virginia built on its long history of anti-miscegenation laws by prohibiting the marriage of whites to "Negroes, *Mongolians*, American Indians, *Asiatic Indians*, and *Malays*" (Va. Acts Ch. 371, Sec. 1–7 [1924]; emphasis added). In 1927, Georgia followed suit with perhaps the most exhaustive and frequently redundant proscription against intermarriage.

> [Sec.] 53–106. Miscegenation prohibited.—
> It shall be unlawful for a white person to marry anyone but a white person. Any marriage in violation of this section shall be void.
> [Sec.] 53–312. "White person" defined.—
> The term "white person" shall include 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. No person, any of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person (Ga. Code Ann., sec. 53 [106 & 312] [1927]; emphasis added).

In 1931, Arizona added Malays and Hindus to the preexisting groups of Negroes, Indians, and Mongolians as unsuitable partners for whites. Similarly, both California in 1933, and Utah in 1939, added Malays to their previous proscriptions against Negroes, Mulattoes, and Mongolians. The one unusual case during this period was Maryland, which in 1935 added Malays to its preexisting anti-miscegenation statutes against blacks but did not create any specific restrictions for Mongolians.

Overall, these anti-miscegenation statutes reveal that unlike African Americans, who all fell under the more general racial category of African, Negro, or black, no generalized *racial* umbrella

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term such as *Asiatic* or *Oriental* was created to include all Asian ethnic groups. Despite the initial use of *Mongolian* to exclude both Chinese and Japanese from citizenship, it appears that state legislators considered this term insufficient to exclude Filipinos and Asian Indians. In addition, these statutes reveal few attempts by states to create a broader category of *nonwhite* applicable to African Americans, Native Americans, and Asian ethnic groups. The two states that did use the term *nonwhite* in their statutes, Virginia and Georgia, immediately clarify all the different groups that were considered nonwhite.

To understand the rationale and underlying constraints faced by state legislatures in their labeling of Asian ethnic groups, we need to turn to the broader national debate regarding the immigrant groups suitable for naturalization and American citizenship. In the following section, I argue that the failure of state legislatures to utilize a single category that could encompass multiple Asian groups or subsume Asian ethnic groups within a broader "nonwhite" category can be traced to court debates regarding the "racial" eligibility of Asian immigrants for citizenship.

National-Level Discourse Regarding Race

Eligibility for Naturalization and Citizenship

Although states viewed the institution of marriage as strictly under their jurisdiction, the language they used to identify Asian groups paralleled racial distinctions being made at the national level regarding which groups were eligible to naturalize and become American citizens. The first area of national debate concerning the rights of different "racial" groups revolved around the applicability of civil rights legislation for Asian ethnic groups. Immediately after the Civil War, Congress passed legislation that gave new rights to blacks, particularly with respect to naturalization and citizenship. Specifically, the Civil Rights Act of April 9, 1866, stipulated that:

> [a]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared citizens of the United States; and such citizens, *of every race and color*, without regard to any previous condition of slavery or involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding (Civil Rights Act, Ch. 31, 14 Stat. 27–30 [1866]; emphasis added).

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The Fourteenth Amendment, ratified in 1868, further clarified the ability of states to create race-based legislation:

> SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws (Fourteenth Amendment 1868).

Finally in 1875, Congress passed the most progressive and comprehensive legislation with regards to citizenship and naturalization. The Civil Rights Act of March 1, 1875, provided that:

> [i]t is the duty of government in its dealings with the people to mete out equal and exact justice for all, of whatever *nativity, race, color or persuasion, religious or political* . . .
>
> That all persons within the jurisdiction of the United States of America shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations of law and applicable alike to *citizens of every race and color*, regardless of any previous condition of servitude (Civil Rights Act, Ch. 14, 18 Stat. Part III [1875]; emphasis added).

Civil rights legislation appeared, in theory, to provide Asian immigrants an avenue to naturalize and gain citizenship. In fact, during debates regarding the wording of the Naturalization Act of July 14, 1870, several congressmen, led by Senator Charles Sumner of Massachusetts, sought to strike down the term *white* from naturalization laws altogether (see discussion in *In re Ah Yup* 1878, also cited in Haney López 1996:43). However, fear among representatives from western states that the rapidly growing Chinese population would seek citizenship rights led Congress to reject a proposal to extend naturalization rights to Asian immigrants (Chew 1994). Thus, the Naturalization Act of February 18, 1875, finally read:

> The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent (Naturalization Act, Ch. 80, 18 Stat. 318 [1875]).

Over the course of the next century, immigrants from various Asian countries would seek to become citizens of the United States. In each of these cases, the courts ruled that the right to naturalize was dependent on the revised Naturalization Act of 1875, which limited citizenship to "whites" and "blacks." Thus, the potentially

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liberal interpretation of equal rights for citizens of every "race" and "color" implied by civil rights legislation quickly became constrained by the courts' distinction between the rights of citizens versus the right to become a citizen.

The "Science" of Race and the Politics of Naturalization

In trying to restrict the ability of Asian immigrants to naturalize based on the Naturalization Act of 1875, the courts were forced to argue that members of Asian ethnic groups were not "white"; yet at the same time, given the new rights provided to African Americans, they could not argue that Asians were merely "nonwhite." It is here that the courts turned to the field of anthropology to provide the "scientific" language and rationale for distinguishing Asians from whites and blacks.

By the late 1800s, anthropology had emerged and gained acceptance as the academic discipline most concerned with the scientific study of racial differences (Smedley 1993:274). Anthropology's interest in the scientific classification and ranking of human groups had evolved from earlier research conducted by the biologist Carolus Linnaeus in the mid-1700s. Linnaeus classified human beings into four varieties based on skin color—red, yellow, white, and black; but he also attributed characteristics such as intelligence and creativity to whites and laziness and carelessness to blacks (Tucker 1996:9). In 1781, Johann Friedrich Blumenbach, considered one of the founders of modern anthropology, expanded on the Linnaean taxonomic system by classifying humans into five categories. He also described whites as the most ideal form of human, and for them he coined the new term *Caucasian* (Tucker 1996:9).[7] Over the next hundred years, researchers continue to argue for the link between physical and behavioral characteristics of groups, and to utilize racial distinctions to explain and justify social, economic, and political inequalities (Smedley 1993:168).

These racial distinctions also became the basis of political attempts to restrict immigrants, who it was feared would overrun the "superior" stock of northern and western Europeans that made up "Americans," and became a key argument for the prohibition of marriage between racial groups. For instance, Harry Laughlin, the eugenics expert for Congress's House Committee on Immigration and Naturalization, argued that the United States should only permit immigration by people whose racial characteristics "are compatible with our prevailing races for mate selection (King

[7] Blumenbach believed that whites had originated from the southern slopes of Mt. Caucasus in the country of Georgia.

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2000:133)."[8] Laughlin suggested that in addition to immigration policies at the national level, marriage laws at the state level would help further maintain the purity of the "American race" (King 2000:136).

Two early post-Civil War cases, *In re Ah Yup* (1878) and *In re Saito* (1894), illustrate how Blumenbach's classification system became utilized to categorize Chinese and Japanese as members of a distinct racial group not eligible for citizenship. In the case of *In re Ah Yup*, Circuit Court Judge Lorenzo Sawyer cited Blumenbach's categories to justify why Ah Yup, an immigrant from China, was ineligible for citizenship:

> In speaking of the various classifications of races, Webster in his dictionary says, "The common classification is that of Blumenbach, who makes five: 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or Negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and 5. The Malay, or Brown race, occupying the islands of the Indian Archipelago," etc (*In re Ah Yup*, 1 F. 223 [1878]).

It is clear from these proceedings that Congress retained the word *white* in the naturalization laws for the sole purpose of excluding the Chinese from the right of naturalization.

In the case of *In re Saito*, Circuit Court Judge LeBaron Colt used the same justification to deny the application of a Japanese immigrant who sought to naturalize:

> The act relating to naturalization declares that "the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Rev. St. § 2169. The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term "white persons." . . . The history of legislation on this subject shows that congress [*sic*] refused to eliminate "white" from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion. . . . Before the act of May 6, 1882 (22 Stat. 58, 61), which prohibited the naturalization of Chinese, or when the Chinese and Japanese stood on the same footing under the law, the question of the right to naturalize a Chinaman came before Judge

[8] In order of acceptableness as Americans, Laughlin ranked "first, descendents of immigrants from the British Isles; then immigrants coming from Germany, Scandinavia, from the Netherlands, from France, then the Jewish group, then from Spain, then, possibly, Hungary, Russia . . ." (King 2000:135). Excluded were the "colored" races.

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> Sawyer in the case *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, and, in a well-considered opinion, the court denied the application. . . . Whether this question is viewed in the light of congressional intent, or of the popular or scientific meaning of "white persons," or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied (*In re Saito*, 62 F. 126 [1894]).

This is not to say that the courts believed that blacks were more suitable for citizenship; rather, they feared that the consequences of granting citizenship rights to Asian ethnic groups would be much greater due to the potential impact of immigration. This perception is reflected in *In re Camille* (1880), where Judge Matthew Deady justified his decision to bar a half-Indian (Native American) from Canada from receiving citizenship:

> From the first our naturalization laws only applied to the people who had settled the country—the Europeans or white race—and so they remained until in 1870, . . . when, under the pro-negro [*sic*] feeling, generated and inflamed by the war with the southern states, and its political consequences, congress [*sic*] was driven at once to the other extreme, and opened the door, not only to persons of African descent, but to all those "of African nativity"—thereby proffering the boon of American citizenship to the comparatively savage and strange inhabitants of the "dark continent," while withholding it from the intermediate and much-better-qualified red and yellow races.
>
> However, there is this to be said in excuse for this seeming inconsistency: the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe, while the Indian and Chinaman were in our midst, and at our doors and only too willing to assume the mantle of American sovereignty, which we ostentatiously offered to the African, but denied to them (*In re Camille*, 6 F. 256 [1880]).

Initially, when immigrants were mainly from China and Japan, the racial category of *Mongolian* served effectively to exclude their naturalization. This category was also used to exclude other Asian ethnic groups such as Burmese (*In re Po* 1894) and Koreans (*Petition of Easurk Emsen Charr* 1921). However, the use of existing racial classification systems that distinguished between "yellow" Asians (i.e., Chinese, Japanese, and Korean) and "brown" Asians (i.e., Filipinos) and viewed those from West Asia and Southeast Asia as "white" made it difficult to create an overarching *racial* category such as "Asiatic" or "Oriental" to exclude *all* Asian ethnic groups. In fact, lawyers representing Asian immigrants quickly recognized that the best way to aid their clients was to differentiate their clients

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from members of other Asian groups and, if possible, to claim that their clients belonged to the "white" race.

Some of the earliest attempts of this differentiation strategy were by Japanese immigrants seeking citizenship. For example, in *In re Yamashita*, argued before the Supreme Court of Washington in 1902, a Japanese gentleman sought to claim citizenship by distinguishing himself from Chinese immigrants. Yamashita unsuccessfully argued that the Chinese Exclusion Act of 1882, which specifically prohibited Chinese from naturalizing, clearly demonstrated that "Japanese were exempted from the general exclusion of the Mongolian race" (*In re Yamashita*, 30 Wash. 234 [1902]). Similarly, in the U.S. Supreme Court case *Ozawa v. United States* (1922), Ozawa argued that since Japanese were visibly distinguished from Chinese immigrants, and since no policy specifically excluded Japanese immigrants from naturalization, he was eligible for U.S. citizenship. Ozawa went even further and argued that Japanese were actually "white," based on visual inspection of skin color. In support of his "whiteness," he argued that Japanese were frequently lighter in skin color than Europeans from Mediterranean countries (Haney López 1996). Justice Sutherland, voicing the opinion of the court, ruled against Ozawa's petition, stating that deciding race based on the "mere color of the skin of each individual is impractical" because of the great variation among people of the same race, and "would result in a confused overlapping of races . . . without any practical line of separation" (*Ozawa v. United States*, 260 U.S. 189 [1922]). In both cases, Japanese were ruled to be "Mongolian" and therefore not racially white as required by naturalization laws.

For Filipinos, self-identifying as "brown" Malays instead of "yellow" Mongolians provided no better avenue toward "white" citizenship. Instead, the legal strategy used by Filipinos to differentiate themselves from other Asian groups was based on the unusual legal status of the Philippines as a protectorate of the United States. Thus, in *In re Rallos* (1917), we find the lawyers for Rallos arguing that he was eligible for citizenship under the Treaty of Paris (1898) and the Act of June 29, 1906, which gave residents of the Philippines "the right to declare their intention to apply for citizenship" (*In re Rallos*, 241 F. 686 [1917]). In this case, the court ruled that while Filipinos had the right to seek citizenship, this did not overrule the racial prerequisite of "whiteness" found in the Revised (Naturalization) Statute of 1875.[9] Eventually, increased

[9] Although Filipinos as "nonwhites" were ineligible to become citizens, they could still enter the United States as American nationals. The courts eventually allowed an exception to the citizenship rule for Filipinos and Puerto Ricans who served in the military, making them eligible for citizenship under the Acts of June 29, 1906, and of May 9, 1918 (see also *United States v. Javier* 1927, and *Rogue Espiritu De La Ysla v. United States* 1935).

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Filipino migration to the United States, and the growing recognition that U.S. jurisdiction over the Philippines negated its ability to control Filipino entry into the United States, led exclusionists to push for Philippine independence (Hing 1993:62; Volpp 2000). These groups achieved their goal with passage of the Tydings-McDuffie Act in 1934, which not only set the stage for future Philippine independence but also limited Filipino immigration to an annual quota of 50.

The group that was most successful in distancing itself from other Asian ethnic groups, and in using existing classification systems to stake a claim to "whiteness," was Asian Indians. The racial classification systems of the time viewed Asian Indians as originating from Caucasian stock, and it was this racial status that immigrants from India used to argue for their right to naturalize. Initially, the courts were sympathetic to the argument regarding the historical origins of Asian Indians and ruled in favor of Asian Indians seeking citizenship as whites. For instance, in *In re Balsara* (1909), Circuit Judge Emile Henry Lacombe ruled that while Congress may have intended *white* to mean only European groups when Congress had first established the racial criteria in the Naturalization Act of 1790, Asian Indians were part of the "race or family known to ethnologists as the Aryan, Indo-European, or Caucasian" and therefore eligible for American citizenship.

It also appears that the courts were swayed by arguments made by Asian Indians justifying their racial purity based on social segregation in India mirroring that in the United States. For instance, when the issue of Balsara's "whiteness" was reconsidered in *United States v. Balsara* (1910), the court accepted the claim made by Balsara that he was a Parsee, a group distinct from other lower-status Hindus. In his ruling, Judge Henry Galbraith Ward made note of the fact that while the Parsees had emigrated from Persia to India more than 1,200 years earlier, they still constituted a "settlement by themselves of intelligent and well-to-do persons . . . as distinct from the Hindus as are the English who dwell in India" (*United States v. Balsara*, 180 F. 694 [1910]). Similarly, in *In re Akhay Kumar Mozumdar* (207 F. 115 [1913]), the court accepted Mozumdar's argument that as a high-caste Hindu-Brahmin who came from the northern part of India known as Hindustan, which in Hindu translated into "land of Aryans," and as a member of a group who by dint of marriage prohibitions had maintained their racial purity, he was racially distinct from both the original inhabitants of India and invaders of the "Mohammedan" faith, and was therefore suitable for American citizenship.

The success of Asian Indians in claiming citizenship as "whites" was, however, short-lived. In 1917, Congress passed a bill banning

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immigration from most parts of Asia (Act of February 5, 1917).[10] For immigrants from India, this raised the question of their right to naturalize given their dual status as immigrants ineligible for entry into the United States and "whites" eligible for naturalization. This issue arose in 1920, when an Indian national who had lived in the United States for seven years challenged the denial of his application for citizenship. Initially, in *In re Bhagat Singh Thind* (1920), the District Court of Oregon ruled that no conflict existed between the laws governing immigration and naturalization, and that while Asian Indians were no longer allowed entry into the United States, this did not preclude those already in the United States from becoming citizens.

Three years later, however, the U.S. Supreme Court overruled this decision in *United States v. Bhagat Singh Thind* (1923). In rendering its decision, the court also created a much narrower definition of *white*, and one in direct contrast to the U.S. Supreme Court decision in *Ozawa v. United States* a year earlier. The court ruled that while it was possible that Asian Indians could be defined as "racially" Caucasian, it was clear that they were not "white" as understood in common speech. The court also ruled that Congress, in specifying citizenship as for "white persons" in the Naturalization Act of 1790, had meant this to apply only to those of European ancestry. While Haney López (1996) rightly stresses the importance of *United States v. Bhagat Singh Thind* in establishing the legal dominance of the "commonsense" notion of "whiteness," this case was also critical in establishing two further points governing American citizenship. First, it created for the first time a category of "whites" ineligible for citizenship, but a geographically bounded one that included only those living in countries in southeast and central Asia such as India and Afghanistan.[11] Second, and more important, it established a link between immigration and naturalization policies in that immigrants from the geographic region of Asia were no longer eligible for citizenship. As Judge Sutherland explained in presenting the opinion of the court, immigration and naturalization laws were inexorably linked, and Congress was "unlikely to accept as citizens those whom it rejected as immigrants" (*United States v. Bhagat Singh Thind*, 262 U.S. 204 [1923]).

A year later, this link between immigration and citizenship came full circle, when Congress inserted a clause into the Johnson-Reed Act (1924) barring immigration of aliens ineligible for citizenship. Foreign-born Asians thus were not allowed to become

[10] China and Japan were excluded from this act, since previous legislation had already blocked their entry.

[11] In addition to European whites, other "whites" that could gain citizenship were Mexicans, Syrians, and Arab.

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citizens because they no longer were able to enter the country, and they could no longer enter the country because they were ineligible for citizenship. A decade later, this connection between immigrant status and eligibility to naturalize was expanded to Filipinos. In addition to limiting Filipino immigration to the United States, the Tydings-McDuffie Act (1934) also grouped the Philippines with other Asian countries from which immigration was barred, thus placing Filipinos under the same restrictions for citizenship as members of other Asian ethnic groups.

The consequence of these actions was that up to the mid-twentieth century, until race-based citizenship was formally ended by the McCarran-Walter Act in 1952, all Asian immigrants living in the United States, regardless of their racial category—yellow-Mongolian, brown-Malay, or white-Caucasian—were unable to become "American." Thus, by connecting immigration and naturalization laws, Congress and the courts were able to achieve a more consistent legal treatment of various Asian ethnic groups which had not been possible through existing racial definitions. This connection was reflected and reinforced by the new legal term created to explain the exclusion of Asian immigrants: "aliens ineligible for citizenship."[12]

Anti-Miscegenation Laws, Race, and Citizenship

Overall, it is evident that the language used to identify Asian ethnic groups in state-level anti-miscegenation laws corresponded closely with that used in court cases regarding Asian naturalization and citizenship, both in demarcating Asian groups from whites and blacks and in distinguishing between categories of Asians. However, and most critically for the long-term exclusion of Asian groups in the United States, state-level anti-miscegenation laws moved beyond naturalization laws by also restricting the rights of U.S.-born Asian Americans.

At the national level, the primary goal of anti-Asian legislation was restricting Asian entry into the United States, and denying *foreign-born* Asians the right to naturalize. Given the previously noted difficulty of excluding diverse Asian ethnic groups based strictly on existing racial categories, and constrained by post–Civil War civil rights legislation, it is not surprising that in naturalization cases courts eventually came to emphasize the "alien" rather than the "racial" status of Asian immigrants, and focused on foreign-born rather than U.S.-born Asians in specifying citizenship rights. In fact, in *United States v. Wong Kim Ark* (1898), the U.S. Supreme

[12] Between 1913 and 1947, 12 states also used this term to pass "Alien Land Laws" prohibiting persons of Japanese descent from land ownership (Haney López 1996:129).

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Court ruled that, regardless of race, people born in the United States were American citizens.[13]

However, in creating and expanding anti-miscegenation laws, state legislatures sought to forbid the racial mixing of whites with all Asians *regardless* of their nativity status. The legal coherence sought in naturalization cases was therefore inadequate for defending state anti-miscegenation laws that included the discriminatory treatment of citizens based on their racial status. In fact, anti-miscegenation laws seemed to directly contradict the provisions of the Civil Rights Acts of 1866 and 1875 and the Fourteenth Amendment (1868), which prohibited states from the unequal treatment of *citizens* and from restricting the rights of individuals to "make and enforce contracts" based on their "race" and "color." However, states seeking to implement anti-miscegenation restrictions were able to rely on two legal justifications to support the legitimacy of these laws.

First, they could rely on the argument that marriage was not a "contract" in the same sense as financial matters. This was the argument made in *In re Hobbs* (1871), where the Georgia Circuit Court ruled that marriage was an "institution of public concernment" and "not technically a contract" in the same way as related to property, and thus not in conflict with the equal protection clause of the U.S. Constitution. The Georgia Circuit Court therefore concluded that the regulation of marriage was left under state control as specified by the Tenth Amendment (1791). The argument that marriage was strictly under the regulation of the state because it constituted a social institution outside the purview of the Fourteenth Amendment and the Civil Rights Act of 1866 was further confirmed at the federal level in the U.S. Supreme Court decision in *Maynard v. Hill* (1888).[14]

The second argument that states could, and did, rely on was that these laws did not contradict the equal protection clause of the Fourteenth Amendment because both whites and nonwhites were treated similarly by these statutes since neither was permitted to marry the other (Sealing 2000). This precedent was established at the national level in *Pace v. Alabama* (1882), where the U.S Supreme Court ruled that Alabama's law punishing interracial adultery

[13] Basing its decision on the language of the U.S. Constitution, which used "natural-born citizens of the United States," and the Fourteenth Amendment (1868), which began with "All persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside," the Supreme Court ruled that Wong Kim Ark, born in San Francisco of Chinese parents, was an American citizen and could not be kept from returning to the United States (after visiting family in China).

[14] *Maynard v. Hill* (1888) established that while states could recognize marriages contracted elsewhere, they were not obligated to do so if the marriages violated policies within that state (such as anti-miscegenation statutes; see Wallenstein 2002).

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more severely than that of same-race adultery did not discriminate against blacks or constitute a violation of the Fourteenth Amendment since the penalty for whites and blacks in interracial relations was equal. In 1896, the U.S. Supreme Court confirmed the legality of the "separate but equal" doctrine in *Plessy v. Ferguson* (1896), until it was overturned in *Brown v. Board of Education* (1954).

In the hundred years between the ratification of the Fourteenth Amendment in 1868 and *Loving v. Virginia* in 1967, the state and federal courts overwhelmingly upheld the legitimacy of state anti-miscegenation statutes.[15] Most of the court challenges to anti-miscegenation laws arose in cases of African American/white unions and were based on the constitutionality of these laws with respect to the civil rights legislation of the 1860s and 1870s. For instance, in *Scott v. State* (1869), the Supreme Court of Georgia held that prohibiting a marriage between a white man and a black woman did not contradict U.S. laws providing for equal protection since marriage was a civil institution. In his opinion, Judge Jos Brown further defended the law by using the biological argument that:

> 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 fullblood [*sic*] 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 inferior. They are productive of evil, and evil only, without any corresponding good (*Scott v. State*, 39 Ga. 321 [1869]).

The position that anti-miscegenation laws were not in conflict with the Fourteenth Amendment was upheld further in such cases as *State v. Jackson* (1883) in Missouri, *State v. Tutty* (1890) in Georgia, and *Kirby v. Kirby* (1922) in Arizona.

While less frequent, marriages between whites and Asians also found their way to the courts. Most of these cases did not directly challenge the validity of state anti-miscegenation laws but instead their applicability under specific conditions. For instance, in the case of *Roldan v. Los Angeles* (1933), Solvador Roldan, a Filipino man who had been refused a license to marry a woman of Caucasian descent, argued that since he was Malay rather than Mongolian, the anti-miscegenation laws in California were not applicable in his case. In ruling in his favor, the California Court

[15] With the notable exception of *Perez v. Sharp* (1948), where the California Supreme Court ruled that anti-miscegenation laws were in direct conflict with the equal protection clause of the U.S. Constitution.

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of Appeal argued that the state legislature in 1880 had been clearly aware of Blumenbach's racial classification system and would have known the difference between Mongolians and Malays.[16] The court therefore suggested that any changes to the California's anti-miscegenation statute were a legislative matter. In response to this decision, the California legislature in the same year amended its civil code to read:

> 60. All marriages of white persons with Negroes, Mongolians, members of the *Malay* race or mulattoes are illegal and void (Cal. Stat. Chs. 104 & 105; amending Cal. Civ. Code Secs. 60 & 69 [1933]; emphasis added).

In the case of *In re Takahashi* (1942), the legal question that arose was whether an interracial marriage contracted outside the state was valid in the state of Montana. The case arose when a white widow sought to become the administrator of her deceased Japanese husband's estate based on the couple's (legal) marriage in the state of Washington. The public administrator of the county argued that since their marriage was invalid in Montana, the administration of the Takahashi estate fell to the county. In making its ruling, the Supreme Court of Montana ruled that even though the marriage between Shun and Vivian Takahashi had taken place in Washington, since both had been residents of Montana at the time of and immediately following the marriage, their marriage outside the state was a clear attempt to circumvent the state anti-miscegenation law.

One case that did challenge the legality of anti-miscegenation laws against Asian/white marriages on the grounds that they violated the equal protection clause of the Fourteenth Amendment was that of *Naim v. Naim* (1955) in Virginia. In this instance, the Supreme Court of Virginia upheld the annulment of a marriage between a Chinese man and a white woman based the state's right and obligation to defend racial purity. Specifically, the court ruled that:

> The prevention of miscegenetic marriage is a proper governmental objective, and within the competency of Virginia to enact; and is not contrary to the due process clause of the federal constitution (*Naim v. Naim*, 197 Va. 80 [1955]).

In delivering the opinion of the court, Judge Archibald Chapman Buchanan concluded with a lengthy defense on the societal benefits of maintaining barriers between the races:

[16] In a more detailed analysis of this case, Volpp (2000) illustrates the contested nature of the Mongolian/Malay racial distinction to demonstrate how social forces affect the development of racial identities, and to point out the antecedents to contemporary discussions about positioning Filipinos as Asian Americans.

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> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius (*Naim v. Naim*, 197 Va. 80 [1955]).

Despite its ruling in *Brown v. Board of Education* only two years earlier, the U.S. Supreme Court refused to hear this case (*Naim v. Naim* 1956), and it would take another 10 years before the U.S. Supreme Court decided that anti-miscegenation laws were unconstitutional and in conflict with the Fourteenth Amendment (*Loving v. Virginia* 1967).

For U.S.-born Asians, the failure of state and federal courts to overturn anti-miscegenation laws as unconstitutional meant that their status as "nonwhites" overrode their legal status as U.S. citizens. In addition, by linking U.S.-born Asians with their more numerous foreign-born counterparts, these laws helped reinforce the presumption that their racial identities included a foreign component (Saito 1997). A key legacy of these anti-miscegenation laws was that unlike newer European immigrant groups, whose descendents over time through intermarriage could became assimilated into "American" society, Asian groups were legally constrained from the process of marital assimilation identified by Gordon (1964).

Conclusion

The United States has a long history of responding to the influx of culturally distinct groups with restrictive legislation. Between 1882 and 1917, Congress passed immigration laws that severely curtailed immigration from Asia: first, with the passage of the Chinese Exclusion Act in 1882; second, with the Gentleman's Agreement of 1908, which informally limited the number of Japanese immigrants to the United States; and finally, the Immigration Act of 1917, which created the Asiatic Barred Zone, prohibiting immigration from the remaining Asian countries. Similarly, the Johnson-Reed Act of 1924 placed heavy restrictions on immigration from southern, central, and eastern European countries.

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Where the treatment of immigrants from Asia and Europe came to differ, and with significant long-term consequences for the social status of each group, was with respect to naturalization laws. Whereas European immigrants could naturalize and gain American citizenship, Asian immigrants eventually found themselves legally barred from the right to become "Americans."

From a contemporary vantage point, it is easy (and has become common) to argue that the more severe restrictions on naturalization faced by Asian immigrants was due to their *greater* racial distinctiveness. However, this ignores the fact that at the beginning of the twentieth century, immigrants from many European countries were considered racially distinct from the "Anglo" settlers that had founded the United States (Handlin 1957), and that members of these groups had to actively contest attempts to label them as racially un-assimilable (as Ignatiev [1995] illustrates for the Irish). More relevant for the current discussion, it also ignores the fact that Asian ethnic groups were viewed as racially diverse, and that some Asian groups, specifically Asian Indians, were originally considered "white."

The main point of this article is to challenge the assumption that members of different Asian ethnic groups originally were grouped together based on their perceived "racial" characteristics. My analysis of the Asian naturalization cases and state anti-miscegenation statutes shows that Asians were legally recognized and categorized as belonging to distinct racial and ethnic groups—yellow-Mongolians, brown-Malays, and white/Caucasian Asian Indians, and that members of these groups frequently utilized these distinctions in attempts to separate themselves from discriminatory practices aimed at other Asian groups. My examination of naturalization cases also reveals that the early reliance of courts on "scientific" racial categories to exclude Asian immigrants from citizenship prevented the development of a racial category that could be uniformly applied to members of all these groups.

While it is clear that the term *Asian* is laden with racial overtones, I argue that the development of *Asian* as a legally meaningful category can be traced to congressional legislation and court rulings that successfully linked immigration and naturalization laws. Specifically, I argue that the treatment of Asian ethnic groups as legally similar is a result of circular legislative and judicial arguments directed toward multiple groups of people linked only by the geographic proximity of their countries of origin. These decisions made it impossible for people from these areas to come to the United States because they were ineligible to naturalize and at the same time made them ineligible for naturalization because they were barred from coming to the United States. Exigencies of the legal system thus led to the fusion of geographic, racial, and legal

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categories. In other words, Asians became "racialized" as Asians not because they were recognized as racially similar, but instead because they were members of the same category of aliens ineligible for citizenship.

Similarly, because state anti-miscegenation laws were created to maintain the racial purity of whites, these laws were not primarily about grouping Asians together racially. Instead, the main consequence of marriage laws was to group together U.S.-born and foreign-born Asians, within their distinctive racial and ethnic categories. The legacy of anti-miscegenation laws is that for Asians it privileged their status as racially distinct—whether that was yellow, brown, or white—over their nativity status. Thus, despite being citizens, U.S.-born Asians were legally viewed as "unassimilable," and grouped with their foreign-born brethren as "foreign" and fundamentally "un-American." Therefore, unlike members of "newer" European groups who could shed their "alien" identity over time, Asian immigrants and their children found that their status increasingly defined by newly constructed categories that conflated geography, race, and foreignness.

While others stress the role of the legal system in excluding Asians based on their "racialization" as nonwhite, my examination of the history of anti-Asian legislation demonstrates the relationship between two distinct, yet mutually reinforcing processes—the linking of immigration and naturalization laws to determine citizenship, and the linking of U.S.-born and foreign-born Asians in anti-miscegenation legislation—in constructing Asians as a distinct, racially un-assimilable category.

Although anti-miscegenation laws now may seem part of a distant and somewhat exotic history of race relations, the consequences of this type of legislation still reverberate today. For instance, the continued view of Asians as a distinct minority group is in large part the legacy of legal and social barriers to marriage. As Haney López (1996) notes, anti-miscegenation laws prevented the racial mixing that over time would have diminished physical differences in features between whites and Asians. Likewise, Espiritu (1992) traces the pan-Asian political mobilization of the 1960s to the result of shared histories of social exclusion among Asian ethnic groups. What is important to consider is that this shared sense of exclusion was a response to categories constructed by the legal system that led to similar discriminatory treatment *and* that marked Asians as distinct from other minority groups.

Finally, we should be careful not to assume that because the category of *Asian* has come to be used by non-Asians and Asians alike, it overrides historical differences between Asian ethnic groups. In her recent work, Espiritu (2004) discusses how different Asian groups have worked together as "Asians" when their

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interests converge, yet they may revert to ethnic (or other) identities when their interests collide. It is also important to recognize that political and social pressures continue to shape how "Asian identity(ies)" are constructed and reconstructed. A recent example is found in the battle over the race category in the 2000 U.S. Census, when Asian ethnic groups banded together to pressure the Census Bureau to retain distinct Asian ethnic categories under the broader Asian grouping.

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