

OF MONGRELS AND MEN

**THE SHARED IDEOLOGY OF ANTI-MISCEGENATION LAW,
CHINESE EXCLUSION, AND CONTEMPORARY AMERICAN
NEO-NATIVISM**

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“We want no more mixture of races. . . . No strong nation was ever born of mongrel races of men.”

—U.S. Senator La Fayette Grover (addressing the “Chinese Problem”), June 30, 1872¹

I. INTRODUCTION

A complex interaction of push and pull factors created a substantial wave of Asian migration to the United States in the 19th century. In brief, acute political and economic instability and dislocation in China arising from European imperialism, internal conflict, and famine “pushed” Chinese laborers to the United States, while a demand for cheap, reliable labor brought on by burgeoning industrialization in the American West, the construction of the Transcontinental Railroad, and the 1849 California gold strike at Sutter’s Creek “pulled” them. Due to America’s historic policy of open borders, this migration was virtually unrestricted and the rapid influx of Chinese immigrants into the American West almost immediately provoked “widespread concerns about the relationship between race and national identity”² in the United States. The Chinese were perceived as possessing characteristics that amounted to unbridgeable racial differences and “fears of hybridity”³ proliferated, prompting one California legislator to warn that “were the Chinese to amalgamate at all with our people, it would be a hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth.”⁴

¹ *Proceedings of the Eleventh Session of the Iron Molders’ International Union in Convention Assembled at Troy, N.Y., July 10, 1872* (quoted in ANDREW GYORY, *CLOSING THE GATE* 149 (1998)).

² RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 100 (1990).

³ I borrow this phrase from Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795, 801 (2000) (discussing “fears of hybridity” felt by Californians in response to Filipino immigration).

⁴ 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)).

Anti-miscegenation laws, state laws prohibiting sex and/or marriage between individuals of different “races”⁵ originally crafted to prevent the mixing of whites and blacks, were quickly extended to regulate the interaction between whites and the Chinese, the new “other” race. In a process dubbed “Negroization” by historian Dan Caldwell,⁶ the Chinese were charged with the same negative racial qualities—“[h]eathen, morally inferior, savage, and childlike . . . lustful, sensual”⁷—that had previously been hoisted on blacks and the rhetoric of anti-black racism became the rhetoric of anti-Chinese racism. This process of reassignment occurred a number of times as subsequent groups of Asian immigrants came to the United States and anti-miscegenation laws were extended further to apply to them: Japanese, Koreans, Indians, Filipinos and eventually all Asian immigrants were subject to the prohibition against commingling with whites.⁸

This Article will examine the anti-miscegenation statute as well as other exclusionary laws specifically applied to the Chinese diaspora in America throughout the 19th and 20th century, describing the impact these racially restrictive laws had on Chinese transnational migration during the period. It will present the anti-miscegenation statute as an emblem of the broader concern of American nativism⁹—a concern with defining and policing American political and civic culture, with protecting American

⁵ A growing number of biologists as well as non-scientific scholars now recognize that “race” is not a valid biological construct but is rather socially constructed. See generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*; see also *id.* at 11–12 (There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites. . . . The data compiled by various scientists demonstrates, contrary to popular opinion, that intra-group differences exceed inter-group differences. That is, greater genetic variation exists *within* the populations typically labeled Black and White than *between* these populations. This finding refutes the supposition that racial divisions reflect fundamental genetic differences.). Nonetheless, in the course of historical analysis, this Article will need to employ various terms denoting race, such as “Negro”, “Black”, “White”, “Nonwhite” and “Asian”.

⁶ Dan Caldwell, *The Negroization of the Chinese Stereotype in California*, 53 *S. Cal. Q.* 123 (1971) (cited in RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH-CENTURY AMERICA* 216 (1990)).

⁷ TAKAKI, *supra* note 6, at 216.

⁸ This Article will focus primarily on the anti-miscegenation statute as applied to the Chinese diaspora. For an overview of its application to other Asian groups, see generally Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in *Asian AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES* (Nobuya Tsuchida ed., 1982); see also JOHN S. W. PARK, *ELUSIVE CITIZENSHIP: IMMIGRATION, ASIAN AMERICANS, AND THE PARADOX OF CIVIL RIGHTS* 110–13 (describing extension of anti-miscegenation prohibition to Japanese and Filipinos)

⁹ The term “nativism” will be used throughout this Article to describe “intense opposition to an internal minority on the ground of its foreign . . . connections.” JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925* 4 (1955).

republicanism from the perceived threat posed by foreigners deemed “unassimilable.”¹⁰ This Article will then situate the anti-miscegenation statute within the larger framework of the xenophobic ideology animating exclusionary laws in general—an ideology in which amalgamation between white and nonwhite persons is assumed to threaten the purity of the white American body politic as much as the white American body.

Viewed in this manner, the anti-miscegenation statute, far from being a relic of America’s racist past, is especially relevant to contemporary arguments regarding immigration. For although the primary thesis of anti-miscegenation law—the assertion that nonwhites are incompatible with whites physically—has been disproven (or at least driven underground) by modern science, a dangerous corollary to that thesis—the notion that certain classes of immigrants, by virtue of their race and/or country of origin, are incompatible with American civic and political culture—endures. The modern nativist revival,¹¹ this Article will conclude, invokes the specter of anti-miscegenation law and Chinese exclusion in charging that the most recent wave of migration to the United States, comprised mostly of Latinos and Asians, “cannot or will not assimilate” and threaten to degrade and undermine “national identity”.¹²

II. BIRTH OF THE “ABOMINATION”: DEVELOPMENT OF ANTI-MISCEGENATION LAW

A. Origins and Early History

The term “anti-miscegenation”—derived from the Latin “anti” (against) “misce-
re” (to mix) and “gen-us” (race)¹³—was the invention of David Croly, editor of the New

¹⁰ See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 595 (1889)

(“[I]t seemed impossible for [the Chinese] to assimilate with our people or to make any change in their habits or modes of living.”).

¹¹ See generally *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997).

¹² See generally SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO NATIONAL IDENTITY* (2004).

¹³ *OXFORD ENGLISH DICTIONARY* 445 (Oxford Press, 2003); The word “miscegenation”, like the word “mulatto” (derived from Portuguese for mule), is outdated and “an awkward term to use in [2004]; 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-

York World, who used in the title of an 1864 anti abolitionist pamphlet that ironically appeared to endorse race-mixing. This pamphlet, “The Theory of the Blending of the Races, Applied to the American White Man and the Negro” was circulated to leading abolitionists in hopes that they would also endorse the “radical” idea of race-mixing and thus reveal to the public the patent absurdity of their ideas.¹⁴ While history suggests that the pamphlet was not entirely successful in perpetuating this ruse, the term “miscegenation” soon became part of the vocabulary of racism. In general, the term came to be used broadly to refer to “any form of sexual contact between members of different races.”¹⁵

Although the word “miscegenation” may have been a neologism in 1864, the idea that whites and nonwhites should be legally prohibited from commingling was certainly not a novel one. Interracial sex was punishable as early as 1630 in the colony of Virginia, where a white man was “to be soundly whipped before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians by defiling his body in lying with a negro”¹⁶ General statutory proscriptions against interracial marriages followed relatively soon thereafter, as Virginia (1691), Maryland (1692), Massachusetts (1705), and Pennsylvania (1725) enacted laws prohibiting such an arrangement.¹⁷ Virginia’s statute, the prototype for such prohibitions¹⁸, was designed to “prevent that abominable mixture and spurious issue which hereafter may [i]ncrease in

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 n.1 (2000).

¹⁴ Emily Field Van Tassel, “*Only the Law Would Rule Between Us: Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights after the Civil War*,” 70 CHI.-KENT. L. REV. 873, 895–97 (1995).

¹⁵ Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO L.J. 49, 49, n.1 (1964);

¹⁶ Walter Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 189, 1191 (1966) (citing 1 Laws of Va. 146 (Hening 1823)).

¹⁷ Wadlington, *supra* note 15, at 1191–92.

¹⁸ “There is probably no better place than Virginia to examine the origins of the American doctrine of racial purity and the related prohibitions on interracial sex and interracial marriage.” A. Leon Higginbotham, Jr., and Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1967 (1989).

this dominion, as well by Negroes, mulattoes, and Indians intermarrying with English or other white[s] . . .”¹⁹ Eventually 41 states in all would enact anti-miscegenation statutes and 16 would still have them on their books in 1967 (the year anti-miscegenation statutes were finally declared unconstitutional).²⁰

As the language of the early statutes indicates, the anti-miscegenation statute was originally crafted to prohibit marriage between whites and blacks or Indians. However, as the nation diversified and expanded, so did the anti-miscegenation statute—most states extended their statutes to include other nonwhite groups whenever such groups existed in significant numbers within their borders.²¹ Thus the Chinese, Asiatic Indians, Japanese, Koreans, and Malaysians all came to be included within the purview of the anti-miscegenation statute.²²

On the other side of the equation, “white”-ness, while clearly regarded as monolithic and invariable, often proved difficult to define. The definition of “white” differed from state to state and individual states occasionally modified their definitions.²³ In general, however, inclusion within the white race usually depended on to what extent an individual’s “white blood” had mixed with the blood of another race. Thus individuals were often defined by the “percentage-of-black- blood” test, ranging, for example, from “an ascertainable trace” to “one-eighth or more” of Negro blood.²⁴ However, perhaps because of the obvious difficulties one would encounter in attempting to determine whether an individual had literally “white” or “black” blood, characterizations of race were usually made on the basis of physical appearance or

¹⁹ *Id.* at 1192.

²⁰ Wadlington, *supra* note 15, at 1190 n.8.

²¹ GILBERT THOMAS STEPHENSON, RACE DISTINCTION IN AMERICAN LAW 23 (noting that “where ... other race elements exist[ed] in considerable numbers, similar distinctions [were] sanctioned.”).

²² Andrew D. Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L. Q. 208, 209 n.19 (1957).

²³ Wadlington, *supra* note 15, at 1200–01(1966) (discussing the changes in the definition in the Virginia statute).

²⁴ *Id.* at 1197.

genealogical research.²⁵ As one Virginia judge observed, “[t]he distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only.”²⁶

B. Anti-Miscegenation Ideology

1. *Monogenism and Christian Fundamentalism*

Much of the substance and rhetoric of anti-miscegenation law reflected a theory of race rooted in Christian fundamentalism. Substantively, the language of the statutes themselves manifested the deeply held religious conviction that racial commingling was sinful, “to the dishonor of God and shame of Christians”²⁷. The political debate surrounding the issue of segregation of the races in general was suffused with the rhetoric of religion. Keeping races separate was thought to be “following the order of Divine Providence”²⁸ and the white man’s “desire to preserve in its purity the race to which [he] belongs” was “not prejudice, but . . . the implantation of the Divine Author of our being”²⁹ To resist anti-miscegenation law was to “defy[] the Almighty and any people who shall do so may certainly expect His curse.”³⁰

As authority for these convictions, anti-miscegenation proponents cited the Bible, specifically the Old Testament, employing a literal interpretation of its text. The theory of *monogenism*—origin from a single source—held that all humans descended from a single pair of ancestors, Adam and Eve, and were therefore of the same species.³¹

Despite this initial unity, according to the monogenists, the races had degenerated in

²⁵ Comment, *Interracial Marriage: A Survey of Statutes and Their Interpretation*, 1 MERCER L. REV. 83, 83–84 (1949).

²⁶ 11 Va. (1 Hen. & M.) 71, 74 (1806) (Roane, J., concurring) (emphasis omitted).

²⁷ Wadlington, *supra* note 15, at 1191.

²⁸ West Chester and Philadelphia R.R. Co. v. Miles, 55 PA 209, 213 (1867).

²⁹ Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875* 2 U. CHI. L. SCH. ROUNDTABLE 303, 305 (1995) (citing 2 Cong Rec 4160 (1874) (Sen. Eli Saulsbury debating the Civil Rights Act of 1875)).

³⁰ *Id.* at 307 (citing 2 Cong Rec App 316 (1874) (Sen. Merriman debating the Civil Rights Act of 1875)).

³¹ Sealing, *supra* note 12, at 562.

various degrees from their original state of perfection—whites had degenerated the least and were thought to be closer to the original divine plan.³² The monogenist argument relied heavily on Biblical genealogy, particularly that of Noah and his three sons—Ham, Shem, and Japheth. Adhering to a fundamentalist interpretation of the Biblical story of the great flood destroying all of humanity save Noah, his wife, their three sons and their wives, the monogenists reasoned that all modern humans are descended from these three sons.³³ Asians and Africans were classified as Hamitic, Arabs and Jews as Shemitic, and Caucasians as Japhethitic.³⁴

These racial classifications, grounded as they were in the Bible, were thought to reflect God’s divine order and any mixing of the races, consequently, was a violation of divine law. This religious conviction was stridently asserted by the Louisiana Supreme Court in *Ex Parte Plessy*³⁵ (a case that would be affirmed by the U.S. Supreme Court in one of its most infamous opinions, *Plessy v. Ferguson*³⁶): “[F]ollowing the order of Divine Providence, human authority ought not to compel [] widely-separated races to intermix.”³⁷ The fundamentalist Christian argument for keeping races from intermingling has proven to be one of the most durable: Present-day defenders of school-imposed bans on interracial dating and marrying, for example, continue to base their arguments on a fundamentalist interpretation of the Bible.³⁸

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ 45 La. Ann. 80 (La. 1893) (*quoting* West Chester and Philadelphia R.R. Co. v. Miles, 55 PA 209, 213 (Pa. 1867)).

³⁶ 163 U.S. 537 (1896).

³⁷ *Id.* at 86 (*quoting* West Chester and Philadelphia R.R. Co. v. Miles, 55 PA 209, 213 (Pa. 1867)).

³⁸ *See, e.g.,* Bob Jones University v. United States, 461 U.S. 574, 583 n.6 (1983) (“According to the interpretation espoused by Goldsboro, race is determined by descendance from one of Noah’s three sons—Ham, Shem, and Japheth. . . . Orientals and Negroes are Hamitic, Hebrews are Shemitic, and Caucasians are Japhethitic. Cultural or biological mixing of the races is regarded as a violation of God’s command.”).

2. Polygenism and Pseudoscience

Though adherents of monogenism thought of the theory as “scientific”, it was still clearly derivative of Christian theology. Another alternative account of racial variety eschewed purely scriptural explanations for perceived differences and more purposefully sought the imprimatur of science. Adherents of this theory, known as *polygenism*, believed that humans emerged in several places by several acts of creation not mentioned in scripture.³⁹ Polygenists were confounded by their observations of perceived differences among races and thus concluded that different races actually represented separate species.⁴⁰ This claim was thought to be substantiated by the widely held belief that racial mixing led to sterility or reduced fertility in subsequent generations.⁴¹ The Missouri Supreme Court, for example, in upholding the conviction of a white woman and a mixed race man under the state’s anti-miscegenation law, took it 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”⁴² Common language used to characterize the offspring of mixed race unions still reflects this belief. The term “mulatto”, for example, often used to describe individuals of mixed racial heritage, is derived from the Spanish and Portuguese word for a young mule, *mulato*,⁴³ which is, of course, the sterile offspring of a horse and donkey.

³⁹ STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 71 (2d ed. 1991).

⁴⁰ Gould relates that Harvard professor Louis Agassiz, an eminent naturalist and leading proponent of polygenism, was converted to the theory as a result of his personal revulsion for American Blacks, vividly illustrated by the following passage:

It is impossible for me to reprocess the feeling that they are not the same blood as us. In seeing their black faces with their thick lips and grimacing teeth, the wool on their head, their bent knees, their elongated hands, their large curved nails, and especially the livid color of the palm of their hands, I could not take my eyes off their face to tell them to stay away. . . .

God preserve us from such a contact! (Agassiz to his mother, December 1846) (*cited in id.* at 77).

⁴¹ *Id.* at 71–72.

⁴² *State v. Jackson*, 80 Mo. 175, 179 (Mo. 1883).

⁴³ THE OXFORD ENGLISH DICTIONARY 747 (Oxford Univ. Press, 2003) (“[a. Sp. (and Pg.) *mulato* young mule, hence any one of mixed race, a mulatto, obscurely derived from *mulo* . . .”).

Of course, it was increasingly difficult to maintain the sterility/reduced fertility argument in the face of so much evidence to the contrary—as successive generations of mixed race individuals successfully reproduced, polygenist theorists began to focus on the “unnaturalness” of mixed race unions and made a more general claim that such mixing would lead to degeneration. Dr. Josiah Nott, for example, one of the first American scientists to publicly promote the theory of polygenism, published an article, whose title is self-explanatory, in the highly-esteemed American Journal of the Medical Sciences entitled “The Mulatto a Hybrid—Probable Extermination of the Two Races if Whites and Blacks are Allowed to Intermarry”.⁴⁴ In *Scott v. State*,⁴⁵ Georgia Supreme Court Chief Justice Joseph Brown, also recited the degeneracy hypothesis in upholding Georgia’s anti-miscegenation law:

The amalgamation of the races is not only unnatural, but always productive of deplorable results. Our daily observations show 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.⁴⁶

The pseudoscientific argument for anti-miscegenation law was further buttressed in the 19th century by the findings of craniometry and phrenology, short-lived but influential pseudoscientific endeavors that claimed that all manners of human variation (not only in race, but in personality, intelligence, etc . . .) could be discerned from the size and weight of the brain, and, in the case of phrenology, the topography of the skull.⁴⁷

⁴⁴ Sealing, *supra* note 12, at 580.

⁴⁵ 39 Ga. 321 (1869).

⁴⁶ 39 Ga. at 323.

⁴⁷ Francis Galton and other phrenologists postulated that each of our “mental abilities” was located in discrete areas of the brain, in relative isolation from the others. Unable to study the brain directly, phrenologists nevertheless assumed they could draw reliable inferences about various mental abilities and personality traits from the shape, contours, bumps, and hollows of the skull. See GOULD, *supra* note 37, at 105–141.

Craniometry and phrenology were taken seriously as objective methods for demonstrating racial variation. The physician Samuel George Morton, a celebrity in his day, studied more than 1,000 skulls and concluded that intelligence was related to brain size and that there were innate racial differences in mental capacities.⁴⁸ From this research, he drew a hierarchy, which, not surprisingly, placed whites at the top, followed by Mongolians, Malays, and Indians in the middle, and Ehtiopians (black) at the bottom.⁴⁹ In a similar vein, Dr. Sanford B. Hunt asserted that the average black brain weighed five ounces less than the average white individual's brain and that the average mulatto's brain was smaller still than the brain of an average black.⁵⁰ From these spurious observations, Hunt concluded that intermarriage between the races would produce inferior offspring,⁵¹ a claim that fit neatly into the existing body of pseudoscience research.

Starting from the initial premise that racial differences existed and that whites were the superior race, these researchers tended to find what they were looking for: “prior prejudices, not copious numerical documentation, dictate[d] conclusions”,⁵² as Stephen Jay Gould observed. Manipulation of data was the rule rather than the exception—when larger skulls were desired to confirm the greater intelligence of the white race, for example, researchers simply chose more male skulls or skulls from larger individuals.⁵³ Nonetheless the findings of craniometry and phrenology were widely disseminated and became entrenched in the popular imagination as further support for

⁴⁸ SAMUEL MORTON, *CRANIA AMERICANA: OR, A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA* (1839) (cited in GOULD, *supra* 37, at 85).

⁴⁹ GOULD, *supra* 37, at 86.

⁵⁰ See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 632.

⁵¹ *Id.*

⁵² GOULD, *supra* 37, at 112.

⁵³ Claudia Roth Pierpont, *The Measure of America: How a Rebel Anthropologist Waged War on Racism*, THE NEW YORKER, March 8, 2004, at 48.

their view that the presumptively superior white race would inevitably suffer from commingling with the presumptively inferior races.⁵⁴

3. *Social Darwinism*

A final powerful strain of the so-called scientific argument for anti-miscegenation law was added in the 19th and 20th century with the advent of social Darwinism.⁵⁵ In 1859, Charles Darwin published his seminal work, *Origin of Species by Means of Natural Selection or the Preservation of Favoured Races in the Struggle for Life*.⁵⁶ The evolutionary concept of “survival of the fittest” was quickly adopted by proponents of anti-miscegenation and transformed from a shorthand description of the long-term process of biological adaptation to an *ex post facto* rationalization for the social status quo of white dominance.⁵⁷ Nonwhite races were viewed as inferior and doomed for extinction as evidenced by innate traits such as immorality, criminality, and degeneracy.⁵⁸ Miscegenation laws were touted as “natural” and thus justifiable. The white race, after all, was the superior race and the desire to preserve racial purity could be seen as part and parcel to the evolutionary drive to produce the “fittest” offspring. And though scientific racists had long maintained that interbreeding weakened the species, the theory of natural selection was embraced as a well-articulated description of the mechanism by which that degeneration occurred.

⁵⁴ “Cranometry was not just a plaything of academicians, a subject confined to technical journals. Conclusions flooded the popular press. Once entrenched, they often embarked on a life of their own, endlessly copied from secondary source to secondary source, refractory to disproof because no one examined the fragility of primary documentation.” GOULD, *supra* 37, at 114.

⁵⁵ See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1955).

⁵⁶ CHARLES DARWIN, *THE ORIGIN OF SPECIES* (London, John Murray 1859). Although Charles Darwin himself should not be held completely accountable for the terrible misappropriations of his work by scientific racism, it cannot be denied that the very title of his magnum opus is racist.

⁵⁷ See RAYMOND S. FRANKLIN, *SHADOWS OF RACE AND CLASS* 45 (1991).

⁵⁸ *Id.* at 46.

4. *A Beacon of Light in a Dark Age of American Racism*

A few scientists were able to rise above the ugly din of racist ideology in the 19th century. Most notably, the great 19th century anthropologist Franz Boas railed against bogus “scientific” claims of racial superiority and inferiority.⁵⁹ Boas’ mentor, the German natural scientist Alexander Humboldt had rejected any hierarchical notion of race and Boas himself also rejected the standard 19th century conceptions of race.⁶⁰ Dismissing the standard assumptions of perceived racial inferiorities, he argued that any observed differences were the very product of racism and the privations it imposed, both physical and psychological. As to the former, he observed that “eminent men represent a much better nourished class.”⁶¹ As to the latter, he remarked: “The old race feeling of the inferiority of the colored race is as potent as ever and is a formidable obstacle to its advance.”⁶² Despite Boas’ remarkable prescience (a half-century later, for example, the Supreme Court in *Brown v. Board of Education*⁶³ would implicitly acknowledge Boas’s observations of the detrimental effects of the stigma imposed by racism),⁶⁴ his arguments would fall for the most part on deaf ears, and racist ideology would continue to proliferate and spread as Americans were exposed to new peoples and cultures, the Chinese first among them.

⁵⁹ See generally Pierpont, *supra* note 51.

⁶⁰ *Id.* at 49.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 347 U.S. 483 (1952).

⁶⁴ 347 U.S. at 494 (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”).

III. “YELLOW PERIL”: ANTI-MISCEGENATION LAW AND CHINESE EXCLUSION

A. Chinese Migration to the United States in the 19th Century

The application of anti-miscegenation law to Asians was part of a much broader, comprehensive campaign of legal exclusion that began in the mid-19th century as Chinese began to stream into California in significant numbers. This migrant labor force was overwhelmingly male: One study reports that in 1851 only 7 out of 4,025 Chinese arrivals to California were female and in 1852 only 8 out of 7,520 were female.⁶⁵ By 1870, Chinese men still outnumbered women by a margin of 14 to 1 with only 4,574 Chinese women out of a population of 63,199.⁶⁶ A standard interpretation of this disparity is enormous gender disparity is that Chinese laborers “came to California with the sole purpose of making money and had no desire to make permanent homes in the strange country.”⁶⁷ At the outset of the period, this appears to be true. However, as we shall see, legal variables, including anti-miscegenation laws and other exclusionary measures must be factored into the analysis of these and other figures concerning Chinese migration, especially in the latter part of the period.⁶⁸ First, however, it will be helpful to review the various inducements, both push and pull factors, that created this enormous wave of immigration.

1. *Pull Factors*

Scholars generally agree that the demand for cheap, reliable labor in California was the primary pull factor effecting 19th century Chinese migration to the United States—rapid industrialization, construction of the transcontinental railroad, the

⁶⁵ SHIH-SHAN HENRY TSAI, CHINA AND THE OVERSEAS CHINESE IN THE UNITED STATES, 1868-1911 20 (1983) (citing HUBERT HENRY BANCROFT, HISTORY OF CALIFORNIA 1860-1890 (1890)).

⁶⁶ TAKAKI, *supra* note 6, at 227 (1990).

⁶⁷ KIL YOUNG ZO, CHINESE EMIGRATION INTO THE UNITED STATES: 1850-1880 4 (1978)

⁶⁸ See *infra* discussion Part III.E.

California Gold Rush; all of these developments created a desire for cheap labor.⁶⁹ In addition, workers were sought after for cooking, laundering, grain and fruit cultivation, tide-land draining, and other labor intensive jobs, as “white settlers in the state had little inclination to perform menial tasks or earn a living as common laborers on a long-term basis.”⁷⁰ Finally, although the Chinese began coming to the United States prior to the abolition of slavery, its abolition in the Americas created an even more acute shortage of labor, a vacuum which the Chinese would soon fill.⁷¹

A significant number of Chinese arrived in the United States without means and were contract laborers, that is, their passage was paid for by foreign shippers, usually British or American, who also advanced them wages for their initial needs, in return for a portion of future wages.⁷² The effort of shippers and Chinese brokers to promote their lucrative trade was a critical factor in the inducement of Chinese migration during this period.⁷³ America was touted as “a fabulously rich country” and California, San Francisco specifically, was referred to as “Gold Mountain”.⁷⁴ Circulars translated into Chinese were promising: “Americans are very rich people. They want the Chinaman to come and make him very welcome. There you will have great pay, large houses, and food and clothing of the finest description.”⁷⁵ To the many poor peasants who constituted the overwhelming majority of migrants,⁷⁶ such enticements were sufficient

⁶⁹ TSAI, *supra* note 63, at 12

⁷⁰ ZO, *supra* note 64, at 119.

⁷¹ *Id.* at 35 (describing a hemisphere wide “acute shortage of labor” resulting from cessation of the slave trade).

⁷² *Id.* at 38.

⁷³ *Id.* at 92 (“The initiatives taken by the shipowners were among the key factors which precipitated an unprecedented 20,000 emigrants to San Francisco in the year 1852.”).

⁷⁴ *Id.* at 92.

⁷⁵ IRIS CHANG, *THE CHINESE IN AMERICA* 29 (2003) (citing a nineteenth-century circular posted in the Canton region by a Hong Kong brokerage office).

⁷⁶ “[T]he overwhelming majority of Chinese residents on the West Coast during the nineteenth century came from poor villages in the Hsin-ning district and its surrounding districts. ZO, *supra* note 64, at 54.

incentive to embark on a very expensive⁷⁷ and extremely dangerous⁷⁸ journey to the West.

Once in the United States, laborers were under a system of bondage for a specified period, usually seven years, during which time their wages were garnished to pay back their debt.⁷⁹ While some scholars, in commenting on this arrangement, have concluded that “[t]he facts support the thesis of opportunity rather than exploitation”⁸⁰, others have argued that the “coolie”⁸¹ system, as the contract labor trade came to be known, “provided the coolie employer all the advantages of slavery,” while allowing the coolie employer to technically escape the charge of participating in the recently abolished slavery system.⁸² In some ways, the coolie system was more punishing than slavery. The coolie employer, unlike the slaveowner, had only to provide a minimum wage and basic provisions, and had no legal duty to take care of laborers who became sick or injured or whose productivity diminished.⁸³ Furthermore, Chinese laborers, so plainly “foreign” to the American White community, were isolated and marginalized and thus more vulnerable to exploitation by employers. Nevertheless, a significant number of Chinese were willing to subject themselves to the terms of coolie labor: In one 15 year period alone—from 1860–1875—the San Francisco Custom House reported over 100,000 Chinese arrivals.⁸⁴

⁷⁷ Average passage fare was \$40-\$50, while unskilled Chinese laborers earned an average of \$3 to \$5 a month in China. *Id.* at 93.

⁷⁸ “In the mid-1800’s, the death rate of coolies in transit hovered between 15 and 45 percent.” CHANG, *supra* note 76, at 31.

⁷⁹ *Id.* at 91.

⁸⁰ TSAI, *supra* note 63, at 27.

⁸¹ “Although the term “coolie,” meaning menial laborer or toiler, had long been in use in China, in the United States it was commonly interpreted as servile labor, something akin to bondsman.” ZO, *supra* note 64, at 3.

⁸² ZO, *supra* note 64, at 37.

⁸³ *Id.*

⁸⁴ TAKAKI, *supra* note 6, at 237.

2. *Push Factors*

A number of push factors provide further insight into why so many Chinese were willing to subject themselves to what was, by most accounts, a brutal and exploitative system. Chief among these was the plight of peasants in China's Kwang-tung province, a southern area of about eighty thousand square miles that produced "almost all of the Chinese who emigrated to the United States in the 19th century".⁸⁵ A "perfect storm" of crises hit Kwang-tung in the 19th century: civil conflict, aggravated by a sharp increase in population and a subsequent rice famine, resulted in "political disorder, social chaos, and economic dislocations."⁸⁶ One Chinese newspaper of the time graphically described the state of affairs as follows: "The fields in the four directions were choked with weeds. Small families found it difficult to make a living and often drowned their girl babies because of the impossibility of looking after them. Emigration was very much in evidence."⁸⁷

Meanwhile, legal emigration from China had only recently been made possible as a result of China's reluctant engagement with the West. Chinese tradition prohibited the emigration of Emperor's subjects, indeed made emigration criminal, as Chinese peasants were viewed as vassals, property of the Emperor.⁸⁸ European imperialism, however, had brought historically reclusive China into contact with the Western world, and more to the point, under the influence of the British Empire, which defeated China in the Opium Wars⁸⁹ China was compelled to sign a number of treaties with the British, notably the

⁸⁵ TSAI, *supra* note 63, at 14.

⁸⁶ *Id.*

⁸⁷ *Id.* at 14 (quoting HSIN-NING HSIEN-CHIH (The Gazetteer of Hsin-ning district) (rep. Taipei, 1965), 14:24a).

⁸⁸ *Id.* at 8-9.

⁸⁹ ZO, *supra* note 64, at 28.

T'ien-tsin Treaty of 1858,⁹⁰ which included the following clause related to Chinese emigration: “That Chinese subjects choosing to take service in the British colonies or other parts beyond the seas are at perfect liberty to enter into engagements with British subjects for that purpose”⁹¹ The central Chinese government, stretched thin, had long been too weak to effectively control its vast empire, thereby making prohibitions against emigration largely unenforceable. Now, with the T'ien-tsin Treaty, any anti-emigration policy was effectively voided and the floodgates were opened.

The combination of these push and pull factors created a desire on the part of both American and Chinese authorities to facilitate migration. This desire led to the Burlingame Treaty of 1868,⁹² a formal recognition of the “inherent and inalienable right of man to change his home and allegiance and . . . the mutual advantage of free migration.”⁹³ However, this treaty truly was a formality, for Chinese migration was already in full swing and, as the next section will demonstrate, a backlash was already developing. According to Ronald Takaki, by 1870 the Chinese already constituted 8.6 percent of the total population of California and 25 percent of the workforce.⁹⁴ Within a generation, between 1850 and 1880, the Chinese population in the United States had increased fifteenfold to 105,465.⁹⁵

B. Anti-Chinese Immigration Legislation

Anti-Chinese legislators in California began passing discriminatory state laws to stem the tide of immigration as soon as the Chinese presence became palpable. In 1852, the state legislature passed a Foreign Miners tax, applying to all foreign miners, but

⁹⁰ *Id.* at 29 (citing GODFREY E. P. HERTSET, TREATIES BETWEEN GREAT BRITAIN AND CHINA, AND BETWEEN CHINA AND FOREIGN POWERS 7 (3rd ed., 1908)).

⁹¹ *Id.*

⁹² Treaty of June 18, 1858, July 28, 1868, U.S.-China, 16 Stat. 739.

⁹³ 16 Stat. at 740.

⁹⁴ TAKAKI, *supra* note 6, at 216.

⁹⁵ *Id.*

aimed “primarily against the Chinese”.⁹⁶ “An Act to Discourage the Immigration to This State of Persons Who Cannot Become Citizens Thereof” was passed into law in 1855.⁹⁷ The legislature sharpened the focus (and the wording) of its anti-Chinese measures in subsequent years, passing “An Act to prevent the furtherimmigration of Chinese or Mongolians to this State”⁹⁸ in 1858, and “An Act to Protect Free Labor Against Competition with Chinese Coolie Labor, and Discourage the Immigration of the Chinese into the State of California”⁹⁹ in 1862. With the end of the Gold Rush and the completion of the transcontinental railroad, the need for cheap labor diminished and the hue and cry for Chinese exclusion intensified.¹⁰⁰

The crowning blow of the anti-Chinese legislative campaign was delivered in 1882. In that year, after a full century of open borders,¹⁰¹ Congress departed from America’s historic “cherished policy”¹⁰² of encouraging foreign migration to the United States, and passed the Chinese Exclusion Act.¹⁰³ Accompanied by a Congressional statement that “the Chinese are peculiar in every respect”,¹⁰⁴ the Chinese Exclusion Act suspended any further immigration of Chinese laborers for a period of ten years and prevented the Chinese from becoming naturalized citizens. This act, a “candid display of

⁹⁶ Act of Apr. 13, 1850, ch. 97, §§ 1, 5, 1850 Cal. Stat. 221.

⁹⁷ Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194, 194-95 (repealed 1955).

⁹⁸ Act of Apr. 26, 1858, 1858 Cal. Stat. 295 (repealed 1955).

⁹⁹ Act of Apr. 26, 1862, ch. 339, 1, 1862 Cal. Stat. 462, 462 (repealed by Revenue and Taxation Code Act of 1939, ch. 154, 50004, 1939 Cal. Stat. 1274).

¹⁰⁰ THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 2 (3d ed. 1995).

¹⁰¹ The “open borders” spirit of the first century of the American Republic is reflected in the Declaration of Independence, in which the colonies include in their list of grievances to King George III his obstruction of naturalization in and discouragement of migration to the colonies: “He has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migration hither, and raising the Conditions of new Appropriations of Lands.”

¹⁰² *Smith v. Turner*, 48 U.S. 283, 401 (1849) (“To encourage foreign emigration was a *cherished policy* of this country at the time the Constitution was adopted If a State can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole and *long-cherished policy* of this country and of the constitution in respect to immigrants coming to the United States.”).

¹⁰³ Act of May 6, 1882, 22 Stat. 58.

¹⁰⁴ Congressional Record 1882, 2608.

racism”,¹⁰⁵ would be extended for another 10 years in 1892 by the Geary Act,¹⁰⁶ which not only extended the Chinese Exclusion Act, but also imposed a system of certification on resident Chinese.¹⁰⁷ When the Geary Act expired in 1902, Congress passed a final exclusion law, extending the period of exclusion indefinitely.

Although the Chinese Exclusion Act specifically applied to the Chinese, similar measures were taken to exclude virtually all groups of Asians in the ensuing years. In 1907, the United States made a “Gentleman’s Agreement” with Japan under which Japan agreed to issue no more passports to workers wishing to come to the United States.¹⁰⁸ In 1917, responding primarily to immigration from the Indian subcontinent, Congress created the “Asiatic Barred Zone”, a blanket prohibition on immigration from all of Continental Asia.¹⁰⁹ The process of Asian immigration restriction culminated in the Immigration Act of 1924,¹¹⁰ which tied immigration to the right of naturalization and created the national origins quota system. This law entirely excluded “alien[s] ineligible to citizenship”, a description that applied recursively to all Asians because the Act itself defined an alien “ineligible to citizenship” as one covered by the Chinese Exclusion Act or by the Asiatic Barred Zone.¹¹¹

¹⁰⁵ TAKAKI, *supra* note 6, at 221.

¹⁰⁶ 27 Stat. 25 (1892).

¹⁰⁷ Under the Geary Act, Chinese laborers in the United States were required to register and receive certificates detailing their legal presence in the United States. In order to receive a certificate, the Act required one white witness to attest that the Chinese applicant was resident at the time of the passage of the act.

¹⁰⁸ See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1121 (1998).

¹⁰⁹ Act of February 5, 1917, ch. 29, 39 Stat. 874 (The "barred zone" did not include China and Japan, as they were already excluded by Chinese Exclusion Act and the Gentlemen's Agreement.).

¹¹⁰ 43 Stat. 153 (amended 1952)

¹¹¹ 43 Stat. at 156.

C. The Chinese Exclusion Case and the Birth of the Plenary Power Doctrine

The U.S. Supreme Court officially approved of the policy of Chinese exclusion in 1889 in *Chae Chin Ping v. United States*,¹¹² a case which has come to be known simply as the Chinese Exclusion Case. Chae Chan Ping, a Chinese laborer who had been in the United States for 12 years, left the United States to visit his family, taking care to obtain a “certificate of re-entry” as required by provisions of the Geary Act. In 1888, a few days before his return, a new law precluding the return of any Chinese migrants leaving the United States, even those with certificates went into effect. Chae Chan Ping challenged the law as both a violation of the Burlingame Treaty and his Fifth Amendment due process rights.

In 1889, Justice Field, speaking for a unanimous Supreme Court, issued a landmark decision announcing the “plenary power doctrine”, which accords complete deference to Congress and the executive—the “political branches” of government—in the area of immigration law.¹¹³ This principle, which conceptualizes plenary, or complete, power to regulate immigration as a right “inherent in sovereignty, and essential to self-preservation”¹¹⁴ continues to be the “guiding principle for evaluating immigration policies” to this day. In yielding to Congress, the Court held that if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”¹¹⁵

The Chinese Exclusion Case, finding Congressional and Executive power over immigration to be nearly absolute, not limited by reliance on earlier law, any

¹¹² 130 U.S. 581 (1889).

¹¹³ See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* (2002).

¹¹⁴ 130 U.S. at 584.

¹¹⁵ 130 U.S. at 585.

international treaty, or by the U.S. Constitution itself, has been called a “fountainhead of congressional power over immigration.”¹¹⁶ Despite heavy criticism from academic quarters,¹¹⁷ the plenary power doctrine, as elucidated by *Chae Chan Ping*, remains good law, the antecedent of cases cited today by the government in support of its authority over matters concerning immigration.¹¹⁸ And although Chinese immigrants, through appeals to the Supreme Court, had found relief from arbitrary *state* discrimination, notably in *Yick Wo v. Hopkins*,¹¹⁹ and would find some protection of procedural rights related to their deportation,¹²⁰ they would ultimately find no relief there from the substantive *federal* discrimination represented by Chinese Exclusion law.¹²¹

D. “Negroes or Mulattoes . . . and Mongolians”: The Anti-Miscegenation Expands to Include the Chinese

It is well-documented that much of the motivation for the anti-Chinese legislation was economic—anti-Chinese nativists argued that the Chinese coolies were a servile class that threatened “free labor” and that the lower wages accepted by the Chinese depressed wages for whites.¹²² However, an examination of the virulently racist rhetoric suggests that the race of the new immigrants was at least as salient a factor. While the importation of labor has always been of particular concern to working people, “that the

¹¹⁶ Jan C. Ting, “*Other Than a Chinaman*”: *How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 304 (1995).

¹¹⁷ See ALEINIKOFF, *supra* note 110, at 11 (describing the 19th century roots of immigration law as “an embarrassment to Constitutional law”).

¹¹⁸ See, e.g., *Hamdi v. Rumsfeld* 124 S. Ct. 2633, 2639 (2004) (“The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.”); see also Louis Henkin, *A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 853 (1987) (“One hundred years later, *Chinese Exclusion* is still very much with us. The Supreme Court has never reexamined the two doctrines for which the case stands, and it has shown no disposition to do so. Nor has the Court looked seriously at what it and other courts have built on and around those doctrines.”).

¹¹⁹ 118 U.S. 356, 373–374 (holding states must extend Fourteenth Amendment protections to all persons within the United States, including Chinese lawfully present); see also *Tape v. Hurley* (

¹²⁰ *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (finding Fifth and Sixth Amendment limitations on Congress' power to exclude and expel aliens).

¹²¹ See *Fong Yue Ting* (reaffirming plenary power doctrine and upholding deportation of Chinese national who had resided in the United States for at least thirteen years because of his failure to produce a credible white witness to verify residence).

¹²² See TAKAKI, *supra* note 6, at 216–217.

Chinese seemed alien—a different race, a different religion, a different culture—made their importation particularly odious.”¹²³ American nativists openly expressed the visceral disgust they felt towards the Chinese. Horace Greeley described them as “uncivilized, unclean and filthy beyond all conception.”¹²⁴ The New York Times echoed this description, calling the Chinese “filthy, unnatural, and abominable.”¹²⁵ A widely cited passage in the New York Tribune summarily dismissed the Chinese as “morally, the most debased people on the face of the earth . . . with a depravity so shocking and horrible, that their character cannot even be hinted . . . Their touch is pollution.”¹²⁶

To guard against the “pollution” thought certain to occur should a race so “filthy and unclean” as the Chinese infiltrate White America, states looked to the anti-miscegenation law. Like blacks, the Chinese were viewed in the popular imagination as lustful and sexually threatening.¹²⁷ The mostly male Chinese laborers were characterized as predators, seducing vulnerable young white women into laundries and opium dens.¹²⁸ Various newspapers reported that Chinese men attended Sunday school in order to proposition their white, female teachers.¹²⁹ And of course, all the fears of the horrifying consequences of hybridization stoked in the black-white context were stoked in the new context of Chinese-white relations in nearly identical language. One California state legislator reasoned that since only the “lowest most vile and degraded” of the white race would consort with the Chinese, the resulting offspring would be “hybrid of the most despicable, a mongrel of the most detestable that has ever afflicted the earth.”¹³⁰

¹²³ GYORY, *supra* note 1, at 64.

¹²⁴ *Id.* at 17.

¹²⁵ *Id.* at 18.

¹²⁶ *Id.* at 17.

¹²⁷ TAKAKI, *supra* note 6, at 217.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

In the context of anti-miscegenation law, the Chinese were subjected to a process which historian Dan Caldwell has dubbed “Negroization”, in which racial qualities that had been hoisted on blacks became Chinese characteristics.¹³¹ Racist cartoons appeared in which Chinese and African physical features were combined and caricatured.¹³² White workers referred to the Chinese as “nagurs.”¹³³ Writers asserted that, although their complexions were lighter than that of Africans, their overall appearance revealed “but a slight removal from the African race.”¹³⁴ The *San Francisco Alta* argued that the Chinese possessed the same vices as the African and that “every reason that exists against the toleration of free blacks may be argued against that of the Chinese here.”¹³⁵ Even the venerable *New York Times*, though thousands of miles away from the situs of conflict, felt compelled to weigh in on the great debate, identifying both newly freed blacks and Chinese immigrants as threats to American political and civic culture:

We have four millions of degraded negroes in the South . . . and if there were to be a flood-tide of Chinese population—a population befouled with all the social vices, with no knowledge or appreciation of free institutions or constitutional liberty, with heathenish souls and heathenish propensities, whose character, and habits, and modes of thought are firmly fixed by the consolidating influences of ages upon ages—we should be prepared to bid farewell to republicanism.¹³⁶

As this closing admonishment so clearly demonstrates, the Chinese were thought to be not only thoroughly incompatible with the American people physically, but also, by virtue of their foreign modes of thought, estranged from the culture and ideals of

¹³¹ *Id.* at 216 (citing Dan Caldwell, *The Negroization of the Chinese Stereotype in California*, 53 *S. Cal. Q.* 123 (1971)).

¹³² *Id.* at 217.

¹³³ *Id.* at 219.

¹³⁴ *Id.* at 217.

¹³⁵ *Id.*

¹³⁶ *Id.* at 216 (emphasis added).

the American republic itself. Western senators arguing for Chinese Exclusion, played variations on this theme, one stridently asserting, for example, that “no strong nation was ever born of mongrel races of men”,¹³⁷ another decrying “the contaminating, corroding, and destructive effects of . . . the Asiatic barbarians”,¹³⁸ and still another warning that “the darkest passages of human history have been enacted when alien races have been brought into contact.”¹³⁹ In perhaps the most elaborate metaphor, one senator declared: “We oppose their coming because our sturdy Aryan tree will wither in root, trunk, and branch, if this noxious vine be permitted to entwine itself around it.”¹⁴⁰

E. Effects of Anti-Miscegenation Law and Chinese Exclusion on Chinese Transnational Movement

Anti-miscegenation law, combined with Chinese Exclusion law, had a devastating impact on the American Chinese diaspora community. New immigration to the United States diminished dramatically. In 1882, the year of the Chinese Exclusion Act, the U.S. Bureau of Immigration reported 39, 579 Chinese arrivals to the United States; in 1883, the year *after* the Chinese Act, it reported 8, 031 arrivals.¹⁴¹ That number dropped to 279 in 1884 and 22 in 1885.¹⁴² In 1887, a nominal 10 new arrivals were recorded.¹⁴³

In addition, Chinese men already in the United States—an “aging bachelor population”—were essentially marooned: Chinese Exclusion law prevented them from bringing wives to join them¹⁴⁴ and anti-miscegenation law prevented them from finding wives domestically. According to the 1900 U.S. Census, there were twenty-six Chinese

¹³⁷ GYORY, *supra* note 1 (quoting Sen. La Fayette Grover (D-Ore.)).

¹³⁸ *Id.* at 141 (quoting Sen. John H. Mitchell (R-Ore.)).

¹³⁹ *Id.* (quoting Sen. Newton Booth (R-Calif.)).

¹⁴⁰ *Id.* at 141–142 (quoting Sen. John P. Jones (R-Nev.)).

¹⁴¹ TSAI, *supra* note 63, at 19.

¹⁴² CHANG, *supra* note 73, at 144.

¹⁴³ *Id.*

¹⁴⁴ In addition to be barred under the Chinese Exclusion Act as “laborers”, Chinese women were also routinely classified as “prostitutes” and thus barred under the Page Law of 1875. PARK, *supra* note 8, at 101.

males for every Chinese female in the country.¹⁴⁵ Consequently, family formation and the subsequent emergence of a second generation were severely restricted. The application of anti-miscegenation statutes and Chinese Exclusion statutes meant that Chinese male laborers faced a simple binary choice: remain in the United States without a family or return to China. As Megumi Dick Osumi has so poignantly described the dilemma, “permitted neither to procreate nor to intermarry, the Chinese immigrant was told, in effect, to re-emigrate or die out—white America would not be touched by his presence.”¹⁴⁶

Not surprisingly, the Chinese diaspora community in the United States began to disappear: from a peak population of 107,488 in 1890 the number of Chinese in the United States steadily declined to approximately 90,000 in 1900, and eventually dwindled to approximately 60,000 in 1920.¹⁴⁷ There is sad evidence that an unrecorded number of Chinese attempted to circumvent the restrictions of exclusion law: Border patrol reports of the time (some of which could be ripped from today’s headlines) included “stories of capsized boats and Chinese nearly drowning, of Chinese hiding in rice bins on steamers bound for America,”¹⁴⁸ and anecdotes about Chinese stowaways hiding in coffins and nearly suffocating.¹⁴⁹ While a number of these attempts were no doubt successful and a small number of Chinese did continue to enter or re-enter during the period of Chinese Exclusion, these numbers were insufficient to reverse the decline of

¹⁴⁵ TSAL, *supra* note 63, at 20.

¹⁴⁶ Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in *ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES* 8 (Nobuya Tsuchida ed., 1982).

¹⁴⁷ TAKAKI, *supra* note 2, at 111–112.

¹⁴⁸ CHANG, *supra* note 76, at

¹⁴⁹ *Id.*

the Chinese American population. Net migration during the period is reported as negative.¹⁵⁰

IV. MORE WHIMPER THAN BANG: THE END OF CHINESE EXCLUSION AND THE ANTI-MISCEGENATION STATUTE

A. The End of Chinese Exclusion

Most scholars observe that the repeal of the Chinese Exclusion Act, as well as the overall reform of America's immigration policy, were motivated more by pragmatic political concerns related to World War II than by a desire to renounce a racist policy.¹⁵¹ China was a critical Allied partner on the Asian continent while many other Asian countries were under Japanese domination. Furthermore, as a key part of their propaganda campaign, the Japanese reminded Asians of the regime of anti-Asian laws in place in the United States.¹⁵² President Roosevelt himself regarded the proposed legislation to repeal the Chinese Exclusion Act as "important in the cause of winning the war and of establishing a secure peace."¹⁵³ The policy of Chinese Exclusion had simply become too politically costly for America. Consequently, in 1943, Congress passed "Chinese Repealer" legislation.¹⁵⁴ This legislation repealed the Chinese Exclusion Act of 1882, allowed Chinese aliens to naturalize, and awarded China a minimal quota (150) of

¹⁵⁰ Between 1880–1920, approximately 700,000 Asians entered the country. By contrast, in the same period, 16,000,000 immigrants arrived from Europe. IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK Table 2 (1989).

¹⁵¹ See, e.g., MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 99 (1987) ("Our alliance with China in the war with Japan was the main factor leading to the repeal of the Chinese Exclusion Act."); REIMERS, *supra* note 10, at 14–15 ("The China bill had been mainly a wartime measure, as a gesture of friendship to an ally."); ABBA P. SCHWARTZ, THE OPEN SOCIETY 107 (1968) (stating that the repeal was "a show of good will toward an ally in war"); TAKAKI, *supra* note 2, at 416–17 (1989) ("World War II had forced the United States to reopen its gates to the Chinese as well as to Filipinos and Asian Indians. Its very claims of democracy required the country to remove the racism contained within immigration policies.").

¹⁵² 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, 285 (1996) ("Immigration reform was particularly important because a central part of the Japanese propaganda campaign involved reminding Asians of the Chinese Exclusion laws.").

¹⁵³ S. REP. NO. 78-535, at 2 (1943)

¹⁵⁴ 57 Stat. 600 (1943)

immigrant visas. In 1946, Congress extended these privileges to Filipinos and Indians.¹⁵⁵

Bars against Japanese and Korean immigration remained until the 1952 McCarran-Walter Act eliminated the remaining bars against Asian naturalization and awarded all Asian countries immigration quotas, most of which were at the hundred-per-year minimum.¹⁵⁶

As the extremely low quota numbers provided by these statutes indicates, these extensions of visas to Asian countries were, for the most part, foreign relations gestures and did not result in significant increases in Asian immigration. However, with the passage of these statutes, an ignominious chapter of American history was finally closed, and though a genuine repudiation of the discriminatory laws of the past would not come until the Immigration Act of 1965¹⁵⁷ (abolishing the national origins quota system), the period of Chinese Exclusion was officially over.

B. The Demise of the Anti-Miscegenation Statute

1. *Early Challenges*

Early legal challenges to anti-miscegenation laws proceeded in fits and starts. In 1872, an Alabama court invalidated its state miscegenation statute as a violation of the Civil Rights Bill of 1866,¹⁵⁸ only to be overruled five years later.¹⁵⁹ A federal judge in Texas suggested that the anti-miscegenation statute was a violation of the Equal Protection clause of the 14th Amendment, but only because it imposed a penalty on the white member of a mixed-race couple.¹⁶⁰ Still other courts skirted the issue of race

¹⁵⁵ 60 Stat. 416 (1946)

¹⁵⁶ 66 Stat. 163 (1952)

¹⁵⁷ Pub. L. No. 89-235, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (1965).

¹⁵⁸ *Burns v. Alabama*, 48 Ala. 195 (1872).

¹⁵⁹ *Green v. Alabama*, 58 Ala. 190 (1877).

¹⁶⁰ *Ex parte Francois*, Case No. 5,047 (W.D. Texas, 1879).

altogether, abrogating state statutes as impermissible regulations of civil contract instead.¹⁶¹

The first true challenge to the underlying racist ideology of the anti-miscegenation statute occurred in 1948 with *Perez v. Lippold*.¹⁶² Finding California's anti-miscegenation laws violative of the 14th amendment's Equal Protection clause, Justice Traynor addressed head on the spurious mix of science and religion used to justify the anti-miscegenation statute stating "modern experts are agreed that the progeny of marriages between persons of different races are not inferior to both parents."¹⁶³ Likewise, he directly addressed the state's claim that the anti-miscegenation statute protected its white citizens "from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians."¹⁶⁴ Rejecting this rationale, he observed "there is no scientific proof that one race is superior to another in native ability."¹⁶⁵

In a powerful concurring opinion, Justice Carter also rejected the ideology of anti-miscegenation law. He pointed to the apostle Paul's statement "God hath made of one blood all nations of men"¹⁶⁶ to contradict the religious theory that distinct races were derived from each of Noah's three sons. In addition, he quoted Thomas Jefferson, who had suggested that after a few generations of cultivation, Blacks might become the equals of Whites in body and mind.¹⁶⁷ Finally, in an ironic flourish, he quoted the words of Adolf Hitler, whose pronouncements on the dangers of "blood-mixing" and the "lowering

¹⁶¹ See, e.g., *Hart v. Hoss & Elder*, 26 La. Ann. 90, 94 (1874).

¹⁶² 198 P.2d 17 (Cal. 1948).

¹⁶³ *Id.* at 22 (citing W.E. Castle, *Biological and Sociological Consequences of Race Crossing*, 9 AM. J. OF PHYSICAL ANTHROP. 145, 152-53 (1926).

¹⁶⁴ *Id.* at 24.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 30 (Carter, J., concurring).

¹⁶⁷ *Id.*

of the racial level caused by it” were uncannily similar, indeed identical, to arguments made by anti-miscegenation law proponents.¹⁶⁸ With all the horrors of the Third Reich and its “scientific” campaign of extermination still in the foreground of America’s consciousness, this comparison was certainly a masterstroke.

2. *Loving*

Despite the moral conviction and scientific rigor of *Perez*, anti-miscegenation statutes would remain on the books of many states for almost 20 more years. Sixteen states still had anti-miscegenation statutes in 1967. In that year, the U.S. Supreme Court would finally drive a stake into the heart of the anti-miscegenation statute in the aptly named *Loving v. Virginia*.¹⁶⁹

The opening paragraph of the Court’s unanimous opinion in *Loving*, written by Chief Justice Warren, laid out Virginia’s rationale for the anti-miscegenation statute:

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride . . .”.¹⁷⁰

Before the Court, both sides offered evidence regarding the scientific justifications for anti-miscegenation laws. The American Civil Liberties Union, arguing for the defense, testified that the biological dangers of race-mixing were thoroughly

¹⁶⁸ *Id.*

¹⁶⁹ 388 U.S. 1 (1967).

¹⁷⁰ *Id.*

discredited, while the state of Virginia introduced experts who indicated that these concerns remained a credible basis for outlawing interracial marriages. Additionally, Virginia presented expert testimony arguing that mixed-race couples and their children faced special social and psychological difficulties. Consequently, Virginia's counsel argued, the Court should defer to the legislature's determination that marriage across the color line posed a threat to the stability of families.¹⁷¹

The Court rejected all of Virginia's justifications for the law, including the pretense of scientific support, stating “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification” and recognizing the true nature of the laws as “measures designed to maintain white supremacy.”¹⁷² Recognizing this official endorsement of racial hierarchy as a clear violation of the Equal Protection Clause of the Fourteenth Amendment, the Court reaffirmed its prior repudiation of “distinctions between citizens solely because of their ancestry” as “odious to a free people whose institutions are founded upon the doctrine of equality.”¹⁷³ Finally, the Court characterized the choice of a marital partner as an individual right “essential to the orderly pursuit of happiness by free men.”¹⁷⁴ Thus, after almost 300 years, spanning “the longest time frame of any modern form of statutory racial discrimination”,¹⁷⁵ the anti-miscegenation statute was finally dead.

V. THE CONTEMPORARY RELEVANCE OF ANTI-MISCEGENATION LAW AND THE PERIOD OF CHINESE EXCLUSION

A. The Good News . . . More Progressive Racial Norms in the Modern Era

¹⁷¹ ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 101 (1972)

¹⁷² 388 U.S. at 11–12.

¹⁷³ *Id.* (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

¹⁷⁴ *Id.* at 14.

¹⁷⁵ Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian-Americans, 1910–1950*, 9 *ASIAN L.J.* 1, 5 (2002).

Having surveyed the shameful history of anti-miscegenation law and its application in the broader context of Chinese Exclusion, we might take pause and consider how much more tolerant and progressive contemporary social norms are regarding both interracial and intercultural mixing in general. There has been a striking shift in attitudes towards interracial marriage since 1958, when, according to Gallup, 96 percent of whites opposed interracial marriage.¹⁷⁶ By 1997, the most recent dates for which figures are available, that statistic had dropped to 24 percent.¹⁷⁷ In addition, U.S. Census Bureau figures indicate that the percentage of mixed marriages in the United States has increased steadily in the past 40 years:

1960: 0.37 percent (149,000) of the nation's 40.5 million married couples.
1970: 0.70 percent (310,000) of the nation's 44.6 million married couples.
1980: 1.92 percent (953,000) of the nation's 49.5 million married couples.
1990: 2.82 percent (1.5 million) of the nation's 51.7 million married couples.¹⁷⁸

Mixed marriages between Asian Americans and non-Asian Americans are most common: Half of all married Asian Americans under the age of 35 are married to non-Asians.¹⁷⁹ Interracial marriage appears to be a *fait accompli*: Demographers predict that by 2050, 20 percent of all marriages will be mixed.¹⁸⁰

Contemporary American immigration policy also reflects a more progressive understanding of race relations. The Immigration and Nationality Act of 1952¹⁸¹ established a formally race-neutral immigration system and the Immigration and Nationality Act of 1965¹⁸² abolished the National Origins quota system, which was racially discriminatory in effect. And for all its inefficiencies and perceived

¹⁷⁶ FRANK H. WU, *YELLOW: RACE AND AMERICA BEYOND BLACK AND WHITE* 267 (2002).

¹⁷⁷ *Id.* at 268.

¹⁷⁸ U.S. Census Bureau statistics, at <http://www.census.gov> (last visited Dec. 12, 2004).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 66 Stat. 163 (1952).

¹⁸² 79 Stat. 911 (1965).

shortcomings, our current system of immigration remains race-neutral and inclusionary.¹⁸³ Notably, the modern regime of American immigration law places an emphasis on family reunification and seeking diversity in immigration. Consequently, in important ways it is the antithesis of the legal regime of Chinese Exclusion, which prevented family formation, and anti-miscegenation, which dreaded heterogeneity.

B. The Bad News . . . Neo-Nativism Serves up “Old Poison in New Bottles”¹⁸⁴

While these changes in attitude suggest that many Americans have rejected the racist ideology of anti-miscegenation law and Chinese Exclusion, it is nevertheless important to recognize the ways in which the specter of that ideology continues to animate immigration discourse in the United States. There are striking parallels, for example, between the views of anti-miscegenation and Chinese Exclusion proponents on the one hand, who believed mixture with nonwhite peoples spelled doom for both the White race and the American republic, and the views of modern day neo-nativists, who see in the current large scale immigration of people of color, primarily Mexicans and Asians, a threat to “national identity”. Both arguments start with a premise that “race” and the American “national identity” are monolithic and invariable. Both stem from a belief in the “presumed foreignness” of certain groups, that is, they are both rooted in the conviction that certain individuals, by nature of their race or ethnicity, are simply

¹⁸³ See T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1 (1998) (“The current United States model, which has taken form over the past four decades, is more inclusionary. Its basic elements include:

- . birthright citizenship;
- . relatively easy (non-race based) naturalization rules;
- . general parity between citizens and aliens in terms of access to social benefits;
- . constitutional restrictions on state discrimination against aliens (other than in the political sphere);
- . few restrictions on work opportunities for permanent resident aliens;
- . exit and re-entry rights for permanent resident aliens (provided they do not stay outside the United States in excess of one year);
- . protection for immigrants under most federal labor, health, and safety regulations;
- . recognition that immigrants possess most constitutional rights afforded to citizens (such as the right of free speech and religion, and rights provided to criminal defendants);
- . protection of immigrants under federal anti-discrimination laws prohibiting discrimination on grounds of national origin, race and citizenship status.”).

¹⁸⁴ Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997).

incompatible with American culture. And both see amalgamation, whether physical or cultural, as a source of dilution and degradation.

The eminent political scientist Samuel Huntington is perhaps the most prominent representative of the neo-nativists who posit an American national identity to which the new breed of immigrants are not assimilating . Conceding that Americans now see their culture as multiracial and multiethnic,¹⁸⁵ he nevertheless identifies “Anglo-Protestant culture” and “the Creed of the founding settlers” as the crucial elements of our national identity.¹⁸⁶ He cites the following, in turn, as the key characteristics of that culture and creed:

(1) the English language; (2) Christianity and religious commitment along with the Protestant values of individualism, the work ethic, and the belief that humans have the ability and the duty to try to create a heaven on earth, a “city on a hill”; and (3) English concepts of the rule of law, including the responsibility of rulers and the rights of individuals.¹⁸⁷

Latino immigration to the United States, he claims, is so little like any earlier wave, so hostile and resistant to the American Creed, that it constitutes “a major potential threat to the cultural and possibly political integrity of the United States.”¹⁸⁸ This line of reasoning is older than the American Republic itself. Benjamin Franklin argued as early as 1751 that citizens of Anglo descent in America represented the “principle Body of white People”¹⁸⁹ and thus America should exclude black and “tawney” people, whom he

¹⁸⁵ HUNTINGTON, *supra* note 13, at xvii (“I believe one of the greatest achievements of, perhaps the greatest achievement, of America is the extent to which it has eliminated the racial and ethnic components that historically were central to its identity and has become a multiethnic, multiracial society in which individuals are to be judged on their merits. That has happened, I believe, because of the commitment successive generations have had to Anglo-Protestant culture and the Creed of the founding fathers.”)

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 59–80 (describing “Anglo-Protestant culture”).

¹⁸⁸ Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POLICY 34 (March/April 2004).

¹⁸⁹ Benjamin Franklin, *Observations Concerning the Increase of Mankind*, cited in TAKAKI, *supra* note 3, at 16.

described as those of African and Asian descent.¹⁹⁰ Franklin's opposition to the immigration of non-English settlers was based on an assumption that they would "never adopt our language or customs anymore than they can acquire our complexion."¹⁹¹ Benjamin Franklin, the grand founding father of nativism, thus equated race with an inability to assimilate for any nonwhite group.

This assumption, however, like the assumptions of anti miscegenation and exclusionary law ideology, is grounded in prejudice rather than empirical reality. For example, although great hay is made of the disunity created by linguistic pluralism, there is no evidence that the United States is any more linguistically divided today than it was in the 18th century when Benjamin Franklin warned that the country was being "Germanized" by the Germans.¹⁹² In their research examining the pattern of linguistic assimilation of the current generation of Hispanic immigrants, Profs. T. Alexander Aleinikoff and Ruben G. Rumbaut, a legal scholar and sociologist, respectively, conclude:

The findings suggest that the linguistic outcomes for the third generation—the grandchildren of the present wave of immigrants—will be no different than what has been the age-old pattern in American history: the grandchildren may learn a few foreign words and phrases as a quaint vestige of their ancestry, but they will most likely grow up speaking English only. It is for this reason that the United States has been called a "language graveyard."¹⁹³

Richard Alba and Victor Nee have come to similar conclusions reporting that in 1990 more than ninety-five per cent of Mexican-Americans between the ages of twenty-

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Aleinikoff & Rumbaut, *supra* note 184, at 14.

five and forty-four who were born in the United States could speak English well.¹⁹⁴ They conclude that although Hispanic-Americans, particularly those who live close to the border, may continue to speak their original language along with English a generation longer than other groups have tended to do, “by any standard, linguistic assimilation is widespread.”¹⁹⁵

Similarly, the neo-nativist perception that Christianity, specifically Protestantism, is an essential characteristic of American national identity is misguided, hard to square with the equally essential American institution of *Constitutional law*, which explicitly disavows the use of religion as a precondition to full participation in American civic and political life. And while it is irrefutable that Protestant Christianity has figured prominently in the history of the United States and continues to be important to many Americans, to argue that it is a *sine qua non* of national identity implies that a vast number of non-Protestant Americans—Catholic, Jews, atheists, and other non-Christians—are essentially alienated from our so-called “core culture”. Furthermore, it ignores the myriad ways in which these groups have shaped and refined the “national identity.”¹⁹⁶

Additionally, the argument that a “work ethic” is a unique characteristic of Protestantism seems to imply that the capacity for and/or desire to hard work is somehow inimical to non-Protestant religions. This assertion is contradicted by the hard work and tremendous success of legions of Irish, Italian, Jewish, Japanese, Filipino, Chinese, Indians, etc . . . , none of whom could be characterized as predominantly Protestant in

¹⁹⁴ RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 77 (2003) (By looking at a variety of indicators including language acquisition, education, and economic progress, Alba and Nee have demonstrated that “the social foundations for ethnic distinctions” among immigrants are for the most part “whittled away” by the third generation. By the third generation, English “monolingualism” was nearly universal among both European and Asian Americans.).

¹⁹⁵ *Id.* at 80.

¹⁹⁶ For a portrait of American identity that recognizes the contributions of diverse groups to that composite, see generally LAWRENCE H. FUCHS, *THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE* (2d ed., 1995).

orientation. While it might be argued that the “work ethic” is a salient characteristic of the American “national identity”, the trait does not appear to be necessarily tied to Protestantism. Indeed, it could be argued that American immigrants are generally self-selected for that trait, regardless of religious background. After all, one of the most enduring themes in the American immigration narrative is that immigrants are lured to the United States because it is a land “where the streets are paved with gold”. That is to say, immigrants often make their decisions to come to the United States based on their perception that it is a country that rewards those who are willing to work hard. Thus, the conversion experience of the immigrant must occur long before he or she wades into the waters of Anglo-Saxon Protestantism.

Finally, perhaps the most dubious claim of neo-nativism is that new immigration somehow threatens to subvert a strain of the American national identity related to the rule of law. Even if one were to agree that the United States is exceptional in its respect for a uniquely “English” rule of law, it does not follow that immigrant groups are incapable of developing that same sentiment. Although the “rule-of-law” phrase is indeed an invention of 18th century Anglo political thought, “[t]he ideal of a political society in which law constrains and guides the exercise of power by rulers dates from the beginnings of systematic thought in the Western world.”¹⁹⁷ Neo-nativists describe the history of autocracy in Latin America and Asia, as well as the pervasive corruption which exists in many countries of those areas, as evidence of an estrangement from democracy and the ideals embodied in the rule of law. They fail to recognize, however, the possibility that a desire to be free from the political oppressiveness of autocracy continues to motivate the current generation of immigrants as much as it did our Anglo-

¹⁹⁷ FRANCIS A. ALLEN, *THE HABITS OF LEGALITY* 3 (1996)

Saxon forebearers, who sought to escape the abuses of power that accompanied absolute monarchy. It is relatively uncontroversial to describe certain political ideals as core components of the American national identity. The more remarkable claim that new immigration is “hostile” to these ideals, however, is unsubstantiated and amounts to mere prejudice, echoing the claims of Chinese Exclusion proponents who argued that accepting the presence of Chinese would mean require “bid[ding] farewell to Republicanism.”¹⁹⁸

VI. CONCLUSION

An alternative to the uniform conception of American political and social culture put forth by anti-miscegenation and exclusionary law, and now neo-nativism, is one that sees the success of America not as the product of a static homogeneity but rather as the result of the dynamic interplay between diverse cultural and racial forces. This conception recognizes that physical and cultural amalgamation does not lead to degradation and degeneration, but quite the opposite can be a generative source of strength, a source of “hybrid vigor”, to reclaim a phrase.¹⁹⁹ While conceding that even a multicultural society such as ours needs to have a common “core of values”, a common “civic culture”,²⁰⁰ we should also recognize that the underlying civic values most Americans embrace easily translate across cultures.²⁰¹ These values include a respect for the law, a belief in an open and democratic government, and a commitment to equal opportunity. The very platitudinous nature of even reciting these values indicates how deeply embedded they are in our national psyche. As intuitively appealing as such values

¹⁹⁸ TAKAKI, *supra* note 6, at 216.

¹⁹⁹ This reference is to the pioneering geneticist Gregor Mendel’s observation that plants cross bred produce healthier, stronger, and bigger plants than those inbred. Since the Nazi misappropriation of geneticism to justify racism and genocide, the use of genetic theory in the area of race has been eschewed, with good reason. Most studies of the genetic differences between races conclude that there is none. See Ian F. Haney Lopez, *supra* note 6. I intend to use the phrase in a purely figurative sense.

²⁰⁰ See generally FUCHS, *supra* note 186.

²⁰¹ *Id.*

are, Americans should have no fear that new groups of immigrants will fail to understand and adopt them. The argument that new immigrants cannot or will not assimilate with American civic culture is a reassertion of anti-miscegenation's theory of unbridgeable differences between peoples and cultures, a theory which then and now is a thinly veiled rationale for irrational prejudices.

Finally, beyond the vitriolic rhetoric of anti-miscegenation and exclusionary law there lies, as Henry Louis Gates has so eloquently stated, "a homely truth: There is no tolerance without respect—and no respect without knowledge. Any human being sufficiently curious and motivated can fully possess another culture, no matter how 'alien' it may appear to be."²⁰² Laying aside our worst fears of the strange and exotic, we as Americans should continue to explore our curiosity. Rejecting the fear of co-sanguinity represented by anti-miscegenation and exclusion law, we might instead embrace a view that sees strength and possibility in of our nation's mixed-blood heritage, a vision expressed plainly, yet eloquently, by Franklin D. Roosevelt in the following passage:

[T]he Murphys and the Kellys, the Smiths and the Joneses, the Cohens, the Carusos, the Kowalskis, the Schultzes, the Olsens, the Swobodas, and—right in with all the rest of them—the Cabots and the Lowells All these and others like them are the life blood of America.²⁰³

Chinese and Latino immigration comprises nearly 24% of all immigration yearly and over 15% of the current U.S. population is of Chinese or Latino descent. It may be time to add the Changs and Garcias to America's proud genealogy.

²⁰² HENRY L. GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* xv (1992), cited in Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863910 (1993).

²⁰³ THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 374 (S. Rosenman ed., 1950).

