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## A Brown Buffalo's Observations on Color (Blindness), Legal History, and Racial Justice in the Rocky Mountain West

Tom I. Romero II

*University of Denver College of Law*, [tr Romero@law.du.edu](mailto:tr Romero@law.du.edu)

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A BROWN BUFFALO’S OBSERVATIONS ON COLOR (BLINDNESS),  
LEGAL HISTORY, AND RACIAL JUSTICE  
IN THE ROCKY MOUNTAIN WEST

Tom I. Romero, II\*

I. WELCOME TO THE “COLORFUL” WEST

Close your eyes and join me on a quintessential American road trip driving west along I-70. As our car hurtles through the corn and wheat fields of western Kansas at over eighty miles an hour, we imperceptibly are gaining altitude. As we cross the 100th meridian, the air becomes drier, the land more barren. Suddenly, a giant brown sign emerges on the horizon. As we approach the sign at nearly 4,000 feet above sea level, it suddenly comes into focus and announces our entry into the Centennial State: “Welcome to Colorful Colorado.”<sup>1</sup> One of the most well-known and beloved state welcome signs, it represents the many promises (and, as I will later argue, the pitfalls) of the Rocky Mountain West.

First created in 1950 and manufactured by inmates at the Colorado State Penitentiary, these signs were designed to provide the state an identity as more than a rural or flyover state.<sup>2</sup> Using posts and planks cut from the state’s abundant Lodgepole pines and carved with bold white letters, the sign symbolized the state’s

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\* © 2022 Tom I. Romero, II. J.D., Ph.D. Associate Professor of Law, University of Denver Sturm College of Law. Affiliate Faculty, University of Denver, Department of History. Director, University of Denver’s Interdisciplinary Research Institute for the Study of (in)Equality. I want to thank the editors of the Utah Law Review as well as its entire staff for hosting such an important symposium. The future and the profession, and indeed, maybe the American Republic is predicated upon embracing, understanding, and sharing the very real social, cultural, economic, religious and many other differences necessary for a thriving diverse democracy. The ideas in this Essay have been shaped and sharpened over many years in public presentations at historical societies, history centers, and various other public talks. Numerous University of Denver students over the years have contributed valuable research time to those presentations. For this Essay in particular, I want to especially thank Nicoli Bowley for her invaluable help in identifying and tracking down historical resources in Denver’s Globeville and Elyria-Swansea neighborhoods.

<sup>1</sup> Amy Colon, *41 “Welcome to Colorful Colorado” Signs*, UNCOVER COLO. (Nov. 15, 2021), <https://www.uncovercolorado.com/welcome-to-colorado-sign-near-me/> [<https://perma.cc/3UQU-CJ5X>].

<sup>2</sup> Austin Cox, *The History Behind Colorado’s Welcome Signs*, 9NEWS.COM (Jan. 21, 2019, 8:19 PM), <https://www.9news.com/article/news/the-history-behind-colorados-welcome-signs/73-cfd0aa6a-fdd8-451c-b425-470e78f84260> [<https://perma.cc/E8M7-H33D>].

connections and its identity to its iconic landscapes of purple mountains majesty, amber fields of grain, soaring red rocks, and blazing orange sunsets.<sup>3</sup>

Though iconic, Colorado's sign is not necessarily unique. Crossing the state lines into other Rocky Mountain States, similar imagery evoking well-known landscapes and related tropes of the "wild" and "untamed" west is part of the state brand.<sup>4</sup> In almost every case, the complexity of human relations, the messiness of cultural interaction, and the fierce struggle of individuals and communities to live in these beautifully brutal environments are rarely, if ever, evoked.

As people who are familiar with my work know, my understanding of these issues is almost fully informed by my family's and my own deep roots in the region. The "Romero" paternal side of my family emerged out of the legacies of conquest, precipitated first by Spanish settlement and occupation of its northern borderlands and its subjection of its indigenous peoples, and then again after the United States War with Mexico and subsequent dispossession and alienation of Mexicans from property, citizenship, and culture. A familiar refrain used by my paternal side of the family (as well as so many others) defiantly states: "We didn't cross the border, but the border crossed us."<sup>5</sup> As one scholar has noted, the phrase and accompanying imagery "is a reminder of a homeland in existence long before modern borders turned Mexicans into immigrants and the continent's Indigenous communities into oppressed minorities in a colonized nation."<sup>6</sup>

Settling in what many Americans identify as northern New Mexico and southern Colorado, my paternal grandparents met in Durango, Colorado, where my father was born. My grandparents (with my father and his siblings in tow) followed opportunities afforded by stratified and segregated labor in railroads and mining to Utah. There they settled first in Price and eventually Salt Lake City, where my grandfather worked as a janitor in the Salt Lake City School District and my grandmother as a seamstress for a company that provided apparel and related

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<sup>3</sup> Cf. Jack Cox, *Welcome to Nostalgia*, DENVER POST (Jan. 14, 2006, 1:54 AM), <https://www.denverpost.com/2006/01/14/welcome-to-nostalgia/> [<https://perma.cc/Q75N-8T2B>]; *Purple Mountain Majesty: Beautiful Views of Colorado's Pikes Peak*, USA TODAY (June 30, 2018, 4:39 AM), <https://www.usatoday.com/story/travel/destinations/2018/06/30/pikes-peak-colorado/747845002/> [<https://perma.cc/3JU7-2HKG>].

<sup>4</sup> See, e.g., Alex Cabrero, *New Billboards Across State Welcome Visitors to Utah*, KSL.COM (May 25, 2010, 6:04 PM), <https://www.ksl.com/article/10914426/new-billboards-across-state-welcome-visitors-to-utah> [<https://perma.cc/SF38-PZPC>]; *Wyoming Welcome Signs Getting Swapped Out*, BUCKRAIL (May 10, 2017), <https://buckrail.com/wyoming-welcome-signs-getting-swapped-out/> [<https://perma.cc/9QYE-W5ZQ>]; Ron Warnick, *Enchanted Welcome*, ROUTE 66 NEWS (Mar. 8, 2010), <https://www.route66news.com/2010/03/08/enchanted-welcome/> [<https://perma.cc/J8LZ-CNFG>]; *State Unveils New 'Welcome to Montana' Highway Signs*, FLATHEAD BEACON (Jan. 23, 2014), <https://flatheadbeacon.com/2014/01/23/state-unveils-new-welcome-to-montana-highway-signs/> [<https://perma.cc/7VKP-JFNE>].

<sup>5</sup> Edward J. McCaughan, "We Didn't Cross the Border, the Border Crossed Us": Artists Images of the US-Mexico Border and Immigration, 2 *LATIN AM. & LATINX VISUAL CULTURE* 6, 6–7 (2020).

<sup>6</sup> *Id.*

services for industrial and commercial workers. My father graduated from Salt Lake City's West High School in 1968 and immediately enlisted in the Navy, where he served as a sonar specialist on a destroyer during the Vietnam War until his honorable discharge in 1973, the year I was born. He subsequently worked as a machinist at the Denver Mint and was active in its union until he retired.

My maternal "Rodriguez" side of the family has a more familiar genealogy. My mother's parents migrated to the United States from Mexico as they were fleeing the effects of the Mexican Revolution in the early 1920s. A part of a much larger migratory stream of agricultural laborers, my grandparents eventually settled on the "Western Slope" of Colorado in a small town known as Olathe in the 1940s. They purchased land, built a house, and operated a farm for nearly the next 50 years. I recall fondly spending a few weeks every summer as a child waking up early to eat freshly made tortillas and a bowl of oatmeal, riding the tractor with my grandpa, and learning to swim in the lateral irrigation ditch adjacent to the farm. My mother went to school in a one-room schoolhouse and, after graduation, settled in Denver, where she worked in various state and federal government jobs in human relations and equal opportunity for the next thirty years.

Having myself been born and raised in the metropolitan Rocky Mountain West, being bussed as part of a school desegregation order in the Denver Public Schools, and ultimately in becoming a legal, social, and political historian as well as law professor in this region, I have long worked to connect my own family's past to a larger excavation of the long history of human relations. In the process, I have strived to reframe how and in what ways we collectively imagine and understand *color* as part of our collective identity, contested history, and shared future.

In my own personal and professional life, color is not used to describe natural landscapes, but instead is the framework to understand law's primary role in determining benefits, rewards, access, opportunity, penalties, and punishment depending upon where one sits in relation to an enforceable and durable color line of Whiteness and non-Whiteness.<sup>7</sup> The "colorful" Rocky Mountain West that I ask the reader to not only imagine, but to confront are the racialized human landscapes in the region that have been created, reinforced, and sustained by law. In a multitude of different contexts—from the sometimes-violent enforcement of immigration law, to racially segregated neighborhoods, unequal and inequitable schools, the school to prison pipeline, or a fundamental lack of access to employment, clean water, and other vital services necessary for the protection of fundamental rights—the Rocky Mountain West is at the center of many of the nation's seemingly impossible to scale challenges around racial equity and justice. It is also a region made more vibrant by

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<sup>7</sup> For an in-depth legal analysis of this distinction, see Tom I. Romero, II, *¿La Raza Latina?: Multiracial Ambivalence, Color Denial, and the Emergence of a Tri-Ethnic Jurisprudence at the End of the Twentieth Century*, 37 N.M. L. REV. 245 (2007) [hereinafter Romero, *¿La Raza Latina?*]. One of the more influential books detailing the impact of the color line in the United States is RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). As Rothstein argues, the "willful blindness" to the deep color lines erected as a result of public and private action in American history is the "consensus view of American jurisprudence." *Id.* at XIII.

the persistent refusal of racially minoritized communities to abandon their language, culture, and historical memories. Indeed, it is these multilayered claims to the history, mythology, values, politics, and legal culture that makes the region a harbinger of similar struggles shaping our current American nation.

I began this Essay to honor the *Utah Law Review* symposium theme to “tell my story.” My story and those of so many others in this collection are “critical counter-narratives” to interrogate larger systemic and institutional patterns and practices of racial and other inequities in American law. Counter-narratives—which are one of the primary methodological tools used in Critical Race Theory, of whom I consider myself an early generation practitioner<sup>8</sup>—such as mine and those of my family provide context and complexity to the lived experience of the law very rarely acknowledged in legal jurisprudence, legislative texts, municipal codes, or regulatory rules.<sup>9</sup> In so contesting mainstream narratives about whom the law benefits, Critical Race Theory also provides permission for legal academics to self-consciously and intentionally advocate for racial justice as a larger scholarly project.

This Essay is accordingly a series of observations about interrogating and complicating the meaning of color for all of us who call the Rocky Mountain West home. These observations are divided into three sections. First, in Part II, I explore what has long been the defining feature of race relations in the Rocky Mountain West—the persistent tension between the region as a racial utopia free from de jure racial inequities and the legacy of state-sanctioned racial violence and deep-rooted nurturing of White supremacy. Trekking through some of the legalscapes of property, state constitutional, civil rights, and martial law, this section spotlights the legal creation and negotiation of color lines across the region’s multi-racial geography.

Part III connects this history to the present day, detailing some of the ways that the region continues to struggle with and be in tension with its ability to confront forthrightly deep-rooted racial inequities. The section begins by situating the analysis within the racial reckonings of 2020 and the backlash against Critical Race Theory in K-12 public education that followed in 2021. I examine the lessons of those tensions by detailing the political and legal reaction to the death of Elijah McClain after being detained by the Aurora, Colorado Police Department in August

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<sup>8</sup> See generally Richard Miller, Katrina Liu & Arnetha F. Ball, *Critical Counter-Narrative as Transformative Methodology for Educational Equity*, 44 REV. RSCH. EDUC. 269 (2020) (reviewing the literature around critical counter-narratives in academia).

<sup>9</sup> For examples of scholars bridging this gap, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1739–40 (1993) (explaining that codified White privilege in property law continued long after desegregation, and noting this effect on lived experience); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L. J. 1329 (1991) (examining antidiscrimination law through lived experiences); Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990) (detailing the stories his grandfather told him as little boy to explore the legal legacies of conquest, colonization, and enslavement to immigration law).

2019.<sup>10</sup> Understanding this tragedy as part of a larger history of colorblindness demonstrates the legacies as well as challenges of racial disparity and inequity in the current geography of the Rocky Mountain West.

I conclude in Part IV by offering some brief observations on the legal, moral, and professional needs for all of us, as practitioners and human beings, to become color conscious as we live, learn, work, and pray in the Rocky Mountain West.

## II. THE INCOMPARABLE COLOR(BLIND) LEGALSCAPES OF MOUNTAINS, PLAINS, AND DESERT

In the summer of 2021, the University of Northern Colorado received a National Parks Service grant for the Dearfield Dream Project—a research program led by Drs. George Junne and Robert Brunswig.<sup>11</sup> As part of a larger re-examination and related excavation of the contribution of Black individuals and communities to American culture and life following the summer of 2020,<sup>12</sup> Dearfield, Colorado, represented a seeming outlier in the larger scope of race relations in the country. Founded in 1910 by Oliver Toussaint Jackson, Dearfield quickly emerged as the state’s only all-Black agriculture colony—claiming at its height 300 to 700 residents, 40 farms, “a filling station, a dance hall, two churches, . . . [and] a school.”<sup>13</sup> Moreover, it served as a “cultural bridge” to the area’s White and Latinx neighbors.<sup>14</sup> It was common for White, Latinx, and Black Dearfield residents to fill Dearfield’s

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<sup>10</sup> Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/C4JA-ZLEJ>].

<sup>11</sup> Anne Delaney, *University of Northern Colorado Receives National Park Service Grant for Dearfield Dream Project*, GREELEY TRIBUNE (Aug. 8, 2021, 8:00 AM), <https://www.greeleytribune.com/2021/08/08/university-of-northern-colorado-receives-national-park-service-grant-for-dearfield-dream-project/> [<https://perma.cc/K69J-GYBR>]. The project “is a collaborative research initiative to conduct archaeological, historical, and environmental studies on the early 20th Century African-American colony of Dearfield, Colorado.” Robert Brunswig, George Junne, Gillian Bowser, Erin Renfrew, Ellyn Dickmann, Amanda Purnell & Mark Brown, *Dearfield Dream Project: Developing an Interdisciplinary Historical/Cultural Research Network*, 2 SOC. SCIS. 168, 169 (2013).

<sup>12</sup> Deanna Herbert, *UNC Awarded Grant for Dearfield Dream Project*, UNC NEWS (Aug. 6, 2021), <https://www.unco.edu/news/articles/dearfield-grant-2021.aspx> [<https://perma.cc/Q75N-8T2B>].

<sup>13</sup> Charlotte West, *Inside Dearfield: A Colorado Ghost Town That Was Once a Bustling All-Black Settlement*, NBC NEWS (Feb. 28, 2019, 1:16 PM), <https://www.nbcnews.com/news/nbcblk/inside-dearfield-colorado-ghost-town-was-once-bustling-all-black-n975716> [<https://perma.cc/4JEQ-3NYV>] (noting that the 300 to 700 residents included “the neighboring [B]lack community of Chapelton. The population of the town of Dearfield itself likely never exceeded more than 50 to 75 residents.”).

<sup>14</sup> Marianne Goodland, *Lawmakers Get a Firsthand Look at Dearfield, Colorado’s Historic Black Farm Colony*, DENVER GAZETTE (July 24, 2021), [https://gazette.com/news/lawmakers-get-a-firsthand-look-at-dearfield-colorados-historic-black-farm-colony/article\\_c7430336-ecb4-11eb-b703-5bb7208e27a4.html](https://gazette.com/news/lawmakers-get-a-firsthand-look-at-dearfield-colorados-historic-black-farm-colony/article_c7430336-ecb4-11eb-b703-5bb7208e27a4.html) [<https://perma.cc/4JEQ-3NYV>].

dance halls on weekend nights.<sup>15</sup> As Dr. Junne observed, “[i]ntegration happened in Dearfield long before it came to Denver.”<sup>16</sup>

Seemingly at the heart of Dearfield’s success was the idea that Colorado and other western states were ideally situated for people of color. Indeed, one promotional letter for Dearfield boldly declared: “There is no better location in the U.S. than Colorado to try on a garment of self-government.”<sup>17</sup> Inspired by the Black intellectual Booker T. Washington and other Black leaders’ recognition of the central importance of land ownership to equality and parity for former slaves and their children,<sup>18</sup> men like Jackson and his wife Minerva saw unbridled opportunity in what would become Colorado, New Mexico, Utah, Wyoming, and Montana.<sup>19</sup>

Part of the promise of the Rocky Mountain West was attributable to what seemed like divine providence for many Blacks suffering under the White supremacy of the reconstruction and post-reconstruction South.<sup>20</sup> On the same day that Abraham Lincoln signed the Emancipation Proclamation, on January 1, 1863, the Homestead Act went into effect.<sup>21</sup> To be sure, in the years leading up to and after the Civil War, the Rocky Mountain West and Colorado, in particular, became the

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Dearfield*, GREELEY HIST., <http://www.greeleyhistory.org/pages/dearfield.htm> [<https://perma.cc/TMR7-37RF>] (last visited Mar. 11, 2022).

<sup>18</sup> *See, e.g.*, BRUCE J. REYNOLDS, BLACK FARMERS IN AMERICA, 1865–2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES, 194 RBS RSCH. REPORT 1, 18 (2002) (“Booker T. Washington became a leading advocate and developer of programs to help blacks become independent farmers.”); Dorceta E. Taylor, *Black Farmers in the USA and Michigan: Longevity, Empowerment, and Food Sovereignty*, 22 J. AFR. AM. STUD. 49 (2018) (discussing the various strategies that Blacks have used to mitigate land loss); Kevin M. Lyles & Robert Brunswig, *Dearfield, Colorado: Homesteading and the Dream of Black Independence Through Agriculture*, THE FIELD: ASLA PRO. PRAC. NETWORKS’ BLOG (July 20, 2021), <https://thefield.asla.org/2021/07/20/dearfield-colorado-homesteading-and-the-dream-of-black-independence-through-agriculture/> [<https://perma.cc/K5GF-WDKG>] (describing how the teachings of Booker T. Washington persuaded many Blacks to move out west).

<sup>19</sup> For additional information, *see* NATIONAL PARK SERVICE, AFRICAN AMERICAN HOMESTEADERS IN THE GREAT PLAINS, NPS.GOV, <https://www.nps.gov/articles/african-american-homesteaders-in-the-great-plains.htm> [<https://perma.cc/3T44-FU7K>] (last visited Feb. 22, 2022).

<sup>20</sup> *See generally* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION xi–xiii (1984); ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 (1st ed. 1988).

<sup>21</sup> Act of May 20, 1862 (Homestead Act), Pub. L. No. 37–64, 12 Stat. 392 (1862); Emancipation Proclamation, Pres. Proc. No. 17, 12 Stat. 1268 (1863); *The Exodusters: The Roots of African American Homesteading*, HOMESTEAD.ORG, <https://www.homestead.org/homesteading-history/exodusters-the-roots-of-african-american-homesteading/> [<https://perma.cc/5C69-BS3A>] (last visited Feb. 14, 2022) [hereinafter *The Roots of African American Homesteading*].

literal as well as figurative center over the larger Civil War question of whether the abolition of slavery and larger commitments of racial equity and equality would be part of the expanding United States.<sup>22</sup> As Susan Schulten explains, by the 1850s, “the political crisis was fought over the *future* of the nation, especially the new and anticipated territories . . . [all] located in the Interior West, save for Washington and by 1861 they constituted 40 percent of the nation’s landmass.”<sup>23</sup>

The end of the Civil War, the subsequent passage of the 1866 Civil Rights Act, and the ratification of the Fourteenth Amendment seemingly settled the issue in favor of racial equality by extending the United States’ land law to all those in the Black community. Inclusion into the United States real property distribution scheme, perhaps the most important path to full and equal citizenship in the United States, accordingly provided unprecedented opportunities for the Black communities.<sup>24</sup> One of the residents of the first Black settlement in New Mexico, for example, argued that “[h]ere the black man has an equal chance with the white man. Here you are reckoned at the value which you place upon yourself. Your future is in your own hands.”<sup>25</sup>

In addition to federal law, state constitutions and legislative acts enshrined the concept and commitment to racial equality and inclusivity in a variety of ways. The 1876 Colorado Constitution and the 1913 New Mexico Constitution provided that its public acts be printed not only in English, but in Spanish.<sup>26</sup> Indeed, language served as a powerful proxy in the New Mexico Constitution to protect the voting and equality of educational opportunity rights of Latinx peoples in the state.<sup>27</sup> The 1973 Montana Constitution articulates the only “human dignity” clause among all

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<sup>22</sup> Tom I. Romero, II, *Wringing Rights Out of the Mountains: Colorado’s Centennial Constitution and the Ambivalent Promise of Human Rights and Social Equality*, 69 ALB. L. REV. 569, 569 (2006) [hereinafter Romero, *Wringing Rights Out of the Mountains*].

<sup>23</sup> Susan Schulten, *The Civil War and the Origins of the Colorado Territory*, 44 W. HIST. Q. 21, 22–23 (2013) (emphasis in original).

<sup>24</sup> See NELL IRVIN PAINTER, *EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION* (1976); DAN MOOS, *OUTSIDE AMERICA: RACE, ETHNICITY, AND THE ROLE OF THE AMERICAN WEST IN NATIONAL BELONGING* 60 (2005) (noting two successful and firmly established Black communities out west); *AFRICAN AMERICANS ON THE WESTERN FRONTIER* (Monroe Lee Billington & Roger D. Hardaway eds., 1998).

<sup>25</sup> Lucy H. Henderson, *Free Land for the Race in Mexico*, CHICAGO DEFENDER: BIG WEEKEND EDITION (Dec. 21, 1912), <https://www.proquest.com/docview/493218518/13BEDBD838DC3B93C2/1?accountid=46638> [<https://perma.cc/95QS-33V4>]; *The Roots of African American Homesteading*, *supra* note 21 (“[The colony, known as Blackdom,] consisted of about 25 families, around 300 people, on 15,000 acres. The township had a post office, hotel, and a weekly newspaper. The center of the community was the Blackdom Baptist Church and Schoolhouse. . . . In its way, Blackdom was a utopia for its residents and a sort of ‘over-ground railway’ of generosity and assistance for the African-Americans of the area.”).

<sup>26</sup> COLO. CONST. art XVIII, § 8 (amended 1990); N.M. CONST. art. XX, § 12.

<sup>27</sup> See N.M. CONST. art. VII, §§ 3, 8, 10 (containing sections pertaining to religious and racial equality, teachers learning English and Spanish, and the educational rights of children of Spanish descent).



of the state and federal constitutions in the United States.<sup>28</sup> Included in the new constitution, because the 1889 Montana Constitution failed to provide “sufficient protections from discrimination,”<sup>29</sup> the 1973 Montana “human dignity” clause provides that “[n]either the state nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”<sup>30</sup>

The emergence of human dignity in Montana’s constitution in the 1970s symbolizes some of the ways that Rocky Mountain States have navigated tensions between color-consciousness and color-blindness in their own changing legal landscapes. To be sure, early in its history, Montana’s earliest territorial legislators passed laws providing for the forfeiture of mining claims held by non-American citizens.<sup>31</sup> The first such law in 1872 was “clearly” designed to dispossess “Chinese Montanans” from their property rights as a result of widespread racial hostility.<sup>32</sup> The law was challenged and eventually found its way two years later to the Montana Territory Supreme Court in *Montana v. Lee*.<sup>33</sup> The three individual opinions (one finding for the Chinese defendant, one concurring, and one dissenting) authored by the three Justices sitting on the court “represented the most comprehensive legal treatment of Chinese rights and responsibilities ever authored. . . . perhaps by any group of sitting western frontier jurists.”<sup>34</sup> Although Montanans would struggle for decades to provide meaningful legal protection to its racially minoritized groups,<sup>35</sup> the three opinions of the *Lee* court overturning the law implicitly recognized the human dignity undergirding the claims of the Chinese miners. In so doing, the jurists articulated arguments that resonate to this very day, including plenary power,

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<sup>28</sup> MONT. CONST. art. II, § 4; Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21 (2004).

<sup>29</sup> Jackson, *supra* note 28.

<sup>30</sup> MONT. CONST. art. II, § 4.

<sup>31</sup> MONT. TERR. STATS., ch. LXXXII § 1 (repealed 1874) (“An Act to provide for the forfeiture to the Territory of placer mines held by aliens.”).

<sup>32</sup> John R. Wunder, *Law and Chinese in Frontier Montana*, 30 MONT. MAG. W. HIST 18, 24 (1980).

<sup>33</sup> *Territory of Montana v. Lee*, 2 Mont. 124 (1874).

<sup>34</sup> Wunder, *supra* note 32, at 24.

<sup>35</sup> See Jackson, *supra* note 28, at 21–22; Julia C. Sherman, *African Americans and Montana’s Criminal Justice System: A Historical Timeline*, <https://hs.umt.edu/aas/timeline/julia-sherman-timeline.pdf> [<https://perma.cc/4NTL-867X>] (last visited Feb. 14, 2022); Anthony William Wood, *The Erosion of the Racial Frontier: Settler Colonialism and the History of Black Montana, 1880–1930* (2018) (M.A. thesis, Montana State University), <https://scholarworks.montana.edu/xmlui/bitstream/handle/1/14597/WoodA0518.pdf?sequence=3&isAllowed=y> [<https://perma.cc/QH87-GU6L>].

authority of federal over state law in matters of the rights of non-citizens,<sup>36</sup> and Fourteenth Amendment equal protection racial animus concerns.<sup>37</sup>

The spirit of “equal protection” seemingly echoed through other parts of the Rocky Mountain West. In 1895 the Colorado Legislature passed one of the nation’s first equal access to public accommodations laws.<sup>38</sup> Sponsored by the state legislature’s only Black representative, the law provided Coloradans “of every race and color” equal access to establishments open to the general public, including “inns, restaurants . . . barbershops, public conveyances . . . theaters, and all other places of public accommodation and amusement . . . .”<sup>39</sup> Colorado’s public accommodations law, as well as the jurisprudential protection of the rights of non-Whites as seen in the *Montana v. Lee* case, however, seemed to be outliers rather than a systemic effort to eradicate the color line in public and private life. No other contemporaneous effort took place in the late 19th or early 20th century Rocky Mountain West, and in many cases, law, jurisprudence, and policy demonstrated an explicit racial bias.<sup>40</sup>

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<sup>36</sup> *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>37</sup> *Dep’t. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020). A majority of the Court held that the Department’s decision to rescind DACA was “arbitrary and capricious” under the Administrative Procedure Act. *Id.* at 1914–16. Four Justices, who concurred in this aspect of the Court’s decision, rejected the equal protection claim. *Id.* at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1935–36 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

<sup>38</sup> H.B. 175, 1895 Leg., 10th Sess. (Co. 1895).

<sup>39</sup> *Id.* At the time, the legislature did not create a state agency to enforce the law’s provisions but left it to the individual complaining of discrimination to bring a lawsuit before a local justice of the peace. *Id.*

<sup>40</sup> One of the most prominent examples of bias is seen in the enforcement of anti-miscegenation laws that existed in every Rocky Mountain State, except New Mexico. *See* “An Act in Relation to Service” (1852 Utah Territory Law outlawing “sexual intercourse” between Whites and Blacks); 1888 Utah Anti-miscegenation Statute; Wyoming Compiled Statutes, 1045, Section 50-108 (“All marriages of white persons with Negroes, Mulattoes, Mongolians, or Malays hereafter contracted in the state of Wyoming are and shall be illegal and void”). Typical and reflective of the complexity of the color line between White and Non-White was Montana’s which prohibited marriage between Whites and “Chinese, Japanese, Negro, or person of Negro blood or in part Negro.” MONT. REV. CODE sec.48-109, 48-1103 (1930). Colorado’s law stemming from its territorial days, was seemingly unique and was written in 1864, mere months before the end of the Civil War. While containing the familiar phrasing that “[a]ll marriages between negroes or mulattoes of either sex and white persons are declared to be absolutely void,” it also provided the following provision: “Nothing in this section shall be construed as to prevent the people living in that portion of the state acquired from Mexico from marrying according to the custom of that country.” Laws Colorado Territory (1864), 108 (“all marriages between [N]egroes or mulattoes of either sex, and [W]hite persons are declared to be absolutely void.”) (codified in COLO. REV. STAT. § c. 107, s. 2 (1935)). For deeper exploration of the impact of these laws, *see generally* Peggy Pascoe, *Race, Gender, and the Privileges of Property: On the Significance of Miscegenation Law in the U.S. West*, in *OVER THE EDGE: REMAPPING THE AMERICAN WEST* 215–230 (Valerie Matsumoto & Blake Allmendinger eds., 1999). *See also infra* Part III.

Even the Colorado law was largely symbolic as the state lacked a state agency to enforce violations.<sup>41</sup> Accordingly, up until 1932, the City and County of Denver maintained an open policy of segregation in the city's public bathhouses and swimming pools.<sup>42</sup> The city's Manager of Improvements and Parks enforced the policy that "provided for certain days for '[W]hite' and other days for 'colored' people."<sup>43</sup> In 1932, Blacks and Whites clashed over attempts to integrate a "White-only" beach at the city's popular Washington Park.<sup>44</sup> As Blacks went swimming,

Whites quickly left the water, armed themselves with sticks and stones, and advanced on the newcomers who fled towards the trucks that had brought them. When the trucks would not start, the [B]lacks were pursued and beaten as nearly a thousand onlookers watched. The police arrested 17 people—10 African Americans and 7 [W]hites who had encouraged the [B]lacks to assert their rights.<sup>45</sup>

Although a subsequent trial would reveal that the city's practice violated Colorado's public accommodations law, Denver's public bathhouses and swimming pools continued to maintain a segregation practice, albeit in a form that recognized the complexity of the color line in the region.<sup>46</sup> Indeed, by the end of World War II, Denver's public swimming pool included separate days for "Spanish" and "Japanese" as well as Blacks and Whites.<sup>47</sup>

Despite the promise that the Rocky Mountain West and its legal system would be fundamentally different from those of other regions of the United States, many elements of these same legal regimes instead became enshrined in the law and legal culture of the region. The "slavery" provisions in the Rocky Mountain West's post-Civil War constitutions, for example, are notable in that the term even appeared in the "four corners" of the document. Following the ratification of the Thirteenth Amendment, which states that "[n]either slavery nor involuntary servitude, *except as a punishment for crime* . . . shall exist within the United States,"<sup>48</sup> twenty-six state

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<sup>41</sup> JAMES A. ATKINS, HUMAN RELATIONS IN COLORADO: A HISTORICAL RECORD 113 (1968); see COLORADO CIVIL RIGHTS COMMISSION, A TIME FOR CHANGE AND CHALLENGE 17 (1969).

<sup>42</sup> See State *ex rel.* McKinney et al. v. Lowry, 66 P.2d 334, 335 (Colo.1937).

<sup>43</sup> *Id.*

<sup>44</sup> STEPHEN J. LEONARD & THOMAS J. NOEL, DENVER: MINING CAMP TO METROPOLIS 366 (1990); Ruthanne Johnson, *The 1932 Washington Park Incident: Denver's Forgotten Segregated Protest*, DEN. URB. SPECTRUM (2007), [http://www.urbanspectrum.net/sept07/writers/wash\\_park.htm](http://www.urbanspectrum.net/sept07/writers/wash_park.htm) [<https://perma.cc/7V3W-QMY8>].

<sup>45</sup> LEONARD & NOEL, *supra* note 44, at 366.

<sup>46</sup> See also Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMP. PO. AND CIV. RTS. L. REV. 817, 843 (2004).

<sup>47</sup> MAYOR'S INTERIM SURVEY COMMITTEE ON HUMAN RELATIONS, A REPORT OF MINORITIES IN DENVER WITH RECOMMENDATIONS 67 (1947).

<sup>48</sup> U.S. CONST. amend. XIII, § 1 (emphasis added).

constitutions, including those in Colorado (1876) and Utah (1896) went on to adopt similar, and in some cases identical, language.<sup>49</sup> While some of these states were already notorious for their use of chattel slavery (Georgia, Mississippi, Louisiana, Kentucky, Alabama, and Arkansas), the inclusion of this language is striking because of the close connection to the anti-slavery sentiments of the Civil War in states like Colorado.<sup>50</sup> Indeed, it was not long before the United States' criminal justice regime, including those in Colorado and Utah, was disproportionately over-represented by people of color.<sup>51</sup> Though slavery had become unconstitutional, it tacitly re-emerged in the White and non-White color lines being erected in the region's police stations, courthouses, jails, and prisons.

These color lines were prominently displayed in the widespread use of racially restrictive covenants by White owners to prevent the purchase of real property by non-Whites. The covenant language typically read: "None of the lots shown on said plat shall be conveyed, leased or given to and no building erected thereon shall be used, owned or occupied by any person not of the White race."<sup>52</sup> Found in every state of the Rocky Mountain West, the covenants played a powerful role in

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<sup>49</sup> Article I section 21 of the 1896 Utah Constitution reads: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State." Article II section 26 of the 1876 Colorado Constitution reads: "That there shall never be in this State either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted." Colorado repealed the exception as punishment for criminals in 2018. See Bill Chappell, *Colorado Votes to Abolish Slavery, 2 Years After Similar Amendment Failed*, NPR (Nov. 7, 2018, 3:12 PM), <https://www.npr.org/2018/11/07/665295736/colorado-votes-to-abolish-slavery-2-years-after-similar-amendment-failed> [<https://perma.cc/VQU3-UDQD>]. Utah repealed their amendment two years later. See Kaelan Deese, *Utah, Nebraska Voters Approve Measures Stripping Slavery Language from State Constitutions*, THE HILL (Nov. 4, 2020, 12:22 PM), <https://thehill.com/homenews/state-watch/524469-utah-nebraska-voters-approve-measure-stripping-slavery-language-in> [<https://perma.cc/9AMH-CPAC>].

<sup>50</sup> Romero, *Wringing Rights Out of the Mountains*, *supra* note 22, at 578; Schulten, *supra* note 23, at 45–46.

<sup>51</sup> See Heather Ann Thomson, *The Racial History of Criminal Justice in America*, 16 DU BOIS REV. 221, 223 (2019). This trend has continued to today. See, e.g., *State-by-State Data*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map> [<https://perma.cc/Q8RP-AH2J>] (last visited Feb. 14, 2022); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/BT5A-K4SZ>].

<sup>52</sup> Covenants by Eastmoor Realty Company, Southmoor Realty Company, & The Madison Real Estate and Investment Company for Crestmoor Park in the County of Denver 8 (May 23, 1947) (on file with author); see Declaration of Protective Covenants for Burns Brentwood Subdivision in the County of Denver 1 (June 29, 1949) (on file with the author).

effectively segregating Whites and non-Whites in the region's neighborhoods and schools.<sup>53</sup>

Two Colorado Supreme Court cases (indeed, the only such cases I could find in the region's jurisprudence) are telling. The first was *Chandler v. Ziegler*, which was decided by the Court in 1930.<sup>54</sup> In *Ziegler*, a White property owner sued the developer of his subdivision for fraudulently representing that all deeds in the subdivision contained a restriction that it "could be owned, leased, or occupied by [W]hite persons only, and that all of said lots were restricted against colored people . . . ."<sup>55</sup> After the White property owner purchased his lot, the neighboring lot was purchased by a Japanese family who subsequently shot off fireworks, erected a building that obstructed his view, and invited guests onto their property.<sup>56</sup> The White homeowner argued and the trial court agreed that the White plaintiffs suffered a loss of value in their property due to the "annoyance and inconvenience" of having a Japanese family next door.<sup>57</sup> In assessing the case, the Colorado Supreme Court declared that it was the public policy of the state to recognize that "[a] person who owns a tract of land . . . may prefer to have as neighbors persons of the [W]hite, or Caucasian, race. . . ."<sup>58</sup> Although the Court left open the question of damages, it made clear the constitutionality and enforceability of such a provision.<sup>59</sup>

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<sup>53</sup> See Kim Briggeman, *Development Covenant Contains Racist Language*, MISSOULIAN (Sept. 7, 2008), [https://missoulian.com/news/state-and-regional/development-covenant-contains-racist-language/article\\_bda2c59b-94bf-5193-890d-35a9235ee8d6.html](https://missoulian.com/news/state-and-regional/development-covenant-contains-racist-language/article_bda2c59b-94bf-5193-890d-35a9235ee8d6.html) [<https://perma.cc/8FCG-P5XD>] (noting the 1945 racially restrictive covenants in the Fairviews Development in southeast Missoula); Wufei Yu, *Albuquerque's Racist History Haunts Its Housing Market*, HIGH COUNTRY NEWS (Mar. 15, 2021), <https://www.hcn.org/issues/53.4/south-race-racism-albuquerques-racist-history-haunts-housing-market> [<https://perma.cc/4X9M-VQ8M>] (exploring the history of racial discrimination against Asian Americans and Pacific Islanders in New Mexico, including through the use of racially restrictive covenants); Camille Erickson, *Bill to Remove Racist Covenants Passes Second Reading in Wyoming House*, CASPER STAR TRIB. (Mar. 2, 2021), [https://trib.com/news/state-and-regional/bill-to-remove-racist-covenants-passes-second-reading-in-wyoming-house/article\\_59bf1392-84ca-5ece-a859-ce9fe2da40a0.html](https://trib.com/news/state-and-regional/bill-to-remove-racist-covenants-passes-second-reading-in-wyoming-house/article_59bf1392-84ca-5ece-a859-ce9fe2da40a0.html) [<https://perma.cc/3BNR-K598>] (analyzing efforts in the Wyoming legislature to remove racially restrictive covenants in real estate deeds in the state); Annie Knox, *White Property Owners Only? Racist Covenants Remain on Books in Utah, But Now There's a Path to Fix Them*, DESERET NEWS (Apr. 2, 2021, 5:21 PM), <https://www.deseret.com/utah/2021/4/2/22361164/white-property-owners-only-racist-covenants-remain-on-books-in-utah-but-now-theres-path-fix-them> [<https://perma.cc/PK47-7ZJQ>] (analyzing efforts in the Utah Legislature to remove racially restrictive covenants in real estate deeds in the state).

<sup>54</sup> See generally *Chandler v. Ziegler*, 88 Colo. 1 (Colo. 1930).

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* (stating initially that racially restrictive covenants were constitutional and then reversing the trial court's order that damages could be assessed due to the "annoyance" of having a "Japanese" neighbor).

The Colorado Supreme Court heard a second racially restrictive covenants case in 1940, *Steward v. Cronan*.<sup>60</sup> In contrast to the White plaintiff in *Ziegler*, the plaintiff in *Steward* was a prospective Black purchaser of real property located in close proximity to a historic and racially segregated Black neighborhood in Denver.<sup>61</sup> The covenant in question prevented the sale “to any colored person or persons” and required sellers to “covenant and agree not to permit any colored persons or person to occupy said premises during the period from this date to January 1, 1941.”<sup>62</sup> Hoping to have the restriction legally declared void, the Black plaintiff brought suit against all of the White defendants who were originally parties to the agreement.<sup>63</sup> Even though only two of the original parties to the agreement appeared in court, both the trial court and ultimately the Colorado Supreme Court upheld the racially restrictive covenant as enforceable and constitutional.<sup>64</sup> According to the court, the racial restriction in this case was “not substantially different” than those found in *Ziegler*.<sup>65</sup> Although it was a Black plaintiff trying to void the restriction rather than a White homeowner attempting to enforce it, there was never any doubt, at least in the Court’s opinion, whether such covenants were unlawful or unconstitutional. Legal restrictions in fee simple were the valid prerogatives of White property owners.<sup>66</sup>

The Supreme Court’s decision in *Shelley v. Kramer* in 1948 did not stop the practice of racial segregation. Along with the “redlining practices” of the real estate industry in cities like Denver<sup>67</sup> and Salt Lake,<sup>68</sup> segregation and racially discriminatory practices affecting where one could live, work, and go to school continued well into the 20th century. To be sure, the legal questions raised by the practice of racial segregation in the Rocky Mountain region’s schools highlighted the pernicious nature of the color line erected against a multitude of those considered non-White. As my own examination of the United States Supreme Court’s analysis of school segregation in the Denver Public Schools (the first non-Southern school

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<sup>60</sup> *Steward v. Cronan*, 105 Colo. 393 (Colo. 1940).

<sup>61</sup> The restrictive covenant agreement was executed by a small group of Caucasians who owned real estate in block 39, Schinner’s Addition to Denver in what would become known as the Whittier Neighborhood. It extended downtown from the city from Twentieth to Twenty-sixth streets and abutted the Five-Points neighborhood, the city’s historic Black district. See SHAWN M. SNOW, *DENVER’S CITY PARK AND WHITTIER NEIGHBORHOODS* 7, 11 (2009); LAURA M. MAUCK, *FIVE POINTS NEIGHBORHOOD OF DENVER* (2001).

<sup>62</sup> *Steward*, 105 Colo. at 394.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 395.

<sup>65</sup> *Id.* at 394.

<sup>66</sup> *Id.* at 395 (reaffirming the holding of *Ziegler*).

<sup>67</sup> Donna Bryson, *Exhibit Highlights the Explicitly Racist Policies of the Past That Still Shape Today’s Denver*, DENVERITE (Nov. 16, 2018, 5:42 AM), <https://denverite.com/2018/11/16/new-exhibit-highlights-the-explicitly-racist-policies-of-the-past-that-still-shape-todays-denver/> [<https://perma.cc/L363-PFQR>].

<sup>68</sup> *Redlining Map of Salt Lake City, Utah ca 1933–1939*, DOCSTEACH, <https://www.docsteach.org/documents/document/redlining-map-of-salt-lake-city-utah> [<https://perma.cc/8M42-F5PS>] (last visited Feb. 22, 2022).

desegregation case to reach the Court at the time) has detailed, government bureaucrats used their vested legal power to subtly manipulate attendance boundaries to maximize, on a yearly basis, rigid distinctions between White, Chicana, and Black students.<sup>69</sup>

White supremacy was embraced by many politicians in the Rocky Mountain West as a political virtue as they won and held seats at the local, state, and federal levels. In perhaps the most notorious case in the region, the Klu Klux Klan became one of the most powerful political forces in Colorado in the 1920s. Building its power around anti-immigrant, antisemitic, and anti-Black sentiment, Colorado's governor, one of its federal senators, and a majority of its state legislators as well as the mayor of its largest city were members of the Klan.<sup>70</sup> Not isolated to particular pockets or regions of the state, support and membership for the KKK were widespread.<sup>71</sup>

Though the Klan takeover of Colorado government was short, White Supremacist ideals continued to animate the behavior of the state's most powerful leaders. To be sure, legal and extra-legal "justice" against non-Whites came powerfully together in the 1930s when Colorado's governor exercised his power as "commander-in-chief" of the national guard to declare martial law against all "Mexicans" coming to the state for work.<sup>72</sup> Beginning in 1935, Colorado's Governor, "Big Ed" Johnson, launched a campaign to scapegoat Mexican immigrants for the impact of the Great Depression.<sup>73</sup> Johnson called for the federal government to deport all alien labor and, to speed the process, he proposed using his powers as "commander-in-chief" of the National Guard to deport alien labor if the federal authorities did not take action.<sup>74</sup>

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<sup>69</sup> See Tom I. Romero, II, "Our Selma Is Here:" *The Political and Legal Struggle for Educational Equality in Denver, Colorado and Multiracial Dilemmas in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73, 73–74, 98 (2004); Tom I. Romero, II, *How I Rode the Bus to Become a Professor at the University of Denver Sturm College of Law: Reflections on Keyes's Legacy for the Metropolitan, Post-Racial, and Multiracial Twenty-First Century*, 90 DENV. L. REV. 1023, 1023 (2013) [hereinafter Romero, *How I Rode the Bus*].

<sup>70</sup> See KENNETH T. JACKSON, *THE KU KLUX KLAN IN THE CITY: 1915–1930* 215–31 (1967); ROBERT ALAN GOLDBERG, *HOODED EMPIRE: THE KU KLUX KLAN IN COLORADO* 163 (1981); James H. Davis, *Colorado Under the Klan*, 42 COLO. MAG. 93 (1965).

<sup>71</sup> A powerful visualization of this reality is seen in Colorado History's Ku Klux Klan Ledgers project. See *Ku Klux Klan Ledgers: The Greater Denver Area, 1920s*, HISTORY COLO., <https://www.historycolorado.org/kkkledgers> [<https://perma.cc/E7HW-NBX2>] (last visited Feb. 22, 2022).

<sup>72</sup> For a deeper exploration of these issues, see Tom I. Romero, II, "A War to Keep Alien Labor Out of Colorado:" *The "Mexican Menace" and the Historical Origins of Local and State Anti-Immigration Initiatives*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 63 (Carissa Byrne Hessick & Gabriel. J. Chin, eds., 2014).

<sup>73</sup> *Id.* at 63.

<sup>74</sup> Francis Wayne, *Colorado Aliens Will Be Deported*, DENVER POST, Mar. 25, 1935, at 1.

Governor Johnson subsequently approved a plan to establish “concentration camps” for “all aliens in Colorado.”<sup>75</sup> Arguing that the plan was the only way to “meet the problems raised by the increasing horde of Mexicans coming into Colorado,”<sup>76</sup> the Governor’s action promised to use the state’s most disciplinary and discretionary legal powers against Mexican men, women, and children by deputizing local police officers to detain and halt “the undesirable aliens” “enroute (sic) to the sugarbeet fields.”<sup>77</sup>

Johnson’s actions and public rhetoric merely fueled the racism of some of his constituents. One man wrote to Johnson: “You are to be highly commended in your efforts to keep aliens out of this State. Particularly Mexicans . . . [t]hey are a blight to any country, Japs are infinitely preferable.”<sup>78</sup> Another wrote to the governor protesting the state’s obligation to “feed, clothe, and shelter these dirty, lazy, shiftless, useless aliens whose very presence here is an ever increasing danger to our civilization.”<sup>79</sup>

On April 18, 1936, Johnson affirmatively exercised his authority as commander-in-chief and placed Colorado’s border with New Mexico and Oklahoma under martial law.<sup>80</sup> Fifty national guardsmen were ordered to the southern boundary of the state, where they were to stop and inspect every train, truck, and automobile seeking entry to the state.<sup>81</sup>

Many Coloradoans made known their support of such an exercise of legal power. One couple wrote to Johnson of their support, stating: “We are right behind you in your move to keep the Mexican race out of our state.”<sup>82</sup> Another Coloradoan, writing in support of the military action, advocated that Johnson support legislation “to sterilize every Mexican on relief who has more than two children.”<sup>83</sup> Even more inflammatory were the bright orange placards publicly posted throughout the state: “WARNING ALL MEXICAN AND ALL OTHER ALIENS TO LEAVE THE

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<sup>75</sup> See *Urges Deporting of Aliens*, N.Y. TIMES, Mar. 28, 1935, at 7.

<sup>76</sup> Frances Wayne, *Aliens on Relief to Be Put in Camp*, DENVER POST, Mar. 26, 1935, at 3; See also *That’s That*, DENVER POST, Mar. 26, 1935, at 2 (“Aliens who have been in this country long enough to be naturalized but who have made no move to obtain citizenship should be deported without any delay.”).

<sup>77</sup> *Party of Aliens from Texas Is Being Held in Trinidad After Governor Wires Sheriff*, CHRON. NEWS, May 7, 1935, at 1.

<sup>78</sup> Letter from C.W. Thuringer to Edwin C. Johnson (Mar. 14, 1936) (on file with author).

<sup>79</sup> Letter from C.W. Varnum to Edwin C. Johnson (Mar. 17, 1936) (on file with author).

<sup>80</sup> *Proclamation Asks Citizens to Support Ban on Cheap Labor*, DENVER POST, Apr. 19, 1936, at 1.

<sup>81</sup> See Fred S. Warren, *Martial Law Saves Jobs for Citizens*, DENVER POST, Apr. 19, 1936, at 1, 3; Barron B. Beschoar, *Governor Declares Martial Law and Mobilizes National Guard to Southern Border to Check Aliens*, DENVER ROCKY MTN. NEWS, Apr. 19, 1936, at 12.

<sup>82</sup> Letter from Mr. and Mrs. Williams to Edwin C. Johnson (Apr. 20, 1936) (Box 26916, Johnson Collection at CSA).

<sup>83</sup> Letter from H.L. Robertson to Edwin C. Johnson (Apr. 29, 1936) (on file with author).



STATE OF COLORADO AT ONCE, By Order of: Colorado State VIGILANTIES.”<sup>84</sup>

For ten days in April, Colorado’s National Guard, “[a]rmed with pistols and clubs,” was fully deployed to stop “Mexicans” and other indigents from entering the state.<sup>85</sup> Seventeen miles south of Trinidad, it established Camp Johnson as its base of operations, as well as other support camps near Alamosa, Durango, and Cortez.<sup>86</sup> The Guard posted soldiers at every major highway and railroad entering the state along its Southern border, whereby Guardsmen asked for and inspected car registration records, labor documents, rail passes, visas, and all forms of identification.<sup>87</sup> It organized daily sorties of the Guard’s 120th Air Squadron to patrol the southern half of the state.<sup>88</sup> The Guard also exercised its authority far removed from the border by inspecting automobiles of suspected “invaders” hundreds of miles into the state.<sup>89</sup> Hundreds of “Mexicans,” many of whom were American citizens and all without what the state deemed proper “credentials,” were turned back and in some cases escorted by the Guard to the New Mexican border.<sup>90</sup>

Governor Johnson’s war against “Mexicans” has largely become a footnote in Colorado’s and the region’s history. Johnson instead continues to be memorialized and celebrated for his support in creating an interstate highway system through the peaks of Colorado’s continental divide.<sup>91</sup> A “homesteader” himself,<sup>92</sup> Johnson’s story and actions as a lawmaker fully encapsulate the promise of color-blindness

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<sup>84</sup> Flyer posted by the Colorado State Vigilanties (on file with author).

<sup>85</sup> David. A. Sandoval, *Recruitment, Rejection, and Reaction: Chicanos in the Twentieth Century*, in ENDURING LEGACIES: ETHNIC HISTORIES AND CULTURES OF COLORADO 239, 244 (Arturo Aldama ed., 2011).

<sup>86</sup> See *Colorado’s Southern Front Against Alien Entry*, DENVER POST, Apr. 19, 1936, at 3.

<sup>87</sup> Sandoval, *supra* note 85, at 245–247.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Rigid Boundary Patrol Maintained by Troops*, CHRONICLE-NEWS (TRINIDAD, CO), April 21, 1936, at 1, 2, 4; *Troops Plug Loopholes in Alien Patrol*, ROCKY MOUNTAIN NEWS, Apr. 22, 1936, at 1, 3; *See Colorado Troops on Border Turn Back 70 Persons Who Have Neither Jobs Nor Cash*, ROCKY MOUNTAIN NEWS, April 21, 1936 at 1; Jack Carberry, *Governor Orders Troops Kept on Colorado Side of Border*, DENVER POST, Apr. 23, 1936, at 1 (noting Governor of New Mexico decrying the impact of the ban on New Mexican American citizens); Charles T. O’Brien, *Colorado Rejects Touring Indigents*, N.Y. TIMES, April 26, 1936, at E7.

<sup>91</sup> See *Edwin C. Johnson Memorial Bore*, COLO. DEP’T OF TRANSP., <https://www.codot.gov/travel/eisenhower-tunnel/edwin-c-johnson-memorial-bore.html> [https://perma.cc/WEQ4-GHG2] (last visited Feb. 14, 2022); Paul Knowles, *From the Museum Archives: ‘Big Ed’ Johnson – NW Colorado’s 3-Term Governor and 3-Term U.S. Senator*, CRAIG PRESS (Mar. 26, 2019), <https://www.craigdailynews.com/news/from-the-museum-archives-big-ed-johnson-nw-colorados-3-term-governor-and-3-term-u-s-senator/> [https://perma.cc/P2D9-HTVR].

<sup>92</sup> See Cosmos Mariner, *The Johnson Homestead*, THE HIST. MARKER DATABASE (Oct. 29, 2020), <https://www.hmdb.org/m.asp?m=114444> [https://perma.cc/BM2S-NP32].

seemingly embedded in the formation and settlement of the Rocky Mountain West and the repeated reality of anti-White color-consciousness created, enforced, and reinforced by the power of law at ALL levels. To be sure, property owners, the police, government bureaucrats, and working men and women all used the law to enforce racial segregation while embedding and amplifying deep-rooted racial inequity. The law, in short, was rarely color-blind.

In writing about the early legal history of Chinese in Montana territory, John Wunder begins to ponder how the territory and the region became so deeply embedded with the principles and values of White supremacy.<sup>93</sup> According to Wunder, “[p]erhaps foremost was the inevitable transfer of anti-Chinese attitudes held by the majority of citizens into statutory law and then sanctioned by judicial interpretation.”<sup>94</sup> Although his study was focused specifically on the Chinese, Wunder is describing precisely the process by which law came to create durable color lines all throughout the American West. In disparate and seemingly unconnected areas of law, administrative policies, legislative acts, and personal bias designed to discriminate, segregate, and differentially treat people of color were not only enacted—but judicially sanctioned—throughout the Rocky Mountain West. This variety of legal and political acts demonstrated the multitude of ways in which the “color[ful]” legal landscape of Whiteness and non-Whiteness had become an enduring reality of the Rocky Mountain region that reverberates to this very day.

### III. BACK TO THE FUTURE

The “racial reckoning protests” in the summer of 2020 seemingly created a new sense of urgency regarding understanding the region’s racial history. Described by commentators as a hopeful indicator about the potential for “unprecedented” racial progress in the United States, the protests catalyzed searing indictments about the law’s role in perpetuating systemic racism.<sup>95</sup> Legislators and jurists in the Rocky

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<sup>93</sup> See generally Wunder, *supra* note 32.

<sup>94</sup> *Id.* at 29.

<sup>95</sup> See, e.g., Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests Are the Broadest in U.S. History—And Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020), <https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/> [<https://perma.cc/YU6X-SKR9>]; Dana R. Fisher, *The Diversity of the Recent Black Lives Matter Protests Is a Good Sign for Racial Equity*, BROOKINGS (July 8, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/07/08/the-diversity-of-the-recent-black-lives-matter-protests-is-a-good-sign-for-racial-equity/> [<https://perma.cc/49VT-9RU8>]; Adam Serwer, *The New Reconstruction*, ATLANTIC (Oct. 2020), <https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/> [<https://perma.cc/2QSR-65R5>]; Lola E. Peters, *Sustaining Anti-Racism After a Summer of Protests for Black Lives*, CROSSCUT (Oct. 15, 2020), <https://crosscut.com/opinion/2020/10/sustaining-anti-racism-after-summer-protests-black-lives> [<https://perma.cc/YE5N-RWP8>]; Ed Pilkington, *After 15 Stunning Days of Anti-Racism Protests . . . What Happens Next?*, THE GUARDIAN (June 20, 2020, 5:00 AM), <https://www.theguardian.com/us-news/2020/jun/10/george-floyd-protests-what-happens-next> [<https://perma.cc/B2B5-2EAL>].

Mountain West responded in a variety of ways. In Wyoming, the state legislature overwhelmingly supported legislation to remove racially restrictive covenants in real estate deeds.<sup>96</sup> According to one of its sponsors, a Republican and Real Estate agent, the idea came to her while closing the sale on a home:

I actually had some clients sitting at the table with me and they had to read through the racist covenants that literally said, people of color had to enter from the rear of the home . . . . The new owners had to sign their initials to acknowledge they were aware of the restrictive covenants . . . and they couldn't do anything about it . . . . This is in Torrington, Wyoming.<sup>97</sup>

In Utah, voters in November 2020 approved by 80% an amendment to remove the term “slavery” as a punishment for crime from the state’s constitution.<sup>98</sup> The effort, led by a coalition of racial justice and civil rights groups,<sup>99</sup> symbolized how the region was seemingly coming to grips with its past.

Yet, a backlash to such efforts quickly emerged. Centered around efforts all around the country to discredit Critical Race Theory, classrooms and curriculums suddenly became the primary battleground in the struggle to be color-blind or color-conscious.<sup>100</sup> Adding the authority of his office as Attorney General of the State of Montana, Austin Knudsen declared that Critical Race Theory and antiracism

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<sup>96</sup> See H.B. 91, 66th Leg., Gen. Sess. (Wyo. 2021); Tom Coulter, *Bill Allowing for Removal of Racist Housing Covenants Gains Final Approval in the Legislature*, WYO. BUS. REP. (March 26, 2021), [https://www.wyomingnews.com/wyomingbusinessreport/industry\\_news/government\\_and\\_politics/bill-allowing-for-removal-of-racist-housing-covenants-gains-final-approval-in-the-legislature/article\\_09edafde-8e54-11eb-a9bb-afec11c33232.html](https://www.wyomingnews.com/wyomingbusinessreport/industry_news/government_and_politics/bill-allowing-for-removal-of-racist-housing-covenants-gains-final-approval-in-the-legislature/article_09edafde-8e54-11eb-a9bb-afec11c33232.html) [<https://perma.cc/4QM7-MDTP>].

<sup>97</sup> Erickson, *supra* note 53.

<sup>98</sup> Deese, *supra* note 49.

<sup>99</sup> These Community groups included: “[T]he ACLU of Utah, Action Utah, The Afro-American Historical and Genealogical Society, Alliance for a Better Utah, Greater Salt Lake Alumnae Chapter of Delta Sigma Theta Sorority, Inc., Iota Chapter of Omega Psi Phi Fraternity, Inc., NAACP (Salt Lake City Chapter), NAACP (Ogden Chapter), Sema Hadithi African American Heritage and Culture Foundation, Upsilon Beta Omega Chapter of Alpha Kappa Alpha Sorority, Inc., and the Utah Black Roundtable.” Tracy Smith, *Utah Coalition to Abolish Slavery Launches Education Campaign*, ABC4.COM (Sept. 22, 2020, 4:22 PM) <https://www.abc4.com/news/politics/election/utahns-vote-to-remove-slavery-as-a-punishment-for-a-crime-from-constitution/> [<https://perma.cc/RR3L-YJVA>].

<sup>100</sup> See, e.g., Ibram X. Kendi, *The Mantra of White Supremacy*, ATLANTIC (Nov. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/> [<https://perma.cc/J4PE-BNMP>]; Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/9EDV-RELF>]; Jon Wiener, *The Predictable Backlash to Critical Race Theory: A Q&A with Kimberlé Crenshaw*, THE NATION (July 5, 2021), <https://www.thenation.com/article/politics/critical-race-kimberle-crenshaw/> [<https://perma.cc/46R8-XH4N>].

programming “discriminates on the basis of race, color, or national origin in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, Article II, Section 4 of the Montana Constitution, and the Montana Human Rights Act.”<sup>101</sup> In a twenty-five-page opinion, Knudsen declared that the study and understanding of “systemic,” “institutional,” or “structural” racism were “hollow rhetorical devices devoid of any legally sufficient rationale for purposes of civil rights law, as well as a *threat to stability of our institutions*.”<sup>102</sup> Importantly, Knudsen’s use of “our” highlighted precisely what those in the Rocky Mountain West had long struggled to claim; the “self-evident virtues” of a “productive colorblind society” free from the taint of racism.<sup>103</sup>

Though the anti-Critical Race Theory rhetoric did not reflect the reality of the classroom,<sup>104</sup> it nevertheless catalyzed other efforts throughout the region to prohibit classroom curriculum and content that addressed institutional racism, White privilege, and a culture of White supremacy. After being directed by the Utah Legislature to “ban” Critical Race Theory in its schools,<sup>105</sup> the Utah Board of Education, for instance, quickly approved a “set of standards” that, among other provisions, banned any class materials “that would teach that one race is ‘inherently superior or inferior’ to another and that people’s moral character is influenced by their race.”<sup>106</sup>

In a similar fashion, Wyoming legislators introduced the Civic Transparency Act<sup>107</sup> to address Critical Race Theory in the state’s public education curriculum.<sup>108</sup> The state’s Superintendent of Public Instruction and a proponent of the measure, Jillian Balow, highlighted precisely the content the bill would discourage: “There are classrooms in the state that have discussed [Critical Race Theory] related topics

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<sup>101</sup> 58 Op. Mont. Att’y Gen. 1 (Mont. May 27, 2021), <https://media.dojmt.gov/wp-content/uploads/AGO-V58-O1-5.27.21-FINAL.pdf> [<https://perma.cc/9VRB-M9AU>].

<sup>102</sup> *Id.* at 17 (emphasis added) (providing a counterpoint to the legal claims of racial discrimination made in Knudsen’s opinion is beyond the scope of this essay, particularly the assertion that studying, understanding, and providing solutions to White supremacy are *prima facie* discriminatory acts).

<sup>103</sup> *Id.* at 15.

<sup>104</sup> See generally Leslie S. Kaplan & William A. Owings, *Countering the Furor Around Critical Race Theory*, 105 NASSP BULL. 200 (2021) (exploring some of the ways that the robust knowledge around racial inequity has and can be used in public schools).

<sup>105</sup> Bryon Schott, *Protest over Critical Race Theory Hits House Floor, Democrats State Walkout*, SALT LAKE TRIB. (May 19, 2021, 7:59 PM), <https://www.sltrib.com/news/politics/2021/05/19/protest-over-critical/> [<https://perma.cc/4VWD-XUQ9>].

<sup>106</sup> Courtney Tanner, *How Are the New Rules Approved by the Utah School Board on Teaching About Racism in Response to Critical Race Theory Debate*, SALT LAKE TRIB. (June 4, 2021, 7:24 PM), <https://www.sltrib.com/news/education/2021/06/04/response-heated-critical/> [<https://perma.cc/M5GN-HAXL>].

<sup>107</sup> S. Res. 22LSO-0137 (Wyo. 2022).

<sup>108</sup> Brianna Kraemer, *Wyoming Lawmakers to Introduce Bill to Combat Critical Race Theory in Schools*, COUNTY 17 (Sept. 13, 2021), <https://county17.com/2021/09/13/center-square-wyo-law-makers-plan-bill-to-combat-critical-race-theory-in-schools-repost/> [<https://perma.cc/QEH8-MJBJ>].

such as white oppression, systemic racism and white privilege.”<sup>109</sup> Although both the Utah, Wyoming, and even Montana cases all decried racial discrimination in their state and the nation’s history, their actions were nevertheless a collective warning to all educators not to go there.<sup>110</sup> These efforts at the highest levels of government were more than just about the classroom. Rather, they signaled the denial of any sustained commitment to addressing the roots and ongoing crisis of racism in their communities.<sup>111</sup>

What follows in this section are brief snapshots into the still ongoing challenge of racism and racial inequity in the Rocky Mountain West. As the first part of this section shows, the successful efforts to create literal color lines in the region have become nearly impossible to unwind, despite civil rights laws, legislative acts, and policy pronouncements ostensibly designed to do so.<sup>112</sup> The result is a modern American West that continues to be racially segregated with devastating consequences.<sup>113</sup> As Stephen Menedian, Samir Gambhir, and Arthur Gailes recently argued, racial residential segregation is the primary foundation upon which structural racism in the United States is not only built, but sustained for long periods of time.<sup>114</sup> To be sure, racial residential segregation is linked to disparate rates of infant mortality,<sup>115</sup> pulmonary disease,<sup>116</sup> cardiovascular disease,<sup>117</sup> diabetes,<sup>118</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> Alex Sakariassen, *Republicans Brings Race-Based Education Debate to Montana*, MONT. FREE PRESS (June 18, 2021), <https://montanafreepress.org/2021/06/18/montana-critical-race-theory/> [<https://perma.cc/AQD8-MJBW>]; Tanner, *supra* note 106; Kraemer, *supra* note 108.

<sup>111</sup> See *supra* note 110 and accompanying text.

<sup>112</sup> See ROTHSTEIN, *supra* note 7, at 177–93.

<sup>113</sup> See Stephen Menedian, Samir Gambhir & Arthur Gailes, *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OBI BERKELEY (June 30, 2021), <https://belonging.berkeley.edu/roots-structural-racism> [<https://perma.cc/SKM3-NF7A>] (examining how the Rocky Mountain West continues to be highly segregated).

<sup>114</sup> *Id.*

<sup>115</sup> Anthony P. Polednak, *Trends in U.S. Urban Black Infant Mortality, By Degree of Residential Segregation*, 86 AM. J. PUB. HEALTH 723, 724 (1996).

<sup>116</sup> See, e.g., Diane Alexander & Janet Currie, *Is it Who You Are or Where You Live? Residential Segregation and Racial Gaps in Childhood Asthma*, 55 J. HEALTH ECON. 186 (2017); Christopher W. Tessum, David J. Paoella, Sarah E. Chamblis, Joshua S. Apte, Jason D. Hill & Julian D. Marshall, *PM 2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 SCI. ADVANCES 1 (Apr. 28, 2021).

<sup>117</sup> Kiarri N. Kershaw, Theresa L. Osypuk, D. Phuong Do, Peter J. De Chavez & Ana V. Diez Roux, *Neighborhood-Level Racial/Ethnic Residential Segregation and Incident Cardiovascular Disease: The Multi-Ethnic Study of Atherosclerosis*, 131 CIRCULATION 141 (2015).

<sup>118</sup> Sharrelle Barber, Kiarri Kershaw, Xu Wang, Mario Sims, Julianne Nelson & Ana V. Diez Roux, *Abstract MP58: Racial Residential Segregation Is Associated with Worse Cardiovascular Health, in African American Adults: The Jackson Heart Study*, 137 CIRCULATION 1 (2018).

hypertension,<sup>119</sup> obesity,<sup>120</sup> and many other health conditions and illness,<sup>121</sup> including most recently Covid-19 infections and the potential reduced efficacy of the vaccines on communities of color.<sup>122</sup>

The section then turns to the still ongoing challenges posed by racially segregated schools and disparate policing in the region. Nearly seventy years after *Brown v. Board of Education* ostensibly ended racial school segregation and nearly fifty years after federal courts compelled regional school districts to integrate, schools continue to remain one of the biggest challenges in maintaining the color line. Particularly as punitive school policies have pushed children of color “out of school and hasten their entry into the juvenile, and eventually the criminal, justice

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<sup>119</sup> Kiarri N. Kershaw, Ana V. Diez Roux, Sarah A. Burgard, Lynda D. Lisabeth, Mahasin J. Mujahid & Amy J. Schulz, *Metropolitan-Level Racial Residential Segregation and Black-White Disparities in Hypertension*, 174 AM. J. EPIDEMIOLOGY 537 (2011).

<sup>120</sup> Lindsay R. Pool, Mercedes R. Carnethon, David C. Goff, Jr., Penny Gordon-Larsen, Whitney R. Robinson & Kiarri N. Kershaw, *Longitudinal Associations of Neighborhood-Level Racial Residential Segregation with Obesity Among Blacks*, 29 EPIDEMIOLOGY 207 (2018).

<sup>121</sup> Kirsten M. M. Beyer, Yuhong Zhou, Kevin Matthews, Ain Bemanian, Purushottam W. Laud & Ann B. Nattinger, *New Spatially Continuous Indices of Redlining and Racial Bias in Mortgage Lending: Links to Survival After Breast Cancer Diagnosis and Implications for Health Disparities Research*, 40 HEALTH & PLACE 34 (2016); Rachel Morello-Frosch & Bill M. Jesdale, *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 ENV'T & HEALTH PERSPS. 386 (2006); Michelle Precourt Debbink & Michael D. M. Bader, *Racial Residential Segregation and Low Birth Weight in Michigan's Metropolitan Areas*, 101 AM. J. PUB. HEALTH 1714 (2011); Renee Mehra, Lisa M. Boyd & Jeannette R. Ickovics, *Racial Residential Segregation and Adverse Birth Outcomes: A Systematic Review and Meta-Analysis*, 191 SOC. SCI. & MED. 237 (2017); Michael McFarland and Cheryl A. Smith, *Segregation, Race, and Infant Well-Being*, 30 POPULATION RSCH. & POL'Y REV. 467 (2011).

<sup>122</sup> Jason Richardson, Bruce C. Mitchell, Hellen C.S. Meier, Emily Lynch & Jad Edlebi, *Redlining and Neighboring Health*, NAT'L CMTY REINV. COAL. (2020), <https://nrcr.org/holc-health> [<https://perma.cc/F8FL-UJ8N>]; Eric Brand, Andrew F. Beck & Tesfaye B. Mersha, *Air Pollution, Racial Disparities, and COVID-19 Mortality*, 146 J. ALLERGY CLINICAL IMMUNOLOGY 61 (2020); Phillippe Grandjean, Clara Amalie Gade Timmermann, Marie Kruse, Flemming Nielsen, Pernille Just Vinholt, Lasse Boding, Carsten Heilmann & Kare Mølbak, *Severity of COVID-19 at Elevated Exposure to Perfluorinated Alkylates*, PLOS ONE (2020); Laura Jean Podewils, Tori L. Burket, Christie Mettenbrink, Abigail Steiner, Allison Seidel, Kenneth Scott, Romana Hasnain-Wynia, *Disproportionate Incidence of COVID-19 Infection, Hospitalizations, and Deaths Among Persons Identifying as Hispanic or Latino — Denver, Colorado March–October 2020*, CTR. DISEASE CONTROL AND PREVENTION (2020); Lisa Sorg, *COVID-19 Vaccine Could Be Less Effective in People with High PFAS Levels in Blood*, COLO. NEWSLINE (Dec. 17, 2020), <https://coloradonewslne.com/2020/12/17/covid-19-vaccine-could-be-less-effective-in-people-with-high-pfas-levels-in-blood/> [<https://perma.cc/J2NW-PVRG>]; Rebecca Trager, *PFAS Exposure Found to Increase Risk of Severe Covid-19*, CHEMISTRY WORLD (Jan. 13, 2021), <https://www.chemistryworld.com/news/pfas-exposure-found-to-increase-risk-of-severe-covid-19/4012992.article> [<https://perma.cc/VAU3-KWY6>].

system,” schools and the practices of policing are deeply connected.<sup>123</sup> For that reason, that section concludes by returning us to the summer of 2020 and regional protests of police violence against communities of color. I reflect on the death of Elijah McClain after being detained by a police officer in one Denver metropolitan area suburb and ongoing efforts to address racial disparities.

The past and ongoing challenges of structural racism are seen directly in the close proximity of neighborhoods of color to highly toxic and constantly polluting hazardous waste facilities.<sup>124</sup> One telling example is demonstrated by a recent project completed by a Utah State University student and faculty member documenting the direct line between the “redlining” maps of the Home Owners Loan Corporation (created during the Great Depression), the residential segregation of Mexican Americans to Salt Lake City’s Pioneer Park and Glendale neighborhoods, and clustered “terrestrial pollution hotspots” created by oil and solid waste facilities in the area.<sup>125</sup> In Southeast Utah, the only currently operational uranium mill in the United States is located a few miles away from the reservation of the Ute Mountain Utes.<sup>126</sup> Built in 1970, the mine “processes waste from the cleanup of other mines to make a uranium concentrate, which is later sold to make fuel rods for nuclear power plants. The leftover waste from the milling process is then stored in containment pods at the mill.”<sup>127</sup> Long suspected of contaminating the drinking water of the Utes

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<sup>123</sup> NAACP LEGAL DEFENSE AND EDUCATION FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, [https://www.naacpldf.org/wp-content/uploads/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline\\_Criminal-Justice\\_.pdf](https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline_Criminal-Justice_.pdf) [<https://perma.cc/CW7N-FWXX>] (last visited Feb. 14, 2022).

<sup>124</sup> Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. AM. PROGRESS (Aug. 7, 2019); Tessum et al., *supra* note 116; Kyle Crowder & Liam Downey, *Inter-Neighborhood Migration, Race, and Environmental Hazards: Modeling Micro-Level Processes of Environmental Inequality*, 115 AJS 110 (2010).

<sup>125</sup> Mariya Scheglovitova, Emma Jones, Catherine Aviles & Brad Westwood, *Redlining Housing Segregation and Environmental Pollution in the Pioneer Park Neighborhood (and Beyond)*, UTAH DEPT. OF CULTURAL & CMTY. ENGAGEMENT, <https://community.utah.gov/redlining-housing-segregation-and-environmental-pollution-in-the-pioneer-park-neighborhood-and-beyond/> [<https://perma.cc/UH2G-72R4>] (last visited Feb. 14, 2022); Emma Nathel Jones, *Environmental Racism in a Growing City: Investigating Demographic Shifts in Salt Lake City’s Polluted Neighborhoods*, UTAH STATE UNIV. UNDERGRADUATE HONORS CAPSTONE PROJECTS (2021).

<sup>126</sup> Sofia Stuart-Rasi, *Native-Led March Protests Possible Contamination from White Mesa Uranium Mill*, KJSD (Oct. 15, 2021), <https://www.ksjd.org/podcast/ksjd-local-newscasts/2021-10-15/native-led-march-protests-possible-contamination-from-white-mesa-uranium-mill> [<https://perma.cc/APZ7-GFG6>].

<sup>127</sup> Kelsey Carolan, *EPA Stops White Mesa Mill from Receiving Toxic Waste from Uranium Sites*, THE JOURNAL (Dec. 13, 2021), <https://www.the-journal.com/articles/epa-stops-white-mesa-mill-from-storing-toxic-waste-from-uranium-sites/> [<https://perma.cc/U3DG-52FS>].

and contributing to dangerous levels of air pollution,<sup>128</sup> the mill was sanctioned recently by the Environmental Protection Agency for a CERCLA violation.<sup>129</sup>

In Colorado's Commerce City, predominately Latinx neighborhoods are similarly tucked between polluting refineries and heavily industrial activities.<sup>130</sup> That neighborhood, at one time, also suffered the health risks associated with its sharing a boundary with the former international airport (where jet fuel often washed into the river and the facility would often exceed acceptable noise limits)<sup>131</sup> and a chemical warfare munitions plant that would become one of the largest Superfund cleanup sites in the county.<sup>132</sup> Indeed, decades after the facility closed and years after the CERCLA cleanup, "[o]rganochlorine pesticides, heavy metals, agent degradation products and manufacturing by-products, and chlorinated and aromatic solvents" still continue to pollute the groundwater.<sup>133</sup>

In another Denver metropolitan neighborhood, Latinx residents lived for decades near smelters that had processed precious metals like gold and silver, in addition to lead, cadmium, and arsenic for over a hundred years.<sup>134</sup> In 2002, "the Agency for Toxic Substances and Disease Registry sent letters to 650 homes" in Globeville that residents could get cancer from living there because the soil was so

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<sup>128</sup> Emma Penrod, *The Water Around a Utah Uranium Mill Is Growing More Polluted. What Does it Mean for the Nearby Town?*, SALT LAKE TRIB. (Oct. 21, 2018, 8:18 AM), <https://www.sltrib.com/news/environment/2018/10/21/ute-tribal-members-living/> [<https://perma.cc/LJJ8-3GVV>]; Mark Richardson, *Utes Fear Uranium Mill Is Becoming Radioactive Waste Dump*, PUBLIC NEWS SERVICE (Sept. 30, 2020), <https://www.publicnewsservice.org/2020-09-30/nuclear-waste/utes-fear-uranium-mill-is-becoming-radioactive-waste-dump/a71634-1> [<https://perma.cc/LW7A-TM9P>].

<sup>129</sup> Carolan, *supra* note 127.

<sup>130</sup> Silvia Foster-Frau, *A Colorado County Offers a Glimpse of America's Future*, WASH. POST (Aug 13, 2021), <https://www.washingtonpost.com/nation/2021/08/13/colorado-race-census-adams-county/> [<https://perma.cc/WJ4P-GB9C>]; Dennis Huspeni, *Adams County Becomes Minority Majority, Works to Update Heavy Industry Image*, THE GAZETTE (Oct. 17, 2021), [https://gazette.com/premium/adams-county-becomes-minority-majority-works-to-update-heavy-industry-image/article\\_5b6c6a24-2e10-11ec-9f34-9f374e7c4d87.html](https://gazette.com/premium/adams-county-becomes-minority-majority-works-to-update-heavy-industry-image/article_5b6c6a24-2e10-11ec-9f34-9f374e7c4d87.html) [<https://perma.cc/PG7M-ZVRR>].

<sup>131</sup> See generally Mathias Basner, Charlotte Clark, Anna Hansell, James I. Hileman Sabine Janssen, Kevin Shepherd & Victor Sparrow, *Aviation Noise Impacts: State of the Science*, 19 NOISE & HEALTH 87 (2017) (collection of articles on various health effects related to airport noise).

<sup>132</sup> See Rachel E. Salcido, *The Rocky Mountain Arsenal National Wildlife Refuge: On a Rocky Road to Creating a Community Asset*, 47 J. MARSHALL L. REV. 1401, 1401–02 (2014); Jeffrey P. Cohn, *A Makeover for Rocky Mountain Arsenal: Transforming a Superfund Site into a National Wildlife Refuge*, 49 BIOSCIENCE 273, 273–277 (1999).

<sup>133</sup> Kirk Mitchell, *Rocky Mountain Arsenal Continues to Leak Contaminants into Groundwater, Colorado Health Department Lawsuit Says*, DENVER POST (Apr. 16, 2019, 5:45 PM), <https://www.denverpost.com/2019/04/16/rocky-mountain-arsenal-chemicals-groundwater-lawsuit/> [<https://perma.cc/3VPX-M87X>].

<sup>134</sup> See *Globeville Neighborhood History*, DENVER PUB. LIBR., <https://history.denverlibrary.org/neighborhood-history-guide/globeville-neighborhood-history> [<https://perma.cc/956Y-P6JY>] (last visited Feb. 21, 2022).



contaminated.<sup>135</sup> The agency concluded that 9% of children living there “showed dangerous levels of lead in their blood.”<sup>136</sup> The result there would anticipate a report published in 2021 finding that the majority of Colorado children under the age of six had detectable levels of lead in their blood (detectable BLLs).<sup>137</sup> When considering detectable BLLs, children from predominantly “Black or Hispanic and Latinx” ZIP codes were disproportionately affected, compared with those in predominantly White ZIP codes.<sup>138</sup>

The proximity of the region’s segregated neighborhoods and communities of color has impacts beyond residents’ health. It also is connected to the fact that racially segregated neighborhoods and communities often have less access to life-sustaining amenities and neighborhood resources like grocery stores with healthy food options, child care facilities, clinics, hospitals, and recreational spaces.<sup>139</sup> Racial segregation also exacerbates the problem of racially segregated schools that are endemic throughout the Rocky Mountain West.<sup>140</sup> As I have documented

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<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

<sup>137</sup> *See* Marissa Hauptman, Justin K. Niles, Jeffrey Gudin & Harvey W. Kaufman, *Individual- and Community-Level Factors Associated with Detectable and Elevated Blood Lead Levels in U.S. Children: Results from a National Clinical Laboratory*, 175 JAMA PEDIATRICS 1252, 1252 (2021), <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2784260> [<https://perma.cc/KF9Q-PN54>] (finding that an estimated 72% of Colorado children under age six had lead detected in their blood, well above the national rate of 51%).

<sup>138</sup> *Id.* at 1255. There is not, however, a “consistent association[] between lead exposure and elevated BLLs in children residing in zip codes with predominantly Black or Hispanic and Latinx populations.” *Id.* at 1256, 1259.

<sup>139</sup> Solomon et al., *supra* note 124; Dayna Bowen Matthew, Edward Rodrigue & Richard V. Reeves, *Time for Justice: Tackling Race Inequalities in Health and Housing*, BROOKINGS (Oct. 19, 2016), <https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/> [<https://perma.cc/5TF4-VDSR>].

<sup>140</sup> *See* Will McGrew, *U.S. School Segregation in the 21st Century: Causes, Consequences, and Solutions*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 15, 2019), <https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/?longform=true#> [<https://perma.cc/F8F5-4GJ9>]; *see also* *Racial Equity Index: 150 Largest Metro Areas*, NAT’L EQUITY ATLAS, <https://nationalequityatlas.org/> [<https://perma.cc/4949-A287>] (last visited Feb. 22, 2022) (providing an extremely powerful tool to examine educational and other forms of segregation at the local and state level). Specific examples of on-going racial segregation and its consequences in the region are prevalent. *See, e.g.*, Meg Wingerter, *More than Half of Denver’s Public Schools Are Segregated, 25 Years After Busing Ended*, DENV. POST (Sept. 8, 2019, 9:40 AM), <https://www.denverpost.com/2019/09/08/denver-school-segregation/> [<https://perma.cc/5244-4DCX>]; Alan Gottlieb, *Denver’s Deeply Segregated Schools Fit a National Trend*, COLLECTIVE COLO. (Mar. 9, 2016), <https://collective.coloradotrust.org/stories/denvers-deeply-segregated-schools-fit-a-national-trend/> [<https://perma.cc/J49A-EBQS>]; Eduardo Medina, *Utah School District Ignored Racial Harassment for Years, Report Says*, N.Y. TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/us/tah-school-racial-harassment-doj.html> [<https://perma.cc/A7VN-2KZQ>].

elsewhere, the history of segregation in the Denver Public Schools, the *de facto v. de jure* distinction in subsequent school desegregation battles, the re-segregation of the district, and the containment of integration after 1995 all reflected the “colorblind” racism that has been one of the most defining aspects of the region for almost all of its history.<sup>141</sup>

In 1973, the Denver Public School District became the first non-southern school district ordered to desegregate by the U.S. Supreme Court.<sup>142</sup> Just a year later, the impact of the decision was limited by a state constitutional amendment that greatly limited the ability of the city and the school district to grow through annexation.<sup>143</sup> Known as the Poundstone Amendment, it prohibited annexation except by the consent of the majority of the voters in each county that was giving up the land.<sup>144</sup> Because most of those lands subject to annexation were largely White, the effect was to limit the reach of the desegregation order into the suburbs.<sup>145</sup> Due to the *Keyes* desegregation order only covering schools within the jurisdictional boundaries of the City and County of Denver, and none of those of other school districts in the metropolitan area, the Poundstone Amendment effectively sealed off Denver from the surrounding suburbs and severely curtailed its ability to have any lasting and stable desegregation of its public school students.<sup>146</sup>

Since the mid-1970s, Denver Public Schools (DPS) have become “minority-majority,” with the biggest surge being that of Latinx enrollment.<sup>147</sup> A study by the Denver Post in 2019 found that nearly a quarter century after the federal courts found the schools to be integrated, the schools were just as “segregated as they were in the

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<sup>141</sup> Romero, *How I Rode the Bus*, *supra* note 69, at 1053.

<sup>142</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 217 (1973) (“This is the first school desegregation case to reach this Court which involves a major city outside the South.”).

<sup>143</sup> See Franklin J. James & Christopher B. Gerboth, *A Camp Divided: Annexation Battles, the Poundstone Amendment, and Their Impact on Metropolitan Denver, 1941–1988*, 5 COLO. HIST. 129, 131–34 (2001).

<sup>144</sup> The amendment stated, “Except as otherwise provided by statute, no part of the territory of any county shall be stricken off and added to an adjoining county, without first submitting the question to the registered electors of the county from which the territory is proposed to be stricken off; nor unless a majority of all the registered electors of said county voting on the question shall vote therefor.” COLO. CONST. art. XIV, § 3 (LEXIS 1974). Another Constitutional amendment that same year prohibited bussing to achieve racial balance in public schools not subject to a desegregation order. See COLO. CONST. art. IX, § 8 (LEXIS 1974) (adding that “nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance”).

<sup>145</sup> James & Gerboth, *supra* note 143, at 163.

<sup>146</sup> *Id.* (providing a comprehensive analysis of the impact on these state constitutional changes).

<sup>147</sup> CHUNGMEI LEE, HARV. U. CIV. RTS. PROJECT, DENVER PUBLIC SCHOOLS: RESEGREGATION, LATINO STYLE, 3 (2006), (“In 1980, DPS was already majority minority with 41 percent [w]hite, 23 percent Black, 32 percent Latino, and 3 percent Asian student enrollment. A little over two decades later, DPS became majority Latin[x], with [w]hite students comprising only one-fifth of the entire student body by 2003.”).

late 1960s.”<sup>148</sup> The impacts in Denver and other segregated schools throughout the region are similar. Racially segregated schools are associated with teacher turnover, lower teacher quality, larger class sizes, fewer extracurricular offerings, substandard facilities, lower test scores, lower and graduation rates.<sup>149</sup> The result is a massive achievement gap between White and non-White schools.<sup>150</sup>

Another consequence of racial segregation is what has become known as the school-to-prison pipeline.<sup>151</sup> Emerging at nearly the exact same time as federally mandated school integration began to wane nationwide and locally,<sup>152</sup> Black and Latinx students in the region found themselves subject to increasing surveillance and punishment in public schools.<sup>153</sup> One study focused on the Denver public schools found a disproportionate number of Black and Latinx students being suspended for being late to school, skipping school, or asking too many questions in class while Denver Police Officers increasingly and regularly began to handle routine

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<sup>148</sup> See Wingerter, *supra* note 140.

<sup>149</sup> See Sean F. Reardon, Ericka S. Weathers, Erin M. Fahle, Heewon Jang, & Demetra Kalogrides, *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps*, 1 (Stan. Ctr. Educ. Pol’y Analysis Working Paper, No. 19–06, 2019), <https://vtechworks.lib.vt.edu/bitstream/handle/10919/97804/SeparateStillEqual.pdf?sequence=1&isAllowed=y> [<https://perma.cc/5AV3-7YJB>] (finding racially segregated schools create test score gaps and non-White majority schools offer less extracurricular activities); Brief for Social Scientists as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 10–12 (2007) (No. 05–908 & 05–915) (stating minority schools have larger class sizes, higher teacher turnover, lower teacher quality, lower facility quality, and lower graduation rates).

<sup>150</sup> See Reardon et al., *supra* note 149, at 33.

<sup>151</sup> See NAACP Legal Defense and Education Fund, *supra* note 123; ALBERS ET AL., *infra* note 153.

<sup>152</sup> In 1995, the Supreme Court all but indicated the end of federally supervised court-ordered desegregation. See *Mo. v. Jenkins*, 515 U.S. 70, 100–03 (1995). *Jenkins* made clear that unless a plaintiff could prove the existence of a direct and deliberate discriminatory act on the part of a state official or school board to cause segregated schools, their continued existence as a result of demographic changes, White flight out of the district, or other unknown or unknowable factors could not be judicially remedied, at least as matter of the 14th Amendment. See *id.*, at 91–101. 1995 was also the same year that the federal courts ended their oversight of the Denver Public School system. See *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274, 1307 (D. Colo. 1995).

<sup>153</sup> See PADRES Y JÓVENES UNIDOS & ADVANCEMENT PROJECT, LESSONS IN RACIAL JUSTICE AND MOVEMENT BUILDING: DISMANTLING THE SCHOOL-TO-PRISON PIPELINE IN COLORADO AND NATIONALLY 5 (2014), [http://www.fixschooldiscipline.org/wp-content/uploads/2020/09/3.Lessons\\_RacialJustice\\_MovementBuilding.2014-copy.pdf](http://www.fixschooldiscipline.org/wp-content/uploads/2020/09/3.Lessons_RacialJustice_MovementBuilding.2014-copy.pdf) [<https://perma.cc/L9X6-VFL8>]; JORDIN ALBERS, SEAN BRIAN, TRACE LEE DOWNEY, JADE FISHER, VICTORIA LUMAN, MARY MILNER, MAUREEN MINSON, DANIEL NIELSEN, NUBIA PENNA, CHRISTOPHER PIEPER ET AL., U. UTAH S.J. QUINNEY COLL. L., FROM FINGERPAINT TO FINGERPRINTS: THE SCHOOL-TO-PRISON PIPELINE IN UTAH 5–15 (2014); VANESSA WALSH, U. UTAH S.J. QUINNEY COLL. L., DISPARITIES IN DISCIPLINE: A LOOK AT SCHOOL DISCIPLINARY ACTIONS FOR UTAH’S AMERICAN INDIAN STUDENTS 3–5 (2015); Tyler B. Bugden, *Addressing Utah’s School to Prison Pipeline*, 2017 UTAH L. REV. 1061, 1061–62, 1073–73 n. 108.

disciplinary matters by sending students to juvenile court.<sup>154</sup> The report found that Black students were over three times more likely to be suspended out-of-school, over five times more likely to be expelled, and over twice as likely to be referred to law enforcement than their White peers.<sup>155</sup>

Another report in Utah found troubling evidence of racial and other disparities in Utah school districts that “have overly subjective and harsh disciplinary policies that permit suspension . . . for vague offenses like ‘immoral behavior’ and ‘defiance.’”<sup>156</sup> As a result of such policies and practices, Native American students “are three and a half times more likely to receive a disciplinary action in Utah schools than any other racial group. In some school districts, they are disciplined six times more frequently than one would expect based upon enrollment.”<sup>157</sup> Similarly, “Black students are disciplined more than three times more often than expected, and Hispanic students are disciplined one and a half times more often than expected.”<sup>158</sup>

In late 2021, the Department of Justice announced a settlement agreement with Utah’s Davis School District.<sup>159</sup> An investigation revealed a persistent practice of racial harassment targeting Black and Asian American and Pacific Islander (“AAPI”) students, who represented only 1% of the approximately 73,000 students enrolled in the district.<sup>160</sup> According to the report, racial epithets, derogatory racial comments, and physical assaults targeting district students occurred in dozens of schools and the school district’s ineffective response left students vulnerable to continued harassment.<sup>161</sup> The department also found that the school district disciplined Black students more harshly than their White peers for similar behavior and that the school district denied Black students the ability to form student groups while supporting similar requests by other students.<sup>162</sup>

The legacy of the region’s color lines in its neighborhoods and schools brings us directly to the summer of 2020 and up to the current moment. While the country and the world were rightly outraged by the deaths of George Floyd and Breanna Taylor at the hands of police, activists in Denver took to the streets to protest the

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<sup>154</sup> See ALBERS ET AL., *supra* note 153, at 6.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See Press Release, U.S. Department of Justice Office of Public Affairs, Justice Department Reaches Settlement to Remedy Severe Racial Harassment of Black and Asian-American Students in Utah School District (Oct. 21, 2021), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-remedy-severe-racial-harassment-black-and-asian> [<https://perma.cc/Z3NW-ZSGQ>].

<sup>160</sup> See *id.*; see also Letter from U.S. Department of Justice Civil Rights Division Educational Opportunities Section, Notice of Findings of Race Discrimination in Davis School District (Sept. 15, 2021), 2–3, 5–8 <https://www.justice.gov/opa/press-release/file/1443856/download> [<https://perma.cc/473M-PEFE>] [hereinafter DOJ Letter].

<sup>161</sup> DOJ Letter, *supra* note 160, at 2–3.

<sup>162</sup> *Id.*

death of Elijah McClain in 2019.<sup>163</sup> McClain was a 23-year old Black man and massage therapist who died after officers of the Aurora Police Department (“APD”) restrained him with a chokehold.<sup>164</sup> An independent panel investigated the circumstances of McClain’s death and found that the officers stopped him without justification, unreasonably escalated their use of force despite McClain “crying out in pain, apologizing, explaining himself, and pleading with the officers,” and subsequent improper treatment by paramedics treating him, including administering the wrong dose of a tranquilizer.<sup>165</sup>

Elijah McClain’s treatment was not an isolated incident. In the fall of 2021, Colorado’s Attorney General issued a report examining larger concerns around racial profiling and racial discrimination by the Aurora Police Department and the Aurora Fire Rescue.<sup>166</sup> Among their findings, the report highlighted that between 2018 and 2021, APD officers used force against subjects of color at 2.5 times the rate they did White subjects.<sup>167</sup> While Black residents make up less than 17% of Aurora’s population, almost half of all the people whom the Aurora Police Department subjected to force between 2015 and 2019 were Black.<sup>168</sup> Officers also arrested Black people 2.5 times as often as White people.<sup>169</sup>

The pattern and practice of racial discrimination by the Aurora Police Department was seemingly not supposed to happen in this suburb of Denver. Gaining national notoriety for a 2012 mass shooting at a movie multiplex,<sup>170</sup> the suburb had long prided itself as being the most diverse city in the state and one of

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<sup>163</sup> See, e.g., Sam Tabachnik, *Thousands Gather in Aurora to Protest Elijah McClain’s Death; Tensions Rise as Evening Falls*, DENVER POST (June 27, 2020, 11:44 PM), <https://www.denverpost.com/2020/06/27/elijah-mcclain-protests-aurora-saturday/> [<https://perma.cc/VJM5-7VEV>]; Kenya Evelyn, *Elijah McClain: Police Use Pepper Spray to Disperse Violin Vigil*, GUARDIAN (June 29, 2020, 3:29 PM); <https://www.theguardian.com/us-news/2020/jun/29/elijah-mcclain-colorado-police> [<https://perma.cc/7PQM-AC3V>].

<sup>164</sup> See Lucy Tompkins, *Here’s What You Need to Know About Elijah McClain’s Death*, N.Y. TIMES (Jan. 18, 2022), <https://www.nytimes.com/article/who-was-elijah-mcclain.html> [<https://perma.cc/4GNR-E6A2>].

<sup>165</sup> CITY OF AURORA COLO., INVESTIGATION REPORT AND RECOMMENDATIONS 1, 5–7, 10, 106 (Feb. 22, 2021), [https://p1cdn4static.civicleve.com/UserFiles/Servers/Server\\_1881137/File/News%20Items/Investigation%20Report%20and%20Recommendations%20\(FINAL\).pdf](https://p1cdn4static.civicleve.com/UserFiles/Servers/Server_1881137/File/News%20Items/Investigation%20Report%20and%20Recommendations%20(FINAL).pdf) [<https://perma.cc/VH47-CGRZ>].

<sup>166</sup> See COLO. ATT’Y GEN., INVESTIGATION OF THE AURORA POLICE DEPARTMENT AND AURORA FIRE RESCUE 1, 15, 37–66 (Sept. 15, 2021) <https://coag.gov/app/uploads/2021/09/Pattern-and-Pracice-Investigation-Report.pdf> [<https://perma.cc/6RQX-FLQ4>].

<sup>167</sup> See *id.* at 48–50, 54.

<sup>168</sup> See *id.* at 37 (“[B]etween the years of 2015 and 2019, Black individuals accounted for nearly 40% of all reported arrests in Aurora.”).

<sup>169</sup> See *id.* at 38.

<sup>170</sup> See Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <https://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html> [<https://perma.cc/3H75-JP7J>].

the most diverse in the region and nation.<sup>171</sup> Indeed, in the first two decades of the twenty-first century, Black residents moved out of the City and County of Denver's historically Black neighborhoods of Five Points, Elyria-Swansea, Cole, Clayton, Whittier, and North Park Hill and many settled in neighboring Aurora.<sup>172</sup> Seeking affordable homes, better schools, and greater cultural diversity, Blacks, as well as Latinx and other non-White communities, moved to and settled in places like Aurora, reflecting a larger national trend of suburban integration of Blacks, Latinx, and AAPI communities.<sup>173</sup>

Yet, as in historically segregated cities in the region and beyond, people of color in Aurora found themselves excluded from political and other processes of legal accountability. For much of its history and certainly in the first two decades of the 21st century, Aurora's City Council has been all White.<sup>174</sup> As a council-manager form of government, the City Council hires the City Manager who oversees day-to-day operations of the city government, including its police department.<sup>175</sup> Its police department is nearly 80% White,<sup>176</sup> and although past police chiefs have been people of color, it nevertheless has a troubling history of racial disparity in its policing.<sup>177</sup> Indeed, in response to a 2016 statewide review of police shootings finding that 54% of officer-involved shootings in Aurora involved Black subjects, Aurora officials argued that the disparity was merely a "statistical coincidence," despite it reflecting national trends in officer-involved shootings nationwide.<sup>178</sup> As Nathan Woodliff-Stanley of the American Civil Liberties Union countered at the time, the only way to deal with the disparity was to first "acknowledge that it's not just a coincidence, because nothing will be done to actually correct it as long as it's written off in that

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<sup>171</sup> See Megan Verlee, *Aurora, Colo., Tries to Capitalize on Its Ethnic Riches*, NPR (Sept. 27, 2012 5:28 PM), <https://www.npr.org/2012/09/27/161885219/aurora-colo-tries-to-capitalize-on-its-ethnic-riches> [<https://perma.cc/VQK6-LGAA>]; Deidre McPhillips, *A New Analysis Finds Growing Diversity in U.S. Cities*, U.S. NEWS & WORLD REP. (Jan. 22, 2020, 12:01 AM), <https://www.usnews.com/news/cities/articles/2020-01-22/americas-cities-are-becoming-more-diverse-new-analysis-shows> [<https://perma.cc/Q7LM-DUZG>]; Kurtis Lee & Jeremy P. Meyer, *Aurora's Growth Reflects that African Americans Are Finding Base in Denver's 'Burbs'*, DENV. POST (March 24, 2012, 2:22 PM) <https://www.denverpost.com/2012/03/24/auroras-growth-reflects-that-african-americans-are-finding-base-in-denver-burbs/> [<https://perma.cc/4ENG-8U2Y>].

<sup>172</sup> Lee & Meyer, *supra* note 171.

<sup>173</sup> WILLIAM H. FREY, MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000S, 10–11 (May 2011); MYRON ORFIELD & THOMAS LUCE, AMERICA'S RACIALLY DIVERSE SUBURBS: OPPORTUNITIES AND CHALLENGES, 2 (2012).

<sup>174</sup> See Verlee, *supra* note 171.

<sup>175</sup> See COLO. ATT'Y GEN., *supra* note 166, at 16.

<sup>176</sup> See *id.* at 10.

<sup>177</sup> See Sam Schanfarber, *Aurora's Heavily White Police Force Is Firing at Blacks*, CU NEWS CORPS (May 1, 2016), <https://www.colorado.edu/initiative/newscorps/2016/05/01/auroras-heavily-white-police-force-firing-blacks> [<https://perma.cc/QB9W-L9ZF>].

<sup>178</sup> See *id.*

way.”<sup>179</sup> In other words, key decision-makers needed to reject color-blindness, and be acutely aware of the current reality and essential fact that “race [and resulting disparities] unfortunately still matter[]”<sup>180</sup> in Aurora, Colorado, and the larger region as well as the United States.<sup>181</sup>

#### IV. TAKING OFF THE BLINDERS

As Oscar Zeta Acosta himself so eloquently stated, “I speak as a historian, a recorder of events with a sour stomach. I have no love for memories of the past.”<sup>182</sup> That past and the stories of my family and those of so many others represented in this brief history are by no means monolithic or easy to understand. Yet, they paint a picture and invoke powerful images, like those welcome signs greeting travelers entering Colorado, Utah, New Mexico, Wyoming, and Montana of seemingly insurmountable landscapes. Implicit within those welcome signs and the larger community they represent is the unyielding belief that the harsh, imposing, dangerous conditions—from seemingly un-scalable mountains to dangerous dry deserts—were challenges that nevertheless could and should be overcome.

So too should this brief history and the picture it paints be understood with the same resolve of all those in the Rocky Mountain West who collectively have found no physical encounter too big to address. To be sure, in boring tunnels through mountain peaks, making the desert bloom with irrigated agriculture, or growing vibrant metropolises in places like Denver and Salt Lake, all of us in the Rocky Mountain West have invested in our shared and collective future by understanding the history and reality of the harsh natural landscapes and environments in which we live, work, and play.

The picture this Essay paints poses no less daunting, yet no less surmountable of a challenge. As the historian Gordon Wood wrote, “[h]istory imparts powerful restraints on what we can think and do. . . . [A] historical sense makes true freedom and moral choice—and *wisdom*—possible.”<sup>183</sup> Understanding the history of race relations in the American West gives us a powerful tool to confront and address, honestly and forthrightly, enduring patterns of racial inequity and inequality in the

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<sup>179</sup> *Id.*

<sup>180</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

<sup>181</sup> Aurora is by no means an outlier in the state. A 2018 ACLU report documented vast racial disparities in Colorado’s criminal justice regime, where Black and Latinx inmates represented 50% of the state’s prison population as well some of the highest incarceration rates in the county. *See* ACLU, *BLUE PRINT FOR SMART JUSTICE: COLO.*, 9 (2018), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-CO.pdf> [<https://perma.cc/4W4P-D7TG>].

<sup>182</sup> OSCAR ZETA ACOSTA, *THE AUTOBIOGRAPHY OF A BROWN BUFFALO* 18 (1972).

<sup>183</sup> GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* 12, 15 (2008) (emphasis added).

region.<sup>184</sup> It also helps us acknowledge that our “colorful” region is more than just vibrant landscapes and awe-inspiring topography. Rather, it embodies the rich and textured context of the nation’s larger and still ongoing struggle of racial and civic nationalism.<sup>185</sup>

Nearly twenty years ago, Justice Sandra Day O’Connor declared that “race unfortunately still matters” in the United States.<sup>186</sup> In an opinion that had a direct connection to my own law school admissions experience, I argued that the statement “represented perhaps the biggest understatement and most obvious part of the decision.”<sup>187</sup> For us studying and practicing law, the resulting years have given us two irreconcilable choices. We could, as Justice Roberts argued in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>188</sup> be color-blind in our practice to avoid a “politics of racial hostility.”<sup>189</sup> Or, as Justice Ruth Bader Ginsberg argued in her dissent in *Shelby County v. Holder*, we can open our eyes to the reality of present-day racial inequity and discrimination.<sup>190</sup> Indeed, as Justice Ginsberg declared: “what’s past is prologue . . . [t]hose who cannot remember the past are condemned to repeat it.”<sup>191</sup> Understanding the long history of the color-line in the Rocky Mountain West helps us to confront the current and future impact of ongoing racial disparities, inequities, and sometimes violence. Our challenge, in this regard, is to become color-conscious in our legal practice.<sup>192</sup>

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<sup>184</sup> A related tool is the National Equity Atlas that allows it users to deploy actionable data on racial and economic equity by providing a state-by-state breakdown on the net economic benefit of being color-conscious in policy and decision making. See *Racial Equity Index: 150 Largest Metro Areas*, *supra* note 140. By highlighting how racial equity and justice is in everyone’s self-interest, it highlights key Critical Race Theory tenant of “interest convergence.” See generally Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 134 HARV. L. REV. 518 (1980).

<sup>185</sup> GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* (2001).

<sup>186</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

<sup>187</sup> Romero, *¿La Raza Latina?*, *supra* note 7, at 248.

<sup>188</sup> *Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>189</sup> *Id.* at 746 (quoting *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1986)).

<sup>190</sup> See *Shelby Cnty., Ala. V. Holder*, 570 U.S. 529, 559–94 (2013) (invalidating section 5 of the Voting Rights Act of 1965 because it relied on outdated data). Although Justice Ginsberg was arguing for the continuation of key provisions of the Voting Rights Act of 1965, her dissent detailed what she described as “second generation barriers” for people of color in the exercise of their constitutional rights. *Id.* at 566 (citing §§2(b)(2)–(3), 120 Stat. 577).

<sup>191</sup> *Id.* at 576 (quoting W. SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1 and G. SANTAYANA, *THE LIFE OF REASON* 284 (1905) (internal references omitted)).

<sup>192</sup> In building my *Color of Water* article and project, I am advocating for the use of racial impact statements as water utilities think about the political and legal implications of their work. Tom I. Romero, II, *The Color of Local Government: Observations of a Brown Buffalo on Racial Impact Statements in the Movement for Water Justice*, SUNY L. REV. (forthcoming 2022).



I end this Essay as I started. I ask you, the reader, to close your eyes and travel with me, not in a car, but in an airplane. As our plane arrives at Denver International Airport, we disembark and make our way to the main terminal to pick up our luggage. When we round the corner to the baggage claim, we encounter a brightly colored, massive 10' high by 55' long digital mural on aluminum substrate hanging on a wall in the main terminal. Titled "La Memoria de Nuestra Tierra"/ "Our Land Has Memory," and created by Judy Baca and her team of students, the mural recreates those familiar natural landscapes and topography of the American West.<sup>193</sup>

Yet, the mural does so much more. It depicts the story of Mexican migration during the 1910–1917 Mexican Revolution that brought the artist's family, like my own maternal grandparents, to Colorado. Indeed, the artist's grandfather, Teodora Baca is one of the images on the mural, and her mother's visit to Teodora's grave in La Junta, Colorado, inspired Baca "to create artwork that would give dignity to the mestizo's story and the stories of countless others who toiled in the mines, fields, and railroads of Colorado."<sup>194</sup>

Judy Baca's mother's efforts to locate her grandfather's grave speak directly to the deep-rooted color lines referenced in this Essay. The cemetery had been historically segregated between "Whites" and "Mexicans." While the "White" section of the cemetery was "green and well maintained," the "Mexican" section was in a state of disrepair. "After much searching among the fallen gravestones," the artist's mother found the grave "in a junkyard of old, unmarked stones and loose dirt."<sup>195</sup> According to Baca, "the simple reality that even in death the bodies of racially different people were separated" inspired her to create a counter-narrative of the color lines shaping our "shared human condition as temporary residents" of these beautiful and unforgiving landscapes.<sup>196</sup>

Also appearing prominently in the mural is Rodolfo "Corky" Gonzales, who organized the Crusade for Justice to challenge discrimination against Chicax in Denver's neighborhoods, workplaces, and schools; as well as Reies López Tijerina, who sought to reclaim the rights of Chicax communities in New Mexico who had been dispossessed from Mexican land grants.<sup>197</sup> In different ways, both provided compelling and militant alternatives to more mainstream non-violent activism of the time. There are also those anonymous and faceless others who bravely traversed dangerous borders and nevertheless had the courage to contest racial oppression in railroads, mines, fields, and schools. The mural also depicts those indigenous peoples who have been removed from the landscape, but nevertheless continue to shape its memories. Indeed, in its depiction of those majestic cliff dwellings that

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<sup>193</sup> Judy Baca, *Memoria de Nuestra Tierra* (2001), <http://www.judybaca.com/artist/portfolio/memoria-de-nuestra-tierra/> [<https://perma.cc/JH3H-D4V8>].

<sup>194</sup> Judith F. Baca, *La Memoria de Nuestra Tierra*, in *CHICANO AND CHICANA ART: A CRITICAL ANTHOLOGY*, 310 (Jennifer A. González, C. Ondine Chavoya, Chon Noriega, and Terazita Romo eds. 2019).

<sup>195</sup> Baca, *supra* note 193.

<sup>196</sup> *Id.*

<sup>197</sup> *La Memoria de Nuestra Tierra*, DENVER INT'L AIRPORT, [https://www.flydenver.com/about/art\\_culture/la\\_memoria\\_de\\_nuestra\\_tierra](https://www.flydenver.com/about/art_culture/la_memoria_de_nuestra_tierra) [<https://perma.cc/A5AV-2E38>].

have stood the test of time, the mural recognizes those who first imagined settling and bringing order to the land.

More than any other sign marking my arrival and connection to the physical space, this mural captures for me the most authentic representation of the “colorful” Rocky Mountain West. By candidly detailing a history of both racial oppression as well as justice and liberation, *La Memoria de Nuestra Tierra* compels all of us to know that we travel, live, learn, and work in places with ongoing racial memories. As practitioners of law, we have an obligation to confront the role of our discipline and profession in creating and perpetuating the color lines in which we work. What we do with that “wisdom” is the challenge that we must embrace.